

Waiting to Exhale: Cannabis in Canada - The Potential Environmental Impacts and the Regulatory Landscape

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Overview

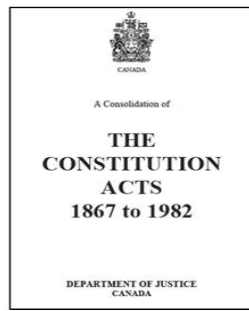
- **Environmental Issues for Cannabis Growers**
- **Who Regulates Environmental Law and Cannabis**
- **Overview of Federal Environmental Regulation**
- **Overview of Provincial/Municipal Environmental Regulation**
- **Permitting Requirements for Growers and Greenhouses**
- **Managing Environmental Liabilities**
- **Q & A**

ENVIRONMENTAL ISSUES FOR CANNABIS GROWERS

Environmental Issues for Growers

- **Air Emissions**
- **Odour**
- **Water**
- **Waste**
- **Greenhouses**
- **Pesticides**
- **Fertilizers**





WHO REGULATES ENVIRONMENTAL LAW AND CANNABIS



Constitutional Jurisdiction

- **From what “supreme law” do governments derive their legal authority to enact environmental laws?**
- **The *Constitution Act, 1867***
 - is the “supreme law” to which all other laws must conform
 - divides powers to make law between the federal government and provincial governments
 - notably, it does not specifically grant constitutional powers to regulate the environment
- **Federal powers: s. 91, including Peace, Order and Good Government of Canada (POGG) power (general power)**
- **Provincial powers: ss. 92 and 109**

Constitutional Jurisdiction – Cannabis Production

- **Criminal Law – s. 91(27)**
- **Federal government regulates**
 - licences to grow cannabis
 - production and cultivation
 - cannabis facility requirements
 - quality and testing
- **Purpose of federal cannabis regulation:**
 - protect public health and safety
 - deter “illicit” activities relating to cannabis
- **Environmental Regulation?**



Constitutional Jurisdiction – Environment

- **Federal Powers and “environment” – s. 91**
 - Trade and Commerce – s. 91(2)
 - Taxation Power – s. 91(3)
 - Navigation – s. 91(10)
 - Seacoast and Fisheries – s. 91(12)
 - First Nations and Aboriginals – s. 91(24)
 - Criminal Law – s. 91(27)

Constitutional Jurisdiction

- **Provincial Powers and “environment” – s. 92**
 - Management and Sale of Public Lands – s. 92(5)
 - Municipal Institutions – s. 92(8)
 - Property and Civil Rights – s. 92(13)
 - Matters of a Local or Private Nature – s. 92(16)
 - Non-Renewable Resources, Forestry Resources and Generation of Electrical Power – s. 92A (1982 amendment)
 - Public Lands, Minerals and other Natural Resources vest with the Province unless federally owned – s. 109

Constitutional Jurisdiction – Environment

- **The “environment” is**
 - constitutionally within the purview of both federal and provincial governments
 - a shared constitutional subject as affirmed by our Courts
 - many elements of the environment are in fact regulated by both levels of government
- **Where there is a ‘conflict of laws’, the doctrine of ‘paramountcy’ applies and the federal law prevails over the provincial statute, unless they can be interpreted harmoniously**

OVERVIEW OF FEDERAL ENVIRONMENTAL REGULATION

Cannabis Regulations (Under *Cannabis Act*)

- ***Cultivation Licencing:*** controls chemicals used in process
- ***Perimeter Security:*** prevent unauthorized access and monitoring
- ***Pesticides:*** pest control products must be registered for use on cannabis
- ***Odours:*** growing and packaging areas must have air filtration system to prevent odours
- ***Sanitation of Facility:*** Growers must develop sanitation program for cleaning chemicals
- ***Documents:*** growers must document destruction methods

Cannabis Waste Destruction (Federal)

- **Licence holder's records must show that:**
 - destruction methods comply with federal, provincial, municipal environmental laws
 - destruction does not expose persons to smoke or vapour (no burning)
 - 2 qualified persons must witness destruction



Cannabis Odour Control (Federal)

- **“The building or part of the building where cannabis is produced, packaged, labelled and stored must be equipped with a system that filters air to prevent the escape of odours”**
(Cannabis Regulations, s. 85)
- **Good Production Practices Guide**
 - air filtration system must be capable of preventing the escape of odours and maintaining air quality
- **Does federal requirement create admission that facility produces odours/emissions for provincial/municipal regulators?**

Other Federal Environmental Laws

- ***Fisheries Act***

- no person shall deposit “deleterious substances” in “waters frequented by fish”
 - includes wastewater, cannabis waste

- ***Pest Control Products Act***

- a person can only use “PCPs” (insecticides, herbicides) that are registered with the federal government
- *Cannabis Regulations* further limit which PCPs may be used to 28 listed substances

