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MEDICAL MARIHUANA UPDATE

NOVEMBER 29, 2013

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I. INTRODUCTION

The issues surrounding the growing and distribution of medical marihuana have been of particular interest to local governments over the recent years as a result of a proliferation of marihuana grow operations in residential areas throughout the Province. Local governments will soon have to address those issues in the context of a new Federal regime that Health Canada states is at least partially in response to concerns raised by local governments and law enforcement.

In this paper, we discuss the legal authority of local governments in relation to medical marihuana production facilities and canvas the issues that local governments will need to consider in an effort to develop a policy to address the issues that will likely be associated with the implementation of the new Federal *Marihuana for Medical Purposes Regulation*, SOR 2013-119, (the "MMPR") as of April 1, 2014.

II. THE *MMPR*

As you know, the MMPR will entirely replace the current Federal *Marihuana Medical Access Regulations*, SOR 2001-227, (the "MMAR") as of April 1, 2014, and fundamentally changes the regulatory regime in relation to medical marihuana.

Under the MMAR, where an individual had obtained an Authorization to Possess Marihuana for Medical Purposes, Health Canada either issued that individual a personal use production license to grow marihuana for his own medical purposes or issued another individual a designated person production license to grow marihuana for the medical purposes of the individual that had obtained the Authorization to Possess Marihuana for Medical Purposes. Under this regime, there became a proliferation of small medical marihuana production operations throughout the Province. As a result of this proliferation of operations throughout the Province, local governments and law enforcement became concerned that such operations, generally carried out in residential areas, created inappropriate risks to the health, security and safety of the public.

With the replacement of the MMAR with the MMPR on April 1, 2014, all personal use production licenses and designated person production licenses under the MMAR will come to an end. As of April 1, 2014, all production and distribution of medical marihuana will be by facilities licensed by Health Canada under the MMPR. These new licensed facilities will have to undertake all production, storage, and distribution of medical marihuana indoors, with the facilities meeting certain security measures specified by Health Canada relating to the control of access to the facilities, control of access to restricted areas of the facilities, visual monitoring of the facilities and the perimeter of their sites, intrusion detection systems for the facilities and the perimeter of their sites. In this regard, the overarching security requirement imposed by

Health Canada is that the facilities and their sites be designed in a manner that prevents unauthorized access. With respect to the distribution of medical marihuana, these new facilities will not be permitted to sell medical marihuana from a storefront or retail outlet, but will distribute the medical marihuana by shipping service (that includes a means of tracking the package during transit) to a registered authorized user, to a medical practitioner or facility responsible for the care of an authorized user or to an authorized pharmacist.

Health Canada has issued statements that the replacement of the MMAR with the MMPR was partially as a result of the concerns raised by local governments and law enforcement regarding inappropriate risks to the health, security and safety of the public arising from the proliferation of small scale medical marihuana production operations in residential areas. While, in those statements, Health Canada indicates that medical marihuana production facilities licensed under the MMPR are more appropriately carried out on agricultural, commercial or industrial lands, the MMPR does not contain any substantive provisions that implement that policy. Rather, the MMPR simply requires the applicant for a license to notify, before submitting the application, the local government, local fire authority and local law enforcement of the name of the applicant, the date on which the applicant will submit the application, the activities for which the license is being sought and the address of the site and of each building on the site at which the applicant proposes to conduct the proposed activities. In this regard, in its issued statements, Health Canada has indicated that local bylaws will not be considered as part of Health Canada's review of license applications. Rather, Health Canada has stated that licensed facilities will be subject to local bylaws, which will have to be enforced by the local government.

III. THE AUTHORITY TO PROHIBIT MEDICAL MARIHUANA PRODUCTION FACILITIES

A. The General Power to Prohibit Land Uses

Pursuant to section 903(1)(c) of the *Local Government Act*, local governments have the broad power to regulate the use of land and buildings within a zone. This power to regulate the use of land and buildings in a zone is broadened further by section 903(4), which provides that this power to regulate includes the power to "prohibit any use or uses in a zone".

