MEDICAL MARIJUANA

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COURT OF APPEAL FOR ONTARIO

LASKIN, ROSENBERG AND MACPHERSON JJ.A.

B E T W E E N:	)	
	)	
JAMES WAKEFORD	)	**Alan Young, Louis Sokolov and Laurel Baig, for the appellant**
	)	
Appellant	)	
	)	
- and -	)	

	)	
HER MAJESTY THE QUEEN	)	**Roslyn J. Levine Q.C. and**
(IN THE RIGHT OF CANADA)	)	**Lara M. Speirs, for the**
		respondent
	)	
Respondent	)	
	)	
	)	**HEARD: March 2, 2001**
	)	**Additional written submissions:**
	)	**November 5, 2001**

On appeal from the judgment of Justice Blenus Wright dated May 1, 2000.

ROSENBERG and MACPHERSON JJ.A.:

[1] The appellant suffers from AIDS and requires marihuana for medicinal purposes to combat wasting syndrome and chemotherapy-induced nausea. For years, the appellant has fought for the right to possess marihuana legally. He believes that officials in the federal Ministry of Health have not been sufficiently attentive to his need for this medication. After an application to LaForme J., which resulted in an order for a temporary constitutional exemption from the operation of the possession and cultivation provisions of the *Controlled Drugs and Substances Act*, the Minister of Health gave the appellant an exemption under s. 56 of the Act. The appellant is not satisfied with this exemption. He believes it is too narrow because it does not exempt his caregivers from liability. He also believes that the federal government has a duty to make medicinal marihuana available to him, and other very sick people, and that the government is dragging its feet.

[2] Accordingly, the appellant applied to the Superior Court of Justice for a declaration that his rights under s. 7 of the *Canadian Charter of Rights and Freedoms*

have been infringed. Because of this infringement, the appellant sought an order under s. 24(1) of the *Charter* declaring that any individual serving as a caregiver to him are exempt from the operation of the possession, trafficking and cultivation provisions of the *Controlled Drugs and Substances Act* while engaged in assisting with his medicinal needs. This exemption was to be temporary, being operative until such time as the Government of Canada established a meaningful and effective programme for the distribution of marihuana to the appellant. Second, the appellant applied for an order directing the government to provide and make available to him a safe, secure and affordable supply of marihuana to be used for medicinal purposes.

[3] Wright J. dismissed the application. He held that the caregiver application was an attempt to review a decision by the Minister of Health under s. 56 of the *Controlled Drugs and Substances Act* and was therefore a matter within the exclusive jurisdiction of the Federal Court under s. 18(1) of the *Federal Court Act*.

[4] As to the application for an order that the government supply marihuana, the applications judge found that the appellant "has no real difficulty obtaining marihuana for medicinal purposes and is not dependent on Government to supply him with marihuana" and that he had not established a violation of his rights under s. 7 of the *Charter*. In any event, the applications judge found that any infringement of the appellant's rights to liberty and security of the person is in accordance with the principles of fundamental justice. Accordingly, the appellant had failed to establish any violation of s. 7 of the *Charter*.

[5] The court first heard the appeal from this disposition in March 2001. The court reserved its decision. Shortly after the oral hearing, the Minister of Health announced that draft regulations had been prepared to deal with the medicinal use of marihuana as a result of this court's decision in *R. v. Parker* (2000), 146 C.C.C. (3d) 193. The court invited the parties to adduce further evidence and make further written submissions concerning these regulations. The parties agreed that this material would be submitted after the regulations were finalized and promulgated at the end of July 2001. We have now received that material and it is summarized below.

[6] For the reasons that follow, we would dismiss this appeal.

THE FACTS
The evidence before the applications judge

[7] The appellant was first diagnosed as HIV-positive in 1989. Since that time he has undergone chemotherapy that produces debilitating side effects, including nausea and loss of appetite. The appellant has tried different medications to relieve these side effects but finds that smoking marihuana provides the best relief for him. He uses marihuana, under a physician's supervision, to combat nausea and to stimulate appetite. He believes that conventional medication has not been effective. In particular, Marinol, a synthetic and legally available version of one of the active ingredients in marihuana causes side effects that can be virtually unbearable.

[8] The appellant's medical condition is variable. At times it is stable; at times he is in crisis. Sometimes he must spend the entire day in bed. He is on a demanding drug regime that requires him to take 12 different medications and 7

nutritional supplements. In total, he takes more than 26 drug doses at intervals throughout the day. Since some of his medication must be taken in relation to food intake, the appellant's meal times are highly regimented.

