COURSE: **CML 3351 – Legal Research and Writing (Selected Problems)**
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THE MUNICIPAL REGULATION OF NON-COMMERCIAL CANNABIS CULTIVATION

EXECUTIVE SUMMARY

This essay submits that municipalities should amend existing licensure by-laws to regulate the non-commercial cultivation of recreational cannabis in a responsible and accountable manner. The Introduction reviews the legislative history of the federal *Cannabis Act* and the Ontario's *Cannabis Act, 2017* to outline the competing policies of Canadian cannabis legalization. Part I characterizes the constitutional right that individuals have to reasonably access medical cannabis and questions whether the fictional distinction between medical and recreational is tenable. Part II reviews the municipal power to prohibit individuals from carrying on activities related to traditional municipal spheres of jurisdiction and submits that a complete prohibition with respect to the non-commercial cultivation of recreational cannabis would likely be *ultra vires* municipal jurisdiction. Part III explains the municipal power to charge individuals levies in the nature of licence fees and taxes and concludes that municipalities should only charge cost-recovery levies necessary to fund administratively simple licensure schemes. The Conclusion outlines the fiduciary duties of municipal councillors and submits that municipalities should update their respective codes of conduct to reduce the potential for conflicts of interest.

INTRODUCTION: THE LEGALIZATION OF RECREATIONAL CANNABIS IN CANADA

SECTION I: THE CONFLICTING POLICIES OF RECREATIONAL CANNABIS

Canada entered a new era of drug regulation on 4 December 2015 when the Governor General of Canada delivered the Speech from the Throne indicating that the federal government

will "legalize, regulate and restrict access to marijuana."[1] But, the transition from prohibition to regulation does not happen instantaneously – first, there must be a written change of policy which evidences the government's new regulatory approach. In this respect, the publication of a Discussion Paper in June 2016, entitled "Towards the legalization, Regulation and Restriction of Access to Marihuana," signalled the outer contours of this policy shift by outlining the government's nine policy goals respecting the regulation of recreational cannabis.[2] MacFarlane, Frater, and Michealson summarize the federal government's new policy as follows:

> The goals articulated set out an ambitious agenda. Instead of prohibiting the use of marihuana for recreational purposes, the government has decided to introduce a regulated market, aimed at denying profits to the criminal gangs who have always benefitted handsomely from sales of the drug. In effect, the government proposal would create not one but two regulated markets: one for the recreational use of marihuana, and one for medical use.[3]

MacFarlane, Frater, and Michealson note that Parliament's challenge will be to pursue two central objectives that conflict, namely "liberalizing access for adults while increasing the restrictions on access for others (youth); and attempting to deter use in ways that may be dangerous."[4] To work out a regulatory compromise, the Liberals appointed public servants to study issues related to recreational cannabis legalization couched in a public health approach,

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[1] *Canada*, Governor General, "Making real change happen: speech from the Throne to open the first session of the forty-second Parliament of Canada," (Dated 4 December 2015) (Online: https://www.canada.ca/content/dam/pco-bcp/documents/pm/speech_from_the_throne.pdf) at p. 7.

[2] Canada, Task Force on Marijuana Legalization and Regulation, *Discussion Paper*: "Towards the legalization, Regulation and Restriction of Access to Marihuana," (Dated 30 June 2016) (Online: https://www.canada.ca/content/dam/hc-sc/healthy-canadians/migration/health-system-systeme-sante/consultations/legalization-marijuana-legalisation/alt/legalization-marijuana-legalisation-eng.pdf) at pp. 3-4.

[3] Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*, "1:100 – Cannabis Legalization," 4th ed. (Toronto: Carswell, 2015) at 1:100.20. See generally *Access to Cannabis for Medical Purposes Regulations*, S.O.R./2016-230, s. 3.(3). A person may possess cannabis for their own medical purposes if they obtained that cannabis from (i) a person authorized by s. 178 to produce cannabis for medical purposes or (ii) by personally producing it for themselves in accordance with s. 174.

[4] Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*,"1:100 – Cannabis Legalization," 4th ed. (Toronto: Carswell, 2015) at 1:100.20.

which the Task Force defined – in part – as "reducing harm and promoting health [and] target[ing] interventions for "high-risk individuals and practices[.]"[5] Although the federal government of Canada intends to take a public health approach to regulating recreational cannabis – it must be said that it will be difficult for the Liberals to balance these two objectives, as the Task Force found "deep divisions among the thousands of experts" it consulted to draft its Discussion Paper in regards to the health benefits and health risks of cannabis.[6] And, according to the Task Force, "[f]ew topics of discussion generated stronger views than the question of whether to allow Canadians to grow cannabis in their homes for their own consumption."[7] Indeed, although some law enforcement, municipal, landlord, and neighbourhood associations submitted that permitting personal cultivation could cause various health and safety risks, "92% of those [regular individuals] who responded to the question" online as part of the Task Force's general request of comments were in favor of personal cultivation, due to the decreased costs and increased access advantages of such a system.[8] To say the least, the contrast between these views are striking – but, municipalities must find a regulatory solution responsive to the needs of both of these groups. It will not be easy. The Federation of Canadian Municipalities' release of the *Municipal*

[5] Canada, Task Force on Cannabis legalization and Regulation, *A Framework for the Legalization and Regulation of Cannabis in Canada*: "The Final Report of the Task Force on Cannabis Legalization and Regulation," (Dated 30 November 2016) (Online: https://www.canada.ca/content/dam/hc-sc/healthy-canadians/migration/task-force-marijuana-groupe-etude/framework-cadre/alt/framework-cadre-eng.pdf) at p. 12.
[6] Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*,"1:100 – Cannabis Legalization," 4th ed. (Toronto: Carswell, 2015) at 1:100.20.
[7] Canada, Task Force on Cannabis legalization and Regulation, *A Framework for the Legalization and Regulation of Cannabis in Canada*: "The Final Report of the Task Force on Cannabis Legalization and Regulation," (Dated 30 November 2016) (Online: https://www.canada.ca/content/dam/hc-sc/healthy-canadians/migration/task-force-marijuana-groupe-etude/framework-cadre/alt/framework-cadre-eng.pdf) at p. 35.
[8] See Canada, Task Force on Cannabis legalization and Regulation, *A Framework for the Legalization and Regulation of Cannabis in Canada*: "The Final Report of the Task Force on Cannabis Legalization and Regulation," (Dated 30 November 2016) (Online: https://www.canada.ca/content/dam/hc-sc/healthy-canadians/migration/task-force-marijuana-groupe-etude/framework-cadre/alt/framework-cadre-eng.pdf) at p. 36.

Guide to Cannabis Legalization indicates its view that municipalities will face "difficult decisions" about using existing or new land use management laws to develop an appropriate regulatory response to the imminent legalization of personal cannabis cultivation.[9] In a brief companion report, the Association of Municipalities Ontario agrees – that is, "legalized non-medical cannabis will have many impacts on municipal governments and the communities they serve.[10]

SECTION II: THE PRIVILEGE TO CULTIVATE RECREATIONAL CANNABIS

The *Cannabis Act* was introduced on 13 April 2017 and is intended to fulfill the Liberal's election promise to legalize recreational cannabis.[11] And, in reflection of the above policy documents, the purpose statement of the Act confirms that the purpose of the Act is to "protect public health and public safety" and to – among other things – "provide for the licit production of cannabis to reduce illicit activities in relation to cannabis[.]"[12] In respect of the personal cultivation of cannabis, s. 12 of the *Cannabis Act* confirms that individuals will be able to cultivate less than four cannabis plants at any one time in their dwelling-house, provided that those individuals are eighteen years of age or older.[13] There have been some changes throughout the various readings of the Act. For example, although the first reading of the Act had an additional

[9] See Federation of Canadian Municipalities, *A Municipal Guide to Cannabis Legalization*, (Dated 16 April 2018) (Online: https://fcm.ca/Documents/issues/Cannabis-Guide-EN.pdf) at p. 8.
[10] Association of Municipalities Ontario, *AMO's Companion Document to FCM'S Municipal Guide*, (Dated 16 April 2018) (Online: https://www.amo.on.ca/AMO-PDFs/Reports/2018/AMOCompanionDocumentFCMGuideCannabis201804.aspx) at p. 1.
[11] See House of Commons of Canada, *Bill C-45: An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts,* (Dated 27 November 2017) (Online: http://www.parl.ca/Content/Bills/421/Government/C-45/C-45_3/C-45_3.PDF).
[12] See House of Commons of Canada, *Bill C-45: An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts,* (Dated 27 November 2017) (Online: http://www.parl.ca/Content/Bills/421/Government/C-45/C-45_3/C-45_3.PDF), s. 7(c).
[13] See House of Commons of Canada, *Bill C-45: An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts,* (Dated 27 November 2017) (Online: http://www.parl.ca/Content/Bills/421/Government/C-45/C-45_3/C-45_3.PDF), s. 12.

prohibition against the cultivation of cannabis plants with a height of more than 100 cm in height,[14] this restriction was later abandoned in Committee due to concerns that this 100 cm height limit would be expensive to administer and difficult to enforce.[15] Interestingly enough, Dr. Page, the co-founder of Anandia Labs and an Adjunct Professor in the Botany Department at the University of British Columbia, had this to say in regards to the initial restriction:

> The task force came up with the suggestion of 100 centimetres and I was puzzled why that was. I think it had a lot to do with screening plants in cultivation in people's backyards. The height of a typical fence in Canada is about four feet, by city bylaw, and that would screen out those plants at 100 centimetres. As I indicated in my submission, allow the cities to enact those bylaws. I would just toss out the plant height restriction.[16]

The municipalities will, therefore, be required to regulate the nuances of personal production.

At the provincial level, the *Cannabis Act, 2017* was enacted on 12 December 2017 and, to that end, will come into force on a day to be named by proclamation by the Lieutenant Governor.[17] Although there are several purposes to the Act, the most relevant purpose is to take a public health approach, which will protect youth and restrict their access to cannabis while ensuring that the sale of cannabis is done in accordance with the *Ontario Cannabis Retail Corporation Act, 2017.*[18] The province of Ontario intends to implement this purpose through measures that will – among other things – involve "establish[ing] prohibitions relating to the sale,

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[14] See House of Commons of Canada, *Bill C-45: An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts,* (Dated 27 November 2017) (Online: http://www.parl.ca/Content/Bills/421/Government/C-45/C-45_1/C-45_1.PDF), s. 12(6)(a).
[15] See generally House of Commons, *HESA Committee Report*: "Twelfth Report," (Dated 3 October 2017) (Online: http://www.ourcommons.ca/DocumentViewer/en/42-1/HESA/report-12/).
[16] House of Commons, "HESA Committee Meeting," (Dated 13 September 2017) (Online: https://www.ourcommons.ca/Content/Committee/421/HESA/Evidence/EV9079821/HESAEV66-E.PDF) at p. 905.
[17] *Cannabis Act, 2017*, S.O. 2017, c. 26, Sch. 1.
[18] See *Cannabis Act, 2017*, S.O. 2017, c. 26, Sch. 1, s. 1(a) and *Ontario Cannabis Retail Corporation Act, 2017*, S.O. 2017, c. 26, Sch. 2, s. 2(1). "The Corporation has the exclusive right to sell cannabis in Ontario."

distribution, purchase, possession, cultivation, propagation and harvesting of cannabis[.]"[19] One prohibition that the province of Ontario has already established is a prohibition against any person under 19 years of age from cultivating cannabis, and the further possibility for the Lieutenant Governor in Council to make regulations to prohibit the cultivation of cannabis "by specified persons or in specified circumstances[.]"[20] Similar to how the *Cannabis Act* maintains the existing *Access to Cannabis for Medical Purposes Regulations*, the *Cannabis Act, 2017* also does not purport to apply with respect to the cultivation of medical cannabis (a separate issue).[21]

PART I: THE TWO SOLITUDES OF MEDICAL AND RECREATIONAL CANNABIS

SECTION III: THE RIGHT TO HAVE REASONABLE ACCESS TO MEDICAL CANNABIS

Although a survey of the medical benefits of cannabis is beyond the scope of this essay, medical studies indicate that cannabis may be used to treat medical conditions such as epilepsy, glaucoma, multiple sclerosis, nausea, and lack of appetite.[22] Before the jurisprudential acceptance of the medical benefits of cannabis, there was a case-by-case possibility of obtaining an exemption to use medical cannabis under s. 56 of the *Controlled Drugs and Substances Act* for medical, scientific, or public interest purposes.[23] Absent this exemption, s. 7(1) of the *Controlled Drugs and Substances Act* prohibits individuals from producing cannabis by any method,

[19] *Cannabis Act, 2017*, S.O. 2017, c. 26, Sch. 1, s. 1(a).
[20] *Cannabis Act, 2017*, S.O. 2017, c. 26, Sch. 1, ss. 10(2) and 28(b).
[21] See *Cannabis Act, 2017*, S.O. 2017, c. 26, Sch. 1, s. 5(1).
[22] See Jonathan P. Caulkins, Beau Kilmer, and Mark A. R. Kleiman, *Marijuana Legalization: What Everyone Needs to Know*, 2nd ed. (New York: Oxford University Press, 2016) at p. 82-83 citing Penny Whiting et. al., "Cannabinoids for Medical Use: A Systemic Review and Meta-Analysis," Journal of the American Medical Association 313, no. 24 (2015) 2456-2473. The Authors made several conclusions, including that "there was moderate-quality evidence to suggest that cannabinoids may be beneficial for the treatment of chronic neuropathic or cancer pain [...] and spasticity due to MS[.]"
[23] See Patrick Hawkins and Jasmine Ghosn, *Canadian Health Law Practice Manual*, 1st ed. (Markham: Lexis Nexis, 2000) (looseleaf updated 2010) at 13.59-13.60 citing *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 56.

including the cultivation of the cannabis plant.[24] In this uncertain legislative context, the medical benefits of cannabis for a patient suffering from a severe form of epilepsy was first accepted by the Court in *R. v. Parker.*[25] In holding that a total prohibition on the possession of cannabis by the *Narcotic Controls Act* was an unconstitutional violation of the accused's s. 7 right to life, liberty, and security of the person as guaranteed by the *Canadian Charter of Rights and Freedoms*,[26] Rosenberg J.A. concluded that "forcing Parker to choose between his health and imprisonment violated his right to liberty and security" in a manner that was analogous to "forcing a woman, by threat of criminal sanction, to carry a foetus to term[.]" was a deprivation of his liberty and his security of his person.[27] On the issue of whether the deprivation of Parker's liberty and security of the person was in accordance with the principles of fundamental justice, the Court acknowledged that while there was no direct entitlement to therapeutic treatment, it was nevertheless true that "the common-law treatment of informed consent, the sanctity of life and commonly held societal beliefs about medical treatment suggest that a broad criminal prohibition that prevents access to necessary medicine is not consistent with fundamental justice."[28] Rosenberg J.A. reasoned that if the purpose of a cannabis prohibition is to protect public health, an overbroad prohibition prevents access to cannabis for persons who need it to

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[24] *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 7(1). See also Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*,"7:40 Modes of Production: The Essential Ingredients," 4th ed. (Toronto: Carswell, 2015) at 7:40.40. The cultivation of cannabis is a *mens reus* offence where an individual must intentionally commit the *actus reus* of cultivating, propagating, or harvesting cannabis from a cannabis plant.
[25] See *R. v. Parker*, [2000] O.J. No. 2787, 2000 CarswellOnt 2627 (Ont. C.A.) at paras. 2-3 and 7-10. "I have concluded that the trial judge was right in finding that Parker needs marihuana to control the symptoms of his epilepsy."
[26] See generally *The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c. 11, s. 7 and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 4(1). See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) (looseleaf updated 2012) at p. 47-3.
[27] *R. v. Parker*, [2000] O.J. No. 2787, 2000 CarswellOnt 2627 (Ont. C.A.) at paras. 10 and 108-109 citing *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 1988 CarswellOnt 45 at para. 27.
[28] *R. v. Parker*, [2000] O.J. No. 2787, 2000 CarswellOnt 2627 (Ont. C.A.) at para. 139.

preserve their health defeats this objective.[29] To provide Parker with a remedy, the Court declared that the offence of possession of cannabis was or no force and effect, but suspended the declaration of invalidity for 1-year to permit Parliament to amend the *Narcotic Control Act.*[30] The Ontario Court of Appeal has subsequently narrowed the scope of *R. v. Parker* to hold that patients have a right to have reasonable access medical cannabis based on their individualized therapeutic needs, and not a free-standing constitutional right to use cannabis for any purpose.[31]

SECTION IV: THE PURPORTED MUNICIPAL POWER TO PROHIBIT CANNABIS CULTIVATION

A municipal corporation generally has the power to prohibit a person from carrying on a particular calling.[32] But, each jurisdiction in Canada is different. For example, even though the common law principle is that there is a distinction between the municipal power to regulate and prohibit the carrying on of a trade or thing,[33] the broad powers of the *Municipal Act, 2001* have substantially undermined the application of this common law principle in Ontario.[34] Instead, the rule in Ontario is that municipalities are permitted to prohibit persons from doing anything in respect of matters that fall under their traditional spheres of jurisdiction. For example, the central issue in *2326169 Ontario Inc. v. Toronto (City)* was whether the City of Toronto had the power to

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[29] *R. v. Parker*, [2000] O.J. No. 2787, 2000 CarswellOnt 2627 (Ont. C.A.) at para. 144. See also Kent Roach et. al., *The Highs and Lows of Medical Marijuana Regulation in Canada*, 2015 62 C.L.Q. 536 (Westlaw). "In our view, granting s. 56 [*CDSA*] exemptions [...] would be justified on compassionate grounds alone, despite the gaps in the medical research."

