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## **AIDS GROUPS CRITICAL OF COURT DECISION ON MEDICAL CANNABIS** *Current and proposed regulations still block access to medicine*

**February 1, 2013** — Today could have been a landmark day for human rights in drug policy and health care in Canada, but the opportunity was missed when Ontario's Court of Appeal overturned a lower court decision that had ruled the federal government's current laws on access to cannabis for medicinal purposes violate Charter rights.

As interveners before the Court in *R. v. Mernagh*, the Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario (HALCO) are disappointed by today's ruling, which rejected a constitutional challenge to the deficient *Marihuana Medical Access Regulations* (MMAR).

"Allowing the current regulations to stand unchanged will leave many people with serious health conditions without effective access to legal authorization to use cannabis as medicine, and this means they are exposed to the risk of criminal prosecution," said Richard Elliott, Executive Director of the Canadian HIV/AIDS Legal Network. "People shouldn't have to risk going to prison in order to get the medicine they need.

A significant number of people living with HIV have found cannabis is critical for managing illness, including dealing with appetite loss and wasting, nausea, pain, anxiety and depression.

"A proper regulatory scheme would ensure that people can get access to a physician or medical expert committee to make a decision on the medical merits of their case," said Ryan Peck, Executive Director of the HIV & AIDS Legal Clinic Ontario (HALCO). "That's what we proposed to the court, since the current regulations don't do this and too many people are left in limbo."

In theory, the current MMAR, adopted in 2001, should make it possible for people in need of cannabis for medical purposes to avoid criminal prosecution for production or possession of the drug. But the reality has proven to be different. In practice, the requirements of the regulations are often unworkable, meaning people suffering with serious health conditions are unable to overcome the hurdles currently in place. As a result, they are treated as criminals under the *Controlled Drugs and Substances Act*, which makes it a crime to produce or possess cannabis without authorization.

Indeed, in the case decided by the Court today, Matthew Mernagh, who suffers constant pain associated with several medical conditions, was left without an adequate means of meeting the requirements to get an exemption from the criminal prohibition on cannabis. As a result of cultivating his own supply for medicinal use while he continued his efforts to meet the requirements under the MMAR, he was charged with illegal production.

In 2011, an Ontario trial judge ruled that the current regime violates the *Canadian Charter of Rights and Freedoms* by effectively depriving seriously ill people, such as Mernagh, of an effective means to gain access to appropriate health care without fear of criminal liability. In today's ruling, the Court of Appeal overturned his findings, stating that there was insufficient evidence before the courts to justify this conclusion.

The current regulations require a physician to provide a medical declaration to accompany a person's application for a licence to possess or produce cannabis for medical purposes. Yet evidence before the courts has shown that many people struggled to find physicians who are properly informed about medical cannabis or willing to fairly consider a patient's request and in a timely fashion. Furthermore, the regulations do not require a doctor to provide any reason for rejecting a patient's request and there is no guaranteed access to a body of medical experts who can decide the merits of a patient's application if the patient can't find a doctor willing to do so.

The HIV groups argued before the Court of Appeal that Canada's regime for access to medical cannabis must ensure that patients have access to an effective mechanism for the timely review on the merits, by appropriate medical experts, of applications for licences to possess or produce cannabis for medical use.

"The current regulations set up physicians as gatekeepers," said Peck. "A doctor's decisions about whether a patient should get a licence exempting him or her from criminal liability for medical use of cannabis effectively determine whether or not the person faces possible criminal prosecution. But the current scheme is arbitrary and unfair."

Meanwhile, the federal government introduced proposed new regulations on access to cannabis for medical purposes in December. But the HIV groups say the proposals still won't address the problem faced by people like Mr. Mernagh or many people living with HIV or other health conditions, because it doesn't ensure access to a medical decision-maker who can, if warranted, provide the medical documentation that will still be required in order to get a licence to avoid the risk of criminal prosecution.

"The underlying problem is that the federal government maintains an overall prohibition on possession of cannabis for personal use," said Elliott. "Decriminalizing possession of cannabis for personal use, as has been repeatedly recommended over decades, would solve this problem. But if the government won't do this, then it has an obligation to ensure that the threat of criminal prosecution doesn't impede access for medical purposes."

Instead, in the proposed regulations, the federal government is proposing to limit further any involvement in ensuring access for medical purposes. "It's not good enough to criminalize cannabis, set up a faulty system for people seeking exemptions from criminal liability to use cannabis as medicine, and then try to avoid any responsibility for the barriers created by that system," said Elliott.

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### **About the Canadian HIV/AIDS Legal Network**

The Canadian HIV/AIDS Legal Network ([www.aidslaw.ca](http://www.aidslaw.ca)) promotes the human rights of people living with and vulnerable to HIV/AIDS, in Canada and internationally, through research and analysis, advocacy and litigation, public education and community mobilization. The Legal Network is Canada's leading advocacy organization working on the legal and human rights issues raised by HIV/AIDS.

### **About the HIV & AIDS Legal Clinic Ontario**

The HIV & AIDS Legal Clinic Ontario (HALCO) ([www.halco.org](http://www.halco.org)) is a charitable not-for-profit community-based legal clinic that provides free legal services to people living with HIV/AIDS in Ontario. In addition to providing direct legal services, HALCO engages in public legal education, community development, and law reform activities.

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