MEDICAL MARIJUANA

** Unedited **

Indexed as:
Wakeford v. Canada

Between
James Wakeford, applicant, and
Her Majesty the Queen (In Right of Canada), respondent

[1998] O.J. No. 3522
File No. 98-CV-141110

Ontario Court of Justice (General Division)
Toronto, Ontario
LaForme J.

Heard: August 5 and 6, 1998.
Judgment: September 8, 1998.
(38 pp.)

Counsel:
A. Young, J. Kolman and Prof. B. Ryder, for the applicant.

LaFORME J.:—

INTRODUCTION:

¶ 1 This action concerns the use of marijuana to alleviate the pain and suffering caused by Acquired Immune Deficiency Syndrome ("AIDS"), a deadly serious health issue that has profoundly affected the entire world community. The Respondent ("Crown") alleges that the use of this drug comes into direct conflict with a deeply entrenched and well established law in this country. This alleged conflict requires this court to consider both the Crown's prohibitive argument, which relies on that law, and the Applicant's exclusionary argument, which relies on the Charter of Rights and Freedoms ("Charter") as well as on general grounds of compassion and sympathy. At issue is whether the current legislative regime that prohibits the possession and use of marijuana is capable of being excluded from application against an individual who is fatally ill and wishes to use it for medicinal purposes.

¶ 2 Generally speaking, then, Mr. Wakeford and the Crown approach the issue from patently different but nonetheless clearly articulated positions.

¶ 3 Several years ago James Wakeford, was diagnosed as having Human Immunodeficiency Virus ("HIV") and now lives with AIDS. He submits that, in these circumstances, his constitutionally protected rights under the Charter extend to his right to medicate himself in his manner of choice. He contends that the Controlled Drugs and Substances Act ("CDSA") [See Note 1 below] prohibits him from exercising his rights and he seeks, among other things, an exemption from its application.

¶ 4 The Crown, on the other hand, argues that Mr. Wakeford has not been deprived of his rights or, if he has, such deprivation is in accordance with the principles of fundamental justice. As well, the Crown takes the position that Mr. Wakeford has not established the requisite criteria to establish his claim that his rights have been infringed. Moreover, the Crown contends that the CDSA is valid legislation that allows for exemptions for medical purposes which, it says, Mr. Wakeford has not availed himself of.

OVERVIEW:

¶ 5 Mr. Wakeford was diagnosed as HIV positive in 1989 and since then has taken numerous forms of medication which leave him with debilitating side-effects above and beyond the medical problems which are part and parcel of his serious illness. He claims that one of the many debilitating side-effects is nausea and loss of appetite and, that to combat this his physician recommended use of Marinol, a drug which contains synthetic THC. THC is the active ingredient in cannabis sativa (marijuana). Marinol, however, only made Mr. Wakeford more ill, and he began using marijuana. He commenced using marijuana under a physician's supervision in 1996 as an anti-emetic (anti-nausea) and as an appetite stimulant. After taking marijuana, Mr. Wakeford discovered that, in addition to its positive effects in controlling his nausea and stimulating his appetite, marijuana also countered many of the side-effects experienced from taking other prescribed medication for his disease.

¶ 6 Cannabis sativa is a prohibited substance contained in Schedule II of the CDSA. Mr. Wakeford contends that the CDSA prohibition is a violation of his s. 7 Charter rights, namely, his guarantee to life, liberty and security of the person and to not be deprived of them except in accordance with the principles of fundamental justice. He argues that it does not accord with the principles of fundamental justice to criminalize a person suffering a serious chronic medical disability for possessing a vitally helpful substance not legally available to him in Canada.

¶ 7 Mr. Wakeford further argues that his s. 15 Charter rights are being violated in that he is denied equal benefit of the law because of his disability. In addition, he submits that the CDSA has an adverse discriminatory impact upon disabled individuals and those suffering from the devastating effects of HIV.

¶ 8 The remedy sought by Mr. Wakeford is a constitutional exemption permitting him to lawfully possess or cultivate marijuana for medicinal purposes. In addition, he seeks to compel the Government of Canada to provide him with a safe and secure supply of marijuana to be used for medicinal purposes. This, Mr. Wakeford argues,

is to protect him against having to deal with the otherwise criminal aspects of the sale and cultivation of marijuana (ie. through the so called "black market").

FACTUAL ISSUES:

¶ 9 My approach will be to examine each of the areas as they were argued by Mr. Wakeford and then responded to by the Crown: first the issues of life, liberty and security of the person; and second the issue of equality. Each of these will no doubt require some examination of the facts, especially as the Crown takes the position that Mr. Wakeford has not established the facts of his case.

¶ 10 The Crown's position in this regard has caused me some difficulty throughout since I initially took the view that this court need not wait for the perfect applicant, if indeed Mr. Wakeford is not, in order to address these significant issues. On many occasions during the hearing I asked counsel for the Crown whether their arguments and submissions would be the same if I were to accept all the evidence of Mr. Wakeford. And, while the answer was consistently "Yes", the most significant submissions continued to be in relation to Mr. Wakeford's credibility and good faith. For example, the Crown asserts that Mr. Wakeford's evidence is that since May 1998 he has ceased taking any AIDS medications and that he "feels wonderful"; he no longer suffers from nausea; and he's "eating like a pig", all without the use of any form of appetite stimulation. This evidence, the Crown submits, demonstrates that Mr. Wakeford's cause of action has ceased to exist.