In *Common Exchange Ltd. v. Langley (City)*, [2000] B.C.J. No. 2473, the BC Supreme Court upheld an amendment to the City's Zoning Bylaw that permitted the operation of adult businesses and pawnbrokers only in one zone, and within an enclosed shopping mall. The owner of a pawnshop argued that the true purpose and effect of the bylaw was to prohibit the operation of pawnbrokers and that the City acted on improper motives and in bad faith. The Court upheld the bylaw finding that it was directed at the regulation of land use. The Court was not satisfied that the City's purpose in passing the bylaw was for any ulterior motive, and commented that the evidence supported that the City Council was concerned about the proliferation of such businesses, particularly in view of events recently transpired in Vancouver and Surrey with respect to such businesses. The Court further held that the then *Municipal Act* was to be interpreted purposively to permit the City to prohibit a use in all zones in the City.

As the provisions of the *Local Government Act* are the same as the provisions of the then *Municipal Act*, *Common Exchange Ltd.* is authority for the proposition that local governments have the general power to prohibit a land use within the local government's territorial jurisdiction and, in our view, a local government has the authority to do so.

However, as the decision in *Common Exchange Ltd.* illustrates, a decision by a local government to prohibit a use in all zones must be based on proper planning purposes, and not extraneous or irrelevant considerations.

In the context of the prohibition of medical marihuana production facilities, which fall within the Federal criminal law jurisdiction, it is important to recognize that it is unconstitutional for local governments to use their powers to enforce the criminal law. There are many examples of cases where local governments unlawfully encroached into the Federal criminal law jurisdiction and, as a result, their bylaws were held to be invalid. For example, in *Maple Ridge (District) v. Meyer* (2000), 777 B.C.L.R. (3d) 171 the BC Supreme Court considered a bylaw that had the effect of prohibiting nudity in public pools. The Court found that the effect and purpose of the bylaw was an attempt to stiffen the existing Criminal Code provisions aimed at nudity, indecency and obscenity and lacked a clear local government objective. In essence, the Court found the bylaw to be a colourable attempt to regulate morality and therefore displace the Federal jurisdiction over the criminal law. As a result, the Court struck down the applicable section of the bylaw. Thus, any move to prohibit medical marihuana production facilities by a local government must have a clear local government objective, and not be for the purpose of regulating morality.

With respect to the prohibition of medical marihuana production facilities, there are a number of potential limitations on the general power of a local government to prohibit land uses within its territorial jurisdiction. Those limitations are discussed below.

B. Limitations on the General Power to Prohibit Land Uses

1. The Interplay between Federal and Provincial Legislation

Where there is interplay between Federal and Provincial jurisdiction in respect of a matter, assuming that there is no issue as to the constitutional jurisdiction of each level of government to legislate in relation to the matter, the question arises as to whether the Federal jurisdiction takes precedence over the Provincial jurisdiction.

(a) The Doctrine of Interjurisdictional Immunity

The first step in answering the question as to whether Federal jurisdiction takes precedence over Provincial jurisdiction is to determine whether the doctrine of interjurisdictional immunity applies. Here, the question is whether Federal jurisdiction over the matter is "absolutely indispensable or necessary" to the discharge by the Federal government of its constitutional authority. If it is, the matter will be immune from Provincial legislation; even where there is a

vacuum of Federal legislation in relation to the matter. If it is not, then both the Federal and Provincial legislation will apply to the matter.

In the context of medical marihuana production facilities, in order to determine if the doctrine of interjurisdictional immunity ousts a local government's powers to prohibit land uses within its territorial jurisdiction, the question to be asked is whether Federal jurisdiction over the location of medical marihuana production facilities is "absolutely indispensable or necessary" to the discharge by the Federal government of its constitutional authority over the criminal law (the authority under which the Federal government has enacted the MMPR).

In our view, the answer to this question is "no". Given the method adopted in the MMPR for the distribution of medical marihuana by licensed medical marihuana production facilities (by shipping service to a registered authorized user, to a medical practitioner or facility responsible for the care of an authorized user or to an authorized pharmacist, with storefront and retail outlet sales being prohibited), the location of such facilities is irrelevant to the authorized user. It is of little to no import to the authorized user whether his medical marihuana is produced and shipped from Moncton or Vancouver. In this regard, it cannot be said that the location of a facility within a particular local government's territorial jurisdiction is "absolutely indispensable or necessary" to the discharge by the Federal government of its constitutional authority.

