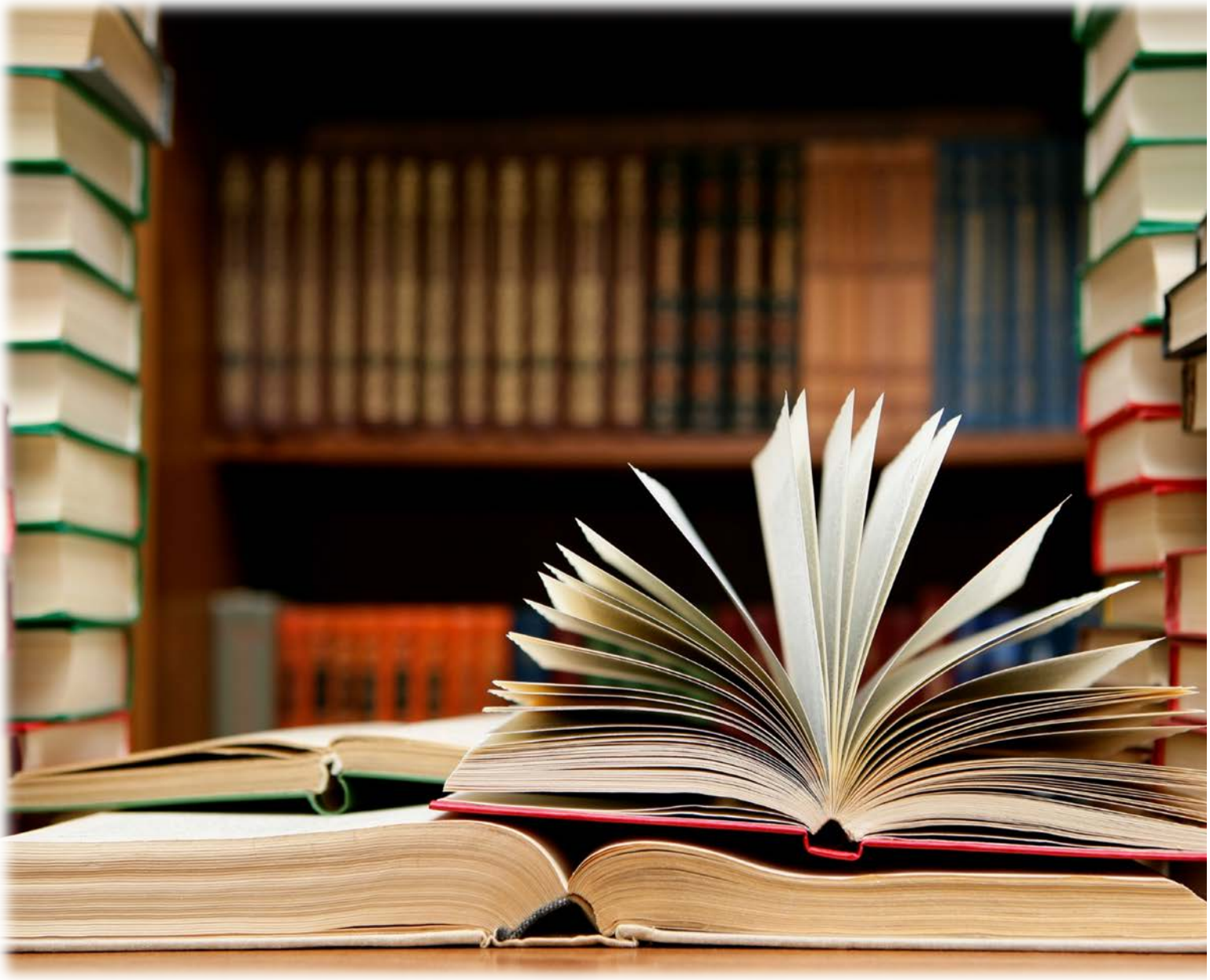
What the Marihuana for Medical Purposes Regulations Overlook

Disclosure and Remediation of Inappropriately Used Dwellings



Fire Chief Len Garis and Dr. Joseph Clare

January 2013

UNIVERSITY OF THE FRASER VALLEY
SCHOOL OF CRIMINOLOGY & CRIMINAL JUSTICE

UNIVERSITY OF THE FRASER VALLEY
CENTRE FOR PUBLIC SAFETY & CRIMINAL JUSTICE RESEARCH

Executive Summary

1. The Marihuana Medical Access Regulations (MMAR), which are currently administered by Health Canada, permit Canadians access to marihuana for medical use provided they have been deemed to require this medical treatment by a physician. The MMAR enable individuals to grow marihuana for themselves, empower a third-party to grow marihuana on their behalf, or purchase marihuana directly from Health Canada.

2. In response to a broad range of concerns that have been identified with the MMAR, in late 2012 Health Canada gazetted an alternative framework, termed the Marihuana for Medical Purposes Regulations (MMPR)[1], under which the "production of marihuana for medical purposes by individuals in homes and communities would be phased out" [1] with a view to moving towards a system of licenced commercial producers.

3. While supportive of the MMPR, this document details why the revised regulations fail to address the need to repair buildings that will almost certainly have been damaged as a result of inappropriate, agricultural use under the MMAR. To this end, an argument is developed as to why a comprehensive process for disclosing and remediating the structures that have been utilized by licence holders to produce medical marihuana is also required in addition to moving away from a process of licencing individuals to produce marihuana in homes.

4. Currently in BC, it is not possible for any prospective property purchaser or tenant to be certain if a building they are interested in has: (a) been identified as having been used in an inappropriate, potentially unhealthy/unsafe manner, or (b) been remediated through a process that would ensure health and safety risks have been eradicated. This term, "inappropriate use", incorporates a range of activities, including, but not restricted to, agricultural activity (e.g., grow-ops, regardless of the legality) and the production of synthetic drugs, which can result in significant damage to the properties. If inadequately remediated, this type of damage can have serious health and safety implications for occupants.

