
Weeding Through the Law and the Stoned, Cold Truth About Medical Marijuana and Strata Corporations

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When it comes to responding to complaints about medical marijuana in a condominium, strata councils are held to a high standard. But navigating this area of law can be hazy.

All puns aside, the laws affecting medicinal marijuana are constantly changing. A strata corporation that mishandles this issue can expect a human rights complaint, a Supreme Court action or a complaint to the Civil Resolutions Tribunal.

As of 2016, Canadians who need access to cannabis for medical purposes are permitted to produce (grow) a limited amount of medical marijuana for their own medical purposes, or designate someone to produce it for them.

Does this translate to open season on grow operations in condominiums? Not exactly.

Strata bylaws provide for the control, management, use and enjoyment of strata lots and common property. Strata councils have an obligation to enforce the bylaws in a fair, impartial and consistent manner.

Carefully drafted and properly enforced bylaws can be an effective means of regulating and restricting the production and use of medicinal marijuana at a condominium.

If an owner, tenant, occupant or visitor is growing or smoking marijuana at a condominium, consider whether there has been a contravention of a bylaw.

For example:

Have *there been unapproved alterations to the unit or common property?* Most stratas require owners to obtain written permission before carrying out certain renovations. Large-scale grow operations often necessitate modifications to the plumbing, electrical and ventilation system. If there have been unapproved alterations that constitute a bylaw infraction, the strata may do what is reasonably necessary to remedy the contravention, including (a) doing work on or to a strata lot, the common property or common assets, and (b) removing objects from the common property. Further, the strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention.

Is the strata lot being used in a way that causes a nuisance? The smell of marijuana plants or smoke may constitute a "nuisance" if it unreasonably interferes with a neighbouring owner's ability to use and enjoy their own property. Determining whether something is a nuisance requires an objective test; not every smell or whiff of smoke will constitute nuisance. Rather, it depends what an ordinary, reasonable person would consider to be a nuisance. Factors to consider include: the nature of the injury suffered, the frequency of the occurrence, and its duration. For example, continuous and pervasive cigar smoke that aggravates a person's asthma is more likely to constitute a legal "nuisance" than an occasional cigarette on a patio. The law of nuisance has evolved to reflect the unique nature of condominiums. Owners cannot expect to be free from interference by their neighbours. On the contrary, they must expect some degree of interference in the use and enjoyment of their own property, otherwise the common ownership principle of condominium living is

defeated. The question in every case is whether the interference is unreasonable.

Does the strata corporation have a smoking bylaw? A smoking bylaw provides clear rules regarding smoking and avoids having to determine whether second hand marijuana smoke constitutes a “nuisance” or an unreasonable interference. The bylaw can set out where smoking is permitted (if at all) and which substances are banned (i.e. tobacco, marijuana, e-cigarettes). That said, a lack of a smoking bylaw does not prevent a strata from responding to owners’ complaints. To the contrary, in 2016, a BC strata corporation was held accountable for failing to deal with second hand smoke complaints.

Is the strata lot being used in a way that is illegal? Individuals who need to produce or use cannabis for medical purposes should have medical document (i.e. prescription) from an authorized health care practitioner. If a resident insists he or she requires the use of medicinal marijuana but refuses to disclose any documentation to verify that claim, and if there is sufficient evidence that the strata lot is being used for illegal purposes, the strata council may conclude that there has been a bylaw infraction. There are other laws that impact smoking. For example, the *Tobacco Control Act* restricts smoking in or near certain places such as in public buildings, common areas of condominium buildings such as hallways, elevators, parkades and laundry rooms, and within a certain distance of doorways and windows. However, it is not clear whether the *Tobacco Control Act* applies to marijuana smoke.

Municipal bylaws could also impose prohibitions on smoking – see for example the City of Vancouver Health Bylaw No. 9535 which extends to marijuana smoke

Has there been a refusal to permit a person authorized by the strata corporation to enter the strata lot? Bylaws often provide that access to a strata lot must be granted on 48 hours’ written notice to inspect, repair or maintain the property. An owner that repeatedly refuses to grant access for those legitimate purposes may be in breach of the bylaws.

Has the grow operation resulted in increased utility costs? In 2015, an Ontario court ordered an owner operating a grow operation to reimburse the condominium for increased utility costs. Whether or not a BC court would follow that example remains to be seen.

It is extremely important that bylaw infractions are dealt with properly and legally. Lesperance Mendes is frequently asked how a strata corporation should respond to complaints that residents have breached a bylaw. In general, we recommend that a strata council follow a “three step process” (see sidebar) when a complaint is received to ensure the response complies with section 135 of the *Strata Property Act*.

Keep in mind that a bylaw is not enforceable to the extent that it contravenes the BC Human Rights Code or any other enactment or law. For example, users of medicinal cannabis often have a physical or mental disability. Strata corporations must not, without a *bona fide* and reasonable justification, discriminate against a person regarding any accommodation, service or facility because of the physical or mental disability of that person.