OVERVIEW OF PROVINCIAL ENVIRONMENTAL REGULATION

Ontario's *Environmental Protection Act* and *Ontario Water Resources Act*

- **“Spills” and “Discharges”**: prohibitions where discharge causes “adverse effect” or impairs water quality
 - reporting requirements trigger on spill/discharge
- **Orders**: control orders, stop orders, remedial orders
- **Permitting**:
 - Environmental Compliance Approvals (ECA)
 - Environmental Activity Sector Registration (EASR)
 - Permits to Take Water (PTTW)

Ontario's *Nutrient Management Act*

- ***Nutrient Management Act, 2002 (NMA)***
 - Regulation of fertilizers, nutrients, management of “Greenhouse Nutrient Feedwater” (GNF)
 - Greenhouse registration
 - transportation, storage, application of GNF
 - soil sampling and analysis
 - Cannabis growers may require
 - *Nutrient Management Strategy*
 - *Non-Agricultural Source Material Plan*

Ontario's *Pesticides Act*

- **Prohibits use of pesticides that cause serious harm to environment**
- **Farmers allowed to use prescribed pesticides for farming and can obtain licence to use prohibited pesticides**



Alberta's *Environmental Protection and Enhancement Act (EPEA)*

- **Release of Substances:** prohibitions where substance is released without an approval or where the release causes a “significant adverse effect”
 - reporting requirements trigger once a person who releases/permits release knows or ought to know of the release
- **Orders:** environmental protection orders, emergency protection orders
- **Permitting:** Director can issue approvals for projects with “environmental impacts” on air, land, water

Alberta Pesticide Sales Handling, Use, and Application Regulation

- **Prohibits use, application, transportation, display, disposal of pesticides likely to cause “adverse effect”**
 - includes strict rules concerning water use, crossing through water, aerial application, storage
 - applicators of pesticides must comply with Alberta Environment and Parks *Environmental Code of Practice for Pesticides*

PERMITTING REQUIREMENTS FOR GROWERS AND GREENHOUSES



Environmental Compliance Approvals for Cannabis Farmers – *EPA*

- **Operation of devices discharging into environment**
 - ECA not required for facilities, equipment “used in agriculture”
 - “Agriculture” is not defined in *EPA*
- **Other statutes list examples of Agriculture**
 - *Pesticides Act* – crop production (including greenhouse crops and tobacco)
 - *NMA* – cultivating land, crop production, operation of agricultural machinery, processing of products produced by farmer

Environmental Compliance Approvals for Cannabis Farmers – *EPA*

- **Operation of a “waste management system” or “waste disposal site”**
 - ECA not required for:
 - “agricultural waste”, “waste biomass”
 - GNF from a Registered Greenhouse
 - Non-Agricultural Source Materials (anaerobic digester output, biosolids)

Environmental Compliance Approvals for Cannabis Farmers – *OWRA*

- **Operation of “Sewage Works”**

- ECA not required for sewer works if:
 - it does not drain into ditch, sewer, water
 - it drains land for agriculture
 - for the management of GNF (counts as “sewage”) from registered greenhouse

- **Operation of “Storm Water Management Facility”**

- ECA not required if facility:
 - services one lot/parcel
 - discharges into “storm sewer” (see *Quiring*)
 - does not service industrial land
 - is not located on industrial land

Case Study on ECA Exemptions – *Quiring*

Quiring v Ontario (Director, MOE) (ERT 2013)

- **Mr. Quiring constructed commercial greenhouse and built Storm Water Pond to service the site – did not obtain ECA**
 - SW Pond discharged into “drain” (channelized open ditch) that flowed into Ruscom River
- **MOE ordered Quiring to apply for “sewage works” ECA under OWRA – Quiring appealed Order to ERT**

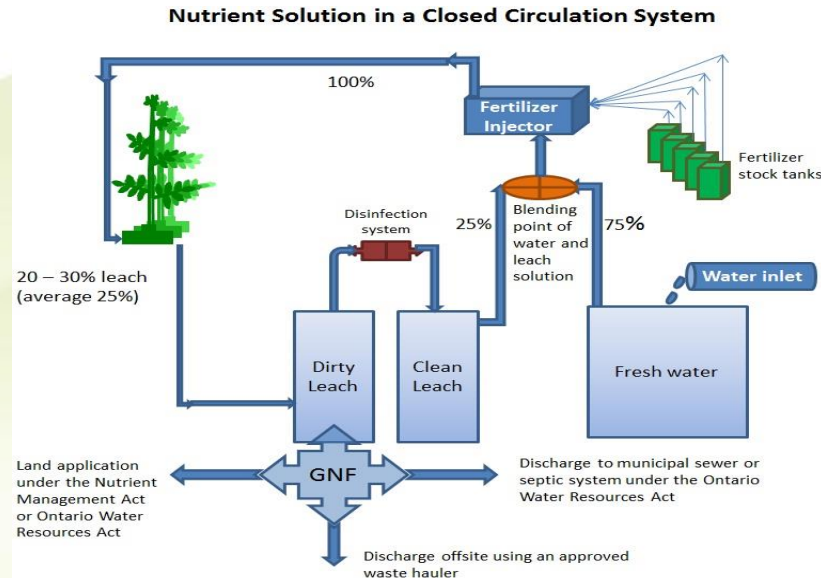


Case Study on ECA Exemptions – *Quiring*

- **ERT found that the SW Pond required an ECA**
 - exception for sewage draining “land” to fulfill agricultural purposes applies to draining agricultural fields and not to commercial greenhouses
 - ERT narrowed Stormwater Management Facility exception for ECA
 - SWM facility can service more than parcel
 - A “channelized ditch” is not a storm sewer – must be a system comprised of pipes, drains, appurtenances
- **Takeaway: ECA for Sewage Works likely required for cannabis greenhouses**

