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ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
WARREN HITZIG, ALISON MYRDEN, MARY-LYNNE CHAMNEY, CATHERINE DEVRIES, JARI DVORAK, STEPHEN VAN DE KEMP, DEBORAH ANNE STULTZ-GIFFIN & MARCO RENDA	)	*Alan N. Young,* For the Applicants, Hitzig and Myrden
	)	*Paul Burstein,* For the Applicant, Renda
Applicants	)	
	)	*Joseph Neuberger,* For the Applicants, Stultz-Giffin and Van De Kemp
- and -	)	
	)	*Leora R. Shemesh,* For the Applicants, Devries, Dvorak and Chamney
HER MAJESTY THE QUEEN	)	*Harvey Frankel, Q.C. & Lara Speirs,* For the Respondent
Respondent	)	
AND BETWEEN:	)	
	)	
TERRANCE PARKER	)	In Person
Applicant	)	
- and -	)	
HER MAJESTY THE QUEEN	)	*Alain Préfontaine,* For the Respondent
Respondent	)	

AND BETWEEN:	)	
	)	
JOHN C. TURMEL AND J.J. MARC PAQUETTE	)	In Person
	)	
	)	
Applicants	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	*Alain Préfontaine,*
	)	For the Respondent
Respondent	)	

HEARD: September 19 & 20, 2002 and October 18, 2002

LEDERMAN J.

INTRODUCTION

[1] This is yet another legal proceeding arising from the tension that presently exists in Canada between the criminal and the medicinal use of marijuana. Although the Minister of Justice has recently announced his intention to introduce legislation to decriminalize the simple possession of less than 30 grams of marijuana, its continuing criminal status plays an important part in this case.

[2] These applications concern the constitutionality of the *Marihuana Medical Access Regulations*, S.O.R./2001-227, made by the Governor in Council on 14 June 2001 pursuant to subsection 55(1) of *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. More particularly, at issue is whether these regulations, in conjunction with prohibitions specified in the *Controlled Drugs and Substances Act* [*CDSA*], violate some or all of the applicants' rights to liberty and security of the person as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]. These applications follow very much in the footsteps of the Ontario Court of Appeal's 31 July 2000 decision in *R. v. Parker* (2000), 49 O.R. (3rd) 482 [*Parker*]. Indeed, the accused in the *Parker* case is one of the applicants presently before this court.

[3] In *Parker*, the Court of Appeal held that a legislative prohibition on the possession of marijuana without an exception for medical use violated Terrance Parker's right to liberty and security of the person. Mr. Parker's liberty rights were infringed because he faced imprisonment upon conviction for possession. The prohibition also denied him the right to make decisions of fundamental personal importance, namely to choose a medicine which alleviated the effects of his epilepsy. His security of the person was also violated because the marijuana prohibition forced him to choose between committing a crime to obtain effective medical treatment and inadequate medical treatment.

[4] The Court held that this s. 7 infringement was not consistent with the principles of fundamental justice because the state's interests in regulating marijuana use (namely protecting against the harmful effects of use of the drug, fulfilling Canada's international treaty obligations, and controlling the trade in illicit drugs) were not enhanced by an overbroad prohibition. Although defences to prosecution were theoretically available through Health Canada's approval of new drugs, medical prescription, and the Emergency Drug Release (Compassionate Use) Programme, the court found these defences to be practically unavailable to Mr. Parker.

[5] Section 56 of the *CDSA* also permitted the Minister to grant a medical exemption from prosecution, but the court found this process to violate s. 7 because it was based on criteria unrelated to Mr. Parker's own medical priorities. The exemption lacked an adequate legislated standard for medical necessity (i.e. it was too vague) and relied on unfettered ministerial discretion, thus compromising his security of the person in a manner inconsistent with the principles of fundamental justice. Concern was also expressed about the s. 56 process comprising unnecessary rules which would result in delay and additional risks to Mr. Parker's health.

[6] By way of remedy, the Court of Appeal declared that the prohibition on the possession of marijuana in s. 4 of the *CDSA* was of no force or effect. The Court also stated that if the cultivation offence had been before it, it would have held that provision invalid as well. This declaration of invalidity was suspended for one year to provide Parliament with the opportunity to craft a medical exemption with adequate guidelines that would pass constitutional muster.

[7] The *Marihuana Medical Access Regulations* [*MMAR* or *Regulations*] came into force on July 30, 2001, one year less a day after the *Parker* decision was released. While the respondent claims that these *Regulations* establish a framework which addresses the prior regime's constitutional infirmities, the applicants contend that the *MMAR* are no more constitutionally satisfactory than s. 56 of the *CDSA*. None of the parties argued the issue which was recently before the Ontario Court of Justice in *The Queen v. J.P.* (2 January 2003), Windsor 02-Y11520. In that case, Justice Douglas W. Phillips held that s. 4(1) of the *CDSA* was still invalid with respect to marijuana possession pursuant to *Parker* because Parliament had not addressed the problem of ministerial discretion with a statutory amendment. This ruling is currently under appeal, and is not considered in this decision.

[8] For the reasons given below, I find the *MMAR* to violate the applicants' s. 7 rights to liberty and security of the person in a manner inconsistent with the principles of fundamental justice. The *Regulations* fail to provide individuals who have a serious medical need to use marijuana with a legal source and safe supply of their medicine. This violation is not saved by s. 1 of the *Charter*. By way of remedy, the *MMAR* are declared to be of no force and effect. This declaration of unconstitutionality is suspended for six months.

THE MARIHUANA MEDICAL ACCESS REGULATIONS (*MMAR*)

Background: Policy Context

[9] While the federal government's introduction of the *MMAR* was clearly designed to fill the regulatory lacuna left by the Court of Appeal's July 2000 decision in *Parker*, the evidence indicates that Health Canada has actually been developing its policies relating to medical cannabis use for several years.

[10] Most of these efforts have been focused on establishing a research plan to provide Health Canada with scientific evidence on the safety and efficacy of cannabis as a therapeutic product. Given the insufficient research to date, Health Canada maintained that such data is essential if marijuana is ever to be developed as a mainstream medicine and approved under the the *Food and Drugs Act*, R.S.C. 1985, c. F-27 [*FDA*].

[11] The Canadian government's plan was announced in March 1999 by the former Minister of Health, Allan Rock, and outlined in Health Canada's June 1999 *Research Plan for Marijuana for Medical Purposes*. It included funding clinical trials, developing appropriate guidelines for medical use of marijuana, and creating a secure domestic supply of research-grade marijuana – because there are so few licit sources of marijuana in the world.

[12] One major result of these initiatives has been the establishment of a Medical Marihuana Research Program. This five-year, $7.5 million program is being operated by Health Canada in conjunction with the Canadian Institutes of Health Research (CIHR). It is designed to facilitate research and fund clinical trials. To date, two such clinical trials have been approved. One is at the Community Research Initiative of Toronto, and deals with appetite loss, while the other is being conducted by researchers at the McGill Pain Centre. CIHR also supported the February 2000 creation of the Canadian Consortium for the Investigation of Cannabinoids in Human Therapeutics, a research network of scientists pursuing research on the medical uses of marijuana.

[13] Perhaps the most dramatic announcement under Health Canada's medical marijuana plan was Minister Rock's December 2000 announcement that a five-year contract to produce a domestic supply of marijuana at a mine in Flin Flon, Manitoba had been awarded to Prairie Plant Systems (PPS). The respondent in this case argued that the several hundred kilograms of marijuana that have been harvested by PPS to date are intended for research purposes only. Minister Rock, however, is quoted as stating in Health Canada's December 21, 2000 "News Release" that:

> This marijuana will be made available to people participating in structured research programs, and to authorized Canadians using it for medical purposes who agree to provide information to my department for monitoring and research purposes. A Canadian source of research-grade marijuana is essential to move forward on our research plan.

[14] Whatever Health Canada's intentions might have been regarding the PPS cannabis and the supply issue more generally, it is clear that early plans on how to exempt medical users from criminal prosecution focused on a refined s. 56 process which included obtaining a legal source of marijuana for s. 56 exemptees. But both a multi-stakeholder consultation workshop on February 28, 2000 and the release of the *Parker* decision shortly thereafter indicated that a new approach was necessary.

[15] Comments were received by Health Canada after a Notice of Intent to develop new medical marijuana access regulations was published in the *Canada Gazette*, Part I, on January 6, 2001, and stakeholder meetings were also held. Following pre-publication in the *Canada Gazette*, Part I, on April 7, 2001, further comments from various interested parties (including patients and patient advocacy organizations, medical associations and licensing authorities, law enforcement agencies, and members of the BC Marijuana Party) were received on the proposed regulations. (See Regulatory Impact Analysis Statement 2001-227, C.Gaz.2001.II.1362-1364 (*Marihuana Medical Access Regulations*)).

Purpose of the MMAR

[16] The purpose of the resulting *MMAR* is described in Health Canada's July 2001 information sheet "Medical Access to Marijuana - How the Regulations Work" and in the affidavit of Ms. Cripps-Prawak, the Director of the Office of Cannabis Medical Access, as follows:

> The regulations establish a compassionate framework to allow the use of marijuana by people who are suffering from serious illnesses, where conventional treatments are inappropriate or are not providing adequate relief of the symptoms related to the medical condition or its treatment, and where the use of marijuana is expected to have some medical benefit that outweigh the risk of its use.

[17] The *Regulations* do not amend *CDSA* provisions criminalizing the possession, trafficking and production of cannabis, nor do they significantly alter the *Narcotic Control Regulations*, C.R.C., c. 1041 [*NCR*] which regulate the legal distribution of narcotic drugs in Canada. The *MMAR* also do not purport to modify Canada's existing drug approval process, laid down in the *FDA* and *Food and Drug Regulations*, C.R.C., c. 870 [*FDR*]. As the *MMAR*'s "Regulatory Impact Analysis Statement," *supra*, notes at 1350:

> The *Marihuana Medical Access Regulations* (Regulations) provide seriously ill Canadian patients with access to marihuana while it is being researched as a possible medicine. These Regulations have been developed in recognition of a need for a more defined process than the one currently used under section 56 of the *Controlled Drugs and Substances Act* (CDSA) for these Canadian patients.

[18] The *MMAR* have thus been designed to respond to the Court of Appeal's main criticism of the s. 56 process by providing some ground rules relating to medical necessity and restricting the Minister's discretion in granting medical exemptions. At the same time, however, the state's interests in controlling illicit access to marijuana and ensuring that potential benefits from

cannabis use outweigh potential harm to a person's health are also evident in the *MMAR*. The respondent has submitted that the policy rationale for imposing certain restrictions under the *MMAR* reflects:

a) the treatment of certain severe illnesses by unapproved narcotic drugs is properly monitored and supervised;

b) the availability of such untested therapies reflects each individual patient's illness and weighs the potential risks against the possible benefits of their use;

c) the medical use of any controlled substance is made available in such a way as to avoid abuse or misuses of the substance;

d) access is facilitated to experimental or emerging therapeutic products; and

e) the concerns of the medical community are taken into account when allowing for access to controlled substances as experimental therapeutic products.