5. Without a consistent, reliable process for disclosing property histories for inappropriate use and for ensuring remediation addresses existing health and safety issues, it is not possible to make an informed decision about the potential risk posed by any property of interest as a result of previous inappropriate, damaging use of the structure.

6. To alleviate these concerns, in addition to the gazetted MMPR reforms, three additional recommended steps should be undertaken in parallel:
    1. Develop a centralised, consistent process for disclosure of property history information for those buildings previously used as sites for the production of marihuana under the MMAR.
    2. Develop a centralised, consistent process for remediation of inappropriately used buildings previously used as sites for the production of marihuana under the MMAR.
    3. Implement these disclosure and remediation processes in a top-down manner, with each provincial government and/or the federal government playing a controlling role, and exploring the potential to use existing legislation as the foundation for this approach.

7. Implementation of these recommendations would simultaneously reduce health and safety risks to building occupants and increase the ability of property purchasers/lessees/tenants to make informed decisions. The authors are fully supportive of the planned moved towards licenced commercial production of medical marihuana and a phasing out of existing licences for individuals to produce marihuana in homes and communities. In addition to this, however, the authors believe a comprehensive process is required for disclosing and remediating the residential properties that have already been utilized to produce medical marihuana under the MMAR, thus ensuring future health and safety issues do not arise.

[1] Canada Gazette, Part I, Vol. 146, No. 50 – December 15, 2012: Marihuana for Medical Purposes Regulations.

The Purpose of this Research Note

The Marihuana Medical Access Regulations (MMAR), which are administered by Health Canada, permit Canadians access to marihuana for medical use provided they have been deemed to require this medical treatment by a physician. These regulations enable individuals to (a) grow marihuana, (b) empower a third-party to grow marihuana on their behalf, or (c) purchase marihuana from Health Canada. To address a range of key stakeholders concerns identified with the MMAR, Health Canada has gazetted a proposed revised framework entitled the Marihuana for Medical Purposes Regulations (MMPR)[2], the main objectives of which would be to phase out individual licences to grow and focus the scheme on licenced commercial producers.

This paper outlines the motivation underlying the proposed changes and then explains why the revisions fail to address the need to repair buildings that will almost certainly have been damaged as a result of inappropriate, agricultural use permitted by the MMAR. The paper concludes by arguing that in order to completely address the health and safety issues that will have arisen through the MMAR, a comprehensive process is also required for the disclosure and remediation of the structures that have been utilized by licence holders to produce medical marihuana under the existing regulations.

Overview of the Marihuana Medical Access Regulations

A Brief Background to the Marihuana Medical Access Program and Regulations

Health Canada outline the history to the Marihuana Medical Access Program and the establishment of the MMAR [1], the main component of which are as follows:

- In 1999 the Program was established to provide a legal source of dried marihuana for medical purposes to seriously ill Canadians. This program operated under exemptions to *Section 56* of the *Controlled Drugs and Substances Act* (CDS) [2].
- In 2000, following an Ontario Court of Appeal ruling, the MMAR were established. These regulations enabled any seriously ill Canadian who wanted access to marihuana and who had an appropriate declaration from a physician to "obtain an authorization to possess and/or a licence to produce dried marihuana for their own personal medical use" [1]. The MMAR also enabled those with authorization to designate a third party to produce marihuana on their behalf.
- In 2003, the MMAR was further amended, with Health Canada also supplying dried marihuana and/or marihuana seeds for medical purposes to authorized persons.

As a result, authorized persons have had three avenues through which they could obtain dried marihuana for medical purposes: (a) a Personal-Use Production Licence, (b) a Designated Person Production Licence, or (c) by purchasing dried marihuana from Health Canada. Production licences have clearly specified terms and conditions, including maximum quantities of marihuana that can be possessed and the maximum number of plants that can be cultivated at any one time [1].

The Scope of the Program in British Columbia (BC)

As of October 12, 2012, across Canada there were:

- 26,222 persons who held an Authorization to Possess marihuana for medical purposes;

[2] Canada Gazette, Part I, Vol. 146, No. 50 – December 15, 2012: Marihuana for Medical Purposes Regulations.

- 16,549 persons who held a Personal-Use Production Licence [3];
- 3,199 persons who held a Designated Person Production Licence [3]; and
- A total of 19,748 persons who held a licence to produce marihuana for medical purposes [3].

In comparison, an equivalent snapshot from June 4, 2010, revealed that, less than three years earlier, there had been:

- 4,654 persons who held an Authorization to Possess marihuana for medical purposes;
- 2,680 persons who held a Personal Use Production Licence [3];
- 760 persons who held a Designated Person Production Licence [3]; and
- A total of 3,440 persons who held a licence to produce marihuana for medical purposes [3].

Nation-wide, this translates to a 474% increase in licences to produce marihuana for medical purposes in approximately 28 months.

The demand for MMAR licences has been very uneven across Canada. BC has approximately 4.62 million people (13.3% of the estimated 2012 national total) [4]. Assuming the proportion of MMAR licences in BC was consistent with the relative contribution the province makes to the national population, it would be expected there would be 3,488 Authorizations to Possess marihuana for medical purposes, 2,201 Personal-Use Production Licences, and 425 Designated Person Production Licences. Instead, however, as of October 12, 2012, there were:

- 11,486 persons who held an Authorization to Possess marihuana for medical purposes (43.8% of the national figure) [3];
- 7,799 persons who held a Personal Use Production Licence (47.1% of the national figure) [3];
- 2,075 persons who held a Designated Person Production Licence (64.9% of the national figure) [3]; and
- A total of 9, 874 persons who held a licence to produce marihuana for medical purposes (50.0% of the national figure) [3].

