

MUNICIPAL, PLANNING & DEVELOPMENT LAW

MEDICAL MARIHUANA
Municipal Regulation of a Budding Industry

Ontario Bar Association - Institute 2017
Emerging Developments in Municipal and Planning Law
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R. v. Parker

2000 CanLII 5762 (ON CA)

Charter rights – liberty and security of the person

[2] “It has been known for centuries that, in addition to its intoxicating or psychoactive effect, marihuana has medicinal value”

- *Section 4 of the Controlled Drugs and Substances Act (“CDSA”)* prohibits unauthorized possession and cultivation of cannabis (marihuana) under threat of imprisonment
- Forcing patients to choose between health and imprisonment violates *Charter* rights to liberty and security of the person and is not in accordance with principles of fundamental justice
- Section 4 of the CDSA declared unconstitutional in the absence of an acceptable medical exemption to provide access for those in need
- Declaration of invalidity suspended for one year

Marihuana Medical Access Regulations

- Health Canada's response to the ruling in *Parker*
- Attempt to provide a constitutionally acceptable medical exemption to Section 4 of the CDSA
- Issuance of authorization to possess ("ATP") based on a declaration of need from medical practitioner
- With ATP, patients could access medical marihuana by:
 - Purchasing directly from Health Canada
 - Producing it themselves pursuant to a Personal Use Production Licence ("PUPL")
 - Production by a third party pursuant to a Designated Person Production Licence ("DPPL")

Site Restrictions

- Production could not take place simultaneously outdoors
- Dried marihuana could only be stored indoors
- Outdoor production could not be adjacent to:
 - schools
 - public playgrounds
 - daycare facilities
 - Other public places frequented by persons mainly under 18 years of age

Other Restrictions

- Designated person (grower) may not:
 - hold more than one DPPL
 - produce marihuana for more than one person
 - grow with more than two other producers
 - be compensated

Hitzig v. Canada

2003 CanLII 30796 (ON CA)
MMAR declared unconstitutional



“Quite simply, it does not lie in the government’s mouth to ask people to consort with criminals to access their constitutional rights”

- Case considered questions of supply of medical marihuana and eligibility to possess
- Appellants argued that state action prevented access to marihuana or a supply of seeds from which patients could grow their own medical marihuana
- Appellants also argued that requirements to have specialists complete declarations to establish necessity onerous and arbitrary rendering medical exemption illusory (eligibility)
- Government argued that patients could obtain marihuana and seeds from the black market
- Right to security of the person includes the right to lawful access
- Court cured constitutional deficiencies by allowing designated producers to:
 - Be compensated
 - Produce for more than one ATP holder
 - Combine growing with more than two other producers

Marihuana for Medical Purposes Regulations

- Health Canada's response to ongoing litigation regarding the constitutionality of the MMAR
- Introduced licensed commercial producers
- All patients to obtain medical marihuana from licensed producer pursuant to prescription
- No point of sale or dispensaries, all product shipped by courier
- Repealed MMAR
- No personal use production permitted, no designated producers permitted
- Municipalities must be given 30 days notice of intention to establish facility prior to submission of application to Health Canada

R. v. Smith

2015 SCC 34

access restriction to cannabis derivatives unconstitutional



“It is difficult to understand why allowing patients to transform dried marihuana into baking oil would put them at a greater risk than permitting them to smoke or vaporize dried marihuana”

- Prohibition on cannabis (marihuana) compounds imposes limits on liberty and security of the person not in accordance with the principles of fundamental justice
- Government’s objective was protection of health and safety
- Court found a total disconnect between limits on liberty and security of the person imposed by the prohibition and the government’s stated objective
- Restriction was arbitrary and undermined objective by forcing patients to smoke marihuana to obtain benefit from marihuana compounds

Allard v. Canada

2016 FC 236

MMPR declared unconstitutional

Wood
Bull^{LLP}

Barristers & Solicitors

- Provided injunctive relief from repeal of MMAR (2014 FC 280)
- Constitutionally viable exemption must provide reasonable access to medically approved patients, including the right to produce medical marihuana for oneself or designate a producer
- Right to liberty properly construed grants the individual a degree of autonomy in making fundamental decisions of personal importance, including the use of cannabis to alleviate the effects of an illness with life-threatening consequences
- Right to security of the person is engaged by establishment of a regulatory regime which restricts access to licensed producers
- Declaration of invalidity suspended for six months to allow Health Canada to enact a new or parallel regime

Access to Cannabis for Medical Purposes

- Health Canada's response to *Allard* ruling
- Essentially a harmonization of MMAR and MMPR
- Allows patients with prescription to access medical marijuana by purchasing from a licensed producer, grow their own or designate someone to grow for them

