

Cannabis is the new Kale? Ontario Veggie Growers are Turning a New Shade of “Green”

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Making the Switch to Cannabis

Ahead of the federal government’s anticipated legalization of recreational cannabis on October 17, 2018, some Canadian vegetable growers are turning to cannabis for relief from years of thinning profit margins.¹ In addition to the higher revenue potential of cannabis compared to traditional crops, in some cases cannabis production requires less labour and moisture than traditional crops.² Also consider recent reports that suggest current Canadian production levels of cannabis could fall short of demand.³

As a result, many growers and greenhouse operators see cannabis as a way to cope with the long-standing challenges of vegetable production, including foreign competition and high costs.⁴ Can we expect to see a shift from the production of green vegetables to green buds?

Before rushing to meet the demand for cannabis, growers in Ontario or owners of commercial space planning to lease to a cannabis production tenant should be aware of the environmental laws and regulations applicable to cannabis operations.⁵

¹ Armina Ligaya, The Toronto Star, “Greenhouse Growers Take Chance on Cannabis in Push for Green”, February 1, 2018, online: <<https://www.thestar.com/business/2018/02/01/greenhouse-growers-take-chance-on-cannabis-in-push-for-green.html>>. Tracey Lindeman, The Globe and Mail, “Vegetable growers convert to cannabis to help boost margins”, January 21, 2018, online: <<https://www.theglobeandmail.com/report-on-business/small-business/sb-growth/vegetable-growers-convert-to-cannabis-to-help-boost-margins/article37677955/>>.

² Armina Ligaya, Financial Post, “Greenhouse growers uproot other crops for a stake in lucrative cannabis market”, February 1, 2018, online: <<https://business.financialpost.com/pm/commodities-business-pmn/agriculture-commodities-business-pmn/greenhouse-growers-uproot-other-crops-for-a-stake-in-lucrative-cannabis-market>>.

³ Armina Ligaya, Financial Post, “Legal cannabis supply to meet 30 to 60 per cent of demand: C.D. Howe report”, October 5, 2018, online: <<https://business.financialpost.com/pm/commodities-business-pmn/agriculture-commodities-business-pmn/legal-cannabis-supply-to-meet-30-to-60-per-cent-of-demand-c-d-howe-report>>.

⁴ *Supra*, note 1.

⁵ Willms & Shier Environmental Lawyers LLP is focused on the full spectrum of environmental law, including agriculture, food production and natural resources law. Richard is the leader of the firm’s Farms, Food and Cannabis practice. Our seventeen lawyers make us the largest private sector environmental law firm in Canada.

Cannabis Act and Provincial Environmental Laws

The *Cannabis Act*⁶ introduces stringent regulation of growing facilities. See for example, Part IV (Physical Security Measures) of the Cannabis Regulations, including video surveillance, access restrictions and physical barriers.⁷

While the *Cannabis Act* does not specifically address environmental standards for producers, cannabis growers and property owners must be aware of provincial environmental laws governing emissions, waste and water use. These include the laws set out in the *Ontario Water Resources Act*,⁸ *Pesticides Act*,⁹ *Nutrient Management Act, 2002*,¹⁰ and *Environmental Protection Act*.¹¹ Failure to comply with these laws can result in regulatory Orders and prosecutions.

Whether growing tomatoes or cannabis, it is critical for facility owners and operators to be aware of their legal obligations and liability. Environmental laws are often applied to both landlord and tenant. What follows is an overview of some of the requirements under Ontario's environmental legislation that may apply to cannabis production facilities.

Permits and Approvals

The OWRA and *Pesticides Act* require growers and greenhouse operators to obtain permits and approvals prior to operating a greenhouse or grow operation. Required permits and approvals may include the following:

- ◆ Permit to Take Water – if the operation is taking more than 50,000 litres of water per day from a lake, stream, river, pond, or groundwater source¹²
- ◆ Environmental Compliance Approval (ECA) – where the operation will be:
 - discharging sewage (including wastewater, storm water, process water and sanitary sewage),¹³ or
 - using an existing sewage works
- ◆ Pesticide licence or permit – where the operation will be applying certain pesticides.¹⁴

⁶ *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, Bill C-45, expected to come into effect on October 17, 2018.

⁷ Cannabis Regulations (SOR/2018-144).

⁸ RSO 1990, c O 40 [OWRA].