[9] In May 1999, LaForme J. granted the appellant an interim constitutional exemption from the applicability and operation of ss. 4 and 7 of the *Controlled Drugs and Substances Act*. These sections prohibit the possession and production (cultivation) of various drugs including marihuana. The exemption was to remain in force until such time as the Minister of Health decided upon the appellant's application under s. 56 of the Act. Section 56 provides as follows:

56. The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

[10] On June 9, 1999, Health Canada granted an exemption to the appellant. The exemption allowed him to possess and cultivate marihuana for medicinal purposes. From the appellant's point of view this exemption is deficient in at least two respects. First, it only applies to his personal use and cultivation. At times, he is dependent upon caregivers to provide him with marihuana and to assist him in growing it. Second, while he successfully grew and harvested some marihuana in the summer of 1999, the appellant is still dependent upon the illicit market for supplies.

[11] The appellant states that some of his caregivers have been charged with trafficking in marihuana as a result of their attempts to assist him. Other caregivers have risked criminal prosecution to assist him in cultivating his crop of marihuana. The appellant states that it causes him grief and anxiety to put other persons in danger so that he may be supplied with medicine.

[12] Some explanation of the appellant's use of the term "caregivers" is required. The appellant applies the term to anyone who provides him with marihuana for medicinal use. As we understand it, this would include friends who obtain or grow marihuana for the appellant. However, from the appellant's point of view, the term would also include persons who deal in marihuana to the public generally. When they sell marihuana to the appellant, they fall within the caregiver category. The appellant estimated that approximately 50 individuals and organizations have assisted him by supplying marihuana to him.

[13] In cross-examination on his affidavit filed in support of the application, the appellant testified that he uses approximately one ounce of marihuana a month. He has been able to purchase this amount at a cost averaging $300 per ounce. The appellant conceded that he has been able to purchase the marihuana he needs from one source or another since he began using it in relation to his illness.

[14] As we have indicated, the appellant has, with assistance, cultivated a crop of marihuana. He did this on the balcony of his apartment in the summer of 1999. He does not believe that he is able to cultivate marihuana indoors. He lacks the funds and probably the expertise to mount a hydroponics operation.

[15] Almost from the time the appellant obtained his exemption, he has raised concerns with the Minister about its adequacy. He or his counsel have written to the Minister or his officials repeatedly to voice concerns that his caregivers risk prosecution. Thus, in a letter dated June 14, 1999 to the Minister of Health, the appellant wrote:

> The exemption falls far short of what I asked the courts to grant. You have not granted me access to marijuana and you have given no protection from criminal sanction for my caregivers.

[16] He has complained to the Minister and to the Minister of Justice that there is no policy to protect people from prosecution when they are supplying him and other s. 56 exemptees with marihuana. The Minister of Health and his officials have indicated that they are studying the issue of caregivers. The appellant believes that he has never obtained a satisfactory answer from the Minister's officials.

[17] The appellant has also raised with the Minister the lack of a safe supply of marihuana. The appellant has complained that the Ministry has failed to take advantage of legal sources of medicinal marihuana from the United Kingdom and the United States. At the time of the application, Health Canada had indicated that it was embarking on a process for the domestic cultivation of medicinal marihuana. It was unclear when this source would be available and whether the appellant would be eligible to receive it since the indication was the marihuana would only be used in clinical trials.

[18] At the conclusion of his cross-examination, the appellant made a statement that explains the purpose of his application. It begins as follows:

> Today is March 20, 2000. Years have gone by and the players have changed, but my case remains. I seek safe, clean, affordable, high-quality, Canadian marijuana for medical purposes. I seek compassionate access, and immunity for care-givers and care-providers.
>
> I now share this experience with twenty-one other Canadians that I know of, who are also Section 56 exemptees. We have been treated recklessly and cruelly by the Federal Government. We have been misled by the Health Minister's statements in

June 1999, when the Health Minister made a commitment to the Canadian public in a news release, and also in the House of Commons in March 1999.

[19] The June 1999 statement by the Health Minister referred to by the appellant would appear to be this, as quoted in a June 9, 1999 press release:

> Moving forward on a research plan that includes establishing a quality Canadian supply of medicinal marijuana and a process to access it is significant. The [Health Canada Research Plan for the Use of Marijuana for Medicinal Purposes] reflects compassion and will also help build the evidence base needed regarding the use of marijuana for medicinal purposes.

The fresh evidence adduced at the March 2001 hearing

[20] The appellant and the respondent sought to tender fresh evidence of events since the release of the applications judge's decision. We begin with a summary of the proposed fresh evidence from the appellant.

[21] Ten days after the release of Wright J.'s decision, the police advised the appellant that they had seized a shipment of medicinal marihuana that was to be delivered to him. Eventually, the Crown agreed to release the marihuana to the appellant.

[22] On June 9, 2000, Health Canada provided the appellant with a new s. 56 exemption. This exemption included stricter conditions on the amount of marihuana that the appellant could produce and possess at one time and was for only 6 months.