¶ 11 I concluded at the outset of the hearing, and continue to believe, that the evidence of Mr. Wakeford must be considered in context. It is beyond dispute that Mr. Wakeford suffers from a debilitating and fatal disease. Medical evidence does not dispute his claim that certain medicines, and in particular Marinol, cause side-effects that, in some cases can be virtually unbearable. It is further beyond any doubt that Mr. Wakeford believes, and has found, that smoking marijuana assists him to treat his disease so as to alleviate his pain and suffering. In other words, at least to him, it assists him in "his" quality of life and in that regard I believe him. In my view, evidence beyond that is of limited, albeit important, significance in respect of the issues in this case.

¶ 12 Moreover, I am ever mindful of Sopinka J.'s comments in Rodiguez v. B.C. (A.G.):

On the one hand, the court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of legislation. On the other hand, the court has not only the power but the duty to deal with this question if it appears that the Charter has been violated. [See Note 2 below]

Note 2: (1993), 85 C.C.C. (3d) 15 at 65 (S.C.C.).

¶ 13 Thus, where the specific factual differences have a direct bearing upon the issue being examined, I will of course, make the appropriate findings and proceed accordingly. For the most part I will proceed with my examination in the context in which Mr. Wakeford forthrightly put it forward. Mr. Wakeford concedes that his medicinal use of marijuana will not save his life or necessarily prolong his life per

se. Nor does he argue that it is the only medication available to him. Rather, he asserts that using marijuana will enhance his quality of life and because of this, it is his medical treatment of choice. Finally, he recognizes that his position is in conflict with the CDSA, which he accepts, for purposes of this application, as valid legislation.

ANALYSIS:

¶ 14 Section 7 of the Charter protects three distinct rights, each of which gives rise to an independent examination if the particular right is infringed. Specifically, and for ease of reference, s. 7 provides:

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.

¶ 15 Any infringement or deprivation of any one of the three distinct rights must accord with the principles of fundamental justice if it is to survive judicial scrutiny. In this case, Mr. Wakeford submits that all three rights, namely, "life, liberty and security of the person", have been infringed by the provisions of the CDSA. Mr. Wakeford, to make his case, will be required to establish that: (i) he has been deprived of the specific right by the CDSA; and (ii) that such deprivation is contrary to the fundamental interests of justice.

¶ 16 At the outset I can dispose of the Crown's initial argument that Mr. Wakeford no longer has a cause of action. The Crown offers as evidence of this the fact that Mr. Wakeford has ceased taking any AIDS medications; that he no longer suffers from nausea and that he is "eating like a pig". With respect, the Crown's submission simply is not supported by the medical evidence, nor is it, in my opinion, the essence of Mr. Wakeford's claim.

¶ 17 The medical evidence is clear that Mr. Wakeford suffers from AIDS and that as a result he will endure, among many other things, severe nausea and weight loss. It is unanimous in concluding that maintaining weight is fundamental to combatting the interminable devastation of AIDS. Nausea and weight loss will arise, and generally be constant, from both the disease itself as well as from the massive and varying amounts of prescription medication Mr. Wakeford has taken and will be required to take to combat the disease. Constant nausea, if it causes vomiting, can be dangerous and even life threatening in that it would prevent a person from obtaining the benefits of other medications which have been previously ingested.

¶ 18 I accept that Mr. Wakeford's "vacation", to use his term, from the massive assortment of prescription medication he is normally required to take will, unfortunately, only be temporary. His nausea and loss of appetite will return, and no doubt all too soon I fear. It cannot be said that the medical condition that gives rise to his cause of action is any less evident today simply because he does not suffer from nausea and loss of appetite twenty-four hours of each day. That which brings him to court in the first place is not altered by any pause in the cruel effects of the disease. He continues to suffer from AIDS; he believes honestly that his quality of life is enhanced by smoking marijuana; and, he asserts, the CDSA prevents him from lawfully doing so.

¶ 19 I find that Mr. Wakeford's cause of action does indeed exist. Therefore, in this regard I shall examine the merits of his application first by determining whether

Mr. Wakeford's s. 7 Charter rights have been infringed, and, second by considering his s. 15 arguments.

¶ 20 Also, for purposes of this application, Mr. Wakeford concedes that the provisions of the CDSA are constitutionally sound. [See Note 3 below] Mr. Wakeford departs from those cases that assert a right to smoke marijuana generally or recreationally. His position is specific to marijuana use for medical and health reasons.

Note 3: It is to be noted that the decisions of R. v. Clay (1997), 9 C.R. (5th) 349 (Ont. Ct. Gen. Div.) and R. v. Caine, unreported decision of the British Columbia Provincial Court, April, 20, 1998, in which the courts upheld the constitutionality of the offences contained in the CDSA, are currently under appeal.

Section 7 - "Life":

¶ 21 As I noted earlier, Mr. Wakeford concedes that the medical use of marijuana will not in itself prolong his life and that the denial of access to medical marijuana does not thus directly deprive him of his protected interest in life. However, he submits his life interest is engaged because of two reasons: (i) if he cannot adequately control his nausea, his ability to take anti-viral medications necessary to sustain his life will be compromised and will amount to a deprivation of life; and (ii) his "right to life" includes "quality of life".

¶ 22 In Rodriguez Sopinka J. wrote that "Canada ... recognizes and applies the principle of the sanctity of life which is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail." [See Note 4 below] It is correct to say that there has been some recognition that quality of life considerations are encompassed in the principle of sanctity of life. To date, however, any judicial analysis of this principle has been directed toward the issue of a person's right to choose death over life. And, while I would not deny that an appropriate case may further examine the extent of this principle, Mr. Wakeford's case is not such a case.

Note 4: Supra, note 2 at 77.

¶ 23 By his own admission, marijuana is not necessary to prolong his life, and although he has compelling reasons to use it as a matter of choice, the operative consideration is precisely that - "choice". There are other prescription drugs, such as Marinol, which the medical evidence suggests should serve Mr. Wakeford's interest in combating his nausea. That, in my view, is the salient feature which removes it from engaging his life interest. I appreciate that Mr. Wakeford has genuine reasons and concerns in connection with his ability to take Marinol. However, his submissions are more appropriately considered in my analysis of the right of "security of the person".