[30] *R. v. Parker*, [2000] O.J. No. 2787, 2000 CarswellOnt 2627 (Ont. C.A.) at para. 210.

[31] See *R. v. Mernagh*, 2013 ONCA 67, 2013 CarswellOnt 885 at para. 61. "The correct proposition expressed in Parker is that, given that marihuana can medically benefit some individuals, a blanket criminal prohibition on its use is unconstitutional. This Court did not hold that serious illness gives rise to an automatic "right to use marihuana", and Parker did not remove the requirement that the applicant lead evidence that his or her rights were impaired."

[32] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 699.

[33] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2018) at p. 693.

[34] See *Municipal Act, 2001,* S.O. 2001, c. 25, s. 8(3). See *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 8(3).

pass a by-law prohibiting hookah smoking – to protect the health, safety, and well-being of persons – in all establishments licensed to carry on business in the City.[35] An important contextual fact behind why the City of Toronto was legislating in order to prohibit the operation of hookah lounges was that, although certain types of shisha have more carcinogens than tobacco, the *Smoke Free Ontario Act* only prohibits people from smoking tobacco in enclosed public places and does not otherwise apply to non-tobacco products, such as the shisha products.[36] In accepting that this prohibition was valid, R.F. Goldstein J. distinguished previous supreme court jurisprudence that had held that – in the absence of an express power to prohibit something – municipalities do not have the power to make it "unlawful to carry on a lawful trade in a lawful manner."[37] His view was that subsequent jurisprudence and the purpose statements in various provincial municipal acts now confirm that the Courts are required to fix a benevolent interpretation upon the municipal power to prohibit matters which threaten the general welfare of persons living in the City of Toronto and elsewhere.[38] The Court of Appeal upheld the decision below and deferred to the City of Toronto's decision to prohibit public hookah consumption.[39]

Attempts to analogize the consumption of cannabis to tobacco will be difficult. Although the Courts have accepted that smoke-able cannabis does have deleterious health effects upon its users, to the Supreme Court, this acknowledgement actually means that patients who use

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[35] See *2326169 Ontario Inc. v. Toronto (City)*, 2016 ONSC 6221, 2016 CarswellOnt 15977 at para. 21 and See *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 8(2)6.
[36] *2326169 Ontario Inc. v. Toronto (City)*, 2016 ONSC 6221, 2016 CarswellOnt 15977 at paras. 16-19 citing *Smoke Free Ontario Act*, S.O. 1994, c. 10, s. 2.
[37] *2326169 Ontario Inc. v. Toronto (City)*, 2016 ONSC 6221, 2016 CarswellOnt 15977 at paras. 25-29 distinguishing *Prince George (City) v. Payne,* [1978] 1 S.C.R. 458, 1977 CarswellBC 366 at paras. 22-23..
[38] *2326169 Ontario Inc. v. Toronto (City)*, 2016 ONSC 6221, 2016 CarswellOnt 15977 at para. 33 citing *Croplife Canada v. Toronto (City)*, 10 M.P.L.R. (4th), 2005 CarswellOnt 1877 at paras. 17-20.
[39] *232169 Ontario Inc. v. Toronto (City)*, 2017 ONCA 484, 2017 CarswelllOnt 8931 at para. 25.

medical cannabis to treat their symptoms must not only have reasonable access to medical cannabis, but in a form that is less harmful to their health, i.e., instead of being required to smoke dried cannabis, patients must be given the options to consume healthier oral or topical forms of cannabis.[40] I would submit that the schematic structure of the *Cannabis Act, 2017* tends to confirm this nuanced understanding of how cannabis, which may both help and harm, is distinct from substances and activities that – notwithstanding their recreational pleasure – only cause harm to their user and participants. The absence of a local option with regards to the sale and distribution of cannabis in the *Cannabis Act, 2017* – in my view – confirms the provincial recognition that governments should be reluctant to prohibit substances that have medicinal effects.[41] These local options remain constitutional in Ontario and the rest of Canada. For example, the issue in *Siemens v. Manitoba* was whether the *Manitoba Gaming Control Local Option Act*, which authorized municipalities to hold binding plebiscites in regards to the prohibition of video lottery terminals, was a valid constitutional delegation of legislative powers from the province to municipalities in Manitoba.[42] Although the Town of Winkler had held a non-binding plebiscite the year before this Act was enacted, the Act retroactively approved their plebiscite – a legislative measure that caused the operators of the Winkler Inn to lose a substantial amount of business upon the provincial revocation of their site-specific gaming

[40] See *R. v. Smith*, 2015 SCC 34, 2015 CarswellBC 1587 at paras. 7, 20, and 25. The Court stated that a "prohibition on non-dried medical marihuana undermines the health and safety of medical marihuana users by diminishing the quality of their medical care." The Supreme Court agreed with the suggestion of Garson J.A. below that that there will be cases where "alternative forms of cannabis [besides smoke-able cannabis] will be 'reasonably required' for the treatment of seriousness illnesses."

[41] See e.g. *Liquor Licence Act,* R.S.O. 1990, c. L.19, s. 52(2). On the other hand, the *Liquor Licence Act* permits municipalities to vote on local option prohibitions in respect of alcohol. For example, s. 52(2) provides that "no government store may be established in a municipality or part thereof in which the sale of liquor in a government store was prohibited under the law as it existed immediately before the 15th day of September, 1990.

[42] See *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, 2002 CarswellMan 574 at para. 11.

licence.[43] In upholding the Act, the Supreme Court affirmed that Canada has a long history of local option legislation and that "there was no doubt of the competence of legislative bodies to make the application of legislation conditional on the approval of municipal electors."[44] To this end, there is a settled legislative presumption that, "in dealing with any subject, the legislature is presumed to have acquired the information and understanding needed to devise appropriate rules or an appropriate regulatory scheme.[45] There is little doubt that the legislature of Ontario did not know that the personal cultivation of cannabis would be a controversial matter. But, it nevertheless did not use the *Cannabis Act, 2017* to authorize local options against the distribution, sale, or cultivation of cannabis even though it could have done as much,[46] and municipalities, thus, must balance the deleterious and beneficial effects of cannabis on their own.

Besides the general power to prohibit matters that fall within the ambit of sections 10 and 11 of the *Municipal Act, 2001*, municipalities also have the settled power to prohibit persons from carrying on businesses if those persons lack the required licences to do business.[47] With

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[43] See *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, 2002 CarswellMan 574 at para. 4.

[44] See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) (looseleaf updated 2014) at p. 14-27 citing *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, 2002 CarswellMan 574 at para. 40. Major J. explained that local option legislation has been upheld and affirmed for centuries in Canada.

[45] See Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at p. 42 citing *R. v. Ahmad*, 2011 SCC 6, 2011 CarswellOnt 583 at para. 31.

[46] See Ruth Sullivan, *Statutory Interpretation*, 3rd ed. (Toronto: Irwin Law, 2016) at pp. 182-184 citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, 2011 CarswellNat 4190 at para. 60. The Court held that the federal human rights tribunal did not have the jurisdiction to award costs to a success complainant because – in part – other provincial human rights tribunals expressly granted their human rights tribunals the authority to award costs.

[47] See *Municipal Act, 2001,* S.O. 2001, c. 25, s. 151(1)(a). See e.g. *2326169 Ontario Inc. v. Toronto (City)*, 2016 ONSC 6221, 2016 CarswellOnt 15977 at para. 48. The Court held in obiter that although the by-law did not prohibit the hookah lounge owners from carrying on their business as licensed restaurants, "it is clear that the City has the power to do so." See also I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 695. "The power to regulate necessarily implies the power to prohibit when conditions are not met." See e.g. *O'Meara v. Ottawa (City)* (1887), 15 O.A.R. 74 (C.A.) affirmed (1888), 14 S.C.E. 742. A by-law that prohibited persons from offering fresh meat for sale unless those persons obtained licences and sold their fresh meats in the stalls of the city markets was held to be valid.

that said, recent jurisprudence in relation to the municipal regulation of riding sharing businesses confirms – to the contrary – that the Courts will not defer to the colorable attempts of municipalities to "holistically" adapt the application of existing licensure schemes to novel business activities.[48] For example, the central issue in Court in *Toronto (City) v. Uber Canada Inc.* was whether the Court should, in purported accordance with the benevolent interpretation of municipal by-laws, accept a "holistic" view of ride sharing businesses.[49] In my view, two of Sean F. Dunphy J.'s discretionary interpretations solidified his reluctance to expand the definition of either "taxicab broker" and "limousine service companies" to include ride sharing businesses.[50] First, he held that the definition of taxicab was completely codified in Chapter 545 of Toronto's *Municipal Code* and that resort to the broader definition of taxicab was unavailable because the introductory stem of that definition provided that "the following terms shall have the meanings indicated [below.]"[51] His view was that the word "shall" had a plain and ordinary meaning that is mandatory – that is, the word "shall" establishes that the definition is exclusive of all other meanings besides the technical meaning of "[a]n ambassador taxicab, a standard taxicab, a Toronto Taxicab and an accessible taxicab [...]"[52] Although this is a reasonable interpretation, Sullivan notes that Courts sometimes – to avoid an absurd meaning – construe the word "shall" to be permissive.[53] Although Sean F. Dunphy J. turned his mind to the belief that a mandatory construction of "shall" was warranted in the circumstances, there is always the contrary

[48] See e.g. *Toronto (City) v. Uber Canada Inc.*, 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at para. 26 and *Edmonton (City) v. Uber Canada Inc.*, 19 Alta. L.R. (6th) 424, 2015 CarswellAlta 577 (Alta. Q.B.)
[49] See *Toronto (City) v. Uber Canada Inc.*, 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at para. 49.
[50] See *Toronto (City) v. Uber Canada Inc.*, 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at paras. 25-26.
[51] *Toronto (City) v. Uber Canada Inc.*, 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at para. 55.
[52] *Toronto (City) v. Uber Canada Inc.*, 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at paras. 52-55.
[53] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at p. 92 citing *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] S.C.J. No. 35 at para. 148.

argument that his decision to exclude the definition of a ride sharing vehicle from a taxicab more generally undermines the consumer protection purposes of the vehicle-for-hire sections provided for in the *City of Toronto Act, 2006*.[54] Second, he also held that the word "accepts" in the definition of a limousine service company, which is "any person or entity which accepts calls in any manner for booking, arranging or providing limousine transportation[,]" could not be given a synonymous meaning to the words "receives" or "relays," so as to include a human operator's act of accepting a telephone call and the ride sharing application's reception on a request for transportation services under the definition of a limousine service company.[55] He refused to make such a broad interpretation because – in his view – the desired consequences of an interpretation should not influence a judge's ultimate interpretation of a matter.[56] Although that is one view of statutory interpretation favored by legal positivists such as Driedger, pragmatists like Sullivan would instead argue that the consequences of an interpretation are always relevant to the correctness of that interpretation.[57] In the context of vehicle-for-hire licensure, where (again) one could argue that consumer protection has always been the pre-eminent historical concern,[58] the consequences of Sean F. Dunphy J.'s interpretation is to remove ride sharing applications from such protective municipal regulation. Although a Court's interpretation of

[54] See also *Municipal Act, 2001,* S.O. 2001, c. 25, s. 156.
[55] *Toronto (City) v. Uber Canada Inc*., 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at para. 55.
[55] *Toronto (City) v. Uber Canada Inc*., 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at paras. 63-65.
[56] See *Toronto (City) v. Uber Canada Inc*., 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at para. 69.
[57] Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994). "Whereas Drieger's account was positivist and purported to constrain judges mine is more fluid and more reflective, I believe, of the real complexity of interpretation."
[58] See *Municipal Act, 2001,* S.O. 2001, c. 25, ss. 2 and Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA4 – 1. See also *Toronto (City) v. Uber Canada Inc*., 126 O.R. (3d) 401, 2015 CarswellOnt 10176 (Ont. S.C.J.) at paras. 3-9. The Court expressly acknowledged the protective purposes of traditional taxicab legislation, but refuses to extend these protections to the "new and potentially disruptive business model" of ride sharing applications.

legislation generally lacks precedential value,[59] my view is that the principle in *Toronto (City) v. Uber Canada Inc.* – that municipalities cannot expand existing licensure schemes to include unforeseen or distinct business matters – has persuasive value. To this end, I would submit that a Court would be likely hold that the personal production of cannabis does not constitute a traditional business capable of being licensed under s. 150 of the *Municipal Act, 2001* for two reasons.[60] First, one of the legal effects of the *Cannabis Act, 2017* is to prohibit anyone except for the Ontario cannabis retailer to sell cannabis in Ontario.[61] Second, s. 150 of the *Municipal Act* contemplates that a "business" will somehow involve the sale or hire of goods for a profit; by definition, the personal cultivation of cannabis does not involve the commercial or retail sale of cannabis to the general public.[62] Although there is a possibility that individual producers could share their home grown cannabis with other individuals at no consideration, the purposive question is whether the individual offering goods or services for sale or hire intends to sell or hire their goods or services for valuable consideration.[63] If the individual does not cultivate cannabis with an intention to sell it to the public, then my view of any related transaction is that – regardless of its actual legality – it would still not be a "business" transaction. Even if this view is open to reasonable disagreement, the case-law generally supports such a narrow interpretation.

In addition, a recent Court decision also confirms that the broad general power of municipalities to prohibit matters is not unlimited and that the exercise of such powers must

[59] See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at p. 714.
[60] See *Municipal Act, 2001,* S.O. 2001, c. 25, s. 150.
[61] *Cannabis Act, 2017*, S.O. 2017, c. 26, Sch. 1, s. 6(1).
[62] See e.g. *Municipal Act, 2001,* S.O. 2001, c. 25, s. 150(c).
[63] See e.g. *Burnaby (City) v. Gildemeester*, 2014 BCSC 2441, 2014 CarswellBC 3908 at paras. 13-14. The Court held that the respondent martial arts instructor operated a business in contravention of the City of Burnaby's business licencing by-law. But, the Court did not extend this holding to also include the spouse of the martial arts instructor (an employee) because – unlike her husband – she did not intend to breach the by-law with her actions.

always be constrained to "valid municipal purposes."[64] The central issue in *Eng v. Toronto* was whether the City of Toronto had the authority to prohibit the sale, possession, and consumption of shark fin products under the broad general powers of s. 8(1).[65] The Court cited *Canada v. Spraytech* for the rule that municipalities can only exercise their general powers for a valid municipal purpose and extended that rule to hold that a by-law will only have a valid municipal purpose if it is an appropriate response to "municipal issues" within the meaning of s. 6(1) of the *City of Toronto Act, 2006.*[66] Although Spence J.'s review of the facts revealed the widespread public sentiment in Canada was against the inhumane practice of shark finning and that, in fact, "[a]s of August 20, 2012, at least six other Canadian municipalities had enacted by-laws substantially similar to Toronto's By-law[,]"[67] he reasoned that:

> [A]n issue is [not] a municipal issue merely because a policy decision is taken by its Council that an issue is important and it is desirable to take municipal action with regard to the issue. If all that was required to give jurisdiction to the City were such a policy decision, the determination of the scope of the jurisdiction of the City would be solely a matter for the decision of City Counsel. That result would be inconsistent with the fact that the power delegated to the City under the Act are limited to municipal issues."[68]

From this determination, the Court rejected the City of Toronto's submission that the consumption of shark fin products would not have an adverse impact on the environmental, economic, or social well-being of the City because the inhumane practice of shark finning itself does not occur within the territorial limits of Toronto.[69] In retrospect, my view is this

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[64] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2011) at MA1 – 18.4(1).
[65] *Eng v. Toronto (City)*, 2012 ONSC 6818, 2012 CarswellOnt 15093 at para. 2. See *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 8(1). See also *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 10(1) and 11(1).
[66] See *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 6(1). See also *Municipal Act, 2001*, S.O. 2001, c. 25, s. 8(1).
[67] *Eng v. Toronto (City)*, 2012 ONSC 6818, 2012 CarswellOnt 15093 at paras. 11, 30, and 31.
[68] *Eng v. Toronto (City)*, 2012 ONSC 6818, 2012 CarswellOnt 15093 at paras. 19-20.
[69] *Eng v. Toronto (City)*, 2012 ONSC 6818, 2012 CarswellOnt 15093 at para. 74.

determination was not controversial, and perhaps could have been reached on the narrower ground that – apart from any concerns over the existence of a municipal issue – there was no valid municipal purpose related to the by-law. The most cogent evidence against the validity of City of Toronto's prohibition with respect to shark finning was that the Executive Director of Municipal Licensing and Standards had advised in his report that "[a]lthough staff have identified clear concerns with the shark-fin industry, no clear municipal purpose – mainly health and safety, consumer protection, or nuisance control exists. The matter is one that clearly and more properly rests with more senior levels of government."[70] Although City Council is never required to follow a staff report, staff assessments are valuable tools that help them in discharge their mandate. In confirmation of the above, it is prophetic to note that the Toronto City Council passed a motion to express its support to the Prime Minister and the Government of Canada to itself enact a ban on shark fin importation,[71] which is expected to pass in the Senate within a couple of months.[72] But in practical terms, *Eng v. Toronto* emphases that the Courts will scrutinize the evidentiary foundation that underlies the general municipal power that a municipal corporation purports to

[70] See *Eng v. Toronto (City*), 2012 ONSC 6818, 2012 CarswellOnt 15093 at para. 77 citing Toronto, Executive Director, Municipal Licensing and Standards, "Banning the possession, sale, and consumption of shark fine products in Toronto," (Dated 4 October 2011) (Online: https://www.toronto.ca/legdocs/mmis/2011/ls/bgrd/backgroundfile-41404.pdf) at 1. But see *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, s. 6(2). In this sense, it was perhaps not necessary for Spence J. to refer to the interpretative section of s. 862), where ambiguities should be construed in favor of the City – as, it was unambiguously true that there was no valid municipal purpose. See also *Municipal Act, 2001*, S.O. 2001, c. 25, s. 8(2).

