



## **MEDICAL MARIJUANA**

R. v. Krieger, 2000 ABQB 1012

Date: 20001211

Action No. 9901 1016 C1

IN THE COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL DISTRICT OF CALGARY

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

GRANT WAYNE KRIEGER

Applicant

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REASONS FOR DECISION

of the

HONOURABLE MADAM JUSTICE L. DARLENE ACTON

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APPEARANCES:

Scott A. Couper

(Justice Canada)

For the Respondent

Adriano Iovinelli

(Van Harten O'Gorman)

For the Applicant

Pursuant to the provisions of s. 648(1) of the Criminal Code , no information relating to this application shall be published in any newspaper or broadcast until the jury has retired to consider its verdict in the trial of this matter.

#### INTRODUCTION

[1] This a pre-trial application under s. 645 of the Criminal Code to determine a question of law prior to the jury being sworn.

[2] The Accused seeks a declaration under s. 24(1) of the Canadian Charter of Rights and Freedoms (the Charter ) that s. 7(1) and s. 5(2) of the Controlled Drugs and Substances Act , S.C. 1996, c. 38.8 (" CDSA ") violate s. 7 of the Charter and further seeks to have ss. 7(1) and 5(2) struck down in accordance with s. 52(1) of the Constitution Act, 1982 .

[3] Counsel for the Accused, relying on the decisions of the Supreme Court of Canada in R. v. Big M Drug Mart , [1985] 1 S.C.R. 295 and R. v. Morgentaler , [1988] 1 S.C.R. 30, (1988), 37 C.C.C. (3d) 449, submits that Mr.Krieger has standing to advance the arguments in this case on his own behalf and on behalf of other individuals with serious illnesses who would benefit from the therapeutic use of marihuana. Crown Counsel has not taken issue with this argument. Thus, I am assuming that the Crown concedes that Mr.Krieger has standing to challenge these provisions of the CDSA on the basis that they infringe not only his rights but also the rights of others who are similarly situated.

#### AGREED FACTS

[4] For the purposes of this pre-trial motion, a Statement of Agreed Facts was entered as Exhibit 2. Those facts are:

##### Circumstances of the Offences

1. On August 25, 1999, at approximately 4:00 p.m., members of the Calgary Police Service ("CPS") attended at 4611 Bowness Road N.W., Calgary, Alberta, which was the residence of Grant Wayne Krieger ("Krieger ") to serve a summons on another individual who police understood to also reside there. Officers encountered Krieger in the back yard and also observed a potted cannabis marihuana plant sitting on a picnic table.
2. Krieger was arrested pursuant to an outstanding warrant and transported to Calgary Police arrest processing facility.
3. The CPS Drug Unit subsequently sought and was granted a warrant to search the residence and commenced this search at approximately 8:45 p.m. Found inside was a marihuana grow operation consisting of a total of 29 plants. Detective Barry Balerud took a series of 30 photographs both inside and outside

the residence, which were submitted in a booklet as Exhibit 3 in these proceedings. A description by Detective Balerud of what is depicted in the photographs is included in the index located at the front of the booklet.

4. The residence is a small one level bungalow consisting of a living room, kitchen, bathroom, and a bedroom which had been converted into a marihuana grow room that Detective Balerud identified in the photograph index as "Grow Room #1". Found in the bedroom were 10 apparently healthy marihuana plants approximately two feet in height, growing in two rows of five plants each. These plants were not yet in the budding stage. They were growing in plastic pots in a rockwell grodan medium and were fed nutrients hydroponically by a top feed, bottom recovery system consisting of tubes which fed the plants from a nearby tank and returned nutrients to the tank by wooden troughs located underneath the plant pots.

5. The plants were provided light by a 1000 watt metal halide bulb, which was operating and moving on a track that had been mounted on the ceiling above the plants. The light was connected to a ballast, which in turn was connected to a timer that had the light operating in 12-hour cycles.

