

Medical Marihuana: What's the Deal?

(and how to nip dispensaries in the bud)

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Overview

- ▶ Legality of Medical Marijuana: overview since 2001
 - ▶ MMARs
 - ▶ MMPS
 - ▶ ACMPRs
- ▶ Legality of Dispensaries and Enforcement Options that have been successful to date
 - ▶ Criminal Law
 - ▶ Business Licensing
 - ▶ Zoning
- ▶ Constraints on Enforcement
 - ▶ Constitutional arguments
- ▶ Mechanics of enforcement
- ▶ Tips and Tricks
- ▶ 2018: the new frontier

Legality of Marihuana

- ▶ The starting point: it isn't
- ▶ *Controlled Drugs and Substances Act:*
 - Possession of substance**
 - 4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.
- ▶ Cannabis (including marihuana) is a Schedule II substance

Legal Access to Marijuana

- ▶ The first set of regulations:
 - ▶ *Marihuana Medical Access Regulations*
 - ▶ Enacted in 2001 by the federal government in response to *R. v. Parker*, 2000 CanLII 5762 (ON CA)
 - ▶ banning marijuana for medicinal purposes violates the *Canadian Charter of Rights and Freedoms*

MMARs

- ▶ ATPs: authorization to possess
- ▶ PPLs: personal-use production licence
- ▶ DPLs: designated-person production licence
- ▶ Only at the production site and area authorized in the licence (including residences)
- ▶ Some expansion over time due to court challenges, such as quantity of DPLs
- ▶ **No provision for retail sale**

MMPRs

- ▶ Harper government tried to replace the MMARs with the MMPRs: *Marihuana for Medical Purposes Regulations*
- ▶ came into force on July 19, 2013
- ▶ All ATPs, PPL and DPL licences were set to expire on March 31, 2014
- ▶ Thereafter medical marihuana was supposed to be obtained only pursuant to the MMPRs
- ▶ But, constitutional challenge

Allard round 1

- ▶ Federal Court decision March 21, 2014
- ▶ granted an interlocutory constitutional exemption
 - ▶ preserved the rights of authorized users and producers under the MMAR regime to continue
 - ▶ pending the determination of the constitutionality of the MMPRs

Implication of Allard (1) on MMPRs

- ▶ Still in force in tandem with MMARs
- ▶ highly regulated system of commercial licenced producers
- ▶ distribute marihuana to authorized users via:
 - ▶ a) secure shipping (this is the primary mechanism for distribution); or
 - ▶ b) pharmacist, authorized health care practitioner, or hospital, all of whom purchase it from a licensed producer (“Authorized Distributors”)
- **No provision for retail sale**

Allard round 2: MMPR's struck

- ▶ Federal Court decision February 24, 2016
 - ▶ MMPR's declared of no force and effect due to the regime infringing on the constitutionally guaranteed right to life, liberty and security of the person;
 - ▶ Declaration suspended for six months to enable the Federal government to adopt new regulations;
 - ▶ Order of Justice Manson dated March 21, 2014, preserving rights under the MMAR regime (Allard round 1) remains in effect until the Federal Court orders otherwise.

Federal Government's Response

- ▶ Did not appeal
- ▶ Instead amended the MMPRs by the August 24, 2016 deadline

“In the meantime, I would like to remind authorized medical marijuana users that the MMPR remain in full effect. Unless one is covered by a Court injunction, Licensed Producers are the only legal way to obtain marijuana for medical purposes.”

The Honourable Jane Philpott, P.C., M.P.
Minister of Health

Status quo until August 24, 2016

- ▶ until August 24, 2016:

- ▶ legal to possess / produce marihuana pursuant to an MMAR licence
- ▶ legal to possess / produce marihuana pursuant to an MMPR licence or authorization

neither the MMARs nor MMPRs permitted the retail sale of marihuana. A dispensary business selling marihuana from a store front was operating contrary to the *Controlled Drugs and Substances Act* and was unlawful.

ACMPRs

- ▶ *Access to Cannabis for Medical Purposes Regulations*
- ▶ Basically combined the MMPRs and MMARs:
 - ▶ Part 1: Production and sale by licenced producers to authorized users via secure shipping only
 - ▶ Part 2: Personal production by registered persons and production by designated persons for registered persons (authorized users)
 - ▶ No provision for retail sale

Legality of Dispensaries

- ▶ They aren't!
 - ▶ Not legal under the MMARs
 - ▶ Not legal under the MMPRs
 - ▶ Not legal under the ACMPRs
- ▶ Will they be?
 - ▶ The million dollar question

Current Enforcement Options for Dispensaries

- Criminal Law

- a) Police raids

- Examples:

- ▶ April 2015: Parksville
 - ▶ July 2015: Edmonton
 - ▶ April 2016: Campbell River, Chilliwack
 - ▶ May & June 2016: Project Claudia (Toronto)
 - ▶ 2017: Richmond