(b) The Doctrine of Federal Paramountcy

Where the Provincial legislation survives the application of the doctrine of interjurisdictional immunity, it must then be determined whether the doctrine of federal paramountcy applies. Here, the question is whether there is an impossibility of simultaneous application of both the Federal and Provincial legislation by reason of an operational conflict or because such application would frustrate the purpose of the Federal legislation.

In the context of medical marihuana production facilities, in order to determine if the doctrine of federal paramountcy applies, the question is whether there is an impossibility of simultaneous application of both the Federal legislation and the local government bylaw by reason of an operational conflict or because such application would frustrate the purpose of the Federal legislation.

In our view, the answer to this question is again "no". First, under the MMPR, the Federal government has not addressed the issue of the location of medical marihuana production facilities. The MMPR does not set out any requirements as to the location of such facilities. The MMPR only requires that the location of a proposed facility be identified in an application. Moreover, the MMPR recognizes the importance of the location of a facility to local governments and law enforcement by requiring that applicants give notice to them of the proposed location for a facility. Second, as indicated earlier, given the method adopted in the MMPR for the distribution of medical marihuana by licensed facilities, the location of such facilities is irrelevant. In this regard, it cannot be said that there is an impossibility of simultaneous application of both the Federal legislation and the local government bylaw by

reason of an operational conflict or because such application would frustrate the purpose of the Federal legislation.

2. Section 46 of the Agricultural Land Commission Act

Pursuant to section 46 of the *Agricultural Land Commission Act*, a local government must, in respect of its bylaws, ensure consistency with the *Agricultural Land Commission Act*, its regulations and the orders of the Agricultural Land Commission. Moreover, a local government bylaw that is inconsistent with the Act, its regulations or an order of the ALC is, to the extent of the inconsistency, of no force or effect.

With respect to medical marihuana production facilities, the ALC has issued an Information Bulletin whereby it advises that, in its view, the farming of medical marihuana is a "farm use" as that term is defined in the *Agricultural Land Commission Act* and, as such is permitted in the Agricultural Land Reserve. The ALC goes on to advise that, in its view, uses accessory to that farm use (being necessary and commensurate with the growing of the medical marihuana) are also permitted in the ALR.

In this context, the issue arises as to whether a local government zoning bylaw that prohibits medical marihuana production facilities would be found to be inconsistent with the *Agricultural Land Commission Act* and, as a result of section 46 of the Act, would be of no force or effect.

There are arguments that the prohibition of a particular farm use would not be inconsistent with the *Agricultural Land Commission Act*, its regulations or an order of the ALC. For example, section 46(6) of the Act makes clear that a bylaw that "provides restrictions on farm use of agricultural land … is not, for that reason alone, inconsistent with the Act and the regulations." However, the very language of section 46(6) of the Act is capable of two interpretations in that it refers to "restrictions" on farm use. While, in one sense, the prohibition of a particular farm use may be considered a restriction on farm use generally, in another sense, the prohibition of a particular farm use goes beyond a mere restriction on that use. In our view, on balance, given the purpose of the Act and its regulations, we believe that the courts would interpret the consistency rule in section 46 of the Act broadly, and find that a bylaw that prohibited a particular farm use is inconsistent with the Act and its regulations. As such, we are of the view that a local government zoning bylaw that prohibits medical marihuana production facilities in the ALR would be found to be inconsistent with the Act and its regulations and, as a result of section 46 of the Act, would be of no force or effect

3. Sections 903(5) and 917 of the *Local Government Act*

Sections 903(5) and 917 of the *Local Government Act* both address the powers of a local government to adopt bylaws prohibiting farming in farming areas (as that term is defined in the Act). Section 903(5) provides that a local government must not enact a bylaw that prohibits the use of land for a farm business in a farming area unless the local government has received Provincial approval of the bylaw. Section 917 provides that a local government may adopt a bylaw that prohibits specified farm operations with Provincial approval.