[19] The government also argued that its policy choice in enacting the *MMAR* to exempt medically qualified individuals from criminal sanction balances a number of significant yet competing societal goals, including:

a) the desire to introduce a regulatory scheme for access to marijuana for medical purposes pending research concerning its use as a possible medicine;

b) protecting individuals from the known and unknown harms associated with marijuana, which is a substance for which there is limited scientific evidence of its safety and efficacy;

c) ensuring the safety and efficacy of any therapeutic drugs prior to allowing their general distribution to the public;

d) respecting the traditional roles of the government as regulator and of the private sector as investigator, manufacturer and marketer of therapeutic drugs;

e) compliance with existing federal legislation and United Nations Drug Conventions, and

f) limiting the risk of diversion of controlled substances to illicit uses or the illicit market.

[20] To sum up, there is some tension between the different purposes of the *MMAR*, especially as they relate to interlocking drug control and drug approval laws. On the one hand, the *MMAR* aim to facilitate access to marijuana for seriously ill individuals where its medical benefits to them outweigh its potential harm. On the other hand, the *MMAR* still treat marijuana as an unapproved drug associated with significant illicit use and criminal activity which should only be used as a medicine *in extremis* – i.e. where conventional treatments are not providing adequate symptomatic relief.

[21] Ultimately, however, the government has stated that the *MMAR* "must […] not unduly restrict the availability of marijuana to patients who may receive health benefits from its use." (See the *MMAR*'s "Regulatory Impact Analysis Statement," *supra* at 1359).

[22] In conjunction with the *CDSA, NCR, FDA* and *FDR*, the four parts of the *MMAR* operationalize these different purposes in several different ways.

Part 1: Authorization to Possess

[23] Part 1 of the *MMAR* creates a regulatory framework for seriously ill people to possess marijuana for therapeutic use. It addresses the Court of Appeal's main concerns regarding s. 56 of the *CDSA* (inadequate legislated standard for medical necessity and unfettered ministerial discretion) in two ways.

[24] First, the *Regulations* designate three categories of applicants for obtaining an authorization to possess marijuana (ATP). These categories are defined in relation to the individual's symptoms as follows:

> Category 1 patients are those diagnosed with a terminal illness for which the prognosis is death within 12 months.
>
> Category 2 patients suffer from specific symptoms associated with serious chronic conditions. These symptoms and their associated medical conditions are set out in the schedule to the *Regulations* as follows:

Medical Condition	Symptom
Cancer, AIDS, HIV infection	Severe nausea
Cancer, AIDS, HIV infection	Cachexia, anorexia, weight loss
Multiple sclerosis, spinal cord injury or disease	Persistent muscle spasms
Epilepsy	Seizures
Cancer, AIDS, HIV infection, multiple sclerosis, spinal cord injury or disease, severe form of arthritis	Severe pain

> Category 3 patients include those with symptoms associated with medical conditions other than those in the other two categories.

[25] Secondly, Part 1 of the *MMAR* requires applicants to obtain declarations from physicians when applying for an ATP. Each of the three categories requires its own form of medical corroboration, with the degree of physician support required increasing from Category 1 to Category 3.

[26] Once a physician has made the appropriate declarations, however, and the other administrative requirements of sections 4 to 10 of the *MMAR* have been met (properly filled out application, photos), subsection 11(1) requires the Minister to issue an ATP. Physicians are thus the designated "gatekeepers" for access to medical marijuana under the *Regulations*, a role formerly performed by the Minister.

[27] For Category 1 applications, subsection 6(2) of the *MMAR* requires a physician to declare that:

> a) the applicant suffers from a terminal illness;
> b) all conventional treatment(s) for the symptom have been tried, or have at least been considered;
> c) the recommended use of marihuana would mitigate the symptom(s);
> d) the benefits to the applicant from the recommended use of marihuana would outweigh any risks associated with that use; and
> e) the medical practitioner is aware that no notice of compliance has been issued under the *FDR* concerning the safety and effectiveness of marihuana as a drug.

[28] The physician then has to indicate the recommended daily dosage of dried marijuana, as well as the route and form of administration. If that dose is greater than 5 grams, s. 9 of the *Regulations* requires that he or she also declare that:

> a) the risks associated with an elevated daily dosage of marihuana have been considered, including risks with respect to the effect on the applicant's cardio-vascular, pulmonary and immune systems and psychomotor performance, as well as potential drug dependency; and
>
> b) the benefits from the applicant's use of marihuana according to the recommended daily dosage would outweigh the risks associated with that dosage, including risks associated with the long-term use of marijuana.

[29] The government submits that the long-term health risks associated with marijuana use are not a major policy concern for Category 1 patients because they face imminent death. As a result, it is reasonable that (1) they be excused from what Ms. Cripps-Prawak calls the "general rule" requiring the support of a specialist physician, and (2) that the Category 1 application form be less thorough than the forms for the other two categories. This is eminently reasonable as this approach is consistent with the aims of palliative care, namely reducing suffering and improving the quality of life of the terminally ill.

[30] For non-terminal Category 2 and Category 3 applicants, the bar is set somewhat higher. The patient must obtain the medical support of one or two specialists certified by the Royal College of Physicians and Surgeons of Canada.

[31] To put it succinctly, Health Canada believes that specialists' more advanced education and expertise regarding innovative treatments put them in a better position than other physicians to evaluate the potential risks and benefits of an applicant's therapeutic use of marijuana. This is important, the respondent argues, citing a report from the Institute of Medicine entitled "Marihuana and Medicine: Assessing the Science Base" (Washington: National Academy Press, 1999), because the applicants in question do not face imminent death and may rely on marijuana for a longer period of time than Category 1 applicants. As a result, there is a greater potential for negative side effects as well as for dependency and abuse.

[32] For Category 2 applicants, then, a specialist must indicate which of the eligible Category 2 medical conditions and symptoms the applicant suffers from. This list comprises chronic medical conditions for which scientific studies suggest marijuana may provide some symptomatic relief.

[33] Subsection 6(3) of the *MMAR* then requires the specialist to exercise his or her "gatekeeping" authority by making (or not making) the following mandatory declarations for Category 2 applicants:

> a) the specialist practices in an area of medicine, to be named by the specialist in the declaration, that is relevant to the treatment of the applicant's medical condition;
>
> b) all conventional treatments for the symptom have been tried, or have at least been considered, and that each of them is medically inappropriate because
> (i) the treatment was ineffective,
> (ii) the applicant has experienced an allergic reaction to the drug used as a treatment, or there is a risk that the applicant would experience cross-sensitivity to a drug of that class,
> (iii) the applicant has experienced an adverse drug reaction to the drug used as a treatment, or there is a risk that the applicant would experience an adverse drug reaction based on a previous adverse drug reaction to a drug of the same class,
> (iv) the drug used as a treatment has resulted in an undesirable interaction with another medication being used by the applicant, or there is a risk that this would occur,
> (v) the drug used as a treatment is contra-indicated, or
> (vi) the drug under consideration as a treatment has a similar chemical structure and pharmacological activity to a drug that has been ineffective for the applicant;
>
> c) the recommended use of marihuana would mitigate the symptom;

> d) the benefits from the applicant's recommended use of marihuana would outweigh any risks associated with that use, including risks associated with the long-term use of marihuana; and
>
> e) the specialist is aware that no notice of compliance has been issued under the *FDR* concerning the safety and effectiveness of marihuana as a drug.

[34] As with Category 1 applications, the specialist also has to write down the recommended dose, method of administration, and make a specific risk/benefit declaration for doses over 5 grams per day.

[35] Category 3 applications require two specialists' declarations because the scientific evidence relating to marijuana's therapeutic merit for other conditions is inconclusive and highly controversial. The first declaration includes all matters referred to in subsection 6(3) for the Category 2 declaration. Subsection 6(4)(b), however, further requires specialists to indicate:

> all conventional treatments that have been tried or considered for the symptom and the reasons, from among those mentioned in paragraph (3)(*b*), why the specialist considers that those treatments are medically inappropriate.

[36] The second specialist's declaration for a Category 3 application is required by s. 4(2)(c) to support the first specialist's declaration. Beyond the aforementioned declarations that the specialist practices in an area of medicine relevant to treating the applicant and is aware that marijuana has not been approved as a drug under the *FDR*, s. 7 of the *MMAR* requires a declaration:

> c) that the specialist is aware that the application is in relation to the mitigation of the symptom identified under paragraph 6(1)(*b*) and that the symptom is associated with the medical condition identified under that paragraph or its treatment;
>
> d) that the specialist has reviewed the applicant's medical file and the information provided under paragraph 6(4)(*b*) and has discussed the applicant's case with the specialist providing that information and agrees with the statements referred to in paragraphs 6(3)(*c*) and (*d*).

[37] It is also worth noting that s. 23 of the *MMAR* allows a person to assist the holder of an ATP with the administration of the daily dosage of marijuana. This "caregiver" cannot help a seriously ill person with an ATP to secure a supply of marijuana or help a person with a licence to produce (see below) to cultivate the plants.

Part 2: Licence to Produce

[38] The *MMAR* provide two ways for adult holders of ATPs to obtain marijuana for their medical needs. Either the holder of an ATP can apply for a Personal-use Production Licence (PPL) to grow his or her own marijuana, or he or she can apply for a Designated-person Production Licence (DPL) to authorize someone else to grow for his or her therapeutic needs.

[39] The application process appears to be relatively straightforward. Applicants fill out a form providing Health Canada with personal information and an explanation of how they will secure their supply of marijuana. (Section 53 also specifies that marijuana shall not be grown outdoors next to schools or other public places frequented mainly by minors). Then, provided the application raises no grounds for refusing to issue a production licence, the *MMAR* require the Minister to issue the appropriate licence. This licence is valid up to 12 months.

[40] To be eligible for a production licence, a person must meet the requirements set out in sections 25 (for a PPL) and 35 (for a DPL). These include being 18 years old, and, for a designated person, not having been found guilty of a drug offence specified in the *MMAR*. There is no exception allowing spouses to be designated growers if they have been found guilty of drug offences, even if these crimes were related to medical use.

[41] Grounds for refusing to issue a licence, meanwhile, are outlined in s. 32 (PPL) and s. 41 (DPL). Among these are having had a production licence revoked under s. 63(2)(b), not having been granted an ATP, making false or misleading statements in the PPL application, proposing a production site for which three production licences have been issued, and holding more than one licence to produce. Although s. 54 permits the holder of a licence to produce marijuana in common with up to two other licence holders, larger scale "compassion club" type arrangements remain illegal under the *MMAR*.

[42] The *MMAR* also specify the maximum number of plants and maximum quantity of dried marijuana a licence holder is authorized to possess. These amounts are calculated as a function of the applicant's prescribed daily dosage. DPL holders must keep records of their marijuana crop and its harvest, and may, at any reasonable time and upon consent, be subject to inspection to ensure that production is in conformity with the *MMAR*.

