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CLIENT BULLETIN

FEDERAL COURT QUASHES NEW MEDICAL MARIHUANA REGULATIONS

The state of flux and uncertainty surrounding medical marihuana production and distribution continues with yesterday's decision of the Federal Court of Canada in *Allard v. The Queen*, a decision that will not sit well with local governments opposed to medical marihuana production within residences. Mr. Justice Phelan found that the *Marihuana for Medical Purposes Regulations (MMPR)* unjustifiably infringed the medical marihuana users' liberty and security rights under section 7 of the *Charter of Rights and Freedoms*. The Court ordered that in six months, the *MMPR* would be declared of no force and effect, giving Health Canada some time to formulate replacement regulations.

The *MMPR* were adopted in 2014 in response to concerns arising from the earlier *Medical Marihuana Access Regulations (MMAR)*. By moving lawful production to large, licensed producers who were required to distribute medical marihuana by mail, the *MMPR* sought to address concerns regarding nuisances, safety risks and crime that arose from the proliferation of personal production and designated person production licences under the *MMAR*.

Phelan J. found that the medical marihuana users' liberty and security interests were infringed by the *MMPR* because the regulations were arbitrary, overbroad and grossly disproportionate in their impact on medical marihuana users. Critical to this conclusion was the finding that the purported risks of fire, mould, theft, violence and diversion to the black market that the *MMPR* prohibition on personal production sought to target, were not shown to exist. The Federal Government was therefore unable to justify, under either section 7 or section 1 of the *Charter*, limiting users to purchasing medical marihuana from licensed producers. In making this conclusion, Phelan J. found that some of the expert opinions presented to the Court in support of the *MMPR* lacked reliability due to the emphatic bias of the experts.

Phelan J. also declined to order that the repealed *MMAR* be restored. However, his conclusion that the evidence showed that "cannabis can be produced [by the user] safely and securely with limited risk to public safety and consistently with the promotion of public health", supports the suggestion that any regulations that replace the *MMPR* should permit personal production to some extent. Phelan J. also did not modify an earlier interim order of the Federal Court that allows certain personal and designated producers to continue to produce as if the *MMAR* had not been repealed.

It is understandable that some local governments have struggled to keep up with the frequently evolving legislation, case law and marketplace of medical marihuana, and the *Allard* decision only heralds more change. We suggest clients be mindful of the following:

- Phelan J.'s order may be appealed to the Federal Court of Appeal. The Court of Appeal might also order that the *MMPR* remain in force until the appeal is decided;
- A local government's authority to regulate and control nuisances and matters of safety to people and property remains unchanged. However, a local government's ability to regulate the location of such production would be significantly constrained by federal regulations that permit users to produce medical marihuana within their residences;
- Personal and designated producers under the *MMAR* who have benefited from the interim order of the Federal Court may continue medical marihuana production and may also be joined by those who anticipate new accommodative regulations;

Producers operating under a licence under the *MMPR* are presently lawful, but must rely on a successful appeal of the *Allard* decision or accommodation under new regulations to remain so;

- Medical marihuana dispensaries, which Phelan J. described as part of a black market, have not been found to be lawful. The prospect of a new regulatory scheme may give them some hope that the regulations will accommodate dispensaries;
- The criminal prohibition of recreational marihuana is unchanged, but Parliament may accelerate its consideration of that issue in conjunction with its response to the *Allard* decision;

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