6. Also located in the corner of the bedroom was a single marihuana plant approximately five feet in height in the early budding stage of growth and apparently healthy. It is described as the "mother plant" by Detective Balerud and is depicted in photograph 15 in the booklet of photographs. Similar to the other plants, it was fed hydroponically with tubes running nutrient to and from a separate 25 gallon tank located nearby and depicted in photograph 16. The plant was provided light by a single 400 watt bulb mounted above it. It was connected to its own ballast and timer.

7. Venting to the bedroom was provided by two fans located in the room along with an ozonator mounted to the ceiling and connected to a hose venting through a window to the outside. There was also a separate fan bringing fresh air into the room as depicted in photograph 21.

8. There was also marihuana shake, being the part of the plant not consisting of bud, found in a plastic pail and cardboard box located in the bedroom.

9. Located in the living room area were a total of 16 smaller apparently healthy "starter" marihuana plants, approximately one inch to six inches in height, in plastic trays. They were provided light by a four-foot fluorescent light mounted to the wall above the plants. The light was not connected to a timer. The plants were growing in cubes of grodan.

10. Also located in the living room was marihuana bud in a plastic bag, weight 6.45 grams, as well as roaches and broken scissors.

11. Located in the kitchen area in plastic pots on a table were two apparently healthy marihuana plants approximately 1 to 5 feet in height, growing in dirt. Also located there were marihuana plant stems in a bag. As well, a three-bar scale and box of baggies were found. These items are commonly used to weigh and package marihuana for distribution.

12. Taking into account the size and sophistication of the marihuana grow

operation, the only reasonable conclusion is the purpose for which it was set up and maintained was to distribute the product to others.

13. Detective Balerud located and seized from the residence various documents. He wrote his initials "BB" and the date 99/08/25 on most of these documents and assigned them police "exhibit" numbers. True copies of these documents were entered as Exhibits 4 to 16 and are described as follows:

Seized from the desk located in the living room were:

- i) Police Exhibit 9 - Agreement of Cultivator and Universal Compassion Club
- ii) Police Exhibit 10 - Release of Confidential Medical Information
- iii) Police Exhibit 11 - Universal Compassion Club, Receipt of Product by Member
- iv) Police Exhibit 12 - Document with heading "OUR LAWS MAKE THIS MAN A CRIMINAL" with accompanying photograph
- v) Police Exhibit 14 - UCC Client List
- vi) Police Exhibit 18 - Greyhound shipper receipt dated 08/16/99, Busbill No. 71066357423
- vii) Police Exhibit 19 - Universal Compassion Club document dated Aug. 15/99, IBT #1
- viii) Police Exhibit 20 - Greyhound shipping receipt dated 08/16/99, Busbill No. 71066357434
- ix) Police Exhibit 21 - Universal Compassion Club document dated Aug. 15/99

Seized from the living room wall were:

- x) Five (5) photographs of marihuana plants

Seized from a cupboard in the kitchen were:

- xi) Police Exhibit 27 - List of names with heading "Canadian Cannabis Coalition"
- xii) Police Exhibit 28 - Handwritten document headed "Draft 1, Product Transfer and Disposition Sheet"

Seized from a shelf in the kitchen was:

- xiii) Untitled and undated document with a photograph and beginning with the sentence: "HIGHWEAR HEMP supports the efforts of GRANTKrieger to decriminalize marihuana."

14. As a result of the search, Krieger was immediately charged with production of cannabis marihuana and possession of it for the purposes of trafficking. During his dealings with police throughout that day, he indicated to them on many occasions that he has multiple sclerosis and that he takes cannabis marihuana

for medicinal purposes. After his arrest, and after he was advised of his right to counsel under the Charter and read the police warning, Krieger advised the police that he was cultivating marihuana for sick people that have diseases such as HIV, cancer and Hepatitis "C".

#### Section 56 CDSA Procedure

15. Prior to May, 1999 there was no formalized process yet developed by Health Canada to entertain applications by individuals seeking an exemption under s. 56 of the CDSA . In that month, Health Canada had developed a procedure that it made public in its Interim Guidance Document. Paragraph 5 of the document sets out the procedure for submitting and reviewing such applications. A formalized application form was subsequently developed. Paragraph 4 specifies the factors the Minister of Health may consider in deciding to grant or refuse such applications.