Part 3: Obligations Concerning Documents and Revocation

[43] ATP, PPL, and DPL holders must show proof of their authority to possess or licence to grow marijuana upon demand. The *Regulations* also specify under what circumstances an authorization or licence will be revoked by the Minister, notably upon discovery of a grounds of ineligibility, receipt of a request for revocation from a licence holder, written advice from a physician that the use of marijuana is no longer recommended, a designated grower's commission of a specified narcotics offence, or discovery that the ATP, PPL, or DPL was issued on the basis of false or misleading information. Upon expiration of an ATP or licence to produce, holders are required to destroy all marijuana in their possession.

Part 4: Supply of Medical Marijuana

[44] Part 4 of the *MMAR* deals with a hypothetical situation under current laws, namely the possibility of a physician receiving marijuana from a licensed dealer (as defined by the *NCR*) and supplying it to the holder of an ATP. This situation is theoretical because under the *CDSA, MMAR, NCR*, *FDA*, and *FDR* there is currently no legal supply of marijuana in Canada and there are no licensed marijuana dealers. The marijuana being produced by PPS under its contract with Health Canada has not been released and, as noted above, the respondent maintains that this cannabis is for research purposes only.

[45] The supply issue is a crucial aspect of the *MMAR*. Although Health Canada's description of "How the Regulations Work" assures holders of ATPs that they can obtain their medicinal marijuana by growing it themselves, having a designated person grow it for them, or possibly acquiring it from a licensed supplier in the future, the reality is somewhat different.

[46] In order to grow or obtain marijuana, licensed users and growers ultimately have no choice but to turn to the black market to get seeds, plants, or dried marijuana.

[47] While s. 51 of the *MMAR* permits the Minister (or a designated person) to import and possess marijuana seed "for the purpose of selling, providing, transporting, sending or delivering" it to licensed dealers or the holders of a licence to produce, the Minister is not required to do so and has not exercised her discretion in this respect. The result is something of an "absurdity," as Madame Justice Acton noted of the old s. 56 exemption process in *R. v. Krieger*, 2000 ABQB 1012 (Q.B.) at para. 36:

> [I]n order to obtain the product, that individual is required to participate in an illegal act, since whoever sells the exempted person either the raw cannabis marihuana or the seeds to grow their own, does so in breach of s. 5(2) of the *CDSA*.

[48] In the absence of a government supply, those who have been authorized to use marijuana or have been granted licences to produce it are forced to seek it on the street and rely on criminal drug dealers. The truth of this assertion is borne out by the testimony of the applicants, as described below. This sad state of affairs is at odds with both drug control and compassionate access objectives underlying the *MMAR*, and has significant ramifications for the legal analysis below.

RESPONSE OF THE MEDICAL PROFESSION TO THE *MMAR*

[49] The medical profession has expressed serious reservations about the gatekeeping role of physicians under the *MMAR*. These concerns appear to flow mainly from the uncomfortable novelty of physicians being responsible for prescribing an unapproved drug. Several medical associations, licensing authorities and the Canadian Medical Protective Association ("CMPA") do not think physicians should have to attest to the relative risks and benefits of marijuana (to

say nothing of recommended dosages and administration), because the information required to make such a declaration is not available. The safety, quality and efficacy of marijuana as a medicine are unknown because there has not been enough research done in the area.

[50] This medical uncertainty means that physicians face significant professional peril in endorsing their patients' *MMAR* applications. Besides the potential liability inherent in prescribing an unapproved medicine, subsection 69(a)(ii)(C) of the *MMAR* authorizes the Minister to report physicians to their licensing authority if she has reasonable grounds to believe they have made a false statement under the *Regulations*. The CMPA fears that physicians may "unknowingly make a false statement because they are being asked to attest to matters that may go beyond the scope of their expertise." (CMPA, "What to do when your patients apply for a licence to possess marijuana for medical purposes," October 2001 Information Sheet).

[51] Physicians can also be reported under subsection 69(a)(ii)(A) for contravening professional conduct rules. In this respect, supporting marijuana use may place doctors in conflict with provisions relating to the use of unapproved or "alternative" medicines.

[52] As a result, the CMPA is advising physicians to verify their college's policy on alternative medicines. It is also recommending that "any physician who does not feel qualified to make any of the declarations required by the regulations should not feel compelled to do so."

THE APPLICANTS

[53] There are three applications before the court, and eleven applicants in all. Eight applicants are represented by counsel, while three are self-represented. I will deal with the former before turning to the latter.

Warren Hitzig

[54] One of the represented applicants, Warren Hitzig, is a caregiver who produces and distributes marijuana to individuals suffering from major illnesses, such as his co-applicants. Although he does not require marijuana for his own medical purposes, he seeks to be free from the *CDSA* and *MMAR*'s continued prohibition of compassion clubs.

[55] Until he was recently charged with trafficking and related offences, Mr. Hitzig operated the Toronto Compassion Centre. He established this not-for-profit organization in 1998 to provide seriously ill people with a safe and reliable supply of cannabis and to provide the general public with information on the therapeutic use of marijuana.

Mary-Lynne Chamney, Jari Dvorak, Alison Myrden and Deborah Anne Stultz-Giffin

[56] The other seven applicants represented by counsel suffer from serious medical conditions and have found relief from their symptoms through the use of marijuana. Four of these applicants have ATPs under the *MMAR*, namely Ms. Chamney (who suffers from epilepsy), Mr.

Dvorak (HIV), Ms. Myrden (chronic multiple sclerosis and trigeminal neuroalgia), and Ms. Stultz-Giffin (progressive multiple sclerosis).

[57] These four applicants' affidavits attest primarily to the difficulties they have experienced in attempting to obtain a safe, licit and continuous supply of the drug they have been authorized to take under the *MMAR*. Ms. Chamney, Mr. Dvorak, and Ms. Stultz-Giffin state that they are either too ill or lack the expertise required to successfully grow their own cannabis; nor can Ms. Stultz-Giffin's husband be her designated grower as he was convicted of producing marijuana for her in 1999. All four affidavits also attest to the high cost of purchasing black market marijuana and the risks associated with it.

Catherine Devries, Marco Renda and Stephen Van de Kemp

[58] Applicants Devries, Renda and Van de Kemp do not have ATPs, although Ms. Devries formerly had a s. 56 exemption for Arachnoiditis, a disease which affects the nerve endings in her spinal column. Ms. Devries uses cannabis to reduce nausea, stimulate her appetite, and lessen her reliance on several other drugs used to treat her condition. Although Health Canada attests that nine other individuals suffering from spinal cord disease have received the support of a specialist in obtaining an ATP for their Category 2 conditions, Ms. Devries has been unable to book an appointment with her neurosurgeon for several months. After discussing the *MMAR* with her doctor, she also fears her specialist will not endorse her application due to cautions issued by the Canadian Medical Association and because of the requirement that he declare all conventional treatments to be medically inappropriate.

[59] Like Ms. Devries, Mr. Renda and Mr. Van de Kemp have been unable to obtain ATPs. Unlike Ms. Devries, their conditions have not been deemed by Health Canada to constitute chronic illnesses for which scientific studies suggest marijuana may provide some symptomatic relief. While Mr. Renda suffers from chronic liver disease and Hepatitis C, Mr. Van de Kemp uses marijuana to treat symptoms of depression and bi-polar disorder. They are thus both required to make a Category 3 application under the *MMAR*.

[60] Although both have been treated by specialists, neither Mr. Renda nor Mr. Van de Kemp has been able to secure the medical support required by the *MMAR*. Both attest to their frustration with the specialist requirement. Mr. Van de Kemp's affidavit describes his experience with long waiting lists (8-10 months) to see specialists. Mr. Renda, on the other hand, explains that his specialist was unwilling to endorse his application upon advice from a lawyer and the CMPA. The position of the CMPA on *MMAR* applications has been described above, and was distributed to Canadian physicians in a memorandum.

Marc Paquette and Terrance Parker

[61] The final three applicants (J.J. Marc Paquette, Terrance Parker and John C. Turmel) are self-represented. Their applications were joined with the application of the others by court order, as they present similar factual and legal issues.

[62] Like most of the other applicants, Messrs. Paquette and Parker are both seriously ill and use marijuana for therapeutic purposes. As mentioned above, Mr. Parker suffers from epilepsy, while Mr. Paquette has been diagnosed with chronic pain, hepatitis, and various secondary conditions. Both Messrs. Paquette and Parker have received exemptions under s. 56 of the *CDSA* to possess and produce marijuana for their medical use. Neither, however, has applied for an ATP under the *MMAR*, and both claim that they have been unable to obtain the requisite specialist support. The respondent contests these assertions concerning securing specialist support, as will be discussed below.

John Turmel

[63] John Turmel, unlike the other applicants, is physically healthy. He smokes marijuana because he believes this protects him from becoming sick. He simply states that he believes, without any supporting medical evidence, that marijuana has preventative qualities which have ensured his good health to date. He also claims that the government is perpetrating genocide on Canadians by not allowing them to use marijuana preventively.

THE PARTIES' POSITIONS

The Applicants' Position

[64] The applicants assert that the *MMAR* throw up so many barriers to gaining access to marijuana for medicinal use that this medicine effectively remains unavailable to many seriously ill people. Furthermore, they contend that the *MMAR* do not provide those who successfully gain exemptions with access to a legal supply of the marijuana medicine.

[65] As a result, the applicants argue that the interplay of *CDSA* offences and *MMAR* exempting regime exposes them to imprisonment and deprives them of their *Charter* right to make medical decisions of fundamental personal importance (the "liberty interest"), and infringes their right to make autonomous decisions with respect to their bodily integrity (the "security of the person interest").

[66] The applicants also submit that these s. 7 deprivations do not accord with the principles of fundamental justice because the *MMAR*'s restrictions on access to cannabis-based medical treatment are arbitrary and do not advance any compelling state interest. The argument is also made that the *MMAR* establish an illusory exemption regime. Not only do many seriously ill Canadians still face the risk of prosecution for their therapeutic use of cannabis, even those who gain authorizations to possess marijuana under the *MMAR* are denied access to a legal supply of that medicine.

[67] The applicants thus seek the invalidation of the *MMAR* under s. 52 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, and a revival of the Court of Appeal's order in the *Parker* case, namely, the constitutional invalidation of the marijuana prohibition in s. 4 of the *CDSA*.

[68] In the alternative, the applicants submit that if the *MMAR* violate s. 7 of the *Charter* only in respect of a failure to provide access to a legal supply of marijuana, then the appropriate remedy would be a mandatory order under s. 24 (1) of the *Charter*, compelling the government to distribute medical marijuana in its possession (through its contract with PPS) to authorized persons under the *MMAR*.

