

Resolving Cannabis Nuisance Claims In Condominium Disputes Through Mediation

Amid Legalization and COVID-19

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The recent legalization of recreational cannabis has given rise to increased condominium-based disputes caused by cannabis-related nuisances. There is a great deal of uncertainty as to how such nuisance disputes will be resolved given the novelty of cannabis law. Mediation is a particularly useful avenue for resolving these types of disputes, as the parties to a mediation are actively involved in the decision-making process and are able to avoid the unpredictability of the result imposed on them by a third-party adjudicator. Their ability to customize and expedite the mediation process provides a practical option to efficiently solve the problem and improve neighbourly relations. Even in the wake of the COVID-19 pandemic, mediation can be effectively accomplished through virtual methods.

Set forth below is an overview of the Canadian legal landscape of existing and proposed cannabis legislation and regulations, and the evolution of cannabis jurisprudence since legalization, in each case relating to cannabis use in condominiums. Also discussed are the legal ramifications for condominiums and their residents who may soon face an increase in nuisance-related cannabis disputes.

Background

On October 17, 2018, the Government of Canada legalized the use of cannabis for recreational purposes. As access to cannabis broadens across Canadian communities, especially given the quick expansion of new retail outlets from which cannabis can be easily purchased, the potential for disputes between neighbours has amplified.

Smoking or growing cannabis in a condominium unit may give rise to nuisance complaints if the cannabis odour unreasonably interferes with neighbouring residents' use and enjoyment of their units, or the building's common areas. The issue of nuisance is prominent in condominiums as shared ventilation, common spaces, and other physical attributes of condominiums expose residents to cannabis odour. A 2017 study found that 7.5% of Ontario residents in multi-unit housing reported involuntary exposure to cannabis smoke in their homes prior to the legalization of recreational cannabis in 2018.¹ This percentage is likely to rise significantly now that condominium residents may legally consume cannabis for recreational purposes.

Relevant Legislation and Decision-Making Entities

Federal legislation does not give condominium residents an unrestricted right to grow or consume cannabis in their units. The *Cannabis Act* currently permits individuals to grow up to four cannabis plants in their condominium units.²

In Ontario, section 117 of the *Condominium Act, 1988* ("*Condominium Act*") prohibits residents from carrying on activities in their units or the common areas that damage property or cause injury.³ A recent proposal from the Ministry of Government and Consumer Services seeks to replace and expand this provision and prohibit any activity that causes a nuisance to another condominium resident. The broader proposal would amend Regulations 48/01 and 179/17 to define what is considered a nuisance, annoyance or disruption, while also widening the scope of disputes that the Condominium Authority Tribunal, Ontario's online condominium dispute resolution body, may adjudicate. The Tribunal would have jurisdiction

¹ Alanna K Chu, Pamela Kaufman & Michael Chaiton, "Prevalence of Involuntary Environmental Cannabis and Tobacco Smoke Exposure in Multi-Unit Housing" (2019) 16 Intl J Env'tl Research & Pub Health 1 at 7.

² *Cannabis Act*, SC 2018, c 16, s 4(b).

³ *Condominium Act, 1988*, SO 1998, c 19, s 117 [*Condominium Act*].

to hear complaints related to cannabis smoke and odour nuisances and the condominium's declarations, by-laws, or rules that govern such nuisances.⁴

The Province of British Columbia has also adopted measures to regulate the use of cannabis in condominiums. B.C.'s *Cannabis Control and Licensing Act* prohibits smoking or vaping cannabis in an enclosed common area within a condominium.⁵ Also, British Columbia's Civil Resolution Tribunal has jurisdiction over strata disputes, including claims related to the use and enjoyment of a strata lot.⁶

Powers of Condominium Corporations to Limit Nuisances

Condominium corporations may impose reasonable limitations on residents' use of cannabis in the building. The *Condominium Act* provides that condominium boards may implement restrictions to promote the safety, security, or welfare of the owners, or property and assets of the condominium corporation, and may prohibit residents from unreasonably interfering with the use and enjoyment of the units and common elements.⁷