¶ 24 I therefore find that the CDSA does not infringe Mr. Wakeford's right to life interest.

Section 7 - "Liberty":

¶ 25 The term "liberty" still remains to be authoritatively defined by our courts and differing opinions as to its meaning have been offered. There are decisions which have said that the type of liberty referred to in s. 7 means that which can be taken away or limited by a court or other agency on which the state confers coercive power to enforce its laws. In B.R. v. Children's Aid Society of Metropolitan Toronto Lamer C.J. says:

... the subject matter of s. 7 must be conduct of the state when the state calls on law enforcement officials to enforce and secure obedience to the law, or invokes the law to deprive a person of liberty through judges, magistrates, ministers, board members etc ... [See Note 5 below]

Note 5: [1995] 1 S.C.R. 315 at 340.

¶ 26 On the other hand, Justice LaForest (as he then was), also in B.R. v. Children's Aid, is of the opinion that "freedom" and "liberty" are words emanating from the same concept. He goes on to say that liberty does not mean unconstrained freedom or 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 importance. In R. v. Morgentaler, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being. [See Note 6 below]

Note 6: Ibid, at 368.

¶ 27 Support for this opinion is to be found in the decision of Dickson J. (as he then was) in R. v. Big M. Drug Mart Ltd. This broader conception of liberty allows that a person is free to do what one wishes subject to limitations necessary "to protect public safety, order, health, or morals ..." [See Note 7 below]

Note 7: [1985] 1 S.C.R. 295 at 336-7.

¶ 28 It is the combined opinions of LaForest J. in B.R. v. Children's Aid and Dickson J. in Big M. Drug Mart which I agree with and adopt. The question here, therefore, is: measured against the interests and objectives of the state as provided for in the CDSA, is Mr. Wakeford's personal autonomy of choosing marijuana for his medical treatment an instance of his guaranteed liberty interest?

¶ 29 Although it will, more often than not, be difficult to measure when a person's liberty interest to make decisions of fundamental personal importance are outweighed by the regulatory powers of the state, in my opinion, in this case it is clear. Personal health and medical care must surely qualify as fundamental matters of personal choice. I accept Mr. Wakeford's evidence that marijuana combats his extremely important and essential health concerns of nausea and appetite. I also accept that his one time experience with Marinol, given his vast and lengthy experience with prescription drugs, qualifies him to determine if he is capable of

tolerating this drug. He says he is not and feels that he does not need to experiment further with Marinol to know that it will continue to make him violently ill if he were to continue taking it. It is also not in dispute that smoking marijuana operates significantly faster than taking oral capsules. And in this regard, the medical evidence does not refute Mr. Wakeford's claims; indeed, it generally supports his position.

¶ 30 The state's interest in criminalizing marijuana, which I accept and which is not challenged by Mr. Wakeford, includes:

1. Preventing the harms associated with cannabis use;
2. Controlling the domestic and international trade in illicit drugs; or
3. Satisfying Canada's international treaty obligations with respect to the control of illicit drugs.

¶ 31 Findings of other courts regarding the consumption of marijuana, which are based upon the same evidence filed in support of this application, are also relevant and very helpful.

¶ 32 It was found by McCart J. in R. v. Clay that in some foreign jurisdictions marijuana offences have been characterized as being "de-criminalized". That is, although they remain against the law, penalties for these offences have been eased. He adds, however, that this is not the case in any western country. [See Note 8 below] Judge Sheppard in R. v. Parker found that the only established negative effect of smoking marijuana was the same as that of smoking tobacco: bronchial pulmonary damage. The greater the usage, the greater this risk becomes. [See Note 9 below] Other court findings include:

1. Consumption of marijuana is relatively harmless compared to so called hard drugs and including tobacco and alcohol;
2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;
3. Cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
4. There is no hard evidence that cannabis consumption induces psychoses;
5. Cannabis is not an addictive substance;
6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. The consumption of marijuana probably does not lead to "hard drug" use for the vast majority of consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;
8. Marijuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marijuana;
10. There is no evidence that marijuana causes amotivational syndrome;

11. Less than 1% of marijuana users are daily users;
12. Consumption in so-called "de-criminalized" states does not increase out of proportion to states where there is no de-criminalization; and
13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption. [See Note 10 below]

Note 8: Supra, note 3 at 360.

Note 9: (1997), 12 C.R. (5th) 251 at 262.

Note 10: Supra, note 3, R. v. Clay at 360-1 and note 9 at 261.

¶ 33 On the evidence filed on this application, I have no reason to dispute or disagree with any of these findings. They must, in my view, be considered when weighing Mr. Wakeford's autonomous choice against potential conflict with the state's interest.

¶ 34 Mr. Wakeford is not a recreational or chronic marijuana smoker. He smokes specifically to control his nausea and to stimulate an appetite, and the relief he seeks from this court is specific to him only. It is difficult in the extreme to see how his personal medical choice, on the facts of this case, limits any of the state's interests. At this time it must surely be acknowledged that the harms associated with smoking marijuana are negligible and that his specific use can hardly be said to impact on the international and domestic control and treaty obligations of Canada with respect to illicit drugs.

¶ 35 I thereby find that depriving Mr. Wakeford of his reasonable and fundamental choice to smoke marijuana for medicinal purposes through the CDSA constitutes a deprivation of his liberty interest.

Section 7 - "Security of the Person":

¶ 36 As I have concluded above, liberty can include the right to make fundamental personal decisions. Indeed, in circumstances such as those in this case and particularly on the facts, those considerations found by me to be relevant in the liberty issue are equally applicable to the issue of security of the person. It is the facts that Mr. Wakeford relies upon and brings before this court that allow for such a striking overlap of the "liberty" and "security of the person" arguments.

