LIDSTONE & COMPANY
BARRISTERS AND SOLICITORS

MEMORANDUM

TO:	clients
FROM:	Sara Dubinsky
DATE:	June 26, 2014
RE:	Province's press release re MMGO zoning

Request for Advice

We have received a number of requests for clarification of the law arising out of the following comments in the press release issued by the Province on July 24, 2014:

1. "The Government of British Columbia will also continue to view medical-marijuana production as an allowable farm use within the Agricultural Land Reserve that should not be prohibited by local government bylaws. This is consistent with the Agricultural Land Commission's interpretation of the Agricultural Land Commission Act."

2. "Consistent with the federal government's direction and the Agricultural Land Commission's position, and based on legal guidance, the Province agrees local governments should not prohibit medical marijuana production in the ALR."

3. "Local governments looking to propose a bylaw prohibiting medical marijuana may wish to seek legal counsel as enacting such a bylaw may give rise to a constitutional challenge as frustrating a lawful initiative of the federal government."

Our Opinion

1. Medical Marihuana Grow Operations ("MMGO's") in the ALR

While we agree with the Province and the ALC that MMGO's are a permitted farm use within the ALR, as the *Agricultural Land Commission Act* ("ALCA") defines farm use broadly, the fact that MMGO's are a permitted farm use does not per se mean that they cannot be prohibited by zoning bylaws. As

the release itself states, “Licensed medical marijuana production facilities may be located on both provincial ALR and non-ALR lands, subject to local government zoning and other site requirements.”

Section 46 (2) of the ALCA requires local government zoning bylaws to be consistent with the ALCA, and s. 46(4) renders such bylaws of no force or effect to the extent of an inconsistency. However, pursuant to s. 46(6), a bylaw that provides additional restrictions on farm use of agricultural land beyond those imposed by the ALCA is not, for that reason alone, inconsistent with the ALCA. On the other hand, a bylaw that allows a use of ALR land that is not permitted under the ALCA, or contemplates a use of land that would impair or impede the intent of the ALCA, is deemed to be inconsistent with the ALCA (s. 46(5).

Key, then, is whether zoning to prohibit MMGO’s on agricultural land would be inconsistent with the ALCA (within the meaning of the Act) and thus of no force or effect.

As noted, s. 46(5) specifies two ways in which a bylaw will be inconsistent with the Act, although it is important to note that this list is non-exhaustive. First, a bylaw will be deemed to be inconsistent with the Act if it allows a use in the ALR that is not permitted by the Act. This form of inconsistency does not arise on the facts in issue here, as the zoning bylaw would prohibit, rather than allow, a use.

Second, the ACLA deems an inconsistency where a zoning bylaw contemplates a use that would interfere with the Act’s intent.

a) Intent of the ALCA

In our view, a zoning bylaw prohibiting MMGO’s on agricultural land would not be inconsistent with the ALCA's intent.

The purposes of the ALCA and the Agricultural Land Commission are set out in s. 6:

> **Purposes of the commission**
>
> **6** The following are the purposes of the commission:
>
> (a) to preserve agricultural land;
>
> (b) to encourage farming on agricultural land in collaboration with other communities of interest;

> (c) to encourage local governments, first nations, the government and its agents to enable and accommodate farm use of agricultural land and uses compatible with agriculture in their plans, bylaws and policies.

As this section makes clear, the legislature established the Commission in order to preserve land for agriculture and to encourage agricultural production. In our opinion prohibiting large scale, commercial, indoor, secure MMGO facilities on agricultural land would not discourage farming. Rather, it would preserve agricultural land for more traditional farm uses. Thus, a bylaw prohibiting MMGO's would be consistent with s. 6. Indeed, the fact that the Province is excluding MMGO's from the list of agricultural uses that qualify for farm assessment highlights its recognition that these operations are not traditional farms.

Additionally, in our view the main "mischief" that the ALCA is meant to address is ensuring that non-farm uses are not occurring on agricultural land. Sections 18(a)(i) and 20(1) expressly speak to this point:

> **Rules for use and subdivision of agricultural land reserve**
>
> **18** Unless permitted under this Act,
>
> (a) a local government ... may not
>
> (i) permit non-farm use of agricultural land or permit a building to be erected on the land except for farm use
>
> **Use of agricultural land reserve**
>
> **20** (1) A person must not use agricultural land for a non-farm use unless permitted under this Act.