Condominiums should be mindful of potential legal ramifications of rules they put in place to regulate or monitor cannabis use by their residents. One Mississauga condominium board has recently imposed new rules regarding cannabis use, which includes a cannabis user registry for its residents.⁸ The new rules require residents to sign the registry if they wish to smoke cannabis in their units, unless they are using cannabis for medical or therapeutic purposes. According to the rules of this condominium, if there are unresolved complaints from

⁴ Government of Ontario, "Proposals under the Condominium Act, 1998" (12 December 2019), online: <www.ontariocanada.com/registry/view.do?postingId=30228>.

⁵ *Cannabis Control and Licensing Act*, SBC 2018, c 29, s 64(1)(c).

⁶ *Civil Resolution Tribunal Act*, SBC 2012, c 25, s 121(1)(c).

⁷ *Condominium Act*, s 58.

⁸ Angelina King, "Registry to Smoke Pot in Mississauga Condo Building a 'Hit List', Unit Owner Charges", *CBC News* (3 July 2019), online: <www.cbc.ca/news/canada/toronto/mississauga-condo-residents-must-sign-registry-to-smoke-pot-1.5197862>.

tenants about the migration of cannabis odour into their units and common areas, the complaint recipients must cease smoking in their units. In response to such rules, one condominium resident has already filed a complaint claiming that the board's imposition of a cannabis registry constitutes an invasion of privacy.⁹

In B.C., a strata corporation has discretion to act as it sees fit in its investigation of nuisance complaints about a particular unit, so long as its conduct is not “significantly unfair” to the owner or tenant of that unit.¹⁰ In deciding whether the condominium corporation's conduct was “significantly unfair”, a court or tribunal will determine: (1) the affected owner's or tenant's expectation regarding the corporation's conduct; (2) whether that expectation was objectively reasonable; and (3) whether that expectation was violated by a significantly unfair action.¹¹ This test was applied by the B.C. Civil Resolution Tribunal in *The Owners, Strata Plan NW 3365 v. Keith*, when neighbouring units complained about a smell coming from a cannabis grow operation in an owner's strata lot.

The corporation claimed that the owner of the unit violated the strata's by-laws by causing a nuisance.¹² The owner argued that his unit contained a proper ventilation system and that there was insufficient evidence to conclude that his lot was the source of the odour complained of.¹³

The B.C. Civil Resolution Tribunal held that the strata corporation's approach to dealing with the complaints was significantly unfair to the owner. In concluding that the corporation had not proven that the owner was causing a nuisance, the tribunal determined that: (1) the owner expected that the corporation would thoroughly investigate the nuisance

⁹ *Ibid.*

¹⁰ *The Owners, Strata Plan NW 3365 v. Keith*, 2019 BCCRT 1418 at para 25.

¹¹ *Ibid* at para 27.

¹² *Ibid* at para 2.

¹³ *Ibid* at paras 21, 29.

complaint; (2) his expectation was reasonable; and (3) his expectation was violated because the corporation did not properly investigate the source of the odour. The tribunal held that it was unfair that the corporation failed to establish the source of the odour and did not provide evidence of air quality testing showing that the other units were affected.¹⁴

A Duty to Accommodate

Condominium corporations may have a duty to accommodate owners with certain disabilities that require them to smoke cannabis for medical reasons, even if such consumption presents a nuisance to fellow residents. In *The Owners, Strata Plan LMS 2900 v. Matthew Hardy* (“*Hardy*”),¹⁵ an owner who was required to use medical cannabis as a treatment for his disability claimed that a strata by-law prohibiting cannabis smoking unfairly discriminated against him. The B.C. Civil Resolution Tribunal upheld the by-law on the grounds that the owner could ingest cannabis as an alternative to smoking it.¹⁶