The Respondent's Position

[69] The respondent submits that the federal government introduced the *MMAR* specifically to comply with the constitutional requirements laid down by the Court of Appeal in *Parker.* It submits that the *MMAR* establish a framework which permits seriously ill individuals who have received the support of their physicians to legally possess and produce cannabis for their medical treatment.

[70] The respondent believes the applicants can be divided into several categories. First, there are those whom it argues have no standing or whose constitutional challenges are premature. Warren Hitzig and John Turmel come under the former heading, while Marc Paquette and Terrance Parker fall under the latter. In short, there are other applicants among those before the court who are better situated to challenge the *MMAR*.

[71] Second, there are those applicants who have not applied for ATPs because they have not been able to obtain the requisite medical support. They include applicants Devries, Renda, Van de Kemp (and Parker, if he has standing). The respondent argues that their rights have not been violated because they have not established that cannabis is the only effective treatment for their respective conditions or even a reasonable form of treatment. In short, the respondent submits that these applicants have established no medical need, and this explains specialists' unwillingness to endorse their applications. There is no untrammelled s. 7 right to choose one's medical treatment.

[72] Finally, some of the applicants have obtained ATPs, including Mary-Lynne Chamney, Jari Dvorak, Alison Myrden and Deborah Anne Stultz-Giffin. The respondent asserts that their rights have not been infringed. They do not face criminal prosecution for possession, and there is no s. 7 *Charter* right to be supplied with marijuana for therapeutic use. If there is such a right, the *MMAR* do not infringe it because they provide a means for individuals to have access to a supply of cannabis via production licences. It is argued that the applicants simply have not availed themselves of this option. Section 7, the respondent submits, cannot be understood to include a positive right forcing the government to provide the applicants with unrestricted quantities of marijuana.

[73] The respondent also submits that any infringement of the applicants' rights to liberty and security of the person is consistent with the principles of fundamental justice because the *MMAR* strike a reasonable balance between competing individual and societal interests.

[74] The *MMAR* permit individuals to use and produce cannabis for medical purposes. In conjunction with other laws, the *MMAR* also aim to protect individuals against potential harm from marijuana use, to ensure drugs are safe and effective prior to regulatory approval, to uphold

the distinction between government (regulatory) and private sector (drug production) roles, and to support domestic and international drug control efforts.

[75] The respondent submits that these societal aims are achieved by the *MMAR*'s specialist requirement, its three categories of medical conditions, its requirement of prescribed dosages, and its limits on the quantities of cannabis authorized individuals may possess. Ensuring that drugs like marijuana are approved through the usual regulatory channels is consistent with public safety. And from a comparative perspective, Canada is a world leader in granting medical access to cannabis. No other countries supply patients with marijuana outside the research context.

[76] Should the court find a breach of the applicants' s. 7 rights, the respondent submits that this infringement can be justified under s. 1 of the *Charter*. The s. 1 justification test is broader than the principles of fundamental justice, and comprises values underlying a free and democratic society. Ensuring the health and safety of Canadians is a pressing and substantial legislative aim of the marijuana regulatory regime, and the *MMAR* constitute a rational and proportional means of achieving this goal.

[77] If the court further finds that a violation of the applicants' s. 7 rights is not saved under s. 1, the respondent argues that ordering the government to supply marijuana is not an appropriate and just remedy. Instead, a less intrusive and more fitting remedy would be declaratory in nature.

ISSUES

1) Do any of the applicants not have standing to bring this application, or do any of the applicants bring a premature constitutional challenge?

2) Do the *MMAR*, in conjunction with marijuana prohibitions in the *CDSA*, violate some or all of the applicants' rights to life, liberty and security of the person?

3) If so, has the deprivation of rights been made in accordance with the principles of fundamental justice?

4) If not, can the s. 7 violation be justified under s. 1 of the *Charter*?

5) If not, what is the appropriate constitutional remedy?

ANALYSIS

STANDING OR PREMATURITY

John Turmel: Standing For Non-Medical Use

[78] Mr. Préfontaine, counsel for the respondent in the Turmel application, argues that Mr. Turmel does not have standing to challenge the constitutionality of the legislative scheme created

by the *CDSA* and *MMAR*. Mr. Turmel does not claim to have a serious medical condition, nor has he ever applied for a medical exemption under s. 56 of the *CDSA* or the *MMAR*.

[79] I have decided that his application should be dismissed for several reasons. First, Mr. Turmel does not have standing to bring this application. He has not demonstrated that he has been directly affected by the *MMAR*. Nor, in light of his position, does he qualify for discretionary constitutional standing (described in greater detail below). Mr. Turmel is not sick, and cannot claim to have a genuine interest in the validity of the *MMAR*. To my mind, the constitutional dimension of his "preventive" use argument was decided by the Court of Appeal in *R. v. Clay* (2000), 49 O.R. (3d) 577 [*Clay*]. In contrast to the *Parker* decision, which dealt with the use of marijuana to treat serious medical conditions, Justice Rosenberg held in *Clay* that other uses of marijuana may be legitimately prohibited by the government.

[80] If Mr. Turmel's argument is construed more broadly, I believe any submissions he might make regarding the constitutionality of the *MMAR* will be amply covered by the ten other applicants involved in these proceedings. Thus, there is an alternate, reasonable and more effective manner to bring the general issue of the constitutionality of the *MMAR* before the court.

[81] Finally, Mr. Turmel's "statistical" arguments are weak and unsubstantiated. While he might personally believe that smoking marijuana has prevented him from becoming sick, and that the Government of Canada is committing "genocide" by prohibiting healthy Canadians from using cannabis, Mr. Turmel has presented no medical evidence to support his bald assertions. As such, they cannot stand.

Warren Hitzig: Caregiver Standing

[82] Mr. Frankel and Ms. Speirs, counsel for the respondent in relation to the represented applicants, also argue that Mr. Hitzig has no standing to seek a remedy in this application. Mr. Hitzig has neither a personal medical need for marijuana nor is he engaged in making decisions of fundamental personal importance or relating to his bodily integrity. Because his *Charter* rights have not been infringed, counsel submit that Mr. Hitzig has no standing to obtain a remedy under s. 24(1) of the *Charter*.

[83] As Mr. Young pointed out, however, this submission appears to misconstrue the nature of the relief being sought by Mr. Hitzig and the other applicants. Granted, one of the remedies they are requesting is injunctive relief pursuant to s. 24(1) of the *Charter*, namely "an Order directing the Government of Canada to provide them with some of the medical marijuana currently being grown and harvested in Manitoba under federal license." This order, however, is only sought in the alternative. The primary thrust of their argument is that the *MMAR* (in conjunction with s. 4 of the *CDSA* as it applies to cannabis) are unconstitutional and should be declared invalid under s. 52 of the *Constitution Act, 1982*.

[84] This case must be distinguished from the Court of Appeal's treatment of caregivers in *Wakeford v. Canada* (2001), 209 D.L.R. (4th) 124 (Ont. C.A.) [*Wakeford*]. In *Wakeford*, an HIV positive man applied for an order under s. 24(1) of the *Charter* to exempt his caregivers from liability under ss. 5 and 7 of the *CDSA*. His bid failed, the Court of Appeal held, because Mr.

Wakeford had not shown his own rights to be violated and because he had not directly challenged the constitutionality of the provisions. As the Supreme Court of Canada has remarked, "[i]t now appears to be settled law that a party cannot generally rely upon the violation of a third party's rights" to obtain a personal remedy under s. 24(1) of the *Charter*: *Benner v. Canada (Secretary of State)* (1997), 143 D.L.R. (4th) 577 at 604 (S.C.C.).

[85] In the case at bar, however, Mr. Hitzig is directly challenging the constitutionality of the *MMAR* and *CDSA* as they apply to caregivers. His counsel has given notice of constitutional question as required by s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and implicitly relies on a string of Supreme Court of Canada standing cases.

[86] Beginning with *Thorson v. A.G. Canada*, [1975] 1 S.C.R. 138, Canada's highest court has held that discretionary standing will be granted in constitutional cases when (1) a party raises a serious, substantial and justiciable constitutional issue; (2) the party has a direct or genuine interest in the impugned law's validity; and (3) there is no other reasonable and effective way to bring the matter before the court. See also *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575; *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607; *Conseil du Patronat du Québec v. A.G. (Qc)*, [1991] 3 S.C.R. 236; and *Hy and Zel's Inc. v. Ontario*, [1993] 3 S.C.R. 675.

[87] While there are other applicants before the court whose interests are arguably more directly affected by the *MMAR* and *CDSA* regime than Mr. Hitzig, a purposive approach to constitutional standing suggests that he should not be precluded from being heard. Mr. Hitzig has extensive knowledge regarding marijuana production, and his sworn testimony helps shed light on some of the paradoxes inherent in the current medical access regime – especially those relating to supply difficulties. There is no other reasonable and effective way of bringing these aspects of the applicants' constitutional challenge before the court.

[88] Whether this testimony will be determinative or not is not at issue at this stage. In a constitutional challenge comprising numerous applicants like this one, there are bound to be some evidentiary overlaps and redundancies. In the final analysis, however, only the most compelling scenarios will be considered. The government must rebut the strongest arguments the applicants can make, which will be based on the most persuasive facts. In this respect, I believe Mr. Hitzig's testimony is necessary.

[89] Although this proceeding is not a criminal trial, it is worth pointing out that Mr. Hitzig also faces criminal charges for running the Toronto Compassion Centre. Pursuant to the Supreme Court's decisions in *R. v. Big M. Drug Mart Ltd*., [1985] 1 S.C.R. 295 [*Big M*] and *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*], he would also have standing as of right at trial to challenge the constitutionality of the legislative regime under which he was being prosecuted, "even though the unconstitutional effects are not directed at [him] per se": *Morgentaler*, *supra* at 63.

[90] To my mind, a purposive interpretation of the *Big M* and *Morgentaler* standing rules allows Mr. Hitzig to challenge the *MMAR*. While cannabis-related offences are only contained

in the *CDSA*, the objectives of the *MMAR* and the nature of Mr. Hitzig's offences both imply a constitutional shortcoming in the access *Regulations*. The thrust of his argument is that the *MMAR* are underinclusive in not legally permitting him to supply medically qualified individuals with marijuana.

[91] For all of these reasons, I find Mr. Hitzig to have standing to bring this application.

Paquette and Parker: Premature Constitutional Challenges?

[92] The respondent argues that applicants must demonstrate that an impugned enactment has an adverse impact on them before they can challenge its validity. It relies on the Court of Appeal's decision in *Wakeford*, *supra*, for this proposition.

[93] While both Mr. Paquette and Mr. Parker argued in court that the *Regulations* make it exceedingly difficult to obtain access to marijuana, the respondent argues that both have had ample time and opportunity to meet the *MMAR*'s requirements. Health Canada has shown sensitivity in granting both of them several extensions of their s. 56 exemptions. Yet neither has attempted to apply for an authorization under the *MMAR*.