[71] See Toronto, City Council, "Supporting Bill S238, "The Ban on Shark Fin Importation Act," (Dated 26 April 2017) (Online: http://app.toronto.ca/tmmis/viewAgendaItemHistory.do?item=2017.MM28.21). See also Global News, Erica Vella, "Petition calls for Toronto to revisit ban on shark fins after Rob Stewart's death, (Dated 6 February 2017) (Online: https://globalnews.ca/news/3231189/petition-calls-for-toronto-to-revisit-ban-on-shark-fins-after-rob-stewarts-death/).

[72] See House of Commons, "S-238 An Act to amend the Fisheries Act and the Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act (importation of shark fins) (Dated 3 December 2015) (Online: https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=8884535). The Senate is conducting its third reading of Bill S-238 as of 27 March 2018.

exercise in respect of any by-law that it passes to provide a necessary or desirable service to the ratepayers. Although municipal by-laws are presumed to be valid,[73] the paternalistic statement in s. 2 of the *Municipal Act, 2001* confirms that Municipalities are created by the Province of Ontario to be responsible and accountable governments with respect to matters within their jurisdiction."[74] In this sense, Sean F. Dunphy J. was very critical of how Toronto's Municipal Councillors chose to ignore the advice that staff had provided to them to solve a novel problem.

It may be shocking for most municipalities to discover that in the Federal Government's Legislative Backgrounder states – in quite unequivocal terms – that two of objectives of the *Cannabis Act* are to provide for the legal production of cannabis to reduce illicit profits and to provide access to a quality-controlled supply of licit cannabis for adults.[75] The federal government believes that a complete prohibition on personal cultivation could be unconstitutional:

> The proposed legislation seeks to achieve these objectives, in part, by permitting personal cultivation of no more than four plants. A lower plant limit may be set in provincial legislation that is consistent with the federal objectives and allows for dual compliance with both provincial and federal limits, however a complete provincial prohibition on personal cultivation could be seen as frustrating the federal objective and thus be deemed inoperable.[76]

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[73] See *Beauvais v. Montreal (City)*, 42 S.C.R. 211, 1909 CarswellQue 29 at paras. 11-13.

[74] *Municipal Act, 2001*, S.O. c. 25, s. 2 and see Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA1 – 18.4(1) citing *East York (Borough) v. Ontario (Attorney General)*, 41 M.P.L.R. (2d) 137, 1997 CarswellOnt 3120 (Ont. Gen. Div.) at para. 13. Section 92(8) of the *Constitution Act, 1867* gives provincial legislatures the right to "create a legal body for the management of municipal affairs[.]"

[75] See Canada, *Legislative Background:* "An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts (Bill C-45)," (Dated May 2017) (Online: http://www.justice.gc.ca/eng/cj-jp/marijuana/c45/c45.pdf) at p. 20.

[76] Canada, *Legislative Background:* "An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts (Bill C-45)," (Dated May 2017) (Online: http://www.justice.gc.ca/eng/cj-jp/marijuana/c45/c45.pdf) at p. 20.

The doctrine of federal paramountcy provides that, "where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails."[77] There are two doctrines that indicate when there will be such an express contraction. First, there is the impossibility of dual compliance doctrine, where one enactment permits what another enactment prohibits, and the provincial Act is rendered inoperative to the extent of any conflict.[78] Second, the frustration of purpose doctrine provides that a provincial law is inoperative to the extent that the effect of the provincial law would be to frustrate the purpose of the federal law.[79] In this sense, although the Federation of Canadian Municipalities discusses the impossibility of dual compliance doctrine in its guide, it does not indicate when – in its view – the municipal regulation of cannabis cultivation would tend to frustrate the purposes of the *Cannabis Act*.[80] I submit that there are few realistic situations where it would be impossible to comply with a municipal law that prohibits individuals from cultivating cannabis and a federal law that grants individuals the (elective} privilege to cultivate cannabis because an individual could simply choose not to grow any cannabis.[81] But this choice is not a real choice. And perhaps a complete prohibition against the cultivation of cannabis

[77] Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) (looseleaf updated 2011) at p. 16-2 to 16-3.
[78] See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) (looseleaf updated 2011) at p. 16-4 citing *Multiple Access v. McCutcheon*, [1992] 2 S.C.R. 161, 1982 CarswellOnt 128 at para. 48. The doctrine of paramountcy will apply where "there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things; compliance with one is defiance of the other."
[79] See Peter Hogg, *Constitutional Law of Canada*, 5th ed. (Toronto: Carswell, 2007) (looseleaf updated 2011) at p. 16-10.1 citing *Law Society of B.C. v. Mangat*, [2001] 3 S.C.R. 133, 2001 CarswellBC 2168 at para. 72.
[80] See Federation of Canadian Municipalities, *A Municipal Guide to Cannabis Legalization*, (Dated 16 April 2018) (Online: https://fcm.ca/Documents/issues/Cannabis-Guide-EN.pdf) at p. 21.
[81] See e.g. *Re s. 92(4) of the Vehicles Act 1957* (Saskatchewan), [1958] S.C.R. 608, 1958 CarswellSask 62 at para. 27. The Court held that where a federal law provided that no person was required to give a breath sample as evidenced of driving while intoxicated, the provincial law would penalize a person who refused to give such a sample by suspending their licence. The Court reasoned that a person could comply with both laws because the provincial law was a mere denial of a "questionable privilege" (the privilege to drive).

is a choice that essentially fails to respects the principle of subsidiarity – that is, the federal government, not a municipal government, should legislate upon the general policy of whether cannabis cultivation ought to be legal, and a municipal government should, then, adapt that general policy responsive to local conditions. For example, the issue in *Smith v. St. Alberta (City)* was whether the City of St. Alberta had exceeded it constitutional jurisdiction when it enacted an amendment to its business licensing by-law which restricted the amount of products and devices associated with illicit drug consumption that stores could sell to the public to a maximum of three items.[82] City Council had legislated on this matter due to its concern that such stores were selling items that might be used by individuals involved in illicit narcotic consumption. The applicant store-owner sold a number of those restricted products and devices – and finding himself in receipt of a ticket for violating the by-law, he applied to the Court to quash the by-law on the grounds that is was in relation to the criminal law. Although the trial judge agreed with the applicant, rejecting the respondent City's submission that the by-law's purpose was to promote the valid municipal purpose of the health, safety, and welfare of its inhabitants,[83] the Court of Appeal disagreed with that holding and allowed the City's appeal.[84] The Court held that although the trial judge was correct to determine that the by-law was in relation to the criminal law power because it was "morality legislation," the Court reasoned that the trial judge failed to consider whether there was a provincial aspect of the by-law of equal importance to this federal aspect of the by-law.[85] In this sense, the Court noted that although the City "could have banned

[82] *Smith v. St. Albert (City)*, 2014 ABCA 76, 2014 CarswellAlta 296 at para. 1.
[83] *Smith v. St. Alberta (City),* 2012 ABQB 780, 2012 CarswellAlta 2278 at paras. 20-21.
[84] *Smith v. St. Albert (City)*, 2014 ABCA 76, 2014 CarswellAlta 296 at para. 57.
[85] See *Smith v. St. Albert (City)*, 2014 ABCA 76, 2014 CarswellAlta 296 at para. 55.

the display or sale of all restricted products," that is not what it did, instead, the City enacted the by-law to regulate the quantity and combination of goods that certain licensed businesses can display and sell on their premises [...] to suppress conditions that are likely to favour the commission of crime[.]"[86] Finding that there was a legitimate municipal purpose related to matters of business licensure and the suppression of crime, the Court held that the federal and provincial aspects of the by-law had equivalent importance.[87] The facts in *Smith v. St. Alberta (City)* could be analogous to the municipal regulation of cannabis cultivation because – in that case – the City took legitimate steps to use its business licensing powers to prevent the commission of crime. The express purpose of the *Cannabis Act* to reduce the profits of the illicit cannabis by permitting individuals to cultivate limited quantities of their own cannabis would – in my view – be frustrated by zero tolerance municipal prohibitions because the illicit market would lose this legal source of competition. In addition, and for reasons that I discuss in Section V, litigation under the *Access to Cannabis for Medical Purposes Regulations* indicates that the illicit cannabis market benefits when there is an insufficient supply of accessible, affordable, and quality cannabis.[88] Although the permitting individuals to cultivate cannabis could lead to some diversion into the illicit market, the legitimate role of a municipal government would be to then review local conditions and enact responsive laws that will reduce the likelihood of this prospect.

SECTION V: THE CONSTITUTIONAL RIGHT TO CULTIVATE MEDICAL CANNABIS

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[86] *Smith v. St. Albert (City)*, 2014 ABCA 76, 2014 CarswellAlta 296 at para. 51.
[87] See *Smith v. St. Albert (City)*, 2014 ABCA 76, 2014 CarswellAlta 296 at para. 55 citing *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, 1982 CarswellOnt 128 at para. 29. When matters may be classified under multiple heads of power according to a pith and substance analysis they may have both provincial and federal aspects. A matter that has such a "double aspect" will not trigger the doctrine of federal paramountcy because their importance is equivalent.
[88] See *Access to Cannabis for Medical Purposes Regulations,* S.O.R./2016-230.

As discussed in Section III, the decision in *R. v. Parker* incited Parliament to enact regulatory regimes to regulate access to medical cannabis, and subsequent constitutional litigation has continued to invalidate the federal government's attempts to prohibit the personal cultivation of cannabis, where, according to MacFarlane, Frater, and Michealson, "[t]he case law under each regime was the primary driver of the subsequent replacement regime."[89] In fact, it was due to the decision in *R. v. Parker* that Parliament enacted the *Marihuana Medical Access Regulations* on 14 June 2001, and established the Office of Cannabis Medical Access to administer this new regulatory approach.[90] According to Patrick Hawkins and Jasmine Ghosn, the purpose of these regulations were to "provide seriously ill Canadian patients with access to marijuana while it is being researched as a possible medicine."[91] During the time in which the *MMAR* was in force, eligible patients could apply to possess cannabis for medical use, and – if approved – these patients could obtain personal-use production licence or obtain a designated-person licence to respectively cultivate their own cannabis or have an agent cultivate their own cannabis for the personal, medical use of these patients.[92] But, on 31 March 2014 the *Marihuana Medical Purpose Regulations* replaced the *MMAR* and created a highly regulated commercial market, which removed Health Canada's role in the production of medical cannabis and instead licensed private individuals to instead produce and distribute medical cannabis for a healthy profit.[93] Yet,

[89] Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*,"36:20 Purpose of this Chapter – Medical Marihuana," 4th ed. (Toronto: Carswell, 2015) at 36:20.
[90] See Patrick Hawkins and Jasmine Ghosn, *Canadian Health Law Practice Manual*, 1st ed. (Markham: Lexis Nexis, 2000) (looseleaf updated 2011) at 13.61 and *Marihuana Medical Access Regulations*, S.O.R./2001-277.
[91] See Patrick Hawkins and Jasmine Ghosn, *Canadian Health Law Practice Manual*, 1st ed. (Markham: Lexis Nexis, 2000) (looseleaf updated 2011) at 13.61.
[92] See Patrick Hawkins and Jasmine Ghosn, *Canadian Health Law Practice Manual*, 1st ed. (Markham: Lexis Nexis, 2000) (looseleaf updated 2011) at 13.61-13.62.
[93] Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*,"36:100 The Marihuana Medical Purpose Regulations," 4th ed. (Toronto: Carswell, 2015) at 36:100.20 and *Marihuana Medical Purpose Regulations*, S.O.R./2013-199.

with the emergence of this commercial market, patients were also no longer permitted to cultivate their own cannabis for their personal medical use.[94] The associated *Regulatory Impact Analysis Statement* explained the public health purpose of this amendment as follows:

> "[S]takeholders have expressed health, safety, and security concerns relating to the production of marihuana by individuals in homes and communities. Their specific concerns relate to the potential for diversion of marihuana to the illicit market due to limited security requirements, the risk of violent home invasion by criminals attempting to steal marihuana, fire hazards due to faulty or overloaded electricity installation to accommodate high intensity lighting for its cultivation, and humidity and poor air quality. Individual producers who are ill may be more vulnerable to health risks associated with mould. As more individuals receive licenses to produce marihuana for medical purposes, the overall risk to Canadians increases."[95]

These are a veritable laundry list of concerns, but – nevertheless – was this removal of a privilege constitutional? With the loss of their respective privileges to cultivate their own cannabis, Allard and three other individuals licensed to produce medical cannabis for personal consumption launched litigation in the Federal Court.[96] Their central submission in *Allard v. Canada* was that the *MMPR's* prohibition against the personal cultivation of medical cannabis unconstitutionally restricted their access to such medicine contrary to s. 7 of the *Canadian Charter of Rights and Freedoms*.[97] At the beginning of his reasons, Phelan J. situated the case as "another decision in a line of cases starting with *R. v. Parker* [...] that have examined, often with a critical eye, the efforts

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[94] Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*,"36:100 The Marihuana Medical Purpose Regulations," 4th ed. (Toronto: Carswell, 2015) at 36:100.20.

[95] Canada, Canada Gazette, *Regulatory Impact Analysis Statement:* "Marihuana for Medical Purposes Regulations," vol. 146, No. 50 (Dated 15 December 2012) (Online: http://gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/reg4-eng.html) at Executive summary.

[96] See *Allard v. Canada*, [2014] F.C.J. No. 412, 2014 CarswellNat 1277 reversed in part by [2014] F.C.J. No. 1241, 2014 CarswellNat 8519 (F.C.A.). Rcihard Boivin J.A. essentially upheld the application judge's granting of an interlocutory injunction to the applicants, allowing them to continue to exercise their former privileges to cultivate medical cannabis for their personal consumption, except that he remitted the matter back to the application judge to more clearly indicate his factual determinations in respect of two of the four applicants.

[97] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 4-5 and The *Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK)*, 1982, c. 11, s. 7

of government to regulate the use of marihuana for medical purposes and the various barriers and impediments to accessing this necessary drug."[98] With this said, Phelan J. found that the impact of the *MMPR* on the applicants was to require the applicants to only obtain legal cannabis from licensed producers, and – due to the cost – "force them to choose between their medication and other basic necessities without a rational connection to the [public health and safety] objectives."[99] The unique evidentiary record in *Allard v. Canada* indicated that, for example, if Mr. Allard was forced to purchase cannabis from licensed producers at an estimated cost of $5.00 per gram of cannabis,[100] instead of being permitted to cultivate his own cannabis at a cost of $230.00 per month, he would have to spend $3,600 per month to maintain his prescribed dosage of 20 grams per day.[101] In Phelan J.'s view, "program costs were a significant, if not dominant, priority" for why the federal government replaced the *MMAR* with the *MMPR*, devolving all of their former jurisdiction over the production of medical cannabis to licensed producers and prohibiting any non-commercial cultivation outside that commercial regime.[102] Following this logic, Phelan J. first held that the federal government's decision to prohibit personal cultivation and therefore restrict the applicants' reasonable access to medical cannabis infringed their liberty interest by removing their ability to choose how to access the medicine they needed to treat their serious medical conditions.[103] Second, he held that this prohibition against the

[98] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at para. 3.
[99] *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at para. 236.
[100] See Canada, *Research Report: 2017-R005:* "The Price of Cannabis in Canada," (Dated 2017) (Online: https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2017-r005/2017-r005-en.pdf) at p. 23. The average price of cannabis in Canada is actually much higher: (i) high quality cannabis is $7.69 per gram; (ii) lower quality cannabis is $7.26 per gram; and (iii) medium quality cannabis is $7.14 per gram.
[101] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 132-134 and 148. Allard is a 60-year old veteran who was diagnosed with chronic fatigue syndrome and clinical depression.
[102] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 28-29.
[103] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 194-196.

personal cultivation of cannabis also infringed their security interest because the *MMPR* "diminish[ed] the quality of their health care through severe restrictions" whose "economic dimension" limited their access to affordable cannabis.[104] Having found that the respondents' evidence did not adequately "distinguish between legal cannabis growing operations under the *MMAR* and illegal growing operation[,]" Phelan J. was especially critical of the federal government's "purported" objective to reduce the health and safety risks caused by the personal cultivation of cannabis.[105] In fact, he demolished of most of respondents' expert witnesses, stating that many of these expert witnesses "were so imbued with a belief for or against marihuana – almost a religious fervour – that the Court had to approach such evidence with a significant degree of caution and scepticism."[106] His conclusion was that there was limited, if any, expert evidence that personal cultivation posed the health and safety risks that the amendments to *MMPR* were designed to defeat.[107] For these essential reasons, Phelan J. held that the prohibition against the personal cultivation of cannabis was arbitrary, overbroad, and could not otherwise be justified under section 1 of the Canadian Charter of Rights and Freedoms.[108] As a remedy, the Court in *Allard v. Canada* declared the *MMPR* to be invalid, and suspended the declaration for six months to allow the government to enact new legislation.[109]

[104] *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 206, 208-209, and 212-213.
[105] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at para. 240.
[106] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 101 and 240.
[107] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at para. 240.
[108] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 254, 271, and 285.
[109] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 295-297.

