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Canada Update: Highlights of Major Legal News and Significant Court Cases from May 2011 through July 2011

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CANADA UPDATE: HIGHLIGHTS OF MAJOR LEGAL NEWS AND SIGNIFICANT COURT CASES FROM MAY 2011 THROUGH JULY 2011

Dorothy Tran*

THIS update includes a summary of legal news, which focuses on two issues that have gained wide coverage in the media. The first topic is about the deportation of Lai Changxing, a Chinese fugitive who lived in Canada for approximately twelve years before he was sent back to China by the Canadian government. The second topic is about the potential legalization of marijuana after the Superior Court of Ontario held that the federal Mari[j]uana Medical Access Regulations and certain provisions of the Controlled Drugs and Substances Act were unconstitutional. The decision has since prompted proposals of revisions to the program.

I. SUMMARY OF LEGAL NEWS

A. CANADA TURNS OVER CHINA'S MOST-WANTED FUGITIVE: MARKING THE CHANGE IN RELATIONS BETWEEN CANADA AND CHINA AND A DECREASE IN CONCERN OVER HUMAN RIGHTS VIOLATIONS

1. *History/Background: Mr. Lai's Journey from China to Canada and Back Again*

On Thursday, July 21, 2011, a Canadian Federal Court decided it was time to deport Lai Changxing, a man China considers to be one of its most sought-after fugitives.¹ Mr. Lai came to Canada from Xiamen, a southeastern city in the People's Republic of China.² He is considered a

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1. Ian Johnson & Michael Wines, *China Arrests Its Most-Wanted Fugitive After Canada Departs Him*, N.Y. TIMES, July 23, 2011, available at <http://www.nytimes.com/2011/07/24/world/asia/24lai.html?scp=1&sq=China%20Arrests%20Its%20Most-Wanted%20Fugitive&st=cse>.

2. Diana Lary, *Political Refugee or 'China's Biggest Criminal' Lai Changxing and his Fight to Stay in Canada*, UNIV. OF EDINBURGH, 2-4, <http://www.cst.ed.ac.uk/Events/Conferences/documents/LaryDPaper.pdf> (last visited Oct. 3, 2011).

wanted criminal by the Chinese government because he is accused of owning a ten billion dollar smuggling ring there.³ This smuggling ring was the product of the Yuanhua Group, a group of companies that Mr. Lai created.⁴ As a young man, Mr. Lai made his business by smuggling cars, petroleum, and cigarettes, and by bribing corrupt Chinese government officials along the way.⁵ Later, Mr. Lai and the Yuanhua Group also invested heavily in the infrastructure of Xiamen, using the clubs and hotels built to help bribe officials.⁶ It is alleged that Mr. Lai's smuggling operation cheated the "Chinese government of millions of dollars in unpaid taxes."⁷ In August of 1999, fearing prosecution by the government after some of his known associates had been "caught up in [a] new anti-corruption campaign," Mr. Lai purchased Hong Kong passports for himself and his family, and fled from China.⁸ He applied for refugee status, seeking asylum and protection in Canada.⁹ Up until the time of his deportation, Mr. Lai continually asserted that if he returned to China, he would most likely be tortured to death by Chinese government officials.¹⁰ To support this claim, Mr. Lai's lawyer, David Matas, a famous human rights attorney,¹¹ stated that "both Mr. Lai's accountant and his brother had died of unknown causes while in prison," alluding to the idea that Mr. Lai will face similar, if not worse, consequences.¹² Furthermore, at the height of its anti-corruption campaign, China has tried and executed many individuals, making examples of high-ranking officials as a showing of the government's abhorrence for corruption.¹³

Despite the fact that Mr. Lai's application for refugee status was denied in 2002,¹⁴ Canada had continued to refuse China's request to send the notorious "criminal" back to his home country, until now.¹⁵ Justice Michael Shore, the judge who presided over the case, stated in his opinion that, "[i]t is assumed that the assurances of the Chinese government,

3. Johnson & Wines, *supra* note 1.

4. Lary, *supra* note 2, at 2.

5. *Id.* at 2-3.

