

Municipal Guide to Cannabis Legalization

A roadmap for Canadian local governments

FCM FEDERATION OF CANADIAN MUNICIPALITIES FÉDÉRATION CANADIENNE DES MUNICIPALITÉS

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Rising to the local challenge of cannabis legalization



To municipal leaders and staff across Canada,

The nationwide legalization of non-medical cannabis by the summer of 2018 presents major challenges for all orders of government.

And of course, municipalities form the order of government closest to daily life and commerce—building more livable communities, handling crises, and doing what it takes to keep residents safe and well-served. We are also very much on the front lines of implementing this new federal commitment. Our cities and communities, after all, are the places where non-medical cannabis will be legally sold and consumed.

Getting this right is a big job.

Local governments will face significant new enforcement and operational challenges in the months and years ahead. And those challenges don't end with policing. There is a world of bylaws to develop and business licensing rules to review. There are processes to adopt across as many as 17 municipal departments. And that's where this guide comes in.

FCM worked with legal, land-use planning and policy experts to develop a roadmap for how municipalities might choose to adapt and develop bylaws in domains ranging from land use management to business regulation to public consumption.

Building on last summer's Cannabis Legalization Primer, this guide offers policy options and practical suggestions for local rules and by-laws. And this roadmap was strengthened by technical and financial contributions from your provincial and territorial municipal associations across the country.

As you forge ahead locally, FCM continues to advocate at the federal level for deeper engagement with municipalities. Municipalities also need new financial tools—and we're making progress on accessing a fair share of cannabis excise tax revenues. While local policing is largely outside the scope of this guide, its costs are inside the scope of many municipal budgets. Those costs, layered onto the new administrative costs you will face, need to be sustainable.

This work and this guide are designed to help you do what you do best: protect and strengthen your communities as sustainably and durably as possible. Legalizing non-medical cannabis across this country requires a strong partnership among orders of government. And your tireless efforts, in communities of all sizes, from coast to coast to coast, are central to getting the job done.



Jenny Gerbasi
Deputy Mayor of Winnipeg
President, FCM

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1 Federal framework

On April 13, 2017, the federal government tabled two bills to legalize and regulate cannabis in Canada:

- Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* (***the "Cannabis Act"***).
- Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts.*

With a planned Summer 2018 adoption date, the *Cannabis Act* creates a regulatory framework for the production, distribution, sale, cultivation, and possession of cannabis across Canada. Bill C-46 addresses offences relating to cannabis trafficking, and focuses on strengthening impaired-driving measures.



1.1 Bill C-45, the proposed *Cannabis Act*

As outlined by the federal government, the *Cannabis Act* seeks to achieve the following objectives:

- Restrict youth access to cannabis.
- Regulate promotion or enticements to use cannabis.
- Enhance public awareness of the health risks associated with cannabis.
- Impose serious criminal penalties for those breaking the law, especially those who provide cannabis to young people.
- Establish strict product safety and quality requirements.
- Provide for the legal production of cannabis.
- Allow adults to possess and access regulated, quality-controlled, legal cannabis.
- Reduce the burden on the criminal justice system.

For local governments, the *Cannabis Act* has significant implications for local land use regulation, business regulation and licensing, and the regulation of public consumption and personal cultivation of cannabis. There will also be, to a certain extent, variations across provincial and territorial jurisdictions. The most significant variance will be whether these jurisdictions choose to distribute non-medical cannabis through a government or a privately run system.

When implementing a strategy to regulate cannabis locally, municipal governments should first consider and work within any existing or anticipated provincial/territorial and federal initiatives that affect the public consumption of cannabis. Under the *Cannabis Act*, the federal government proposed significant restrictions on the marketing and promotion of cannabis products. We address this in Chapter 2: Land Use Management and Chapter 4: Public Consumption.

Public smoking and alcohol consumption legislation varies greatly across provinces and territories. We anticipate that many will extend existing legislation to public cannabis consumption.

Local governments should be attuned to where consumption of cannabis is, or is not, permitted in their province or territory. Local governments should also be aware of what cannabis consumption regulations the federal and provincial/territorial governments introduce. This will help them determine whether or how the local government wishes to contribute to and work within those regulations in their community.

1.2 Bill C-46, on impaired driving

While the *Cannabis Act* and Bill C-46 were proposed at the same time and relate to the regulation of cannabis, they have distinct focuses. Bill C-46 addresses offences relating to cannabis conveyancing and trafficking, as well as enhancing impaired-driving investigation and enforcement measures.

Bill C-46 has significant implications for law enforcement as well as individual rights protected by the Charter. A brief summary of the proposed legislation follows, but Bill C-46 is otherwise outside the scope of this guide.

- **Part 1 creates three new offences** for having specified levels of a drug in the blood within two hours of driving. The penalties would depend on the drug type and the levels of drug or the combination of alcohol and drugs, with the drug levels to be set by regulation.



For THC, the main psychoactive compound in cannabis, a person found driving with a blood content of 2 or more nanograms of THC would be subject to a summary conviction criminal offence. A person found driving with higher THC blood content levels, or a combined alcohol and THC blood content level, would be subject to even more severe criminal penalties.

- **Part 2 replaces the current Criminal Code** regime dealing with transportation offences. It would allow for mandatory alcohol and drug screening by police at roadside stops, as well as increased minimum fines for impaired driving.

  Under the proposed mandatory alcohol and drug screening provisions, law enforcement officers would

be able to demand an oral fluid sample at roadside if they suspect a driver has a drug, including THC, in their body. For alcohol, if law enforcement officers have an "approved screening device" at hand, they will be permitted to demand breath samples of any drivers they lawfully stop without first suspecting that the driver has alcohol in their body.

The proposed legislation would also allow for police officers to provide opinion evidence in court, as to whether they believe a driver was impaired by a drug at the time of testing. This is without the need for an expert witness in each trial.

- **Law enforcement practices by local police forces and the RCMP will be affected if Bill C-46 is enacted.** Many of the legislative changes in Bill C-46 relate to amending the Criminal Code or involve policing and law enforcement practices. The focus of this Guide is to assist local governments in the regulation of cannabis under the *Cannabis Act*. If a local government is concerned about the impact of Bill C-46, consultation with local police forces and the RCMP is recommended.

1.3 Medical vs. non-medical cannabis regimes

The laws regarding cannabis do not change until the *Cannabis Act* has passed. Until such time, the Access to Cannabis for Medical Purposes Regulations (ACMPR), released August 2016, remain the authority for lawful cannabis production and possession. Currently, cannabis may be grown by registered persons and licensed producers for medical purposes only, unlicensed possession of any cannabis is illegal, and the retail distribution of cannabis in "dispensaries" and other storefront operations is also illegal.

Although the federal government has indicated it may revisit the ACMPR regime if the *Cannabis Act* becomes law, the current ACMPR regime continues under the Act. Medical practitioners will continue to be able to prescribe cannabis for medical purposes. Individuals with a prescription, including those under 18, will continue to be able to access medical cannabis. The *Cannabis Act* also provides that those licensed under the ACMPR for commercial medical cannabis production will continue to be authorized to produce medical cannabis under the *Cannabis Act*, and be deemed to hold licenses for the production of non-medical cannabis.

Definitions: Cannabis vs marihuana

Cannabis is commonly used as a broad term to describe the products derived from the leaves, flowers and resins of the *Cannabis sativa* and *Cannabis indica plants*, or hybrids of the two. These products exist in various forms, such as dried leaves or oils. They are used for different purposes, including medical, non-medical, and industrial purposes. Under the *Cannabis Act*, cannabis is broadly defined and includes:

- Any part of the cannabis plant, other than mature stalks that do not contain leaves, flowers or seeds, the cannabis plant fibre, or the plant root.
- Any substance or mixture of substances that contains or has on it any part of a cannabis plant.
- Any substance that is identical to any phytocannabinoid produced by, or found in, such a plant, regardless of how the substance was obtained.

Marihuana (marijuana) is commonly used to refer to parts of a cannabis plant, such as the leaves or flowers. It not a defined term under the *Cannabis Act*. Under the *Controlled Drugs and Substances Act*, marihuana is referred to as a form of cannabis.

"Cannabis" is preferable to "marihuana" for the regulatory context. Furthermore, "marihuana" is often seen spelled two different ways: the "h" is common in federal communications, while the "j" is associated with a phonetic Mexican Spanish usage—which has also drawn critique for a xenophobic association. Although cannabis and marihuana have historically been used interchangeably, the definition for cannabis is broader, and better able to include cannabis products and other substances than marihuana.

1.4 Jurisdictional issues

Federal responsibilities

Under the *Cannabis Act*, the federal government is responsible for establishing and maintaining a comprehensive and consistent national framework for regulating production of cannabis. This also includes setting standards for health and safety and establishing criminal prohibitions. Under the *Cannabis Act*, the federal government is specifically responsible for:

- Individual adult possession of cannabis, including determining the maximum allowable cannabis possession and home cultivation quantities.
- Promotions and advertising, including regulating how cannabis or cannabis accessories can be promoted, packaged, labelled and displayed.
- Licensing commercial cannabis production.
- Industry-wide regulations on the quantities, potency, and ingredients in the types of products that will be allowed for sale.
- Registration and tracking of cannabis from seed to sale.
- Minimum conditions for provincial/territorial distribution and retail sale; and allowing for the federal government to license distribution and sale in any province/territory that does not enact such legislation.
- Law enforcement at the border.
- Criminal penalties for those operating outside the legal system.

Provincial and territorial responsibilities

Under the proposed federal legislation, the provinces and territories are authorized to license and oversee the distribution and sale of cannabis, subject to minimum federal conditions. Some of these minimum conditions are that cannabis, including cannabis accessories and other products, may only be sold if it:

- qualifies as fresh cannabis, cannabis oil, cannabis plants or seeds;
- does not have an appearance, shape or attribute that could be appealing to a young person;
- does not contain ingredients such as caffeine, alcohol, or nicotine; and
- has not been recalled.

Edibles, or foods such as candy and baked goods that have been infused with cannabis, are not currently authorized under the proposed federal regime. Although these additional forms of cannabis may be authorized and regulated in the future.

All retailers must be authorized to sell cannabis under the proposed federal Act, or by provincial legislation that meets the minimum federal conditions on retail sale. These minimum conditions are that an authorized retailer can only sell cannabis produced by a federally authorized producer that is sold:

- to a person older than 18;
- with appropriate record-keeping measures in place;
- under conditions to prevent diversion to an illegal market or activity; and
- not through a self-service display or vending machine.

Delegation of authority

Many of the activities involved in cannabis legalization fall within the exclusive jurisdiction of provinces. Federal enabling legislation may grant similar legislative powers to the territorial governments. In some circumstances, provincial or territorial governments have further delegated or recognized local government authority to address certain matters. As a general principle, a federal role does not necessarily oust provincial/territorial or local government jurisdiction. Throughout this guide, we examine how jurisdictional authority is applied in the context of non-medical cannabis.

Municipal governments should examine their enabling legislation, as well as federal legislation and regulations, to understand the full extent of their potential scope of action.