Concerns with the Program and Proposed Improvements and Reforms

Health Canada explains that a, "wide range of stakeholders including police and law enforcement, fire officials, physicians, municipalities, and program participants and groups representing their interests, have identified concerns with the current" MMAR [1]. Some of the major public safety concerns identified include [1]:

- The potential for diversion of marihuana produced for medical purposes to the illicit market;
- The risk of home invasion due to the presence of large quantities of dried marihuana or marihuana plants;
- Public safety risks, including electrical fire hazards, stemming from the unpermitted building alternations required to enable cultivation of marihuana in homes;
- Public health risks due to the presence of excess mould and poor air quality associated with the cultivation of marihuana plants in homes.

In response to the range of concerns raised with the MMAR, Health Canada has proposed the MMPR as an alternative [5], motivated by the desire to reduce the risk of abuse and potential for exploitation by organized crime [1]. The MMPR have nothing to do with legalization of marihuana, with the core of the redesigned program representing [1]:

"…a new, simplified process in which Health Canada no longer receives applications from program participants. A new supply and distribution system for dried marihuana that relies on licensed commercial producers would be established. These licensed commercial producers, who would be inspected and audited by Health Canada so as to ensure that they comply with all applicable regulatory requirements, would be able to cultivate any strain(s) of marihuana they choose. Finally, the production of marihuana for medical purposes by individuals in homes and communities would be phased out."

What the MMPR Overlooks: Consistent Disclosure and Remediation Processes

While the MMPR definitely would represent a positive step towards addressing concerns raised by key stakeholders, what is currently lacking in these proposed new regulations is any plan to deal with remediation of premises where MMAR-licenced marihuana growing operations were located, or the fire, health, and safety issues associated with occupying a residence that once was an active, federally-licenced marihuana growing operation [6]. This issue is exacerbated by the fact that, as it stands, the physical location of the grow operations associated with the MMAR licences are unknown, with municipalities and police/fire services only becoming aware of them as a by-product of their daily public safety duties.

To give some sense of the scope of this issue, a recent request made by the City of Surrey under the *Access to Information Act*, revealed that as of October 1, 2012, there were a total of:

- 753 licences to produce marihuana for medical purposes (includes Personal Use Production licences and Designated person Production licences) issued to individuals who indicated a physical address in the City of Surrey, BC [7]; and
- 510 production sites in Surrey, BC [7].

Since March, 2005, the City of Surrey has become aware of 97 MMAR-licenced grow operations (approximately 1% of these locations in BC) in residential properties, meaning that as it currently stands, the location of 81% of the licenced grow production sites in Surrey remains unknown to the municipal government. Furthermore, from a provincial level, only 7.6% of the total production licences that have been allocated to BC can be traced to Surrey.

There has not been any indication from Health Canada of any intent to fully disclose the addresses of production sites to the Local Government Authorities, which would assist in the enforcement of remediation of premises damaged as a result of licenced production of marihuana [6]. While it is the case that by eliminating licensed marihuana production in homes the proposed MMPR would eliminate additional public health, safety and security concerns developing as a consequence of licensed activities, it is not the case that the existing health and safety issues will be "eliminated" as proposed by the Government of Canada [5]. As has been previously discussed in a paper produced for the Fraser Valley Real Estate Board [8], the absence of any such process from Health Canada with respect to existing, damaged properties will exacerbate the current situation in BC, which already renders potential property purchasers, lessees, and renters unable to make informed decisions about the likelihood that prospective properties pose health and safety risks as a result of previous inappropriate use. There are two causal, related factors that have produced this concern. On the one hand, the current process for disclosure of information about properties that have been identified as having been used inappropriately is flawed. There is no centralised, consistent process in place to ensure this information is recorded and disseminated in a standardised, timely, meaningful manner. This first issue is exacerbated by the unreliable, inconsistent processes for remediating buildings that have been identified as having been used inappropriately. As a consequence of these two issues, it is not possible to know unequivocally whether: (a) a building in BC has been identified as having previously been used for

inappropriate, potentially unhealthy/unsafe purposes, or (b) how the remediation process was executed (if at all) when the building was identified as having experienced inappropriate use.

The Sources of Risk Posed by Inappropriate Use of Properties

Damage to Properties

There is a range of ways in which inappropriate use of a building can result in significant physical damage. The most obvious of these involves unauthorised alteration to the building's support structures; for example, cutting into foundations for ventilation and power access. These renovations can extend as far as manipulating chimneys and roofs. The combined effect of these alterations is to severely degrade the structural integrity and fire rating of the building. Following from this, wiring defects are another issue that frequently require remediation. These alterations are often completed to a poor quality standard by unqualified individuals who are aiming to achieve one or more of the following: (a) illegally bypass electrical metres with a view to stealing power, (b) enable power to be provided to the structure by additional means, such as generators, and (c) internal rewiring to support a large number of industrial strength grow-lamps. The substandard workmanship and the absence of standardised safety processes mean that these properties pose a highly elevated risk for electrocution and fire after these electrical renovations. When buildings are used for these inappropriate purposes, there can also be a large amount of moisture damage that can significantly deteriorate the building's structural materials. Finally, there is the potential that inappropriate disposal of dangerous goods through the drainage system can degrade the plumbing infrastructure to the extent that it may need to be replaced. For a recent review of some of these issues, see the work by Plecas and colleagues [9].

Environmental and Public Health Concerns

In contrast to these overt signs of physical damage, the environmental and public health concerns that emerge from inappropriate use of properties can also produce an alternative class of hazards, typically more difficult to detect and harder to address [as discussed by 10]. The first of these, mould and fungi, typically grow in conditions of high humidity, poor ventilation, and heat. These do not always grow in obvious places (e.g., they can prosper inside wall cavities) and are highly resilient, so without proper remediation they are very likely to return. Given that mould has the potential to be allergenic, pathogenic, or toxigenic, its presence within commercial or residential buildings creates a significant health concern for future building occupants [10]. In combination with chemicals such as pesticides and fertilizers, these microscopic organic particles can linger for lengthy periods of time after the source of the contaminant has been removed, significantly impacting on the safety and quality of the air inside the property. Inappropriate use of commercial or residential buildings for agricultural purposes can also result in toxic residue contaminating the building materials and the soil in the building's surrounds. This issue can persist even after the source of the contaminants has been removed, as a result of spills, over-spraying, and the absorbent properties of building materials [10]. Finally, following from the potential damage to the plumbing infrastructure of these buildings discussed previously, inappropriately disposing of chemicals through the drains or onto the ground can also cause contamination to the surrounding ground water supplies to the extent that the content of these areas could need to be reclaimed.

