

# Transition to Cannabis-Free & Smoke-Free Apartments



Cohen Highley<sup>LLP</sup>  
L A W Y E R S

PRESENTED BY JOE HOFFER & KRISTIN LEY

COHEN HIGHLEY LLP  
519-672-9330

[HOFFER@COHENHIGHLEY.COM](mailto:HOFFER@COHENHIGHLEY.COM)

[LEY@COHENHIGHLEY.COM](mailto:LEY@COHENHIGHLEY.COM)

# Transitioning to “Smoke & Cannabis Free”

- ▶ What does “transitioning” mean?
- ▶ Smoking: Do you want to “transition”? Why? Why Not?
- ▶ Cannabis Cultivation: Why? Why not?
- ▶ What tools do landlords have to deal with cannabis issues?
- ▶ Language for “grandfathered” tenants?
- ▶ What about *Human Rights Code* Issues?



# What Does “Transitioning” Mean?

- ▶ Taking occupancies from “smoking” to “non-smoking”
- ▶ Current tenants and smoking status
- ▶ Changing the rules when it comes to smoking
- ▶ Transition from “smoking” to “non-smoking” can be fast or slow
- ▶ Slow Transition
- ▶ Fast Transition
- ▶ Absolute or partial prohibition?

# Do You Want to “Transition”? Why? Why Not?

- ▶ Why transition?: Nuisance, property damage, fire
- ▶ Why not transition?: Existing tenancy agreements, tenant pushback, potential LTB and Human Rights proceedings?
- ▶ What is the actual threat for landlords?
- ▶ What is the perception? The experience?



# What Tools do Landlords Have to Deal With Cannabis Issues

- ▶ New Tenancies: “Standard Lease” smoking and cannabis cultivation Rules
- ▶ Rental Application and “Standard Terms” for new tenants
- ▶ The old industry lease provisions for current tenants
- ▶ “Rules and Regulations”: The right to amend

# Standard Lease: “Prescribed” Section about Smoking

## 10. Smoking

Under provincial law, smoking is not allowed in any indoor common areas of the building. The tenant agrees to these additional rules on smoking:

Select one:

☐ None

or

☒ Smoking rules

Provide description of smoking rules (if necessary add additional pages):

See section 31 of the Additional Terms and Conditions, attached.

### Note:

In making and enforcing smoking rules, the landlord must follow the Ontario *Human Rights Code*. See Parts M and S in General Information.



# Standard Lease: “Prescribed” Sections about Smoking, Cannabis, and Cultivation

## **31. Smoking or Burning of Any Substance in Rental Unit**

In all cases where the Landlord has checked, in clause 10 of the Standard Lease, that there are smoking rules, the smoking rules are as follows: The Tenants, occupants, and their invitees are prohibited from engaging in the smoking of tobacco, cigarettes, or the burning or smoking of any other substance in the Rental Unit or in common areas inside or outside of the building, unless the Landlord specifically authorizes same in writing, or unless same is required to accommodate a person under the provisions of the *Human Rights Code*. All references to “smoking” are deemed to include the smoking or burning of any substance.

# Standard Lease: “Prescribed” Sections about Smoking, Cannabis, and Cultivation

## **O Cannabis**

The Tenant shall not cultivate, grow, produce, purchase, sell, distribute, or smoke (including vaping) any cannabis plant or product within the Rental Unit or residential complex. If the Tenant generates smoke from any cannabis plant or product for medical purposes, the Tenant shall notify the Landlord in writing, and together with the Landlord shall create a plan for the Tenant to consume such cannabis plant or product in a manner that minimizes interference or disturbance to other tenants or the Landlord.

**AMENDMENTS** X. The Tenant covenants and agrees to comply with each of the rules and regulations herein and, upon notice, any additions or amendments thereto



# Language for “Grandfathered” Tenants?

- ▶ Notice of “No Smoking” Rule
- ▶ Timing
- ▶ Context
- ▶ “Reasonableness”
- ▶ Enforcement

# Cannabis Cultivation: Prohibition?

- ▶ Is it legal to prohibit cannabis cultivation?
- ▶ What problems can be caused by cannabis cultivation?
- ▶ Prohibition in the lease for new tenants
- ▶ Prohibition in the Rules and Regs for current tenants



