Marijuana as Medicine and the law circa 2001

By John W. Conroy QC

Introduction and some early history

[1]On July 31st last year, the Ontario Court of Appeal, in a case involving Terry Parker, ruled that our marijuana laws are unconstitutional to the extent that they did not provide for access by medical patients requiring cannabis for their health or at least if there health is threatened in a serious way. The court also ruled that the existing exemption process was unconstitutional because it gave the Minister of Health an absolute discretion to grant or withhold such an exemption from the law without any criteria for so doing. The court gave the government until July 31st of this year to remedy the situation. The government did not appeal this decision and is currently developing a new regulatory approach for the use of marijuana for medical purposes.

[2]Marijuana (*Cannabis Sativa*) has been demonstrated to be safe and effective in the treatment of numerous medical conditions. Muscle spasms and tremor, pain, migraine headache, nausea and vomiting, and loss of appetite are all conditions for which marijuana has been shown to be effective, in maladies ranging from multiple sclerosis to AIDS wasting syndrome to epilepsy and chemotherapy treatments for cancer. Marijuana also reduces intra-ocular pressure, and is effective in slowing the progression of glaucoma.

[3]Marijuana has been used as medicine for thousands of years. Doctors in the United States officially recognized its therapeutic value as early as the 1840s, including it in the United States Pharmacopoeia from 1850 through 1942. The United States government accepted and even encouraged the medicinal uses of marijuana. USDA Farmer's Bulletin No. 663 (in print from 1915–1935) provided instructions on growing *cannabis sativa* for medical/pharmaceutical purposes. The *Journal of the American Medical Association*, reported that between 1840 and 1900, European and American medical journals published more than 100 articles on the therapeutic uses of cannabis. In the second half of the 1800's, fluid extracts of cannabis were marketed by Parke Davis, Squibb, Lilly, and Burroughs Wellcome. Grimault and Sons manufactured cannabis cigarettes as an asthma relief.

[4]According to the 1998 report of the House of Lords Select Committee on Science and Technology, "Cannabis, the Scientific and Medical Evidence", marihuana, like many other herbs, has been used in Asian and Middle Eastern countries for at least 2600 years for medicinal purposes. It first appeared in Western medicine in 60 AD in the Herbal of Dioscorides and was listed in subsequent herbals or pharmacopoeia since that time. It has been widely used for a variety of ailments, including muscle spasms, in the nineteenth century. In the 1930's, the advent of synthetic drugs led to the abandonment of many ancient herbal remedies including marihuana, although an extract of cannabis and a tincture of cannabis remained in the British Pharmaceutical Codex of 1949.

[5]The early history of marijuana regulation in Canada is set out in the British Columbia decisions in Caine and Malmo-Levine and the

Ontario court decisions in R. v. Clay. That history shows, to quote from the court in Clay that, unlike the regulation of assisted suicide, for example, the regulation of marihuana has a very short history and does not have a significant foundation in our legal tradition. In fact, it is an embarrassing history based upon misinformation and racism. As Judge McCart observed, and the Court of Appeal reiterated in Clay, marihuana prohibition was enacted in a climate of "irrational fear" based upon wild and outlandish claims that its users are driven completely insane, are immune from pain and, while in this state of maniacal rage, kill or indulge in other forms of violence using the most savage methods of cruelty.

The law – the legislation, some more history and current developments

[6]The possession and use of Marijuana became illegal in Canada in 1923 when the Federal cabinet added it to the schedule under the Opium and Drug Act of 1911. This was largely as a result of the climate of "irrational fear" whipped up by the writings of crusading Edmonton magistrate Emily Murphy. Her writings were primarily based on misinformation from US Chiefs of Police and were written under the name of Janey Canuck and serialized in MacLeans magazine. She also wrote a racist and sensationalist book called the Black Candle. Judge Murphy, to her credit was also one of the famous five that brought women the vote in Canada, but to her further discredit, was also a proponent of eugenics.

[7]The use of Marijuana was rare in Canada both before and after its placement in the schedule to the Act until the sixties. Then its use began to skyrocket as part of the youth rebellion of that era. Apparently, while use has become popular once again since the early nineties, rates of use are nowhere close to what they were back in the sixties.

[8]Throughout this time the legislation, which became known as the Narcotic Control Act, unlike the US laws, allowed "physicians" to "administer, prescribe, give sell, or furnish a narcotic" to a patient for a condition for which the person was receiving professional treatment. This provision in section 53 of the Narcotic Control Regulations has survived and continues to be the law today under the new Controlled Drugs and Substances Act. All drugs covered by the Act are now called "controlled drugs " instead of "narcotics".