Despite the tribunal’s decision in *Hardy*, if smoking cannabis is shown to be a more effective treatment than ingesting cannabis, then a condominium corporation would be constitutionally obligated to accommodate a resident’s smoking of cannabis for medical purposes. The corporation would otherwise risk violating the right to security of the person under section 7 of the *Charter of Rights and Freedoms*. In *R v. Smith*, at issue was the constitutionality of regulations under the *Controlled Drugs and Substances Act*, which had permitted the use of cannabis (referred to as marihuana within those regulations) to treat medical conditions but confined medical access to dried cannabis. In deciding that the regulations were unconstitutional, the Supreme Court of Canada noted that compelling a person

¹⁴ *Ibid* at paras 29, 31-32.

¹⁵ 2016 BCCRT 1.

¹⁶ *Ibid* at para 49.

to choose between a legal but inadequate treatment and an illegal but more effective option constitutes an infringement on security of the person, protected by section 7 of the *Charter*.¹⁷

At the same time, condominium corporations have a competing duty to reasonably accommodate owners with disabilities that are exacerbated by second-hand cannabis smoke. In *Leary v. Strata Plan VR 1001*, the complainant had argued that a strata corporation discriminated against her by failing to accommodate her disability, which made her particularly vulnerable to second-hand smoke from a neighbouring apartment.¹⁸ The B.C. Human Rights Tribunal held that the strata corporation failed to accommodate the complainant up to the point of undue hardship. The corporation did not properly inquire into the degree and severity of adverse effects on her health or contemplate measures that would be necessary to accommodate her disability.¹⁹

This decision suggests that in order to fulfill their legal duty to accommodate, condominium corporations may be required to determine whether they can implement a solution to provide the necessary accommodation. This may include requiring medical cannabis consumers to use alternatives to smoking cannabis, such as consuming edibles or using oils, or to leave the condominium premises in order to smoke.

Some condominiums have been required to balance the competing medical needs of their residents. This was the case with a condominium in Mississauga where one resident had a deadly allergy to cannabis that came into conflict with several other residents' needs to smoke cannabis for medical reasons. The condominium board proposed a rule that would ban smoking tobacco and growing and smoking cannabis in the condominium's units and common

¹⁷ *R v. Smith*, 2015 SCC 34 at para 18.

¹⁸ *Leary v. Strata Plan VR 1001*, 2016 BCHRT 139 at para 1.

¹⁹ *Ibid* at para 63.

areas, with an exception for medical cannabis users and tobacco users who registered with the condominium corporation. Condominium owners voted down the proposed rule, which meant that residents could continue to smoke tobacco, as well as grow and smoke cannabis in the building.

The board subsequently became aware of the resident who had a potentially lethal allergy to cannabis. Although the board did not explicitly reintroduce a no-cannabis rule, it sent a notice to all residents, informing them that the board had passed resolutions deeming cannabis odour to be an “unreasonable nuisance” and advising all residents and owners that smoking cannabis would be prohibited anywhere in the building.²⁰ The board based its decision on the fact that any resident or owner who violates the prohibition, even if not expressly mandated by an official condominium rule, would jeopardize a resident’s life, thereby violating section 117 of the *Condominium Act*.²¹

Absent official rules and by-laws, measures such as the informal prohibition imposed by the Mississauga condominium board rely significantly on the good will of the condominium’s residents and may be difficult to enforce. However, a proposed addition to Part IX of the *Condominium Act* would provide condominium boards with an additional tool to prevent nuisances. If implemented, a court would be able to, among other things, order the permanent removal of a person from the condominium premises if the court is satisfied: (1) that the person carries on an activity in his or her unit or the common areas that damages the

²⁰ Lisa Xing, “Woman’s Allergy Prompts Mississauga Condo to Ban Pot, Despite Residents Voting It Down”, *CBC News* (2 October 2018), online: <www.cbc.ca/news/canada/toronto/condo-mississauga-bans-marijuana-1.4847945>.