Licensed Producers

- Provide written notice to municipalities at least 30 days before applying to Health Canada for a licence
- All production must take place indoors
- No point of sale, no dispensaries, all delivery by courier
- Must comply with zoning by-laws
- Right of inspection

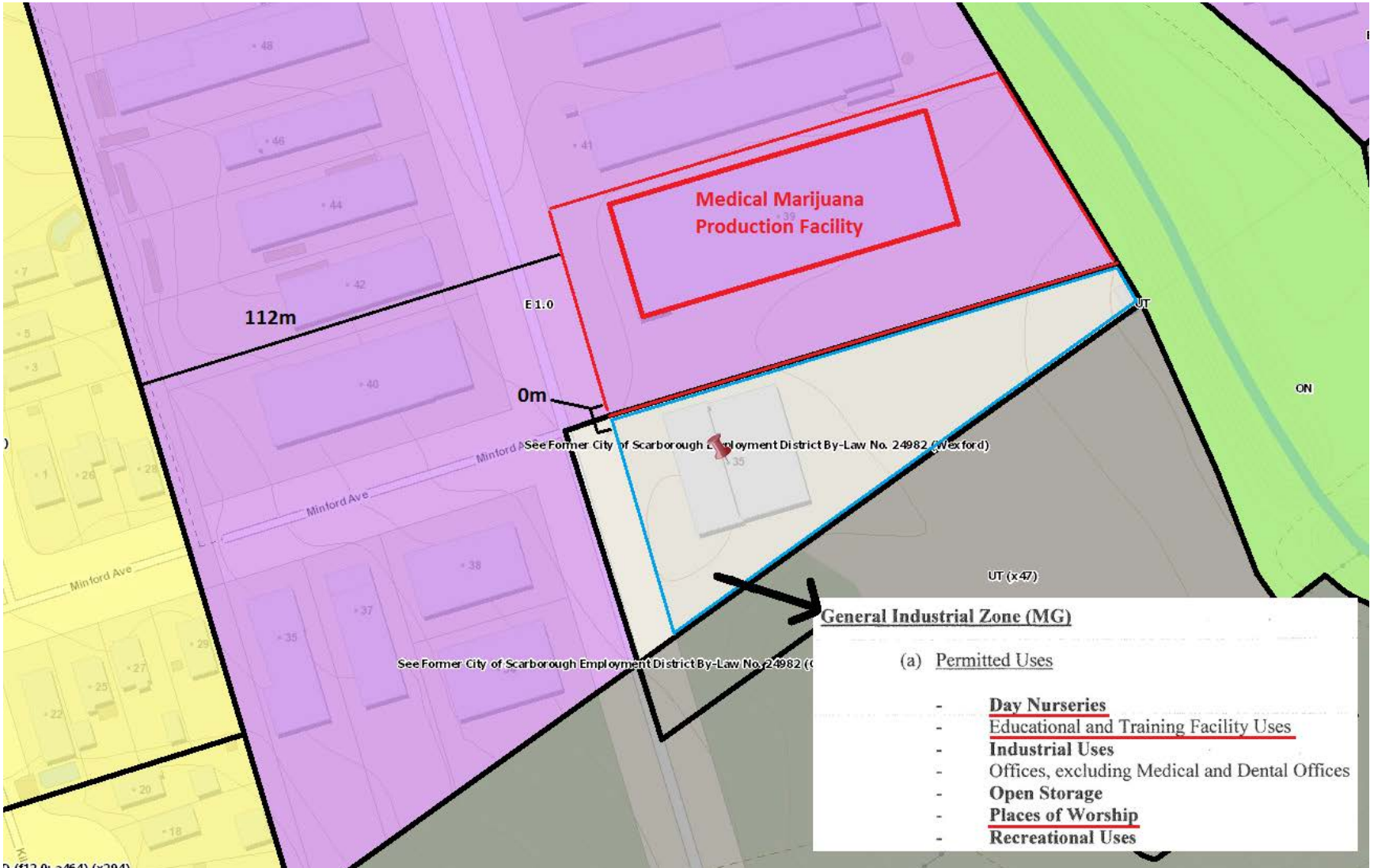
Personal Use Production or Designated Producer

- Must register to produce with Health Canada pursuant to prescription
- Production may take place indoors or outdoors
- Production may take place in a dwelling
- Outdoor production prohibited adjacent to a school, public playground, daycare facility or other place frequented by persons under 18 years of age
- No requirement to notify municipality
- No right to inspect dwelling place without consent
- Site limited to four registrations

Zoning By-law Approaches

- Site specific zoning by-law required
- Defined use as of right in certain zones eg. industrial or agricultural
- Use fits within existing definitions eg. industrial use

Scarborough - Wexford Employment District





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