[23] Jari Dvorak is an exempted person under s. 56 of the Act. He is a member of the board of the Clinical Research Initiative of Toronto. The Initiative is developing the first clinical cannabis study in Canada. The study has been under development for over 2 years and has been plagued with delays. A particular problem is that Health Canada has been unable or unwilling to supply medicinal marihuana to be used in the study.

[24] Steven Bacon is another s. 56 exemptee. He and other exemptees banded together to form a co-operative to grow medicinal marihuana for themselves. The landlord discovered the crop and called the police. By the time the matter was sorted out, the crop had been lost.

[25] The respondent sought to introduce the affidavit of a person in the Communications Directorate of Health Canada. She attached several press releases and information sheets that indicate announcements from Health Canada about its attempts to establish a Canadian source for medicinal marihuana and the new regulatory approach for Canadians to access marihuana for medical purposes. In view of the new regulations discussed below, we will only summarize the materials

concerning a Canadian source for medicinal marihuana. In short, the Minister of Health announced in December 2000 that a contract had been awarded to a Canadian company to provide Health Canada with a source of affordable, quality, standardized marihuana to meet medical and research needs. It was estimated that it would take a year before this marihuana would be available.

The fresh evidence adduced following proclamation of the July 2001 regulations

[26] The *Marihuana Medical Access Regulations*, SOR 2001-227 came into force on July 30, 2001. The regulations define the circumstances in which patients and caregivers will be authorized by the Minister to possess and cultivate marihuana. We do not propose to summarize the effect of the regulations or their apparent operation. It is possible that cases will arise in the future where the validity or operation of the regulations will be in issue. Suffice it to say that the parties dispute the efficacy of the regulations in making medicinal marihuana available to patients who require it. At the time the affidavits were filed, no one had actual experience with the regulatory scheme. The affidavits were therefore somewhat speculative. The appellant's affidavits also raise questions about the government's plan to grow marihuana for medicinal use. The concerns raised in the appellant's affidavits may be summarized as follows:

(i) the caregiver exemption is too narrow because it only applies where the caregiver prepares the dosage of marihuana or physically assists the patient in ingesting the marihuana;

(ii) a person cannot be a designated-person producer if he or she has been found guilty, within the previous ten years, of a designated drug offence;

(iii) a designated-person producer cannot receive any payment for growing, nor grow marihuana for more than one authorized person;

(iv) the holder of a designated-person production license must maintain detailed records and these records are subject to inspection by an inspector who may enter any place, except a dwelling house, for that purpose;

(v) it may be difficult for some people who require marihuana for medicinal purposes to meet the requirement that they obtain a declaration from a specialist, especially since physician associations such as the Canadian Medical Association do

not support the regulations; one of the appellant's physician witnesses described the specialist requirement as a tremendous barrier to access to medicinal marihuana; the specialist requirement may be particularly problematic in rural areas;

(vi) physicians required to make the declaration in support of an application for an exemption may find it difficult to comply with the detailed requirements such as specifying the dosage;

(vii) while Prairie Plant Systems has been contracted by the government to grow marihuana, it appears that the marihuana will only be made available for medical research and clinical trials;

(viii) Health Canada is unable to say what the quality of the marihuana produced by Prairie Plant Systems will be, since the seeds are of unknown origin seized by police.

[27] The Crown respondent makes the following points in relation to the fresh evidence application:

(i) the appellant has not yet applied under the new regulations; his current s. 56 exemption has been renewed until April 2002;

(ii) the appellant's physician had no difficulty in ascertaining a dosage for the appellant nor in referring the appellant to a specialist.

THE REASONS OF THE APPLICATIONS JUDGE

[28] With respect to the application for a caregiver's exemption, the applications judge stated that it was not clear whether the Minister had dealt with this request. He also stated that there was no evidence that a named person who is a caregiver to the appellant had applied for an exemption. In any event, he held that anything to do with the Minister of Health granting or failing to grant exemptions under s. 56 of the *Controlled Drugs and Substances Act* concerns the administration of the Act. Therefore, any problem concerning the obtaining of a

caregiver exemption falls within the exclusive jurisdiction of the Federal Court of Canada.

[29] With respect to government supply of marihuana, the applications judge held that the Federal Court and the Superior Court of Justice had concurrent jurisdiction to consider this part of the application. He reasoned that since the Act does not deal with the supply of drugs by the Government, the issue did not concern the administration of the Act. He held, however, that since the applicant is allowed to possess and cultivate marihuana, his rights to liberty and security of the person were not infringed. Based on the record and particularly the cross-examination referred to above, the applications judge found that, "Mr. Wakeford has no real difficulty in obtaining marihuana for medicinal purposes and is not dependent on Government to supply him with marijuana".