¶ 37 The Crown is of the opinion that security of the person is not violated in this case because in seeking medical marijuana for his nausea and lack of appetite, Mr. Wakeford does not request medical treatment for a condition that represents a danger to health or life. The Crown submits that although Mr. Wakeford is being denied a treatment for a condition that represents a danger to his health or life he is not being denied any and all treatments that will alleviate that condition. In sum, the Crown argues that Mr. Wakeford's discomfort and anxieties are important

medical issues, but that they do not engage constitutional rights. He must, the Crown adds, show not only that his loss of appetite is life-threatening, but also that smoking marijuana is the only effective treatment for it.

¶ 38 With respect, I disagree with the Crown's submissions. It is now abundantly clear that our courts recognize, in the strongest terms, that the right to security of the person includes the right to make autonomous decisions with respect to one's bodily integrity. Sopinka J. in Rodriguez articulated this principle and found 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.
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> * * * * *
>
> In my view, then, 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. [See Note 11 below]

Note 11: Supra, note 2 at 62 and 63. R. v. Morgentaler is reported at (1988), 37 C.C.C. (3d) 449 (S.C.C.).

¶ 39 Canadian courts recognize that patients have the right to refuse or withdraw medical treatment. I am satisfied that any interpretation given to security of the person encompasses more than the requirement for persons to show health and life in absolute terms. That is, it is not necessary for Mr. Wakeford to demonstrate that the only effective treatment for his loss of appetite is marijuana. On the specific facts of this case, it is enough for him to show, as he has done, that it is a significant beneficial treatment for a serious health concern. As far as his requirement to show that loss of appetite is life threatening, the medical evidence and common sense convince me that, given Mr. Wakeford's life threatening and terminal illness, appetite and weight maintenance are essential to his health and thus, in a fashion, to prolonging his life, notwithstanding his submissions to the contrary. There is no doubt that marijuana does effectively treat his serious and often violent bouts of nausea which are brought on by both his AIDS disease and the significant amounts of prescription medication he takes to combat AIDS, not to mention the further medication he requires to combat the side effects of his AIDS medicine. The amount and degree of suffering that Mr. Wakeford endures and the vast daily quantity and variety of prescription medication he takes are, to me, mind numbing. He is certainly and unequivocally a person who is entitled to treat himself for all of this in a manner that he chooses and that grants him dignity.

¶ 40 Guidance as to what dignity of human life and the autonomy of choice mean can be found in the eloquently stated dissenting opinion of Cory J. in Rodriguez. In considering security of the person as it related to Ms. Rodriguez, her terminal illness, and her right to choose her treatment, he concluded:

> The life of an individual must include dying. Dying is the final act in the drama of life. If, as I believe, dying is an integral part of living, then as part of life it is entitled to the constitutional protection provided by s. 7. It follows that the right to die with dignity should be as well protected as any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity. [See Note 12 below]

Note 12: Ibid, at 85.

¶ 41 Mr. Wakeford's terminal illness, its dreadful and painful effects on him physically and emotionally, and his desire to treat himself effectively and in a manner that allows him relief and dignity surely qualify as rights protected by s. 7. His choice harms no one and, once again, in no way interferes with the interest of the state as provided for in the CDSA.

¶ 42 The evidence is clear that Mr. Wakeford finds marijuana to be the best treatment for his nausea and for the stimulation of his appetite. And for him, based on his medical and personal experiences, it is the least negatively reactive and affords him the most dignity. As has been previously stated, he has attempted other, although not all, synthetic THC medications, such as Marinol, and found them to cause him further illness, personal difficulty and indignation. To me it is of no import that he only attempted Marinol on one occasion. His history of taking medication, his observations of others similarly afflicted, and medical opinion, I find, all allow him to make that conclusion without the need to further experiment.

¶ 43 It cannot be said, on the facts of this case, that Mr. Wakeford is not entitled to choose his method of treatment. He has found a treatment that allows him to ease his suffering, assist in his overall medical treatment, and perhaps assist in prolonging his life. Nor is it significant that this method of treatment will not absolutely cure his terminal and devastating illness. Indeed, Mr. Wakeford does not even pretend to make such an assertion. In my view it is enough that Mr. Wakeford chooses to treat his illness in the manner he has, which, in my view, he is constitutionally entitled to. The CDSA, by denying him that right, I find, infringes upon his right to security of the person.

Section 7 - "Fundamental Justice":

¶ 44 Having decided that Mr. Wakeford has both a liberty and security of the person interest in respect to his choice of marijuana for medical purposes and that the CDSA criminalizes the therapeutic use of marijuana and thereby deprives him of the exercise of his rights, the question to be determined next is whether such deprivation is in accordance with the principles of fundamental justice.

¶ 45 The principles of fundamental justice are the basic tenets of our legal system. They are not to be found in the realm of public policy but in the inherent domain of the judiciary as guardian of the justice system. They include, as well, other components of our legal system such as common law and international

conventions, and they reflect a belief in the dignity and worth of the human person and the rule of law. Whether a principle is one of fundamental justice will depend upon the nature, sources, rationale, and essential role of that principle within the judicial process and in our legal system as it evolves. [See Note 13 below] Furthermore, as set out by Sopinka J. in Rodriguez, a principle of fundamental justice requires "principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice":

> Principles of fundamental justice must not, however, be so broad as to be more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. [See Note 14 below]

Note 13: Reference Re: s. 94(2) of the Motor Vehicle Act (1985), 48 C.R. (3d) 289 at 309 (S.C.C.).

Note 14: Supra, note 2 at 65-6.