[94] The respondent also suggests that Mr. Paquette's claim of having great difficulty obtaining specialist support rings hollow, because he has the support of his psychiatrist (a specialist) and an infectious disease specialist at the Ottawa Hospital. The respondent thus submits that Mr. Paquette has simply not bothered to obtain declarations from them.

[95] Likewise, the respondent argues that there is no evidence before the court regarding Mr. Parker's difficulty in seeing a specialist; nor is there any evidence suggesting that applying under the *MMAR* is futile. Health Canada has approved nine applications from individuals with epilepsy who obtained the requisite medical declarations from specialists.

[96] It is obviously in Messrs. Paquette and Parker's interest to make reasonable, good faith efforts to apply for ATPs under the *MMAR*. And indeed there is no sworn evidence before the court showing that they have tried to do so, although they argued that this was the case in their oral submissions.

[97] Nonetheless, I do not find the government's "prematurity" argument to be determinative of Messrs. Paquette and Parker's standing for reasons similar to those argued above with respect to Mr. Hitzig. They deserve discretionary standing in this constitutional application because they have a serious issue to raise, an obvious interest in the validity of the *MMAR*, and there was no other reasonable way the matter would come before the court than for them to challenge the *Regulations*.

[98] The facts of the current application must be distinguished from those present in *Wakeford, supra*. A thorough reading of that appeal reveals that the applicant's challenge was found premature because the *Regulations* had not been in existence for a long enough time to determine whether they were working or not, and not just because the appellant had not yet

applied for an ATP. (See *Wakeford, supra* at para. 48). The applicant had also not given requisite notice of constitutional question to directly challenge the *CDSA*.

[99] For these reasons, I find Messrs. Paquette and Parker's application not to be premature.

SECTION 7: ***The Right to Life, Liberty & Security of the Person***

[100] Section 7 of the *Canadian Charter of Rights and Freedoms* states:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[101] The wording of this section implies a two-stage analysis. First, the applicants must demonstrate that the *MMAR* and interlocking marijuana prohibitions impose a threshold violation of their right to liberty or security of the person. Second, if there is a threshold violation of rights, the applicants must further show that this infringement does not accord with the principles of fundamental justice. The onus only shifts to the respondent at the s. 1 justification stage. I will deal with the first step of the s. 7 analysis (the "threshold" violation) in this section, before turning to the principles of fundamental justice below.

[102] As noted above, *Parker* is the leading case regarding the constitutionality of restricting a seriously ill person's access to marijuana for medical treatment. In many respects, the s. 7 rights at issue in this application reflect those ruled on by the Court of Appeal in *Parker*, *supra*. Some of the applicants (namely those without ATPs) still face the prospect of criminal prosecution under the *CDSA*; they also claim that they have been denied the right to choose a medicine which provides effective relief from their serious symptoms.

[103] On the other hand, this challenge is somewhat distinct from *Parker, supra,* in that the government has recently attempted to respond to the constitutional deficiencies of the *CDSA*'s general prohibition of marijuana and its ill-defined s. 56 exemption. The *CDSA* now includes a comprehensive set of regulations, the *MMAR*, which specify how medical authorizations to possess and grow cannabis may be obtained. Several of the applicants are also challenging the lack of a legal source and supply of marijuana under the *MMAR*.

[104] Thus, whereas the Court of Appeal focused most of its attention on the *CDSA*'s cannabis prohibition in finding a threshold s. 7 violation of Mr. Parker's rights, the focus in this case is on whether the *MMAR* deprive the applicants of their s. 7 rights by not granting them constitutionally acceptable access to marijuana.

The Liberty Interest

[105] While the question of whether s. 7 includes substantive as well as procedural guarantees was decided early on by the Supreme Court in *Reference re s. 94(2) of the Motor Vehicle Act*

(British Columbia), [1985] 2 S.C.R. 486, 24 D.L.R (4th) 536, there has been a great deal of debate since then over just how far s. 7 goes beyond upholding freedom from imprisonment or physical restraint by the state.

[106] The Supreme Court has endorsed a broader understanding of liberty in several important decisions, finding s. 7 to protect individual autonomy over decisions involving "basic choices going to the core of what it means to enjoy individual dignity and independence:" see *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at para. 66. As Justice La Forest also noted in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 368 [*B.(R.)*]:

> [L]iberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

[107] But the Supreme Court has also expressed concern over loosening the definition of liberty too much, to protect against all state measures that might in some way impinge individual freedom. In *B.(R.), supra*, La Forest J. underscored at 389 that liberty "is limited to those essentially personal rights that are inherent to the individual."

[108] What seems clear in considering the jurisprudence is that the *Charter*'s liberty guarantee does protect a range of interests, and contextual analysis will be important in determining whether the applicants' s. 7 interests have been infringed.

[109] In *Parker, supra*, at para. 92, the Court of Appeal held that Terrance Parker's liberty interest was engaged in two ways. First, he faced criminal prosecution and possible imprisonment. Second, his right to choose how to treat his serious medical condition was restricted by criminal sanction. The latter violation of liberty also overlapped to some extent with an infringement of Mr. Parker's security of the person, as I will discuss below.

[110] In considering whether the availability of the s. 56 exemption process affected this threshold violation of Mr. Parker's liberty, Rosenberg J.A. stated at para. 188:

> [I]n my view, s. 56 is no answer to the deprivation of Parker's right to liberty. The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences.

[111] Subjecting Mr. Parker's choice to unfettered ministerial discretion still amounted to a s. 7 violation that was not consistent with the principles of fundamental justice.

[112] The Supreme Court of Canada's very recent decision in *Gosselin v. Quebec (Attorney General),* [2002] SCC 84, must also be considered. While *Gosselin* did not overturn cases reflecting the broader view of s. 7 relied on in *Parker,* McLachlin C.J.C.'s discussion of s. 7 for the majority suggests that this understanding may operate within certain constraints. As she states at para. 77:

> As emphasized by my colleague Bastarache J., the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individual's interaction with the justice system and its administration": *New Brunswick (Minister of Health and Community Services) v. G. (J.),* [1999] 3 S.C.R. 46, at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law", *(G. (J.)*, at para. 65). This view limits the potential scope of "life, liberty and security of person" by asking whom or what s. 7 protects against. Under this narrow interpretation, s. 7 does not protect against all measures that might in some way impinge on life, liberty or security, but only against those that can be attributed to state action implicating the administration of justice: see *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 (the "*Prostitution Reference*"), at pp. 1173-74, per Lamer J. (as he then was), writing for himself; *B. (R.) v. Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315, at paras. 21-23, per Lamer C.J., again writing for himself alone; and *G. (J.), supra*, for the majority. This approach was affirmed in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, *per* Bastarache J. for the majority [emphasis added].

[113] However, McLachlin C.J.C. also noted at para. 78 that "the administration of justice does not refer exclusively to processes operating in the criminal law." Nor is an "adjudicative context" required for s. 7 to be implicated. And the question of whether s. 7 applies "to protect rights or interests wholly unconnected to the administration of justice" remains unanswered. In short, the Chief Justice adopted an incremental approach to defining both the administration of justice and the scope of s. 7, suggesting that the nature of the right will evolve over time as "unforeseen issues arise for consideration."

[114] In the case at bar, all of the applicants save Mr. Hitzig wish to use marijuana to treat illnesses with varying degrees of seriousness. Most of them have tried traditional treatments and found them to be unsuccessful or less successful than cannabis. Due to the inability of some of the applicants to obtain ATPs under the *MMAR*, they still face the prospect of imprisonment for drug offences under the *CDSA*.

[115] The respondent, however, argues that the applicants without authorizations to possess cannot claim their rights have been violated by the *MMAR*. They simply have not tried to apply for an ATP or have been unsuccessful in obtaining the requisite medical support because they have not demonstrated a real, serious medical need to use marijuana. There is thus no rights infringement under the *MMAR*, according to the respondent.

[116] I am wary of this argument for reasons similar to those noted above in considering the premature nature of Messrs. Paquette and Parker's constitutional challenge. Governments cannot insulate their laws from constitutional scrutiny by claiming that individuals have not "engaged" a regulatory regime when it is the regulations themselves which limit how those individuals exercise their rights.

[117] Under the *MMAR*, for instance, the Minister has delegated deciding whether an applicant has a *bona fide* medical need to use marijuana to physicians. It is thus up to physicians to make substantive decisions about who can apply to Health Canada for an ATP. But it is still the *MMAR* which specify this requirement, which amounts to a constraint on the individual's right to legally use marijuana to treat a serious medical condition. Individuals' s. 7 rights are engaged with respect to the *MMAR* as soon as they wish to use marijuana for therapeutic purposes.

[118] The *MMAR* restrict individuals' broader liberty right to make decisions of fundamental personal importance and, in conjunction with the *CDSA*, expose them to prosecution and imprisonment – thus engaging their narrower liberty rights. The *MMAR* engage the applicants' broader liberty interest because they specify an exemption process which is known to involve significant delay (i.e. the specialist requirement) and which has put most physicians in a position of professional peril. I find this to be the case for at least Ms. Devries, who is on a waiting list to see her specialist. Her liberty interest is engaged by the *MMAR* and *CDSA*.

[119] On the other hand, there is something that resonates in the respondent's submissions when considering the evidence as it relates to Messrs. Renda and Van de Kemp, who cannot get physicians to sign off on their Category 3 applications. I agree that their cases are less medically compelling than Ms. Devries's condition. It does seem reasonable to imagine that some people will not be able to obtain the requisite medical support to proceed with an ATP application.

[120] By reason of the holding in *Parker,* individuals in Canada have a s. 7 right to use marijuana as a medicine to treat serious or life-threatening illnesses. On the question of just how serious a person's condition must be before this right manifests itself, Justice Rosenberg had this to say in *Parker, supra* at paras. 103-104:

> To intrude into that decision-making process through the threat of criminal prosecution is a serious deprivation of liberty. For the purposes of this appeal, it is unnecessary to decide whether the decision-making must meet some objective standard to fall within this aspect of liberty. The evidence established that Parker's choice was a reasonable one. He has lived with this illness for many years. He has tried to treat the illness through highly invasive surgery and continues to take conventional medication notwithstanding the significant side effects. He has studied his illness, he has studied the effects of marijuana, and he has produced a reasonable explanation for why Marinol is not an effective form of treatment. He has found relief from some of the debilitating effects of the illness through smoking marijuana, a drug that, aside from the psychotropic effect, has limited proven side effects in a mature adult. That drug helps protect him from the serious consequences of seizures -- consequences that could threaten his life and health. In those circumstances, a court should not be too quick to stigmatize his choice as unreasonable.
>
> In view of my conclusion with respect to Parker's liberty rights, it is not strictly necessary to consider the situation of other persons seeking to use marijuana to alleviate their symptoms from other serious, even terminal, disease. Suffice it to

> say that Parker presented sufficient evidence that marijuana is a reasonable choice for those persons that I would have found that their liberty interests are infringed by the marijuana prohibition [emphasis added].