[9]However, because there is no legal source of supply, the federal government, that controls the ability to license growers and dealers of controlled drugs frowns on doctors who do so, as does the British Columbia College of Physicians and Surgeons. Fortunately there are a few doctors who are prepared to do what the law authorizes them to do. In the British Columbia Medical Association newsletter it was suggested that a "letter of authorization" of sorts be used, instead of actually prescribing. Regretfully most Doctors are too timid when it comes to standing up to their Government, unless it involves their pay cheque. Besides, its not in that blue book supplied by the pharmaceutical industry that gives them all those free samples of real hard drugs with real bad side effects. What do they need marijuana for when they have all those heavier drugs?

[10]Similarly a provision was also carried forward into the new Act that allowed the Minister of Health to exempt certain persons from the law for a "medical or scientific purpose" or a purpose that is

“otherwise in the public interest”. While not originally intended for this purpose, this provision in section 56 of the Act has become the section under which the Minister of Health has now exempted 140 people over the last 18 months. Typically an exemptee is authorized to grow several plants for his or her own use. They are not authorized to obtain it elsewhere. Many are too ill or lack experience in growing and are therefore forced to go to the black market and risk obtaining marijuana contaminated with metals and molds not to mention pesticides liberally applied by those only interested in cranking out their next crop for a profit and not for health care.

[11]Last year, the Federal government put out a request for proposals to grow Cannabis for certain planned clinical trials and to possibly supply “the exemptees”. Recently it announced that it had picked Prairie Plant Systems of Saskatoon to fulfill this five year contract by growing it in a heavily secured bunker in Manitoba. Of course the heavy security is necessary because there are all those people out there “dying “ to get their hands on this government grade mild sedative as if they couldn’t get enough of the good stuff from the black market or better yet a “Compassion Club”.

[12]What about the Compassion Clubs that have sprung up around the country to fill the void while awaiting the governments US induced snails pace of compassion? No marijuana will be legally available through the first government licensed grower/dealer for another year. These Clubs, modeled on their counterparts in the US, and particularly those in California, have a number of illicit growers on contract to grow medical grade marijuana only for the Club, which is subject to verification and testing for contaminants. The Club obtains the marijuana from the growers, often through middlemen who perform quality and quantity controls, and supplies it to Club members who must have either a prescription or letter from their doctors, with rare exceptions. It is usually supplied at less than market cost even though it is grown primarily organically and is therefore more expensive to produce. The BC Compassion Club Society in Vancouver is a registered non-profit society with approximately 1400 member patients at this time. The Vancouver Island Compassion Club has approximately 130 members. Many other Clubs exist throughout the Province and elsewhere.

[13]These clubs operate like hospices providing a wide range of holistic therapeutic services to members for their conditions besides providing a source of supply to fill prescriptions and letters for those that need it now and can’t wait for the governments slow and controlled “compassion”. Maybe this is the true meaning of the term “compassionate conservative “. The police and governments at all levels have turned a deliberate blind eye to the public service these Clubs provide, from a prosecution stand point and in fact have clearly condoned them. Nevertheless the Minister of Health has made a point of studiously ignoring them and their expertise, not to mention their invaluable research data base, in the process leading up to the change in the law.

The law- medical marijuana cases in the courts

[14]The BC Court of Appeal recognized the distinction between medical and recreational use of marijuana as far back as 1989 when it upheld the imposition of a conditional discharge on a man called Lieph, who

was growing it to make an ointment to apply to his eczema. Most of the BC medical cases have involved patient/growers producing it primarily for themselves and sometimes for the Compassion Club as well (Czoslowski for glaucoma; Gionet for fibromyalgia; and Davis for myalgia rheumatica). All received conditional discharges subject to probation with minimal terms. They will not get an official criminal record. They were caught because either someone (often a neighbour) called in an anonymous crimestoppers tip or the police stumbled across it because of the smell or other indicators. Bill Small, a founder/grower for the BC Club received an absolute discharge in BC Supreme Court for growing for the Club the first time and a fine of $3,000 plus probation for his second one. The latter was reduced on appeal by our Court of Appeal recently to a conditional discharge with one years probation. A middleman/wholesaler for the Club, Mark Richardson, who was convicted of possession for the purpose of trafficking (that carries a maximum sentence of life in prison and therefore is not eligible for a discharge) received a suspended sentence with minimal probation for transporting 6 kilos for the Club. The court also declined to order forfeiture of the Club float of $6,000 that he had on him, to the government.