Both sections 903(5) and 917 of the *Local Government Act* were enacted at the time that the Province enacted the *Farm Practices Protection (Right to Farm) Act*. Sections 903(5) and 917 of the *Local Government Act* are only applicable in local governments identified by regulation under Section 918 of the *Local Government Act*. As of today, sections 903(5) and 917 of the Act are only applicable to the Township of Langley, the City of Abbotsford, the Corporation of Delta, and the City of Kelowna.

Based on the legislative debates around the enactment of the *Farm Practices Protection (Right to Farm) Act*, it appears that the legislative intent behind the enactment of sections 903(5) and 917 of the *Local Government Act* was to prevent local governments from using their general powers to restrict farming activities. This legislative intent was accepted by the BC Supreme Court in *Windset Greenhouses (Ladner) Ltd. v. Delta (Corp.)*, [2003] B.C.J. No. 839, where the Court considered a challenge to regulations enacted by Delta relating to greenhouse lighting and heating. It was argued by the Petitioner that the regulations were farm regulations under section 917 of the Act and, as such, required Provincial approval to be valid and enforceable. Delta argued that the regulations were enacted under its broad business regulation powers and did not require Provincial approval. The Court held that the purpose of the legislative regime around farm businesses was to recognize the importance of the farming industry to the Province and its economy, and to establish a more uniform standard of regulation applicable throughout the Province. In this regard, the Court held that "the legislature intended that bylaws respecting the conduct of farm operations as part of farm businesses be adopted under the farm bylaw provisions of section 917 and that they be subject to approval". In addition, the Court commented that Delta's argument that it could enact the regulations under its broad business regulation powers without Provincial approval would clearly frustrate and defeat the very purpose of the legislative regime.

In light of the foregoing, the likely outcome of court proceedings addressing a zoning bylaw that prohibits a farm use would be that the bylaw would be set aside unless sections 903(5) and 917 of the *Local Government Act* have been made applicable by regulation to the local government that adopted the bylaw, and the bylaw received Provincial approval.

C. Conclusion

In conclusion, while local governments have the general power to prohibit land uses within their territorial jurisdictions, local governments cannot do so where it would be inconsistent with the *Agricultural Land Commission Act*, its regulations or an order of the ALC, or would fall within the powers afforded under sections 903(5) and 917 of the *Local Government Act* (unless the local government was identified by regulation under section 918 of the Act, and the bylaw enacting the prohibition received Provincial approval).

In the context of medical marihuana production facilities, we are of the view that it is likely that local governments would be required, at the very least, to permit medical marihuana production facilities on all lands within their territorial jurisdiction that are located within the ALR.

IV. THE AUTHORITY TO REGULATE MEDICAL MARIHUANA PRODUCTION FACILITIES

A. Local Government Zoning Regulatory Powers

As can be seen from the foregoing, it is likely that local governments must, at the very least, permit medical marihuana production facilities on all lands within their territorial jurisdiction that are located within the ALR.

In the circumstances, local governments will want to consider whether they wish to permit such facilities in other parts of their territorial jurisdiction. In considering this issue, local governments must be mindful that they can only exercise their zoning powers for proper planning purposes. There are the obvious planning considerations that come to mind when considering where such facilities should be permitted (e.g., public health and safety considerations, impact on the public from nuisances associated with such facilities, and the impact of such facilities on community services). In addition, local governments should consider the impact of such a decision on their tax base. The BC Assessment Authority has advised that medical marihuana production facilities licensed under the MMPR will qualify to be classed, at least partially, as farm and, as such, will attract significantly lesser taxes than if they were classed as commercial or industrial.

Once local governments have considered in which zones they wish to permit medical marihuana production facilities, local governments should turn their minds to any special zoning considerations that may be applicable to such facilities. For example, local governments should consider if any special setback or screening requirements are warranted given the public health and safety and nuisances issues associated with such facilities.

B. Municipal Business Regulatory Powers

1. Medical Marihuana Production Facilities as a Business

There is little doubt that a medical marihuana production facility is a business for the purposes of a municipality's business regulatory powers. As such, a municipality's business regulatory powers can be used to regulate such facilities. The foregoing being said, it is important that those regulations not go beyond the scope of the municipality's authority (e.g., the regulations cannot relate to the regulation of a farm business and cannot have prohibitory effect).