The federal government enacted the *Access to Cannabis for Medical Purposes Regulations* on 24 August 2016 to response to the decision in *Allard v. Canada.*[110] The general structure of the *ACMPR* amalgamates the constitutional portions of the *MMAR and MMPR* and allow eligible patients to again be able to cultivate medical cannabis – although, with additional restrictions.[111]

SECTION VI: THE CONSTITUTIONAL RIGHT TO CULTIVATE RECREATIONAL CANNABIS?

Perhaps the most notable principle from *Allard v. Canada* in respect of the municipal regulation of recreational cannabis was that cost considerations will rarely justify an infringement of s. 7 of the *Canadian Charter of Rights and Freedoms*.[112] To him, risks related to mould, fire, and potential criminal abuse were unconvincing because "the all too easy position that budgets trump rights" devalues the otherwise solemn rights of the *Canadian Charter of Rights and Freedoms.*[113] For example, in Phelan J.'s view, risks related to mould can be addressed by permitting outdoor cultivation, and – failing that – (inevitably expensive) inspection schemes can be instituted to reduce the risk of mould growing inside residential units.[114] In this sense, the Federation of Canadian municipalities' view that "[r]esidential buildings are usually not designed or constructed to accommodate cannabis production" is both a relevant, but also misleading

[110] Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*, "36:110 The Access to Cannabis For Medical Purposes Regulations," 4th ed. (Toronto: Carswell, 2015) at 36:110 and *Access to Cannabis for Medical Purposes Regulations,* S.O.R./2016-230.

[111] See Bruce A. MacFarlane, Robert J. Frater, and Croft Michaelson, *Drug Offences in Canada*, "36:110 The Access to Cannabis For Medical Purposes Regulations," 4th ed. (Toronto: Carswell, 2015) at 36:110 and *Access to Cannabis for Medical Purposes Regulations,* S.O.R./2016-230. These added restrictions included requirements related to additional security measures; a prohibition against growing cannabis outside, where an adjacent boundary of land has a school, public playground, or other public places; and a formula to calculate the maximum amount of cannabis that may be grown.

[112] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at para. 269 citing *Newfoundland (Treasury Board) v. N.A.P.E.,* 2004 SCC 66, 2004 CarswellNfld 322 at para. 72.

[113] *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at paras. 269-270.

[114] See *Allard v. Canada*, 2016 FC 236, 2016 CarswellNat 459 at para. 270.

concern.[115] The issue is not just whether residential buildings are designed or constructed to accommodate cannabis production, but whether "dwelling-houses" – as a whole – will be capable of supporting such cannabis production.[116] In the context of the *Criminal Code* definition of a dwelling-house, the Courts have given a broad interpretation of the term to also include additional buildings within the curtilage of a dwelling-house, meaning – in plain language – "the land or yard adjoining a house, usually within an enclosure" or the surrounding premises.[117] The Manitoba and Ontario Courts of Appeal have affirmed this expansive definition of a dwelling-houses in both criminal and municipal contexts. For example, the issue in *R. v. Le (T.D.)* was whether was whether a warrant, which authorized the police to search the premises around a dwelling-house, also authorized them to "dig around in the flower bed" in order to find a hidden handgun.[118] Richard J. Scott C.J.M. reviewed the jurisprudence and noted that accused persons have never been able to successfully challenge the ability of the police to search in flower beds or other open areas of the adjacent yard pursuant to the terms of a valid warrant to search the premises around a dwelling-house.[119] In holding that the search was valid, the Court held that – on the facts of the case – a "flower bed located in the back of the fenced in area [...] typical of many residential backyards found in the City of Winnipeg [... and constitutes] the curtilage or

[115] See Federation of Canadian Municipalities, *A Municipal Guide to Cannabis Legalization*, (Dated 16 April 2018) (Online: https://fcm.ca/Documents/issues/Cannabis-Guide-EN.pdf) at p. 15.
[116] See House of Commons of Canada, *Bill C-45: An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts,* (Dated 27 November 2017) (Online: http://www.parl.ca/Content/Bills/421/Government/C-45/C-45_3/C-45_3.PDF), ss. 2(1) and 12(6). The *Cannabis Act* prohibits individuals from cultivating cannabis at a place that is not their dwelling-house, and defines a "dwelling-house" as having the same meaning in [the *Cannabis Act*] as in section 2 of the *Criminal Code*[.]" See *Criminal Code*, R.S.C. 1985, c. C-46, s. 2.
[117] *R. v. Le (T.D.),* 2011 MBCA 83, 2011 CarswellMan 484 at para. 83.
[118] *R. v. Le (T.D.),* 2011 MBCA 83, 2011 CarswellMan 484 at para. 83.
[119] *R. v. Le (T.D.),* 2011 MBCA 83, 2011 CarswellMan 484 at para. 88.

grounds around the primary or main building on the property."[120] Applied to a municipal context, the issue in *Midland (Town) v. Fed D'Silva Enterprises Ltd.* was whether the City's building by-law and plumbing by-law applied to the defendant's construction of a septic tank system on land, land which had subsequently been annexed to the City after the previous owner obtained a building permit allowing it to construct this septic tank.[121] Even though Brooke J.A. held that a septic tank could not be defined as a building within the meaning of the building by-law, he nevertheless held that the plumbing by-law did apply to the construction of that septic tank because the by-law used the broader term of "premises."[122] In this sense, the Court reasoned that while the term premises is colloquially used to mean buildings, "it is frequently used in the broader sense to mean lands whereon buildings are erected and lands immediately surrounding them."[123] Based on this jurisprudence, although the federation may believe that a prohibition against the personal cultivation of recreational cannabis could be upheld under s. 1 of the *Canadian Charter of Rights and Freedoms*, "given the compelling rational for building safety requirements,"[124] this submission fails to fully grapple with the proposition that, absent a cogent evidentiary record, it will be difficult for municipalities to justify that a zero tolerance approach which prohibits both indoor and outdoor cannabis cultivation is not an overbroad measure.

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[120] *R. v. Le (T.D.),* 2011 MBCA 83, 2011 CarswellMan 484 at para. 95 approving of *R. v. H. (N.E.),* 2004 O.T.C. 148, 1990 CarswellMan 504 at para. 233. "[T]he broad term, 'premises' would include a private residence, barns, outbuildings and the land surrounding the same[.]"

[121] *Midland (Town) v. Fed D'Silva Enterprises Ltd.*, [1977] O.J. No. 2329, 1977 CarswellOnt 359 at para. 2.

[122] *Midland (Town) v. Fed D'Silva Enterprises Ltd.*, [1977] O.J. No. 2329, 1977 CarswellOnt 359 at para. 16.

[123] *Midland (Town) v. Fed D'Silva Enterprises Ltd.*, [1977] O.J. No. 2329, 1977 CarswellOnt 359 at para. 16. But see *R. v. Patriquen*, [1994] N.S.J. No. 573, 1994 CarswellNS 29 at paras. 19-21. The Court held that the doctrine of curtilage did not apply to a secluded field of corn that was not connected to a farm house and contained hidden cannabis plants growing in that same field of corn.

[124] Federation of Canadian Municipalities, *A Municipal Guide to Cannabis Legalization*, (Dated 16 April 2018) (Online: https://fcm.ca/Documents/issues/Cannabis-Guide-EN.pdf) at pp. 43-44.

The fundamental issue that requires municipalities to tailor their regulatory responses in respect of the personal cultivation of cannabis is that there is no such thing as recreational or medical strains of cannabis. Although the federal and provincial legislative schemes treat these two purposes under separate regimes – that is, two solitudes that do not communicate; patients who take cannabis to reduce the symptoms associated with their medical conditions will sometimes use cannabis to have fun. By the same token, individuals who usually use cannabis for mere pleasure will sometimes use cannabis to treat ephemeral conditions such as nausea. For example, one prominent activist in California once famously stated – upon the legalization of medical cannabis in California – that "[a]ll marijuana use is medical now."[125] He could be correct because, as Ries notes, "[d]espite the existence of the federal government's medical access program for over a decade, recent research indicates that fewer than 10% of Canadian medical cannabis users obtain the drug solely from legal sources."[126] This conclusion is well-founded because, having made physicians the constitutional gate-keepers of medical cannabis despite their reluctance to support patient access to cannabis,[127] it is not inconceivable that many

[125] Jonathan P. Caulkins, Beau Kilmer, and Mark A. R. Kleiman, *Marijuana Legalization: What Everyone Needs to Know*, 2nd ed. (New York: Oxford University Press, 2016) at p. 211. The activist's name is Denis Peron.
[126] Nola M Ries, "Prescribe with Caution: The Response of Canada's Medical Regulatory Authorities to the Therapeutic Use of Cannabis," (2016) 9 McGill J.L. & Health 215 at p. 11 citing Lynne Belle-Isle et. al., "Barriers to Access for Canadians Who Use Cannabis for Therapeutic Purposes," (2014) 25:4 Int. J. Drug Policy 691 at 697.
[127] See e.g. *Hitzig v. Canada*, [2003] O.J. No. 3873, 2003 CarswellOnt 3795 at para. 139. "Just as physicians are relied on to determine the need for prescription drugs, it is reasonable for the state to require the medical opinion of physicians here, particularly given that this drug is untested." See Nola M Ries, "Prescribe with Caution: The Response of Canada's Medical Regulatory Authorities to the Therapeutic Use of Cannabis," (2016) 9 McGill J.L. & Health 215 at p. 12. "The medical cannabis policies of all the Canadian colleges take the position that more evidence is needed to establish the safety and efficacy of cannabis as a medical therapy and to send a clear message that doctors should be cautious in authorizing cannabis use for their patients. See also Jay Carter Brown, *Growing Marijuana Indoors: A Foolproof Guide*, 1st ed. (Toronto: ECW Press, 2013) at p. XI-XII. "In Canada, people can legally obtain a license to use medical marijuana if they follow the correct steps. On the surface, this appears to be an intelligent way of obtaining marijuana. But there is no guarantee that a person will be approved for medical marijuana since most doctors refuse to sign off on the appropriate government forms, perhaps from fear of reprisals."

individuals – who would otherwise be unable to obtain the required medical declaration to cultivate their own medical cannabis – will resort to cultivating un-prescribed, recreational cannabis.[128] In this sense, it must be acknowledged that, compared to the silent suffering of a vulnerable person unable to obtain authorization to cultivate their own medical cannabis, onerous building safety concerns related to the "fairly low-stakes move"[129] of permitting the personal production of recreational cannabis could be constitutionally suspect. Recall, both Rosenberg J.A. and Phelan J. stated that forcing a patient to choose between medicine that improved his quality of life and the potential for imprisonment was a breach of that individual's right to liberty and the security of the person. Therefore, it is questionable – in my view – that a municipality will be permitted to totally prohibit both the indoor and outdoor cultivation of cannabis. To solve this sensitive problem, a municipality will need to consult with its ratepayers and explain – in clear terms – that the Courts have spoken: sick people have a right to the reasonable access of cannabis. A public education campaign that can address local concerns and management expectations is essential.[130] And, I expect that, once these consultations have been

[128] See e.g. Philippe Lucas and Zach Walsh, "Medical cannabis access, use, and substitutions for prescription opioids and other substances: A survey of authorized medical cannabis patients," International Journal of Drug Policy 42 (2017) 30 at 34. There is a high rate of substitution for prescription drugs with pain-related and mental health conditions in respect of medical cannabis. Nevertheless, evidence shows that patients under the *MMPR* continue to purchase cannabis from unregulated sources due to the high cost of purchasing medical cannabis.
[129] See Jonathan P. Caulkins, Beau Kilmer, and Mark A. R. Kleiman, *Marijuana Legalization: What Everyone Needs to Know*, 2nd ed. (New York: Oxford University Press, 2016) at p. 177.
[130] See e.g. Eirik Hammersvik, Sveinung Sandberg, Willy Pedersen, "Why small-scale cannabis growers stay small: Five mechanisms that prevent small-scale growers from going large scale," International Journal of Drug Policy 23 (2012) 458 at p. 402. Most cannabis growers stay at a small-small due to (i) organizational challenges; (ii) capital costs; (iii) the risk of criminal apprehension; (iv) limited horticultural skills; and (v) a cannabis culture that supports anti-commercialism, anti-violence, and ecological and community values. See Gary R. Potter et. al., "Global Patterns of domestic cannabis cultivation: Sample characteristics and patterns of growing across eleven countries, International Journal of Drug Policy 20 (2015) 220 at 236. "[T]here should be no assumption that most small-scale growers are criminally or socially deviant: instead, most tend to come from more-or-less normal socio-economic backgrounds with minimal involvement in drug dealing[.]"

concluded, municipalities will be able to balance the interests of different stakeholders by prohibiting individuals from cultivating cannabis outdoors, but by permitting individuals to (at least) cultivate a couple of cannabis plants indoors, according to a standard of best practices that will minimize the health and safety risks associated with the indoor cultivation of that cannabis.

Therefore, although my view is that a total prohibition against the personal cultivation of cannabis would likely lead to a municipality expending significant costs on constitutional litigation, not all municipal attempts to regulate matters relating to property standards under s. 35.3(1) of the *Building Code Act, 1992* will constitute unreasonable limitations upon a person's right to access medical cannabis.[131] Municipalities have the settled jurisdiction to – in response to emerging issues and changing local concerns – amend existing property standards by-law to apply new property standards to pre-existing buildings.[132] In the context of its property standards by-law, a municipality could amend its residential property standards to provide that while cannabis plants may not be grown outside,[133] individuals will only be licensed to cultivate these same plants indoors if their dwelling-house otherwise complies with property standard concerns related to matters of cleanliness;[134] vermin prevention;[135] and dampness prevention.[136]

PART II: THE MUNICIPAL REGULATION OF RECREATIONAL CANNABIS IN CANADA

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[131] See *Building Code Act, 1992*, S.O. 1992, c. 23, s. 35.3(1).
[132] See *Oshawa (City) v. Carter*, [2009] O.J. No. 4078, 2009 CarswellOnt 5970 at para. 11.
[133] See e.g. Ottawa, *Property Standards*, By-law No. 2013 – 416 (Online: http://documents.ottawa.ca/sites/documents.ottawa.ca/files/2013_416_en.pdf), s. 6.8). This section may not even have to be amended to prohibit the outdoor cultivation of cannabis, as it already provides that plants shall not be planted and maintained in a manner that "adversely affect[s] the safety of the public[.]"
[134] See e.g. Ottawa, *Property Standards*, By-law No. 2013 – 416 (Online: http://documents.ottawa.ca/sites/documents.ottawa.ca/files/2013_416_en.pdf), s. 27.2).
[135] See e.g. Ottawa, *Property Standards*, By-law No. 2013 – 416 (Online: http://documents.ottawa.ca/sites/documents.ottawa.ca/files/2013_416_en.pdf), s. 13.1).
[136] See e.g. Ottawa, *Property Standards*, By-law No. 2013 – 416 (Online: http://documents.ottawa.ca/sites/documents.ottawa.ca/files/2013_416_en.pdf), s. 19.

SECTION VII: THE TWO ADDITIONAL MUNICIPAL POWERS TO LICENSE AND TAX

A municipality has the constitutional jurisdiction to use its police power or taxation power to regulate persons using a licence requirement in respect of particular callings or things.[137]

The *Municipal Act, 2001* has codified this constitutional jurisdiction in Ontario and Part IV of that Act provides for a general framework in respect of municipal licensing schemes.[138] In this sense, Part IV of the Act focuses on matters of business licensure, that is – the licensing of business relating to trades and occupations, organized public events, and the sale of goods,[139] municipalities nevertheless possess the plenary right to license, regulate, or prohibit a person from going any particular calling or thing in respect of what a by-law may be enacted thereunder.[140] To understand what may be licensed, the starting-point is s. 10(1) of the *Municipal Act, 2001* grants municipalities broad authority to legislate: "[a] single-tier municipality may provide any service or thing that the municipality consider necessary or desirable for the public."[141] A significant body of jurisprudence and academic commentary has interpreted the power of municipalities to determine what is "necessary and desirable" service or thing to such a broad extent that single-tier municipalities are – in practical terms – no longer limited to

[137] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at pp. 685-686 and 699. "[T]he authority of the [municipal] corporation proceeds upon a delegation by the legislature of the power conferred by s. 92(9) of *The Constitution Act* to make laws respecting licences in order to raise revenue for provincial, local or municipal purposes." See generally *The Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(9).

[138] *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 150-170.

[139] See *Municipal Act, 2001*, S.O. c. 25, s. 150.