[121] Without explicitly stating that the right to use marijuana requires an objective determination of medical necessity, Justice Rosenberg's analysis suggests that such use must indeed be reasonable to be constitutionally protected by s. 7 of the *Charter*.

[122] Under the *MMAR*, this determination of reasonableness is to be made by the relevant physician(s) acting in accordance with the categorical requirements laid down by the *MMAR*. While this approach may be consistent with the principles of fundamental justice, there is little doubt that the *MMAR*'s specialist requirements amount to a threshold violation of the liberty of at least Ms. Devries. Based on the evidence, and independent of the "reasonableness" of her decision to use marijuana according to the *MMAR*'s criteria, I find that she has demonstrated that marijuana is a reasonable choice of medicine for her condition.

[123] Ms. Devries' freedom from prosecution and potential imprisonment is conditional upon obtaining the medical support required by the *MMAR*. She has tried to see the requisite specialists, and has not succeeded. She faces long waiting lists. In short, despite her reasonable efforts to comply with the *MMAR*, the seriousness of her medical conditions, and the therapeutic effectiveness of marijuana for her symptoms, she still faces criminal prosecution under the *CDSA* for using cannabis.

[124] In this instance, the administration of justice is sufficiently engaged for me to find a threshold violation of liberty rights based on either a narrow or broader understanding of that right. The fact that this particular violation nonetheless complies with the principles of fundamental justice will be discussed below.

[125] Mr. Hitzig, on the other hand, faces criminal charges for possessing, producing, and trafficking marijuana as a caregiver. His s. 7 liberty interest is engaged because he faces imprisonment for growing and distributing cannabis to medicinal marijuana users. Neither the *MMAR* nor the *CDSA* allow for this. Whether this violation is consistent with the principles of fundamental justice will be taken up below.

[126] The applicants who have obtained authorizations to possess marijuana under the *MMAR* – namely Mary-Lynne Chamney, Jari Dvorak, Alison Myrden and Deborah Anne Stultz-Giffin – do not face criminal sanction for having or using marijuana. The argument that their liberty interest has been infringed is based on a broader understanding of liberty, i.e. the *MMAR* restrict how the applicants make medical decisions of fundamental personal importance. While the *MMAR* permit the applicants to grow marijuana, they argue that in effect the requirements surrounding the use of PPLs and DPLs deny them the ability to obtain marijuana for medical use.

[127] I think that arguments relating to applicants' medical well-being and their supply of marijuana are best examined in considering security of the person. The "personal autonomy and bodily integrity" notion of liberty overlaps with the protected interest in security of the person. For this reason, I will deal with it in the next section.

The Security of the Person Interest

[128] The leading cases to consider with respect to access to medical treatment in the context of a general criminal prohibition are *Morgentaler, Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*], and *Parker*.

[129] In *Morgentaler, supra* Dickson C.J.C. held at 56 that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person". Beetz J. also explained in the same case at 90 that security of the person "must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction" [emphasis added]. Wilson J., meanwhile, found security of the person to protect "both the physical and psychological integrity of the individual" (at 173).

[130] In *Rodriguez, supra*, Justice Sopinka, writing for the majority at 587, elaborated that "the judgments of this Court in *Morgentaler* can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress." This notion was picked up on in *Parker, supra*, where the Court of Appeal found the accused's security of the person to be violated notwithstanding that s. 56 of the *CDSA* presented a lawful means to possess marijuana. The exemption process "involved criteria unrelated to Parker's own priorities and aspirations" and was "concerned with much larger questions of drug policy and controls unrelated to Parker's own needs." Mr. Parker was still constrained by criminal sanction in accessing medication "reasonably necessary for the treatment of a medical condition that threatens life or health" (*Parker, supra* at paras. 109 and 97).

[131] In the case at bar, the applicants argue that the cannabis prohibition in the *CDSA* combined with the restrictions on gaining access to marijuana in the *MMAR* infringe their security of the person. All of them (except Mr. Hitzig) wish to treat their various medical conditions with marijuana. Some of them, as described above, have obtained the support of their physicians and succeeded in applying for an ATP under the *MMAR*. Others have not been successful at either trying to see a specialist or in having a specialist sign off on their application.

[132] For applicants without ATPs, the security of the person interest engaged by the *MMAR* overlaps with the liberty interest described above. For those applicants with a reasonable medical need to use marijuana, the *MMAR* establish requirements which restrict their ability to legally access this medicine.

[133] As in *Parker*, these applicants still face prosecution under the *CDSA* because of the delay and impediments to access inherent in the *MMAR*. Despite their health being in danger, they must choose between legal but inadequate treatment or face imprisonment in using an effective medical treatment. To force such a choice on seriously ill people is to violate their security of the person, as Justice Beetz explained in *Morgentaler, supra* at 90 and Justice Sopinka held in *Rodriguez, supra* at 587.

[134] These applicants are forced to make medical decisions based on criteria unrelated to their own priorities and aspirations, interfering with their bodily integrity in both a physical and emotional sense. This is sufficient to find a s. 7 breach, as Justice Rosenberg noted in *Parker, supra* at para. 109. As explained above, the *MMAR* are concerned with larger narcotics control and drug approval policy issues as well as facilitating access to marijuana for medical use. While this approach might be justifiable and consistent with the principles of fundamental justice, I have little difficulty accepting that the applicants' access has been compromised under the *MMAR* in a manner which amounts to a threshold s. 7 violation.

[135] For the applicants with ATPs, the infringement of their security of the person is somewhat different. As noted above, Ms. Chamney, Mr. Dvorak, Ms. Myrden and Ms. Stultz-Giffin do not face criminal sanction for having or using marijuana. They do not have to make the untenable choice between effective therapy at the risk of imprisonment and ineffective medicine.

[136] They do, however, face difficulties under the *MMAR* in obtaining the medicine they have been authorized to possess. Despite having medical conditions which qualify them to possess cannabis for therapeutic purposes, the *MMAR* throw up significant barriers to actually obtaining a safe, licit and continuous supply of this medicine. Several of them are either too ill or lack the skill required to successfully cultivate their own cannabis with a PPL. Ms. Stultz-Giffin also claims that a designated production licence is not a viable option for her as she lives in on an isolated farm and her husband has been convicted of growing marijuana for her in 1999 and is, therefore, not eligible for a DPL.

[137] Despite having licences to produce, all four applicants with ATPs rely on the black market to purchase cannabis. They are simply having an exceedingly difficult time using the method of licensed growing to obtain a continuous supply of their marijuana medicine.

[138] The respondent's answer to this argument is that it is misleading to suggest the *MMAR* are responsible for restricting the applicants in exercising their choice to use marijuana when they have not availed themselves of the full process under the *Regulations*. In particular, they have not applied for DPLs, which would allow them to obtain the marijuana they are allowed to possess under the *MMAR*.

[139] This response is not convincing for several reasons.

[140] The respondent overlooks that there is actually no legal way for the applicants or anyone possessing a production licence to obtain marijuana, because there is no legal source of marijuana in Canada. Cannabis is a controlled substance under the Schedule II of the *CDSA*, as are cannabis seeds (see *R. v. Hunter* (2000), 145 C.C.C. (3d) 528 (B.C.C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 451 [*Hunter*]), which individuals are prohibited from trafficking in and importing under ss. 5(1) and 6(1) of the *CDSA*. As a result, individuals who are authorized to possess or grow marijuana under the *MMAR* have no legal way of obtaining their cannabis, which is tantamount to prohibiting them from possessing it. Any potential suppliers are liable to conviction, or at least they would be if those laws were properly enforced.

[141] It is obviously no answer to this argument for the respondent to state that it does not care how the applicants and others obtain their marijuana, marijuana plants, or marijuana seeds to grow marijuana. As I will discuss below in considering the principles of fundamental justice, the state obviously has an interest in upholding drug control laws. Even if the state could make this argument, though, there are still some serious problems with forcing individuals authorized to possess or grow marijuana to turn to black market drug dealers for their supply.

[142] Laws which put seriously ill, vulnerable people in a position where they have to deal with the criminal underworld to obtain medicine they have been authorized to take, violate the constitutional right to security of the person. The *MMAR* expose the applicants, who all have serious medical conditions, to further risk to their personal safety. Not only do they face the risks associated with consorting with criminals, and the possibility of prosecution should they breach the terms of their ATP or production licence, but they have to deal with the uncertain quality of the product they are getting on the street.

[143] The source issue with relation to marijuana for medical use is hardly new. In discussing viable medical exemption regimes, for instance, Justice Rosenberg noted the following at para. 204 of *Parker, supra*:

> There is, in my view, no question that a medical exemption with adequate guidelines is possible. The fact that such exemptions exist in some states in the United States is testament to that. However, there are many options to consider and this is a matter within the legislative sphere. <u>There is also a particular problem in the case of marijuana because of a lack of a legal source for the drug</u>. This raises issues that can only be adequately addressed by Parliament [emphasis added].

[144] Despite this warning and another comment in passing at para. 97 and note 6, the government has declined to adequately address this issue. As noted above, s. 51 of the *MMAR* actually permits the Minister (or a designated person) to import and possess marijuana seed "for the purpose of selling, providing, transporting, sending or delivering" it to licensed dealers or the holders of a licence to produce. But the Minister is not required to act under this provision, and she has not done so.

[145] As a result, the applicants' security of the person has been infringed. I have grave reservations about a regime which is supposed to grant legal access to marijuana while controlling its illicit use, but instead grants legal access by relying on drug dealers to supply and distribute the required medicine.

SECTION 7: THE PRINCIPLES OF FUNDAMENTAL JUSTICE

[146] I now turn to whether the threshold s. 7 violations discussed above are consistent with the principles of fundamental justice. These principles provide the rules which any state infringement of an individual's "life, liberty and security of the person" must adhere to.

Although different principles of fundamental justice will be relevant in analyzing different breaches of s. 7 (see *R. v. White*, [1999] 2 S.C.R. 417 at para. 38), Lamer J. stated in the *Prostitution Reference, supra* at para. 30, that "the principles of fundamental justice are to be found in the basic tenets of our legal system." The inquiry is thus narrower than the proportionality and justification analysis conducted under s. 1 of the *Charter*, where a broader set of values (those underlying a free and democratic society) must be considered. (See *R. v. Mills*, [1999] 3 S.C.R. 668 [*Mills*] at para. 66). Also, the onus is still on the applicants to make their case at this point, unlike at the s. 1 stage.

Past Inconsistency of Exemptions Under s. 56 With the Principles of Fundamental Justice

[147] In considering s. 7 and the principles of fundamental justice, the Court of Appeal in the *Parker* case focused on both the outright prohibition on possession of marijuana contained in the *CDSA* and its predecessor, the *Narcotics Control Act*, R.S.C. 1985, c. N-1, repealed S.C. 1996, c. 19, and the s. 56 exemption process under the *CDSA*. The blanket prohibition was easily disposed of as overbroad when the state's interests in regulating marijuana use were considered. It banned a drug which had considerable therapeutic value and was far less harmful than many other medicines.

