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B.C. CANNABIS RETAIL - THE LANDSCAPE FOR LANDLORDS

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In what was expected to be a close vote, the Senate recently voted to move the proposed federal legislation relating to the legalization of cannabis to committee. What does legalization mean for commercial landlords in B.C.? Leasing to a dispensary, as the B.C. courts recently identified, currently raises a number of legal issues pending the introduction of the federal legislation. Even after federal legislation is introduced, each province will regulate certain aspects of cannabis sales.

In February 2018 the government of BC released the B.C. Cannabis Private Retail Licensing Guide (the "Cannabis Guide"). The Cannabis Guide sets out a framework for the regulation of private retail stores selling cannabis. While the Cannabis Guide sets out the framework for the BC Government's intentions for the retail cannabis framework, it is subject to legislation to be passed at both the federal and provincial level.

The wholesale distribution of non-medical cannabis will be controlled and managed solely by the Liquor Distribution Branch ("LDB"). In addition to wholesale distribution, the LDB will also operate government-run retail cannabis stores. Cannabis stores will not be permitted to sell any other products, including, perhaps most significantly, any liquor products. The Liquor Control and Licensing Branch ("LCLB") will be responsible for licensing and monitoring the retail cannabis sector using a mixed public/private model.

Of key importance for commercial landlords in BC that may already be leasing to retail cannabis operations, is the requirement that all retailers will have to apply through the yet to be released government portal for a retail cannabis license. Current retailers of cannabis products will have to apply using the same process as new applicants. Having run an illegal cannabis retail operation will not preclude an applicant from obtaining a legal license.

Similar to applications for liquor licenses through the LCLB, applicants will have to submit to a background check and provide information about the individual(s), corporation(s), society or other legal entity that will run the cannabis retail operation. Details about the proposed location of the retail operation will also have to be provided. In the case of a leased premise, the applicant will have to provide a fully signed lease that does not expire for at least 12 months from the date of license approval.



After legalization of retail cannabis operations it will be incumbent upon a landlord to ensure that tenants have obtained the required retail license if the landlord wants to have the ability to enforce lease provisions regarding compliance with all applicable laws and obtaining all required permits and licenses. There is a recent decision from the British Columbia Supreme Court, *1028840 B.C. Ltd. v. The Heritage Dispensary Clinic Society*, 2018 BCSC 82 (“Heritage Dispensary”) dealing with this specific issue. In *Heritage Dispensary*, the landlord was successful in terminating the lease with the tenant on the basis of the tenant failing to comply with lease terms regarding compliance with applicable laws and obtaining all required business permits and licenses.

The landlord in *Heritage Dispensary* had collected rent on a regular basis from the tenant in full knowledge that the tenant was carrying on an illegal marijuana dispensary business. The main issue to be determined was whether the landlord was estopped from terminating the lease due to knowledge that the tenant was operating an unlicensed marijuana dispensary. The court found that the landlord had in the past waived breaches of the lease provisions regarding compliance with laws and obtaining all necessary permits and licenses when it accepted rent payments from the tenant. However, the court also found that such waivers on the part of the landlord are not irrevocable for the duration of the lease. The landlord had in fact continued to accept payment from the tenant after serving notice that the tenant was in breach of the terms of the lease and that the lease was terminated. The landlord had, however, noted on the cheques provided by the tenant that the payment was for “use and occupation.” Such notation, in the decision of Justice Kent, was sufficient for the landlord to deny that it continued to accept “rent” payments.

If a commercial lease does not expressly permit the tenant to carry on an illegal retail cannabis operation then it is open to a landlord, even after having accepted payment for rent, to insist that the tenant comply with the lease terms regarding compliance with all applicable laws and obtaining all necessary licenses and permits. As retail cannabis operations are legalized, there will be an extensive process for applicants to obtain the required license from the LCLB. Should a landlord wish to ensure that all laws are complied with and all permits and licenses are obtained by the tenant they should include lease terms that require the tenant to provide copies of all permits and licenses prior to the commencement of the lease term. According to *Heritage Dispensary* acceptance of rent prior to alleging a breach, in full knowledge of non-permitted or illegal operations, is not an irrevocable waiver, however, it would be prudent to ensure that all permits are in place at the outset of the lease.

While the Cannabis Guide offers a great deal of useful information for potential retail cannabis licensees and their potential landlords, there remain many details to be determined as legislation is introduced and passed at both the federal and provincial level. Landlords with existing or potential retail cannabis tenants are encouraged to read the Cannabis Guide and to stay tuned for further details as the date for cannabis





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If you have any questions about this particular topic or another Commercial Leasing matter, please contact the Practice Group Leader, C. Nicole Mangan at nmangan@rbs.ca, or the author of this article, Casey L. Smith at csmith@rbs.ca.



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