Summary of possible roles and responsibilities

Federal	Provincial/Territorial	Municipal
Cannabis production	Wholesale and retail distribution of cannabis	Zoning (density, location)
Cannabis possession limits	Selection of retail distribution model	Retail locations
Trafficking	Workplace safety	Home cultivation
Advertising	Discretion to set more restrictive limits for: • minimum age for consumption • possession amount	Business Licensing
Minimum age limits (18)		Building Codes
Oversight of medical cannabis regime, including personal cultivation registration		Nuisance
		Smoking restrictions
		Odours
		Municipal workplace safety
		Enforcement
		Regulations around public consumption
		Personal possession
		Municipal cost considerations related to local policing

Charter issues

Over the past few years, the *Controlled Drugs and Substances Act* provisions dealing with the possession of medical cannabis have been held to be contrary to the *Canadian Charter of Rights and Freedoms*. But there currently does not appear to be a basis in the Charter for a challenge on local government restrictions applying to the production, distribution, retail sale or consumption of cannabis for non-medical purposes. Neither the right to life, liberty and security of the person, nor any other right guaranteed by the Charter, would be infringed by such restrictions.

As an example, the Charter should not prevent local governments from enforcing building construction and safety standards in relation to home cultivation of cannabis. These would likely qualify as "reasonable limits" on any Charter right to access a supply of non-medical cannabis. We note other specific Charter considerations in subsequent sections of this guide.

2 Land use management

The location, scale and density of cannabis cultivation and retail facilities will have real impacts for local communities. Commercial cultivation presents challenges ranging from odours to use of public water and energy utilities. Retail facilities influence the social and economic character of neighbourhoods, and residents have concerns about proximity to parks and schools.

Local governments' ability to manage land use with tools like zoning will depend on the authority that provinces and territories delegate, as will as the retail models they choose to adopt. Personal cultivation of cannabis is an issue that will require extensive public consultation—and municipalities will face difficult decisions about whether to develop a regulatory response.



2.1 Jurisdictional issues

Planning and zoning regulations fall within the scope of matters for which the *Constitution Act*, 1867 assigns exclusive jurisdiction to the provinces. This includes matters of a merely local and private nature, and property and civil rights. Federal enabling legislation grants similar legislative powers to the territorial governments.

In most circumstances, local government regulations addressing land use activities related to the cultivation, processing, retail sale and consumption of non-medical cannabis would fall within the scope of these provincial/territorial matters. They could fall to local governments, depending on the extent to which the relevant provincial or territorial government delegates appropriate powers.

If a business obtains a federal licence under the *Cannabis Act*, it will not mean that the company will not be subject to provincial/territorial or local government regulations dealing with land use management. Locally, this constitutional arrangement can provide municipalities with the authority to prohibit particular land uses. We recommend that municipalities consult their individual provincial/territorial enabling land use laws for specific direction. But generally, there is no obligation for municipalities to permit cannabis cultivation in specific areas.

Delegation of land use regulation

The provinces and territories have largely delegated their authority over planning and land use management to local and, in some cases, regional governments. The wording of the enabling legislation defines the precise scope of planning and land use management authority. This can be done through stand-alone legislation like Prince Edward Island's *Planning Act*, or through a more general statute like Alberta's *Municipal Government Act*.

Local governments are entitled to interpret enabling legislation broadly enough to address emerging issues and respond effectively to community objectives. However, they cannot extend its scope beyond what the wording of the legislation can reasonably bear. Some enabling legislation across Canada may allow local governments to deal with particular uses on a "conditional use" or "direct control" basis, which might be particularly appropriate in the case of new land use activities (such as those associated with cannabis) whose impacts are not well-understood at the outset.

Note that a provincial or territorial government might choose to exercise its jurisdiction over planning and land use management to control cannabis-related activities directly. For example, as a matter of general policy, the government might not wish to allow the use of residential premises for the cultivation of cannabis plants for non-medical use, as is the case in Quebec. This is despite the federal government's willingness to allow that type of private production under the *Cannabis Act*. Municipal governments should monitor the development of the relevant provincial or territorial regime before initiating their own regulations.

What does this mean for municipalities?

None of the land use activities that are expected to result from the legalization of cannabis are likely to diverge from the existing enabling legislation and interpretations noted above. The land use activities contemplated relative to the *Cannabis Act* are similar to activities associated with other consumable commodities such as food, beverages and tobacco.

Given the existing regulatory framework and role of municipal governments, there are several issues related to land use management that local governments may have to address.

2.2 Location and scale of commercial cultivation and processing

This section addresses commercial-scale cannabis production. For information on personal cultivation of cannabis for non-medical consumption, see Section 2.4: Personal Cultivation.

Typical land use impacts: agriculture and production

Producing cannabis for non-medical use at a commercial scale is an activity that has some similarities to certain agricultural uses carried out in greenhouses, usually but not necessarily in agricultural zones. Greenhouse agriculture is sometimes carried out in industrial zones and business parks as well.

Federal authorization for commercial cannabis cultivation under the *Cannabis Act* will address two scales of cultivation: standard cultivation and micro-cultivation. It will authorize activities typically associated with this type of land use, including research and development, product storage and transportation—but not packaging, labelling or retail sale to the public.

Whether local government regulations should distinguish between standard and micro-cultivation will depend, in part, on whether the distinction the federal licensing regime is making would be practical as a local government distinction. It might be if it is based on cultivation area, but might not be if it is based on product weight or volume. This issue is addressed in greater detail below.

Municipally-operated utilities

As a type of intensive agriculture, cannabis production needs a supply of water for irrigation, of electricity for lighting, and of energy for heating. The availability of adequate utilities is a basic land use management consideration.

As a result, zoning regulations whether for agricultural or industrial zones should always be in step with the capacity of utility systems to support the permitted land uses.

Cannabis production has some special impacts in relation to odour emissions and a need for heightened security that can be associated with high-value crops. All of these factors can reasonably inform locational criteria for land use management purposes.

There are currently around 90 commercial-scale facilities in Canada licensed by Health Canada for medical cannabis production, and many more worldwide. Municipalities may wish to examine these existing facilities to identify and evaluate likely land use impacts and assess the need for a local regulatory framework. Locations of licensed Canadian facilities can be found on the Health Canada website.

Other considerations

Commercial-scale processing of cannabis may give rise to additional considerations. Extraction of cannabis oil, for example, can involve the use of butane, which is explosive at ordinary temperatures. This is an industrial-type activity, which may be appropriate only in industrial zones, or in buildings with particular design and construction characteristics.

The federal government is proposing to license cannabis processing separately from cultivation and retail sales. These authorizations will include research and development activities, product storage and transportation, and the sale of product to licensed retail distributors. Again, both standard-scale and micro-scale processing facilities might be authorized. This suggests that land use regulations should address cannabis production and cannabis processing as separate activities. In addition, local regulations could distinguish between different scales of processing reflecting the federal licensing regime, if such a distinction is practical to enforce.

Typical land use restrictions

As noted earlier, commercial-scale cannabis production is a form of agriculture. Most zoning bylaw definitions of agriculture would include it, unless the cultivation of this particular crop has been carved out of the permitted use category.

A carve-out for cannabis would have been rare prior to the enactment of federal legislation permitting the cultivation of

cannabis for medical use. In general, most zoning bylaws are designed to prohibit land uses in particular zones unless the regulations expressly permit the use.

For clarity, some bylaws also contain a list of expressly prohibited uses, to avoid any doubt. Explicitly forbidding a specific land use would provide more certainty than relying on an omission in the list of permitted activities.

The Land Use Bylaw of Grande Prairie, AB, is typical and defines an "agricultural operation" as *"An agricultural activity conducted for gain or reward or in the hope of expectation of gain or reward, and includes, but is not limited to … the production of fruit, vegetables, sod, trees, shrubs and other specialty horticultural crops."*

Municipalities can write land use regulations to make very fine distinctions, for example between manufacturing plants for furniture and manufacturing plants for automobiles, if the uses have different land use impacts and there is accordingly a policy reason for making the distinction. Likewise, a local government could distinguish between the cultivation of cannabis and the cultivation of other types of crops—prohibiting one but not others.

Similarly, regulations can reflect distinctions that the federal government may be making between standard-scale cannabis production and micro-production facilities run by small-scale growers. Enforcing such a distinction could be difficult, though, if the federal distinction is based on a revenue or production criterion rather than plant numbers or growing area. It is a good practice to establish a basis for such distinctions by documenting and analyzing a comparison between potential impacts.

Proximity and clustering restrictions

Once Health Canada began licensing commercial production facilities for medical cannabis, some local governments amended their land use regulations to address community concerns. This included clustering cannabis businesses in certain districts by imposing minimum distances between the facilities. In some cases, cities established minimum distances between the production facilities and land uses involving children, such as parks and schools. In these cases, municipalities did not feel that the equivalent federal licensing criteria were sufficient.

To this extent, the facilities were being dealt with in the same manner as pawnshops and adult entertainment venues. Applying similar criteria should be considered carefully in the context of local considerations, including health, safety, and economic development. This is an example of an instance where the federal role does not necessarily oust provincial/territorial or local government's jurisdiction.



What can municipalities do?

Policy options

- Simply allow the activities to occur within the rubric of existing land use regulations, as agricultural or industrial activities in the case of production and industrial or manufacturing activities in the case of processing.
- Carve the activities out from existing permitted use categories, to be permitted only at locations specified in the regulations or under the authority of a special use permit.
- Carve the activities out from existing permitted use categories, with an exception for existing cannabis production operations that were established under the medical cannabis regime.
- Prohibit the activities entirely, as activities that the local government simply does not wish to permit within its jurisdiction, if the enabling legislation permits prohibition of uses.

Regulatory options

- Make no regulatory change, or amend existing regulations to make it clear that activities related to the commercial production or processing of cannabis are included in permitted or permissible use categories.
- Amend existing permitted or permissible use categories to exclude commercial cannabis production or processing activities, except at specific locations or under the authority of a special permit.
- As immediately above, but limit production to the scale that is appropriate to supply cannabis for medical uses.

- Add these activities to a list of prohibited uses, or amend all permitted or permissible use categories that could conceivably include them, to specifically exclude the activities.

Possible regulatory language

A land use bylaw definition of "agriculture" usually refers to the cultivation of crops. A definition could be modified to reflect a local regulatory choice about cannabis cultivation, adding wording that excludes "the cultivation of cannabis, other than cultivation authorized under either Part 1 or Part 2 of the Access to Cannabis for Medical Purposes Regulations under the *Controlled Drugs and Substances Act* (Canada)."

The reference to the ACMPR would reflect a policy choice to allow this use only to the extent that it serves a medicinal market. The exclusion could be narrowed to refer to specific locations where cannabis cultivation or processing is allowed, or to a local conditional use permit or other discretionary authorization being obtained.

Under the *Cannabis Act*, Part 1, authorizations are for commercial-scale operations. Part 2 deals with personal use and designated person production as originally authorized under the Medical Marihuana Access Regulations. Excluding cannabis production from permitted "agricultural" uses could either permit or forbid both types of production—or allow one of them but not the other.

2.3 Location and density of retail facilities

Anticipated land use impacts

One of the key variations in provincial/territorial frameworks is the type of retail model that will be implemented. There are exclusively public models where the province or territory takes control of the entire retail system. There are hybrid models where a mix of private retailers and government run stores will be present. There is also the option of an exclusively private model where the province controls distribution but private businesses are responsible for retail sale.