Accordingly, our view of the intent of the ALCA is narrow: its purpose is to preclude non-farm uses of agricultural land, and encourage farming of agricultural land. Again, the zoning bylaw contemplated here would not be permitting a non-farm use or interfering with traditional farm uses. Thus, in our view such a bylaw would not be inconsistent with the Act.

b) The Meaning of "Restrictions"

As noted above, section 46(6) expressly provides that local government bylaws may restrict the use of agricultural land without running afoul of the Act:

> (6) A local government bylaw or a first nation government law that provides restrictions on farm use of agricultural land additional to those provided under this Act is not, for that reason alone, inconsistent with the Act and the regulations.

It is possible to interpret the term "restriction" as capturing only regulation but not prohibition (in which case a bylaw cannot prohibit a use outright), or both regulation and prohibition (in which case a bylaw can prohibit a use). We are aware that local governments have been advised that the former interpretation is most likely to prevail. We disagree, as the ALCA regime expressly contemplates that local governments can prohibit certain land uses.

Section 2(2) of the *Agricultural Land Reserve Use, Subdivision And Procedure Regulation* designates certain activities as "farm uses" and provides that these particular activities may be regulated, but must not be prohibited by any local government bylaw (except a bylaw under section 917 of the LGA). Similarly, s. 3(1) of the Regulation specifies certain land uses that are permitted in the ALR unless they are prohibited by a local government bylaw.

We raise this for two reasons. First, MMGO's are not included in the list of activities that cannot be prohibited. Second, if the term "restriction" in s. 46(6) meant that a local government could not prohibit any uses of land within the ALR, then there would be no need to specify uses in s. 2(2) that cannot be prohibited.

c) ALC Bulletin

Finally, in our view the ALC bulletin which is referred to in the press release reflects our interpretation of the ALCA, namely that it does not preclude local governments from zoning to prohibit medical marihuana cultivation in the ALR. The bulletin states (in part):

> Municipalities are responsible for governing the use of land within the respective municipality's jurisdiction. Zoning bylaws enacted by municipalities may set out restrictions on land use, including but not limited to the use of land for medical marihuana production. Where such restrictions may apply to land within the ALR, such restrictions with respect to the particular land use of lawfully sanctioned medical marihuana production would not in and of themselves be considered as inconsistent with the *ALC Act.*

For these reasons in our opinion local governments may zone to prohibit MMGO's in the ALR without running afoul of the ACLA.

2. Frustrating the Federal Law

a. Intent to Respect Local Government Jurisdiction Over Zoning

As a preliminary matter, it is important to note that the federal government has indicated that it will respect local government zoning when determining whether to issue production licences for MMGO's.

In particular, Annex A to the Regulatory Impact Analysis Statement for the new medical marihuana legislation (the "MMPR's"), available online at: http://gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/reg4-eng.html states: "rather than specifying zoning requirements for the location of sites where marihuana is to be produced in the MMPR, only municipal by-laws governing location would apply."

In addition, Health Canada's Frequently Asked Questions, available online at http://www.hc-sc.gc.ca/dhp-mps/marihuana/info/faq-eng.php state: "Licensed producers must comply with all federal, provincial/territorial and municipal laws and by-laws, including municipal zoning by-laws."

This represents a change from the former medical marihuana legislation, which itself provided restrictions on the locations where medical marihuana could be grown (such as by limiting proximity to schools, daycare and other places frequented by those less than 18 years of age).

We also note that a critical element of an application for a licence to produce (or for an amendment to the licence to produce) under the MMPR's is that the applicant must first notify the local government of the pending application for a licence, and the notice must include the address of the proposed MMGO. The applicant must submit a copy of this notice to the federal government as part of the application materials. If the applicant has not provided the requisite notice to the local government, the licence (or licence renewal or amendment) must be refused.

Presumably the intent of these requirements is to provide local governments with notice and the opportunity to comment regarding the applicant or application. In particular, we expect that these requirements are included in the application process so that comments regarding whether the zoning permits MMGO's in the specified location may and will be provided by the local government to the federal government.

Accordingly, in our view the new MMPR regime endorses exclusive local government control over their locations.

b. Law of paramountcy

In certain circumstances in which both the federal and provincial levels of government regulate a particular matter, the federal legislation will trump the provincial legislation to the extent of an inconsistency. This is known as the doctrine of paramountcy. Thus, where a zoning bylaw (which is considered provincial legislation for the purposes of the constitutional division of powers) conflicts with the federal criminal law power, a court will likely hold that the zoning bylaw is of no force or effect to the extent of the inconsistency.