6. *Id.* at 3.

7. *Lai Changxing's Deportation to China is Upheld in Canada*, N.Y. TIMES, July 21, 2011, available at <http://www.nytimes.com/2011/07/22/world/americas/22canada.html> [hereinafter *Deportation to China is Upheld*].

8. Lary, *supra* note 2, at 4.

9. *Id.*

10. *Deportation to China is Upheld*, *supra* note 7; see also Johnson & Wines, *supra* note 1.

11. Lary, *supra* note 2, at 4.

12. Johnson & Wines, *supra* note 1; see also Sunny Dhillon, *Chinese Fugitive Faces Quick Deportation After Federal Court Loss*, GLOBE & MAIL, July 22, 2011, available at <http://www.theglobeandmail.com/news/national/british-columbia/bc-politics/chinese-fugitive-faces-quick-deportation-after-federal-court-loss/article2105808/>.

13. Sui-Lee Wee, *China's Most Wanted Fugitive in Beijing After Extradition*, MSNBC.COM (July 23, 2011, 6:24AM ET), http://www.msnbc.msn.com/id/43840406/ns/world-news-asia_pacific/t/chinas-most-wanted-fugitive-beijing-after-extradition/#.ToKPGdSwVVd; Lary, *supra* note 2, at 4.

14. Lary, *supra* note 2, at 4.

15. Johnson & Wines, *supra* note 1.

as per its written promises, will be kept, as the Chinese government's honour and face is, and will be, bound and kept respectively, by the monitoring for the lifetime of the applicant"¹⁶ These promises include assurances of a fair and public trial, including access to representation, that Mr. Lai will not be subjected to torture or killed,¹⁷ and that Canadian officials will have the right and opportunity to visit Mr. Lai in China, as well as the right to attend public hearings in China.¹⁸ One may wonder why Canada, a nation that has always heavily criticized China for its human rights violations has finally decided to repatriate Mr. Lai. Are written promises suddenly enough to dispel human rights concerns, which have underlined Canada's hesitation to deport Mr. Lai for eleven years?

2. *Why Lai Changxing was Expatriated*

The decision to extradite Mr. Lai back to China comes at a time of change in policy focus, which may partially explain his deportation. Stephen Harper is Canada's twenty-second Prime Minister and the first head of the Conservative Party of Canada.¹⁹ When the Stephen Harper administration first took power, Chinese-Canadian relations were tepid and uneasy.²⁰ In the past the conservative government has been very critical of China in regards to human rights,²¹ and the Chinese government has always responded accordingly.²² Since then, however, John Baird, Canada's newest Foreign Affairs Minister, has taken great strides to improve the relationship. This is because of the government's dedication to the economy, which has become Prime Minister Harper's number one priority for his third term in office.²³ Mr. Baird visited China in July with the intention of promoting economic and trade ties with China.²⁴ Trying to keep the focus on economics, Mr. Baird referred to China as "a friend and an ally," and stated to Chinese reporters that he believes China to be a "strategic partner, whether it [is] on energy, natural resources, international affairs."²⁵

Despite the lip service paid to human rights during and after the visit, there is an obvious trend of putting human rights on the back burner as

16. Dhillon, *supra* note 12.

17. *Deportation to China is Upheld*, *supra* note 7; Johnson & Wines, *supra* note 1.

18. Dhillon, *supra* note 12.

19. *Prime Minister of Canada Stephen Harper*, PRIME MINISTER OF CANADA, <http://pm.gc.ca/eng/pm.asp> (last visited Oct. 4, 2011).

20. Campbell Clark, *Effusive John Baird Wraps up China Visit With Praise for 'Strategic Partner'*, GLOBE & MAIL, July 20, 2011, available at <http://www.theglobeandmail.com/news/politics/ottawa-notebook/effusive-john-baird-wraps-up-china-visit-with-praise-for-strategic-partner/article2103353/>.

21. See Johnson & Wines, *supra* note 1.

22. Lary, *supra* note 1, at 7.

23. *Prime Minister Stephen Harper*, *supra* note 19.