¶ 46 It must be remembered, however, that while each court is the guardian of Charter interests, its own views as to the wisdom of the legislation are not a basis for making a fundamental change to long-standing policy.

¶ 47 The approach which has been adopted and applied to determine principles of fundamental justice is to balance the individual's protected interest against the state's interest or objective in enacting the impugned legislation. In the case at bar, the interests to be balanced may be characterized as being: whether the blanket prohibitions on possession and use of marijuana for medicinal purposes are arbitrary and unfair in that they are unrelated to the state's interest in the prevention of harm to the public and in the maintenance of its international treaty obligations. In this regard, does the state interest have a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition?

¶ 48 As I have indicated throughout this decision, Mr. Wakeford has, after years of intense medical treatment for his terminal illness, discovered and concluded that marijuana, together with other prescription drugs, assists him in a very important aspect of his medical treatment. Fundamental to his constant struggle with his illness is the requirement that he maintain weight and thus is required to prevent himself from suffering nausea and, to the extent possible, possess an appetite. He has concluded that he is able to accomplish this through smoking a marijuana cigarette two times each day. He does not smoke marijuana for recreational purposes, rather, he does so exclusively for medical therapy.

¶ 49 It is apparent that harmful effects of marijuana are today perceived to be far less than in 1923 when the "evils" of and concerns for public health were considerations giving rise to making marijuana a prohibited drug in Canada. And, although there remain some health risks, albeit slight as compared to so called hard-drugs, it cannot be said that the state's interest in prohibiting marijuana is totally

arbitrary. It is not the degree of risk of harm but the fact there is risk, coupled with the evidence that more studies are required to test long term effects, that makes it appropriate for Parliament to act.

¶ 50 Were this a case such as was decided by McCart J. in R. v. Clay, [See Note 15 below] where the issue was the recreational use of marijuana, I would perhaps conclude the matter here. However, it is not. Rather, this case is about use of marijuana for medical purposes as it was in R. v. Parker. [See Note 16 below]

Note 15: Supra, note 3.

Note 16: Supra, note 9.

¶ 51 In the context of the legislative prohibition as it applies to health issues McCart J. in Clay had this to say:

> As an aside, Parliament may wish to take a serious look at easing the restrictions that apply to the use of marijuana for the medical uses as outlined above as well as for alleviating some of the symptoms associated with multiple sclerosis, such as pain and muscle spasm. There appears to be no merit to the widespread claim that marijuana has no therapeutic value whatsoever. [See Note 17 below]

Note 17: Supra, note 3 at 33.

¶ 52 I would agree with his aside and add that the medicinal use of marijuana by Mr. Wakeford and others in his position attests to the compelling need for Parliament to address this problem with dispatch.

¶ 53 In Parker the court held that an exemption should be read into the legislation so as to allow Mr. Parker to cultivate marijuana and use it for medicinal purposes without criminal sanctions. His reasons for reaching this conclusion included:

> It is overbroad not to provide by legislation a procedural process for an individual in these circumstances to be exempt from prosecution when personal possession and cultivation is for legitimate medical use. It does not accord with fundamental justice to criminalize a person suffering a serious chronic medical disability for possessing a vitally helpful substance not legally available to him in Canada. [See Note 18 below]

Note 18: Supra, note 9 at 266.

¶ 54 I agree in principle with the finding of the learned judge. That is, it would be contrary to the principles of fundamental justice to prohibit marijuana where marijuana can be shown to be a significant medicinal treatment for a debilitating and deadly disease and where there was no procedural process for obtaining an exemption from prosecution. Providing for an exemption procedure in such circumstances in no way runs afoul of or affects the state's interest either domestically or internationally. Indeed, if the health and safety of the Canadian public constitute a stated interest and objective, then an exemption procedure for medical reasons would be wholly consistent with that.

¶ 55 The Crown submits that Parliament has put into place specific mechanisms to allow for access to controlled substances in cases of demonstrated means:

1. The ability to apply to the Ministry of Health Canada for approval of new drugs.
2. Health Canada's Special Access Program ("SAP") which approves requests for access to otherwise non-marketable drugs.
3. Exemptions by the Minister of Health pursuant to s. 56 of the CDSA.

¶ 56 Items 1 and 2, I find, do not afford Mr. Wakeford, or others in his position, with any real relief or opportunity for an exemption regarding medicinal marijuana. The uncontradicted evidence presented to this court on behalf of Mr. Wakeford, and there was little to none in response by the Crown, satisfies me that any exemptions by Health Canada and SAP are illusory for persons like Mr. Wakeford. To obtain any kind of exemption, Mr. Wakeford would need to show:

1. There is a licensed dealer in Canada.
2. Clinical testing to prove that marijuana is a life saving medication.
3. A standard that the marijuana "medicine" meets the requirements of "effectiveness, quality and consistency".

¶ 57 In this regard, there is no authorized source of medicinal marijuana in Canada. The Crown submits that Health Canada is empowered to issue licences for the production and distribution of marijuana for medical purposes, and is prepared to issue such licences to suitable applicants, but no-one has been prepared to satisfy the necessary basic licensing requirements. However, no evidence of any substance was put before this court in that regard. I do, however, accept the evidence of Dr. Donald Kilby, who was the source of my findings above, that indicates the requirements by Health Canada and SAP.

¶ 58 In the face of what I have just described, how can it be said with any degree of seriousness that such a procedure or process could provide exemptions to persons suffering a terminal illness like Mr. Wakeford? It is simply a claim without any substance.

¶ 59 Where I do part company with the holding of the court in Parker is in respect to s. 56 of the CDSA. That section provides:

> The Minister [of Health] 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.