Diverse retail sales models

At the time of writing, six provinces/territories are moving toward a Crown corporation (public) distribution model for cannabis retail sales. Four other jurisdictions signalled they will develop a private retail system. One territory will run a public retail system but with no bricks and mortar storefronts—online sales only. Another two provinces/territories will have a hybrid system with both private and public retail distribution.

Municipalities should consult their specific provincial/territorial cannabis legislation as well as general enabling land use planning legislation to better understand where their own municipal roles and responsibilities will originate on the issue of non-medical cannabis.

The storefront sale of cannabis for non-medical use is essentially a type of retail trade with similarities to the sale of other consumable commodities such as food and beverages. Cannabis is already being sold in Canada, in illegal storefront dispensaries that some local governments have tolerated in mixed-use neighbourhoods.

The use does not appear to have any unusual characteristics in relation to functional aspects such as deliveries of product, off-street parking or signage requirements. It has some similarity to pharmacy uses and banks in relation to the need for secure storage. Hours of operation may be different from other types of business, but would usually be addressed via business regulations. See Chapter 3: Business Regulation for more information.

Local governments will have to consider what behaviours they wish to incent. And they may be limited in this regard by restrictions set out in a specific province or territory. For example, if a municipality wants to use the availability of non-medical cannabis to promote tourism, they may wish to focus on creating tourist commercial districts.

Local governments would benefit from speaking with municipal staff members from U.S. cities where retail cannabis sale is already permitted. Even some bigger Canadian cities have a good sense of the challenges associated with cannabis clientele, based on their experience with storefront dispensaries. This could help guide Canadian municipalities in deciding whether to enact special land use restrictions to either encourage or control the growth of cannabis-related businesses.

Commercial consumption facilities

Smoking tobacco is illegal in most enclosed public places in Canada. The legalization of cannabis use for non-medical purposes will mean that municipalities must clarify whether smoking laws automatically include cannabis. This would mean examining both provincial/territorial and municipal laws.

In Vancouver, for example, the Public Health Bylaw is drafted in such a way that cannabis is likely covered.

Vancouver's Health Bylaw No. 9535 defines "smoking" as including *"burning a cigarette or cigar, or burning any substance using a pipe, hookah pipe, lighted smoking device or electronic smoking device."*

Municipalities may have to amend smoking bylaws that contain narrower definitions restricting their scope to tobacco use. The same policy concerns that gave rise to this type of public health bylaw, including second-hand tobacco smoke, would presumably extend equally to cannabis.

Assuming that provincial/territorial health laws allow local governments the flexibility to consume publicly, local governments wishing to allow smoking in particular types of premises such as "cannabis cafés" may need to make an exception in their own smoking bylaws. This is in addition to addressing this land use category in zoning and business regulations.

Provincial and territorial occupational health and safety regulations that require employers to protect workers from second-hand smoke in the workplace may complicate the operation of such premises, or even make it impossible.

Alberta's proposed *Act to Control and Regulate Cannabis* provides that: *"No person may smoke or vape cannabis … in any area or place where that person is prohibited from smoking under the Tobacco and Smoking Reduction Act or any other Act or the bylaws of a municipality."*

Proximity and clustering restrictions

Municipalities can use local land use regulations to prevent the clustering of too many of one kind of business. They can also keep similar types of businesses or activities in one place, and/or away from other land uses. Common candidates for such treatment are so-called "adult" businesses, arcades, pawnshops and thrift stores.

In terms of restrictions on cannabis consumption and sales or production, regulations about minimum distance from other facilities like schools should be specific. Does the distance requirement refer to a school site on which a school might be built? Or is a school scheduled to be built there? Does the regulation refer to an unused school building, or only a school that is actually in operation? Also, regulations should address what kind of school needs to be a minimum distance away from a cannabis business—public, private, commercial, technical or post-secondary.

In the case of spacing between retail cannabis sales outlets, local governments should consider several questions as they develop regulations:

- When exactly does a "cannabis sales use" start, and therefore become subject to proximity or clustering considerations?
- Is a building permit or business licence sufficient, or must the use actually be in operation?
- Is an application for a building permit or business licence sufficient?

In all cases, details on how the requisite distance is to be measured need to be defined and could include how the distance is calculated, and how variances will be approached.

Some local governments will be permitted by their land use management enabling legislation to deal with retail cannabis sales as a conditional use. This would allow them to use direct control as well as or in the place of zoning, taking clustering and spacing considerations into account when issuing site-specific land use approvals. In these cases, they will not need to address those matters in generally applicable regulations. The one-off nature of such approvals does not eliminate the need, though, for conditions to be grounded in an evidence-based land use impact analysis and for the clustering and spacing requirements to be communicated clearly to stakeholders.

Considerations for medical cannabis

Prohibitions and regulations regarding retail sales of cannabis will have to acknowledge that sales of cannabis for medical purposes will continue. For example, some pharmacy chains have been entering into supply contracts with producers of medicinal cannabis. Local governments should therefore be careful not to restrict this type of canna-bis sales with overly broad regulations.

Retail signs

Retail trade facilities require signage. Under the *Canadian Charter of Rights and Freedoms*, there is a right to freedom of commercial expression. Local government regulations that limit the types and sizes of signs that can be used in commercial areas are generally acceptable. Examples include prohibitions on large window signs and other types of signage that detract from the visual attractiveness of an area, or restrictions on temporary signage associated with the opening of a new business.

Sign regulations that attempt to directly control the message conveyed by a commercial sign could, however, potentially risk interfering with the right to freedom of commercial expression under the Charter.

The federal government intends to address the packaging and labelling of cannabis products with regulations under the *Cannabis Act*. These regulations will have to respect provincial and territorial jurisdiction over land use management, and are therefore unlikely to touch on retail signage.

For their part, provincial and territorial governments may choose to address advertising issues as they create their own cannabis distribution regimes. Neither of these regimes is likely to deprive local governments of their entire jurisdiction over the use of commercial signage.

Typically, local government signage regulations address the types of signs that are permitted on particular premises—whether freestanding or mounted on a building, for example. These regulations can also specify the extent of sign area permitted in relation to the size of the business premises. Business operators are often subject to landlord controls as well, such as those requiring a consistent signage format or theme in a retail mall.

Quebec's proposed *Cannabis Regulation Act* contains the following: *"All direct or indirect advertising for the promotion of cannabis, a brand of cannabis, the Société québécoise du cannabis or a cannabis producer is prohibited where the advertising … is disseminated otherwise than … in printed newspapers and magazines that have an adult readership of not less than 85%; or … by means of signage visible only from the inside of a cannabis retail outlet."*

Another aspect of signage relates to public health and the desire to reduce public consumption through marketing and advertising. We address this in Chapter 4: Public Consumption.

What can municipalities do?

Policy options

- Allow and issue authorization for cannabis shops. Permit this as you would any other business in a commercial district.
- Carve this type of retail sales out of existing permitted use categories. Only permit cannabis businesses at particular locations or under the authority of a special permit.
- Prohibit cannabis retail stores completely if the enabling legislation permits prohibition of uses.

Regulatory options

- Make no regulatory change, or amend existing regulations to make it clear that retail cannabis sales are included in permitted retail trade land use categories.
- Amend existing permitted use categories to exclude retail cannabis sales activities, except at specific locations or under the authority of a special permit, from all land use categories that could conceivably include the use.
- Add these activities to a list of prohibited uses.

Possible regulatory language

- "Retail trade" means the sale of consumer goods at retail, including retail trade in bakeries, but excludes the retail sale of cannabis other than in licensed pharmacies.

2.4 Personal cultivation

Personal use and designated personal cultivation

The use of residential premises for the cultivation of medical cannabis plants has caused major problems for Canadian municipalities over the past several decades. It has meant a significantly compromised housing stock, heavy demands on policing resources, local nuisance complaints, and erosion of the culture of compliance on which the effectiveness of local bylaws largely depends.

These problems were exacerbated because people holding Health Canada production licenses failed to adhere to the terms of their licence regarding plant quantities. Health Canada also failed to enforce those terms. And many of these licences actually authorized cannabis production at a scale (hundreds of plants) that is simply inappropriate for a typical residential dwelling.

Residential buildings are usually not designed or constructed to accommodate cannabis production. The mechanical systems in non-industrial buildings are usually not appropriate to support this kind of use without modifications (that are often carried out by unqualified persons and without permits). The location of dwellings where cannabis is being grown exposes neighbours to odours and other impacts. The federal government's initiatives in commercial production of medical cannabis were, in part, an attempt to alleviate these problems by shifting cannabis production from residential premises to properly designed and constructed facilities.

Personal use under the *Cannabis Act*

The *Cannabis Act* permits people over 18 to grow up to four cannabis plants within a "dwelling-house." Provincial and territorial governments will be able to exercise their own jurisdiction to prohibit or regulate this scale of production, although only Manitoba and Quebec have announced the intention to do so.



The relevant definition of "dwelling-house" makes no distinction between a detached dwelling and a dwelling in a multiple-unit building. It also includes any adjacent yard or garden where the plants could be grown outdoors. No federal permit or licence would be required.

The *Cannabis Act* prohibits the use of residential premises for the production of cannabis for non-medical use at a larger scale. Health Canada will continue to authorize, however, the production of medical cannabis under Part 2 of the ACMPR, including production under up to four registrations per production site.

Local regulation of medical cannabis production in residential premises will continue to engage Charter issues. We suggest that you carefully consider these issues before attempting to further regulate medical cannabis production.

The courts have found that commercial-scale cannabis production facilities were not a complete answer, constitutionally, to patients' needs for medical cannabis, and assumed that cannabis production, distribution and possession were otherwise illegal. Legalization profoundly undermines that assumption, and will likely result in broad availability of the drug across the country.

Ordinary land use regulations prohibiting cannabis production in residential premises may, over time, become a reasonable limit on access to medical cannabis, and therefore wholly constitutional, if there are plentiful alternative sources of supply.

Manitoba's proposed *Safe and Responsible Retailing of Cannabis Act* provides that *"a person must not cultivate cannabis at his or her residence." The Act does not apply to the "cultivation of cannabis for medical purposes that occurs in accordance with the requirements of the applicable federal law."*

Land use impacts

Local governments in provinces and territories that have not prohibited this activity will need to consider whether personal use cannabis production in a dwelling, at the minor scale permitted by the *Cannabis Act*, will raise land use management issues.

Residence-based cannabis production under the federal medical cannabis regime did cause certain challenges from a municipal health and safety perspective. But this regime is likely not an accurate predictor of how non-medical personal cultivation will be taken up by the public at large.

Regardless, municipalities may be skeptical about whether or not people will comply with the four-plant limit and if federal government will enforce the rule. Personal-use cannabis production at the scale permitted by the *Cannabis Act* would seem to engage no different land use management issues than the cultivation of other types of domestic plants. Possible exceptions could be odour issues and those associated with the risks of outdoor cultivation to children and domestic pets.

This all assumes an adequate commercial supply of cannabis that will eliminate the black market. In an ideal world, an adequate legal supply would eliminate the security issues associated with cannabis production in residential premises. The incentive to obtain a licence to produce medical cannabis and then violate the terms of that licence, may significantly reduce after legalization.