[30] Even if there was an infringement of the appellant's right to liberty or security of the person, the applications judge found that this infringement was in accord with the principles of fundamental justice. He found as follows:

In my view the Government is acting reasonably in planning to have Mr. Wakeford and others participate in clinical trials rather than to supply marijuana directly to exemptees. Because we are all individuals the benefits of a particular medication for one person may be of no benefit to another and may even be harmful. There are risks to using marijuana.

[31] He also found that the appellant had not exhausted other possibilities that may be equally as effective as marihuana. The applications judge concluded as follows:

In view of the fact that the Government does not have, within Canada, a source of licit marijuana, and that the Government is moving at a reasonable pace to provide clinical trials of marijuana, and that Mr. Wakeford has no real difficulty in obtaining marijuana, and that marijuana is not the only avenue by which Mr. Wakeford may improve his quality of life, the principles of fundamental justice are not infringed by the failure of the Government to supply marijuana directly to Mr. Wakeford.

To be in accordance with the principles of fundamental justice does not mandate a perfect system of government which is required to meet the desires and demands of its citizens even in the area of personal health.

This is not the type of case in which the court should take the extraordinary step of requiring the Government to do anything, especially to require the Government to supply marijuana directly to the applicant.

[32] Accordingly, the applications judge dismissed this part of the application as well.

THE ISSUES

[33] This appeal raises the following issues:

1. Does the Federal Court, Trial Division have exclusive jurisdiction to grant a remedy for a constitutional infringement resulting from the lack of a caregiver exemption under or in the *Controlled Drugs and Substances Act*?

2. If not, has the applicant established an infringement of his rights under s. 7 of the *Charter* because of the lack of a caregiver exemption?

3. Has the appellant established an infringement of his s. 7 rights because the government has not made available to him a safe supply of marihuana for medicinal use?

ANALYSIS

1. Jurisdiction

[34] As we understand it, the jurisdiction issue applies only to the question of a caregiver exemption. We do not understand the respondent to disagree with the applications judge's holding that he had jurisdiction to determine the supply question. The issue arises because of s. 18 of the *Federal Court Act*, which provides as follows:

18. (1) Subject to section 28, the Trial Division has exclusive original jurisdiction

(a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[35] The respondent supports the applications judge's holding that the Federal Court has exclusive jurisdiction because the appellant's application concerned the administration of the *Controlled Drugs and Substances Act*.

[36] In order to deal with the jurisdiction issue, it is necessary to properly characterize the appellant's application concerning a caregiver exemption. The respondent characterizes the appellant's application as a challenge to "the Minister's administrative action and the exercise or the refusal to exercise his discretion pursuant to valid federal legislation, namely, s. 56 of the *CDSA*". Since the Minister or his delegates are acting as a "federal board, commission or other tribunal" within the meaning of s. 2 of the *Federal Court Act*, it follows, says the respondent, that the Federal Court has exclusive jurisdiction. In our view this is not a completely accurate characterization of the appellant's application.

[37] At the core of the appellant's application is the unavailability of a safe secure source of marihuana to treat the symptoms of his illness. Because of that unavailability the appellant claims he must rely upon caregivers. It is not apparent, however, that the appellant's claim is solely a disguised attempt to review the Minister's administration of s. 56 of the Act. The order requested is said to be pursuant to s. 24(1) of the *Charter* as follows:

Any individual serving in the capacity as a caregiver to the Appellant, who directly or indirectly commits an offence under s. 4 (possession), s. 5 (trafficking or possession for the purpose) and s. 7 (production), is exempt from the operation of these provisions if the offence was committed while engaged in assisting the Appellant with his medical needs. This exemption is operative until such time as the Government of Canada establishes a meaningful and effective program for the distribution of cannabis sativa to the Appellant.

[38] Since the appellant invokes s. 24(1) of the *Charter*, he must first establish a violation of his rights. In this case, the appellant alleges a violation of s. 7 of the Charter. Although not expressly sought as part of the order requested it is implicit that the appellant also seeks a declaration that his rights under s. 7 have been violated. This s. 7 violation arguably has three sources:

(1) The failure of the *Controlled Drugs and Substances Act* to provide an exemption for caregivers to the appellant;

(2) The failure of the Minister of Health to provide the appellant a sufficiently broad exemption under s. 56 to protect his caregivers; or

(3) The failure of the Minister of Health to provide to the appellant's caregivers a s. 56 exemption.

[39] While we will deal with each in turn, it is our view that the first source of the s. 7 violation is not a matter exclusively within the jurisdiction of the Federal Court.