Greenhouse Nutrient Feedwater

- GNF: Material generated when nutrient solution is removed from a closed circulation system at a registered greenhouse**



OMAFRA, Greenhouse Nutrient Feedwater Regulation (2016)

GNF – Greenhouse Registration

- **Registration requirement for Greenhouses is optional**
 - greenhouse must register to obtain GNF ECA exemption
- **Registered Greenhouses must:**
 - calculate expected GNF, GNF storage capacity, nutrient units each year, following *GNF Management Protocol*
 - prepare a Nutrient Management Strategy or Nutrient Management Plan
 - may not be worth “regulatory headache”

Alberta Compliance Requirements

- ***EPEA* Director approval required for activities that have environmental impacts on air, land, water**
 - release of substances
 - waste management
 - activities designated under regulations, including
 - registration of services related to use/application of pesticides (AR 43/1997)
- **“Single blanket approval” may be issued if project requires more than one approval**
- ***EPEA* Director required to notify public once he/she receives application for approval**

OVERVIEW OF MUNICIPAL / LOCAL ENVIRONMENTAL REGULATION

Municipal v. Provincial

- **Municipalities may regulate the environment, but only if they do not “displace or frustrate” federal and provincial regulatory schemes**
- ***114957 Canada Ltée (Spraytech, Société d’arrosage) v. Hudson (Town)***
 - the SCC upheld the right of the Town of Hudson to restrict the *cosmetic use* of pesticides, in order to protect health of its residents
 - municipal bylaws must be measured, tied directly to particular local harms, and minimize interference with the senior government regulatory framework.

Municipal Compliance Requirements

By-laws and Public Notices RE:

- **Air**
 - Odour – public health, fire services, MECP
 - Max. parameters and discharge agreements
- **Waste**
 - Municipal control of waste collection (curb side and litter)
- **Water**
 - Development regulated through Sewer Use, including max. parameters and discharge agreements

Civil Liability re Nuisance

- **Nuisance**
 - contamination on-site (soil, groundwater, indoor air)
 - contaminant migration and impact off-site (groundwater, air emissions)
 - concept of “flow through” property
 - causes of action and damages

Civil Lawsuits for Nuisance

TMS Lighting Ltd. v KJS Transport Inc. (ONCA 2014)

- **Dust from KJS Transport property caused substantial and unreasonable interference with use and enjoyment of TMS lands (retail lighting manufacturer)**
- **Four factors considered to establish nuisance**



1. severity of interferences
2. character of neighbourhood
3. utility of defendant's conduct
4. sensitivity of plaintiff

MANAGING ENVIRONMENTAL LIABILITIES FOR CANNABIS GROWERS



Environmental Risks & Liabilities

- **Understand environmental issues and risks**
 - Do you have all requisite approvals, licences, and registrations?
 - What are the contaminants or emissions from facility?
 - Destruction, disposal, and sewage treatment requirements satisfied?
 - Has there been a spill/leak/discharge?
 - Do you have a spills prevention and contingency plan?

Managing Environmental Liabilities – Environmental Management Systems

- **Develop and Implement an Environmental Management System**
 - reasonable and realistic policy
 - identify environmental impacts and legal requirements
 - implement SOPs and training
 - adequate commitment of resources
 - continuous improvement (management review, audits, updates)

Managing Environmental Liabilities – Environmental Liability Protection

- **Environmental Insurance**
 - Commercial General Liability typically has a pollution exclusion
 - Director & Officer Liability policies typically exclude environmental matters
 - Insurers offer Environmental Impairment Liability policies

Managing Environmental Liabilities – Checklist

- **Obtain all required approvals and licences**
- **Know your environmental risks – create your environmental team – technical and legal**
- **Create and implement environmental management systems**
- **Build EMS into workplace culture**
- **Consider and obtain environmental liability protection, where available/applicable**

Q&A

Willms & Shier Environmental Lawyers

- **Established over 40 years ago**
- **20 lawyers**
 - seven are certified by the Law Society of Ontario as Environmental Law Specialists
 - lawyers called to the Bars of Alberta, British Columbia, Ontario, New Brunswick, Northwest Territories, Nunavut and Yukon
 - offices in Toronto, Ottawa, Calgary and Yellowknife

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