Cannabis (Marijuana) – Social and Medical Regulation – Reflections in October 2015 - to empower the patients, continue the fundraising and obtain a just solution politically and in the courts.

John W Conroy QC

The Politics of the upcoming Federal Election

Well here we are in **October 2015**, and within 10 days, there will be a Federal election in which the current party leading in the polls – the Liberal Party of Canada – has promised, if elected, they will "legalize". Their main competitor, the unprogressive Conservative Party of Canada is opposed, and will at best, or perhaps at worst, introduce a traffic ticketing scheme that will result in greater intrusions into the civil liberties of the population than never. The other major party, the NDP (New Democratic Party) has promised that if they are elected, they will "Decriminalize" but on a limited basis.

As usual, the primary concern is the "splitting of the vote" between the Liberals and the NDP, allowing the Conservatives to get in once again with less than 50% of the vote. Strategic voting is the call of the day and Mr. Mulcair to his credit, has affirmed this position, and is committed to working with the Liberal government of Canada if it is elected.

My advice is to continue to vote strategically and for whoever you think will beat the Conservative candidate in your riding and hopefully it will be a member of the Liberal Party of Canada, who are taking the best position on this issue.

Get out and vote or you will be helping Harper and the 'unprogressive' Conservatives to win!!

Social or Recreational use

Both "Legalization" and "Decriminalization" involve the Federal government withdrawing from the exercise of its constitutional power over "the criminal law". While they would also be wise to consider the abolition of "prohibition" of all drugs as a policy approach to reduce illicit market violence and organized crime, all they have to do to accomplish this with respect to Cannabis is to have the new Cabinet of the government issue an Order in Council, removing Cannabis, in all of its forms, from schedule II to the Controlled Drugs and Substances Act. The possession, possession for the purpose of distribution, distribution, production, importing and exporting of Cannabis would no longer be subject to the criminal law as criminal offenses. Federal, provincial and local regulations will be enacted to regulate the market.

What will happen next in relation to the "social market" will be a matter working things out with the Provinces and Territories, paralleling approaches with respect to alcohol and tobacco in relation to age limits, advertising, importing and exporting, packaging, protection of children, impaired driving and production, including significant inputs from local governments in terms of zoning, nuisance (smell) and fire and electrical safety. The constitutional powers will be divided between the Federal government and the Provinces and Territories. This may take some time to sort out, but we now have the models in Colorado and Washington State and other US states to assist us in what to do and what **not** to do.

The Liberal Party of Canada policy is to "legalize" whereas the NDP policy is to "decriminalize" which they limit to possession of 1 ounce per adult person while undertaking a new commission or study. While it may make sense to establish a committee to quickly implement a regime that can be fine-tuned there is certainly no need for any further Royal Commission or in-depth study with respect to Cannabis itself generally.

In Vancouver and Toronto social clubs like "vapor lounges" already exist analogous to bars and lounges in relation to alcohol. Some licensing and regulation is to be expected if one is selling a product to the public but excessive legislation is not required as history has demonstrated.

Medical Use

If the above scenario should come to pass, and Cannabis Is removed from Schedule II to the Controlled Drugs and Substances Act then it becomes subject to **the "Natural Healthcare Product" regulations pursuant to the Federal Food and Drugs Act**. These regulations include "plants" that are held out for health or medical purposes (see schedule 1) and all drugs under the Controlled Drugs and Substances Act, are excluded (see schedule 2). These regulations are significant in relation to licensing of persons and sites, and involving good manufacturing practices and good clinical practices. A "natural health product" is defined as:

"natural health product" means a substance set out in Schedule 1 or a combination of substances in which all the medicinal ingredients are substances set out in Schedule 1, a homeopathic medicine or a traditional medicine, that is manufactured, sold or represented for use in

- (*a*) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state or its symptoms in humans;
- (*b*) restoring or correcting organic functions in humans; or
- (*c*) modifying organic functions in humans, such as modifying those functions in a manner that maintains or promotes health.

An alternative would be for the Federal government to continue the licensing of Cannabis (marihuana) Under the Marihuana for Medical Purposes Regulations (MMPR) as an exemption pursuant to section 56 of the CDSA and regulations pursuant to section 55 thereof or simply transfer these Regulations into a new regime under the Food and Drugs Act and away from the Controlled Drugs and Substances Act.

Whatever approach is taken the Licensed Producer (LP) model already exists under the MMPR and the decision of the Federal Court Trial division in **Allard v The Queen** – currently awaiting decision by Phelan J., since the trial proceedings completed in June 2015, will determine whether or not that regime, to be constitutional, so as to prevent a violation of patients constitutional rights, will be required to provide for continued personal production by a patient or a "caregiver" for that patient.

