

Marihuana for Medical Purposes (MMPR)

A. Introduction

On June 10, 2013, the Federal Health Minister announced new regulations for the prescription, production, and dispersal of medical marihuana in Canada. The regulations were published in the *Canadian Gazette* and came into force on June 19, 2013. The new *Marihuana for Medical Purposes Regulations* (MMPR) will operate concurrently with the previous *Marihuana for Medical Access Regulations* (MMAR) until March 31, 2014, at which time the MMAR will no longer be applicable.

These regulations, made pursuant to the Federal *Controlled Drugs and Substances Act*, may have considerable impact on local governments with concerns pertaining to the establishment of marihuana production facilities within their communities. It will also have an impact on local governments with existing medical marihuana licenses in their jurisdiction.

B. Legal Background

The Ontario Court of Appeal case of *R v. Parker* (2000) ruled that the prohibition against possession of marihuana for those with specific medical needs violated Section 7 of the *Canadian Charter of Rights and Freedoms*. However, an individual's constitutional right to obtain marihuana for medical purposes is not without limits; the government must only ensure "reasonable access". In 2001, the government responded by establishing the *Medical Marihuana Access Regulations* (MARR). The MMAR have undergone numerous changes as a result of both input from stakeholders and the courts. The cases of *Sfetkopoulous v. Canada* (2009) and *R. v. Beren* (2010) led to an increase in the number of production licenses a designated individual could obtain, and struck down the one-to-one producer to user ratio.

Under the existing system, it was estimated that over 50,000 individuals would be licensed to grow marijuana by 2014. These court decisions, combined with a greater concern for public health, safety and security, led to the new MMPR. During the 75-day consultation process after the proposed regulations were first announced on December 25, 2012, local governments, first responders, and police officers raised particular concerns about the fact that individuals were not required to inform local authorities about their intent to produce medical marihuana.

C. The Proposed Changes

The proposed MMPR is part of an attempt to address the health, safety and security issues of the existing system. The most significant change is the abolishment of Personal Use Production Licenses (PUPL) and Designated Person Production Licenses (DPPL) in favour of for-profit production facilities. As well, the proposed regulations eliminate the specific classes of individuals who were permitted to possess marihuana, and would allow any individual with a prescription from a doctor or authorized health practitioner to obtain a commercially available strain of medical marihuana. The Federal Government will no longer process applications, issue authorizations, or supply medical marihuana. It is expected that this may result in the creation of an entirely new industry, which may or may not be attractive to some local governments.

Under the new MMPR, a potential producer must obtain a license from the Minister and comply with all requirements. Licenses are valid for no more than three years, and may be renewed and amended upon further application. Important aspects of the MMPR include:

- a) written notice to local governments informing the location of production and storage facilities;
- b) production will be prohibited in dwellings;

- c) production and storage activities must take place indoors;
- d) requirements for security measures, site monitoring, and security clearances;
- e) compliance with all production, packaging, labeling, and shipping standards;
- f) registration of all clients with applicable medical documents; and
- g) delivery of medical marihuana by mail only.

Importantly, the new MMPR does not include any restrictions on the ability of Local Governments to regulate marihuana production through zoning bylaws or any other regulatory authority.

D. Impact on Local Governments and Zoning Bylaws

When considering local regulations, the following are some of the key impacts of the new MMPR:

1. Prior to applying for a new or amended license, as well as after any issuance or renewal, a licensed producer must provide written notices to senior officials of the local government, which includes: an incorporated or unincorporated city, metropolitan area, town, village, municipality, and bands defined under the *Indian Act* (or self-government agreement).
2. There is no reason to assume that a licensed producer will be immune from relevant bylaws and zoning restrictions. Local governments have the authority to regulate these activities and should be able to prohibit production in certain areas, as long as there is not a complete ban and the restrictions can be read in “harmony” with the MMPR. When combined with “shipping-only” delivery, it is unlikely that zoning restrictions will infringe on an individual’s rights to “reasonable access”. Furthermore, the Supreme Court of Canada has confirmed that local governments have the authority to implement bylaws and zoning restrictions that increase the stringency of Federal regulations, so long

as individuals can comply with both laws at the same time (114957 *Canada Ltée v. Hudson*, 2001).

3. Prior to the new MMPR, disclosure of the location of PUPL's or DPPL's to local authorities was contrary to the *Privacy Act*, creating further regulatory and policing challenges. While this information is still protected, new provisions in the MMPR require communication to the Minister of the location of PUPL's and DPPL's that are intending to sell remaining seeds, plants, and "dried marihuana" to licensed producers. This information may be available to local governments, assisting in their ability to regulate and police the transition from the MMAR to the MMPR.
4. It will be left to the discretion of a particular local government as to whether or not they will create specific bylaws governing licensed producers. Local authorities will have to evaluate the social, security, and administrative impacts of production facilities within their jurisdictions.

E. Future Challenges for Local Governments

In addition to the unique health, safety, and security issues created by the new regulations, the following are additional legal and administrative challenges that may arise under the MMPR:

1. The future extraction of alternative products and chemicals from marihuana may create additional health, safety, and security risks moving forward. Under the new MMPR, licensed producers can only sell or provide "dried marihuana". The same requirement existed under the previous MMAR; however, the BC Supreme Court decision of *R v. Smith* (2012) ruled that this restriction violated Section 7 of the Charter. At this juncture, *R v. Smith* has not been considered by the BC Court of Appeal, but to date the prohibition is of no force and effect in BC.

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2. It also remains to be seen whether non-residential zoning restrictions or complete bans will frustrate the purpose of the new MMPR. As long as there are enough production facilities in operation allowing individuals to access medical marihuana via mail, it is possible that complete bans in certain jurisdictions may not violate the constitutional right to “reasonable access” of medical marihuana.
3. Under the new regime, Health Canada will only inspect for compliance under the MMPR; it is the responsibility of local governments to inspect for compliance under local bylaws and regulations. Concerns of local governments over production facilities will have to be dealt with between the local government and the licensed producer. Health Canada has not stated whether they will inspect individuals with invalid licenses under the MMAR.
4. Under the *Community Charter*, local governments have the power to regulate businesses through licensing and may wish to use bylaws to require producers to obtain licenses in addition to those under the MMPR. However, the local government would still be responsible for enforcing any such licensing scheme.
5. The added health and security risks associated with marihuana production facilities may increase costs to neighbouring businesses and/or residential areas. It may also negatively affect the fair market value of such premises.

Further Information:

The MMPR was published in the *Canadian Gazette* on June 19, 2013, and is attached to this legal update. Further information is also available on the Health Canada website at <http://www.hc-sc.gc.ca/dhp-mps/marihuana/transition/index-eng.php>.

Please contact us should you wish to discuss the implications of this decision in more detail.