Insurability

Section 11, *Permitted Exclusions - Defects* (1) and (2) of the *Home Warranty Insurance and Statutory Protection* clause of the *Homeowner Protection Act* permits warranty providers to exclude a range of items from home warranty insurance, including:

> *"(c) any loss or damage which arises while a new home is being used primarily or substantially for non-residential purposes;*
> *(e) any damage to the extent that it is caused or made worse by an owner or third party, including:*
> *(i) negligent or improper maintenance or improper operation by anyone other than the residential builder or its employees, agents or subcontractors [which includes bodily injury, or damage to personal property, caused by mould],*
> *(ii) failure of anyone, other than the residential builder or its employees, agents or subcontractors, to comply with the warranty requirements of the manufacturers of appliances, equipment or fixtures,*
> *(iii) alterations to the new home, including the conversion of non-living space into living space or the conversion of a dwelling unit into 2 or more units, by anyone other than the residential builder or its employees, agents or subcontractors while undertaking their obligations under the sales contract, and*
> *(k) changes, alterations or additions made to a new home by anyone after initial occupancy, except those performed by the residential builder or its employees, agents or subcontractors as required by the home warranty insurance or under the construction contract or sales agreement;*
> *(l) contaminated soil;*
> *(n) diminution in the value of the new home."*

The implication of this legislation for prospective home purchasers is that, in addition to the health and safety issues that arise from the inappropriate use of dwellings, unknowingly purchasing properties that are potentially uninsurable (under the *Homeowner Protection Act*) also poses serious financial risks.

These Concerns are Not Specific to Illegal Inappropriate Use

Although these health and safety concerns do encompass the issues associated with using dwellings for the production of marihuana and methamphetamine, the problem is not illegal activity in the building, per se. Instead, it is the potential of injury/disease for interested buyers if they purchase properties that are unsafe/unhealthy without being able to make an informed decision about the risk. This risk is paralleled by prospective tenants when making a choice about potential rental properties. Legality of activity aside, therefore, the issue is the health and safety issues associated with improper use of buildings. Taking the case of indoor marihuana grow operations, for example, regardless as to whether the business owner has been granted a licence to produce under the MMAR, if the building is not zoned or constructed to be used for agricultural purposes, safety inspections have not been passed, and agricultural grade fertilizers/pesticides have been used, then the health and safety issues that result are equivalent to an illegal indoor marihuana grow operation. By extension, even if information is made available about the relevant history of a property, if there is an inconsistent, unreliable remediation process, then being informed a property has been remediated does not provide the necessary basis for an informed decision.

Disclosure

Across BC's Fraser Valley region[3], despite the implementation of a range of municipality-specific *Controlled Substance Property Bylaws*, there is a clear lack of desire to record any permanent information identifying properties as having been used inappropriately.[4] The one exception to this approach is the City of Surrey, BC, which requires the owners of formerly remediated properties in perpetuity to provide written notification to any future occupants advising them that the building was formerly identified as needing rehabilitation and that the requirements of this rehabilitation process were met. Furthermore, a notice is included on the City of Surrey property tax certificate advising that the property is/was subject to a bylaw infraction (with the number of the bylaw cited).

In contrast, the City of Abbotsford, BC, ensures that all references to inappropriate use are removed from the property land title when the structure is deemed to have been successfully remediated. However, the records relating to the inappropriate use of the property are kept by the city for seven years, in accordance with the city's record management system. This means that some documents associated with inappropriate use of buildings in Abbotsford can be accessed via a Freedom of Information request. In addition to this, the city also keeps searchable binders at their front counter which contain dates when notices were filed and removed.

These approaches both contrast the positions currently adopted by the City and the Township of Langley, BC, neither of which rely on their own employees to make judgements about the success of remediation and the corresponding inhabitability of the property. This simultaneously reduces each municipality's liability in any post-rehabilitation health and safety complications, and also means that neither municipality possess complete information about the outcome of any rehabilitation process. Once again, no permanent record is made to the property title or tax certificate in either Langley municipality that would indicate a remediation process had taken place.

Caution with Disclosure: The Freedom of Information and Privacy Act

As it stands, the default strategy from institutions in possession of this information about known history of improper use of buildings is non-disclosure. The end result is that it is not currently possible to say definitively whether any given property in BC is currently or was previously used inappropriately. There are at least two reasons for this. First is the inconsistent sharing of information between agencies (e.g., police, bylaw inspectors, and others). Second is the lack of a centralized, searchable record of identified and/or remediated unhealthy dwellings. The major impediment to this information flow seems to be public officials' interpretation and understanding of the *Freedom of Information and Protection of Privacy Act* RSBC 1996 (*FIPPA*). Given the penalties for non-compliance with the *FIPPA* include fines of up to $25,000 for a service provider and up to $500,000 for a corporation, non-disclosure has been adopted as the default stance by the majority of municipalities in BC with a view to limiting their liability exposure. The source of complication posed by *FIPPA* with respect to prospective buyers determining the safety of a potential purchase emerges as a consequence of the following steps:

1. *FIPPA* makes public bodies more accountable to the public and to protect personal privacy;
2. *FIPPA* gives the public the right of access to records with specified limitations (*accountability*);

---

[3] For the purposes of this paper, "Fraser Valley" refers to the communities of Abbotsford, Mission, Langley City and Township, Surrey, White Rock and Delta – the communities in which members of the Fraser Valley Real Estate Board live and work.