The remaining issue of interest to the LPs and both social and medical users is the status of retail outlets such as "the Dispensaries" or "Compassion Clubs" or any variations of them. The current flaw in the MMPR model appears to not only be excessive and unnecessary overregulation, resulting in increased costs, but the lack of retail facilities enabling patients to attend and observe the product and discuss it with knowledgeable others. Not everyone has a credit card or computer and many patients are on disability pensions. The rise in dispensaries appears to coincide with dissatisfaction by patients with the MMPR model and a level playing field needs to be developed for all from the LPs through to the patient's. In Allard the evidence with respect to what happened in the Netherlands in relation to medical marihuana was that their model did not appear to work satisfactorily and patients "voted with their feet" and returned to the "coffee shops". That appears to have happened here as well.

The City of Vancouver, in my opinion, to its credit, determined that it had to bring in some form of regulation with respect to zoning and permitted uses within zones consistent with their "Local Government" jurisdiction while acknowledging that control over cannabis remains currently with the Federal government under its "criminal law power". The problem is the federal government, not local governments. When people start doing things within their territorial geographical jurisdiction impacting their citizens they are required to act and not allow matters to spiral out of control.

I understand that at the most recent meeting of the Union of BC municipalities it was decided that municipalities or local governments across the Province intend to enact similar bylaws to Vancouver to regulate the emerging dispensaries. Many of them have already legislated in relation to zoning regarding license producers under the MMPR and to some extent remaining producers and the MMAR.

Some are of the opinion that litigation should be commenced against the City of Vancouver, asserting that they have acted outside of their jurisdiction. While I think ongoing communications need to take place with Vancouver and other local governments to ensure that the bylaws are not excessive and unreasonable, I do not think that a constitutional challenge is advisable at this time and concentrating efforts on creating dispensaries that can comply.

In my opinion, the focus should be on the Federal government amending the MMPR model to allow for LPs, dispensaries and Compassion Clubs, and personal or caregiver production on a level playing field between them.

If a constitutional challenge is to be mounted in this area, it is my opinion that it should be taken on behalf of one of the established Compassion clubs that operates as nonprofit societies with members to establish that they are part of the "reasonable access" required by the courts in **Parker.**

Litigation –the ongoing power of the patients

The final decision after trial in **Allard v. Canada** is anxiously awaited by all "medically approved patients" as impacting not only their ability to produce for themselves at affordable prices/costs or have a true caregiver do so for them but also to facilitate such things as changes in production sites and possession limits.

While the Allard case was filed in court in December 2013(after sorting through some 3.000 'victim impact ' statements obtained by the MMAR Coalition commencing in 2012 and picking representative BC patients for costs reasons), the interim or introductory injunction was obtained on **March 21, 2014 from Mr. Justice Manson**, sitting in the Federal Court Trial Division in Vancouver. That decision essentially grandfathered patients who had valid authorization's to possess (ATPs) on that date and a valid either personal production licenses (PPL's) or designated grower licenses (DGL's) on **September 30, 2013,** the MMPR transition date from the MMAR. For more details go to www.johnconroy.com and click on the MMAR constitutional challenge link on the left and it will take you to a page with updates, all of the pleadings and proceedings and evidence, including the injunction proceedings and appeals and final arguments, including submissions with respect to the impact of **Smith v. Canada.**

Health Canada takes the position that the injunction decision requires not only a valid ATP but an associated PPL or DGL and that if one is not valid, neither is the other. I disagree with this opinion and have advised patients if their ATP has expired to obtain the equivalent of a prescription or an authorization pursuant to **Section 53 of the Narcotic Control Regulations**, that is discussed by Manson J. in his decision as one of the ways to be authorized to possess that is the general 'prescribing power' given to all practitioners in relation to any narcotics, as then defined, for a patient for a medical condition that they are treating them for. This covers possession not production. In my opinion if Justice Manson had intended that both the ATP and PPL (or DGL) had to be valid he would have said so and picked one date and not separate dates.

The problem for patients is that while Health Canada asserts that they would have to resurrect the entire bureaucracy to simply enable patients to change their sites, they are maintaining a part of the bureaucracy, at least to assist the police by maintaining a 24-hour call line and email contact. The police are able to contact this number to determine if a site they are investigating is licensed or not. If the PPL or DGL is valid but the ATP has expired, they will tell the police that the license is invalid. Essentially they pull up the frozen database and determined whether the address being investigated is valid under the MMAR and this is usually what they provide to the police, but when they see that the ATP was not valid on March 21, 2014 they say the production site is not valid either. This issue is the subject of some charges that are slowly proceedings through the courts and may be resolved before trial.