[148] The s. 56 exemption, on the other hand, required more careful consideration before the Court of Appeal found it inconsistent with the principles of fundamental justice. In his analysis, Justice Rosenberg followed up on Justice LaForme's May 1999 decision in *Wakeford v. The Queen* (1999), 173 D.L.R. (4th) 726 (Ont. S.C.J.). In that case, the court agreed to re-open a September 1999 application in which it had originally found the applicant's s. 7 rights not to be infringed because he had not demonstrated that he could not obtain an exemption under s. 56. The court did so because new evidence showed that the s. 56 exemption in place at the time of the original application was illusory with respect to medical marijuana use. Such an exemption was not a real or intended objective of s. 56, nor was there a process in place under which Mr. Wakeford could apply to obtain immunity from prosecution. This illusory exemption was found to be inconsistent with the principles of fundamental justice. Health Canada's new "Interim Guidance Document" for granting s. 56 exemptions did not change Justice LaForme's decision to grant Mr. Wakeford a constitutional exemption pending consideration of his application, because it was uncertain the new process would work in an effective and timely fashion.

[149] This "Interim Guidance Document" s. 56 regime was still in place when the Court of Appeal heard *Parker, supra*. This document governed applications for exemptions pending the development of a more comprehensive and considered framework, namely the *MMAR*. The interim process, however, was found by the court to be no more constitutionally satisfactory than what had existed before. As Justice Rosenberg stated at paras. 184 and 188, with respect to the security of the person interest and liberty interest:

> In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered discretion in the Minister, the deprivation of Parker's right to security of the person does not accord with the principles of fundamental justice.

> […]
>
> The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject that decision to unfettered ministerial discretion. It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marijuana does not enter the illicit market [emphasis added].

[150] Justice Rosenberg also relied on *Morgentaler, supra*, to suggest that administrative delay might amount to a violation of the principles of fundamental justice. As he stated at para. 189, "an administrative structure made up of unnecessary rules that results in an additional risk to the health of the person is manifestly unfair and does not conform to the principles of fundamental justice." But the court did not hold that this principle was engaged based on the facts of the case, which were inconclusive on this issue.

Do the MMAR Accord With the Principles of Fundamental Justice?

[151] The applicants argue that the *MMAR* offer a bad-faith, illusory exemption to criminal liability that is no better than the former s. 56 exempting regime. They submit that although the *MMAR* lay down criteria to structure the Minister's discretion in granting ATPs and licences to produce, and add greater transparency to the process, these improvements have only been achieved at the cost of efficiency, effectiveness and accessibility. The applicants argue that the *MMAR* throw up so many barriers to access that they offer only an illusory exemption to criminal liability based on arbitrary considerations. It is their position that the *Regulations* offer no remedy to those applicants whose rights have been violated. In short, they contend that the structure must be invalidated because it is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice." (See *Morgentaler, supra* at 72, per Dickson C.J.C.).

[152] With respect, I do not find these aspects of the applicants' argument to have demonstrated a rights violation inconsistent with the principles of fundamental justice. The *MMAR* have responded to the constitutional infirmities of the s. 56 exempting regime identified in *Parker* by establishing both a means of determining medical necessity and criteria upon which the Minister will grant permission to possess and produce cannabis. The *MMAR* do so by defining a three-category framework for determining medical necessity, and requiring physician approval of all applications. While the three categories of conditions may need to be refined over time, as new evidence of the therapeutic effectiveness of cannabis emerges, I find the approach to be satisfactory for several reasons. Not only is marijuana a novel, relatively untested medicine, but the state's interest in restricting diversion to the illicit drug trade is legitimate. Moreover, the Court of Appeal suggested in *Parker, supra* at para. 188 that:

> It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marijuana does not enter the illicit market.

[153] The dosage and specialist requirements in the *Regulations* are also consistent with the principles of fundamental justice. While self-titration might be a viable means of administering marijuana, I agree with the government's submission that limiting diversion and upholding domestic and international drug control laws may require there to be some minimum degree of certainty about the quantities of marijuana that individuals are authorized to possess, produce and store. Should marijuana users require a higher daily dosage of marijuana than they have been authorized to use, they can always return and discuss this with their physician(s), as is the case for other prescribed medicines.

[154] Likewise, it is not inconsistent with the principles of fundamental justice for Health Canada to require the intervention of highly educated specialist physicians in authorizing the use of novel, unapproved treatments, despite the delay this might add to the application process. The medical use of marijuana in this case is distinguishable from the medical procedure at issue in *Morgentaler* because of the unapproved and relatively untested nature of this drug. Furthermore, as noted above, the degree of medical support required to obtain an authorization (physician, specialist or two specialists) is proportional to the gravity of the applicant's condition.

[155] After considering the evidence before me, I do not find the application process, specialist requirement and daily dosage provisions to be either arbitrary or unrelated to the objectives of the *MMAR*. Nor are these requirements creating an illusory remedy in the sense that ATPs, PPLs and DPLs are "practically unavailable" to medically qualified applicants. Despite the concerns of medical and physicians' associations, it is clear that individual physicians who feel comfortable authorizing therapeutic use of marijuana are doing so. That not all physicians will feel comfortable with signing off on an unapproved medicine is obvious. But physician involvement, as the Court of Appeal noted above, is the traditional way such decisions are made, and it is also the way these decisions are made under the Special Access Program. This Health Canada program permits physicians to access unapproved drugs for patients with serious or life-threatening conditions when conventional remedies have failed, are unsuitable, or unavailable.

[156] Health Canada's figures on the number of authorizations granted also demonstrate that many applicants, suffering from a variety of Category 1, 2, and 3 ailments, are in fact succeeding in obtaining ATPs. And once an applicant has obtained an ATP, there are few restrictions on applying for a PPL or DPL.

[157] The principles of fundamental justice do not hold Parliament or the government to a standard of perfection. While the application process specified by the *MMAR* might be cumbersome, and the specialist requirements onerous for many seriously ill applicants, especially in light of the medical associations' stance, I do not find these aspects of the *MMAR* to

be inconsistent with the principles of fundamental justice. As Chief Justice Dickson noted in the *Prostitution Reference, supra* at 1142:

> The issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system. […] The principles of fundamental justice are not designed to ensure that the optimal legislation is enacted.

The Source and Supply Problem

[158] On the question of how ATP and production licence holders are supposed to obtain a licit source of cannabis under the *MMAR*, however, I find the applicants' s. 7 rights to be infringed in a manner inconsistent with the principles of fundamental justice. They have a constitutional right which they cannot benefit from because the *Regulations* do not provide for a legal source of dried marijuana, marijuana plants or marijuana seeds, and these forms of cannabis are all prohibited substances under the *CDSA* and *NCR* (See *Hunter, supra*). This is highly problematic, and inconsistent with the principles of fundamental justice for several reasons.

[159] First, and most fundamentally, there is the problem of the "first seed." To put matters simply, the prohibition on cannabis and cannabis seeds means that individuals who obtain production licences have nowhere to turn to start growing their own marijuana. There is simply no way for individuals to obtain marijuana seeds in Canada under existing laws, given the Minister's inaction under s. 51 of the *MMAR*. As a result, the regulatory system set in place by the *MMAR* to allow people with a demonstrated medical need to obtain marijuana simply cannot work without relying on criminal conduct and lax law enforcement. While individuals with the ATPs or production licences may not be charged with trafficking, because they have regulatory permission to possess cannabis, the "absurdity" of their situation is clear:

> [I]n order to obtain the product, that individual is required to participate in an illegal act, since whoever sells the exempted person either the raw cannabis marihuana or the seeds to grow their own, does so in breach of s. 5(2) of the *CDSA*. (*Krieger, supra* at para. 29).

[160] To my mind, this aspect of the scheme offends the basic tenets of our legal system. It is inconsistent with the principles of fundamental justice to deny a legal source of marijuana to people who have been granted ATPs and licences to produce. Quite simply, it does not lie in the government's mouth to ask people to consort with criminals to access their constitutional rights. As Justice Acton stated with respect to the old s. 56 exemption regime in *Krieger, supra* at para. 30:

> [T]hat substance must be something that is available to the individual by legal means at the time the exemption is granted. As a s. 56 exemption has no practical purpose without a legal source for cannabis marihuana, s. 56 cannot serve to delineate the boundaries of the Applicant's s. 7 rights or to justify violation of those boundaries.

[161] In a sense, it is even incoherent for the government to allow medically qualified individuals to obtain ATPs without obtaining either a PPL or DPL. Once again, granting an individual immunity from prosecution for possessing marijuana but not envisaging any legal means for that person to obtain his or her drug is highly problematic. Tacitly, the government is relying on a criminal, black market supply of marijuana to fill the individual's medical needs. Indeed, as several of the applicants attest in their affidavits, practically speaking they have no choice but to turn to the black market to obtain their medicine. That the government relies on the criminal underworld in this manner is rather surprising when it has declared that the goals of the *MMAR* and its interlocking regulatory regime include controlling the illicit drug trade and upholding Canada's international narcotics control obligations.

[162] In the recent case of *R. c. St.-Maurice et Néron*, (19 December 2002), Montreal 500-01-001826-004 (C.Q.), Justice Cadieux of the Court of Québec similarly noted the following:

> Comme le juge Acton dans l'affaire Krieger, on peut s'interroger quant au caractère raisonnable d'un système d'exemptions permettant de posséder et cultiver de la marihuana alors qu'il n'existe pas de source légale au Canada, de laquelle le titulaire de l'exemption peut obtenir la marihuana séchée pour la consommer ou des graines de semences viables pour la cultiver.
>
> Like Justice Acton in the Krieger case, we may ask ourselves about the reasonableness of an exemption system which permits the possession and cultivation of marijuana when there is no legal source in Canada by means of which the holder of an exemption may obtain dried marijuana to consume or viable seeds to grow [translated by author].

[163] As a result, production licences offer the applicants an illusory remedy which can only be accessed through reliance on black market distributors. Despite ostensibly being concerned with avoiding diversion and illegal use of marijuana, to say nothing of conforming with international drug conventions, the *MMAR* force medical marijuana users into the arms of suppliers whom the state has deemed criminal drug dealers. This position is untenable, and is certainly not consistent with the principles of fundamental justice.

[164] Several of the applicants further argue that they are having great difficulty growing their own marijuana despite having a PPL. They note that it takes a great deal of effort and expertise to successfully grow marijuana. As counsel put it, "it's not like growing tomatoes." For instance, indoor cultivation requires careful control of light, temperature, humidity, soil conditions, and a sanitary growing space, while outdoor growing is difficult and unreliable due to weather conditions and pollen contamination. Preparing the plant for consumption also requires skill to flush out chemicals. Some of the applicants have thus tried but not succeeded in growing cannabis because they lack the requisite skill or knowledge, or have simply been unlucky.