2. Municipal Business Regulation Powers

Pursuant to section 8(6) of the *Community Charter*, municipalities have the authority, by bylaw, to regulate in relation to business. However, before adopting a bylaw regulating business, the municipality must give notice of its intention to adopt the bylaw and provide an opportunity for persons who consider that they are affected by the bylaw to make representations to council in relation to the bylaw. Also, after adopting the bylaw, the council must make available to the public, on request, a statement respecting the council's reasons for adopting the bylaw.

In considering whether to adopt a business regulation bylaw regulating medical marihuana production facilities, municipalities must again be mindful that they can only exercise their powers for proper municipal purposes. There are the obvious municipal considerations that come to mind when considering whether such facilities should be subject to specific business regulations (e.g., public health and safety considerations, including the security of the facilities, and the impact on the public from nuisances associated with such facilities). However, before enacting such regulations, municipalities should consider the effectiveness of the measures imposed by Health Canada as a condition of licensing such facilities in addressing those concerns. For example, as set out earlier, under the MMPR, Health Canada has stringent requirements for the security of such facilities and the site on which they are located, with the overarching security requirement being that the facilities and their sites be designed in a manner that prevents unauthorized access. In its *Directive on Physical Security Requirements for Controlled Substances* and its *Guidance Document – Building and Production Security Requirements for Marihuana for Medical Purposes* Health Canada addresses the manner in which the security requirements of the MMPR are to be achieved. Where a municipality is satisfied that these requirements achieve municipal purposes, the municipality may wish to leave the enforcement of such requirements to Health Canada.

Where a municipality wishes to address concerns regarding medical marihuana production facilities through its business regulation powers, it may do so on an across the board basis through the adoption of generic business regulations for all such facilities. However, where a municipality wishes to address specific considerations that may arise in relation to specific locations for such facilities, the municipality will need to do so through its powers relating to business licensing.

3. Municipal Business Licensing Powers

(a) Business License Application Requirements and Conditions

As part of its business licensing powers, a municipality has the authority to establish terms and conditions that must be met for obtaining, continuing to hold or renewing a business license. The usual manner in which this authority is exercised is through license application requirements established by bylaw.

Where a municipality wishes to address specific considerations that may arise in relation to specific locations for medical marihuana production facilities, the municipality will first need to include in its requirements for business license applications requirements relating to the specific matters that the municipality wishes to consider on a site specific basis. Again, such matters may include issues relating to public health and safety considerations, including the security of the facilities, and the impact on the public from nuisances associated with such facilities. At this stage, the municipality can require that the applicant provide the municipality with a copy of its license from Health Canada such that the municipality can consider the effectiveness of Health Canada's requirements on issues of concern to the municipality. Having required such information as part of an application, the municipality will need to include within

the bylaw the ability for the issuer of the license to consider the information provided and impose, if necessary, terms and conditions on the license that address the public health and safety and nuisance issues. In this manner, the municipality can effectively take into account and address through the licensing process specific considerations that may arise in relation to specific locations for such facilities.

(b) Business License Suspension and Revocation

Pursuant to section 60 of the *Community Charter*, a municipality may refuse to issue a business license for a medical marihuana production facility for reasonable cause and, where a municipality has issued a business license for such a facility, the municipality has the authority to suspend or revoke that license for reasonable cause. Prior to exercising any authority under section 60 of the *Community Charter*, the municipality must give the license holder notice of the proposed action and an opportunity to be heard.

The foregoing being said, a municipality can only refuse to issue a business license based on matters in respect of which it has the specific power to regulate, such as health and safety matters.

In *Prince George (City) v. Payne* [1977] S.C.J. No. 53, the Supreme Court of Canada considered whether the City Council's refusal to issue a business license for an "adult boutique" store, which refusal appeared to be based on moral grounds, was within its jurisdiction. The Court held that Council's view that the moral welfare of the community required protection was an irrelevant consideration in deciding whether a business license should be granted or withheld. To withhold a license on other than licensing considerations would be to withhold the license unreasonably. The Court held that Council's refusal to issue a business license was outside its statutory authority and was therefore invalid. The Court specifically endorsed the use of the zoning power to eliminate this type of land use provided that the prohibition was based on proper land use purposes.