16. As at October 2, 2000, a total of 72 exemptions under s. 56 had been granted. Health Canada refused one request and there were five requests which it intended to refuse and which it had either already sent the applicant a letter signifying that intention or such letter was about to be sent shortly.

17. Health Canada has publicly stated its intention to review these applications within 15 days of receipt and it has endeavoured in its procedures to adhere to this guideline as much as possible.

[5] A Supplementary Agreed Statement of Facts was entered as Exhibit 24. The facts contained in that Statement are:

18. On June 9, 1999, in a paper entitled "Research Plan for Marijuana for Medical Purposes: A Status Report," Health Canada announced a strategy to develop research plans to study the medical uses of cannabis marihuana. It also announced mechanisms outside of research projects to access marihuana as well as a plan to secure licit supplies of the drug for research purposes.

19. Health Canada has recognized the need to obtain standardized quality marihuana from a Canadian supplier for research purposes. In a news release dated May 5, 2000, it announced steps taken in this direction. A Request for Proposal was issued inviting prospective contractors to submit proposals to produce marihuana for such purposes on a 5-year contract subject to guidelines which are summarized in the news release. The news release provided updates on... [Health Canada's] development of research protocols with two organizations [ to which] it is to provide funding for clinical trials; the Community Research Initiative of Toronto and the Canadian HIV Trials Network. The news release also provided details of outside consultations... [Health Canada] had regarding possible improvements to the s. 56 exemption process and as well announced that 37 such exemptions had been granted as of that date.

20. The closing date for prospective contractors to respond to the Request for Proposal was June 28, 2000. A number of proposals were received by Health Canada. It is reviewing them and intends to have a 5-year supplier contract in place by the autumn of 2000.

## EVIDENCE

[6] Mr.Krieger has been charged under s. 7(1) of the CDSA with production of cannabis marihuana. In addition, he has been charged under s. 5(2) of the Act with possession of cannabis marihuana in an amount exceeding 3 kilograms for the purpose of trafficking. He is fighting both counts of the indictment by claiming that ss. 7(1) and 5(2) of the CDSA violate his rights under s. 7 of the Charter . Section 7 of the Charter guarantees that everyone has the right to life, liberty and security of the person and the right not to be deprived of those rights except in accordance with the principles of fundamental justice.

[7] The evidence is clear that Mr.Krieger suffers from chronic progressive multiple sclerosis, the symptoms of which he is able to control by ingesting and smoking cannabis marihuana.

[8] Dr. Todd Gash, the Accused's physician, testified that it appeared from Mr. Krieger's medical history that Mr.Krieger was better able to control his symptoms with the use of cannabis than with any legally prescribed medication that doctors had given him in the past. The prescription drugs which he had taken caused unpleasant side effects for Mr.Krieger . Crown counsel referred Dr. Gash to an extensive number of prescription medications available for alleviating the symptoms of multiple sclerosis. These medications ranged from Valium to botulinus toxin, a drug which paralyzes the nerves when injected. According to both Dr. Gant and Dr. Kalant, the Crown's expert witness, these legally available drugs have a variety of known side effects .

[9] Mr.Krieger testified that he tried the conventional treatment route using many of the medications canvassed by Crown counsel. During the years 1992 to 1994 he had physiotherapy almost every other day. In addition, he tried acupuncture - all without success. At one time, in addition to several other prescribed medications, Mr.Krieger was taking 200 milligrams of Demerol per day for pain. Dr. Gash, a treating physician, advised the Court that this was a significant amount, saying that such a dosage would result in most persons " sleeping for most of the day, if [they] still breathed."

[10] The Court heard evidence as to how Mr.Krieger , in the depth of despair and unable to control his pain, attempted suicide in December, 1994 by consuming sufficient quantities of two of the prescription medications in his possession. Fortunately, he was discovered and medical intervention was implemented which saved his life. Subsequent to that event, Mr.Krieger stopped taking the assortment of legal pharmaceuticals which had been prescribed for him. He has found that his multiple sclerosis remains stable and his symptoms under control if he ingests and smokes cannabis marihuana.