24. Daniel LeBlanc, *Baird Aims to Balance Trade, Human Rights Issues on China Trip*, GLOBE & MAIL, July 17, 2011, available at <http://www.theglobeandmail.com/news/politics/baird-aims-to-balance-trade-human-rights-issues-on-china-trip/article2100120/>.

25. Clark, *supra* note 20 (quoting Foreign Minister Baird).

Canada attempts to boost its economy through engaging with, and investing in, China—one of the world's most significant economies today. For example, Mr. Baird has compared China with other countries that have committed gross human rights violations in the past but with whom Canada now enjoys foreign relations.²⁶ He lists Germany and Russia as prime examples and says that there is no reason why China's history of human rights violations should deter building better relations.²⁷ In saying such things, Mr. Baird seems to forget that Mr. Lai's deportation and subsequent arrest is not history yet. While Mr. Lai's deportation illustrates Canada's commitment towards fixing Chinese-Canadian foreign relations, it is also indicative of what the number one priority is for the Canadian government moving forward.

B. STATUS OF MARIJUANA LEGALIZATION REMAINS IN LIMBO:
PROPOSALS TO THE MARIJUANA MEDICAL ACCESS
PROGRAM ARE MADE

This past April, many individuals were hopeful that July 10, 2011 would be a day of celebration for Canadians looking forward to smoking marijuana—whether for recreational or medicinal purposes. Many were hopeful that it would be the first day in which they could utilize marijuana openly, without fear of criminal apprehension. Instead, the status of the legalization or regulation of marijuana remains unknown. To be realistic, the legalization or regulation of marijuana in Canada, a controversial topic, was unlikely to be resolved in three months anyway. As of today, the April 11, 2011 ruling held by the Superior Court of Ontario has been stayed until the Ontario Court of Appeals gets a chance to hear *R. v. Mernagh*.

1. R. v. Mernagh April Decision

On April 11, 2011, the Ontario Superior Court held that the federal “Mari[j]uana Medical Access Regulations, SOR/2001-226 and the prohibitions against the possession and production of cannabis (mari[j]uana) contained in sections 4 and 7 respectively of the Controlled Drugs and Substances Act, S.C. 1996, C. 19” unconstitutional as applied.²⁸ The defendant in this case, Matthew Mernagh, suffers from an array of medical problems, including “fibromyalgia, scoliosis, seizures and depression.”²⁹ Under the Mari[j]uana Medical Access Regulations prior to April 10, in order to use marijuana medically, one had to first be diagnosed by a physician with an ailment whose symptoms could be dulled by the use of marijuana, and the doctor had to sign off on such usage.³⁰

26. *Id.*

27. *Id.*

28. *R. v. Mernagh*, 2011 CanLII 2121 para. 345 (Can. O.N.S.C.).

29. *Id.* para. 1.

30. *Marihuana Medical Access Program*, HEALTH CANADA (June 17, 2011), http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/_2011/2011_80bkr-eng.php.

After endorsement from a doctor, one had to also be authorized by Health Canada in order to possess marijuana, a process that could take up to several months and included many stipulations.³¹ Mr. Mernagh came before the court on April 11, 2011, because he was charged with producing marijuana in violation of the Controlled Drugs and Substances Act, which criminalizes marijuana production and usage without a valid license.³² Mr. Mernagh had previously made several attempts to find a doctor who would approve of his declaration to no avail; thus despite his very serious illnesses, he was arrested and his case was sent to trial.³³