Local governments might consider whether any of this could be addressed by requiring licences for personal home cultivation. A registration system could help identify where cannabis production is actually occurring—though it is worth evaluating whether citizens would be likely to comply with such a requirement.

In the land use management context, growing four cannabis plants either indoors or outdoors in residential premises would probably be like growing other types of domestic plants. It would constitute an ordinary incidental, accessory or ancillary use of the premises not requiring express authorization in the relevant land use regulations.

Local governments contemplating a regulatory response to this aspect of the *Cannabis Act* should examine their accessory or ancillary use regulations. If the regulations already address in detail the types of plant cultivation that is permitted and cannabis is not mentioned, the regulations might be interpreted, by implication, to prohibit the cultivation of this particular plant species.

The Land Use Bylaw of the Town of Truro, NS defines an *"accessory use"* as *"the use or uses which take place on the same site as the principal use, and of a nature customarily and clearly secondary and incidental to the principal use."*

Nuisance regulation

An alternative approach to the issue would be to address the actual impacts of cannabis cultivation in residential areas. This would mean enacting regulations that deal directly with the physical impacts of the activity. A local government may have nuisance regulation and abatement powers that have already been, or could be, exercised in

relation to odour-producing activities. In that case, cannabis production would not need to be addressed at all via land use regulations. We examine nuisance regulations in greater detail in the Chapter 6: Enforcement Issues.

B.C.'s Community Charter authorizes local governments, under their authority to deal with nuisances, to regulate, prohibit and impose requirements in relation to *"the emission of smoke."*

Proprietary jurisdiction of other entities

Cultivation of cannabis in residential premises, while potentially subject to local government regulation, is also subject to supervision by other interested parties including landlords, condominium corporations and co-operative boards. They deal more directly with complaints from neighbours and may therefore seek to regulate its cultivation or use to some degree.

Saskatchewan's *Condominium Property Act*, Section 47(1)(e), gives a condominium corporation the authority to pass bylaws *"governing the management, control, administration, use and enjoyment of the units, common property and common facilities."*

Landlords, including local governments that manage their own rental housing portfolio, have an interest in ensuring that their premises are not used in a manner that is inherently damaging or unsafe. Boards composed of owners have a similar interest in ensuring that multi-unit buildings are not used in such a way as to create nuisances or unsafe conditions. Local governments with concerns about this use in multiple-unit buildings might reasonably conclude that they can manage the four-plant scenario in their own rental housing portfolio via tenancy agreements. They may also choose to leave the management of home cannabis cultivation in other buildings for owners to deal with as they see fit.

Choosing to regulate

The issue of home cultivation of cannabis—even with a four-plant limit in place—is one that will require public consultation. It is also the issue that will be the most challenging for municipalities to decide on whether to develop a regulatory response. The impacts of cannabis cultivation at this scale are perhaps minor, and other actors may be likely to address them via separate mechanisms such as tenancy agreements and strata association bylaws.

Citizens expect governments to enforce regulations. The issue of how to regulate home cultivation of cannabis will apply to the greatest number of properties. Of all the regulations that might be considered in relation to the legalization of cannabis, this one has the potential to generate the greatest number of enforcement complaints.

What can municipalities do?

Policy options

- Accept minimum-scale plant cultivation (four plants) in residential premises without a local regulatory response.
- Require some type of permit for this scale of cannabis cultivation in residential premises. Clarify that this is not a commercial activity that would require a business licence. Local government permit records would be public.
- Regulate the activity by permitting indoor production only, or by permitting it only in certain areas such as detached-dwelling zones.
- Prohibit the activity in all residences. (Accepting that such a prohibition could be unenforceable in relation to individuals who hold a personal use production licence for medical cannabis.)

Regulatory options

- Do nothing.
- Amend the zoning regulations to require a land use permit for the cultivation of cannabis in residential premises, and establishing a permit application procedure.
- Amend the zoning regulations to specify that accessory cultivation of cannabis is permitted only in certain zones, or is only permitted indoors.
- Amend the zoning regulations by adding a prohibition on cannabis cultivation in residential premises generally, or by excluding cannabis cultivation from the "accessory use" category that is permitted in residential zones.

Possible regulatory language

This suggested language could support the options above. A definition of the term "cannabis" could be included, referring to its definition in the *Cannabis Act*, or it could be left undefined. Consider these options for amending the land use regulations:

- Add a regulation along these lines: "No person, other than a person who is authorized to do so under Part 2 of the Access to Cannabis for Medical Purposes Regulation under the *Controlled Drugs and Substances Act* (Canada), shall use any residential premises for the growing of a cannabis plant, unless the person has registered the premises with the [municipality] as a residential cannabis production site."
- Establish a registration process that includes a registration fee sufficient to cover the costs of administering the process.
- Specify that the use of residential premises for the growing of a cannabis plant is permitted only if the premises are [a detached dwelling] [located in a single-family residential (RS1) or two-family residential (RS2) zone].
- Specify that the use of residential premises for the growing of a cannabis plant is permitted only if the plant is located within a dwelling unit.
- Specify that the use of residential premises for the growing of a cannabis plant is prohibited, except in the case of premises in respect of which a registration has been issued by Health Canada under Part 2 of the Access to Cannabis for Medical Purposes Regulation under the *Controlled Drugs and Substances Act* (Canada).

3 Business regulation

Local governments expect to have some scope to regulate cannabis cultivation, processing and retail businesses in their communities. Once again, that scope will depend on the specific regulatory authority that individual provinces and territories choose to delegate to municipalities in their enabling legislation.

Local governments may use tools like business licensing to protect public health and safety, to protect youth and restrict their access to cannabis, to deter illicit activities, to mitigate public nuisances, and more. In doing so, it will be essential to strike an effective balance between empowering legal cannabis businesses to operate and addressing legitimate community concerns.



3.1 Jurisdictional issues

Constitution Act

Business regulations are exclusively the domain of provinces. According to the *Constitution Act, 1867,* provinces have 1) the power to regulate particular trades or callings under "property and civil rights"; and 2) the power to make laws in relation to "shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local, or municipal purposes."

Federal enabling legislation grants similar legislative powers to territorial governments. In many cases, provinces or territories have delegated this authority to local governments. In these cases, municipalities are free to regulate business activities related to the cultivation, processing, retail sale and consumption of non-medical cannabis.

Provincial/territorial delegation of regulation

The extent to which provinces and territories delegate their authority over business regulation to local governments will depend on the wording of the enabling legislation. For example, in British Columbia, local governments but not regional governments have been delegated the authority to regulate businesses. The authority does not include the authority to prohibit businesses. It also requires that before council adopts a business regulation bylaw, it give notice and provide an opportunity for people who say they are affected to make representations to council.

In New Brunswick, local governments do not have the broad general powers to make business licensing bylaws but do have the power to regulate and license only certain businesses. In Winnipeg, the municipal charter states that a bylaw passed under the general authority to regulate businesses must not require a licence to be obtained for "selling agricultural produce grown in Manitoba if the sale is made by the individual who produced it, a member of the immediate family of the individual or another individual employed by the individual."

Conflicts with legislation

Business regulations would only be rendered inoperative if there is a conflict with federal or provincial/territorial legislation regulating the same subject matter. In this regard, a conflict may arise where one enactment says "yes" and the other says "no." In these cases, citizens are being told to do inconsistent things. The exception is in cases in where the relevant provincial/territorial legislation specifies a different legal test.

This is another example where the mere existence of federal or provincial/territorial legislation does not oust local government jurisdiction to regulate the same subject matter. Thus, as discussed in Chapter 2: Land Use Management, a federal licence does not automatically mean a business is immune from local business regulations.

Local government business regulations may, for example, enhance the statutory scheme by complementing or filling in certain gaps in the federal or provincial/territorial legislation. They may also impose higher standards of control than those in related federal or provincial/territorial legislation.

Federal and provincial lands and cannabis businesses

One restriction on a local government's delegated authority in relation to business regulation is in relation to any cannabis businesses operated by the federal government or on land owned by the federal government. The *Constitution Act* gives exclusive jurisdiction over the use of federal lands to the federal government. As a result, neither the provincial/territorial governments nor local governments may regulate in relation to the use of federal lands.

A further restriction in some provinces/territories is in relation to cannabis businesses operated by the provincial/territorial government or on land owned by the provincial/territorial government. As noted in Chapter 2: Land Use Management, at least six provinces/territories will run public retail distribution models, meaning there is likely to be legislation that grants provincial/territorial governments immunity from some or all local government regulations. In most cases this will mean a limited role on the land management and business licensing aspects of retail cannabis sales in jurisdictions with government run stores as the exclusive retail distributor.

In Ontario, the *Legislation Act* is broadly worded such that no Act or regulation binds or affects the provincial Crown unless it expressly states an intention to do so. This would include local government business regulations. In contrast, in British Columbia, the *Interpretation Act* only makes local government regulations inapplicable to the provincial Crown in its use and development of land.

3.2 Business regulation power

Scope and municipal purpose

To the extent that a province or territory has delegated business regulation powers to local governments, local governments may place restrictions on businesses. This is true even if those restrictions may adversely affect the profitability of the business in some circumstances. Local governments should ensure, however, that such regulations are enacted for a proper municipal purpose.

There are several "municipal purposes" that support regulating cannabis businesses. For example, a local government may wish to regulate such businesses to protect public health and safety, to protect youth and restrict their access to cannabis, to deter illicit activities, and to mitigate nuisances.

Types of business regulations

One of the most common business regulations is a requirement that people obtain a licence from the local government in order to run a business. The local government may establish in the bylaw terms and conditions that must be met for obtaining, continuing to hold or renewing a business licence. It can also designate someone to impose these terms and conditions. The bylaw may suspend or cancel a business licence for failing to comply with the terms and conditions.

The local government may set out in the bylaw specific regulations for certain types of businesses. Types of regulations may include, for example: the days and hours of operation of the business, the age of individuals on the premises, the keeping of records, or the display and advertising of products at the premises.

The City of Whitehorse's Business Licence Bylaw requires every person who offers adult books, adult magazines or adult videos for sale where such items are on display to the public to place such items:

- at a distance not less than 1.5 meters above the floor;
- in display cases in such a manner that only the title is displayed; and
- in display cases that are within clear view of the area
- where payment is made for purchased items.

Another common type of business regulation is a requirement in the bylaw that the business comply with all applicable federal and provincial laws. In British Columbia,

local governments have been successful in enforcing such a provision in their business licence bylaws against storefront medical cannabis retailers. The business licence applications were rejected on the basis that the retail sale of cannabis was unlawful under the federal law.

In this regard, the business bylaw may be a helpful tool to address any ongoing issues with cannabis retail businesses that are operating without a business licence.

Business bylaws may also require that the business comply with all applicable municipal bylaws such as zoning and building bylaws. Local governments should be careful, however, not to use their business regulation powers to prevent, for land use management reasons, a particular type of business that is permitted by the applicable zoning regulations.

It is usually also a general requirement in the bylaw for people to pay a fee to obtain a business licence. Such a fee should be calculated to correspond with the cost of administering and enforcing the regulatory scheme, to preserve its constitutionality as a regulatory charge.

3.3 Cannabis retail businesses

Typical business regulations

As noted in Chapter 2: Land Use Management, storefront cannabis retailers have been lawful in some U.S. states for several years now. Despite their illegal status in Canada, these storefront operations have proliferated under many local governments. To manage these businesses, some jurisdictions have enacted specific regulations. Others may choose to do so before cannabis becomes legal in 2018.