# Some Results of Cannabis Cultivation





# What About *Human Rights Code* Issues?

- ▶ Section 3(4) of the *Residential Tenancies Act*
- ▶ Medical cannabis, Recreational cannabis and Cigarettes
- ▶ *Human Rights Code* and Duty to Accommodate
- ▶ OHRC Policy Statement released October 11, 2018



# *Cannabis Control Act, 2017 and Smoke-Free Ontario Act, 2017*

## **Recreational Cannabis and Cigarettes**

- ▶ Use (smoking/vaping):
  - ✓ Private residences unless lease agreements or by-laws provide otherwise (note exception for long-term care and/or retirement homes)
  - ✓ Outdoor public spaces
  - ✗ Indoor common areas
  - ✗ Enclosed public spaces
  - ✗ Children's playgrounds/play facilities

# *Cannabis Control Act, 2017 and Smoke-Free Ontario Act, 2017 (cont'd)*

- ▶ Purchase:

- ▶ Currently the only legal option is through the Ontario Cannabis Store website

- ▶ Production:

- ▶ 4 plants per dwelling unit (not per adult)



# Medical Cannabis

- ▶ Federally regulated
- ▶ *Cannabis Act*
- ▶ Cannabis Regulations (SOR/2018-144)
  - ▶ Access to Medical Cannabis for Medical Purposes (Part 14)
  - ▶ “registered person”
  - ▶ “designated person”

# Medical Cannabis (cont'd)

- ▶ Registration Certificate
  - ▶ Issued by Health Canada
  - ▶ Number of cannabis plants entitled to grow based on medical prescription
  - ▶ Consent of owner not required if site for production is ordinary place of residence of registered person
  - ▶ Does not displace or supersede contractual provisions/lease agreement



# *Human Rights Code*

- ▶ Applies to housing (one of 5 social areas)
- ▶ Prohibited grounds of discrimination
  - ▶ disability
  - ▶ addiction may constitute disability (cigarettes and cannabis)
  - ▶ medicinal cannabis prescribed to treat disability

# Section 2(1) of the Code

- ▶ Every person has the right to equal treatment with respect to the occupancy of accommodation, without discrimination because of race, ancestry, sex, age, family status, disability, etc.



# Constructive Discrimination (or Adverse Effect Discrimination)

- ▶ A right is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where
  - ▶ the requirement...is reasonable and *bona fide*; or
  - ▶ it falls within an exception under the Code

# Test for Discrimination

- ▶ Tenant/complainant is required to show:
  - ▶ that they have a characteristic protected from discrimination under the Code;
  - ▶ that they experienced an adverse impact with respect to occupancy of accommodation; and
  - ▶ that the protected characteristic was a factor in the adverse impact



# Is there discrimination?

- ▶ smoking prohibition may discriminate against someone who is addicted to cigarettes or who is prescribed medical cannabis to treat a disability
- ▶ unless medical opinion that an individual *needs* to grow medical cannabis, a cultivation prohibition is unlikely to be found to discriminate
- ▶ need versus choice/preference—can be required to provide medical or other information to support their needs

# Duty to Accommodate

- ▶ if *prima facie* case of discrimination, then there is a procedural and substantive duty to accommodate
- ▶ engage in dialogue with individual requesting accommodation
- ▶ consider alternatives or modifications to prohibition
  - ▶ Example: smoking rules prohibit smoking and vaping- can person go outside or ingest nicotine or cannabis in another form?



# Undue Hardship

- ▶ Duty to accommodate to the point of undue hardship
- ▶ Permitted considerations:
  - ▶ Cost
  - ▶ Outside sources of funding
  - ▶ Health and safety requirements
- ▶ Permitting the smoking and/or cultivation of cannabis and the smoking of cigarettes may constitute undue hardship based on health and safety requirements
  - ▶ Consider section 20 of the *Residential Tenancies Act*
  - ▶ Consider rights of other tenants in multi-unit housing (allergies and other disabilities)

# OHRC Policy Statement

- ▶ published October 11, 2018
- ▶ Cannabis use in residential housing (p. 3)
- ▶ Recognizes ability of property owners to impose rules or by-laws prohibiting or restricting consumption of cannabis
- ▶ confirms duty to accommodate applies
- ▶ No duty to accommodate recreational cannabis use or production



Questions?



Cohen Highley  
LAWYERS