[140] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA4 – 1: "The licensing of businesses by municipalities has long been recognized, from s. 92(9) of the *Constitution Act, 1867* [...] The new licensing scheme in the statute goes well beyond the licensing of "businesses and essentially provides for the licensing of any activity, matter or thing for which a by-law may be enacted under ss. 9, 10, and 11.

[141] *Municipal Act, 2001*, S.O. 2001, c. 25, s. 10(1).

legislating within their traditional spheres of jurisdiction.[142] On that related note, single-tier municipalities are then authorized by s. 10(2) of the *Municipal Act, 2001* to pass by-laws in respect of matters of both municipal governance and general regulation, including [s]ervices and things that municipalities are authorized to provide under s. 10](1)."[143] Based on this review of what matters municipalities may move to regulate through a system of licences – there is little doubt that a municipal corporation would be unable to use its general powers to protect the health, safety, and well-being of persons or to regulate building standards by instituting a licensure system in respect of the personal cultivation of cannabis. From a jurisprudential perspective, most Courts have taken judicial notice of the fact that "unexplained grow-op paraphilia" is often cogent evidence that an individual is engaged in the illegal cultivation of cannabis.[144] In this sense, the role of municipal government could be to require individuals interested in cultivating cannabis to "explain themselves," i.e., how can your neighbours be sure that you will not cultivate more than the prescribed number of cannabis plants? As already

[142] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA2 – 36: "The authority for single-tier municipalities to provide any service or thing that they consider necessary or desirable for the public under subs. 10(1) not only encompasses the various traditional areas of municipal jurisdiction as enumerated under the spheres of jurisdiction in subs. 11(3) of the Act but potentially extends to other areas and subject matters. There is therefore no need to retain the spheres of jurisdiction for single-tier municipalities." The London City Council is a noteworthy example of a City that uses the broad powers of s. 10(1) to defend its enactment of controversial by-laws. See e.g. *London Property Management Association v. London (City)*, 2011 ONSC 4710, 2011 CarswellOnt 11699 (Ont. S.C.J.). The Court upheld a by-law providing for the licensing and regulation of rental units in the City upon the basis – in part – that the by-law had been enacted in good faith because the City considered it necessary and desirable for the public to regulate the renting of residential premises to protect the health and safety of tenants. See e.g. *London Taxicab Owners' and Drivers' Group Inc. v. London (City)*, 2013 ONSC 1460, 2013 CarswellOnt 2641. The Court upheld a by-law providing for the deregulation of limousine fares, again, upon the basis – in part – that the by-law had been enacted in good faith because the City considered it necessary and desirable to maintain the existing quality of limousine services. See also *Municipal Act, 2001*, S.O. 2001, c. 25, s. 152(2).

[143] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 10(2)7. Other paragraphs provide that the municipality may also regulate other matters, including "[h]ealth, safety and well-being" and "Business licensing."

[144] See e.g. *R. v. Johnson,* 2007 MBCA 14, 2007 CarswellMan 49 at para. 17.

discussed in Section VI, there are several measures that a municipal corporation could take to improve accountability. Perhaps the easiest would be a name and address registration system.

Both lower-tier and upper-tier municipalities have corresponding provisions to the aforementioned single-tier municipality provisions – but, with the restriction that the jurisdiction of upper-tier municipalities and lower-tier municipalities cannot conflict.[145] Although the municipal regulation of the personal cultivation of cannabis should fall within the jurisdiction of lower-tier municipalities – there should be communication between these levels of government to co-ordinate comparable treatments of this subject, unless local conditions require elsewise.

With this all said, even though the scope of a municipality's powers are to be given a benevolent interpretation,[146] the Courts continue to affirm the interpretative principle that broad municipal powers cannot be construed so as to be an "open and unlimited" grant of provincial power."[147] Despite the instruction in s. 8(1) of the *Municipal Act, 2001* that municipal powers ought to be broadly interpreted in order to permit municipal corporations to respond to local concerns,[148] to ensure that general municipal powers do not subsume specific municipal

[145] See *Municipal Act, 2001,* S.O. 2001, c. 25, ss. 11 and 13.1 . Section 13.1 codifies constitutional rules with respect to the paramountcy of federal legislation over provincial legislation and applies it with necessary modification to upper-tier and lower-tier municipalities, that is – in the event of a conflict, the by-law of an upper-tier municipality prevails over the by-law of a lower-tier municipality. See *Orangeville (Town) v. Dufferin (County),* 2010 ONCA 83, CarswellOnt 562 (Ont. C.A.) at paras. 16-18. The allocation of jurisdiction between lower-tier and upper-tier municipaliites is determined with reference to the *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 8, 9, and 11.

[146] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 8 and *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, 2004 CarswellAlta 355.

[147] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA2 – 38 reproducing *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, 2001 SCC 40, 2001 CarswellQue 1268 at para. 53. In the context of interpreting the scope of the general welfare power, LeBel J. stated – in part – "such [a] provision cannot be construed as an open and unlimited grant of provincial power. [...] It does not allow local governments and communities to exercise powers I questions that lie outside the traditional area of municipal interests, even if municipal powers should be interpreted broadly and generously."

[148] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 8(1).

powers, the Supreme Court continues to insist that "[n]on-included powers [in specific powers] may not be supplemented through the use of the general residuary clauses often found in municipal laws."[149] In the context of municipal business licensure, this rule is operationalized by several provisions that – among other things – determine minimum procedural fairness in respect of licence suspensions;[150] restrict which businesses municipalities have the power to licence;[151] and provide for more respective licensure schemes in respect of certain prescribed businesses.[152] The conflict between these general and specific powers to licence various municipal issues will likely not arise with respect to the legal cultivation of cannabis, for the reason that – as discussed in Section IV – the personal, non-commercial cultivation of cannabis is not a business activity.

SECTION VIII: THE MUNICIPAL POLICE POWER TO CHARGE USER FEES

A municipality's regulatory power or police power authorizes a municipal corporation to regulate, control, and govern the persons involved in a licensed trade or business is one means to safeguard the health, safety, and wellbeing of persons.[153] As already discussed in Sections IV

[149] *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, 2001 SCC 40, 2001 CarswellQue 1268 at para. 52 citing *R. v. Greenbaum*, [1973] 1 S.C.R. 674, 1993 CarswellOnt 80 at para. 36.

[150] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 151(2). See e.g. *Victoria Marine Tourism Association v. Victoria (City)*, 28 M.P.L.R. (3d) 99, 2001 CarswellBC 2838 (S.C.) affirmed 2003 BCCA 204, 46 M.P.L.R. (3d) 66 (C.A.). The Court held that the City of Victoria unlawfully seized the owner's kiosk because the City never communicated to the owner that – as a matter of law – the owner should never have been eligible to receive a licence.

[151] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 152(1)1 and O. Reg. 583/06 – *Licensing Powers*. A municipal does not have the jurisdiction to licence most forms of manufacturer or industrial businesses.

[152] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 154. See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2007) at MA4 – 75. Section 154 supplements the general licensing authority under s. 151 with respect to adult entertainment establishments.

[153] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at pp. 685. See generally Municipal Act, 2001, S.O. 2001, c. 25, s. 10(2)6. The health, safety, and welfare of persons is a term of art for one broad power of municipalities to enact regulations in respect of the general welfare of persons. See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2007) at MA2 – 36-37 and 49 citing *Ontario Restaurant Hotel & Motel Assn. v. Toronto (City) (2002),* 26 M.P.L.R. (2d) 286, 2002 CarswellOnt 19 (Ont. Div. Ct.). The City of Toronto had the jurisdiction to protect the health and safety of the public by forcing restraint owners to publicly disclose the results of food premises inspections, even though this right interfered with the commercial interests of restaurant operators.

and VI, the municipal regulation of the personal cultivation will likely fall within such a general municipal power. Municipal corporations are able to fund the administrative costs related to such licensure schemes because the provincial legislatures of a province will fix a maximum fee that municipalities may incorporate into the regulatory by-law.[154] In my view, from these general principles, two specific rules become apparent. First, the objective of the by-law must be to regulate a particular trade or calling through the requirement of a licence, permit, registration, or some other form of privilege.[155] Second, the licence is to be funded through the imposition of a charge that is reasonably required to fund the administrative costs related to that licence.[156] For example, the issue in *Yorkton (City) v. Trach* was whether two by-laws, a cemetery by-law being entitled "A Bylaw of the City of Yorkton to provide for the control and to regulate the operation of cemeteries within the City limits," and a business by-law being entitled "A Bylaw to provide for the licensing, controlling, regulating, and governing of certain businesses carried on in the City of Yorkton," were *ultra vires* the authority of the City because these by-laws respectively imposed a monument foundation permit fee of $35 and a tradesperson licence fee of $350 in the nature of a tax.[157] The defendant funeral director had installed a foundation for a monument in a cemetery within the plaintiff municipality without paying those aforementioned fees and submitted – in his defence – that the City did not have the legislative authority to enact

[154] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2008) at pp. 687.
[155] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2007) at MA4 – 9.
[156] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2007) at MA4 – 11. See also *Municipal Act, 2001*, S.O. 2001, c. 25, s. 191(3).
[157] See *Yorkton (City) v. Trach*, 21 M.P.L.R. 269, 1983 CarswellSask 109 at para. 9. See also *Assessment Act*, R.S.O. 1990, c. A.31, ss. 3(1)2., 2.1, 2.2., 3., 3.1 and *General O. Reg. 282/98*, Part III.2. The use of land in respect of cemeteries, burial sites, and crematoriums is prescribed by the *Assessment Act* and the *General O. Reg.* to be exempt from taxation in Ontario.

such a tax. Without determining whether the City could have the legislative authority to raise revenue through the imposition of such taxes, Malone J. reasoned that "[t]he titles of both by-laws lead me to conclude that each fall within the second category referred to by Rogers as "police power" by-laws and therefore fees provided for therein cannot be considered as being "in the nature of a tax."[158] The trial judge's reached this decision in a manner that accords with the two aforementioned rules. First, his reasons implied that he found that the legislative objective of the municipal corporation in this circumstance was regulate which persons would be qualified to effect improvements in an area of the City where there are health concerns in respect of burial plots in a cemetery. Second, he must have recognized that the real substance of the purported taxes were nominal fees, designed to do no more than pay for the costs of their respective licences by defraying the municipality's costs of administering the licensure scheme.[159]

Due to the fact-specific nature of fees, the definition of a fee provided in the *Municipal Act, 2001* is of limited assistance due to its somewhat circular nature.[160] Even though ss. 390(1) and 390(1.1) illustrate without limitation that municipalities and local boards may impose fees or charges on persons for the cost of services or activities done by these entities or on their behalf and for the use of municipal property[161] – in my view, most inhabitants of municipalities already have a common-sense understanding of what constitutes a municipal fee or charge, although

[158] *Yorkton (City) v. Trach*, 21 M.P.L.R. 269, 1983 CarswellSask 109 at para 11.
[159] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2008) at p. 687. But see *Allard Contractors Ltd. v. Coquitlam (District),* [1993] 4 S.C.R. 371, 1993 CarswellBC 1272. Although most licensing fees are flat charges levied directly on the person from whom payment must be received, with the proper legislative authority, municipalities may also levy volumetric licensing that are indirectly levied on the person from whom payment must be received.
[160] See *Municipal Act, 2001*, S.O. 2001, c. 25, s. 390. S. 390 provides that the definition of a fee or charge is a fee or charged imposed under sections 9 (a municipal corporation has the powers of a natural person); 10 (single-tier municipal powers; and 11 (upper-tier and lower-tier municipal powers) with reference to the interpretative sections of 391(1) and 391(1.1).
[161] See *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 391(1) and 391(1.1).

persons may nevertheless dispute such parking fees,[162] garbage collection fees,[163] and hydro fees (to just name a few).[164] To them, a fee is a one-time or recurring charge in exchange for the right to use a particular municipal service. But, distinguishing between fees and taxes is of the utmost importance because – as I discuss in greater detail below – municipalities may only impose taxes in regards to a limited, prescribed classes of things, for example, on different classes of property; on utilities and railways; and in service areas to finance the provisioning of special services.[165] The municipal regulation of the personal cultivation of cannabis is not one of these prescribed classes of things; therefore, a by-law that purports to tax the cultivation of cannabis will be invalid. According to Auerback and Mascarin, a fee is distinguishable from a tax (i) when there is a nexus between the fee charged and the cost of the services provided; (ii) the fee is reasonable; and (iii) the revenue derived from the fee is not deposited into general revenues.[166] For example, the central issue in *Ontario Private Campground Association v. Harvey (Township)* was whether the applicant campground association's application to quash a by-law of the respondent municipality should be granted on the basis that the municipality had imposed an invalid levy in the nature of a tax on the operators of seasonal trailer parks.[167] The levy in question was a $50.00

[162] See e.g. *Toronto (City) v. Weingust*, 2006 ONCJ 23, 2006 CarswellOnt 461.
[163] See e.g. *Greater Toronto Apartment Association v. Toronto (City),* 2 M.P.L.R. (5th) 114, 2012 CarswellOnt 10104 (S.C.J.).
[164] See *Duris v. Prescott (Town),* 37 M.P.L.R. (5th) 130, 2015 CarswellOnt 7761 (S.C.J.).
[165] See generally *Municipal Act, 2001*, S.O. 2001, c. 25, Pt. VII.
[166] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2015) at MA12 – 5. See also *Urban Outdoor Trans Ad v. Scarborough (City),* [2001] O.J. No. 261, 2001 CarswellOnt 187 at paras. 27 and 31 citing P. Hogg, *Constitutional Law of Canada* (Looseleaf Edition, vol. 2, at 30-18). The Court of Appeal outlined a slightly different test to determine whether a levy is a tax or a fee – that is, a levy will be found to be a tax if it is: (i) enforceable by law; (ii) imposed under the authority of the legislature; (iii) levied by a public body; and (iv) intended for a public purpose. The Court cited Hogg for the proposition that levies are not intended for a public purpose if they are intended to "bear a reasonable relation to the cost of providing the service" rather than to raise revenue.
[167] *Ontario Private Campground Association v. Harvey (Township)*, 33 O.R. (3d) 578, 1997 CarswellOnt 1547 at paras. 1 and 8(C.J.).

charge on each occupied trailer site intended to be placed into the municipality's general revenue fund to fund municipal services and to reduce the "Cottage-Trailer Site Tax Difference (said by the Township to be $372.01)."[168] The public perception among some cottagers and municipalities that trailer parks did not pay municipal taxes at a fair rate and licensing by-law was enacted to change as much.[169] Although both parties agreed that the licensing by-law imposed a tax upon the applicant campground association, s. 220.1(1) of the *Municipal Act, 1990* had just been enacted by the *Savings and Restructuring Act* to increase the ability of municipalities to raise revenues in light of diminishing transfer payments from the province of Ontario, and the parties disagreed as to whether "s. 220.1 [now s. 391] of the *Municipal Act* create[d] an omnibus power to impose a tax as a fee[.]"[170] Howden J. cited Rogers for the proposition that "there is a distinction between the authority for a municipality to impose a tax and its authority to collect a fee such a licensing" and held that "s. 220.1 cannot be used as authority to impose a tax for purposes of general municipal revenues."[171] The Court noted that although the *Municipal Act* had once permitted licence fees in the nature of taxes, s. 220.1 was designed to clarify that although license fees do not have to conform to the costs of the particular service, user-specific license fees cannot be used to raise general municipal revenue.[172] Municipalities therefore would

[168] *Ontario Private Campground Association v. Harvey (Township)*, 33 O.R. (3d) 578, 1997 CarswellOnt 1547 at para. 6 (C.J.).
[169] See *Ontario Private Campground Association v. Harvey (Township)*, 33 O.R. (3d) 578, 1997 CarswellOnt 1547 at paras. 10-12.
[170] See *Ontario Private Campground Association v. Harvey (Township)*, 33 O.R. (3d) 578, 1997 CarswellOnt 1547 at paras. 2 and 22 citing *Savings and Restructuring Act,* S.O. 1996, c. 1.
[171] *Ontario Private Campground Association v. Harvey (Township)*, 33 O.R. (3d) 578, 1997 CarswellOnt 1547 at paras. 29 and 35 citing I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf update unknown) at p. 737.
[172] See *Ontario Private Campground Association v. Harvey (Township)*, 33 O.R. (3d) 578, 1997 CarswellOnt 1547 at paras. 39-40.

be well advised to reasonably estimate their costs of regulating the non-commercial cultivation of cannabis – with the acknowledgement that such a novel estimate does not need to be perfect.