Many of these regulations parallel alcohol and tobacco related regulations. For example, Alberta, Manitoba and Newfoundland and Labrador are proposing to amend their liquor legislation to impose a licensing regime for the sale of cannabis with some similarities to liquor sales. These provinces are considering allowing private retailers to sell cannabis administered through the applicable liquor commission or corporation.

The manner and extent to which the applicable provincial/territorial government intends to regulate such businesses may prevent or influence a local government's decision whether to implement its own regulations. An example is how the LCBO in Ontario will have the exclusive right to sell cannabis.

Typical business regulations for cannabis retail businesses might include:

- Requiring the applicant to submit certain documents such as a security plan, proof of a security alarm contract, 24/7 contact information, a list of employees and a police information check.
- Prohibiting minors on the premises, limiting the hours of operation and requiring security measures.
- Prohibiting consumption on the premises.
- Restricting the sale of other products on the premises.
- Prohibiting the display and advertising to minors.
- Prohibiting online sales and home delivery.
- Requiring business owners to keep records of all business activities.
- Restricting the number of licences that may be issued to each person and the total number of licences that may be issued in the jurisdiction.
- Requiring that a minimum number of employees with specific qualifications be on the premises when open.
- Restricting the advertising and signs visible from the outside of the premises.
- Requiring a transparent storefront.
- Requiring measures to prevent nuisances.

The City of Vancouver's Licence Bylaw requires the following security measures to be installed and maintained on the business premises of a medical marijuana-related retail business:

- Video surveillance cameras that monitor all entrances and exits and the interior of the business premises at all times.
- Video camera data must be retained for at least 21 days after it is gathered.
- A security and fire alarm system must be monitored at all times.
- Valuables must be removed from the business premises or locked in a safe on the business premises at all times when the business is not in operation.

Local governments should monitor the development of the relevant provincial or territorial regime and may wish to seek legal advice before initiating their own business regulations.



What can municipalities do?

Policy options

- Simply allow the activities to occur within existing business regulations as business activities, which may or may not require a business licence under the applicable regime and which are not subject to any particular regulations.
- Specifically regulate cannabis retail businesses to address issues related with these types of businesses, if the provincial/territorial enabling legislation permits this.

Regulatory options

- Make no regulatory change, or amend existing regulations to specify the applicable business licence fee for this category of business, if the enabling legislation permits this.
- Amend existing regulations to set out specific business regulations for cannabis retail businesses, if the enabling legislation permits this.

3.4 Commercial cultivation and processing facilities

Typical business regulations

Most municipal governments have yet to enact specific regulations for cannabis-related businesses. It could be because the Access to Cannabis for Medical Purposes Regulations (ACMPR) already addresses the commercial cultivation and processing of cannabis for medical purposes. Regulations under ACMPR include:

- Requiring a criminal record check.
- Security features such as video surveillance cameras and an intrusion detection system.
- Detailed record-keeping.
- Air filter equipment to prevent the escape of odours.

At the time of writing, the proposed Health Canada *Cannabis Act* regulations have established similar licensing requirements related to location, physical and personal security, record keeping and good production practices.

This does not mean local governments cannot also manage such businesses. Some of the types of business regulations for cannabis retailers noted above may be equally

applicable to cannabis cultivation and processing businesses. In the U.S., some states and local governments have enacted specific regulations to manage these businesses, including:

- Prohibiting minors on the premises.
- Prohibiting consumption on the premises.
- Restricting the advertising and signs on the premises.

Local governments may also wish to enact specific regulations in relation to cannabis cultivation and processing businesses to:

- Prevent nuisances by requiring the annual maintenance and documentation of odour control equipment.
- Support community aesthetics by prohibiting the outdoor storage of production or processing equipment.

What can municipalities do?

Policy options

- Allow the activities to occur within the existing regulations as business activities, which may or may not require a business licence under the applicable regime and which are not subject to any particular regulations.
- Specifically regulate cannabis cultivation and processing businesses to address any related issues.

Regulatory options

- Make no regulatory change, or amend existing regulations to specify the applicable business licence fee for this category of business.
- Amend existing regulations to set out specific business regulations for cannabis cultivation and processing businesses.



4 Public consumption

The public consumption of cannabis is associated with a range of potential public harms, from health impacts of second-hand smoke to behavioural modelling effects for children and youth. The tools and options available to municipalities to mitigate potential harms will depend on the space of authority that provinces and territories choose to delegate.

Established practices in regulating tobacco and alcohol consumption offer a foundation for developing a strategy that reflects local priorities. Many factors other than the law influence how and when people consume cannabis—from social customs to product availability—and no single regulatory approach eliminate all harmful public impacts.



4.1 Jurisdictional issues

As with most local governance matters, municipalities must consider the extent to which they are authorized to regulate cannabis consumption. This chapter addresses how local governments can regulate public consumption through bylaws and policies. As the factors influencing public consumption of cannabis are diverse, we recommend that municipalities consider a combination of these approaches, alongside consultation with legal counsel.

Public consumption cannot be regulated by a local government on the moral grounds that cannabis consumption should be considered a criminal activity. Under the constitutional division of powers, the federal government has the exclusive authority to regulate with respect to criminal law matters. Local bylaws or regulations that are based on a moral position, or perceptions and stereotypes about people who consume cannabis, are unlikely to withstand a challenge before the courts.

Many aspects of cannabis consumption, such as possession, advertising and smoking, are regulated by the federal and provincial/territorial orders of government. Most local governments are able to regulate cannabis only as it relates to a power that has been granted to the local government by the provincial or territorial government.

In assessing how to effectively address issues associated with public cannabis consumption, local governments must first consider the aspects of public cannabis consumption it intends to regulate, and determine whether it is authorized, or necessary, to do so.

4.2 Provincial smoking restrictions

Across Canada, provincial and territorial governments have regulated, or indicated they will regulate, aspects of public consumption of cannabis. They plan to use a combination of cannabis-specific legislation, tobacco smoking legislation, as well as occupational health and safety regulations.

Smoking is the most common form of cannabis consumption, and most provincial/territorial governments have sought to incorporate cannabis into the legislation addressing tobacco smoking. Some provinces have done so through expanding the definition of "smoke" to include cannabis as well as tobacco and other vapour products. This approach results in existing tobacco smoke restrictions also applying to cannabis.

New Brunswick's *Smoke-Free Places Act* contains a broad definition for smoking that extends to cannabis. Specifically, "smoke" means:

(a) to smoke, hold or otherwise have control over an ignited tobacco product or another ignited substance that is intended to be smoked, or

(b) to inhale or exhale vapour from, or to hold or otherwise have control over, (i) an activated electronic cigarette, (ii) an activated water pipe, or (iii) another activated device containing a substance that is intended to be inhaled or exhaled.

In addition to including cannabis in the relevant definitions under the smoking legislation, many provincial/territorial governments have enacted specific legislation or regulations to restrict the places in which cannabis may be consumed.

In some cases, these prohibitions on the public consumption of cannabis are broader than the prohibitions on smoking tobacco. In Ontario's *Cannabis Act*, for example, consuming cannabis for non-medical purposes is specifically prohibited in all public places in the province. This applies in workplaces under the *Occupational Health and Safety Act*, as well as in vehicles or boats. By comparison, the prohibitions under the *Smoke-Free Ontario Act*, establish that tobacco smoking is prohibited in enclosed public places and enclosed workplaces, and that no person shall smoke tobacco in a vehicle while another person who is less than 16 years old is present in the vehicle.

Put simply, someone accustomed to walking through an Ontario town smoking a tobacco cigarette will not be able to do the same with non-medical cannabis. But how local rules will be enforced remains to be clarified (see Chapter 6: Enforcement Issues.)

In other regions, occupational health and safety regulations address the public consumption of cannabis by limiting the places in which a person may smoke any substance. In the Northwest Territories, smoking in public is primarily regulated in this way. Under those regulations, smoking is prohibited in almost all enclosed workplaces, within a buffer zone around those workplaces, as well as in outdoor bus shelters.

Ontario's *Cannabis Act, 2017,* Section 11, prohibits the non-medical consumption of cannabis in public places, workplaces, vehicles or boats, or any other place prescribed by the regulations. A "public place" is defined as "any place to which the public has access as of right or by invitation, whether express or implied, and whether or not a fee is charged." These prohibitions are broader than those in the provincial tobacco smoking legislation.

New Brunswick's *Cannabis Control Act* (Bill 16) proposes restrictions on the places in which cannabis may be consumed in addition to those in the provincial smoking legislation:

17 (1) No person who is 19 years of age or older shall consume cannabis unless the person is in lawful possession of the cannabis and

a) is in a private dwelling and has obtained the consent of the occupant,

b) is on vacant land and has obtained the consent of the owner or occupant, or

c) is in a place prescribed by regulation and in the circumstances prescribed by regulation, if any

(2) For greater certainty, no person who is 19 years of age or older shall consume cannabis in a place to which the public has access as of right or by express or implied invitation, or any other place prescribed by regulation.

[…]

19 Despite any other provision of this Act or the regulations, no person shall smoke cannabis or medical use cannabis in a place where smoking is prohibited under the *Smoke-free Places Act.*

4.3 Public health and welfare

Where a local government has been empowered to regulate the public health or welfare of its community, it may be able to further regulate the public areas in which cannabis may be consumed.

In British Columbia and Ontario, many of the municipal bylaws regulating the areas in which smoking is permitted

have been enacted through such authority. Generally, the understanding that tobacco consumption can be harmful to respiratory health and contribute to cancers, and that second-hand smoke can have similar negative health impacts, has qualified as health-related reasons for municipal restrictions on tobacco consumption. Local governments are likely to be able to draw on a similar approach for cannabis consumption where authorized.

In Vancouver, the Parks Board was delegated authority to enact bylaws to regulate smoking in parks to protect and promote public health—adopting language like the following:

3.1 A person must not smoke:

(a) in a park;

(b) on a sea wall or beach in a park;

(c) in a building in a park, except in a caretaker's residence;

(d) in a customer service area in a park;

(e) in a vehicle for hire in a park;

(f) on public transit in a park; or

(g) in an enclosed or partially enclosed shelter in a park where people wait to board a vehicle for hire or public transit.

3.2 Except as permitted by Section 3.1, a responsible person must not suffer or allow a person to smoke in:

(a) a building in a park;

(b) customer service area in a park; or

(c) a vehicle for hire in a park.

4.4 Municipally-owned or managed property

Local governments can also regulate the locations in which cannabis may be consumed as owners or operators of property. In the event that provincial/territorial smoking legislation does not already prohibit cannabis consumption in a park, a local government may be able to enact such a prohibition through its authority as the owner of that park. A similar approach can be taken to municipally-operated property, such as community centres or recreational facilities.

Community events and municipal alcohol policies

The approach many municipalities have taken in developing a municipal alcohol policy could be adapted to apply to cannabis. For example, an agreement for the use of municipal property for special events, such as festivals or sporting events, could also be used to manage the public consumption of cannabis. This could also apply to community centre and arena rentals.



