THE GROWING AND SELLING OF MEDICAL MARIJUANA: A LOCAL GOVERNMENT'S ROLE

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I. INTRODUCTION

In recent years, medical marijuana dispensaries have been opening up across British Columbia. To date, there are approximately 8 dispensaries across the province. This is far less than the approximately 800 dispensaries in Los Angeles alone. The number of dispensaries, however, will no doubt grow. There has also been a proliferation of marijuana grow operations in British Columbia. In particular, the number of grow operations in residential neighbourhoods has exploded. These issues raise several questions for local governments such as whether the dispensaries and grow operations are operating legally for medical marijuana purposes and what is the scope of a local government's authority to regulate or prohibit such dispensaries and grow operations in their communities? This paper seeks to explore some of these questions in the context of a local government's zoning and business regulation powers.

II. FEDERAL JURISDICTION

Pursuant to s. 91(27) of the *Constitution Act, 1867*, the federal government has exclusive legislative jurisdiction over the criminal law. The criminalization of marijuana and other illicit drugs is therefore squarely within the jurisdiction of the federal government. For example, the federal *Controlled Drugs and Substances Act* prohibits possession of a controlled substance through section 4(1), "[e]xcept as authorized under the regulations, no person shall possess a substance included in Schedule I [including cannabis], II or III." Section 5(1) prohibits trafficking in a controlled substances: "[n]o person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance."

A. Medical Marihuana Access Regulations

The federal government has provided an exemption to criminal penalties for people who are authorized to grow, possess and distribute marijuana under the *Medical Marihuana Access Regulations*, SOR/2001-227 ("*MMA Regulations*") established pursuant to the *Controlled Drugs and Substances Act*. Under s. 11(1) of the *MMA Regulations*, a person may possess marijuana up to a specified amount through the issuance of an "authorization to possess" by Health Canada. A person holding an authorization to possess (an "authorized person") currently has the following ways of obtaining medical marijuana:

1. An authorized person may be granted a personal-use production licence whereby the holder is permitted to grow up to a specified number of marijuana plants;

2. An authorized person may apply for a designated-person production licence whereby the designated-person grows and provides marijuana to the authorized person, pursuant to the authorization to possess. The designated-person must not produce for more than two authorized persons at a given time; and

3. An authorized person may obtain marijuana directly through Health Canada which obtains marijuana through a licensed dealer in Saskatchewan.

B. Compassion Clubs

Medical marijuana dispensaries are often run by organizations called "compassion clubs". Compassion clubs vary in size, organizational structure and the services they provide. Some compassion clubs are registered as non-profit societies. Compassion clubs provide access to marijuana to persons who either have been authorized by Health Canada to possess marijuana under the *MMA Regulations* or who comply with alternative criteria specified by the club itself such as providing a letter from a medical practitioner to confirm a diagnosis. Compassion clubs are not legally authorized to possess, produce or distribute marijuana for medical purposes under the *MMA Regulations*. They claim, however, that the *MMA Regulations* are unduly restrictive and act as a barrier to access marijuana for medical purposes. The stated purpose of these clubs is to ameliorate the difficulty in finding a legal source of marijuana for persons authorized under the *MMA Regulations* while also broadening the range of persons who have access to marijuana for medical purposes. There are also grow operations that grow marijuana in large quantities for compassion clubs. These grow operations are not legally authorized to possess, produce or distribute marijuana for medical purposes under the *MMA Regulations*.

The issue of access and supply to medical marijuana under the *MMA Regulations* has been the subject of constitutional challenge and is an issue of great debate. In *R. v. Beren* [2009] B.C.J. No. 618, the accused was charged with production, possession and controlling marijuana for the purpose of trafficking. The accused argued that he produced marijuana in large quantities to supply the marijuana to a compassion club that distributed marijuana to persons with medical conditions. The accused argued that the *MMA Regulations* breached s. 7 of the *Canadian Charter of Rights and Freedoms,* the right to life, liberty and security. The court found the accused guilty of the charges. However, the court declared that the sections of the *MMA Regulations* that restricted persons to only produce for one person and prohibited licence holders to produce marijuana in common with other licence holders was contrary to s. 7 of the *Charter of Rights* and therefore invalid. The court stayed the effect of the declaration to provide the federal government time to put in place appropriate monitoring and enforcement mechanisms in relation to compassion clubs.