SECTION VIV: THE MUNICIPAL TAXATION POWER TO CHARGE DIRECT TAXES

On the other hand, a municipal corporation's taxing power is characterized as a power which permits the municipality to create a tax by enacting a by-law that requires persons carrying on or proposing to carry on a licensed trade, business, or occupation to contribute a licence fee in the nature of a tax for the privilege conferred by the licence.[173] The primary objective of a tax by-law is not to regulate, control, and govern a licensed trade or business as the police power is intended to do, but to instead raise municipal revenue in accordance with the delegated provincial taxing power in s. 92(9) of *The Constitution Act, 1867* to make laws in relation to "Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes."[174] For example, the issue in in *Montreal Abattoirs Ltd.* was whether the city of Montreal had passed a by-law that was *ultra vires* its police power to inspect slaughterhouses as a matter of ensuring health and safety standards or *intra vires* its power to raise revenue.[175] The City of Montreal's Charter provided in part as follows:

"The city may exact and recover from any [...] company operating public or private abattoirs [...] to pay the salary of the health officers [...] to inspect the cattle and other animals slaughtered at any such abattoirs, a sum of not more than one thousand dollars per annum for each

[173] I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 686 citing *Montreal Abattoirs Ltd. v. Montreal,* [1926] S.C.R. 60, 1925 CarswellQue 60. See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA8 – 2. The authors state that "[a] hallmark of any government is the ability to impose taxes [...] Part VIII [of the *Municipal Act, 2001*] authorizes municipalities in Ontario to impose taxes that have been traditionally levied by local governments."

[174] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 686 citing *The Constitution Act, 1867*, 30 & 31 Vict., c. 3, s. 92(9).

[175] See *Montreal Abattoirs Ltd. v. Montreal,* [1926] S.C.R. 60, 1925 CarswellQue 60.

public abattoir, and a sum of not more than two hundred dollars per annum for each private abattoir operated by any such [...] company."[176]

The defendant slaughterhouse submitted that the City did not have the jurisdiction to collect a licence fee in the nature of the police power because the City had not appointed any health officers to inspect the slaughterhouses.[177] Although the Court accepted the factual accuracy of this submission, Rinfret J. nevertheless reasoned that "[t]he strength of this objection depends entirely on the nature of the imposition contemplated by the section referred to: whether it provides for a tax, or for the bare right to recover a compensation for services."[178] His view was that the real substance of the fee was in the nature of a tax because the statute did not obligate the municipality to appoint health officers to inspect the slaughterhouses or provide a benefit the company in any form. Instead, the he held that purpose of the tax was to raise revenue to carry out other public purposes unrelated to the regulation of slaughterhouses at all.[179] Stated otherwise, the substance of a municipal corporation's power to raise revenue, then, is whether the municipal corporation has an objective to generate funds through the existence of a genuine regulatory licensing scheme, which may be contributed to discharging a public purpose.[180] In contrast, defraying the costs of a licensure scheme is not considered to be a public purpose, instead it is a mere incident of regulation. To that end, a municipal licensing scheme in respect of the personal cultivation of cannabis that imposed a fee to cover the costs of registering users – among other things – would likely not be considered to be discharging an impermissible public

[176] *Montreal Abattoirs Ltd. v. Montreal,* [1926] S.C.R. 60, 1925 CarswellQue 60 at para 6.
[177] See *Montreal Abattoirs Ltd. v. Montreal,* [1926] S.C.R. 60, 1925 CarswellQue 60 at para 10.
[178] *Montreal Abattoirs Ltd. v. Montreal,* [1926] S.C.R. 60, 1925 CarswellQue 60 at para. 11.
[179] *Montreal Abattoirs Ltd. v. Montreal,* [1926] S.C.R. 60, 1925 CarswellQue 60 at paras. 13-15.
[180] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at pp. 686.1.

purpose. This is an important point. The case of *Gould v. Weyburn (City)* illustrates the determinative effect that the purpose of a levy will often have on the characterization of a levy as either a valid fee or an invalid tax.[181] The respondent city had imposed a tax for improvements on the land upon which the applicant corporation and shareholder would be personally liable to pay, even though he would not own the improvements.[182] The applicant brought an application arguing that a by-law providing for of $445 per year for each trailer or mobile home was illegal because it was excessive and outside the scope of the *Cities Ac*t.[183] Those sections provided that the fee for a licence must not exceed the cost to the city for administering and regulating the activity in question. The Court easily agreed with the applicant's submission and held that the by-law was *ultra vires* because the Act did not authorize the City to recover the cost of services provided by the City to the occupants of the trailer park in that amount.[184] But, perhaps the most noteworthy part of the judgement was where G.A. Chicoine J. outlined that the Act nevertheless authorized the City to assess a valid tax upon each of the residents of the trailer park, instead of an invalid tax on the operator of the trailer park for improvements which the operator would not own.[185] For example, the Court in the recent case of *Nylene Canada Inc. v Arnprior (Town)* followed this distinction to hold that a municipality was not prohibited by s. 394(1)(c) of the *Municipal Act, 2001* to charge for sewer services that were based on the amount of water supplied to the corporate person, rather than the amount of water that it discharged into the

[181] *Gould v. Weyburn (City)* 57 M.P.L.R. (4th) 199, 2009 CarswellSask 182 (Sask. Q.B.)
[182] *Gould v. Weyburn (City)* 57 M.P.L.R. (4th) 199, 2009 CarswellSask 182 at para. 8 (Sask. Q.B.)
[183] *Gould v. Weyburn (City)* 57 M.P.L.R. (4th) 199, 2009 CarswellSask 182 at para. 2 (Sask. Q.B.) citing *Cities Act,* S.S. 2002, c. C-11.1, ss. 8(4)(a) and (b).
[184] *Gould v. Weyburn (City)* 57 M.P.L.R. (4th) 199, 2009 CarswellSask 182 at para. 34 (Sask. Q.B.)
[185] *Gould v. Weyburn (City)* 57 M.P.L.R. (4th) 199, 2009 CarswellSask 182 at para. 35 (Sask. Q.B.) citing *Cities Act,* S.S. 2002, c. C-11.1, ss. 177 and 164.

sewage system.[186] To reach this conclusion, Robert Smith J. cited *Ontario Private Campground Association v. Harvey (Township)* to confirm that the City had the authority to charge Nylene Canada Inc. a licence fee based on "a reasonable attempt to estimate its costs to provide wastewater services [...] the fees charged for wastewater services cannot [therefore] be considered to be a tax imposed by Arnprior[.]"[187] There is little doubt that a municipal licensure scheme in respect of the personal cultivation of cannabis would provide some benefit to individuals producing cannabis. Perhaps one benefit would be the peace of mind of knowing – after centuries of prohibition – it is legal to cultivate your own cannabis. Municipal by-laws designed to ensure related questions of user safety and health would supplement that benefit.

SECTION VV: AVOID COMPLEX FEES TO REDUCE INVALIDATION RISKS

Even in light of these purportedly clear distinctions between the police and taxation powers, the case of *Allard Contractors Ltd. v. Coquitlam (District)* illustrates – in practical terms – that it can be very difficult to determine whether the objective of an enabling provincial statute and of the municipal by-law is to permit the municipality to collect "dynamic" licence fees as part of its police power or taxation power.[188] Trainor J. began his discussion of this dispute by referencing the continuing efforts of municipalities to extract volumetric fees from gravel pit operators and how the Supreme Court had decided not to "consider the constitutional question of whether a volumetric fee constituted a tax or levy which was beyond the legislative

[186] *Nylene Canada Inc. v. Arnprior (Town)*, 2017 ONSC 795, 2017 CarswellOnt 1101 at para. 5.
[187] *Nylene Canada Inc. v. Arnprior (Town)*, 2017 ONSC 795, 2017 CarswellOnt 1101 at paras. 45-49 citing *Ontario Private Campground Association v. Harvey (Township)*, 33 O.R. (3d) 578, 1997 CarswellOnt 1547 at paras. 39-40 (C.J.).
[188] *Allard Contractors Ltd. v. Coquitlam (District),* [1993] 4 S.C.R. 371, 1993 CarswellBC 1272.

competence of the province."[189] Although the central issue at the trial level was whether a varying fee was an indirect tax that was *ultra vires* the provincial competence to raise revenues by imposing a direct tax, to determine that central issue,[190] the Court had to decide whether the real substance of the licence fee was a fee in the nature of a tax or a mere fee ancillary to a genuine licensing and regulatory scheme.[191] To this end, Trainor J. held that the volumetric fee was not a fee in the nature of a tax because, although the evidence disclosed that the volumetric fee raised "considerably more moneys" than needed to fund the regulatory scheme, the municipality nevertheless had "an intention to raise sufficient revenue to cover the costs of the regulatory scheme and the building and maintenance of roads over which gravel trucks would pass," which is, as aforementioned, the general objective of a police power licensing fee.[192] On appeal, the British Columbia Court of Appeal also sidestepped the question of whether the volumetric fee was an indirect fee and instead affirmed the trial judgement by referencing section 92A of *The Constitution Act, 1867*; a provision which had not been argued at trial level and which confirms that provincial legislatures have the exclusive power to make laws in relation to exploration of non-renewable natural resources located in the province, including the direct

[189] See *Kirkpatrick v. Maple Ridge (District),* [1986] 2 S.C.R. 124, 1986 CarswellBC 257. The defendant municipality had first enacted a by-law providing for comprehensive regulations on the removal of soil from the municipality and prohibited soil removal in designated areas unless a permit was obtained, the plaintiff contractor had commenced an action to quash the by-law for being *ultra vires* the power of the municipality to "fix a fee for the permit" under the *Municipal Act*, R.S.B.C. 1970, c. 1979, s. 930(d). The municipality had changed the permit fee to remove soil from a nominal flat fee to a much higher volumetric fee based on the amount of soil removed from the ground to purportedly defray the costs of regulation. The Supreme Court agreed that the *Municipal Act* did not, at that time, authorize the municipality to impose a varying fee in respect of soil removal and quashed the by-law on that grounds of illegality. But the Court did not answer the question is to whether this licence fee constituted a tax that was beyond the legislative competence of the province and – by extension – the municipal corporation.

[190] See *Allard Contractors Ltd. v. Coquitlam (District)* (1988), 40 M.P.L.R. 96, 1988 CarswellBC 365 at para. 3.

[191] See *Allard Contractors Ltd. v. Coquitlam (District)* (1988), 40 M.P.L.R. 96, 1988 CarswellBC 365 at para. 5.

[192] See *Allard Contractors Ltd. v. Coquitlam (District)* (1988), 40 M.P.L.R. 96, 1988 CarswellBC 365 at para. 5. See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at pp. 685.

or indirect taxation thereof.[193] On subsequent appeal to the Supreme Court, the Court criticized the Court of Appeal for engaging in this novel interpretation of section 92A when the issue did not "squarely arise for decision."[194] Unlike the trial decision and the appellate decision before it, the Supreme Court squarely confronted the issue, confirming that although flat fees are a form of direct taxation, "the volumetric fees at issue are indirect in their general tendency" and that, if classified as a tax under s. 92(9) of *The Constitution Act, 1867* would in fact be *ultra vires* the authority of the provinces.[195] In this sense, the Supreme Court nevertheless agreed with the trial judge's decision that the licence fee was nevertheless ancillary to a genuine regulatory scheme, in that these fees are (i) connected to the regulatory scheme; (ii) designed as a cost-recovery mechanism; and (iii) a reasonable attempt to achieve the objective of matching the fee revenues with the administrative costs of the regulatory scheme.[196] The lesson to be taken from *Allard Contractors Ltd. v. Coquitlam (Districts)* is that sometimes less is more. To that end, municipalities should avoid setting licence fees that would charge an individual a higher or lower fee based on the number of cannabis plants that purpose elects to cultivate. Although a Court could uphold such a system of fees, the cost of litigation would likely be prohibitively expensive.

CONCLUSION: BUT WHO REGULATES THE REGULATORS?

SECTION VVI: THE TRUST-LIKE DUTIES OF MUNICIPAL COUNCILLORS

A municipal corporation can only act through the human agencies who are elected or appointed to represent it and act on its behalf. And the municipal council is the general agent of

[193] See *Allard Contractors Ltd. v. Coquitlam (District)*, [1992] B.C.W.L.D. 123, 1991 CarswellBC 294 at paras. 18-19.
[194] *Allard Contractors Ltd. v. Coquitlam (District),* [1993] 4 S.C.R. 371, 1993 CarswellBC 1272.
[195] *Allard Contractors Ltd. v. Coquitlam (District),* [1993] 4 S.C.R. 371, 1993 CarswellBC 1272 at paras. 44-46 and 56.
[196] *Allard Contractors Ltd. v. Coquitlam (District),* [1993] 4 S.C.R. 371, 1993 CarswellBC 1272 at paras. 74, 79, and 83-84.

the municipal corporation for all purposes and is the instrumentality by which the municipality may bind itself to a course of action.[197] Being the general agent of the municipal corporation, municipal councillors, thus, are at the centre of this governance structure and act as stewards over the interests of ratepayers. To this end, the jurisprudence confirms that – in general terms – municipal councillors must exercise their statutory powers for the benefit of the ratepayers.[198]

The pressing ethical question, in the context of the legalization of personal cannabis cultivation, is whether some municipal councillors will be able to put aside deeply-seated moral beliefs against the cultivation of cannabis to do what is best for their constituents. For example, the authors of the *Toronto Drug Strategy* report have endorsed the general view that "the harms of criminalizing cannabis far outweigh the benefits and that a new approach is needed."[199] Although the report did not discuss the federal and provincial legislation of personal cannabis cultivation, I would submit that an "evidenced-based public health approach to develop a regulatory framework for non-medical cannabis" requires municipalities to make the controversial, but wise policy decision to let responsible individuals grow their own cannabis.[200]

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[197]See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 215.

[198]See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 217 citing *Morrow v. Connor* (1886), 11 P.R. 423, 1887WL13509.

[199] Toronto, "Toronto Drug Strategy Status Report 2016," (Dated November 2016) (Online: https://www.toronto.ca/legdocs/mmis/2016/hl/bgrd/backgroundfile-98606.pdf) at p. 12.

[200] Toronto, "Toronto Drug Strategy Status Report 2016," (Dated November 2016) (Online: https://www.toronto.ca/legdocs/mmis/2016/hl/bgrd/backgroundfile-98606.pdf) at pp. 12-13. See Jonathan P. Caulkins, Beau Kilmer, and Mark A. R. Kleiman, *Marijuana Legalization: What Everyone Needs to Know*, 2nd ed. (New York: Oxford University Press, 2016) at pp. 175-176. A household survey of cannabis users asked how they obtained their recent supply of cannabis. 3.5 percent of respondents reported that they grew their own. But, the fact that 6.6 percent of daily or near-daily users reported growing their own cannabis indicates that even if the personal cultivation of cannabis may have general appeal to cannabis users – few people actually put the time and effort into learning how to cultivate the cannabis plant.

With that said, the exact legal status of municipal councillors is unsettled. Although Rogers acknowledges that "earlier jurisprudence of the highest authority" characterizes municipal councillors as trustees and refers to ratepayers as beneficiaries for whom the council acts – his view is that "this concept is erroneous since it is by no means accurate to say that every wrongful act of councils constitutes a breach of trust which may be remedied by the application of a ratepayer."[201] Instead, according to Rogers, council members are only trustees in favor of the beneficial interests of their ratepayers in three distinct circumstances; the two most significant for the purposes of this essay being an abuse of corporate property and an abuse of office.[202]

First, council members are in a fiduciary relationship with respect to their use of corporate funds and property in relation to the beneficial interests of the ratepayers.[203] According to O'Connor, the essential nature of this relationship is that employees should not be permitted to commit an "abuse of property" in relation to corporate funds and property because access to that property is conditional upon the public use of that property for the sole benefit of the ratepayers.[204] Although innocuous abuses of property such as occasionally surfing the web for personal enjoyment at work should not necessarily be penalized, one must recognize that:

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[201] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 218.

[202] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 219. The third circumstance, the legal principle that "[council] members occupy collectively a position analogous to that of trustees under certain Acts which confer upon them special powers and duties to be discharged for the benefit of landowners in general or such of them as come within a particular class" will not be discussed. See e.g. *Clearly v. Windsor*, 10 O.L.R. 333, 1905 CarswellOnt 401. Anglin J. held that the City of Windsor's construction of a four foot wide sidewalk instead of a 5 foot wide sidewalk was a breach of trust. The raising and expenditure of the ratepayers' money was only authorized by the vote of the ratepayers for the particular purpose of constructing a 5 foot wide sidewalk.

[203] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 219.

[204] M. Rick O'Connor et al., *Conduct Handbook For Municipal Employees and Officials*, 2nd ed. (LexisNexis: Toronto, 2003) at p. 188.

> Where employees devote excessive time to 'surfing' in the pursuit of person matters, there is a cost to the employer in the form of lost productivity and wasted network bandwidth. Seen in this light, Internet abuse can be likened to an employee who conducts a private business on company time and makes use of company resources, such as a photocopier for personal purposes.[205]

Although the respective offices of municipal employees and municipal councillors have distinct legal statuses, the analogy is apt. A municipal councillor has no greater right than a municipal employee to use their control or possession over government property for personal gain.[206] If anything – as quasi-fiduciaries – municipal councillors must be held to an even higher standard.

Second, a municipal councillor is also a trustee for the inhabitants of the municipality in the limited sense that he is prohibited from making any decision of the council which would misuse his office for purposes of private gain.[207] Although there are several forms of abuse of office, perhaps a more common form of such an abuse would be for the municipal councillor to use his office to procure a benefit. For example, a municipal councillor could use his public office to prevent the adoption of a measure, a motion, or resolution in order to reap a personal reward.[208] In relation to the legalization of cannabis, there is a real concern that various municipal councillors may inadvertently vote on matters that could benefit their private interests.[209] And,

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[205] M. Rick O'Connor et al., *Conduct Handbook For Municipal Employees and Officials*, 2nd ed. (LexisNexis: Toronto, 2003) at p. 187.