[11] Mr.Krieger developed a cultivation operation which provides him with a regular and reliable source of cannabis marihuana. Mr.Krieger prefers to take marihuana in the form of butter as he obtains relief from his symptoms for a longer period of time than with smoking and avoids the risks associated with smoking itself. However, he also smokes marihuana if he requires immediate relief of a spasm.

[12] Mr.Krieger is unable to work. He lives on a disability pension, as do many of the others to whom he supplies marihuana. Mr.Krieger testified that an ounce of

marihuana sells for \$240.00 and up on the street whereas his compassion club sells an ounce for as little as \$125.00. Mr.Krieger indicated that he is concerned about the quality of the product which is available from dealers and does not like to deal with the underground, criminal element.

[13] Mr.Krieger testified that during the sixteen days when he was incarcerated in relation to this matter and unable to ingest marihuana, the spasticity symptoms of his multiple sclerosis increased to the point where he was forced to use a wheelchair.

[14] The Court heard evidence that one of the elements in cannabis marihuana, namely tetrahydrocannabinol (THC), has been synthesized and is available by prescription under the trade name Marinol. Mr.Krieger testified that when he was resident in Preeceville, Saskatchewan, he attempted to fill a prescription for Marinol prescribed for him by Dr. John Ellis. His request was refused by the pharmacist. Since discovering that ingesting crude cannabis successfully controls his symptoms, Mr.Krieger has made no further efforts to obtain the synthetic form of THC, which is available through legal means.

[15] The Crown's expert, Dr. Harold Kalant, is probably the foremost Canadian, if not worldwide, expert on the medicinal use of cannabis marihuana. He was qualified as an expert to give opinion evidence in the fields of general medicine, medical pharmacology, and the pharmacology of cannabis marihuana. Dr. Kalant has testified as an expert witness at a number of trials, including the Ontario cases of R. v. Parker (1997), 12 C.R. (5 th ) 251 (Ct. Just, Prov. Div.), varied (2000) 49 O.R. (3d) 481 (C.A.) and R. v. Clay (1997), 9 C.R. (5 th ) 349 (Ct. Just., Gen. Div.); aff'd (2000), 146 C.C.C. (3d) 301 ( C. A.); app'n for leave to appeal filed Oct. 17, 2000).

[16] Dr. Kalant's evidence was that to date there have been two major chemical components in cannabis marihuana which have been identified as having pharmacological properties: THC and cannabidiol (CBD). He testified that CBD has been synthesized and is available in synthetic form in Israel but not in North America. Dr. Kalant suggested that there may very well be other chemical properties in cannabis marihuana that alone or in combination have valuable medicinal effects but which remain unknown at this time since no clinical trials have been undertaken. In his opinion, it is time that clinical trials be held on crude cannabis marihuana as it appears to hold some promise in treating the symptoms of several disabling disorders, including multiple sclerosis and epilepsy. Dr. Kalant testified that his own laboratory has had no trouble in obtaining cannabis for research purposes.

[17] He agreed in cross-examination that the consumption of marihuana is relatively harmless compared to the use of hard drugs. However, he advised that the effects of consumption of marihuana compare to those relating to the use of alcohol and tobacco. Dr. Kalant agreed that there is no causal link between the use of marihuana and criminality and that the use of marihuana does not make people more violent or aggressive. According to Dr. Kalant, there have been no recorded deaths from the consumption of marihuana alone.

[18] Dr. Kalant indicated that there are a number of concerns that relate to the smoking of marihuana. The particulate fraction of marihuana is similar to that of tobacco smoke. Marihuana has a high tar content and when smoked can produce

chronic irritation and precancerous changes in the lining of the bronchi. Smoking marihuana has been associated with an increased risk in lung and upper airway cancer.

[19] The acute effects of marihuana use include intoxication that can lead to impairment of certain psychomotor and cognitive functions. Larger doses can have an effect on sensation and perception which, if severe enough, can lead to an experience of depersonalization. For some, such an experience may cause acute anxiety which can precipitate panic attacks or short term psychosis. Dr. Kalant also testified that one of the physiological effects of THC is to increase the heart rate.