(i) The Act does not exempt caregivers

[40] We are of the view that the provincial superior court had jurisdiction to consider whether the *Controlled Drugs and Substances Act* violates the appellant's s. 7 rights because it does not provide a caregiver exemption. While administrative action or, more correctly, inaction led the appellant to the courts, he does not in this aspect of the case seek a review of such action. He claims that the Act in its operation violates his rights. In our view, the holding in *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.* (1983), 146 D.L.R. (3rd) 202 (S.C.C.), although arising in a division of powers context, can apply to this case. In that case Gonthier J. relied upon *A.-G. Can. et al. v. Law Society of British Columbia et al.; Jabour v. Law Society of British Columbia et al.* (1982), 137 D.L.R. (3d) 1 (S.C.C.), where the Court held that s. 18 of the *Federal Court Act* could not oust the inherent jurisdiction of the provincial superior court to declare a federal enactment *ultra vires*. As to the argument that the *Law Society* case did not apply, Gonthier J. said the following at p. 213:

… I do not see any difference in this context between constitutionality and applicability: both relate to constitutional jurisdiction. In the first instance, a provision is *ultra vires* and must be set aside. In the second, a provision which is otherwise valid and applicable within the jurisdictional ambit of the Legislature which adopted it, becomes inapplicable when it trenches on the field of jurisdiction of the other legislative power. Parliament has a perfect right to enact that the superintending and reforming power over federal agencies, acting in the administration of the laws of Canada, understood in the sense defined above, will be

exercised exclusively by the Federal Court, a court created for the better administration of those laws. However, it cannot confer such an exclusive power on the Federal Court when what is involved is no longer the administration of a law of Canada, but the interpretation and application of the Constitution. [Emphasis added.]

[41] The *Law Society* and *Paul L'Anglais Inc.* cases were applied by the British Columbia Court of Appeal in the *Charter* context in *Lavers v. British Columbia (Minister of Finance*) (1989), 64 D.L.R. (4th) 193. As the court pointed out, the *Charter of Rights and Freedoms* is as much a part of the Constitution as are the division of powers sections of the *Constitution Act, 1867*. Speaking for a five-person court on this issue, Lambert J.A. found at p. 201 that the holdings in those cases are not confined to cases of total unconstitutionality as opposed to cases of the unconstitutional application of otherwise constitutional legislation. Thus, the superior court has jurisdiction to grant a declaration on *Charter* grounds that a federal enactment violates a party's rights and to grant an appropriate remedy. That said, it might well be that the provincial superior court and the Federal Court have concurrent jurisdiction to consider this aspect of the application. Whether the applications judge should have declined jurisdiction therefore depends upon application of the factors discussed in *Reza v. Canada* (1994), 116 D.L.R. (4th) 61 (S.C.C.) at 68:

The Ontario Court (General Division) and the Federal Court had concurrent jurisdiction to hear the respondent's application but, under s. 106 of the *Courts of Justice Act*, any judge of the General Division had a discretion to stay the proceedings. Ferrier J. properly exercised his discretion on the basis that Parliament had created a comprehensive scheme of review of immigration matters and the Federal Court was an effective and appropriate forum. In view of our decision in *Kourtessis v. M.N.R.* (1993), 102 D.L.R. (4th) 456, 81 C.C.C. (3d) 286, [1993] 2 S.C.R. 53, this was the correct approach. [Emphasis added.]

[42] In *Kourtessis v. M.N.R.* (1993), 102 D.L.R. (4th) 456 (S.C.C.) La Forest J. said the following at pp. 476-77 concerning the court's discretion to refuse to grant declaratory relief:

It by no means follows, however, that the declaratory judgment should be widely used as a separate collateral procedure to, in effect, create an automatic right of

appeal where Parliament has, for sound policy reasons, refused to do so. It must be remembered that the inherent power of the courts to declare laws invalid is a discretionary one, and that discretion must be used on a proper basis. If the power is routinely used whenever any particular step in a criminal proceeding is thought to be unconstitutional, it would result in bringing through the back door all the problems Parliament sought to avoid by restricting appeals. The policy concern against allowing declarations, even of unconstitutionality, as a separate and overriding procedure is that they will, in many cases, result in undesirable procedural overlap and delay. As long as a reasonably effective procedure exists for the consideration of constitutional challenges, I fail to see why another procedure must be provided. [Emphasis added.]

[43] Since the applications judge did not purport to exercise his discretion, it is for this court to make that determination. In our view, this would have been a proper case to assume jurisdiction. This is not a case like *Reza* where Parliament has established a comprehensive scheme of review of proceedings in which the Federal Court has a particular expertise. Although this declaration is brought under the civil rules, it concerns the application of the criminal law, a matter over which the provincial superior courts have the expertise. Finally, at least at the time of the application, the appellant had not been charged with any offence under the *Controlled Drugs and Substances Act*. Thus, he could not bring his challenge to the application of the legislation in the criminal context as was done in *R. v. Parker* (2000), 49 O.R. (3d) 482 (C.A.).