[206] See e.g. *Criminal Code,* R.S.C. 1985, c. C-46, s. 337.

[207] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2017) at p. 219. See also *Parsons v. London (City),* 20 O.W.R. 534, 1911 CarwellOnt 628 at para. 36 (Ont. H.C.J.) affirmed 21 O.W.R. 205, 1912 CarswellOnt 71 (Ont. C.A.) per Middleton J. Municipal councillors "occupy a fiduciary position towards the ratepayers, which will render them liable to account for any secret profit they may make out of municipal business[.]"

[208] M. Rick O'Connor et al., *Conduct Handbook For Municipal Employees and Officials*, 2nd ed. (LexisNexis: Toronto, 2003) at p. 32.

[209] See e.g. CBC News, Samantha Craggs, "Hamilton's mayor is a shareholder in a marijuana growing company," (Dated 13 October 2017) (Online: http://www.cbc.ca/news/canada/hamilton/eisenberger-marijuana-investment-1.4354078). The headline reads that "Fred Eisenberger says medicinal marijuana is a 'growing field' and he's not worried about the optics."

with respect to the municipal regulation of cannabis, prohibiting the personal cultivation of cannabis would certainly benefit those councillors who own shares in commercial cultivators.[210]

SECTION VVII: THE STRICT ETHICS OF THE MUNICIPAL CONFLICT OF INTEREST ACT

Administrative lawyers are well aware that members of administrative tribunals will have their reasons disqualified and their decisions invalidated upon the basis of a reasonable apprehension of bias.[211] There are different categories of bias that can disqualify a decision maker: (i) antagonism during the hearing by a decision maker toward a party; (ii) an association between one or more of the parties and a decision maker; (iii) an involvement by a decision maker in a preliminary stage of the proceeding; and (iv) a particular attitude of a decision maker toward an outcome.[212] As elected public officials, the Courts permit municipal councillors to have strongly held beliefs and viewpoints in respect of various matters, indeed, that is perhaps one reason for which they could be elected. But, nevertheless, when a municipal councillor sits on a municipal board and must make a decision, that decision maker cannot have so closed of a mind that he prejudges the matter before he hears all of the evidence.[213] This degree of prejudgement

[210] See Canada, Canada Gazette, *Regulatory Impact Analysis Statement:* "Marihuana for Medical Purposes Regulations," vol. 146, No. 50 (Dated 15 December 2012) (Online: http://gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/reg4-eng.html) at Producer surplus gains. "Under the proposed *MMPR*, there would be beneficial impacts for the industry, over and above the benefits to the individuals involved in the market. [...] The CBA found that the new regulated market [prohibiting the personal production of cannabis] would generate an overall producer surplus of $.26 million in the first year of implementation (2014-2015), rising to about $110 million in 2024 as the market expands."

[211] See *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 1976 CarswellNat 434 at pp. 394-395. The main test for a reasonable apprehension of bias is whether an informed person, viewing the matter realistically and practically – and having thought the matter through would reasonably think that the decision maker was biased.

[212] Cynthia Amsterdam et al., "Principles of Fundamental Justice: Reasonable Apprehension of Bias in Administrative Law and Municipal Conflicts," 27 Can. J. Admin. L. & Prac. 241 at 3 (Westlaw).

[213] See e.g. *Rainbow Beach Developments Inc. v. Parkland (County*), 2013 ABCA 205, 2013 CarswellAlta 949 at para. 15.

denies the parties before it the procedural right to be heard and a reasonable person might believe, even in the absence of an actual bias, that such a decision maker has a perceived bias.

Outside of administrative decisions analogous to the above, the *Municipal Conflict of Interest Act* is a complete code in respect of conflicts of interest in relation to members of municipal councils and local boards.[214] O'Connor and Rust-D'Eye summarize the purposes of the *MCIA*:

> The passage of this legislation constituted a fundamental change in the approach to handling conflicts of interest in the municipal arena. Its general intent was to preclude councillors and members of local boards from considering or voting on those specific matters in which they had a "pecuniary interest" — while not affecting their qualification to remain in public office. In essence, the 19th-century principle of disqualification had been replaced by the dual concepts of disclosure and abstention by members on an issue-by-issue basis.[215]

On one hand, the *MCIA* could be said to be a progressive statute that recognizes the practical reality that many municipal councillors may have second, private sector jobs. On the other hand, the unavoidable purpose of the statute is to strictly punish any undisclosed conflicts of interests that may arise out of this practical reality.[216] Recent amendments to the *MCIA* affirm the above, namely that "[t]here is a benefit to municipalities and local boards when members have a broad range of knowledge and continue to be active in their own communities, whether in business, in the practice of a profession, in community associations, and otherwise [... but] Members are

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[214] *Municipal Conflict of Interest Act,* R.S.O. 1990, c. 50. See *Harding v. Fraser*, 23 M.P.L.R. (4th) 288, 2006 CarswellOnt 3933 at para. 31 (Ont. S.C.J.) and *Ruffolo v. Jackson*, 2010 ONCA 472, 2010 CarswellOnt 4657 at para. 14. But see *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 256, 258(1), 424(1) and 423(1). The *Municipal Conflict of Interest Act* does not completely codify ethical violations that a municipal councillor commits before being elected to public office. For example, s. 258 disqualifies an integrity commissioner from being able to hold office as a municipal councillor.

[215] M. Rick O'Connor and George H. Rust-D'Eye, *Ontario's Municipal Conflict of Interest Act — A Handbook* (St. Thomas: Municipal World Inc., 2007) at 2-3. See also *Lorello v. Meffe*, 2010 ONSC 1976, 2010 CarswellOnt 11195 at para. 23. "The *MCIA* governs the conduct of local government members regarding conflicts of interest. It reflects the need for integrity and accountability as cornerstones a of a strong local government system."

[216] See John Mascarin, "Eyes Wide Shut – -- Wilful Blindness & A Conflict of Fordian Proportions," 5 M.P.L.R. (5th) 30 at 7 (Westlaw) citing *Halton Hills (Town) v. Equity Waste Management of Canada*, 30 M.P.L.R. (2d) 232, 1995 CarswellOnt 1048 (Ont. C.J.) at para. 9.

expected to perform their duties of office with integrity and impartiality in a manner that will bear the closest scrutiny."[217] Although purpose statements may – in other contexts – have limited weight, the broad definition of a conflict of interest and the harsh penalties for their breach affirm the provincial concern of ensuring that municipal councillors reconcile their public duties with their private interests.[218] First, the *MCIA* prohibits a municipal councillor from having or potentially having a direct or indirect pecuniary interest in any matter that is the subject of a council meeting or a local board of which the municipal councillor is a member.[219] Second, subject to certain narrow defences, the penalty for contravening the Act is severe – that is, the judge must decide, individually or collectively, to vacant the municipal councillor's seat; disqualify the municipal councillor from running for election again for up to seven-years; or require the member to disgorge their gains.[220] The issue in respect of the municipal regulation of cannabis is to determine to what extent a municipal councillor can have a permissible private interest in either the emerging commercial and even non-commercial recreational cannabis markets.

A general view is that the *MCIA* does not apply to conflicts of interest that do not have a pecuniary or monetary component.[221] The correctness of this view is suspect, but likely inconsequential. This is because "[t]here is no suggestion in the wording of the *MCIA* that it is limited to situations where the City has a financial interest, although it is true that in most of the

[217] *Municipal Conflict of Interest Act,* R.S.O. 1990, c. 50., ss. 1.1.3. and 1.1.4.
[218] See also *Municipal Conflict of Interest Act,* R.S.O. 1990, c. 50., ss. 1.1.1. and 1.1.3.
[219] *Municipal Conflict of Interest Act,* R.S.O. 1990, c. 50., s. 5. See e.g. *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 at para. 32 citing *Greene v. Borins,* 50 O.R. (2d) 513, 1985 CarswellOnt 666 (DIv. Ct.) per Lederer J. (D. Gordon J. concurring) affirmed 2012 ONCA 567, 2012 CarswellOnt 10842 (C.A.). "The question that must be asked and answered is 'does the matter to be voted upon have a potential to affect the pecuniary interest of the municipal councillor?"'
[220] *Municipal Conflict of Interest Act,* R.S.O. 1990, c. 50., ss. 9 and 10.
[221] See *Gammie v. Turner*, 2013 ONSC 4563, 2013 CarswellOnt 9236 citing *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 (Div. Ct.) at para. 31. The Courts have generally held that a pecuniary interest is an interest that "relates to money in some shape or form."

decided cases, financial or commercial interests of the City were involved."[222] In this sense, I will not speculate upon whether a municipal councillor – if he was so inclined to grow his own cannabis – could face a conflict of interest if he voted on a matter related to this hobby. The more practical issue is whether that same municipal councillor could be so conflicted if he owned shares in a private or public corporation that commercially cultivates cannabis. The answer to this question is simple. According to the *MCIA*, a municipal councillors who owns shares in a commercial cultivar of cannabis would have a pecuniary interest if the corporation is private, and would have a pecuniary interest in a public corporation if he had a controlling interest therein.[223]

The leading case of *Magder v. Ford* is a recent illustration of the seriousness that inures to any perceived or actual violation of a municipal councillor's fiduciary duty not to misappropriate public property or opportunities in a manner that provides him with some direct or indirect pecuniary benefit.[224] The factual background of the case was that Rob Ford was serving as the mayor of Toronto and was found to have breached three articles of the Toronto *Code of Conduct*, where he improperly used the City of Toronto Logo,[225] City staff, and his status as a councillor to solicit $3,150.00 in donations for a charitable foundation.[226] The charitable foundation in question was the Rob Ford Football Foundation – a foundation he used to fund the purchase of football equipment for high school football teams, and which the application judge noted involved "absolutely no issue of corruption or pecuniary gain on [Rob Ford's] part [... and]

[222] *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at para. 36.
[223] See *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, s. 2.
[224] *Magder v. Ford*, 2012 ONSC 5615, 2012 CarswellOnt 14510 (O.N.S.C.J.) reversed by 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) leave to appeal denied [2013] S.C.C.A. No. 117, 2013 CarswellOnt 8410 (S.C.C.).
[225] See especially Toronto, *2014-2018 City Council Handbook*, "5.2.2. Using the City logo" (Volume 1) (Online: https://www.toronto.ca/wp-content/uploads/2017/08/88ed-2014-2018-City-Council-Handbook-Volume-1.pdf) at 90.
[226] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at para. 17.

involved a modest amount of money which he endeavoured to raise for a legitimate charity[.]"[227] This discrete abuse of property lead the Integrity Commissioner to draft a report which recommended that Rob Ford repay the donations he received from members of the public in light of his violations of the Toronto Code of Conduct, and this report was approved without debate at a City Council meeting on 25 August 2010, with the added requirement that Rob Ford provide proof of reimbursement to the Integrity Commissioner (Decision CC 52.1).[228] Of course, Rob Ford did not abide by the terms of Decision CC 52.1 and refused to repay the donations to his foundation, citing that "he never received any of the donors' funds" and had notified the donors that he would permit them to be reimbursed personally for the monies they had donated to the Rob Ford Football Foundation.[229] This refusal to reimburse was somewhat boneheaded.[230]

Rob Ford's decision to subsequently vote on a motion forwarded by Councillor Paul Ainslie to rescind Decision CC 52.1 adds to that criticism because it was this vote, and not his underlying breaches of the Toronto Code of Code, which was the purported abuse of office that was the central issue in *Magder v. Ford*.[231] The application judge, Hackland R.S.J., had held that Rob Ford had breached s. 5 of the *Municipal Conflict of Interest Act* when he voted on this matter because he had not declared that he had a direct pecuniary interest on the matter in the course of casting that vote.[232] It was that breach which required Hackland R.S.J. to – in accordance with s. 10(1)(a)

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[227] See *Magder v. Ford*, 2012 ONSC 5615, 2012 CarswellOnt 14510 (O.N.S.C.J.) at para. 48.
[228] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at paras. 17-19.
[229] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at paras. 21-22.
[230] See John Mascarin, "Eyes Wide Shut – -- Wilful Blindness & A Conflict of Fordian Proportions," 5 M.P.L.R. (5th) 30 at pp. 2-4 (Westlaw). This unfortunate event aside, according to Mascarin, Rob Ford's mayor tenure had "an astounding series of gaffes, blunders and plain outright mistakes that even [perhaps] the most politically-incorrect novice council member could not have committed."
[231] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at paras. 24-26.
[232] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at para. 15 and *Municipal Conflict of Interest Act,* R.S.O. 1990, c. 50., s. 5(1)(b).

– vacate Rob Ford's seat on the Toronto City Council as punishment for the aforementioned conflict of interest, a penalty which was stayed pending Rob Ford's (successful) appeal.[233] Regarding the penalty that had been imposed, Clayton Ruby – who represented Rob Ford – stated that "Rob Ford did this to Rob Ford. It could so easily have been avoided. It could have been avoided if Rob Ford had used a bit of common sense. And if he had played by the rules."[234]

On appeal, the Divisional Court reversed Hackland R.S.J.'s decision on the technical ground that the financial sanction imposed by Decision CC 52.1 using Toronto's *Code of Conduct* was null. To explain, Toronto's *Code of Conduct* permitted the City Council penalize Rob Ford by either issuing a reprimand to him or by suspending his remuneration for up to 90-days for the three violations he committed, and to recommend "Other Actions." The Divisional Court's conclusion was that these miscellaneous recommendations, unlike the express penalties, did not constitute penalties within the meaning of s. 160(5) of the *City of Toronto Act, 2006,* and instead were remedial measures that could not be used for a punitive purpose.[235] Notwithstanding this holding, the Court nevertheless confirmed that the application judge had "correctly found that Mr. Ford had a direct pecuniary interest" when he voted on the motion to rescind Decision CC 52.1, "as he would be relieved of the reimbursement obligation if the motion passed."[236] In this sense, although Rob Ford should never have been required to reimburse donors, the real conflict of interest, of which he would have been guilty of had Decision CC 52.1 not been *ultra vires* s. 160(5) *City of Toronto Act*, and which only permitted a reprimand or a suspension of

[233] See *Magder v. Ford*, 2012 ONSC 5615, 2012 CarswellOnt 14510 (O.N.S.C.J.) at paras. 60 and 62 citing *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50, ss. 5 and 10(1)(a).
[234] John Mascarin, "Eyes Wide Shut – -- Wilful Blindness & A Conflict of Fordian Proportions," 5 M.P.L.R. (5th) 30 at p. 16 (Westlaw).
[235] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at paras 68-69.
[236] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at para 46.

remuneration as a penalty for a conflict of interest, was using his office to vote in favor of a motion that terminated the illegal repaid order.[237] Before this appeal had succeeded, Mascarin was of the view that reimbursement would not have been a nullity: "[t]here is nothing in the [*MCIA*] that gives any indication that the obligations of a member of council to declare a pecuniary interest and to not take certain actions are only predicated upon lawfully authorized actions."[238] As Rick O'Connor notes, what is simple on paper may be difficult in practice:"[a]lthough it is clear that abuse of office is a serious ethical violation, drawing a line between proper and improper exercises of authority or discretion is no simple task."[239] To relieve Rob Ford from an ethical violation upon the basis of the validity of a remedial order would – following the merits of this argument – require the Court to engage in this complex review of municipal procedure that Rob Ford had not disputed the legality thereof himself. Upon the release of Rob Ford's successful appeal, Mascarin criticized the Divisional Court for elevating form over substance and imposing a new requirement under s. 5 of the *MCIA*: "that "any matter" in which the member may have a pecuniary interest must somehow be a "lawful matter."[240]

The conclusion I would take from *Magder v. Ford* would be the need to supplement conflict of interest rules with local policy measures. The essential role of a municipal councillor is to exercise the legislative, administrative, and judicial roles that are inherent to local government.[241]

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[237] See *Magder v. Ford*, 2013 ONSC 263, 2013 CarswellOnt 387 (Ont. Div. Ct.) at para 48 and *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, 160(5).
[238] John Mascarin, "Eyes Wide Shut – -- Wilful Blindness & A Conflict of Fordian Proportions," 5 M.P.L.R. (5th) 30 at p. 11 (Westlaw).
[239] M. Rick O'Connor et al., *Conduct Handbook For Municipal Employees and Officials*, 2nd ed. (LexisNexis: Toronto, 2003) at 17.
[240] John Mascarin, "Magder v. Ford: The Saga Continues," 7 M.P.L.R. (5th) 28 at p. 9 (Westlaw).
[241] I.M. Rogers, *Municipal Councillors' Handbook*, 6th ed. (Toronto: Carswell, 1993) at 1. According to Rogers, some of the decisions that a municipal councillor will have to make are varied and will relate to the municipal budget, the regulation of garbage collection, the disposal of sewage, land development, and business licensing.