The federal government has since amended the *MMA Regulations* to allow for a designated person to produce for up to two authorized persons and to allow for a maximum of four production licences at one site. To date, however, the federal government continues not to licence or regulate compassion clubs to possess, produce or distribute marijuana for medical

purposes. The issue of access and supply to medical marijuana under the *MMA Regulations* and the role of compassion clubs therefore remains a live constitutional issue.

III. LOCAL GOVERNMENT JURISDICTION

The *Constitution Act, 1867* gives no powers to local governments. Local governments are delegated all of their authority by the province. For example, the province has legislative jurisdiction over land use management. The province of British Columbia has delegated local governments their zoning powers through the *Local Government Act*.

It is unconstitutional for local governments to use their powers to enforce the criminal law. There are many examples of cases where local governments have unlawfully encroached into federal criminal jurisdiction. For example, in *Maple Ridge (District) v. Meyer* (2000), 777 B.C.L.R. (3d) 171 (B.C.S.C.) at issue was 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. The court commented that the bylaw lacked a clear provincial objective and suggested a colourable attempt to regulate morality and therefore displace the federal jurisdiction of criminal law. The court held the applicable section of the bylaw to be invalid.

Local governments must therefore be careful in enacting and enforcing bylaws in respect of marijuana dispensaries and grow operations not to be perceived as enforcing the criminal law or basing their decision on moral or other irrelevant considerations. Local governments may get pressure from the police and the community at large not to allow marijuana dispensaries and grow operations to operate in their communities because they are "illegal". This is an enforcement issue, however, that falls squarely under the jurisdiction of federal law enforcement agencies. Any bylaw based on such rationale will be held to be outside a local government's authority and therefore invalid. The Supreme Court of Canada commented in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board*, [1987] 2 S.C.R. 59 as follows:

> "… it is [not] open to the province to re-enact the criminal provision and accomplish the same result by effectively "convicting" the licensee of a criminal offence already existing in federal law, under its own process and in its own forum."

That being said, local governments may enact and enforce bylaws in respect of marijuana dispensaries and grow operations if such bylaws are based on proper municipal objectives within the scope of a local government's authority and only incidentally affects the federal interest in the regulation of such matters.

The first step in resolving a question involving the constitutionality of legislation in relation to the division of powers begins with an inquiry into the true nature of the law in question for the purpose of identifying the "matter" to which it essentially relates. The courts traditionally refer to this as the "pith and substance" of the legislation. There are generally two aspects to the

characterization of the pith and substance of a law: 1) the purpose of the legislation and 2) its effect. The purpose of a law may be determined by examining intrinsic evidence, like purposive clauses and the general structure of the legislation. It may also be determined by examining extrinsic evidence like the minutes of municipal council meetings and reports considered by municipal council. The effect of a law is found in both the legal effect of the text and the practical consequences that flow from the application of the statute. A local government should therefore ensure that any bylaw to regulate or prohibit the growing or selling of marijuana is based on legitimate municipal objectives. The issue of criminality or other irrelevant considerations should not be a motivating factor. There should also be clear evidence that the purpose of the bylaw is for a matter within the jurisdiction of the local government to reduce the likelihood of a possible legal challenge.

The second step in considering the constitutionality of legislation is to consider what the courts traditionally refer to as the doctrine of paramountcy. The doctrine provides that if there is operational incompatibility between the federal and provincial or municipal legislation or if the provincial or municipal legislation serves to frustrate the purpose of the federal legislation, the provincial or municipal legislation is suspended or rendered inoperative to the extent that it is inconsistent with the federal legislation. A local government should therefore also ensure that any bylaw to regulate or prohibit the growing or selling of marijuana is consistent with the *MMA Regulations* and other federal legislation to reduce the likelihood of a possible legal challenge.

