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CLIENT BULLETIN

Changes in Federal Marihuana Regulation

Late in 2012 the federal Minister of Health announced pending changes in federal policy regarding the production of marihuana for medicinal purposes. Essentially, the government is proposing to abandon the "personal use license" approach that has led to the establishment of thousands of individual "grow-ops" around the country, and the related "designated person licenses", in favour of the licensing of more centralized, commercial-scale indoor marihuana production facilities. The government would close its marihuana production facility in Saskatchewan and get out of the business of marihuana sales, existing personal use licences and designated person licences (under which non-patients were allowed to grow marihuana to meet someone else's medical needs) would expire on April 1, 2014, and new licence applications under the existing regulations would not be accepted after September 30, 2013. While the government is not changing the basic rule that possession and use of marihuana for medicinal purposes requires a prescription, it is proposing to eliminate the closed list of categories of conditions or symptoms for which marihuana may be prescribed, leaving this up to the patient's physician to determine. Persons for whom the use of marihuana has been prescribed for medicinal purposes would be able to purchase the drug in dried form from licensed suppliers in person, or by registered mail or bonded courier. If the take-up of personal use licences is any indication – the number of licensees increased nationally from 477 in 2002 to about 25,000 in 2012 - we should expect that there will be a high degree of interest in commercial marihuana production.

These changes have important implications for Canadian municipalities, which were heavily involved in efforts to have the federal government re-assess the existing regulatory scheme. Some B.C. municipalities have amended their zoning regulations to prohibit marihuana production by holders of personal use or designated person licences – a prohibition that engages *Charter of Rights and Freedoms* issues – while others have attempted to expressly accommodate such production as a use accessory to residential uses where required for medical purposes, while prohibiting production facilities (such as marihuana dispensaries and so-called "compassion clubs") having a larger scale or lacking a federal licence. Many municipalities have adopted bylaws that address the remediation of residential premises that have been damaged by marijuana production activities, many of which are suspected of operating under the cover of federal personal-use or designated-person licences, and attempt to recover municipal bylaw enforcement and policing costs as well. All of these approaches will have to be carefully reconsidered in view of the proposed changes in federal law.

Under the new federal scheme, we believe that federally licensed marihuana producers would have to comply with all applicable provincial and municipal regulations, including building and zoning bylaws. In regard to zoning, this will immediately raise questions as to whether this land use – which is essentially a horticultural use with onerous security requirements – is permitted by existing commercial, industrial or agricultural zoning regulations; if so, whether the use should continue to be permitted given the particular land use impacts associated with the production of a federally controlled substance (which might be different from those associated with the production of other plant-based medical products like ginseng); and if not, whether and where the use might be suitable in the municipality or rural area in question. (Ordinarily a commercial drug production use of this type would not fit within the regulations applicable to residential zones.) Relevant considerations will include whether existing zoning already permits the commercial production of drugs or controlled substances other than marihuana (usually this would be a manufacturing use), and whether there is anything different about marihuana production that warrants different zoning treatment; whether the federal government's security requirements for these facilities can be accommodated given building form and character requirements (for example the government requires physical barriers such as fencing); and whether requirements for air filtration systems and an uninterruptible supply of power for on-site security systems (which will necessitate the installation and use of on-site generators) can be accommodated without creating a local nuisance.

The case law on the *Controlled Drugs and Substances Act* has established that individuals who need marihuana for medical purposes have a right to reasonable access to a legal source of marihuana under the *Canadian Charter of Rights and Freedoms*, and the proposed changes to federal regulations are an attempt on the part of Health Canada to accommodate this right. Municipalities are also subject to the *Charter*, and we have in the past suggested that local zoning regulations that prohibit the growing of medical marihuana under a personal use licence may be unconstitutional. Whether municipalities are required to accommodate commercial marihuana production under the proposed new federal scheme is a different question. As a general proposition, it is not necessary for a local government to permit every conceivable land use in its zoning regulations. If patients with marihuana prescriptions are able to fill the prescription by registered mail or bonded courier, or by dealing with a licenced producer/supplier in a neighbouring municipality, they might be considered to have reasonable access to the drug such that a local prohibition of this use would not be a contravention of the *Charter*.

The proposed federal regulations would not permit marihuana production in residential dwellings, and would permit only indoor marihuana production and storage. Applicants for federal licences (which would be good for three years, and renewable) would be obliged to give notice of their application to the local police force, local fire authority and local government. The proposed regulations do not require applicants to make any representation to Health Canada as to whether marihuana production and storage are permitted under local zoning regulations, or expressly require or allow Health Canada to refuse to approve a licence application if it would not comply with local zoning, but local governments should obviously advise Health Canada as to any zoning issues as soon as they receive notice of a licence application from the applicant (providing a copy of that advice to the applicant). Our review of the proposed regulation suggests that Health Canada will have discretion not to approve a licence if the appropriate local zoning is not in place.

In the event that a federal licence is issued notwithstanding that the use is not permitted by the applicable zoning regulations, we see no reason that the zoning regulations would not be enforceable should the licence holder undertake the use.

Health Canada's regulatory impact analysis statement for the proposed regulations states that "the proposed [Marihuana for Medical Purposes Regulation] would enable an entirely new industry to be created in Canada". Some B.C. municipalities have already received inquiries from entrepreneurs inquiring as to whether and where commercial marihuana production would be permitted by existing zoning regulations. Municipalities should expect that business enterprises will be aggressive in establishing these uses, given the significant demand for the product, the scarcity of legal supply that can be expected when existing personal-use licenses are phased out, and the financial advantages that will accrue to early entrants into the industry. Some municipalities may see these changes as opening opportunities for economic development and the creation of long-term local employment, while others may see the social, environmental and law-enforcement implications of marihuana production in local commercial-scale facilities as something to be avoided.

Local governments should also be considering the effect of the expiry of existing personal-use and designated-person licences, including whether the continuation of marihuana production in previously licensed premises would constitute an offence under local bylaws, whether police forces will be enforcing the *Controlled Drugs and Substances Act* in relation to such premises, or whether the local government will be left to consider on its own whether to attempt to enforce local bylaws in relation to such activities.

The new federal regulations and related material, including draft building and production security requirements for marihuana production facilities, can be reviewed on the Health Canada website at

http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2012/2012-193-eng.php

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