The City of Ottawa's Municipal Alcohol Policy applies to all City Staff, volunteers, community partners who either manage or have control over City property, rental clients, and organizers of events, on City property, at which alcohol will be sold, served or consumed. This Policy applies to the sale, serving and consumption of alcohol on City property, or at locations or for events under the City's control (collectively "City Property"), whether or not a facility is operating under a liquor licence issued by the Alcohol and Gaming Commission of Ontario (AGCO), a Special Occasion Permit, a liquor licence with a Catering Endorsement, or any other approval that has been issued by the AGCO.

City Property includes the following:

- All City-owned properties,
- All properties leased by the City,
- City Highways (including the travelled portion of the Highway (roadway), boulevards, sidewalks or other areas of the Highway),
- Properties controlled by local boards over which City Council may require that general policies be followed,
- Events held by the City at partner or third-party premises, and,
- City Properties under a Public-Private Partnership Agreement, as determined on a case-by-case basis by the General Manager of Recreation, Cultural and Facility Services

Special challenges for municipalities

Regulating cannabis consumption presents multiple challenges and options for local governments. Their authority to regulate smoking cannabis in public depends on provincial or territorial legislation. Their authority, and need, to regulate smoking also varies greatly across the provinces and territories.

Regulating the public consumption of cannabis that is not smoked presents further challenges as identifiable markers of consumption, such as smoke or odours, are not as easy to detect. The health risks associated with smoking are also less present.

In regulating public consumption, local governments should be aware that cannabis may be consumed in many different forms. The *Cannabis Act* allows the production of cannabis as fresh, dried or oil-based products. While smoking remains the most common, consumption methods that do not produce smoke, including herbal vaporizers or e-cigarettes, or other cannabis-oil based products such as skin creams, are also available.

"Edibles," or foods such as candy and baked goods that have been infused with cannabis, are not currently authorized under the proposed federal regime, although such additional forms of cannabis may be authorized and regulated in the future.

Public consumption exceptions for the use of cannabis for medical purposes, or for traditional ceremonial practices, must also be considered.

What can municipalities do?

Policy options

- Allow cannabis smoking within the framework of the existing provincial and federal regulations.
- Regulate the conditions under which the smoking of cannabis may occur in public places.
- Prohibit the locations in which the smoking of cannabis may occur in public places.

Regulatory options

- Make no regulatory changes to public place policies or bylaws.
- Amend existing bylaws and policies to clarify that smoking cannabis is only permitted in accordance with the regulations and policies.
- Specifically regulate conditions under which the smoking of cannabis may occur in public places, or specific public places.
- Prohibit the smoking of cannabis on specific public places, such as parks, community centres, and sports arenas.
- For special events, develop policies regarding an event host's responsibility to control and be accountable for the smoking of cannabis.

4.5 Promotions, advertising and signage

Local governments should also be aware of how other orders of government have responded to concerns relating to public consumption of cannabis. Similar to the *Tobacco Act*, the federal government has set standards on how cannabis can be marketed across Canada, as well as minimum standards for the packaging of cannabis products. When a local government is concerned about how promotion and advertising may influence public consumption, an important first step is to be aware of the federal regulations on these matters.

Federal regulation of cannabis promotions

Under the *Cannabis Act*, the federal government has prohibited cannabis products from being promoted in a manner that:

- Refers to its price or distribution.
- Is appealing to young people.
- Uses testimonials or endorsements.
- Uses depictions of real or fictional characters.
- Presents cannabis brand elements as glamorous, risky, exciting or daring.
- Induces the purchase of cannabis through monetary incentives, lotteries, or contests.
- Is misleading about the characteristics, safety, and health effects of cannabis.

The federal government has also proposed restrictions on the venues in which advertising for cannabis may occur. The *Cannabis Act* prohibits the use of cannabis branding elements in locations where people under the age of 18 are permitted, in sponsorships for people, events and facilities, as well as in foreign media.

Marketing regulation and content

Local governments may have the authority to regulate business and public health regulations and business marketing options when it comes to cannabis. But the rules must be consistent with the federal *Cannabis Act* and any related federal or provincial enactments.

Awareness of the impact of cannabis consumption on human functioning and development can influence and reduce the consumption of cannabis. Some local governments may have the ability to regulate aspects of how cannabis is promoted, which may indirectly affect cannabis consumption levels.

In considering this approach, municipal governments should be aware that regulating expressive content, which includes advertising, has the potential to conflict with the right to freedom of expression under the *Canadian Charter of Rights and Freedoms*.

Any content-related signage regulations must be connected to a proper municipal purpose and should not infringe on this right. This is an area where it is extremely important to consult legal counsel familiar with the applicable municipal regulatory framework and expression rights.

5 Cannabis in the workplace

As employers, municipalities have a duty to ensure safe workplaces—and a cannabis-impaired employee can pose safety risks to co-workers and the public. This duty may sometimes collide with an employer's duty to accommodate people with medical needs or disabilities. Achieving the right balance is vital.

Municipalities will face practical and policy challenges here. Cannabis impairment remains difficult to establish objectively. Banning cannabis use among all employees is problematic because some may be using it as prescribed by a doctor. Fundamentally, human resources policies and interventions need to be based on an employee's ability to do their job, rather than stereotypes or moral judgements about cannabis use.



5.1 Maintaining safe municipal workplaces

Employers are required to ensure a safe workplace, and an impaired employee can pose a safety risk to themselves, their co-workers, or the public. Whether an employee consumes a substance that may cause impairment for medical or non-medical purposes, the basic principles around impairment in the workplace continue to apply.

It is generally acceptable to maintain a policy that all employees arrive at work fit for duty and to conduct themselves in a safe and lawful manner while on duty.

When considering changes to human resource policies with respect to non-medical cannabis, municipal employers should not make any decisions about impairment based on assumptions about cannabis use and its impact on an employee's ability to do their job. Employers must rely on their observations to establish reasonable grounds to determine whether an employee is impaired or not.

5.2 Existing medical cannabis regime

Access to medical cannabis is currently permitted only under the terms and conditions set out in the Access to Cannabis for Medical Purposes Regulations (ACMPR). Although the federal government has indicated it will revisit the ACMPR regime if and once the *Cannabis Act* becomes law, the current ACMPR regime would continue under the *Cannabis Act*.

An employer should treat medically prescribed cannabis similar to other prescription medication. As outlined below, there are additional considerations for cannabis consumption for non-medical purposes.

5.3 Determining impairment

The legalization of non-medical cannabis does not affect an employer's duty to ensure a safe workplace—as well as to accommodate employees with disabilities who are being prescribed medical cannabis or employees with disabilities stemming from an addiction to cannabis. These duties to accommodate are addressed in Section 5.8.

If an employer suspects that an employee is impaired, they must observe that the employee's conduct in the workplace and their ability to perform their work-related duties are compromised.

Employers must not make decisions based on assumptions about the use of cannabis and its impact on an employee's ability to do their jobs. On its own, information about the consumption of an impairment-causing substance, or whether it has been consumed for non-medical or medical purposes, will not determine whether an employee is impaired or not.

Accurately assessing whether a person is impaired as a result of consuming cannabis is difficult. There are limited methods to determine impairment from cannabis through testing. The effects of an average dose of cannabis for an average user will vary. And unlike the use of a blood-content level to determine impairment from alcohol, THC levels in bodily fluids cannot reliably indicate the degree of current impairment.

As it stands, blood-content levels for THC (the main psychoactive compound in cannabis) are considered under Bill C-46 in the context of impaired driving offences. Bill C-46 proposes to create three new Criminal Code offences for having specified levels of THC within two hours of driving.

However, there is no universally agreed-upon standard of measurement to determine whether a person is impaired as a result of consuming cannabis. The proposed blood content thresholds under Bill C-46 are of limited relevance for employers, as a determination of impaired driving requires different considerations than determining that an employee is impaired in the performance of their job duties.

In considering whether an employee is impaired, a supervisor of the employee should be able to respond to the issues outlined in the following table.

Reasonable grounds for impairment: Five factors to consider

1 Impairment	• Are there facts to indicate that the employee has shown a form of impairment? • Is there a change in physical appearance, behaviour, actions or work performance? • Observations may include: slurred speech, tardiness, unsteadiness, yelling, odours, admissions of use.
2 Reliable facts	• Are the facts reliable? • Did you witness a situation personally, or are you sure that the witness(es) are reliable and have provided first-hand information?
3 Reasonable facts	• Can you explain the facts? • Would you be able to describe the observations to another person who does not know the people involved?
4 Documentation	• Are the facts capable of documentation? • Can the dates, times, names and locations be documented?
5 Timeliness	• Is the impairment situation current, today, while on the job or company property? • Is this a repeated or ongoing situation?

– Adapted from the City of Edmonton 'Drug and Alcohol Operating Procedures', March 2016

Once a supervisor can reasonably demonstrate that an employee may be impaired, an employer should consider the following questions:

- Is there a safety risk, or a risk of injury, illness or incident in the workplace?
- Is the safety risk based on an employee's change in behaviour or ability?
- Is the change in the employee's behaviour or ability related to the consumption of cannabis?

As the effects of cannabis will vary among consumers, employers must assess people on a case-by-case basis. The specific performance requirements of a position, as well as the individual's capacity to fulfill those requirements, must be taken into consideration.

In evaluating whether there is a safety risk as a result of an employee's consumption of cannabis, the Canadian Centre for Occupational Health and Safety has recommended employers consider additional questions such as:

- Does the person have the ability to perform the job or task safely while impaired? For instance, is the employee driving, operating machinery or equipment, or using of sharp objects?
- Is there an impact on cognitive ability or judgment while impaired?
- Are there other side effects of the medical condition or the treatment that need to be considered?

5.4 Zero-tolerance policies

A zero-tolerance policy on the use of a substance in the workplace can result in discrimination against employees who are prescribed that substance. A person who has a medical prescription for a substance, including cannabis, is generally entitled to consume that substance in accordance with their prescription.

Whether the prescribed substance is available for non-medical or medical purposes does not affect an employee's entitlement to use it in accordance with their prescription.

Zero tolerance: alcohol vs. cannabis

In most cases, the non-medical use of cannabis and alcohol can be regulated similarly in the workplace. However, the history of cannabis as a medically prescribed substance provides context for why implementing a zero-tolerance policy toward cannabis is not as straightforward as a similar prohibition on alcohol.

In developing a regulatory framework for the non-medical use of alcohol, its treatment as a medical necessity has been given significantly less attention than it has for cannabis. The regulation of alcohol has largely been developed from the perspective that it is a non-medical substance. Alcohol regulation has taken place without comparable judicial commentary on the right to access it for medical purposes, or a comparable legislative regime to enable such access.

When alcohol became regulated for non-medical consumption, the existence of a right to access it for medical purposes was unclear, and there were significantly fewer people who were prescribed alcohol for medical purposes in the first place.

Workplace policies that include a prohibition on alcohol consumption are generally justified on workplace health and safety considerations. As outlined below, a policy that is *prima facie* discriminatory may be justified on the basis of being a bona fide occupational requirement (BFOR).

An actual safety risk as a result of impairment from a substance can justify a prohibition on the use of that substance in the workplace. With alcohol, there are generally accepted methods and standards— such as a blood alcohol content and a *per se* limit—for determining an impairment threshold. As there is an accepted correlation between alcohol consumption and impairment, as well as

established thresholds to determine impairment, a specific prohibition on the use of alcohol in the workplace may be justified with regard to those standards and workplace safety considerations.