[4] These issues are discussed fully within a White Paper Discussion entitled, "Standards of Reporting and Remediation: The Impact of Illegal Drug Operations on Housing", prepared for the Fraser Valley Real Estate Board in September 2008. Copies of this paper can be accessed by contacting the Fraser Valley Real Estate Board at mls@fvreb.bc.ca.

3. One specified limitation to *FIPPA* is the disclosure of personal information (defined as "information about an identifiable individual") by public bodies (*privacy*);
4. Information about any known history of improper use of a property is of immediate importance to potential buyers/lessees/tenants;
5. Information about any known history of improper use of a property has been determined by public officials to be personal information (with one concern to do with record linkage that potentially could result in the disclosure of personal information that causes harm to individuals);
6. Information about any known history of improper use of a property is not being disclosed, with *FIPPA* cited as the reason: privacy trumps accountability.

The reoccurring message here is that, for the most part, these municipalities are concerned about record keeping and disseminating information in cases where they have acted on evidence that buildings have been used inappropriately. The default strategy is to ensure that these records are non-permanent (when they are retained at all) and that they are not maintained in an easy-to-search format (such as a database). This protects the governments in these areas from being able to disseminate information that could later be perceived to have contravened FIPPA. However, it has not been determined by the Courts whether such disclosure actually does constitute a breach of this Act.

In the absence of a definitive Court ruling with respect to the legality of disclosing this type of information, an alternative, valuable perspective on this issue has been provided by the former BC Information and Privacy Commissioner, David Loukidelis, in a letter to Fire Chief Garis, City of Surrey Fire Services [11]. It must be noted that Loukidelis' perspective was qualified by stating that, "Because of my role investigating and enforcing privacy issues under the [FIPPA], I cannot give a formal much less binding opinion on any specific issue." This caveat noted, however, Loukidelis continued to explain:

> *"...it can be argued that information about the physical condition of a particular property, or about any building bylaw or other bylaw infractions, notices or actions respecting a piece of property is not personal information of anyone, including the registered owner. FIPPA offers protections for personal information, which it defines as 'information about an identifiable individual', while information of the kind just mentioned is information about a piece of real estate, not about an identifiable individual. Of course, personal information may be found in or associated with this type of information, so a local government would have to ensure that it discloses only information about building bylaw or other bylaw infractions, notices or actions respecting the property and not personal information of individuals."*

This perspective was supported by subsequent correspondence from the Executive Director of the Office of the Information and Privacy Commissioner of BC to the Fraser Valley Real Estate Board [12], which indicated that, "[t]here is a positive duty in law to disclose information about a significant risk to someone's health or safety."

Inconsistencies with Respect to Disclosure

In addition to disregarding these opinions that disclosure of health and safety information about properties should be occurring, the current practices with respect to disclosure about inappropriate use of buildings are also arguably inconsistent, being treated differently from other property information that is recorded and disclosed. The first major example of this involves the release of excessively-high power consumption data from BC Hydro to local municipalities. This information is released under the *Safety Standards Amendment Act* and gives an indication of inappropriate use of residential dwellings, in a manner that is highly likely to result

in a fire-related health and safety risk. As it stands, approximately twelve municipalities in BC regularly access this information without any legal backlash with respect to breaches of *FIPPA*.[5] Given BC Hydro collects this information about consumption as a key aspect of their business, there are no municipal boundaries at play here. The dissemination of this information actually represents a current, working example of a centralised process where information about potential inappropriate use of dwellings is disclosed.

A second, similarly centralised process is demonstrated by the BC Provincial Contaminated Site Registry, which is a registry of (a) confirmed contaminated sites, (b) sites under investigation for contamination, and (c) formerly contaminated sites that have been remediated. A contaminated site in this context is defined as "an area of land in which the soil or underlying groundwater or sediment contains a hazardous waste or substance in an amount or concentration that exceeds provincial environmental quality standards," resulting in a site being unsuitable for specific land, water, and sediment uses [14]. All information gathered since 1988 about contaminated sites is completely accessible to the public and site-specific information can be attained via an online search at www.bconline.gov.bc.ca.

On a municipal level, it is also routine procedure to record permanent information about other building-specific information, such as renovations, building permits, and structural damage. Although there is no centralised process capturing this information, it is possible to visit municipal offices and learn about these aspects of a building's history. These amendments to the building records are not temporary, removed from the record following remediation, in the same way that some municipalities currently deal with information about inappropriate use of dwellings.

Potential Novel Approach to Addressing the Disclosure Issue

Despite these inconsistencies, and working within the current concerns about privacy and disclosure, some alternatives for achieving the necessary dissemination of information have been proposed. Given the former Information and Privacy Commissioner's perspective on the non-personal nature of information about (a) the physical condition of a particular property, (b) any building bylaw or other bylaw infractions of a particular property, or (c) any notices or actions respecting a piece of property, the Fraser Valley Real Estate Board has proposed a protocol which would enable members of the public and real estate professionals representing them to access information necessary to make an informed decision about a property without contravening *FIPPA*. Potential wordings that have been trialed [15] include:

- According to City records, has the property ever been investigated for the cultivation of marihuana or as a clandestine drug lab?
- Was the property ever invoiced by the City on the basis that it had been used for cultivation of marihuana or as a clandestine drug lab enforced at this property?
- Was a City action taken as a result of findings in a residential building on the property?
- Was a City action taken as a result of findings in a non-residential outbuilding, barn, shed or other shelter situated away from the residence?
- Has the City's Controlled *Substance Property Bylaw* been enforced at this property?