- b) Police warnings- “voluntary closure” in Grand Forks

But

- ▶ Much more common police response:
 - ▶ Targeting dispensaries is not an operational priority
- ▶ What can municipalities do about this?
- ▶ Not much:
 - ▶ councils have very little control over their police departments
 - ▶ cannot exert operational oversight or control

Implications of Federal Election



- ▶ Legalization (and regulation) of marihuana
- ▶ Summer 2018: Cannabis Act
- ▶ Criminal law may not be an option

Business Licencing

- ▶ Common business licence bylaw requirements:
 - ▶ Applicants must comply with all applicable regulatory requirements, including provincial and federal ones
 - ▶ licence inspectors may require proof of applicable certifications, approvals
- ▶ For now, these provisions enable B/L refusal:
 - ▶ marihuana dispensaries do not comply with the federal criminal law, and cannot produce Health Canada or other valid authorization

Abbotsford (City) v. Weeds Glass & Gifts Ltd., 2016 BCSC 135

- ▶ First case in Canada in the current climate to shut down a marihuana dispensary
- ▶ Abbotsford's B/L bylaw:
 - ▶ Broad definition of "business"
 - ▶ all businesses must have either a valid business licence, or be subject to an exemption
 - ▶ all business must comply with City bylaws, and all applicable federal and provincial requirements
 - ▶ enables the licence inspector to require applicants to provide proof of a certification or approval

Abbotsford (City) v. Weeds Glass & Gifts Ltd., 2016 BCSC 135

- ▶ Marihuana dispensary applied for B/L, City rejected the application
- ▶ Dispensary opened and remained operational, despite repeated warnings and demand letters
- ▶ City filed a petition, seeking a permanent statutory injunction to enjoin and restrain the respondents from operating a business without a valid licence or exemption

Abbotsford (City) v. Weeds Glass & Gifts Ltd., 2016 BCSC 135

- ▶ On January 11, 2016, Mr. Justice Walker granted the injunction sought
 - ▶ The dispensary, which involved the retail sale of cannabis and cannabis- related products, fell within the definition of “business”:
 - ▶ carrying on a commercial or industrial activity or undertaking of any kind; providing professional, personal or other services for the purpose of gain or profit
 - ▶ Operator did not have a licence or exemption as required
 - ▶ Retail sale of marihuana is not lawful

[23] I am satisfied that an injunction should be granted in this case. The City has met all of the requirements necessary to only engage this Court’s jurisdiction and to support the injunction sought, on the terms in the proposed order contained in the City’s notice of application.

Delta (Corporation) v. WeeMedical Dispensary Society, 2016 BCSC 1566:

- ▶ Dispensary operating without a business licence and in contravention of the zoning bylaw
- ▶ Similar definition of business as in Abbotsford
- ▶ Delta issued daily tickets (operator and landlord)
- ▶ Landlord attempted to evict the dispensary: hired a bailiff who changed the locks
 - Dispensary broke back in and recommenced operations
- ▶ August 2016: Obtained a statutory injunction, including special costs and a police enforcement order, to shut down the dispensary

Delta (Corporation) v. WeeMedical Dispensary Society, 2016 BCSC 1566 cont'd

- ▶ The dispensary initially shut down, but days later reopened:
 - ▶ Now operated by WeeCare Dispensary Society
 - ▶ Exact same directors as WeeMedical
 - ▶ Rehired WeeMedical's employees (just fired by WeeMedical)
 - ▶ Subleased the premises from WeeMedical
- ▶ September 2016: Obtained an order that both societies, the directors, and various employees were in contempt of court.
 - ▶ Special costs awarded
 - ▶ The dispensary closed for good

Business Licence Limitation

- ▶ Statutory power to regulate business does not include power to prohibit (most) businesses

Prince George (City) v. Payne, [1978] 1 S.C.R. 458

Common Exchange Ltd. et al v. City of Langley, 2000 BCSC 1724

- ▶ Once the retail sale of marihuana is legalized business licence bylaws will be rendered ineffective as a means of precluding dispensaries

Zoning

- ▶ most effective way to avoid a proliferation of dispensaries
- ▶ expressly prohibit them via zoning
- ▶ power to zone includes the power to prohibit any use or uses in a zone or throughout the local government
- ▶ Eg: City of Abbotsford

140.3 Uses Prohibited in all Zones

.1 Commercial and Industrial Uses

The following uses are not permitted in any zone unless specifically provided for in that zone:

- a. Cultivating, growing, producing, packaging, storing, distributing, dispensing, trading or selling of cannabis (Marihuana).