Comparable methods or norms to determine impairment do not yet exist for cannabis. It is generally accepted that the effects of cannabis consumption differ from person to person. If two people consume the same amount of cannabis within the same time frame, there is the potential that this would result in one person not being impaired and other being significantly impaired. This environment underlines the need for an observation-based approach to determining impairment.

Bona fide occupational requirements

A zero-tolerance policy may be relevant in a workplace where the employer can demonstrate that sobriety is a bona fide occupational requirement (BFOR). A BFOR is a requirement that is essential to the safe and proper performance of the job.

As a BFOR is an exception to the general prohibition against discrimination, whether a policy meets the standard of a BFOR will be given very close consideration by the courts, human rights tribunals, and labour arbitrators. A BFOR will only be valid where the employer is able to demonstrate that the requirement meets three conditions:

- It was adopted for a purpose rationally connected to the performance of the job.
- It was adopted in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose.
- It is reasonably necessary to the accomplishment of the legitimate work-related purpose, in the sense that the employer cannot accommodate the affected employee without incurring undue hardship.

A BFOR must clearly relate to the needs and performance of the job. A requirement to be able to lift a certain amount of weight may discriminate against people who have a physical disability, but may qualify as a BFOR in the context of a care home where staff are required to assist people with mobility issues. Similarly, minimum eyesight and hearing requirements can discriminate on the basis of physical disability but may qualify as a BFOR in the context of a position as a vehicle driver.

In establishing a job requirement as a BFOR, an employer should be able to demonstrate, with credible evidence, they have considered the specific requirements of the job, and have explored alternatives to fulfill these requirements that did not result in a discriminatory effect.

5.5 Disclosure of cannabis consumption

Non-medical cannabis use

The general rule is that employers have no authority over what employees do outside working hours, unless it can be shown that an employer's legitimate business interests are affected in some way. An employee's decision to frequent a particular pub on a Monday night, for example, should not affect their employment, unless their Monday night activities impaired the employee's ability to do their job when they reported for work on Tuesday morning.

General practice suggests that a workplace standard of requiring employees to show up fit for work is acceptable. A requirement that employees self-disclose to their supervisor, or not attend work, if they believe they are impaired as a result of consuming a substance is also consistent with an employer's duty to maintain a safe workplace.

An employer is generally not entitled to request information about an employee's use of substances while off-duty. An important consideration in dealing with employees who use cannabis is to not make decisions based on assumptions about the use of cannabis and its impact on an employee's ability to do their job. An employer may, however, investigate an employee's off-duty conduct if the employer has reasonable grounds to believe that the employee's off-duty conduct is negatively affecting their ability to fulfil the requirements of their job. An employer's reasonable grounds must be based on observations of the employee in the workplace, and a connection between the alleged off-conduct impairing the employee while on-duty.

Medical cannabis use

Employers may be able to require that employees disclose their use of medical cannabis in the same manner as other prescription drugs that cause impairment. In obtaining this information, an employer's right to medical information does not typically extend to the right to learn about specific illness or conditions for which an employee may have a drug prescription.

The focus of any employer enquiries should be on the impact on the ability of the employee's ability to perform their job duties. Questions about the likelihood of the prescribed medication causing impairment while on duty are more likely to be acceptable than those that ask for information about why the medication was prescribed.

If there are reasonable concerns about impairment, employers may be able to request confirmation from the doctor that the prescribed cannabis usage does not impair an employee's ability to perform their job duties safely. Depending on the requirements of an employee's position, the employer may also be able to request medical information about the amount and type of cannabis that has been prescribed, as well as the frequency of use. The more safety-sensitive the workplace or position is, the more medical information an employer will be able to justify requesting.

If an employer has reasonable concerns that an employee is impaired while at work, even if as a result of consuming cannabis for medical purposes, the employer may be able to require the employee to provide medical information about their consumption of impairment-causing substances. Decisions on any further actions should be based on the nature of the job duties and appropriate medical evidence.

5.6 Substance use policies

Employers should update their substance use policies to address any changes to the legal status of cannabis possession and consumption. Any substance use policy must focus on impairment, and what it means to be fit for duty.

At a minimum, substance use policies should address:

- Employee conduct standards.
- Guidelines for the use of substances that may cause impairment.
- Standards and procedures for supervisors and managers to address impairment.
- Consequences of violating the policy.

Employee conduct standards

A workplace standard requiring employees to show up fit for work is acceptable. Similar to alcohol or smoking, employers may be able to prohibit the consumption of cannabis for non-medical purposes while in the performance of one's employment duties or on a worksite.

Employer policies prohibiting alcohol consumption in the workplace and during work hours can be amended to include the use of non-medical cannabis once it is legal. Anti-smoking laws will likely apply to cannabis as they do to tobacco, in that smoking in most enclosed workplaces is likely to be prohibited.

Local governments should review such legislation from their province/territory to evaluate the extent to which, if at all, cannabis smoking may be permissible in the workplace.

Guidelines for employee use of substances

A substance use policy should identify the circumstances in which an employee should report the use of substances that may cause impairment. It should also specify any requirements to provide appropriate medical information. A standard that employees self-disclose to their supervisor—or not attend work—if they believe they are impaired as a result of consuming a substance is consistent with an employer's duty to maintain a safe workplace.

Addressing substance-related impairment

Guidelines for supervisors and managers to assist in evaluating whether an employee is impaired in the workplace should be included in a substance use policy (SEE REASONABLE GROUNDS FOR IMPAIRMENT: FIVE FACTORS). Employers may wish to establish a documentation or

reporting procedure, such as a checklist, to help determine whether indicators of impaired behaviour are present in the workplace.

Where an employer has reasonable grounds to believe that an employee is impaired in the workplace, they may request additional information from that employee. The level of information that can be requested, including medical documents where appropriate, will depend on the circumstances and must be assessed case-by-case. Policies will need to incorporate flexibility and focus on impairment and safety, not the use of cannabis or other substances.

Employers are also required to accommodate employees with disabilities. Substance use policies should provide managers and supervisors with guidelines for situations where an employee may be misusing substances in connection with a substance dependence.

The policy should outline any consequences of a policy violation, including disciplinary action, or assessment and rehabilitation measures. For unionized workplaces, consultation with the union regarding any proposed changes to the current substance use policies is recommended.

5.7 Substance testing

We strongly suggest that municipalities consult with legal counsel if they are considering a workplace substance testing policy.

Workplace safety concerns vs. privacy interests

Privacy and safety are highly sensitive and significant workplace interests that are occasionally in conflict. The right to privacy and the related right to security of the person are fundamental individual rights protected by the *Canadian Charter of Rights and Freedoms*. A workplace substance testing policy will often infringe on some aspect of these individual rights. This is because substance testing typically involves some form of bodily intrusion and surrender of bodily substances in a coercive environment, and can result in disciplinary consequences or public embarrassment.

Employer substance testing policies tend to be motivated by employer perceptions of workplace safety risks. Any substance testing policy must balance an employee's privacy and human rights with an employer's ability to require personal information to achieve worksite safety.

The courts, arbitrators and tribunals have overwhelmingly rejected employer-imposed substance testing policies, particularly those involving mandatory random testing of employees. The only exception is if there is evidence of enhanced safety risks, including evidence of workplace substance misuse problems.

Employers should also be aware there is a growing body of research questioning the efficacy of drug testing programs for establishing impairment. Drug testing indicates the presence of a substance, not how the body interacts with it. With cannabis, it is recognized that a standard dose will affect individuals differently. Technology to establish a standard mechanism to determine impairment from cannabis consumption is being researched and developed, particularly in the context of tools to assist law enforcement in determining impaired driving in a roadside stop. But at this point, there is no reliable measurement on which employers can rely.

In considering any workplace substance testing policy, the onus is on the employer to establish the reasonableness of its policy. The evidence to demonstrate that the extent of the safety risk justifies the imposition of a substance testing policy will depend on the circumstances of the specific case. The jurisprudence has outlined that, where a substance testing policy is motivated by safety concerns, those concerns must be real and tangible. Uncertain or speculative health and safety risks, including those based on stereotypes or perceptions of substances or disabilities, will not justify such an invasion of employee privacy.

When substance testing policies may be permitted

Substance testing policies have been upheld by the courts in situations where they represent a proportionate response to legitimate safety concerns as well as privacy interests. In those cases, evidence of the following factors has supported the implementation of a substance testing policy:

- The workplace or industry is safety-sensitive.
- There are known problems involving impaired employees in the workplace.
- The procedures for and methods of testing for substance are minimally invasive.
- Affected employees are given advance notice of the substance testing policy, including prior to the commencement of their employment.

Workplace substance testing for individual employees may be justifiable for individual employees as part of a post-incident response. A post-incident substance test should only be conducted when the employee's actions or lack of actions have contributed to the cause of the incident, a "near-miss" or a potentially dangerous situation.

Prior to any testing, an employer should have a post-incident substance testing protocol in place that identifies the specific circumstances in which testing will take place. Language should not be retaliatory, or discourage the reporting of illnesses or injuries.

Workplace substance testing may also be permissible as part of a return-to-work program, including a last-chance agreement or a contingency behaviour contract. For example, substance testing may be part of return-to-work conditions for an individual employee who is returning to a safety-sensitive job after treatment for a substance addiction.

In safety-sensitive worksites, reasonable cause testing may be permitted. Individual employees may be required to undergo substance testing where the employer believes on reasonable grounds that an employee is impaired while on duty or their actions are in contravention of an established workplace substance use policy.

In all cases, the onus is on the employer to establish the reasonableness of any workplace substance testing policy, and employers must ensure that any substance testing procedures and methods are reasonable, not onerous, and minimally invasive.

The Halifax Regional Municipality's Substance Abuse Prevention Policy specifies that alcohol and drug testing is appropriate for employees working in safety sensitive positions and are subject to testing for alcohol and drugs, as funded by the applicable business unit, under the following situations:

- Post-accident, near miss, or potentially dangerous incidents;
- Reasonable grounds;
- Return to work program after primary treatment;
- Return to work program while in aftercare.

The policy contains checklists to assist in documenting observations about the potential impairment of an employee, as well as procedures for testing based on reasonable grounds or post-incidents.

Whether a particular risk is sufficient to justify an employer's drug-testing policy will depend on a variety of circumstances and considerations, including the employer's evidence to demonstrate these factors. Legal counsel is strongly encouraged if an employer is considering a workplace substance testing policy.

5.8 Duty to accommodate

Employers are required to accommodate employees with disabilities. With cannabis, this duty is likely to arise in two ways in the workplace:

- The employee is addicted to cannabis, which is a disability in and of itself under the *Canadian Human Rights Act*.
- An employee is not addicted to cannabis, but uses cannabis to treat a disability.

The laws in regard to employees who are addicted to cannabis will not necessarily change when it is legalized, as employers already have the duty to accommodate employees addicted to substances like alcohol and prescription drugs. Where an employee has a legal prescription for medical cannabis, there are three requirements to trigger an employer's duty to accommodate:

- the employee has a disability;
- the employee has been legally prescribed cannabis by a medical practitioner in accordance with the relevant regulations to treat the disability; and
- the employee is using cannabis in accordance with the prescription.