---

[5] This is not to say that this process has not been scrutinised with respect to *FIPPA*, and the status quo has emerged as the outcome of extensive lobbying of the provincial government that led to the introduction of *Bill 25* (the *Safety Standards Amendment Act*) in 2006. Subsequent to this, the legitimacy of this process has been tested in the BC Supreme Court (2008) and the BC Court of Appeal (2010). In both instances the rulings have been upheld. For a comprehensive summary of these cases see [13] L. Garis, et al., *Community Response to Marijuana Grow Operations: A Guide Towards Promising Practices*, 2009, City of Surrey: Surrey BC. p. 32. http://www.surrey.ca/files/DCT_-_Community_Response_to_MGOs_Guide_Sept_2009.pdf

- Have the requirements of the action been undertaken such that the requirements of the Bylaw or other City order been satisfied?
- If the answer to any of the above questions is "yes," and the potential purchaser/lessee/tenant of the property are still interested in the property, they may wish to ask, "What was the date of the occurrence?"

The assumption underlying the proposal of these questions is that they could be answered by officials with a yes/no response without contravening the scope of *FIPPA*. Garis and Bond [15][6] then discuss that if this argument is incorrect, and that personal information was being disclosed when a property was listed for sale, this issue may be resolved by the property owner giving their consent to disclose, as explained by Loukidelis [11]:

> *"Even if this argument were wrong, such that personal information were being disclosed, when a property is listed for sale, the seller could consent in writing at the time of listing to disclosure by the relevant local government of information about the condition of the property and whether it has been used for grow-ops or other illegal drug operations. This would avoid any issue under FIPPA altogether, since s.33.1(b) authorizes a local government to disclose personal information 'if the individual the information is about has identified the information and consented, in the prescribed manner, to its disclosure'."*

In addition to this, Loukidelis [11] also outlined that the BC Real Estate Association property disclosure statement (Part 2, clause P) requires a yes/no response to the following: "Are you aware if the premises or property have been used as a marihuana grow operation or to manufacture illegal drugs?" Given that the answer to this question is a representation and warranty under any subsequent sale agreement, it is plausible that a failure to provide this information to a potential buyer would be good grounds for suspicion.[7]

Remediation

Moving on from the discussion of disclosure of information about improper use of dwellings, the next section of this report discusses the issues around the process for remediating unhealthy/unsafe buildings. In their discussion paper that focused on marihuana grow operations, Garis, Plecas, Cohen, and McCormick [13] explain that it is essential that the damage done to properties that have been used inappropriately are completely remediated before they are reoccupied. The primary purpose for this remediation is to ensure these buildings do not become abandoned. This issue can be (and, in a range of BC municipalities, is being) addressed through the use of bylaws that place the remediation costs back onto the property owner. However the issue that remains is that the current process allows inconsistent, highly variable standards to influence the remediation of these structures.

The General Prototype Approach to Remediation in BC

As with the approaches to disclosure already discussed, across BC there is a wide range of approaches to remediation of properties that have been identified as having experienced inappropriate use. Grounded in

[6] The full paper is available at http://www.surrey.ca/city-services/7388.aspx

[7] The BC Real Estate Association's property disclosure statement is not currently mandatory, and even if it were to become mandatory, this would not address the problems associated with property sales (a) conducted by real estate agents who do not belong to a real estate board/association, (b) conducted privately by property owners, and (c) for commercial properties. This would also not addresses issues arising for tenants and lessees as landlords are not required to complete this disclosure statement.

municipal bylaws, the general approach to remediation that has been adopted contains some/all of the following components:

- A site visit is conducted by an inspection team under a locally developed Controlled Substance Property Bylaw;
- If inappropriate use is detected, further occupation is prohibited and a notice is served that commences the remediation process;
- Within a certain period of time the remediation requirements must be addressed;
- If these requirements are satisfactorily addressed, then the occupation prohibition is lifted.

This process occurs at the property owner's expense, and the final source of approval for the remediation process is a non-government, designated expert. In some cases the records of this process are kept in such a way that they can only be accessed by municipal staff and there is generally little to indicate in the permanent record that the property had been used in this inappropriate, potentially unhealthy/unsafe manner.

Issues with the Various Existing Approaches to Remediation

Although on first inspection these steps appear comprehensive and thorough, closer examination exposes a range of issues associated with these various approaches to remediation of inappropriately used buildings. To highlight this issue, Garis [16] produced a summary paper entitled *Improving the Remediation Process for Marihuana Grow Operations* that succinctly summarises the outcomes of a workshop involving remediation experts that focused on addressing concerns with the status quo. These issues are expanded in length within Garis's paper,[8] but for the purposes of this paper they are summarized as follows:

- Due to a range of different qualifications that are available, different requirements for maintaining qualifications, rules about the number of qualified individuals required for a company to hold a licence, and necessary insurance standards, it is very difficult for laypeople to determine which service providers are appropriately qualified/certified to undertake remediation work.
- Uncertainty exists regarding the process and roles of environmental consultants and restoration companies in the remediation process.
- There are inconsistencies and inefficiencies in how these remediation processes are executed across-municipalities, with no guarantee that remediation is being undertaken consistently and effectively to ensure that the work is completed correctly.
- The recommendations for the scope of remediation work required are often insufficient to complete the remediation task. This is often the consequence of the environmental consultants making recommendations following a superficial inspection, which tends to miss more covert damage (e.g., under carpets and within wall cavities). A detailed scope of work is essential to (a) ensure the property is completely and effectively remediated, and (b) enable the prospective buyers/lessees/tenants to know exactly what work was completed. In addition to the lack of clear scope of work for remediation, there are also additional logistical constraints with respect to the quantity of suitable remediation companies, hygienists, and Hazmat staff that are available to remediate inappropriately used dwellings [e.g., 10, 17].
- Inconsistencies are also an issue with respect to the quality of remediation work that is done. There is generally no obligation on the behalf of the property owner to procure the services of certified restoration companies. Consequently, property owners can cut corners to save money by doing

[8] The full paper is available for download at http://www.surrey.ca/city-services/7388.aspx

remediation work themselves or hiring uncertified contractors. This generally has a detrimental impact on the quality of the workmanship, which directly impacts on the success of the remediation process and the subsequent amelioration of the health and safety risks created by the inappropriate use.