While it is my opinion that medically approved patients have the defense of "medical necessity" open to them in that the evil that they allegedly commit is a lesser evil than the evil that occurs to them in the absence of access to their medicine, especially if they can't afford the LPs or dispensary prices, nevertheless, I can't prevent the police from coming in with a warrant and tearing down your site and confiscating your medicine and you having to go through the cost of defending yourself through a trial before being vindicated. The best advice I can give at this stage is to ensure that your possession is covered and try to access from a source other than your production until Allard is decided.

The decision of the Supreme Court of Canada in **Smith v Canada** in June of this year declared that restricting cannabis for medical purposes to its dried form was unconstitutional and struck down the limitation to that effect in the MMAR, so that cannabis in "all of its forms" can be used by patients. That same limitation in the Narcotic Control Regulations (as amended by the MMPR) and the same limitation

the MMPR are also part of the challenge in Allard, and it is expected that the court will follow Smith in that regard. Also, in response to Smith, the federal government issued a number of section 56 CDSA exemptions for LPs, doctors, hospitals, MMPR patients and MMAR patients in relation to other forms besides the dried form.

Recently, the BC Supreme Court decided the case of **Garber et al v. Canada**, and essentially allowed the Plaintiffs in that case, who had large doses medically approved, to possess more than the 150 g limit, imposed by the MMPR, and by Manson J. as part of the MMAR injunction. Those plaintiffs are also covered by the Allard injunction. The court, however, did not permit them to change their production sites.

While the Defendant Canada, appealed the injunction order of Mr. Justice Manson in Allard and we cross appealed, the Court of Appeal dismissed the government's appeal and allowed our appeal, but only to the extent of seeking clarification from Justice Manson as to whether he intended to cut out the Plaintiffs Hebert and Beamish, as he had done because her ATP had expired. Justice Manson confirmed his order and the Court of Appeal said we had to start a new appeal which we did initially. However, because we were by then at the end of the trial and the evidence was all before Justice Phelan, including evidence not allowed to be introduced in the Court of Appeal, we decided to abandon the appeal and argue this point before him as part of the final arguments, seeking an interim order pending his decision. Unfortunately he did not agree and dismissed our application to vary the injunction as requested. We await his final decision.

The Future and the need for ongoing fundraising.

While we await the decision in Allard, there remains the task of fundraising not only to cover past's costs and expenses, but in anticipation of what other events lie ahead in the future.

The primary fundraiser enabling the Allard challenge started in 2012 as the **MMPR MMAR Coalition against Repeal, (now known as the Cannabis Rights Coalition,** a registered nonprofit under the Canada Corporations Act) consisting of patients with organized by Jason Wilcox, himself a patient. The great majority of the funds raised have come from member patients of this organization and fundraising events that they have put on sometimes in conjunction with others, including other groups. Without them this litigation would not have been started and would not be able to continue. Many others have also contributed directly through my webpage www.johnconroy.com and the link to the MMAR Constitutional Challenge on that page. **The Canadian Concentrate Open** Group also deserves honorable mention for substantial contributions raised as well. A number of patients have also pledged a portion of any damages received as a result of the class action lawsuit against Health Canada over the alleged privacy breach in November of 2013. Together we have raised approximately $280,000 with over half from Coalition patients, many of whom are on disability pensions!!

Without all of your help in the past, your continued efforts in the present and in the future, we could not have done what we have done and we will not be able to do what we plan to continue to do. Thank you very much.

Unfortunately, it is not over. If we can elect a government that is sympathetic like the Liberal Party of Canada or perhaps the NDP, then hopefully Health Canada will be persuaded to work together with the patient's, the dispensaries and clubs and LPs to develop the best medical model in the world instead of continuing the litigation.

However, unless that occurs, we can expect that if Justice Phelan decides in favor of the Plaintiffs that Canada will appeal to the Federal Court of Appeal, and depending upon what happens there it may continue on to the Supreme Court of Canada. We will have to ensure that the injunction continues pending appeal, hopefully in an expanded form. If Mr. Justice Phelan decides in favor of the Defendant Canada, then we will have to appeal and seek a stay of his judgment pending appeal, so that the injunction provisions will continue, at least in their narrow form, pending appeal.

Please donate generously whenever you can and get your friends and as many others as possible to do so. The case is being handled on a donations basis.

This constitutional challenge is on behalf of all medically approved patients, past, present and in the future!!

All funds raised go to fund the past and present in Allard, and if there is any over, which is unlikely, it will be applied towards achieving the best medical cannabis model in the world for patients together with the best social model in the world for other consumers in Canada.

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