

September 29, 2022

Our File No. 127060

Ms. Natalie Bray
Director of Clerks and Planning Services
City of Elliot Lake
45 Hillside Drive North Elliot Lake, ON P5A 1X5

Dear Ms. Bray:

Re: Opinion re Proposed Personal Recreational Cannabis By-law

We have been asked to provide an opinion with respect to a proposed Personal Recreational Cannabis By-law (the “By-law”) for the City of Elliot Lake (the “City”).

We are advised that the purpose of the By-law would be to regulate the location/placement of personal recreational cannabis plants in outdoor spaces on private property. It is our further understanding the By-law would require cannabis plants to be out of public sight and reach and would prohibit individuals from cultivating cannabis plants outdoors should their home be located near a school, park or other place where children congregate.

We are not aware of any other municipalities that have passed by-laws regarding the cultivation of personal recreational cannabis.

SUMMARY OF OPINION

At this time, it is not possible to provide a definitive opinion regarding whether the By-law is constitutionally valid. However, the Supreme Court of Canada (“SCC”) recently heard an appeal from the Quebec Court of Appeal which is likely to shed light on this issue and assist provinces (and by extension, municipalities) to understand the scope of their authority, if any, to impose restrictions on the personal cultivation of recreational cannabis.¹

The City is advised not to adopt the By-law until it has had the benefit of reviewing the SCC decision which is expected to be issued within the next six months. If the SCC rules that the province (and by extension municipalities) may not curtail the ability of individuals to possess and cultivate up to four cannabis plants (as permitted by the federal *Cannabis Act*) then it will be clear that the By-law is unconstitutional and should not be enacted. If the SCC rules that the province may impose more stringent regulations than the federal *Cannabis Act* provides, then the City can be more confident in the constitutional validity of the By-law.

In any event, even if the SCC determines that provinces (and municipalities) have the authority to regulate the possession and cultivation of personal recreational cannabis plants, in our opinion the City should not enact the By-law. The enforcement of the By-law would require additional City resources in terms of monitoring compliance, responding to complaints and prosecution. In

¹ *Janick Murray-Hall v. Attorney General of Quebec*, 2022 CarswellQue 2423 (leave to appeal allowed), 2019 QCCS 3664, (C.S. Que.) (rev'd) 2021 QCCA 1325 (C.A. Que.).

addition, given that the By-law is likely to have opponents, it is possible that an application to quash the By-law would be brought pursuant to section 273 of the *Municipal Act, 2001*.² Responding to an application to quash the By-law would come at a significant legal cost to the City even if the City is ultimately successful.

In our opinion, any concerns the City has regarding the personal production of recreational cannabis would be better addressed through public education.

If the City decides to proceed with the By-law, it must be drafted to ensure it is clear in terms of its application and that it does not conflict with other City by-laws.

APPLICABLE LEGISLATION

On June 21, 2018, the federal government enacted the *Cannabis Act* to legalize access to cannabis and to control and regulate its production, distribution, and sale. Among other things, this legislation allows individuals over the age of 18 to cultivate up to four cannabis plants in their homes or yards:

Possession

8 (1) Unless authorized under this Act, it is prohibited

...

(e) for an individual to possess more than four cannabis plants that are not budding or flowering; or

...

Production

12 (4) Unless authorized under this Act, it is prohibited for an individual who is 18 years of age or older to cultivate, propagate or harvest, or to offer to cultivate, propagate or harvest,

...

(b) more than four cannabis plants at any one time in their dwelling-house.

...

Definition of *dwelling-house*

(8) For the purposes of this section, ***dwelling-house***, in respect of an individual, means the dwelling-house where the individual is ordinarily resident and includes

(a) any land that is subjacent to it and the immediately contiguous land that is attributable to it, including a yard, garden or any similar land; and

(b) any building or structure on any land referred to in paragraph (a)

² *Municipal Act, 2001*, S.O. 2001, c. 25.