¶ 60 Mr. Wakeford argues that it is pointless for him to make such application to the Minister since there is no evidence that any exemption for medical marijuana has ever been granted. While the Crown was unable to disagree that no such exemption had ever been granted, they also were not in a position to advise as to whether any individual has ever made such an application. Specifically, the Crown submits that Mr. Wakeford never has. To this end the Crown argues that Mr. Wakeford must first avail himself of his statutory remedies before seeking a constitutional remedy, and that he has not done so.

¶ 61 Mr. Wakeford says that he should be deemed to have made such an application by virtue of his letter to the Minister of Health, the response to which denied him the access to marijuana. Further, he says, if it is found that he has not applied for a s. 56 exemption, the court should consider two reasons why it would be futile for him to do so: (i) there is no process in place by the Minister to properly consider any application; and (ii) the Minister responded to him in such a fashion so as to satisfy him that no exemption would be granted. In other words, he contends that it would be pointless and unfair to require him to make such an application when it is known in advance that no exemption will be granted.

¶ 62 Letters were written to various politicians regarding his pleas in connection with his desire to use marijuana for medical purposes. One such letter was dated July 15, 1997 and addressed to the "Right Honourable Jean Chretien, P.C., M.P.". In the letter Mr Wakeford asked for compassionate access to marijuana for "personal medical use" and urged the government to "decriminalize marijuana for medical purposes". A similar letter with the same date was sent to The Honourable A. Anne McLellan, P.C., M.P.. The letter to Minister Rock with the same date included the same request and other statements such as "... I do not know how to proceed", and "I appeal to you to help me find a way for me to access medical marijuana for private use ...". Minister Rock responded by a letter, which I believe was dated November 11, 1997. He wrote:

> I sympathize with your situation and I understand your reasons for writing. Marijuana has not been approved for medical use in Canada. However, to obtain approval, a sponsor must provide scientific evidence to Health Canada to prove that the drug is safe and effective for the claimed use. In this manner, cocaine and heroin have received approval for use under specific conditions. To date, no sponsor has provided the required evidence to allow the medical use of marijuana in this country.

¶ 63 Minister Rock went on to advise Mr. Wakeford of two other drugs, including Marinol, which had been approved for nausea and vomiting. He concluded:

> I regret that I am unable to provide you with a more positive

response, but please accept my sincere wishes for a satisfactory resolution to your problem.

¶ 64 To be sure, I do not know what the Honourable Minister meant by "satisfactory resolution to your problem" and it is clear he did not advise Mr. Wakeford of a possible exemption under s. 56 of the CDSA. It may be, and is in fact likely, that no process or procedure exists within the Minister's offices to respond fairly and properly to requests made under s. 56. Considering that there was no evidence put before me to establish that any applications were ever made, or that if they had been made, they had been granted or rejected, it can fairly be assumed no formal process exists. However, I do not know that with certainty, and fundamental fairness dictates that the Minister be given the opportunity to exercise his statutory discretion before the court determines whether it is constitutionally unsound. This court must be mindful of the fact that Parliament validly authorized and specifically vested the Minister with this responsibility and discretionary power, and before a court should interfere, it must, at the least, be satisfied that the power either doesn't exist or is not being properly exercised.

¶ 65 Even if I were to find that Mr. Wakeford's letter to Minister Rock amounted to an application for exemption, that would not at this stage result in a finding that a constitutional remedy was appropriate relief. Without deciding the matter, it may well be that Mr. Wakeford's proper course of action in such circumstances should be in the nature of judicial review of the Minister's exercise of his discretion.

¶ 66 As I said, if there is no real process or procedure whereby an individual in the situation of Mr. Wakeford could seek to be exempt from the application of the CDSA, that would be contrary to the principles of fundamental justice. If that were the case I would have no hesitation in granting, perhaps even all, the relief Mr. Wakeford seeks. However, Parliament has provided a specific means for individuals to apply for exemptions and that must be exhausted prior to this court's intervention. Mr. Wakeford, I find, has not done so and, at this time, I am unable to hold that his denial of rights under s. 7 of the Charter is not in accordance with the principles of fundamental justice.

¶ 67 Before leaving this aspect of my decision I wish to comment on the nature of the relief sought by Mr. Wakeford. It should be obvious by now that our society must begin to seriously give consideration to the medicinal benefits of marijuana. Medical evidence and opinion, albeit not complete, clearly indicate that the time has come to examine this sincerely. In the case at bar, anecdotal evidence was submitted that attempts to demonstrate the many ways in which marijuana has brought medical assistance and relief to persons suffering debilitating and deadly ailments. These include prominent professionals and others who suffer from cancer, AIDS and epilepsy, to mention only some. All speak of the relief and benefits obtained from marijuana smoking during their illnesses and treatment, all of which is described as painful and debilitating until then. In this regard they express the same concerns as Mr. Wakeford as to the availability of "clean" and affordable marijuana. All of these concerns are, in my view, valid and ought to be dealt with by Parliament if it has not done so or is not doing so. If such is not the case, the courts of this land will, without question, continue to be called upon and expected to provide a remedy for this very pressing and fundamentally important issue. Unlike government, the courts do not have the luxury of avoiding this difficult and sensitive matter until a more suitable time. Our duty is to decide such issues as they are

presented to us on a case by case basis. Such an approach, in my opinion, cannot be either satisfactory or the most beneficial to the interests of our society.

Section 15 - "Equality":

¶ 68 Mr. Wakeford submits that his denial of access to marijuana for his medical needs violates his s. 15 Charter rights. The basis for his contention is that the operation of the CDSA denies him equal benefit of the law on the basis of the enumerated ground of physical disability. Furthermore, he says, the legislation has an adverse discriminatory impact upon disabled individuals and individuals suffering from the devastating effects of AIDS.