(ii) The adequacy of the appellant's s. 56 exemption

[44] In our view, the failure of the Minister to provide the appellant a sufficiently broad exemption under s. 56 to protect his caregivers is not properly before this court. The adequacy of the appellant's s. 56 exemption would involve judicial review of acts of the Minister and falls squarely within the exclusive jurisdiction of the Federal Court.

(iii) The failure to exempt caregivers under s. 56

[45] The appellant is seeking a personal remedy under s. 24(1) of the *Charter*. He must therefore show that his rights have been infringed. Assuming that the proper interpretation of the events leading up to this application is that the Minister refused to exempt the appellant's caregivers under s. 56, this too concerns an attempt to judicially review the actions of the Minister. As such, it is a matter within the exclusive jurisdiction of the Federal Court.

2. Violation of s. 7 because of a lack of caregiver exemption

[46] The context in which this case arises is important. Unlike the accused in *Parker*, the appellant does not bring his constitutional case to the courts as a defence to a criminal prosecution. Further, as indicated, he has not challenged the constitutionality of s. 56 of the Act, which provides a mechanism for obtaining an exemption from the provisions of the Act. Nor has the appellant challenged ss. 5 and 7 of the Act, which make it an offence to traffic in or possess marihuana for the purpose of trafficking and to produce marihuana. Finally, this constitutional challenge does not arise out of a prosecution of one of the appellant's caregivers for supplying marihuana to the appellant.

[47] The appellant claims that his liberty and security interests are infringed because the state has denied him access to a safe, clean and affordable source of medicinal marihuana. This infringement manifests itself in two ways. First, the government has failed to provide a meaningful exemption for the appellant's caregivers in circumstances where the appellant must rely upon such caregivers for his medicinal marihuana. Second the government itself has not provided him with medicinal marihuana. We deal with the first issue in this part of our reasons.

[48] It was possible that the new regulations might have resolved this issue. However, as our review of the fresh evidence shows, the parties dispute the impact and value of the new scheme in respect of caregivers. We decline to admit the post-July fresh evidence. The appellant's material does not concern the impact of the regulations upon him. The affiants have raised important questions about the efficacy of the regulations but at the time the fresh evidence was prepared the operation of the regulations was entirely hypothetical. The material does not show that the appellant or his caregivers have applied for exemptions. In short, the appellant has not yet demonstrated that the regulations as applied to him have an adverse impact upon his liberty or security of the person. Consideration of the new regulations in the context of this case is premature: *Public School Boards' Assn. of Alberta v. Alberta (Attorney General)*, [2000] 2 S.C.R. 409 at 436. Put another way in terms of the test for admission of fresh evidence, this evidence if admitted could not be expected to have affected the result. See *R. v. Palmer*, [1980] 1 S.C.R. 759 at 775.

[49] We return to the state of the record when the application was made before Wright J. As we have indicated, the superior court had jurisdiction on this aspect of the case on the theory that the appellant's rights were violated because the Act does not provide an exemption for caregivers to the appellant. The other issues about the sufficiency of the appellant's own s. 56 exemption or the Minister's failure to grant exemptions to the appellant's caregivers concern review of administrative action over which the Federal Court has exclusive jurisdiction.

[50] On its face, s. 56 is capable of providing a mechanism to exempt caregivers from the operation of the trafficking provisions. The Minister may exempt "any person or class of persons or any controlled substance" from the application of any or all of the provisions of the Act "if, in the opinion of the Minister, the exemption is necessary for a medical … purpose". If the appellant's caregivers have been unable to obtain an exemption, it is not because the Act is inadequate, it is because they have not sought an exemption or the Minister has refused to give one. The appellant's rights are not infringed by the state because someone who

might have applied for an exemption failed to do so. The Minister's refusal to grant an exemption to a caregiver might arguably infringe the appellant's s. 7 rights, if the appellant could establish a real dependency upon such a person. Alternatively, the decision might be reviewable on administrative law grounds. That would, however, involve the review of a specific act of the Minister, a matter for the Federal Court. See *Beaudoin v. Canada (Attorney General)* (2001), 157 C.C.C. (3d) 378 (F.C.T.D.).

[51] The provincial superior court had jurisdiction to consider the appellant's application for a declaration if he could establish that the provisions of the *Controlled Drugs and Substances Act* violated his rights. He has not shown that s. 56 itself violates his rights and therefore has not shown that he is entitled to the remedy he seeks from the provincial superior court.