- Although remediation cannot generally be concluded without the authorisation of a certified industrial hygienist or registered occupational hygienist, it is rarely the case that these individuals are providing consistent project oversight for the duration of the remediation process. Furthermore, there are concerns about a lack of independence between the environmental consultants who originally scope the size of the damage, the cleaning companies responsible for the remediation, and the hygienists who sign-off on the process as being complete.
- Concerns about premature removal of the occupancy ban were also identified, stemming from the fact that the hygienist conducts their final site visit and inspection while the building's walls are still open for building/electrical inspection (and hence, not yet in a liveable state).

Addressing these Limitations by Standardizing the Process

In order to address these issues, a coherent, clearly defined process needs to be developed and applied consistently. Following this, sufficient numbers of appropriately trained staff need to be deployed to ensure this remediation process is being adhered to. The fundamentally important issue here is that each instance of inappropriate use of a building needs to be assessed in its own rights, based on the context. This means that the process is the key and the issue as it stands is the inconsistency of the process. Garis's [16] paper identified a set of detailed roles and recommendations that property owners, environmental consultants, restoration contractors, and governments must play in this process. Furthermore, Garis provided a concise process overview for remediation that included the following steps:

- Issuing and posting a "Do Not Occupy" order on the inappropriately used building;
- The government involved providing the property owner with the necessary information about the remediation process;
- The property owner hiring appropriate environmental consultants and restoration contractors;
- The environmental consultant investigating/assessing the site, preparing the scope of work for the restoration contractor, coordinating hiring registered professionals (as required), and monitoring remediation;
- The restoration contractor obtaining permits (by submission of documents prepared by registered professionals, as required), hiring trades, ensuring all work is completed and signing-off;
- The environmental consultant signing-off on the project and issuing a "Certificate of Entry";
- The property owner completing the finishing work on the property;
- The government involved receiving the final approvals from the environmental consultant of a successful final inspection, and subsequently removing the "Do Not Occupy" order; and
- Inclusion of a permanent record of remediation in the building records for the property.

A Top-Down, Centralized Process for Disclosure and Remediation

The question remains then as to what the best method is for achieving these revisions to the process for disclosure and remediation. In addressing these issues it is important to heed the position outlined in Loukidelis' [18] report into local governments and the growth of surveillance, which discusses the scope for the provincial *Safety Standards Amendment Act*, 2006 to be used to its full effect, rather than developing piecemeal municipal bylaws that attempt to combat criminal activity. Loukidelis [18] cautions against the

development of municipal bylaws that would "compel businesses to collect, compile, or disclose customers' personal information" suggesting that:

> *"Such [bylaws] should only be adopted as a last resort. Other measures ought to be considered before a bylaw is entertained as a solution. A bylaw should be adopted only where conventional means for achieving the same law enforcement objectives are substantially less effective than the bylaw promises, on clear evidence, to be and the benefits of surveillance substantially outweigh any diminution of privacy inherent in the bylaw's operation."*

The BC provincial *Safety Standards Amendment Act*, 2006, is the legislation that has enabled BC Hydro to provide power consumption information to municipal governments under the grounds of potentially elevated health and safety risks. This has been achieved without contravening *FIPPA*. Consequently, the authors feel it is worth exploring other existing provincial legislation, such as the *BC Building Code*, the *BC Residential Tenancy Act*, and the *BC Homeowner Protection Act*, which all also dictate aspects of safety that apply across the province.

This move towards lobbying for taking provincial responsibility for these issues has already begun in other areas within Canada. In 2007 there were discussions in Toronto regarding the development of a provincial, centralized registry of indoor marihuana grow operations to help inform and protect consumers in the same sense as information regarding other hazards (e.g., flooding risks, and Urea Formaldehyde Foam Insulation). Indeed, it would make sense for such a registry, motivated by maximising public safety, to incorporate information about factors such as vermiculite, which are neither banned substances nor latent defects, but do pose potential liability risks at a later date if not disclosed when selling a property [as dicussed by 19]. Furthermore, Garis [16] discusses how "The Alberta Real Estate Association (AREA) is actively lobbying the provincial government for consistent standards for assessing and remediating drug houses to protect future property owners from structural and health problems." As Lee and Rollins [10] explain:

> *Inconsistent interpretation of remediation procedures and techniques can lead to inadequate remediation resulting in a continued health and safety risk for occupants, or a costly and unnecessary sterilisation of a property. Recommendations adopted by the Province would remove inconsistencies and facilitate a more cohesive remediation process. They would also assure prospective property buyers in Alberta that all properties identified as illegal drug operations have been restored to a provincial standard [10]*

Recommendations

In conclusion, in addition to supporting the proposed MMPR, there are three recommendations from this research note. In combination, these amendments to current processes would simultaneously address the damage done to existing residential properties as a result of MMAR-licenced indoor marihuana production and better enable Canadian residents to make informed decisions about the potential health and safety risks posed by residential buildings they are looking to purchase, lease or rent. As suggested from the outset, these recommendations make no comment about the legality of inappropriate activity in properties. The three recommendations are as follows:

1. *Develop a centralised, consistent process for disclosure of property history information for those buildings previously used as sites for the production of marihuana under the MMAR*

A consistent process needs to be developed, which does not breach *FIPPA*, for ensuring that information about inappropriate use and remediation of properties used as sites for the licenced production of marihuana under the MMAR. This information needs to be made available in a timely, straightforward manner. This process

would need to enable prospective property purchasers/lessees/tenants to learn about the relevant history of the property to ensure they could make an informed decision about the potential health and safety risks.

2. *Develop a centralised, consistent process for remediation of inappropriately used buildings previously used as sites for the production of marihuana under the MMAR*

As the situation currently stands, even if potential purchasers/tenants are able to learn about the history of inappropriate use and/or remediation at a specific property, they are unable to be certain that the property has been safely and completely remediated. In order to address this issue, it is recommended that a consistent process for remediation is developed that enables each remediation situation to be addressed in its own right, whilst providing a framework for determining:

- What is required to be tested and remediated?
- Who is responsible for completing the remediation process?
- What is the time frame within which remediation must take place?
- Who is responsible for assessing the completeness of the remediation process and guaranteeing it has been undertaken?
- Who is responsible for determining when buildings are safe to be occupied following remediation?
- What are the impacts, if any, for the insurability of the building?
- How and where is this documented?

