

Retro-active Justice: Pardons for Pot in Canada

By: H Gunn

In April 2017, the Government of Canada introduced Bill C-45 – The Cannabis Act, aimed at legalizing and regulating the production and sale of cannabis. The act received royal ascent and came into force on 17 October 2018. While this was celebrated by many Canadians as a step in the right direction for a free and democratic society, some legal experts and civil libertarians had some concerns as to the manner of implementation of this new law. Some of these concerns have to do with a legal grey area that seems to have emerged as a result of the new legislation. This grey area involves those in Canada that have previous convictions for simple possession of small quantities of marijuana for personal use.

Before cannabis became legal in 2018, possession (even in small amounts), was unlawful in Canada under the Controlled Drugs and Substances Act, SC 1996, c 19 (CDSA). Those caught in possession of modest quantities of pot faced a fine of up to \$1000.00 and as many as six months in jail. If one looks at the history of pot criminalization in Canada, it becomes clear that something very strange is going on. If the current government, like many jurisdictions around the world, no longer see pot use as criminal, why was it criminalized in the first place? In her book “Jailed for Possession: Illegal Drug Use, Regulation and Power in Canada, 1920-1961, historian Catherine Carstairs discusses how pot became a scheduled drug in 1923 under the government of William Lyon Mackenzie King. The Act to Prohibit the Improper Use of Opium and Other Drugs was a consolidation of earlier legislation. Up to that point, the only scheduled drugs in

Canada were opium, morphine and cocaine. Carstairs hints at the fact that pot (cannabis indica-indian hemp or hasheesh), was added to the list at the last minute.¹ Why?

Perhaps this could be explained by understanding the spirit of the times. The 1920's and 30's was an era of prohibition, and the societal evils of drink and drugs were to be combated most vociferously. Emily Murphy, the lead petitioner in the 1929 Persons Case, wrote in her book "The Black Candle" that pot smokers "became raving maniacs" and "are liable to kill or indulge in any sort of violence".² No doubt the producers of the movie "Reefer Madness" read her book! To anyone at all familiar with pot...this is utter nonsense! It is also interesting to note that the leading report of the era, and it was seven volumes in length, was Britain's Indian Hemp Drugs Commission report, published in 1894. This report states "moderate use practically produces no ill effects". The report also found that "little injury society has hitherto sustained from hemp drugs".³

During the 1920's and 30's, most Canadians were not smoking pot and those in power had little knowledge of the drug. Between 1923 and 1965, there were only 270 possession offences reported in Canada.⁴ By the late 1960's, the government formed the Le Dain Commission to study the effects of pot use in Canada. Their 1972 report argues that pot prohibition was costly to both individuals and the state. The report recommended that pot possession be decriminalized.⁵ Government largely overlooked cannabis decriminalization, or regulation for decades.

¹ Daniel Schwartz, "Marijuana was criminalized in 1923, but why?" (3 May 2014), online: CBC News <www.cbc.ca/news>

² Jon Tattrie, "Cannabis Legalization in Canada" (29 November 2016), online: The Canadian Encyclopedia <www.thecanadianencyclopedia.ca/en/article/marijuana-lagalization-in-canada>

³ Supra note 1.

⁴ Supra note 2.

⁵ Ibid.

In 2000, the Ontario Court of Appeal decided that cannabis prohibition was unconstitutional because it did not make an exception for medical use.⁶ In 2013, new federal regulations allowed for the production and distribution of medical cannabis under the *Marijuana for Medical Purposes Regulations (MMPR)*.⁷ However, in the 2014 case of *Allard v Canada*, the Federal Court of Appeal found the *MMPR* to be unconstitutional, to the extent that it prohibits patients from growing their own marijuana. This infringed on their liberty and security interests under section 7 of the Canadian Charter of Rights and Freedoms.⁸

The current law permits Canadians age 18 and older to buy cannabis by mail or in provincially regulated retail stores. Adults are now permitted to grow up to four cannabis plants at home and can carry up to 30 grams on their person while in public. Rosy! However, where does that leave the 500,000 Canadians with a pot-related conviction on their criminal record?⁹ On the first day of pot legalization in Canada, the government said it would table legislation that would make it easier for those with pot-related convictions to get a pardon.

In 2019, the Government of Canada introduced Bill C-93, which allows those who have previously been convicted **only** of simple cannabis possession to apply for a pardon with no application fee or wait period, once their sentence has been served.¹⁰ The Parole Board of Canada will order the pardon provided the applicant only has convictions for simple possession of cannabis. The states purpose of the pardon is to reduce barriers to reintegration by facilitating access to job opportunities, educational programs and housing.

⁶ Ibid at page 5.

⁷ Ibid.

⁸ *Allard v Canada*, 2014 FC 280 CarswellNat 1277.

⁹ Pardons Canada, "What Pot Legalization Means for Pardons Canada" online: recordfree.ca/pot-legalization-and-pardons-canada/

¹⁰ Supra note 4.

Pardons are normally expensive and can take years to process. Yes...the new rule does away with fees and wait times, but only for those who have been convicted of simple cannabis possession. The only true way to clear ones record is through expungement, and thus far the government has been hesitant to do this. According to the Government of Canada, expungement is an extraordinary measure reserved for cases where the criminalization of the activity in question and the law never should have existed.¹¹ It is my firm opinion, based on historical evidence and personal experience that the laws regarding pot prohibition never should have existed.

¹¹ Ibid.