[52] Alternatively, the appellant's case could be framed on the basis that s. 5 (trafficking) and s. 7 (production) violate the appellant's rights because they do not exempt his caregivers. The difficulty with this theory is that since this application is not brought in the context of a criminal prosecution, he cannot rely upon the broad standing rules in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. He must show that his own rights have been violated in order to obtain a s. 24(1) remedy; he cannot rely upon the possible unconstitutional application of these provisions to someone else. The only claim of direct threat to his liberty or security is the appellant's claim that he suffers psychological trauma because his caregivers are exposed to possible criminal prosecution. In *R. v. Morgentaler* (1988), 37 C.C.C. (3d) 449 (S.C.C.) at 465 Dickson J. held as follows:

The case-law leads me to the conclusion 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. [Emphasis added.]

[53] Sopinka J. referred to this passage with approval in *Rodriguez v. British Columbia (Attorney General)* (1993), 85 C.C.C. (3d) 15 (S.C.C.) at 63. In our view, the appellant's anxiety about the plight of other persons exposed to criminal prosecution under valid legislation is probably not the kind of serious state-imposed psychological stress that could trigger s. 7. But, even if it were, the infringement of the appellant's security, in that context, would accord with the principles of fundamental justice. The prosecution of offenders under valid federal legislation in accordance with all of the criminal law's procedural and constitutional safeguards is consistent with the principles of fundamental justice.

[54] Can it be said that the failure of Parliament to exempt caregivers from ss. 5 and 7 of the Act violates the appellant's right to security of the person because it has the effect of depriving the appellant of a secure supply of medicinal marihuana? In *Operation Dismantle v. The Queen* (1985), 18 D.L.R. (4th) 481 (S.C.C.) at 487, Dickson J. said that "regardless of the basis upon which the appellants advance their claim for declaratory relief -- whether it be s. 24(1) of the *Charter*, s. 52 of the *Constitution Act, 1982*, or the common law -- they must at least be able to establish a threat of violation, if not an actual violation, of their rights under the Charter". On this point, the appellant is faced with the finding of fact by

the applications judge that "Mr. Wakeford has no real difficulty in obtaining marijuana for medicinal purposes". We cannot say that this finding is unreasonable. Although the fresh evidence tendered at the hearing of the appeal shows that on occasion the appellant has experienced some problems, that evidence does not undermine the applications judge's finding of fact, at least not to the point that it can be said the appellant's security of the person is threatened.

[55] It seems to us that the appellant's real complaint is that ss. 5 and 7 of the Act are unconstitutional because they do not exempt caregivers. But, that argument is not open to him absent a direct attack on those provisions, which would include notice to the Attorneys General in accordance with s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. *Eaton v. Brant County Board of Education* (1997), 142 D.L.R. (4th) 385 (S.C.C.) at 400:

The purpose of s. 109 is obvious. In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the *Charter* and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise. [Emphasis added.]

[56] That is the problem here. As the law now stands it is not possible to obtain a constitutional exemption to valid legislation: *R. v. Parker* at p. 267. [1] If the appellant wants to challenge the validity of the *Controlled Drugs and Substances Act* because it does not provide an adequate caregiver exemption he must do so directly. The government could then have the "fullest opportunity" to defend the legislation.

[57] That is not to say that the provincial trial courts would have no jurisdiction to consider an infringement of the appellant's s. 7 rights in a different context, particularly in the context of a prosecution of the appellant or his caregiver for an offence under ss. 4 and 5 of the Act. That, however, is not this case.

3. Source of Supply

[58] Similar reasoning applies with respect to the remedy sought by the appellant relating to a source of supply of marihuana.

[59] The appellant contends that government action towards obtaining a supply of medical marihuana for sick Canadians has been limited, slow, reluctant and ineffective.

[60] On March 3, 1999, the Minister stated in the House of Commons:

> [T]his government is aware that there are Canadians suffering, who have terminal illnesses, who believe that using medical marijuana can help ease their symptoms. We want to help. As a result, I have asked my officials to develop a plan that will include clinical trials for medical marijuana, appropriate guidelines for its medial use and *access to a safe supply of the drug*. [Emphasis added.]

In a letter to the appellant dated November 23, 1999, the Minister added a personal handwritten note stating: "And I'll work to have our own supply as soon as possible".

[61] The appellant submits that the respondent has done virtually nothing to fulfil these commitments. It has not taken sufficent steps to develop a domestic source of safe marihuana for patients and it has not attempted to obtain safe marihuana from reputable foreign sources such as the National Institute of Drug Abuse in the United States and GW Pharmaceuticals in the United Kingdom.

[62] Moreover, asserts the appellant, the *Marihuana Medical Access Regulations* which came into force on July 30, 2001, after the appeal hearing, do not improve the supply situation for Canadian patients. The appellant acknowledges that the respondent has contracted with a supplier (Prairie Plant Systems) to produce marihuana for research purposes, but contends that the regulations and contract, taken together, do not guarantee that exemptees will receive a safe supply of marihuana for medical purposes.

[63] We do not agree with these submissions. Again, we note that the context within which this case arises is not, like *Parker*, a criminal context where an accused asserts *Charter* s. 7 rights, and seeks *Charter* s. 24(1) remedies, as a defence to a criminal prosecution.