The Mari[j]uana Medical Access Regulations, or MMAR, was enacted in 2001 in order to allow seriously ill Canadians to “legally access, possess, and cultivate mari[j]uana for medicinal purposes.”³⁴ This legislation, which was seemingly friendly towards the ill, ended up having the opposite effect of what it was meant to accomplish. In practice, it was found that the Mari[j]uana Medical Access Regulation actually prevented the sick from obtaining relief, and that the provisions of the Controlled Drugs and Substances Act criminalized their conduct when they were forced to turn to purchasing the drug from the black market or to growing marijuana without a license as a last resort.³⁵ In its decision, the Ontario Superior Court stated that one of the major problems with the Mari[j]uana Medical Access Regulations was that it forced doctors to be “the gatekeepers” of access even though they, as a collective profession, do not wish to have that role.³⁶ Because marijuana has never been approved as a drug, the Mari[j]uana Medical Access Regulations put doctors in an uneasy position that may or may not go against their consciences.³⁷ Furthermore, the Court found that in delegating the role of gatekeeper to doctors, Parliament was under an obligation to educate them on the subject matter.³⁸ The facts provided in the case illustrate that without such knowledge, doctors may be unwilling to sign the declaration, which in turn leads to a failure of the regulations to accomplish their intended goal.³⁹ As such, the court held that requiring a doctor’s signature in order to access marijuana medically rendered the statute unconstitutional, as the entire legislative scheme would not function without that particular provision.⁴⁰ The court also held sections 4 and 7 of the

31. *Id.*

32. *Mernagh*, 2011 CanLII 2121, para. 3.

33. *Id.*

34. *Id.* para. 2.

35. *Mernagh*, 2011 CanLII 2121, para. 290; *Marijuana Ruling Lights Path to Legalization: Appeal of Medical Marijuana Case Pondered by Ottawa*, CBCNEWS, Apr. 13, 2011, <http://www.cbc.ca/news/canada/toronto/story/2011/04/13/medicinal-marijuana-court-ruling.html>; Sandro Contenta, *Ruling Opens the Door to Legalize Marijuana in Canada*, GLOBALPOST, Apr. 19, 2011, <http://www.globalpost.com/dispatch/news/regions/americas/canada/110418/pot-medical-marijuana-legal>.

36. *Mernagh*, 2011 CanLII 2121, para. 234.

37. *Id.* ¶¶ 248-50.

38. *Id.* ¶¶ 254-57.

39. *See id.* ¶¶ 3, 256-57.

40. *Id.* ¶¶ 327-29.

Controlled Drugs and Substances Act invalid, because without the Mari[j]uana Medical Access Regulations, no exemptions to criminalization would be available.⁴¹

In order to give time for safe adjustment, Justice Donald Taliano, the presiding Justice in the case, suspended the decision for a three-month period, giving the government a chance to modify the federal marijuana program before the decision to legalize possession and production takes effect.⁴²

2. *Proposed Changes to the Legislation*

As mentioned previously, the decision has been stayed indefinitely, as an appeal by the Crown of Taliano's ruling is being mounted in Ontario's Court of Appeals.⁴³ The Crown looks to challenge the holding in *Mernagh* by stating that Justice Taliano erred in the law.⁴⁴ At the same time, amendments to Health Canada's Mari[j]uana Medical Access Program are being proposed. According to Health Canada's website:

The core of the redesigned Program would be a new, simplified process in which Health Canada no longer receives applications from program participants. A new supply and distribution system for dried mari[j]uana that relies on licensed commercial producers would be established. These licensed commercial producers, who would be inspected and audited by Health Canada so as to ensure that they comply with all applicable regulatory requirements, would be able to cultivate any strain(s) of mari[j]uana they choose. Finally, the production of mari[j]uana for medical purposes by individuals in homes and communities would be phased out.

Individuals wishing to use mari[j]uana for medical purposes would still be required to consult a physician who is licensed to practice medicine in Canada.⁴⁵

One of the reasons given for deeming the Mari[j]uana Medical Access Program unconstitutional in *Mernagh* was the fact that the regulations erected an unreasonable barrier to obtaining marijuana legally in the form of making physicians gatekeepers to the drug.⁴⁶ Under the proposed changes, this barrier would still exist, but the burden on patients would be lessened because categories of conditions or symptoms that previously made consulting a specialist necessary would be eliminated.⁴⁷

41. *Id.* ¶ 332.

42. *Id.* ¶¶ 334-35.

43. *Marijuana Laws Can Stand Until Appeal is Heard*, THESPEC.COM (June 23, 2011), <http://www.thespec.com/news/canada/article/552097—marijuana-laws-can-stand-until-appeal-is-heard>.