¶ 69 Again, for ease of reference, s. 15(1) of the Charter provides:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

¶ 70 The test for what constitutes a violation of s. 15 has been articulated by the Supreme Court in Egan v. Canada:

(a) Is the individual denied equal benefit or protection of the law?
(b) Is the reason for the assertion based on an enumerated or analogous ground?
(c) Does the law discriminate against the individual based on the enumerated or analogous ground? [See Note 19 below]

Note 19: [1995] 2 S.C.R. 513 at 584.

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a) Is the Applicant denied equal benefit or protection of the law?

¶ 71 Mr. Wakeford contends that marijuana, for persons such as himself, is a proven therapeutic substance, the benefits of which are being denied to him because of the CDSA. Persons like Mr. Wakeford, it is argued, are denied access to this medical substance whereas other persons are not denied other medical substances that are approved by licensing and distribution schemes pursuant to the legislation. Mr. Wakeford, it is said, is therefore denied equal benefit of the law.

¶ 72 Mr. Wakeford, albeit for his own good reasons, has chosen to smoke marijuana to treat symptoms of his illness rather than to use other legal prescription drugs. While he has his own good reasons for doing so, it is nonetheless his specific choice. That his choice to do so is, at the moment, barred by the CDSA does not of itself mean that Parliament is denying him equal access to the benefit of helpful and therapeutic medication. If it could be said that the CDSA denied Mr. Wakeford other medication that was available to others, clearly then he would have a legitimate

argument that reasonable accommodation for his disability is being denied. That, however, is not the case.

¶ 73 As was set out by the Supreme Court in Eaton v. Brant County Board of Education:

> ... it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them ... It is recognition of the actual characteristics, and reasonable accommodation of these characteristics which is the central purpose of s. 15(1) in relation to disability. [See Note 20 below]

Note 20: [1997] 1 S.C.R. 241, as cited with approval in Eldridge v. British Columbia (Attorney General) (1997), 151 D.L.R. (4th) 577 at 618.

¶ 74 The CDSA does not give blanket permission to other individuals who are ill to choose to take whatever drugs they wish. In this way Mr. Wakeford is not being denied any benefit that is available to others and therefore cannot be said to be discriminated against. Although some other controlled substances are available to patients through the operation of the legislative scheme, the law itself does not create an unequal benefit.

¶ 75 That corporations have not applied for licenses to produce and distribute cannabis is beyond the control of the state. As the state does not itself provide for the benefit of controlled substances, it cannot be said that it provides any such benefit unequally. It is private industry that chooses whether or not to pursue the licensing and distribution of controlled substances. And, while the legislation provides the mechanisms to permit the production and distribution of these controlled substances, it does not guarantee that this will happen for any particular controlled substance. In my opinion, for Mr. Wakeford's claim of discrimination to be successful, actions that are within the realm of the private sector would have to be attributed to the government. This is not something this court is prepared to do, nor would it be proper for it to do so.

¶ 76 Even if one accepts that the provision of the benefit in question is in the control of the state, Mr. Wakeford is still not denied equal benefit of the law because, again, there are other medications available to him that can alleviate his nausea and lack of appetite. It cannot therefore be argued that the government is completely ignoring the needs of AIDS patients requiring anti-emetics and appetite stimulants. I am satisfied that reasonable accommodations are made for patients who require these types of drugs. The government does provide a legislative scheme to allow for controlled substances to be developed and distributed, and there are several other medications which are readily available through prescription that relieve the symptoms suffered by Mr. Wakeford. And, although Mr. Wakeford's evidence is that these medications are to him inadequate, inefficient, or unsatisfactory, that is not sufficient to find that the state discriminates against him.

¶ 77 It may be true that private industry has not chosen to pursue becoming licensed distributers of cannabis and, that Mr. Wakeford has chosen not to take other available medications. This, however, is beyond the control of Parliament, and these are not matters that Parliament should be expected to predict or make advance accommodations for.

b) Is the reason for assertion based on an enumerated or analogous ground?

¶ 78 To my mind there can be little doubt that Mr. Wakeford is a member of an enumerated group protected by s. 15(1) of the Charter. The decision in Brown v. British Columbia (Minister of Health), [See Note 21 below] while recognized as not being binding on this court, nonetheless is some authority that supports my findings in the case at bar. Specifically it is confirmative of and consistent with my opinion that individuals suffering from AIDS are included in the enumerated ground of physical disability. The Crown has provided no authority to suggest to this court that such a conclusion is not warranted. Indeed, such a finding is consistent with the legal principles underlying s. 15(1), as expressed by the Supreme Court in Andrews v. Law Society of British Columbia where it was held:

> ... the enumerated grounds themselves and other possible grounds of discrimination recognized under s. 15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a 'continuing framework for the legitimate exercise of governmental power' and at the same time, for the 'unremitting protection' of equality rights. [See Note 22 below]

Note 21: [1990] B.C.J. No. 151 (B.C.S.C.).

Note 22: [1989] 1 S.C.R. 143 at 175.

¶ 79 Mr. Wakeford's physical activities and capabilities are severely limited by the effects of the terrible disease from which he suffers. As noted in Brown, aside from the extreme effects of the illness itself, those who suffer from AIDS face ongoing discrimination in subtle and not so subtle ways. Discrimination towards those with AIDS exists in respect of housing, employment, access to medical and dental care, and public services. Regardless of whether or not this court finds that discrimination exists in the present case, there is no denying that AIDS is a physical disability and thus an enumerated ground under s. 15(1).

c) Does the law discriminate against Mr. Wakeford?

