THE LAWYERS WEEKLY

Vol. 35, No. 41 MARCH 11, 2016 lawyersweekly.ca

Winning lawyer hopes for path out of deepest weeds on pot file

Judge says restrictions against small-scale growers unjustified

CRISTIN SCHMITZ
OTTAWA

The latest *Charter* ruling striking down the federal medical marijuana regulation regime as arbitrary and overbroad could help the Liberals implement their campaign pledge to legalize marijuana for recreational use, suggests the lawyer who has led a series of successful court challenges to Canada's cannabis laws.

Federal Court Justice Michael Phelan's Feb. 24 decision declaring invalid the *Marihuana for Medical Purposes Regulations* (MMPR), implemented in 2014 by the Conservative government, could be an educational tool for the successor Liberals because the court debunks persistent concerns — not borne out by evidence, the judge found — that the licit small-scale production of marijuana often leads to fires and mould, as well as thievery, violence and black markets, said John Conroy of Conroy & Company in Abbotsford, B.C., who won the case along with Kirk Tousaw and other co-counsel: *Allard v. Canada* [2016] FC 237.

"There [are] still some police and fire people who go on and on, and make all these comments in the media, and whip up the public's fear's over cannabis, by these sorts of statements, and at least we now have a judge who's examined that evidence and who has found it to be lacking in credibility," Conroy said.

He said he hopes the judgment helps the public to overcome its fears and the government to get on with legalizing cannabis. He acknowledged, however, that Ottawa might instead opt to appeal *Allard*, if only to "buy time" to come up with an overarching approach to regulating

Ruling, Page 2

Abbotsford, B.C. lawyer John Conroy sees a way ahead on marijuana legalization for Justin Trudeau's Liberals given his recent victory in Federal Court, but acknowledges that Ottawa may still opt to appeal the decision, if only to buy time. ALISTAIR EAGLE FOR THE LAWYERS WEEKLY

Inuit detainees face 'deplorable' jail conditions

LUIS MILLAN

Nearly three years after the president of the Quebec legal society warned the provincial government about appalling conditions faced by Inuit inmates, the province's ombudsman upbraided the government for turning a blind eye to the daily violation of basic human rights, unacceptable detention conditions and systemic shortcomings in the administration of justice in Nunavik.

Unsanitary and overcrowded holding cells, nauseating odours, soiled bedding, inaccessible showers, sanitation facilities that fail to provide detainees with privacy and prisoners having to eat their meals on the floor are among some of the more disturbing findings made by Quebec Ombudsman Raymonde Saint-Germain, who likened Nunavik's detention and justice system to the Third World. Just as troubling were her findings that detainees are kept in cells 24 hours a day because there are no outdoor courtyards, with some offenders having to wait as long as two weeks in preventative custody. The *Criminal Code* prescribes a maximum waiting time of three days.

Ombudsman, Page 10

BUSINESS LAW

Financing the fight

Third party litigation funding is expanded

PAGE 12

INTELLECTUAL PROPERTY

The imitation name game

Dressing up a trademark not a basis for action

PAGE 15

BUSINESS & CAREERS

Booming opportunities

Shift focus of firm as population ages

PAGE 21

PUBLICATIONS MAIL AGREEMENT NO. 40065517

News

Contents

Ruling: Restrictions as they stood were not just minimal impairment

Continued from page 1

both medical and recreational cannabis use.

"We don't think that there is a good ground for appeal there, with all these findings of fact by the court," said Conroy, who with Tousaw has used s. 7 of the *Charter* to knock down other barriers to cannabis use in the predecessor *Medical Marihuana Access Regulation* (MMAR) struck down in *R. v. Beren and Swallow* [2009] BCSC 429 and *R. v. Smith* [2015] SCC 34.

"The most important thing," Conroy said, "is that the [Federal] Court did find that the previous government's attempt to take away the ability of medically approved patients to produce cannabis, or have a caregiver do so for them, violated their s. 7 *Charter* rights because, again, it was irrational, arbitrary and, in the alternative, overbroad."

Justice Phelan declared that the constitutional rights of plaintiff Neil Allard, and three other medical marijuana users, not to be deprived of their liberty or security of the person, except in accordance with the principles of fundamental justice, were unjustifiably violated by access restrictions in the MMPR that limited the plaintiffs to dried marijuana grown by licensed producers and took away their right to grow marijuana for their own use (or have their delegate do so).

"The access restrictions did not prove to reduce risk to health and safety or to improve access to marijuana — the purported objectives of the regulation," Justice Phelan found, in holding that the MMPR is arbitrary. "In the alternative, even if some connection is found, the restriction is still overbroad and does not minimally impair s. 7 rights," he concluded.

> But I think they should bite the bullet, and not tie this up with further litigation that, to me, is probably doomed to failure ...
>
> **Alan Young**
> Osgoode Hall

The judge awarded the plaintiffs their substantial indemnity costs, but suspended his declaration for six months to give the government time to enact something new.

Osgoode Hall law professor Alan Young, who successfully challenged the MMAR in *Hitzig v. Canada [2004]* 231 DLR (4th) 104, and *Canada (Attorney General) v. Sfetkopoulos* [2008] FCA 328, agreed with Conroy that *Allard* "completely demythologizes the dangers of production... In theory, there are no risks or harms from small-scale production of marijuana in your home — and that's what *Allard* showed — if done right."

However, Young said it would not be easy for the government to make self-production of marijuana part of its regime for legalizing recreational use, rather than confining production to licensed producers. "You have to understand that the Canadian public has been flooded with highly exaggerated concerns about producing marijuana [so] that this government can't just turn around tomorrow and say, 'People can produce for themselves,' because people need some assurance that that's not going to affect house values, create fire risks, etc.," Young said. While *Allard* undercuts such concerns, "it takes time for that information to be diffused through the general public," he noted. Moreover, the government has not shown any willingness to spend the millions of dollars it would cost to inspect the production facilities of thousands of medical marijuana users who grow cannabis themselves or via a delegate.

Young, who won a landmark *Charter* challenge to Canada's prostitution laws that was unsuccessfully appealed to the Supreme Court by Ottawa, said there are times when going to the top court makes sense. Not now, he advised. Rather the government should respond to the judgment "and work collectively on the recreational and medical side together — and if they need another six months [to formulate their regime], so be it, apply for it" in Federal Court, he said. "But I think they should bite the bullet, and not tie this up with further litigation that, to me, is probably doomed to failure, and would not be a very constructive thing to do for patients who are waiting for a responsible response from the government as to how to take care of their medical needs."

Justice Phelan held that the regime's breach of s. 7 could not be upheld under s. 1 of the *Charter* as reasonable and demonstrably justified in a free and democratic society. He noted some of the government's key expert witnesses were strongly biased against marijuana use and their views were not supported by the evidence.

"I agree that the plaintiffs have, on a balance of probabilities, demonstrated that cannabis can be produced safely and securely with limited risk to public safety and consistently with the promotion of public health," the judge found. "Accepting that fire, mould, diversion, theft and violence are risks that inherently exist to a certain degree — although I note that these risks were not detailed — this significant restriction [in the regulation] punishes those who are able to safely produce by abiding with local laws and taking simple precautions to reduce such risk. A complete restriction is not minimal impairment."

He explained that "the mould and fire risk are addressed by complying with B.C.'s *Safety Standards Act* and installing proper ventilation systems. Further, as demonstrated by the plaintiffs, a security system reduces risk of theft and violence. Finally, risk of diversion is also present in the licensed producer regime; thus it is not demonstrated how this restriction has the effect of reducing this risk."