A central objective of a municipal councillor's duty to uphold the public interest is to formulate long-term policies, which – as a matter of public ethics – both reflects the interests of his individual constituents and the best interests of the municipality as a whole.[242] A municipal councillor ought not to abuse his control over the formulation of municipal policy – so as to take a private advantage or give effect to a personal prejudice using the stature of his public office. [243] And although much of the media attention in *Magder v. Ford* focused on the draconian sanctions of the *MCIA*, perhaps more attention ought have been placed on the systemic misuse and misapplication of Toronto's *Code of Conduct*. Even though the integrity commissioner could (perhaps) be forgiven by making the error of attempting to take money out of Rob Ford's pocket instead of suspending his salary for a rateable period of time, so as to not put money in that same pocket, it is worth noting that Rob Ford admitted in trial that he (i) had not read the *MCIA*; (ii) did not know what was in the *MCIA*; (iii) had absented himself from the legal department's orientation session explaining the *MCIA*; (iv) had not read the councillor's handbook; and (v) had never sought legal advice on this matter beforehand.[244] Whatever good and bad that Rob Ford has done for the City of Toronto had not just been done through the promulgation of rules – his oft-cited humanity was based upon his personal policy of caring for the ratepayers interests: taking their calls, making personal visits, and other acts of deep kindness.[245] But, those same

[242] See I.M. Rogers, *Municipal Councillors' Handbook*, 6th ed. (Toronto: Carswell, 1993) at 1 and M. Rick O'Connor et al., *Conduct Handbook For Municipal Employees and Officials*, 2nd ed. (LexisNexis: Toronto, 2003) at pp. 16-20. The infamous Montreal "Green Onions" dispute is one example of a high-profile abuse of power in the City of Montreal.
[243] See generally *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 1959 CarswellQue 37.
[244] See *Magder v. Ford*, 2012 ONSC 5615, 2012 CarswellOnt 14510 (O.N.S.C.J.) at para. 54.
[245] See e.g. The Huffington Post Canada, Ryan Maloney, "Doug Ford May Have Revealed The Secret To His Brother Rob's Success," (Dated 30 March 2016). The author outlines a story that Doug Ford told of Rob Ford during his funeral, where at 10:00pm at night Rob Ford delivered $32.00's worth of submarine sandwiches to a customer because the owner of the restaurant did not have anyone else available to deliver those sandwiches.

ratepayers would have been even better served if Rob Ford had also spent some amount of time following the City of Toronto's ethical conduct policies. To avoid similar gaffs in the future, and in light of the pending legalization of cannabis, I would submit that Cities should review the plain language of their codes of conduct. Attention should be paid to rules regarding when exactly a municipal councillor's interest in a public corporation will constitute a conflict of interest.

SECTION VVIII: THE PRACTICAL UTILITY OF CODES OF CONDUCT

My view is that Rob Ford's brief downfall and subsequent ascent (before the events then surrounding his premature death) demonstrates the practical utility of codes of conduct, the use of which is a product of recent legislative reform. To this end, the *Municipal Statute Law Amendment Act, 2006* introduced new accountability and transparency provisions into the newly created Part V.1 of the *Municipal Act, 2001.*[246] The purpose of this amendment was to enhance the accountability of municipal councillors and other public office holders, the amendment itself being modelled after Part V of the *City of Toronto Act, 2006*.[247] Some of the new measures include providing municipalities with the permissive authority to establish an Integrity Commissioner, code of conduct, Ombudsman, Auditor General, and lobbyist registry.[248]

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[246] *Municipal Statute Law Amendment Act, 2006*, S.O. 2006, c. 32, Sch. A, s. 98.

[247] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA5.1 – 2. See also Denise E. Bellamy, Commissioner, *Toronto Computer Leasing Inquiry*, Volume 4: Executive Summary, 2005 (Toronto: City of Toronto) (Online: https://www.toronto.ca/ext/digital_comm/inquiry/inquiry_site/report/pdf/TCLI_TECI_Report_Executive_Summary.pdf) at p. 83. The inciting force behind the City of Toronto's promulgation of increased accountability and transparency measures was due to Bellamy J.'s report, which found – among other things – that the City of Toronto had improperly awarded computer leasing contracts to MFP Financial Services Ltd. through a suspect, single-source competition with a cost of more than $80,000,000. One of Bellamy J.'s recommendations was to expand its current code of conduct to "go beyond the minimum standards of behaviour and [instead] set out the highest ideals and values toward which all public servants should be working."

[248] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA5.1 – 2.

With this said, the *Municipal Act, 2001* does not purport to do all and everything in respect of ethical violations: it does not define a code of conduct.[249] Although model codes of conducts are available,[250] not all municipalities in Ontario have adopted these models or drafted their own versions, one notable example being the City of Thunder Bay.[251] One reason for this reticence is that, unlike the *City of Toronto Act, 2006*, the *Municipal Act, 2001* permits, but does not require, municipalities to establish code of conducts in respect of the conduct of public office holders, although recent legislative changes intend to mimic the mandatory requirements found in the *City of Toronto Act, 2006*.[252] This lack of legislative action is disconcerting because codes of conducts could provide a workable legal standard upon which the uncertain facts related to the municipal regulation of cannabis cultivation could be applied in clearer terms. Although one view of that matter may be that codes of conducts create legal prohibitions that municipal councillors must take extra steps to avoid, my view is that – more fundamentally – these codes of conduct also provide those same municipal councillors with the benefit of knowing what to do and what not to do to avoid running afoul of their trust-like duties to the ratepayers.

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[249] *Municipal Act, 2001*, S.O. 2001, c. 25, s. 223.1 and A public office holder is exhaustively defined to mean a city council member and his staff; an officer or employee of the municipality; the member of a local municipal board and his staff; an officer, director, or employee of a local municipal board; and any other person determined by the municipality appointed to one of the aforementioned positions.

[250] See M. Rick O'Connor et al., *Conduct Handbook For Municipal Employees and Officials*, 2nd ed. (LexisNexis: Toronto, 2003) at pp. 233-246.

[251] See e.g. Thunder Bay, City Manager's Office – Office of the City Clerk, "Council Code of Conduct," (Dated 29 January 2015) (Online: http://www.thunderbay.ca/Assets/City+Government/Council+Meetings/docs/2015+12+14+Add+Info.pdf) at 4 and Thunder Bay, City Council, "Disclosures of Interest," (Dated 22 June 2015) (Online: http://www.thunderbay.ca/AssetFactory.aspx?did=32789) at p. 4. The Office of the City Clerk recommended that the City Council of Thunder Bay adopt a draft Code of Conduct, but City Council never adopted that draft Code of Conduct.

[252] *Municipal Act, 2001*, S.O. 2001, c. 25, ss. 223.1-223.2 and *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A, ss. 156-157.

The recent case of *Mondoux v. Tuchenhagen* is a *MCIA* case that illustrates the pitfalls of municipal councillors face in municipalities that have chosen not to draft these policy documents.[253] The central issue in that case was whether a city councillor's stated interest in bidding on the purchase of vacant property that the City of Thunder Bay had acquired due to unpaid taxes violated s. 5(1) of the *MCIA* because this interest had "crystalized" before he made a formal offer to purchase that property.[254] Rust-D'Eye helpfully summarizes the facts as follows:

> In a nutshell, the case concerned a situation in which a member of the council of the City of Thunder Bay (the "City") expressed an interest in a tax sale property to be disposed of by the City by tender. [...] The expression of interest was made in the councillor's email to a City staff member requesting a copy of the advertisement for the property, in which he stated: "I may be interested in bidding on this property."[255]

To answer the above question, the majority of the Court answered in the affirmative:

> As soon as [Councillor Tuchenhagen] saw himself as a potential buyer, he had become a person with a pecuniary interest. The email he sent [...] indicated that he might be interested in bidding on the property. At that point, he was no longer looking at this only from the perspective of a member of Council with the public responsibilities that entails. From the moment he decided that he might make a bid, he began examining the situation to see how it could advantage his private interests. He had acquired a pecuniary interest.[256]

To ensure that a consequence would flow from this violation of s. 5(1) of the *MCIA*, the majority of the Divisional Court upheld the application judge's disqualification of Councillor Tuchenhagen from running for public office for a period of 4-years.[257] Rust-D'Eye's stark conclusion was that "[t]here appears to be no previous case in which the Court imposed such a relatively small burden

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[253] *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 (Div. Ct.).
[254] *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 (Div. Ct.). at para. 21
[255] John Mascarin, eds., *The Digest of Municipal & Planning Law*, George H Rust-D'Eye, "Municipal Councillors – Don't Even Think About It! Unprecedented Decision in Mondoux v. Tuchenhagen," ((2012) 5 D.M.P.L. (2d) January 2012, Issue 13) at p. 1.
[256] *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 (Div. Ct.) at para. 34.
[257] *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 (Div. Ct.) at paras. 71-72.

on an applicant in a municipal conflict application, or attributed such sinister motives to a councillor in considering whether or not to enter into a transaction with the municipality."[258]

For my purposes of outlining the practical utility of codes of conduct, I would also outline that these other relevant facts, that is – the City of Thunder Bay had no public policy that prohibited a councillor from bidding on surplus real estate and that Councillor Tuchenhagen had previously sought legal advice confirming that a member of council was not precluded from bidding on tax sale properties.[259] Both the majority and dissenting justices in the Divisional Court also noted that the voluminous factual record provided to the Court was difficult to decipher because the City Council did not keep a complete record of the various meetings, or – to make matters worse – follow the applicable procedures in its own by-law with regarding the sale of tax-arrear properties.[260] Contrasting the decision reached in *Mondoux v. Tuchenhagen* with *Magder v. Ford* leads to several invariable conclusions in my view. First, the factual record in the latter case outlined the procedural history of the matter in a manner that was worth its weight in gold, whereas the factual record in the former case was not worth the paper it was printed on. As outlined above, the Court in *Magder v. Ford* was able to review the evidence with a critical eye and determine that City Council had imposed an invalid punishment upon Rob Ford and, thus, cause the entire matter to become null. In contrast, the Court in *Mondoux v. Tuchenhagen* grappled with such a poor factual record that, in the words of the dissenting justice, "[the Court]

[258] John Mascarin, eds., *The Digest of Municipal & Planning Law*, George H Rust-D'Eye, "Municipal Councillors – Don't Even Think About It! Unprecedented Decision in Mondoux v. Tuchenhagen," ((2012) 5 D.M.P.L. (2d) January 2012, Issue 13) at p. 10. In his view, "MUNICIPAL COUNCILLORS [should] BE FOREWARNED!"
[259] John Mascarin, eds., *The Digest of Municipal & Planning Law*, George H Rust-D'Eye, "Municipal Councillors – Don't Even Think About It! Unprecedented Decision in Mondoux v. Tuchenhagen," ((2012) 5 D.M.P.L. (2d) January 2012, Issue 13) at p. 2.
[260] See *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 at paras. 3-4 and 184 (Div. Ct.).

found ourselves hampered during the oral arguments [...] it was difficult to reliably establish the sequence of the facts, and there were disputes between counsel as to the import of what occurred at the various meetings."[261] Second, although Rob Ford was unaware of the City of Toronto's policies regarding a municipal councillor's abuse of property or his public office because he had never read Toronto's *Code of Conduct*, the Court was able to review City policy and determine that it, in fact, had not been followed by the integrity commissioner or the City Council in general. In contrast, while the Court confirmed that there was no public policy that prohibited Robert Tuchenhagen from bidding on surplus real estate, the application judge also criticized Robert Tuchenhagen for relying on general legal advice that he had received from the City Solicitor several years prior to the dispute, and not seeking more current legal advice from the City Solicitor pertaining "to the member's very actions in question."[262] Although I would not assume for certain that a code of conduct would have discussed this matter in detail, I also would be unable to dismiss the possibility that written policy on this matter would nevertheless have been a helpful resource for the councillor. It is always worth noting that rights of appeal in respect of *MCIA* matters are limited, often to no higher than the Divisional Court.[263]

SECTION VVIV: THE PUBLIC INTEREST OF ETHICAL MUNICIPAL LICENSURE SCHEMES

These questions of conduct are especially relevant to the promulgation of licensure schemes and the judicial construction thereof because the uncontroversial source of the municipal power

[261] See *Mondoux v. Tuchenhagen*, 2011 ONSC 5398, 2011 CarswellOnt 11438 (Div. Ct.) at para. 140 .
[262] *Mondoux v. Tuchenhagen*, 2010 ONSC 6536, 2010 CarswellOnt 9765 (S.C.) at para. 77.
[263] See *Mondoux v. Tuchenhagen*, 2012 ONCA 567, 2012 CarswellOnt 10842 at paras. 5-6. The Ontario Court of Appeal quashed Robert Tuchenhagen's appeal to it because "no appeal lies to this court from the Divisional Court under s. 11 of the *MCIA*." But see *Magder v. Ford,* 2013 ONSC 263, 2014 CarswellOnt 8410. A direct appeal to the Supreme Court of Canada is available from the Divisional Court, although, Paul Magder's appeal to the Supreme Court of Canada was nevertheless denied.

to regulate and license the activities of individuals belies the sometimes controversial political implications of such decisions – that is, in respect of business licensing, interfering with the common law right of an individual to carry on a lawful trade occupation.[264] For example, the City of Hamilton in *1657575 Ontario Inc. v. Hamilton (City)* passed a by-law with the expressed intention of reducing the number of adult entertainment parlours in the city from four to two by revoking existing licenses.[265] The central issue was whether the City breached the appellant's right to a fair hearing when it failed to abide by the procedural safeguards contained in its General Licensing By-law when it decided to revoke his licence to operate an adult entertainment parlor.[266] The appellant was the owner and operator of one such establishment whose licence to operate an adult entertainment parlour had been revoked because he had not actively carried on business "within a reasonable time" following the issuance of his licence.[267] At the Divisional Court, Jennings J. held that the appellant had not been denied procedural justice because the "Council's stated objective of reducing the number of adult entertainment parlours was a permissible objective of municipal governance, provided the objective was arrived at fairly in accordance with the terms of the by-law."[268] To this end, the Divisional Court's reasons indicated its implied endorsement of the long-standing judicial belief that the legitimate role of the Courts

[264] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2018) at pp. 691.
[265] See Auerback and Mascarin, *The Annotated Municipal Act*, 2nd ed. (Toronto: Carswell, 1990) (loose-leaf updated 2016) at MA2 – 56.46 reproducing *1657575 Ontario Inc. v. Hamilton (City)*, 2008 ONCA 570, 2008 CarswellOnt 4548 at paras. 1-2.
[266] *1657575 Ontario Inc. v. Hamilton (City)*, 2008 ONCA 570, 2008 CarswellOnt 4548 at paras. 1-2.
[267] The licence had been issued on 6 March 2006 and the appellant only opened for business on 6 July 2006 because he continued to be unable to obtain a liquor licence from the Alcohol and Gaming Commission of Ontario due a failure to satisfy outstanding tax arrears on another similar establishment.
[268] *1657575 Ontario Inc. v. Hamilton (City)*, 34 M.P.L.R. (4th) 193, 2007 CarswellOnt 2335 at para. 5 (Div. Ct.).

is not to second-guess the wisdom of elected representatives absent findings of illegality.[269] In reversing the decision of the Divisional Court, P. Rouleau J.A. held that "the respondent's failure to provide proper disclosure [in accordance with s. 14(7) of the General Licensing By-law] tainted the hearing from the outset and denied the appellant the right to a fair hearing."[270] Although the Court of Appeal did not second-guess the decision of the municipal councillors to revoke the licence, it reasoned that "when one's ability to carry on business is being put at risk, one should not have to guess why revocation of the licence is being proposed or speculate as to the grounds for the proposed revocation."[271] The same is true in respect of the legislative decisions made by municipal councillors in respect of business licensing more generally, that is – a municipal council's commitment to ongoing and long-term deliberations in respect of the future of business licensing in his community should be unquestionable.[272] Not only should municipal councillors follow the existing rules of the game, but – when emerging issues such as the regulation of cannabis arise – these same elected officials need to take a stand. Although the ethical issues surrounding the non-commercial cultivation of cannabis continues to be controversial, a municipal councillor should not close his mind to the need to adopt responsive measures,

[269] See I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2018) at pp. 692 citing *Re Hassard and Toronto* (1908), 11 O.W.R. 684, 1908 CarswellOnt 179 at para. 16 (Ont. Weekly Ct.), affirmed 11 O.W.R. 1088, 1908 CarswellOnt 290 (Ont. Div. Ct.).
[270] *1657575 Ontario Inc. v. Hamilton (City)*, 2008 ONCA 570, 2008 CarswellOnt 4548 at paras 21-22.
[271] *1657575 Ontario Inc. v. Hamilton (City)*, 2008 ONCA 570, 2008 CarswellOnt 4548 at para. 29. See also I.M. Rogers, *The Law of Canadian Municipal Corporations*, 2nd ed. (Toronto: Carswell, 1988) (loose-leaf updated 2018) at pp. 692-693. Although the growing trend is that the licensing powers of municipal corporations should be given a benevolent interpretation when such by-laws provide for the peace and welfare of the community; the traditional rule is that a power to interfere by municipal regulation or licence with the common law right of persons to carry on lawful trades and occupations in a lawful manner should be strictly construed by the Courts.
[272] See I.M. Rogers, *Municipal Councillors' Handbook*, 6th ed. (Toronto: Carswell, 1993) at 3.

motions, resolutions, and by-laws needed to implement long-term policies needed to regulate this drug in a manner that balances the competing interests of various stakeholders.[273]

[273] See also M. Rick O'Connor et al., *Conduct Handbook For Municipal Employees and Officials*, 2nd ed. (LexisNexis: Toronto, 2003) at pp. 32-33. It would be an even greater breach of trust for a municipal councillor to stonewall legislative action because he received some form of personal benefit.

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