A strata corporation that uses its bylaws to limit or prevent a disabled resident from growing or using medical marijuana at the condominium must show that its decision was *bona fide* and reasonably justified. It would therefore need evidence that:

- the policy, action or decision was reasonably necessary to accomplish a legitimate purpose or goal;
- the policy, action or decision was implemented in good faith, in the belief that it was necessary to accomplish that goal; and
- the strata corporation would incur undue hardship accommodating the resident.

Strata corporations may face human rights complaints from both marijuana smokers and their non-smoking neighbours. As such, these instances require a careful and objective analysis of the facts, a sensitive approach and a solid understanding of the law.

In conclusion, the blunt truth is that strata councils dealing with a grow-operation in their condominium should seek legal advice before embarking on a path that could lead owners to get their noses out of joint.

Three Step Process

In general, it is recommend that a strata council follow this “**three step process**” when a complaint is received, to comply with section 135 of the *Strata Property Act*.

Step 1: Send the resident a written notice that a complaint was received by the strata corporation.

The strata council must first give written notice to the resident that a complaint was received.

The written notice should:

- include details of the complaint, including the date and time of the alleged bylaw infraction(s);
- refer to the specific bylaw(s) that was allegedly breached;
- give the recipient (owner or tenant) a reasonable opportunity to respond;
- indicate that the resident can request a hearing;
- list possible consequences if the council finds there has been an infraction, such as a fine;
- provide a deadline by which the resident must (a) respond in writing to the complaint and/or (b) request a hearing at an upcoming strata council meeting.

Step 2: Hold a council meeting.

After the hearing (if a hearing is requested), and once the deadline to submit written submissions has passed, the strata council must ultimately determine if there has been a bylaw infraction. In doing so, council members must consider the correspondence and submissions from both sides in an impartial manner. If the council determines that there has been a bylaw infraction, council members must also vote on the consequence. This could be as a warning, a fine, or other remedies that are permitted by the *Strata Property Act*.

The council’s decision must be noted in the strata council meeting minutes, without reference to individual names.

Of course, a council member who is personally involved with the complaint should recuse him or herself from the meetings at which the complaint is discussed and must abstain from voting.

Step 3: Send a decision letter.

A decision letter must be issued that sets out the strata council’s decision. For example:

- The resident receives a warning.
- A fine is imposed, according to the maximum fine allowed by the bylaws.
- For a continuing contravention, a fine is imposed every 7 days until the resident remedies the bylaw infraction.
- The strata does work on or to the owner’s strata lot or the common, such as removing objects from the common property or common assets, and the cost of doing so is charged to the resident who may be fined.
- The resident is denied the use of a recreational facility (but only if the bylaw contravention relates to the facility).

What happens if the resident still refuses to follow the bylaws?

In many instances, fines and other consequences do not have a deterrent effect. If the resident or occupant continues to contravene the bylaw and/or refuses to pay the fines, the strata council should consider other avenues of bylaw enforcement, such as filing a complaint at the Civil Resolution Tribunal.

As a general rule of thumb, the strata council should start the complaint process within 90 days of the non-compliance. This will reduce the chance of missing the limitation period (deadline) to bring a complaint. It will also prevent excessive and unnecessary fines from accumulating, which may be difficult to collect.

Additional Points to Consider

1. The strata council should obtain as much information as possible about a complaint. The strata council may need to ask follow-up questions to determine who may be responsible for the contravention and which bylaws or rules were broken.
2. A fine must not automatically be levied every time a new complaint is received. The strata council must respond to each complaint as a separate incident and follow the three step process every time.
3. A strata council may determine that a resident has breached a bylaw on a 'balance of probabilities'. In other words: is it more likely than not that the resident contravened the bylaw? The council does not need to show proof 'beyond a reasonable doubt'. The council members can take many factors into consideration when rendering a decision, including circumstantial evidence and the resident's failure to respond to (or deny) the allegation.
4. Whether a behavior constitutes a "nuisance" is a question of mixed fact and law. The strata council should consider a number of factors, including the nature of the conduct and the frequency and the duration of the behavior.
5. A strata council must ensure that its actions or decisions do not violate an owner's reasonable expectation in a manner that is "significantly unfair" to the owner.
6. Strata corporations must always be mindful of the *Human Rights Code*. Council members must ensure that their decision does not discriminate against a person or class of persons because of their race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age.

Conclusion

A strata corporation that follows the three step process improves its chances of enforcing and collecting fines that are levied. The process encourages fairness, promotes impartiality and can potentially avoid future disputes. In contrast, failure to follow the three step process will likely result in a Court or Tribunal order that some or all of the fines imposed be reduced or removed entirely.