[165] Other applicants are unable to grow because of the effort involved and the state of their health. Ms. Stultz-Giffin, for instance, has multiple sclerosis. She is too ill and too weak to cultivate her own cannabis with a PPL. Anticipating the respondent's argument, she also claims

that a DPL is not a viable option for her. Not only is her husband ineligible for a DPL, because he was convicted of growing marijuana for her in 1999, but she lives on an isolated farm. There is simply no one nearby upon whom she could rely to cultivate marijuana for her and provide her with a continuous supply.

[166] This case is thus distinguishable from *Wakeford, supra*, because some of the applicants have testified that they cannot successfully grow marijuana and have had to purchase their cannabis medicine on the black market. In doing so, they expose themselves to marijuana which may be contaminated with adulterants and mould.

[167] The respondent's assertion with respect to DPLs also assumes that people will indeed be willing to come forward to grow for ATP holders. In light of the record-keeping obligations and inspection provisions which apply to marijuana producers under *MMAR*, I do not find it obvious that volunteers will be lining up to assist medially needy ATP holders. Mr. Hitzig's testimony in relation to the home invasions and assaults he has suffered while growing marijuana also speaks to the fears most law-abiding individuals would have in involving themselves with marijuana production (legal or not). That some seriously ill individuals with PPLs might also not want to face further health risks of this sort goes without saying.

[168] To sum up, regulations which allow for the possession of marijuana without providing for any legal means to obtain this drug, to say nothing of maintaining access to a reliable supply of it on an ongoing basis, violate the applicants' s. 7 rights in a manner inconsistent with the principles of fundamental justice. While it is not surprising that the *MMAR* focus on the possession aspect of medical marijuana use at issue in *Parker*, the applicants' right to use marijuana therapeutically must be understood purposively. Marijuana possession and production rights offer little relief to seriously ill individuals when there is no legal and safe way to take advantage of them.

SECTION 1 ANALYSIS

[169] Section 1 of the *Charter* states:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[170] This section permits legislative provisions which would otherwise breach *Charter* rights to be found constitutional. As when considering the principles of fundamental justice, the inquiry at this stage involves some consideration of whether the "law strikes the right balance between the accused's interests and the interests of society." (*Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 152). But the justification analysis under s. 1, as noted above, goes beyond the internal limitations proscribed by the principles of fundamental justice and incorporates broader values, namely those of a free and democratic society. (See *Mills, supra*). Section 1 analysis thus involves two parts.

[171] First, the party seeking to uphold the provision must demonstrate that its objective is "of sufficient importance to warrant overriding a constitutionally protected right or freedom." (*Big M, supra* at 352).

[172] Second, the legislative means chosen in overriding that right or freedom must be proportional to the ends sought: they must be reasonable and demonstrably justified in a free and democratic society. In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Supreme Court of Canada laid down three considerations which the court later described in *Morgentaler, supra* at 73, as "typically useful" in making this proportionality inquiry. First, the means chosen must be rationally connected to pressing and substantial legislative purpose. Secondly, the legislative means should impair the relevant right or freedom as minimally as possible. Thirdly, there must be a proportionality between the effects of the measure and its objective, such that the individual costs of the rights deprivation do not outweigh the collective benefit of the measure. The deleterious and salutary effects of the measures must be proportional. See *R. v. Edwards Books and Art*, [1986] 2 S.C.R. 713 at 768 and *Dagenais v. CBC*, [1994] 3 S.C.R. 835 at 889.

[173] In the case at bar, the parties mainly dealt with balancing societal and individual interests in their submissions relating to the principles of fundamental justice. Having found the *MMAR* to violate the applicants' s. 7 rights, I will only briefly deal with the respondent's s. 1 arguments.

[174] I do not find the *MMAR* to be saved under s. 1, regardless of the broader considerations to be examined at this stage of the analysis. While I agree with the respondent that the *Regulations* target pressing and substantial objectives – namely securing access to marijuana for seriously ill individuals while ensuring the public health and safety of Canadians, upholding existing drug control measures, and guarding against misuse, abuse, and diversion – the means chosen by the government to achieve these goals are not proportional. This is the case even if the *MMAR* are considered a temporary framework pending further research and the commercialization of marijuana as a medicine under the *FDA* and *FDR* – a process the respondent notes can take up to 15 years.

[175] In particular, the lack of a licit source and supply of marijuana in the *MMAR* makes little sense when it comes to ensuring access, public health and narcotics control. Access is compromised because there is simply no legal way for individuals with production licences to obtain the marijuana seeds required to grow marijuana. Even if it were somehow acceptable for individuals to rely on black market supplies to exercise their constitutional rights, the unreliability of this supply cannot be ignored.

[176] Regarding public health, I find it hard to see this goal being served when seriously ill individuals are forced to rely on black market drug dealers to supply themselves with dried marijuana and seeds. As several of the affidavits sworn in connection with this application explain, one never knows exactly what one is getting when marijuana is bought on the black market. Mould, chemicals and other adulterants are often present. Consorting with criminal drug dealers also strikes me as a relatively risky means of obtaining medicine. And being forced to grow marijuana with a production licence may expose the applicants to home invasion and assault, crimes Mr. Hitzig swears to have suffered in his affidavit.

[177] Forcing medically needy individuals to rely on black market marijuana is also obviously inconsistent with the narcotics control objectives of the *MMAR*. Many applicants end up in this position because they are unable to produce sufficient marijuana on their own, or have not applied for a production licence (PPL or DPL). More fundamentally, even holders of production licences must turn to an illegal supplier to obtain seeds to grow their marijuana medicine. In short, because they do not provide for a legal source or supply of cannabis, the *MMAR* actually foster the criminal conduct they are supposed to be working against, in conjunction with the *CDSA* and *NCR*.

[178] For these reasons, I find that the provisions of the *MMAR* do not achieve their stated goal. The means chosen by Health Canada cannot be considered rationally connected to the objectives of the *MMAR* and related drug control and drug approval laws. Nor does the lack of provision for a legal source or supply minimally impair the applicants' rights.

REMEDY

[179] Having found the *MMAR* to be unconstitutional in not allowing seriously ill Canadians to use marijuana because there is no legal source or supply of the drug, the question of what remedy to award the applicants now arises. The applicants seek a mandatory order under s. 24(1) of the *Charter* compelling the government to distribute the medical marijuana which has been grown and harvested by PPS to the applicants and other medically needy individuals. The applicants submit that this supply is presently available for distribution and is far safer in quality than marijuana acquired on the black market.

[180] The respondent submits that a mandatory order is not appropriate and just for several reasons. Most of these relate to the fundamental constitutional principle of the separation of powers. As the Supreme Court noted in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 96:

> A declaration, as opposed to some kind of injunctive relief, is the appropriate remedy in this case because there are myriad options available to the government that may rectify the unconstitutionality of the current system. It is not this Court's role to dictate how this is to be accomplished.

[181] In light of the complex balancing of policy considerations underlying the *MMAR*, the government submits that the injunctive relief requested by the applicants amounts to a "dramatic intrusion into the social policy and legislative sphere of government that is unwarranted."

[182] In counsel's oral submissions, a further, very practical, point of contention emerged regarding the applicant's proposed remedy. The applicants and the respondent are at odds over the quantity of available marijuana in the hands of the government or PPS. Mr. Young submitted that the stockpile amounts to 400 kg and would supply 115 people with medicine for one and a half years. Mr. Frankel, on the other hand, estimated that there is presently only 200 kg available and that this amount would be used up in a week's time.

[183] This dispute over the certainty of the supply currently in the government's hands reinforces my belief that injunctive relief is not the appropriate remedy in this situation. The problem the applicants face is with the *MMAR* themselves, not with government action under the *Regulations* per se. The *MMAR* are underinclusive in not ensuring that seriously ill Canadians who have a right to use marijuana have some way of legally obtaining that drug. The appropriate remedy is thus one granted under s. 52(1) of the *Constitution Act, 1982*, which states:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

[184] When faced with legislation that is partially unconstitutional due to its underinclusiveness, lower courts are bound by the Supreme Court of Canada's decision in *Schachter v. Canada*, [1992] 2 S.C.R. 689 [*Schachter*], to consider whether reading in is an appropriate remedy to repair "the extent of the inconsistency." As Chief Justice Lamer noted in that case at 718, however, "[s]everance or reading in will be warranted only in the clearest of cases."

[185] After considering the test set out in *Schachter, supra* at 718, I find reading in a legal form of access to marijuana to be an inappropriate remedy in this case. In light of the careful balancing of policy considerations which have gone into formulating the *MMAR* and interlocking drug laws, and the numerous options which remain open to the government to remedy the lack of a legal source and supply of marijuana, reading in would constitute an unacceptable intrusion into the legislative domain.

[186] The respondent may, for instance, wish to continue to utilize PPS or some other entity to grow medical marijuana and provide a legal source of seeds. As far as the distribution of marijuana to qualified users is concerned, the government might consider creating properly regulated distribution centres or licensing compassion clubs, as proposed in the recent *Report of the Senate Special Committee on Illegal Drugs: Cannabis*. As the applicants suggest, the Special Access Program may also offer a mechanism for distributing a safe and reliable supply of medical marijuana.

[187] But ultimately it is up to the government – and not the courts – to decide how to create an appropriate legal source and supply of marijuana. The Court of Appeal suggested this at para. 204 of *Parker, supra* where it noted that the source problem "raises issues that can only be adequately addressed by Parliament."

[188] In order to permit the respondent the "flexibility necessary to fashion a response which is suited to the circumstances," then, the appropriate relief in this application is declaratory in nature: *Mahé v. Alberta* (1990), 68 D.L.R. (4th) 69 at 106 (S.C.C.).

[189] In *Schachter, supra* at 719, the Supreme Court of Canada held that suspending a declaration of invalidity would be appropriate when:

> the legislation was deemed unconstitutional because of underinclusiveness rather than overbreadth, and therefore striking down the legislation would result in the deprivation of benefits from deserving persons without thereby benefitting the individual whose rights have been violated.

[190] This appears to be the case with declaring the *MMAR* unconstitutional. The government must be granted time to fix the *MMAR* or otherwise provide for a legal source and supply of the drug the *MMAR* authorize seriously ill individuals to possess and produce, consistent with their s. 7 rights.

[191] Accordingly, there will be an order declaring the *MMAR* invalid and this order will be suspended for 6 months.

_____

LEDERMAN J.

Released: January 9, 2003

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02-CV-226629CM1
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DATE: 20030109

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

WARREN HITZIG, ALISON MYRDEN, MARY-LYNNE CHAMNEY, CATHERINE DEVRIES, JARI DVORAK, STEPHEN VAN DE KEMP, DEBORAH ANNE STULTZ-GIFFIN & MARCO RENDA

Applicants

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

TERRANCE PARKER

Applicant

- and -

HER MAJESTY THE QUEEN

Respondent

AND BETWEEN:

JOHN C. TURMEL AND J.J. MARC PAQUETTE

Applicants

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

LEDERMAN J.

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