[15]The most important cases on the medical issue have occurred in Ontario. Terry Parker has suffered from a severe form of epilepsy since he was a child. He has experienced serious life threatening seizures that have not been controlled by conventional medications and surgery. He found that smoking marijuana substantially reduced the incidence of seizures and in fact would stop one that he felt coming on. His physicians have supported him in this use of cannabis since 1987. They determined that he could not take any higher doses of conventional medication because of the serious side effects. He was subsequently charged with possession of Cannabis and acquitted by the courts on the basis that his use was medically necessary. A Crown appeal was dismissed. He started to grow his own to avoid the black market. In 1996 the police raided his home and seized 71 plants and charged him with cultivation (maximum 7 years) and possession for the purpose of trafficking (maximum life imprisonment). In 1997 they raided him again and found 3 more plants and charged him with simple possession. He decided to challenge the constitutionality of the law that forced him to choose between his liberty and his health. Judge Sheppard of the Ontario Court of Justice agreed with him and stayed the charges. He also gave him and others like him a constitutional exemption for “personal medically approved use”. The Crown appealed to the Ontario court of Appeal.

[16]Meanwhile, Jim Wakeford, who suffered from AIDS, sought a similar constitutional exemption from the courts. In his case the Government raised section 56 of the Act (which they hadn’t raised in Parker) and argued that Mr. Wakeford had to exhaust this remedy first before the courts could grant him the remedy he was seeking. The court agreed even though it was told that this section was not originally intended for this purpose and that no protocol was in place for it. Consequently Mr. Wakeford applied to the government under section 56 only to confirm the lack of protocol as the government scrambled to put one in place. He then returned to the court and reopened his case. The court granted him the exemption this time pending receipt of the section 56 exemption. He later received the government section 56 exemption and so that exemption process was born or at least developed. He then brought an action to try and compel the government to supply him with marijuana,

given his exemption, because he was too sick and lacked the finances and experience to grow his own. Naturally given his illness and weak immune system he wished to avoid the black market. Unfortunately the court declined to order the government to do so.

[17]Then, on July 31st, 2000, the Ontario Court of Appeal decided the Parker appeal. It dismissed the Crown appeal and held that the law was indeed unconstitutional in so far as it precluded access to marijuana for medical purposes. The court declared the law prohibiting the possession of marijuana to be of no force and effect. However, as mentioned above, it suspended the declaration of invalidity for one year to enable Parliament (or more accurately the executive government) an opportunity to make amendments to try and bring the law into compliance with the Charter. The government could have asked the Supreme Court of Canada for permission to appeal this decision. It has chosen not to do so. Consequently, the government is working on these new medical marijuana regulations that must be in place by July 31st of this year.

The new medical marijuana regulatory framework

[18]The Minister of Health has said that this new regulatory framework will address such issues as the definition of medical necessity, the factors to be considered in granting or denying an authorization to use marijuana for medical purposes and a transparent exemption process.

[19]Remember the law currently gives doctors the right to prescribe Cannabis for any medical condition to a patient under professional treatment. The only problem is the lack of a legal supply. Consequently one can rest assured that whatever the Government comes up with, it will be more restrictive than the current situation. Control is the key word here – we just can't have those doctors giving it to any patient for anything, particularly a soft drug like this. Let's see, hard drugs with terrible side effects, well that's a different story. We can trust doctors with those. But marijuana – heck, they'll probably start giving it to people for stress. Heaven forbid, people might even enjoy taking their medication. They can use alcohol or tobacco for that! In fact medical marijuana users typically describe no "high" from marijuana use. They describe relief from pain or other symptoms.

[20]In Parker the court appended to its reasons a copy of the California Compassionate Use Act of 1996 as well as the most recent legislation from Hawaii. The Californian law, while declaring that its purpose is to ensure that "seriously ill " Californians have access to marijuana where recommended by their doctor for cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis and migraine, goes on to include "or any other illness for which marijuana provides relief." This would appear to leave the medical decision in the hands of the doctor where it belongs. In addition the Act is intended to not only protect patients and doctors but also other primary caregivers to the patient.

[21]The Hawaiian law, on the other hand, requires the doctor to first diagnose the patient as having a "debilitating medical condition". This is defined as firstly as, "cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or the treatment of these conditions. Secondly as a chronic or debilitating disease or medical condition or its treatment that produces one or more

of – Cachexia or wasting syndrome, severe pain, severe nausea, seizures, including those characteristic of epilepsy; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis or Crohns disease. Thirdly as "any other medical condition approved by the department of health pursuant to administrative rules in response to a request from a physician or qualifying patient." This model takes control of the medical decision out of the hands of the doctors and places it with government bureaucrats where it does not belong.