[20] Long term heavy users of marihuana can experience a deterioration of mental function and there is a mild but recognizable physical withdrawal syndrome related to the heavy use of cannabis. Using marihuana poses a risk of precipitating a relapse in those with compensated schizophrenia and may have effects on the foetus of a pregnant woman.

[21] Dr. Kalant testified that marihuana does have a recognized therapeutic effect in relieving nausea and vomiting in those who are undergoing chemotherapy or radiation. It is also known to stimulate the appetite and assist in weight gain for individuals, such as certain cancer and AIDS patients, who suffer from a wasting syndrome. CBD, one of the chemical components of cannabis marihuana, has a positive effect in suppressing epileptic seizures. Studies and anecdotal histories also suggest that THC works to relieve pain and muscle spasms. Cannabinoids in general are good analgesics.

#### ANALYSIS

[22] Mr.Krieger claims that he needs to grow and ingest cannabis marihuana as a medicine to control his multiple sclerosis. Because Parliament has made cultivation and possession of marihuana illegal, Mr.Krieger faces the threat of imprisonment in order to maintain his health. Mr.Krieger argues that such a statute is inconsistent with the concept of fundamental justice. He contends that he should be allowed to share the marihuana that he grows with other persons who claim they require it for medicinal purposes. Mr.Krieger suggests that s. 5(2) of the CDSA , the section prohibiting trafficking, contravenes the right of those who are similarly situated to obtain cannabis marihuana from a reputable supplier. He argues that s. 5(2) is in conflict with the principles of fundamental justice.

#### Breach of Section 7 Rights

[23] The onus of establishing a breach of s. 7 of the Charter rests with the accused. It is evident in the present case that s. 7(1) of the CDSA violates Mr. Krieger's right to liberty given that he is subject to imprisonment if convicted. The impact of incarceration on Mr.Krieger is particularly severe, as his condition deteriorates when he is unable to access marihuana.

[24] Section 7(1) of the CDSA deprives Mr.Krieger of the right to his choice of medication to alleviate the effects of his multiple sclerosis, a decision of fundamental personal importance. The Crown argued that Mr.Krieger was not in the same situation as the accused in R. v. Parker , supra as he has other medical

options for alleviating his symptoms and therefore was not forced to choose between committing a crime in order to obtain effective treatment and suffering from inadequate treatment. However, the evidence was clear that cannabis marihuana is effective in alleviating Mr. Krieger's symptoms whereas the plethora of other drugs which he has been prescribed have failed to do so.

[25] Dr. Kalant was of the view that Mr. Krieger might benefit from a combination of drugs. He suggested that use of oral Baclofen together with oral Tizanidine has promise. However, he also indicated that many patients don't benefit from Baclofen when it is given by mouth. The use of Baclofen may cause sedation and an increased weakening of the muscles. Suddenly stopping the use of Baclofen can give rise to hallucinations or seizures. Tizanidine can cause dry mouth, sedation, weakness, dizziness, a fall in blood pressure and in three cases has caused death from liver failure.

[26] Dr. Kalant also suggested that Mr. Krieger might benefit from the use of THC in combination with some other anti-spasticity drug. While Marinol may have some of the same beneficial effects as raw cannabis, Dr. Kalant admitted that there are many chemical components in crude cannabis marihuana which have not yet been studied but which alone or in combination may provide additional therapeutic effects. He advised that the Canadian Consortium on Clinical Studies, with the support of Health Canada, plans to carry out a study comparing the effects of smoked or ingested crude cannabis and THC or other cannabinoids.

[27] Dr. Kalant conceded that most of the risks associated with the use of raw cannabis marihuana also apply to the use of THC. In addition, he advised the Court that Marinol has been approved only for use in combatting nausea and vomiting associated with chemotherapy and in stimulating the appetite of those suffering from the wasting syndrome. As the Minister of Health has granted exemptions in relation to raw cannabis marihuana, presumably he has recognized that Marinol is not always a sufficient substitute.