3. *Implement these disclosure and remediation processes in a top-town manner, founded in existing provincial and/or federal legislation*

To address municipal boundary issues about information sharing and to avoid unnecessary legislation being developed, it is recommended that the disclosure process and remediation process for dwellings used as licenced production sites under the MMAR both be implemented in a top-down manner, directed by provincial and/or the federal governments, and founded on the existing legislative framework.

As stated previously, the proposed MMPR program does not go far enough to ensure the damage done to existing building stock under the MMAR will be redressed. The authors are fully supportive of the MMPR's planned moved towards licenced commercial production of medical marihuana and a phasing out of existing licences for individuals to produce marihuana in homes and communities. However, for the reasons outlined above, the authors believe the Government of Canada also needs a comprehensive process for disclosing and remediating the residential properties that have already been utilized to produce medical marihuana under the MMAR, thus ensuring future health and safety issues do not arise as a result of this Federal programs implementation to date.

References

[1] Health Canada. *Drugs and health products: proposed improvements to Health Canada's Marihuana Medical Access Program*. 2011 17 December, 2012 [cited 2013 January 23]; Available from: http://www.hc-sc.gc.ca/dhp-mps/consultation/marihuana/_2011/program/consult-eng.php#aa.

[2] Minister of Justice, *Controlled Drugs and Substances Act, S.C.1996, c.19*, Canadian Ministry of Justice, Editor 2012: Ottawa, ON.

[3] C. Vaughan, *Queries about data for MMAR, Email communication to Fire Chief Len Garis, received on January 24 2013*, 2013, A/ Senior Policy Analyst Bureau of Medical Cannabis Controlled substances and Tobacco Directorate HECSB Health Canada.

[4] Statistics Canada. *Population by year, by province and territory*. 2012 2012-09-27 [cited 2013 January 24]; Available from: http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/demo02a-eng.htm.
[5] Government of Canada. *Canada Gazette: Part I, Vol. 146, No.50 - December 15, 2012: Marihuana for Medical Purposes Regulations*. 2012; Available from: http://gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/reg4-eng.html.
[6] L. Garis, *Memorandum for Mayor and Council: MMAR-Licenced Medical Marijuana Growing Operations within the City of Surrey*, 2013, Surrey Fire Services: City of Surrey, BC, Canada. p. 2.
[7] Letter from the Access to Information and Privacy Divison Health Canada sent to Carole Richardson from the City of Surrey, *Response to Access to Information request*, December 14, 2012, Amanda Wilson, Director, Access to Information and Privacy Division, Health Canada: Ottawa. p. 2.
[8] L. Garis and J. Clare, *Responding to unhealthy properties: developing a contralized, consistent process for community safety*, 2011, A discussion paper produced for the Fraser Valley Real Estate Board: Surrey. p. 15.
[9] D. Plecas, J. Diplock, and L. Garis, *Revisiting the issues around commercially viable indoor marihuana growing operations in British Columbia*, 2012, Centre for Public Safety and Criminal Justice Research, University of the Fraser Valley: Abbotsford. p. 29.
[10] T.G. Lee and K. Rollins, *Recommendations for the assessment and remediation of properties used as illegal drug operations*, 2009, Report prepared by Lee and de Ridder Architects and Indoor Air Quality Management for Alberta Real Estate Association (AREA): Calgary.
[11] Letter from the Information and Privacy Commissioner of BC, Sent to the Fire Chief Len Garis Surrey Fire Services, Editor November 22, 2007.
[12] Email from the Executive Director of the Office of the Information and Privacy Commissioner of BC, Sent to the Fraser Valley Real Estate Board Communications Department, Editor June 24, 2008.
[13] L. Garis, et al., *Community Response to Marijuana Grow Operations: A Guide Towards Promising Practices*, 2009, City of Surrey: Surrey BC. p. 32.
[14] BC Ministry of Environment. *An introduction to contaminated sites in British Columbia*. 2009; Available from: http://www.env.gov.bc.ca/epd/remediation/fact_sheets/pdf/fs01.pdf.
[15] L. Garis and J. Bond, *Disclosure of controlled substance properties and the Freedom of Information and Protection of Privancy Act*, 2010, Surrey Fire Services: City of Surrey. p. 4.
[16] L. Garis, *Improving the remediation process for marijuana grow operations: a discussion paper*, 2010, University of the Fraser Valley, School of Criminology. p. 9.
[17] Canada Mortgage and Housing Corporation, *A discussion paper on indoor air quality investigations of houses used for marijuana grow operations*, in *Research Highlight*2007, Canada Mortgage and Housing Corporation: Ottawa. p. 4.
[18] D. Loukidelis, *Local Governments and the Growth of Surveillance*, 2006, Office of the Information and Privacy Commissioner of British Columbia: Victoria.
[19] The Canadian Real Estate Association, *Vermiculite insulation and asbestos: information for REALTORS*, 2005, The Canadian Real Estate Association: Ottawa, Ontario.

Author Biographical Information

Joseph Clare, Ph.D., is the strategic planning analyst for the Surrey Fire Service, an Associate Professor in the Crime Research Centre, University of Western Australia, and a member of the Institute of Canadian Urban Research Studies, Simon Fraser University. Contact him at joe.clare@uwa.edu.au.

Len Garis is the Fire Chief for the City of Surrey, B.C. and is an Adjunct Professor in the School of Criminology and Criminal Justice at the University of the Fraser Valley and a member of the Institute of Canadian Urban Research Studies, Simon Fraser University. Contact him at Len.Garis@ufv.ca.