[64] We also decline to admit the post-July fresh evidence as it relates to the supply issue. The operation of the recently promulgated regulations and the results of the supply contract with Prairie Plant Systems are unknown with respect to the appellant. Accordingly, we proceed on the basis of the record that was before the applications judge.

[65] It is important to underline that what the appellant seeks on this issue is a *remedy* for a violation of his constitutional rights, specifically his *Charter* s.7 rights

of liberty and security of the person. Thus, before even considering whether the remedy sought by the appellant under s. 24(1) of the *Charter* – namely, government supply of marihuana to the appellant for medicinal purposes – is appropriate, it is first necessary to determine whether the appellant's s. 7 rights have been violated.

[66] We cannot say that the appellant has been deprived of his s. 7 rights. The crucial finding of fact by the applications judge on this issue was: "I find that Mr. Wakeford . . . is not dependent on Government to supply him with marijuana". On the record before him, this was a reasonable conclusion.

[67] However, the appellant contends that this finding should not conclude the analysis on the supply issue. He asserts that the problem is not only the *lack* of a supply of marihuana which is central to his argument on the caregiver issue. Rather, the problem is also the absence of a *safe* supply of a medical product essential for his health. The appellant asserts that compelling him to grow his own marihuana or to purchase it on the black market violates his s. 7 rights because neither of these options will necessarily provide him with the safe supply he needs. Limitations of time, physical energy, space, money and expertise are serious constraints on the option of personal growing of marihuana. The addition of adulterants or contaminants renders dangerous the option of purchasing marihuana on the black market.

[68] On the basis of the record before the applications judge, we cannot say that these were serious problems for the appellant when he brought his application in March 2000.

[69] In June 1999, the appellant was granted an exemption to grow marihuana under s. 56 of the *Controlled Drugs and Substances Act*. In the same month, he sent a letter to the Minister with this request:

I would like to apply for a grower's license or permit so I can supply not only my

needs but those of others as well. I would like to recruit a botanist and an

experienced grower to develop strains and pedigrees for clinical trials.

As well, in cross-examination on the affidavit the appellant swore in support of his application, the appellant said: "I have achieved a modicum of self-sufficiency through outdoor growing on the balcony". These developments and statements by the appellant, taken together, do not suggest that there was, in the appellant's mind, any linkage between personal growth of marihuana and unsafe supply.

[70] The same can be said, from the perspective of this appellant, on the black market supply component of this issue. In the cross-examination on his affidavit, he acknowledged that in the previous four years he had received marihuana from approximately 50 individuals and organizations and that it was always possible for him to obtain a supply. He was glowing in his description of his principal suppliers or caregivers. There was no hint in his description of his caregivers and their products that the appellant was concerned about impurities in their supply. Moreover, his answers also establish that he is knowledgeable and vigilant about contaminants:

A. Let me go back a step before the puffing. When one purchases marijuana, it's usually in a baggie. One of the first things one does - - or that I do is to check the appearance, how it looks. I check the smell – and that's before a sample, whether it's smoking a joint or a bowl.

. . . . .

A. The smell and the sight are two - - I watch for contaminants, mould, those sorts of risk elements.

. . . . .

A. The British Columbia marijuana that I've accessed has been fresher, has a fragrance, has a quality, a medicinal use that is superior to most of the marijuana I've experienced grown in other provinces.

[71] For these reasons, we conclude that the applications judge did not err by concluding that the appellant's s.7 rights were not violated by the respondent's failure to supply the appellant with a safe supply of marihuana. It is, therefore, not necessary to consider either the principles of the fundamental justice component of the s. 7 analysis or the appropriateness of making the type of positive order the appellant seeks under s. 24(1). In our view, in light of the major change in the legislative landscape represented by the new regulations, it would be unwise to comment on these issues in the context of the previous legislative regime.

DISPOSITION

[72] We would dismiss the appeal. In its supplementary factum filed after the promulgation of the new regulations, the respondent submits that this disposition could be qualified in this fashion: "on the understanding that the Appellant may make an application under the new Regulations". In our view, this is a fair and appropriate suggestion and we adopt it.

[73] The respondent does not seek its costs of the appeal. Accordingly, there should be no order as to costs.

RELEASED: Jan 17, 2002

Signed: "M. Rosenberg J.A."
"J.C. MacPherson J.A."

" I agree John Laskin
J.A."

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[1] We note that in *R. v. Latimer* (2001), 150 C.C.C. (3d) 129 (S.C.C.) the court seemed to leave open the possibility of a constitutional exemption if the application of valid legislation would result in the infliction of cruel and unusual punishment in violation of s. 12 of the *Charter*. Section 12 was not raised in this case.