[28] I am of the view that Mr. Krieger has led sufficient evidence to show that he requires cannabis marihuana for his medical needs and that he should be in a position to acquire it by legal means, in this case by cultivating the plant. The fact that Mr. Krieger has not tried every conceivable combination of prescribed drugs available for alleviating the symptoms of multiple sclerosis does not preclude me from finding that he requires marihuana. Rather, his need is evident in that he has followed the conventional form of treatment without apparent success but has found relief from his symptoms when ingesting and smoking marihuana on a regular basis.

[29] Mr. Krieger's right to security of the person also has been infringed as the legislation, by threat of criminal sanction, effectively denies him access to a valid form of treatment for his medical condition and puts his health at risk. Mr. Krieger has established that s. 7(1) of the CDSA has a similar effect in relation to others suffering from various serious illnesses or conditions who have found marihuana effective in the treatment of their symptoms.

Section 56 of the CDSA

[30] The question then arises whether the denial of the section 7 rights of Mr. Krieger and those who are similarly situated occurred in accordance with the

principles of fundamental justice? The Crown suggested that s. 56 of the CDSA should be considered as part of the s. 7 analysis, although counsel for Mr. Krieger argued that s. 56 is more properly dealt with under s. 1 of the Charter .

[31] As stated by the majority in *R. v. Mills* , [1999] 3 S.C.R. 668, (1999) 139 C.C.C. (3d) 321 at 359-360:

...there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the Charter rights.

[32] In *R. v. Parker* , supra the Ontario Court of Appeal upheld the trial judge's finding that the accused in that case required marihuana to control his epilepsy. Mr. Parker had been charged with simple possession. The court agreed with the trial judge that the prohibition against possession and cultivation of marihuana in the former Narcotic Control Act , R.S.C. 1985, c. N-1 and in the CDSA was an infringement of the accused's s. 7 Charter rights. Rosenberg, J.A., who delivered the judgment of the Court of Appeal, concluded that the possibility of a s. 56 exemption which was dependent upon the unstructured and unfettered discretion of the Minister of Health, was not consistent with the principles of fundamental justice.

[33] The parties in *R. v. Parker* , supra examined the effect of s. 56 as part of a s. 7 analysis. Rosenberg J. A. dealt with the case on that basis but indicated at para. 120 that the availability of the s. 56 exemption might more properly be dealt with under s. 1.

[34] In my view, s. 56 must be considered in relation to s. 7. As suggested by the British Court of Appeal in *R. v. Malmo-Levine* (2000) 145 C.C.C. (3d) 225 at para. 62; app'n for leave to appeal filed [2000] S.C.C.A. No. 361, "`societal interests' may form part of the s. 7 analysis when the operative principle of fundamental justice necessarily involves issues like the protection of society." The state's health concerns fall under this heading. However, s. 56 may well come into play in relation to the s. 1 analysis also. As will be apparent from the discussion below, it is unnecessary for me to decide that issue.

[35] Section 56 of the Act allows the Minister of Health to exempt any person or any controlled substance from the application of all or any of the provisions of the Act if the Minister is of the opinion that the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest. The irony of the s.56 exemption is that there is no legal source for cannabis marihuana in Canada at this time. Moreover a s. 56 application requires that a physician prescribe the drug, follow the patient, report to the Bureau of Drug Surveillance, and identify the source of the product to be used. Even if a physician is prepared to fulfill the reporting requirements, it would be impossible for that physician to identify a licit source of the product as it is not legally available in Canada.

[36] Obtaining a s. 56 exemption from the Minister of Health triggers the absurdity that an individual who has been granted an exemption has the legal right to produce, possess and use cannabis marihuana. However, in order to obtain the product, that individual is required to participate in an illegal act, since whoever sells the exempted person either the raw cannabis marihuana or the seeds to grow their own, does so in breach of s. 5(2) of the CDSA .