However, federal legislation is only paramount to provincial (including municipal) legislation when there is a direct conflict between the two, which occurs either where compliance with one enactment inherently requires defiance of the other[1]; or where application of the provincial law would frustrate the purpose of the federal law: *Multiple Access Ltd. v. McCutcheon,* [1982] 2 S.C.R. 161*; 114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* 2001 SCC 40*; Canadian Western Bank v. Alberta,* 2007 SCC 22; *Canada (Attorney General) v. PHS Community Services Society,* 2011 SCC 44.

With respect to the first form of a direct conflict, if the MMPR's required that particular locations within a municipality be used for MMGO's, a zoning bylaw which prohibited that use of that land would impermissibly conflict with the MMPR's, and would be of no force or effect to this extent. However, the MMPR's do not require that any land be used for an MMGO: they simply permit or authorize MMGO's, provided that an applicant meets the requirements and obtains a production licence.

As an example of a provincial law "frustrating" a federal law, in *Law Society of British Columbia v. Mangat,* 2001 SCC 67, federal immigration legislation allowed non-lawyers to appear as counsel for a fee before the Immigration and Refugee Board. However, provincial legislation prohibited non-lawyers from appearing for a fee before the tribunal. The Court noted that although compliance with both laws was technically possible, the provincial law was incompatible with the purpose of the federal law. As a result, the federal law was paramount and the provincial law was inoperative to the extent of the inconsistency.

In our view the same analysis would apply in a situation in which a particular premise was issued a production licence for medical marihuana pursuant to federal legislation, but provincial legislation prohibited the use of that premise for medical marihuana production. **In this scenario,**

[1] Or, in other words, where 'the same citizens are being told to do inconsistent things' (*Multiple Access Ltd. v. McCutcheon*, 1982 CanLII 55 (SCC) at p. 191.

although it would be possible to comply with both regimes by not creating the MMGO, upholding the zoning would frustrate the federal legislation.

Accordingly, **if the federal government (in contravention of its stated policy) issues a licence to produce for a particular location in which the zoning bylaw prohibits MMGO's, the zoning bylaw would be inoperative.** The zoning bylaw would be incompatible with the federal scheme, because in this hypothetical example, the federal scheme expressly granted permission to conduct a MMGO at that location.

However, there is a distinction between a potential conflict that could arise should the federal government choose to licence MMGO's in conflict with zoning bylaws, which would render zoning inapplicable, and an inability to legally zone for MMGO's at all. This principle has been expressly endorsed by the Supreme Court of Canada:

> As a general principle, the mere existence of provincial (or federal) legislation in a given field does not oust municipal prerogatives to regulate the subject matter.[2]

Put another way, in a case in which a City of Vancouver bylaw forbade an activity in Vancouver which a BC Lottery Corporation regulation authorized or permitted, but did not compel, the Court of Appeal held:

> It is no longer the key to this kind of problem to look at one comprehensive scheme, and then to look at the other comprehensive scheme, and to decide which scheme entirely occupies the field to the exclusion of the other. Instead, the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they coexist in this particular case in their operation? If so, they should be allowed to co-exist, and each should do its own parallel regulation of one aspect of the same activity, or two different aspects of the same activity.[3]

In our opinion, absent express federal permission to conduct an MMGO in contravention of the applicable zoning, there is no qualifying conflict and no need to resort to the doctrine of paramountcy. Zoning bylaws and the MMPR's can coexist: there is no inherent conflict between the two.

Furthermore, there is reason to believe that such an impermissible conflict between the two schemes will not arise. First, on our review of the MMPR's,

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[2] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town),* 2001 SCC 40 at para 39

[3] *B.C. Lottery Corp. v. Vancouver (City),* 1999 BCCA 18 at para. 19

there is nothing to suggest that the federal government wishes to attain any particular geographic spacing or locating of MMGO's. Indeed, as discussed above, the MMPR regime contemplates and endorses exclusive local government control over the location of MMGO's, and includes specific notification requirements which appear to be tailored to ensuring such local government control. Accordingly, it would be contrary to stated policy for the federal government to licence locations as MMGO's where the zoning does not permit such a use of the property.

In sum, absent express federal permission to conduct an MMGO in contravention of the applicable zoning at the specified location, in our opinion, a court would likely conclude that a zoning prohibition against MMGO's throughout a particular local government's jurisdiction does not conflict with or frustrate the federal purpose, as providing for specific locations of MMGO's (or control over locations) is not a part of the federal government's purpose.