⁹ RSO 1990, c P 11.

¹⁰ SO 2002, c 4 [NMA].

¹¹ RSO 1990, c E 19 [EPA].

¹² OWRA, s 34(1).

¹³ *Ibid*, s 53(1).

¹⁴ *Pesticides Act*, RSO 1990, c P 11; O Reg 63/09.

An operation may also require a building permit for the installation of septic tank systems.

Local municipalities may require additional permits and building specifications for operations.

Managing Greenhouse Nutrient Feedwater

Ontario producers may use greenhouses for cannabis production as an alternative to other types of indoor industrial facilities. Greenhouses can be preferred as operators can maintain a year-long production schedule while limiting emissions because of reduced use of lighting and air conditioning.

Where greenhouse operations use closed circulation systems, the resulting nutrient rich solution, known as greenhouse nutrient feedwater (GNF), can be used to fertilize other agricultural crops.

The Greenhouse Nutrient Feedwater Regulation¹⁵ under the NMA sets out requirements for managing GNF generated by registered greenhouses. These include provisions about:

- ◆ transportation of GNF between agricultural operations
- ◆ application and storage of GNF
- ◆ soil sampling and analysis requirements, and
- ◆ annual, daily, and hourly application rate limits.

It is important for greenhouse operators to fully understand the options available under the GNF Regulation and their downsides. Some options require the use of a contingency process where processes do not work out as planned. This can result in product damage and operation shutdowns.

Waste Regulation and Other Provincial Laws

Waste cannabis material from cultivation or production is regulated at the federal level by the Cannabis Regulations. Licensing requirements for cannabis production demand that any waste or controlled substance must be secured and destroyed. Destruction must not result in exposure to cannabis vapour (in the case of incineration), and must comply with all federal provincial and municipal environmental legislation.¹⁶ Thus, licensed producers must comply with provincial waste requirements.

¹⁵ O Reg 300/14 [GNF Regulation].

¹⁶ Cannabis Regulations (SOR/2018-144), s.47

The EPA prohibits the discharge of contaminants that are likely to cause an adverse effect. Similarly, the OWRA prohibits discharge or deposit of any material into any water body or watercourse that may impair water quality.¹⁷ Greenhouse and other grow operations with nutrient management strategies and plans may be required to have a contingency plan in place for handling spills related to manure or other prescribed materials. The emission of odours may also lead to nuisance complaints from nearby landowners.

The EPA and NMA regulate the spreading of non-agricultural waste materials on agricultural land. ECAs or non-agricultural source material plans may be required where an operation will spread non-agricultural waste materials on agricultural land.

Compliance Inspections

The Ministry of Environment, Conservation and Parks (MECP) may send an Environmental Officer to inspect operations approved under ECAs. MECP inspections may be unplanned and unannounced, especially in the event of a spill, complaint, or where there are ongoing compliance issues.

Orders & Prosecutions

MECP can issue Orders to current owners (and former owners) of a property and those with environmental management and control.

Non-compliance with an Order can result in an MECP prosecution of the orderee who is in breach. The Crown may also prosecute where there is a violation of an environmental law and despite no breach of an Order.

In *R. v. Westbrook Greenhouses Limited*,¹⁸ a greenhouse operator was charged under *OWRA*, s. 30(1) for discharging nutrient loaded water into a creek. The greenhouse operator, Westbrook Greenhouses Limited (Westbrook), applied “Kool Ray” to the roof of its greenhouse to help block out the UV light from the sun. Kool Ray entered the drainage system of the greenhouse and migrated into a nearby creek. A resident driving by observed a whitish colour to the creek and reported to the Ministry of the Environment and Climate Change’s (MOECC, as it then was) Spills Action Centre. The MOECC investigated and found concentrations of nitrate at the discharge pipe that exceeded known toxicity thresholds for amphibians. Westbrook pleaded guilty and was fined \$12,000 plus a victim fine surcharge.

¹⁷ OWRA, s 30(1).

¹⁸ 2008 CarswellOnt 10107 (OCJ).

Going Forward

Whether growing vegetables or cannabis, greenhouse and industrial growing facilities must pay close attention to applicable environmental laws. Failure to comply with laws can result in prosecutions and fines. Those seeking to establish new greenhouses or to “green” their existing greenhouses should seek legal advice to manage and reduce their exposure to environmental liability.

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