Accommodations for the use of medical cannabis will need to be treated in the same manner as when other employees are prescribed medication that could cause impairment. That the prescribed medication is cannabis as opposed to another type of prescription medication does not change the employer's obligations in the consideration of whether an employee can be accommodated. This is the case even for employees in safety-sensitive positions, though the duty to accommodate may be different than for employees who are not in safety-sensitive positions.



6 Enforcement issues

For years, local governments have faced enforcement issues arising from illegal cannabis production and sale. While enforcing federal law on controlled substances falls to local police and the RCMP, municipalities have also developed by-laws to address community impacts. Though the former is beyond this guide's scope, we explore interplays between local police and bylaw services.

With legalization, municipal enforcement roles will include inspection and compliance with provincial building codes and municipal bylaws, including regulating neighbourhood disputes over nuisance issues. Critically, in designing new bylaws and tools, municipalities must carefully weigh how practical they will be to enforce, and how well they can align with the work of police services.



6.1 Cultivation: Building code and bylaw enforcement

Building code compliance issues related to illegal cannabis production are well known to local governments. Cannabis production in residential premises has been associated with shoddy construction, overloaded or bypassed electrical wiring, and private security measures that block required fire exits. Other dangers include unauthorized municipal water connections that risk back-flow into municipal water services, and mould and air quality issues that endure even after cannabis production has ended.

Local governments have had a role to play in inspecting such operations, and enforcing building codes and other construction standards. Some local governments have passed bylaws specifically aimed at addressing these building code, fire, health and safety issues—recovering investigation and enforcement costs from building owners.

Context: medical cannabis

With the advent of the Access to Cannabis for Medical Purposes Regulations (ACMPR) and predecessor federal regulations, some cannabis cultivation for medical purposes within residences became legal under federal law. Under the ACMPR, a registered person is permitted to grow up to five indoor cannabis plants for each daily gram of dried cannabis they have been prescribed for medical purposes.

A registered person may grow cannabis plants themselves, or assign a designated person to do so. A designated person may grow plants for up to two registered persons, and any particular civic address can be used for production under up to four registrations. This can result in a significant number of cannabis plants being cultivated by one or more designated people, including within residential premises. While the ACMPR regime may be amended or replaced at some point, there has been no indication that these arrangements will change once non-medical cannabis is legalized.

As this level of cannabis cultivation is completely legal under federal law, there is no reason (other than avoiding costs) for those engaged in the activity not to comply with applicable building construction and safety standards. They don't need to stay "under the radar" of law enforcement. Nevertheless, building code compliance issues in relation to such matters as electrical safety and air quality may continue to arise in these lawful production sites, as owners and tenants attempt to alter their premises to accommodate activities for which they were not originally designed or constructed.

If the *Cannabis Act* has its desired effect, the commercial availability of an adequate, quality supply of cannabis will reduce the need for people to grow the plants themselves. Local governments may, however, wish to consider how they will inspect for and properly enforce building code requirements in relation to large scale indoor operations that the ACMPR allows in residential premises.

Provincial/territorial or municipal building construction and safety laws could be found to infringe a person's right under

the *Canadian Charter of Rights and Freedoms* to a reasonable supply of medical cannabis. But this infringement would have a good chance of being found to be a justifiable limit of that right under Section 1 of the Charter, given the compelling rationale for building safety requirements. Local governments have little reason to be timid about enforcing these types of standards.

Non-medical cannabis

The non-medical cannabis regime will authorize a maximum of four plants per household for personal cultivation, which may be indoors or outdoors. Provincial and territorial regimes may further restrict or prohibit this type of cannabis production, which may pose risks for young children and domestic pets, particularly if carried on outdoors.

This minor scale of production may not ordinarily create health or safety issues or lead to contraventions of building safety standards. There are no *Charter of Rights and Freedoms* issues with laws restricting or prohibiting the production of cannabis that has no medical purpose.

The extent to which federal officials will police and enforce the four-plant limit is unknown. For the same reasons that federal officials may have little inclination to enforce this limit, local governments should carefully consider whether they have the resources to monitor compliance with any overlapping local limit, whether enacted in a zoning bylaw or some other regulatory bylaw.

Unlawful production operations

One of the goals of the legalization of non-medical cannabis is to undermine its unlawful production. However, local governments may still be called upon to inspect illegal cannabis production facilities operating without federal permits or at a scale that exceeds the federal authorization.

Municipalities should take care both to protect the safety of inspectors and to act within the authority they have to inspect and enforce bylaws, without allowing the inspection to become an unlawful search and seizure for the purposes of enforcing federal law. However, these operations may be unlawful under applicable local government land use and/or business regulations, or may involve contraventions of building construction or fire safety standards. Inspections are wholly appropriate for those purposes.

Many local governments have found it helpful to coordinate inspections of known or suspected unlawful cannabis production operations with police and provincial health inspectors. While police cannot participate in inspections for enforcement of federal law without a warrant, they can accompany other inspectors for the purposes of ensuring their safety. In some cases, a warrant may also be advisable. This is an example of the interplay between local police and municipal bylaw services that will need to drive successful enforcement approaches.

The Coordinated Safety Response Team (CSRT) in Calgary provides a coordinated approach to identifying potentially unsafe conditions on construction sites or buildings and conducts comprehensive joint reviews, inspections and investigations of these sites. CSRT members include:

- City of Calgary: Safety Response Unit, Calgary Community Standards, Calgary Police Service
- Occupational Health and Safety Alberta
- ALERT: Green Team South and Safer Communities and Neighbourhoods
- Alberta Health Services

The team is designed to quickly respond to incidents and help ensure public safety. It also builds strategies to help the construction industry decrease risk, including through the remediation and demolition of cannabis grow-op sites.

Local government permits and licences

Permit and licence issuance remains an important part of the bylaw enforcement function for many local governments. Its application will vary across provinces and territories depending on the regulations and authorities they

provide to local governments. Broadly speaking, building permit and business licence applications are a significant opportunity for local governments to review bylaw compliance. This includes a review of zoning, provincial and local building and fire safety standards. In the case of business licences, local governments may review any federal and provincial/territorial authorizations that may be required.

6.2 Nuisance bylaws and enforcement issues

Local governments are key regulators when it comes to neighbourhood disputes over nuisance issues. Many local governments have special powers in this regard, and may even be able to make nuisance abatement orders. As a starting point, though, local governments should be cognizant of all nuisance management aspects of regulations from other orders of government.

As noted in Chapter 3: Business Regulation, federal government authorizations for medical cannabis production facilities have, from the outset, required the installation of odour control equipment. This suggests that local governments might wish to focus efforts on proper use and operation of the equipment—a matter that the federal government may tend to leave unaddressed.

Odours

As local governments anticipate an increase in nuisance complaints with legalized cannabis, odour issues rank among their top concerns—and these are notoriously difficult to regulate and remediate.

Because odours are hard to quantify objectively in terms of strength or character, setting regulatory standards is challenging. While some odour testing labs exist in Canada, their usefulness for regulatory purposes is questionable, and testing can be onerous and expensive. Even if and when the quantification of odour can be satisfactorily addressed, an odour's source can be challenging to prove to the standard needed in court.

Proactive approaches to cannabis-related odour and nuisance abatement are therefore preferable. For example, odour impact assessments and control plans might be included in requirements for rezoning applications or development approvals in circumstances where these are authorized and warranted.

Zoning setbacks, landscaping, buffer or similar requirements may be considered for certain types of facilities that are anticipated to cause odour or other nuisances. This is in addition to the basic locational criteria that have traditionally restricted problem activities to their own special zones.

Municipalities may also want to set business licence conditions that could reduce nuisance concerns around cannabis production and retail facilities. For more on this, see Chapter 3: Business Regulation. In addition, public consumption regulations, where authorized, may be used to contain or limit public exposure to odours and smoke. For more on this, see Chapter 4: Public Consumption.

6.3 Potential liability and non-enforcement

Given the potential nuisance, health and safety issues that might arise, responsibility for cannabis-related regulation and enforcement has led to some concern over potential liability issues for local governments. However, the liability potential in this area is no more significant than any other area of local government regulation.

It is sometimes alleged in lawsuits against local governments that failure to enforce local regulations in relation to a nuisance has depressed the value of adjacent properties. These lawsuits claim that the local government is under a legal duty to enforce its regulations to prevent the nuisance, and that it must therefore compensate property owners for the reduced value. Generally, this legal proposition is not sound. (The property owner may have a good claim in nuisance against their neighbour, however.)

Local governments can decide, for *bona fide* reasons, not to enforce particular regulations in relation to particular factual circumstances, even if non-enforcement might cause financial harm to affected neighbours or owners. *Bona fide* reasons include such factors as the severity, scale or duration of the contravention and the cost to the local government of securing compliance with the regulation.

Further, enforcement is sometimes suspended while a regulation is under review or in the process of being amended or repealed. However, the position of any citizen complainant must also be considered. Good governance suggests that the maker of a valid complaint is entitled to an explanation of any local government decision not to investigate or enforce.

Building inspection is an established area where local governments owe a duty of care to those who may occupy or purchase property. Ensuring a consistent level of care in monitoring building code compliance will be important once non-medical cannabis is legalized. No local government is required to establish any particular type of regime for inspection and enforcement of building standards, except in some jurisdictions in relation to fire safety inspections. However having established a particular regime, such as one based on complaints from tenants or neighbours, local governments should be diligent about following that regime in relation to each individual complaint.

6.4 Enforcement tools and policies

Bylaw drafting

Residents will likely expect enforcement of any regulations that have been adopted with regard to the legalization of cannabis. This expectation should be kept in mind as regulations are drafted and considered for enactment. Enacting regulations that the local government has no realistic intention or ability to enforce is not a good governance practice. It can lead to reduced voluntary compliance with respect to that regulation as well as other enforcement areas.

Having elected to regulate, local governments should keep enforcement practicalities in mind when drafting the regulations, consulting with legal counsel as to the elements of any offence that will have to be proven to obtain a conviction or fine.

Enforcement practices

Enforcement policies are an important tool for managing expectations and resources. Local governments should consider whether to implement proactive enforcement and investigations, or only to investigate where complaints have been made.

Any complaints made under a complaint-based enforcement policy should be documented. Proactive enforcement practices should also be documented so staff, elected officials and the public know what they can expect, and the extent of resources that may be invested.

Generally speaking, prompt attention to bylaw contraventions once discovered, whether by complaint or proactive investigation, will result in better compliance rates overall.

Enforcement remedies for cannabis-related complaints and contraventions may vary greatly, depending on the enactment that has been breached. Self-help remedies are often attempted first.

Businesses breaching zoning or business licensing conditions, or even federal or provincial/territorial enactments—depending on how the business licensing regulations have been drafted—may be subject to licence suspension or revocation.

Building permits may be withheld or stop-work orders issued if proposed or actual construction does not respect applicable building codes or bylaw standards—including those pertaining to signage on retail premises. Remedial action orders can be considered for existing buildings in which contraventions are detected, such as bypassed electrical breaker panels or barricaded exit doors.

Municipal ticketing, injunctions and other court proceedings are usually a last resort. These remedies are almost always more expensive, and to some degree take the matter out of the local government's hands, exposing it to procedural delays.





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