IV. ZONING POWERS

A local government's most powerful tool to regulate or prohibit medical marijuana dispensaries and grow operations is likely its zoning power. Local governments have the broad power under s. 903 of the *Local Government Act* to regulate or prohibit within a zone the use of land and buildings. A local government may therefore regulate or prohibit the growing or selling of marijuana through its zoning powers provided that the regulation or prohibition is based on proper planning purposes and is not inconsistent with the *MMA Regulations* or any other federal legislation.

A. Proper Planning Purpose

A local government's first instinct when they hear that a medical marijuana dispensary is opening up in their community may be to quickly prohibit such dispensaries in their zoning bylaw with the rationale being that such dispensaries are illegal. As noted above, however, local governments cannot enforce the criminal law or base their decision on moral or other irrelevant considerations. If the "pith and substance" of a bylaw regulating or prohibiting the growing or selling of marijuana, however, is based on proper planning purposes and only incidentally affects the federal interest in such matters, a court may find that this is a valid exercise of a local government's land use authority.

In *Common Exchange Ltd. v. Langley (City)*, [2000] B.C.J. No. 2473, the B.C. Supreme Court upheld an amendment to the City's Zoning Bylaw that permitted the operation of adult businesses and pawnbrokers only in a zone within an enclosed shopping mall. The business owner of a pawnshop argued that the true purpose and effect of the bylaw was to prohibit the operation of pawnbrokers and the City acted on improper motives and in bad faith. The Court upheld the bylaw finding that the bylaw was directed at the regulation of land use. The Court was not satisfied that the purpose of the City in passing the bylaw was for any ulterior motive. The Court commented that the evidence supported that 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* must be interpreted purposively to permit the City to prohibit a use in all zones in the City.

In *R. v. Konakov*, [2004] O.J. No. 114, the Ontario Court of Appeal considered whether a zoning bylaw that did not permit the operation of a body rub parlour at any location in the City was valid. In upholding the bylaw the court commented as follows at para. 18:

> Through zoning bylaws a municipality chooses the type of uses it will permit in certain or all parts of land under its jurisdiction and so long as there are proper planning grounds or standards to warrant these distinctions, this is a valid exercise of jurisdiction. A municipality will not be permitted to invoke the implicit power granted in order to enact bylaws that are in fact related to ulterior objectives.

Recently, in *Quebec (Attorney General) v. Lacombe*, [2010] S.C.J. No. 38 the Supreme Court of Canada commented on the need for proper planning considerations in enacting a zoning bylaw. In that case the court considered whether a bylaw that regulated the location of water aerodromes was valid. The court found that the bylaw did not in "pith and substance" relate to zoning. It related to aeronautics, a matter within the exclusive federal jurisdiction and therefore was invalid. The court commented as follows regarding the lack of any reference to the planning purposes of the bylaw:

> … by-law 260 purports to regulate the location of aerodromes without reference to the underlying land use regime. It does not function as zoning legislation, but rather, is a stand-alone prohibition.
>
> … At the end of the day, what is missing is evidence of any purpose for by-law 260 other than the prohibition of certain aeronautical activities in a significant portion of the municipality…. There is no evidence that by-law 260 is an integrated feature of the zoning scheme, viewed as a whole. Indeed, it is difficult to say that by-law 260 is even supplemental to the zoning scheme, given

its arbitrary focus on banning aeronautics without regard to underlying land use.

To reduce the likelihood of a possible legal challenge, a local government should therefore ensure that there is sufficient evidence before council that the bylaw regulating or prohibiting the growing or selling of marijuana is clearly to address a proper planning purpose. In this regard, a staff report in respect of the bylaw should be written to focus on proper planning considerations such as the impact or effect of this type of use on community services and health and safety concerns. The report should be bolstered with articles or information from other local governments, the RCMP or others regarding the broader community effects of the growing or sale of marijuana. Furthermore, in adopting any such bylaw, council should make it clear that planning grounds are the express rationale for the bylaw. The illegality of growing or selling marijuana should not be the rationale for the bylaw.