Abbotsford (City) v. Mary Jane's Glass & Gifts Ltd., 2017 BCSC 237

- ▶ City filed Petition to obtain injunction to restrain the breach of its business licence and zoning bylaws
- ▶ Constitutional arguments raised in defence:
 - ▶ Business licence and zoning bylaws are unconstitutional
 - ▶ Division of powers (jurisdiction) and Charter arguments
 - ▶ New ACMPRs are unconstitutional
- ▶ BC Attorney General appeared re: jurisdiction
- ▶ Hearing proceeded November 21, 2016
- ▶ Decision released February 14, 2017

Abbotsford (City) v. Mary Jane's Glass & Gifts Ltd., 2017 BCSC 237

- ▶ Madam Justice Gropper's decision:
 - ▶ Abbotsford's zoning provisions are properly classified as the regulation of land and building use, which is a matter of provincial (municipal) jurisdiction;
 - ▶ Retail marijuana dispensaries engage issues of health, safety, nuisance, youth exposure, land use conflicts, impact on local economy and neighbourhood character: i.e. land use and community planning
 - ▶ These matters are squarely within provincial (municipal) jurisdiction

Abbotsford (City) v. Mary Jane's Glass & Gifts Ltd., 2017 BCSC 237

- ▶ “I find that the Zoning Bylaw is valid and enforceable, and the operators’ arguments based on the constitutional division of powers should be dismissed.”
- ▶ “I find the City’s Business Licence and Zoning Bylaws to be constitutionally valid. I decline to declare the bylaws unduly restrict access to medical marihuana and unjustly infringe ss. 7 and 15 of the Charter, or that they are of no force and effect.”
 - ▶ Madam Justice Gropper, Reasons paras. 70, 74
- ▶ Decision has been appealed

Status Quo

- ▶ Medical marihuana use, production and sale is lawful if pursuant to ACMPRs
 - ▶ Authorized users; personal production by registered or designated persons; commercial production by licenced producers
- ▶ Dispensaries are illegal and may be prohibited, and shut down for noncompliance with bylaws

Mechanics of Enforcement

- ▶ Demand letters, tickets, bylaw notices
- ▶ Statutory injunction: s. 274 of the *Community Charter*
 - ▶ once prove breach of the bylaw, will almost always be granted
 - ▶ Civil burden of proof, faster process
- ▶ *Offence Act* prosecution
 - ▶ Quasi criminal, can impose punitive fines
 - ▶ Higher burden, trial with live witnesses, resource intensive

Tips and Tricks - bylaws

- ▶ Business licence bylaws should:
 - ▶ broadly define business
 - ▶ require business licence even if a dispensary is operated by a society or on a non-profit basis
 - ▶ Alternative options: fee exemption, or require approved licence exemption
- ▶ Zoning Bylaws should:
 - ▶ broadly define and prohibit marihuana operations
 - ▶ particularly until the new federal/ provincial regime
 - ▶ tailor zoning thereafter

Tips and Tricks - bylaws

- ▶ Both Business and Zoning Bylaws should:
 - ▶ require dispensaries to comply with all applicable bylaws as well as provincial and federal laws
 - ▶ Section 15(2) of the *Community Charter* enables municipalities to adopt provincial or national requirements
 - ▶ Provide each day of violation is a separate offence
 - ▶ be designated as enforceable by bylaw notice and ticket with significant fines (max \$500, \$1000)

Tips and Tricks - effective enforcement

- ▶ To shut down dispensaries:
 - ▶ Progressive enforcement (warnings, demand letter, tickets/BON's, then injunction)
 - ▶ Issue tickets/BON's to landlords
 - ▶ Successful vis a vis many dispensaries in Abbotsford
 - ▶ Landlords have an obligation to ensure the use of their property is lawful
 - ▶ Each owner can be fined separately

R. v. Morshedian and Janani, 2015 BCPC 368

District of West Vancouver v. Morshedian, 2017 BCSC 408

What does the future hold?

- ▶ Target date of legalization: adoption of Cannabis Act by July 2018
- ▶ Federal Government:
 - ▶ Regulate production and product (potency, packaging, ingredients, advertising)
 - ▶ determine minimum age, possession limits, criminal offences
- ▶ Provincial Governments
 - ▶ Supplement Federal regulations: Increase minimum age, lower possession/production maximums, regulate consumption location
 - ▶ Regulate and licence distribution

What will distribution look like in BC?

- ▶ No substantive information from BC government as of yet - will assemble an expert panel and follow advice
- ▶ Options: pharmacies, liquor stores, dispensaries, “serving it right”

Recommendations:

- ▶ Consultation is likely coming- engage your communities, consider establishing a policy position and weigh in
- ▶ Be ready to implement bylaw changes (business licence and regulation, zoning) to reflect the new regime

What does the future hold for local governments?

Q22. Will municipal governments have a role to play in the system proposed under the Cannabis Act?

- ▶ Yes, municipalities will be key partners in supporting the implementation of the proposed legislation. It is anticipated that municipalities will work closely with their respective provincial or territorial governments to support the oversight and regulation of cannabis distribution and sales once the Cannabis Act comes into force.
- ▶ It is also anticipated that municipalities will play an important role in enforcing local zoning and density bylaws, building standards, and matters related to the minimum age of purchase, personal cultivation, personal possession limits, smoking restrictions, and public nuisance complaints. These will be enforced through municipal by-law, health and safety inspectors and police.

<https://www.canada.ca/en/services/health/campaigns/introduction-cannabis-act-questions-answers.html>

Questions?