CASE LAW

On June 12, 2018, the Quebec legislature enacted the *Cannabis Regulation Act*.³ Among other things, the *Cannabis Regulation Act* prohibits and makes it an offence to possess or cultivate cannabis plants for personal purposes (the “Impugned Provisions”).

An application was brought challenging the constitutional validity of the Impugned Provisions. The lower court found that the Impugned Provisions, imposing a blanket prohibition on the possession and cultivation of cannabis plants for personal purposes, unacceptably encroach on the federal government’s exclusive jurisdiction over criminal matters and therefore declared the Impugned Provisions to be unconstitutional.⁴

The decision of the lower court was appealed to the Quebec Court of Appeal. The Court of Appeal reversed the decision of the lower court finding that the province was authorized to enact the Impugned Provisions pursuant to its power to legislate in the area of public health and that the federal *Cannabis Act* did not limit the province’s power to prohibit the private cultivation of cannabis.⁵ The Court of Appeal’s decision was subsequently appealed to the SCC and the matter was heard on September 15, 2022.

ANALYSIS

While the By-law does not propose an absolute ban on the possession and cultivation of personal recreational cannabis in the City, it imposes restrictions which are not found in the federal *Cannabis Act*. An argument may be made that the By-law is *ultra vires* municipal jurisdiction as it resembles an exercise of the criminal law power set out in section 91(27) of the *Constitution Act, 1987*.⁶ The criminal law power seeks to preserve the public peace, order, security, health, and morality by suppressing conduct deemed harmful, undesirable or injurious. Another argument may be made that the By-law conflicts with the provisions of the federal *Cannabis Act* which permit individuals over the age of 18 to possess and cultivate up to four cannabis plants and that pursuant to the principle of federal paramountcy, the By-law is of no force or effect

Aside from uncertainty regarding the constitutional validity of the By-law, we have practical concerns regarding its enforcement. Enforcing the By-law would require additional City resources for monitoring compliance, responding to complaints and prosecution. The City should assess whether its objective of preventing children from obtaining recreational cannabis grown on private property can be achieved by other means such as enhanced public education.

In addition and as noted above, given that the By-law is likely to have some opponents, it is possible that an application to quash would be brought pursuant to section 273 of the *Municipal Act, 2001*. Responding to an application to quash the By-law would come at a significant legal cost to the City even if the City is ultimately successful.

³ CQLR, c. C-5.3, ss. 5 & 10.

⁴ *Murray Hall v. Attorney General of Quebec*, 2019 QCCS 3664, (C.S. Que.).

⁵ *Attorney General of Quebec v. Murray-Hall*, 2021 QCCA 1325 (C.A. Que.).

⁶ *The Constitution Act*, 1867, 30 & 31 Vict, c. 3.

As noted above, in our opinion, any concerns the City has regarding the personal production of recreational cannabis would be better addressed through public education.

If the City decides to proceed with the By-law, it should be drafted to ensure it is clear in terms of its application. For example, if the City seeks to prohibit outdoor cannabis cultivation in the vicinity of schools and parks, it should identify a specific distance within which cultivation is prohibited. As an example, Ontario Regulation 468/18, made pursuant to the *Cannabis Licence Act, 2018* prohibits a cannabis retail store from being located less than 150 metres from a school.⁷ The regulation does not impose any buffering distance from parks. In our opinion, extending the prohibition to “any place where children congregate” is overly broad, not sufficiently clear and could potentially be challenged through an application to quash the By-law.

In addition, if the City decides to proceed with the By-law, including the requirement that personal recreational cannabis plants be out of public site and reach, it must ensure that property owners still comply with By-law No. 06-99 being the City’s Building By-law, which requires a permit for the erection of a fence over 2 metres tall. Other considerations when preparing the By-law include identifying a process for addressing contraventions and determining appropriate penalties.

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Should you have any questions with respect to the above, please do not hesitate to contact the undersigned.

Yours truly,

AIRD & BERLIS LLP



Laura Dean
Partner

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⁷ *Cannabis Licence Act, 2018*, S.O. 2018, c. 12, Sched. 2, s. 11.