B. Consistency with Federal Legislation

A local government should also ensure that a bylaw in respect of the growing or selling of marijuana is consistent with the *MMA Regulations* and any other federal legislation. In this regard, a zoning bylaw that completely prohibits the growing or selling of all marijuana would likely be inconsistent with the *MMA Regulations* and would be subject to constitutional, *Charter of Rights* and *Human Rights Code* challenges. The zoning bylaw should therefore exempt those persons authorized to grow or distribute marijuana under the *MMA Regulations* to reduce the likelihood of such a legal challenge.

A case on point is *James and Moynan v. City of Salmon Arm*, 2009 BCHRT 285. In that case, the City had adopted a Controlled Substance – Safe Premises Bylaw to prevent properties in the City from being used as marijuana grow operations. The City became aware that the complainant's property was being used as a grow operation and pursuant to the bylaw, ordered the complainants to vacate the residence and disconnected the water supply. Mr. James had a debilitating disability and had been granted permits from Health Canada to allow him to produce and possess marijuana for his personal use. At the time the City enforced its bylaw against the complainants, Mr. James' permits had expired and he was awaiting renewal permits. The human rights tribunal found that the City's decision to enforce the bylaw against the complainants discriminated against Mr. James based on his physical disability contrary to the *Human Rights Code*.

V. BUSINESS POWERS

If a local government has not regulated or prohibited the growing or selling of marijuana in its zoning bylaw and a person or compassion club wishes to open a medical marijuana dispensary in its community, a local government's instinct may be to refuse to issue a business licence (if required) and to prevent the dispensary from opening. It is important to keep in mind,

however, that a local government can only refuse to issue a business licence 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 Council's refusal to issue a business licence for an "adult boutique" store which 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 licence should be granted or withheld. To withhold a licence on other than licensing considerations would be to withhold the licence unreasonably. The court held that Council's refusal to issue a business licence 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.

A local government cannot refuse to issue a business licence on the basis that the local government considers the business to be illegal. A local government may be able to refuse to issue a business licence for such businesses if the owners of the business have actually been convicted of a criminal offence in the operation of the business. As noted above, however, a local government cannot effectively "convict" the licensee of a criminal offence already existing in federal law under its own process and in its own forum.

The decision to refuse to issue a business licence must be based on proper municipal considerations. In this regard, the staff report to council should be written to focus on proper business licensing considerations such as concerns regarding this type of business on public safety and the enjoyment of use of neighbouring properties. The staff report should be supported by articles or information from other local governments, the RCMP or others regarding the broader community effects of such businesses. Furthermore, in any reasons for refusing to issue the business licence, it should be clear that proper business licensing grounds relating to the business are the express rationale for refusing to issue the business licence.

One difficulty local governments may face is that information regarding the adverse effects of medical marijuana dispensaries may not be known until the dispensary is open and operating in its community. Local governments may, however, look to other local governments for such information. If there is insufficient information, a local government's only choice may be to allow the medical marijuana dispensary to open and to monitor the "management" of the business for grounds to cancel or suspend the business licence.

In *377050 B.C. Ltd. (c.o.b. the Inter-City Motel) v. Burnaby (City)*, [2007] B.C.J. No. 661, the City of Burnaby refused to renew a business licence 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 B.C. Court of Appeal found that the City's decision to refuse the business licence was not patently unreasonable.

In *Poco Cabaret Ltd. v. Coquitlam (City)* [1998] B.C.J. No. 2680 Council revoked the petitioner's business licence 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 Licencing 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 Council from which it could conclude that there was cause for revocation.

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

VI. CONCLUSION

With a growing number of medical marijuana dispensaries and grow operations in British Columbia, land use and community effects of such uses are likely to increase and become more apparent. Local governments must keep in mind, however, the division of powers and to address their concerns regarding such matters within the scope of their authority. This will require research and preparation to be undertaken before council considers exercising its powers in respect of medical marijuana dispensaries or grow operations. The time and care spent at the front end, however, will reduce the likelihood of a possible legal challenge in the future.

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