¶ 80 To establish that the legislation discriminates against him, Mr. Wakeford must show that it has the effect of imposing a burden, obligation or disadvantage not imposed on others, or of withholding or limiting access to benefits or advantages which are available to others. [See Note 23 below] As conceded by Mr. Wakeford, the regulations treat access to cannabis for medicinal purposes in the same way as other controlled substances. And, the legislation does not, on its face, draw a distinction between AIDS patients and other individuals seeking

medication. However, the Supreme Court has held in Rodriguez, [See Note 24 below] and more recently in Eldridge that discrimination does not have to intentionally discriminate, it is sufficient if it is effect based:

> ... legislation equally applicable to everyone is capable of infringing the right to equality ... Even in imposing generally applicable provisions, the government must take into account differences which in fact exist between individuals and so far as possible ensure that the provisions adopted will not have a greater impact on certain classes of persons due to irrelevant personal characteristics than on the public as a whole. In other words, to promote the objective of the more equal society, s. 15(1) acts as a bar to the executive enacting provisions without taking into account their possible impact on already disadvantaged classes of persons. [See Note 25 below] (my emphasis)

Note 23: Egan, supra, note 19.

Note 24: Supra, note 2 at 549.

Note 25: Supra, note 20 at 673.

¶ 81 Thus, in addition to ensuring that its legislation avoids discrimination on its face, the government also has the responsibility to make certain that the effect of legislation does not have more of an impact on an enumerated or analogous group than on society at large. Mr. Wakeford contends that by prohibiting everyone from using marijuana, its effect on him is to prohibit him from using it medicinally as an anti-emetic and appetite stimulate. Its effect, therefore, is to discriminate against him, an AIDS sufferer. Respectfully, however, I can find no basis to conclude that Parliament has failed entirely to take into account the needs of AIDS patients who require anti-emetic and appetite stimulant drugs.

¶ 82 The main consideration for the court must be to assess the impact of the law on the individual or the group concerned. After doing so however, I reach the conclusion that even though the law in question can be said to have a negative impact on Mr. Wakeford, it does so in the same way as with all others. There is perhaps no question that the result will be that he will be denied the drug of his choice; however, pursuant to Canadian drug legislation, no one is totally free to take whatever drugs he or she chooses. This is particularly true respecting controlled substances (whether this violates s. 7 is a separate issue from the s. 15 analysis). Anyone who wishes to take a controlled substance must do so in a manner consistent with the legislative scheme provided by Parliament.

¶ 83 Respecting persons with disability, the law has clearly stated the recognition of actual characteristics, and reasonable accommodation of these characteristics, is the central purpose of s. 15(1). A law will generally not be discriminatory if reasonable accommodations are made that recognize the particular needs of vulnerable members of society. [See Note 26 below]

Note 26: Reference, Eaton, supra, note 20 at 272-3.

¶ 84 If cannabis were the only means of treating Mr. Wakeford's symptoms, and it was not reasonably accessible, then it could be argued that the government was disregarding the needs of a particular identifiable group. However, that is not the situation here. Mr. Wakeford has not established that he has no other effective legal way to treat his nausea and loss of appetite. Indeed, the evidence is there are other options that are available to him, some of which he has, for his own reasons, chosen not to avail himself of.

¶ 85 It is again Mr. Wakeford's choice not to use the other available medications which may also effectively treat his condition. The letter of health Minister Allan Rock to Mr. Wakeford, portions of which have been set out above, demonstrates that the government is aware that these medications exist. In my view, it cannot be said that the government is impassive to his needs solely on the basis it does not actively seek to make available Mr. Wakeford's drug of choice. This would be analogous to the situation where the government equipped its buildings to accommodate those with a specific disability and those individuals claimed they were being discriminated against because they would rather have something different.

¶ 86 It can be argued that another reasonable accommodation Parliament has made available is the ability of persons to apply for a Ministerial exemption under s. 56 of the CDSA. Mr. Wakeford, as I found earlier, has not availed himself of such an opportunity (and it is not necessary here that I repeat my concerns respecting the reality of any success he may have should he do so). Nonetheless, s. 56 does represent, on its face, a reasonable accommodation.

¶ 87 Even if this court were to accept Mr. Wakeford's claim that the government has a duty to pro-actively eliminate adverse effects discrimination, the principles of reasonable accommodation as enunciated in Eaton would dictate that there would be no such duty in the present case. As noted above, Mr. Wakeford has available to him several other legal choices to treat his condition. Even in an adverse effects based analysis of discrimination, I find that none can be found in the present case. As I have said, no individuals are granted the right by legislation to virtually any and all drugs of their choice. The legislative scheme provides that any individual who desires controlled substances must obtain them in accordance with the regulations. The legislation does not deny Mr. Wakeford the medication that he requires, it only in effect denies him the one medication he desires.

¶ 88 Mr. Wakeford has not tried each of the other anti-emetic and appetite stimulating medications that are available to him, and while, as has been previously reasoned, he may not be required to do so in the s. 7 Charter analysis, to require the government to accommodate specific preferences for the purpose of s. 15 is not only too wide reaching a principle of law, but also administratively impossible. The effect of such a principle would require the government to seek out the wishes of individuals in order to avoid legislation having a discriminatory effect. Such an implication is unreasonable in the extreme.

¶ 89 For all of the foregoing reasons, the Applicant's claim that the CDSA violates his s. 15(1) Charter right to equality is respectfully dismissed.

CONCLUSION:

¶ 90 To summarize, the application of Mr. Wakeford is decided as follows:

1. The CDSA does not infringe Mr. Wakeford's s. 7 Charter right to "life", however, it does infringe his s. 7 rights to both his "liberty" and "security of the person".
2. The denial of Mr. Wakeford's s. 7 rights are in accordance with the "principles of fundamental justice" and accordingly his application in this regard is dismissed.
3. The CDSA does not discriminate against Mr. Wakeford and his application in respect of an infringement upon his s. 15 Charter right to "equality" is dismissed.

Order accordingly.

LaFORME J.

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