[37] Although approximately 72 exemptions have been granted by the Minister of Health under s. 56 of the statute, I am not satisfied that the absurdity that I mentioned above has been properly addressed. In my view, when a minister has the discretion to allow someone an exemption to produce and use a substance for proper medical purposes, that substance must be something that is available to the individual by legal means at the time the exemption is granted. As a s. 56 exemption has no practical purpose without a legal source for cannabis marihuana, s. 56 cannot serve to delineate the boundaries of the Applicant's s. 7 rights or to justify violation of those boundaries.

[38] I have considered the arguments presented by both sides on the issue of fettered or unfettered discretion of the Minister of Health in granting a s. 56 exemption. I do not believe it necessary to decide that issue here as I find that the current absurdity created by s. 7(1) of the legislation is sufficient grounds upon which to say that s. 56 of the CDSA cannot be relied on to save this legislation under s. 7 or s.1 of the Charter .

#### Fundamental Justice

[39] In *Re B.C. Motor Vehicle Act* , [1985] 2 S.C.R. 486 at 503 Lamer J. stated that: "...the principles of fundamental justice are to be found in the basic tenets of the legal system." Sopinka J. in *Rodriguez v. British Columbia (Attorney General)* , [1993] 3 S.C.R. 519 at 594 held that, "Where the deprivation of the right in question does little or nothing to enhance the state's interest ( whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid reason."

[40] There was limited evidence presented on this application as to the state's interest in prohibiting the production of marihuana. However, Dr. Kalant did speak of the possible harmful effects of marihuana. It is quite apparent from the evidence presented during this application that the state has a legitimate health concern in prohibiting the possession, production and trafficking of marihuana.

[41] However, it cannot be said that the state's interest is enhanced by the prohibition against marihuana possession and production in terms of those with a serious illness who would benefit from use of cannabis marihuana. I am satisfied, from the evidence presented on this application, that marihuana does have a therapeutic effect in the treatment of nausea and vomiting related to chemotherapy or radiation and for muscle spasticity, epileptic seizures and chronic pain. Marihuana also is helpful in stimulating the appetite of those suffering from a wasting syndrome. I agree with the statement of Sheppard, Prov. J. in *R. v. Parker* , supra at para. 51 that, "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."

[42] THC, which produces the psychoactive effects associated with smoking marihuana, has been approved for sale in Canada in the form of Marinol. In addition, the federal government, by putting in place s. 56 of the CDSA, has acknowledged that raw cannabis marihuana has some valid therapeutic use and should be available through a regulated process.

[43] The Ontario Court of Appeal in *R. v. Parker*, supra commented in obiter that had s. 7(1) of the CDSA been before them they would have held that it infringed upon Mr. Parker's rights. They noted, in paragraph 190:

Since there is no legal source of supply of marihuana, Parker's only practical way of obtaining marihuana for his medical needs is to cultivate it. In this way, he avoids having to interact with the illicit market and can provide some quality control.

[44] I am satisfied that s. 7(1) of the CDSA deprives Mr. Krieger and those who are similarly situated of their rights under s. 7 of the Charter to the extent that it prohibits these individuals from producing raw cannabis marihuana for their own therapeutic purposes. I am also convinced that such deprivation is not in accordance with the principles of fundamental justice.

#### Section 1

[45] Having found a Charter breach, the onus now shifts to the Crown to establish under s. 1 of the Charter that this breach is demonstrably justifiable in a free and democratic society.

[46] The Supreme Court of Canada in *R. v. Oakes* [1986] 1 S.C.R. 103 at 138-139 defined the criteria which must be met to justify any limitation of a Charter right. First, the objective to be served by the measure limiting the Charter right in question must be of sufficient societal importance to warrant overriding a constitutionally protected right or freedom. Second, the means must be reasonable and demonstrably justified in proportion to the importance of the objective. This latter criteria, the proportionality test, involves three components:

- (i) The measure must be fair, not arbitrary. It must be carefully designed to achieve the objective in question and rationally connected to that objective;
- (ii) The means should impair the Charter right as little as possible;
- (iii) There must be a proportionality between the effects of limiting the measure and the objective.