[22]I'm betting that our Minister of Health, who will not be spared from US federal government pressure on this issue, will try for the more restrictive type of regulations ensuring that control will remain with the government and not be left to the doctors and their patients. Whatever the government comes up with it will have to comply with " the principles of fundamental justice " referred to in Section 7 of the Canadian Charter of Rights and Freedoms. It will not meet those principles if it takes away an individuals right to make decisions of fundamental personal importance which at least includes the right to make decisions as to what medication to take to alleviate the effects of an illness with life threatening consequences. As the court stated in Parker, regulations requiring doctor approval and setting out safeguards to prevent the marijuana from getting into the illicit market may well pass Charter muster. However, the tricky area defining the qualifying illnesses and the residual power regarding specific illness that are not defined, will prove the most interesting. At least we know that an unfettered discretion in the Minister or one of his subordinates will not do.

[23]At least the Canadian government is moving forward and will provide legislation that will apply to the entire country, unlike the USA. There the federal government is most upset at the many States that have provided for medical use and claims that these States have exceeded there powers. While this may seem a little odd in theory given that the criminal law power in the USA is supposed to rest with the States and not the federal government, there is nothing odd about it in practice. The US federal government continues to wage a war against both doctors and patients threatening to charge them criminally and to revoke the license of any doctor who recommends marijuana to a patient. Patients have been severely harassed by federal law enforcement officials and some have died as a result. Recently author Peter McWilliams died in his bathroom by choking on his own vomit. He used to use marijuana for the nausea he suffered from his AIDS medications with the support of his physician. While on bail for his role in the Todd McCormick medical marijuana grow in Belair, California, he was prohibited from using and his mothers house was at risk of forfeiture if he did. Meanwhile Todd McCormick languishes in solitary confinement without adequate medication, despite suffering from cancer since childhood and the support of many physicians. Now the US government wishes to extradite Renee Boje from Canada for helping him by watering and moving some of Mr. McCormick's plants. If successful she faces a 10 year minimum to life imprisonment without parole, for this heinous crime.

[24]And all of this over a plant, known for centuries to have medicinal value and described by medical experts as a mild sedative with dependency aspects equivalent to coffee or tea. A non-toxic substance they describe as one of the safest therapeutically active substances known to man in its natural form. The lethal dose ratio (LD-50) for

cannabis is estimated to be around 1:20.000 to 1:40,000 which means you have to consume 20,000 to 40,000 times as much marijuana as is contained in one marijuana cigarette to induce death. This means you would have to consume something like 1,500 lbs in 15 minutes to induce a lethal response. There are no known fatalities from the substance and it is considered non- toxic. Aspirin by contrast causes a hundred deaths per year. In other words, if one applies the same criteria to marijuana as to manufactured drugs, marijuana would fall into the category of medications available without prescription over the counter. In comparison, Echinacea, which is and continues to be widely available without prescription, is just beginning to go though clinical trials to determine if it has any therapeutic value at all. Meanwhile it is known to not be good for those with immune problems like those suffering from AIDS. So what about all the Chinese herbal medicines or those used for centuries by various other indigenous communities? Maybe its “high” time we conduct some clinical trials on our politicians!

[25]As the British Columbia Court of Appeal held in Malmo-Levine and Caine, and the Ontario Court of Appeal agreed, the reasoned risk of harm to the public from the possession and use of marijuana is not large, serious, significant nor substantial. It is more than trivial or insignificant and therefore decided to leave the matter for Parliament. What level of risk of harm to the public is required before the government can threaten your liberty with imprisonment, will hopefully be decided by the Supreme Court of Canada in the next year. It is submitted that there should be limits on Parliaments power to criminalise conduct and the risk should be a serious one before resort to the big stick of the criminal law is warranted in a society that calls itself free.

[26]However, in a medical context different and additional considerations arise. The intent of the growers/dealers and caregivers is to reduce harm by the use of marijuana as therapeutic medicine and to reduce the risk of harm from the marijuana itself by proper regulation. Consequently if the risk of harm from possession in a black market context is only slightly more than trivial but not serious (and is at a level comparable to other non prescribed drugs), then the introduction of laws by way of regulations to restrict the exposure and use by immature youths, and other identified vulnerable groups, will serve to reduce the risk of harm to the trivial or below. Then it will no longer be necessary to use our costly criminal justice system in the pursuit of relatively harmless marijuana users.