The decision to refuse, suspend or revoke a business license must be based on proper municipal considerations. For example, public health and safety considerations, including the security of the facilities, and the impact on the public from nuisances associated with such facilities are valid municipal considerations.

In addition, in considering whether to refuse, suspend or revoke a business license, the management of the business is a relevant consideration for the municipal council.

In *377050 B.C. Ltd. (c.o.b. the Inter-City Motel) v. Burnaby (City)*, [2007] B.C.J. No. 661, the City refused to renew a business license for a motel. The motel attracted unsavoury activities and the operators of the motel were complacent with those activities. The City did not base its decision on the contravention of any particular bylaw or policy; rather, it based its decision on "poor management of the operation of the motel giving rise to concerns for public safety, the enjoyment of use of neighbouring properties and a high demand for police services related to the business." The BC Court of Appeal upheld the City's decision to refuse the business license.

In *Poco Cabaret Ltd. v. Coquitlam (City)* [1998] B.C.J. No. 2680, the City revoked the Petitioner's business license based on concerns about its operation and impact on the surrounding area. The concerns included RCMP reports of alleged violations of liquor regulations, a shooting at the club and problems outside the building after closing time. The Licensing Inspector's report cited problems with the management of the business which included allegations of liquor control regulation violations, fire safety and building violations. The Court held that, based on the voluminous RCMP reports, Liquor Branch report and the Licencing Inspector's report, there was adequate material before the City from which it could conclude that there was cause for revocation.

Local governments therefore have a broad discretion to refuse to issue a business license or to suspend or cancel a business license. The decision must, however, be reasonable and supported by proper business licensing considerations.

V. THE TRANSITION TO THE MMPR

As indicated earlier, with the replacement of the MMAR with the MMPR on April 1, 2014, all personal use production licenses and designated person production licenses under the MMAR will come to an end, and all production and distribution of medical marihuana will be by facilities licensed by Health Canada under the MMPR.

A review of the MMPR indicates that there may be a lack of sufficient provision for the transition period between when personal use production licenses and designated person production licenses under the MMAR come to an end and when medical marihuana production facilities licensed under the MMPR will be in a position to supply the needed amounts of medical marihuana. This apparent lack of a sufficient transition period may have significant impact on the enforcement of the termination of personal use production licenses and designated person production licenses under the MMAR.

The issue of access and supply to medical marihuana has been the subject of numerous constitutional challenges. In the end, the courts have repeatedly held that individuals who can demonstrate a medical need for marihuana have a constitutional right to it. For example, in *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104, the Ontario Court of Appeal considered the issue of whether the MMAR breached section 7 of the *Canadian Charter of Rights and Freedoms*, the right to life, liberty and security of the person. The Court concluded that the failure to provide practical access to medical marihuana did violate section 7, and was not saved by section 1.

In the event that an individual who has obtained an Authorization to Possess Marihuana for Medical Purposes is unable to obtain medical marihuana during the transition period between when personal use production licenses and designated person production licenses under the MMAR come to an end and when medical marihuana production facilities licensed under the MMPR will be in a position to supply the needed amounts of medical marihuana, it is likely that any enforcement proceedings brought in relation to the termination of personal use production licenses and designated person production licenses under the MMAR would be stayed until

medical marihuana production facilities licensed under the MMPR are in a position to supply the needed amounts of medical marihuana. In such an event, it is possible that such a finding could have an impact on the ability of local governments to enforce their bylaws as they relate to properties that contain medical marihuana production operations that were previously operated under personal use production licenses and designated person production licenses under the MMAR.

VI. CONCLUSION

The issues surrounding the prohibition or regulation of medical marihuana production facilities licensed under the MMPR are numerous and complex. It would be wise for local governments seeking to address the issues associated with such facilities to seek legal counsel throughout the process to ensure that they are not straying into questionable territory.

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