44. *Id.*

45. *Proposed Improvements to Health Canada's Marihuana Medical Access Program*, HEALTH CANADA (Aug. 8, 2011), <http://www.hc-sc.gc.ca/dhp-mps/consultation/marihuana/2011/program/consult-eng.php#a3> [hereinafter *Proposed Improvements*].

46. See Jennifer Yang, *Pot Laws Ruled Unconstitutional*, THESTAR.COM (Apr. 13, 2011), <http://www.thestar.com/news/article/973886—pot-laws-ruled-unconstitutional>.

47. *Proposed Improvements*, *supra* note 45.

The burden on patients would also be lessened because under the proposed legislation they would be able to bypass Health Canada's authorization of the physician's approval.⁴⁸ Skipping over Health Canada, individuals who have procured a doctor's document can go straight to a licensed commercial producer.⁴⁹

Another problem that existed under the old Mari[j]uana Medical Access Program was the fact that growers could easily take advantage of the system and grow more than their allotted amount.⁵⁰ Under the proposed amendments, only licensed commercial producers would be allowed to grow and distribute the drugs.⁵¹ This would potentially cut down on the overproduction of marijuana by individuals who were authorized to grow their own marijuana or by those who were designated growers under the previous scheme. It would also deter criminal factions from attempting to gain access to marijuana through growers, which is also an issue that has been cited, particularly by law enforcement.⁵² These official vendors would be heavily regulated by the government. For example, in order to be licensed by Health Canada, each commercial grower would have to maintain strict compliance with regulations over areas such as product quality, personnel, record-keeping, safety and security, disposal and reporting, product labeling and packaging, where the marijuana could be cultivated or grown and how the transactions between commercial growers and medical users may occur.⁵³ To enforce these regulations, the facilities would be inspected and the growers would be audited.⁵⁴ Despite these heavy restrictions, the new proposals do afford some flexibility. For example, any strain of the plant could be cultivated.⁵⁵

In *Mernagh*, the Superior Court of Ontario listed that Parliament had failed to provide those in the medical profession with adequate information and knowledge regarding marijuana as a critical factor in deciding that the Mari[j]uana Medical Access Program was unconstitutional.⁵⁶ Health Canada has committed itself to providing "more comprehensive, accurate and up-to-date information . . . on the risks and benefits associated with the use of mari[j]uana for medical purposes, so as to support them in making informed decisions about treatment options with their patients."⁵⁷

48. *Id.*

49. *Id.*

50. *Medical Marijuana Growth Rules to Change*, CBCNEWS (June 16, 2011), <http://www.cbc.ca/news/health/story/2011/06/16/marijuana-medical.html>.

51. *Proposed Improvements*, *supra* note 45.

52. *Frequently Asked Questions*, HEALTH CANADA (June 17, 2011), http://www.hc-sc.gc.ca/dhp-mps/consultation/marihuana/_2011/program/faq-eng.php [hereinafter *FAQ*].

53. *Proposed Improvements*, *supra* note 45.

54. *Id.*

55. *Id.*

56. *Mernagh*, 2011 CanLII 2121, para. 254.

57. *FAQ*, *supra* note 52.

3. *Conclusion*

It is still uncertain at this point whether or not there will be an attempt to implement the proposed changes at all. As an appeal of the *Mernagh* decision has already been launched, it seems that this controversial case will eventually make its way to the highest court, the Supreme Court of Canada, whether or not amendments are actually implemented. As mentioned previously in the introductory paragraph of section B, many citizens across Canada hoped that marijuana would be legalized on July 10, 2011, but due to the stay this was not the case. The Superior Court of Ontario's holding has been stayed again—this time until the appeal is heard. While Health Canada's proposed changes do not encompass legalization or decriminalization,⁵⁸ if the changes are implemented and found to be insufficient, or if the case is heard before the amendments take place and the decision is upheld in a higher court, it is possible that users of marijuana—all types of users—will still be able to celebrate.

58. *Id.*