²¹ Correspondence with Denise Lash, counsel for resident with cannabis allergy, dated March 30, 2020.

property or causes injury; and (2) the individual poses a serious risk to another resident’s health and safety.²²

Cannabis Consumption in Condominiums Amid the COVID-19 Pandemic

The recent COVID-19 pandemic has seen a marked increase in cannabis purchases, which will likely cause a spike in cannabis use inside condominiums as “stay-at-home” measures are enforced, and therefore result in increased nuisance complaints in condominiums in the coming weeks and months. In March, the Ontario Cannabis Store reported a significant increase in sales volume, with almost 3000 orders of cannabis made on Saturday, March 14, an 80% increase from the average number of orders made on a Saturday in 2020. The average amount that customers spent during a single transaction almost doubled to approximately \$50 per transaction on March 14.²³

Although Ontario’s 52 licensed cannabis dispensaries closed shop on April 4, they reopened on a limited basis following an emergency order approved by the provincial government on April 7. The emergency order permits retailers to sell cannabis through an online or phone ordering system. Customers can pick up their orders at the store or, under certain conditions, request their orders to be delivered to them.²⁴ Within the first month of the pandemic, the Ontario Cannabis Store has indicated that online sales have risen as much as 600%.²⁵

²² *Condominium Act*, s 135.1, as amended by *Protecting Condominium Owners Act*, SO 2015, c 28, s 118 (not in force).

²³ Jason Miller, “Cannabis Purchases Higher Amid COVID-19 Crisis”, *Toronto Star* (19 March 2020), online: <www.thestar.com/news/gta/2020/03/19/cannabis-purchases-higher-amid-covid-19-crisis.html>.

²⁴ David George-Cosh, “Ontario’s Pot Shops to Reopen with Delivery, Click-and-Collect Options”, *BNN Bloomberg* (7 April 2020), online: <www.bnnbloomberg.ca/ontario-s-pot-shops-to-reopen-with-delivery-click-and-collect-options-1.1418702>.

²⁵ David George-Cosh, “Ontario’s Online Pot Purchases Jump 600% amid COVID-19 Pandemic, Data Shows”, *BNN Bloomberg* (16 April 2020), online: <www.bnnbloomberg.ca/ontario-online-pot-purchases-jump-600-amid-covid-19-pandemic-data-shows-1.1422369>.

This change to cannabis retail operations will likely lead to an abundance of deliveries to condominium residents. With the common elements outdoor spaces of most condominiums currently closed, cannabis consumption will take place exclusively in the condominium residents' units and will result in enhanced odours and smoke migration. The impact could be significant on condominium residents, including those who are now working from home, which will undoubtedly lead to more nuisance complaints to the condominium's property manager.

Mediation Can Quickly and Effectively Resolve Cannabis Nuisance Complaints

Section 132(4) of the *Condominium Act* requires mediation, to be followed by arbitration, for disputes regarding condominium declarations, by-laws, or rules.²⁶ The mediator will strive to assist the parties to find a win-win solution that allows for competing rights raised by condominium residents to be satisfactorily recognized. Through mediation, there is a greater likelihood that disputants will have the nuisance complaint resolved in a way that diffuses the tension and can positively transform their relationship.

While we are enduring the COVID-19 pandemic, there is a heightened stress that comes with being a condominium resident who may be impacted on a 24-hour per day basis by their neighbour's cannabis consumption because of "stay-at-home" measures. It is therefore understandable that timely resolution of the alleged nuisance is desirable. The parties' direct involvement in the decision-making process is especially important as the outcome will directly affect their well-being while self-isolating at home and after the pandemic subsides. Despite the social distancing measures that the COVID-19 pandemic has required, the parties to a cannabis-related nuisance problem are currently able to quickly meet and resolve their dispute through online mediation.

²⁶ *Condominium Act*, s 132(4).



The mediators and arbitrators of the Canadian Cannabis Dispute Resolution Centre are lawyers, licensed condominium managers and alternative dispute resolution specialists, who have helped property managers, condominium boards and residents resolve their disputes and are available to assist with the resolution of nuisance complaints during this pandemic.