[47] The Crown chose to discuss s. 56 under its s. 7 argument and did not attempt any type of s. 1 analysis. As I have indicated in the discussion on s. 7, the object of the prohibition against production of marihuana is reflective of a valid societal concern. However, that concern does not extend to the therapeutic use of marihuana where the benefits to be derived from use of the drug outweigh its risks. If s. 56 is taken out of the s. 1 equation, as I believe that it must be until such time as there is a licit supply of marihuana, it can be seen that s. 7(1) fails the proportionality test. In my view, s. 7(1) is not a reasonable

limit on the s. 7 rights of Mr.Krieger and others who are in a similar situation.

#### Trafficking

[48] With respect to the trafficking charge under s. 5(2) of the Charter , Mr.Krieger argued that he set up a non-profit compassion club and through this vehicle provided medicinal grade cannabis marihuana at a reasonable cost to persons whom the club determined required the product for valid therapeutic reasons.

[49] According to Mr.Krieger . The club has one member who has a science degree and is able to write medical protocols. A prospective member must provide a form letter from a doctor which identifies the applicant's medical condition. The club then makes the determination as to whether or not that medical condition is one where cannabis marihuana might be of some medicinal benefit.

[50] In essence, Mr.Krieger is seeking the Court's blessing to have an unfettered discretion to distribute cannabis marihuana to whomever he and his compassion club members decide might benefit from the product.

[51] Section 5(2) of the CDSA does not infringe Mr. Krieger's right to security of the person, although his right to liberty is involved. Nevertheless, I find that any such limit is in accordance with the principles of fundamental justice and is demonstrably justified in a free and democratic society.

[52] The object of s. 5(2) and the regulations to the CDSA is to regulate the distribution of drugs in Canada as a matter of public health and safety. This is a legitimate objective. Providing prohibited products to others opens a Pandora's box of problems for both society and for the provider of that product. Clearly, in the pharmaceutical industry, there are strict controls on who may prepare, prescribe, and dispense pharmaceuticals. It would be inappropriate, in my view, for the Courts to allow cannabis marihuana to bypass all of those safety provisions.

[53] To deny Mr.Krieger the right to possess marihuana for the purpose of trafficking does not create any hardship for Mr.Krieger or for those who might be similarly situated, to the extent that they may also wish to traffic in the drug. The Applicant argues that the hardship is suffered by members of the compassion club to whom he supplies marihuana for medicinal purposes. However, their right to possess marihuana for personal therapeutic use does not translate into a right on Mr. Krieger's part to traffic.

[54] I recognize that the absurdity which I acknowledged above remains. However, I am satisfied that s. 5(2) is an important safeguard preventing unregulated distribution of powerful drugs.

#### CONCLUSION

[55] I am prepared to agree with the Applicant that s. 7(1) of the CDSA should be struck down to the extent that it deals with production of cannabis marihuana. If s. 4 were before me I, like the Ontario Court of Appeal in R. v. Parker , supra , would strike down the prohibition against possession of marihuana because to do

otherwise would be, to use Dr. Kalant's word, "inhumane" to Mr.Krieger under the circumstances.

[56] I am troubled by the fact that the Canadian government has not made arrangements for a legal source of cannabis marihuana to be made available to persons who require it for therapeutic use. Since Dr. Kalant indicated that he was able to obtain cannabis marihuana for research purposes, it must be available from some legitimate source. I trust that if I put a stay of one year on the effect of my decision, similar to that done by the Ontario Court of Appeal, this problem will be solved within the year.

[57] With respect to Mr. Krieger , I am satisfied on the evidence of the Crown's expert witness and Mr.Krieger himself that it would be inhumane not to grant Mr. Krieger an exemption from the prohibition in s. 7(1) of the CDSA during the period of the suspended invalidity in order that he may cultivate cannabis marihuana for his own medical use. Pursuant to s. 24(1) of the Charter , I would stay the proceedings against him under s. 7(1) of the CDSA.

[58] The application with respect to s. 5(2) of the CDSA , supra is dismissed.

HEARD on the 10 th day of October, 2000.

DATED at Calgary, Alberta this 11 th day of December, 2000.

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J.C.Q.B.A.