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COURT OF APPEAL FOR ONTARIO

CATZMAN, CHARRON and ROSENBERG JJ.A.

B E T W E E N :	)	
	)	**Kevin R. Wilson,**
HER MAJESTY THE QUEEN	)	**for the appellant**
	)	
Appellant	)	**Richard P. Macklin and**
	)	**Aaron B. Harnett,**
- and -	)	**for the respondent**
	)	
TERRANCE PARKER	)	**Ed Morgan,**
	)	**for the Intervener,**
Respondent	)	**Epilepsy Association of Toronto**
	)	
	)	**Heard: October 6, 7 and 8, 1999**
	)	

On appeal against the stay of proceedings granted to the respondent by The Honourable Judge Patrick Sheppard on December 10, 1997

ROSENBERG J.A.:

[1] This is one of two appeals heard by this court concerning the constitutionality of the marihuana prohibition in the former *Narcotic Control Act*, R.S.C. 1985, c. N-1 and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. The appeal in *R. v. Clay* concerns the use of the criminal law power to penalize the possession of marihuana. This Crown appeal concerns the medical use of marihuana.

OVERVIEW

[2] It has been known for centuries that, in addition to its intoxicating or psychoactive effect, marihuana has medicinal value. The active ingredients of marihuana are known as cannabinoids. The cannabinoid that gives marihuana its psychoactive effect is tetrahydrocannabinol (THC). While less is known about the other cannabinoids, the scientific evidence is overwhelming that some of them may have anti-seizure properties. The most promising of these is cannabidiol (CBD). Smoking marihuana is one way to obtain the benefit of CBD and other cannabinoids with anti-seizure properties.

[3] The respondent Terrance Parker has suffered from a very severe form of epilepsy since he was a young child. For close to 40 years he has experienced frequent serious and potentially life-threatening seizures. He has attempted to control these seizures through surgery and conventional medication. The surgery was a failure and the conventional medication only moderately successful. He has found that by smoking marihuana he can substantially reduce the incidence of seizures. Since he has no legal source of marihuana, he has been growing it himself. On two occasions, the police searched his home and seized the marihuana. He was first charged with cultivating marihuana under the *Narcotic Control Act*. By the time of the second investigation, that Act had been repealed and he was charged with possession of marihuana under the new *Controlled Drugs and Substances Act*.

[4] The former *Narcotic Control Act* and the *Controlled Drugs and Substances Act* prohibit under threat of imprisonment the possession and cultivation of marihuana. That prohibition is theoretically not absolute. Both statutes contemplate that drugs like marihuana may have medicinal value and therefore should be available through a regulatory process. If a drug receives the necessary regulatory approval, it can be made available to the public through a physician's prescription. A synthetic version of THC, known as Marinol, has been approved for use in Canada and is available by prescription. No drug company has applied for a licence to sell CBD and therefore it is not available in Canada.

[5] Parker decided to fight the charges against him by attempting to show that the prohibition on the cultivation and possession of marihuana in the two statutes is unconstitutional. Specifically, he claims that the legislation infringes his rights as guaranteed by s. 7 of the *Canadian Charter of Rights and Freedoms*. Section 7 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. Put simply, Parker claims that he needs to grow and smoke marihuana as medicine to control his epilepsy. Because Parliament has made cultivation and possession of marihuana illegal, he faces the threat of imprisonment to keep his health. Parker argues that a statute that has this effect does not comport with fundamental justice. To support his claim at trial, Parker led a great deal of scientific and other

evidence. That evidence demonstrated the therapeutic value of marihuana for treating a number of very serious conditions including epilepsy, glaucoma, the side effects of cancer treatment and the symptoms of AIDS.

[6] The government countered with its own evidence at trial. It argued that Parker does not need marihuana to control his seizures and that he has a number of other legal therapeutic alternatives; such as better treatment with conventional epilepsy medication or obtaining a prescription for Marinol.

[7] In reasons reported at (1997), 12 C.R. (5th) 251, Sheppard J. of the Ontario Court of Justice concluded that Parker requires marihuana to control his epilepsy and that the prohibition against marihuana infringes Parker's rights under s. 7 of the *Charter*. Sheppard J. stayed the cultivation and possession charges against Parker. Further, in order to protect Parker and others like him who need to use marihuana as medicine the trial judge read into the legislation an exemption for persons possessing or cultivating marihuana for their "personal medically approved use".

[8] The Crown appeals from that judgment. It argues that the trial judge made a factual error in finding that Parker requires marihuana for medical purposes. The Crown also argues that the legislation is valid and that there are legal means by which Parker can obtain marihuana. It says that the legislation is not unconstitutional simply because no

drug company has attempted to have marihuana or CBD licensed for sale through prescription. It also argues that Parker could have applied for a special exemption from the Minister of Health under s. 56 of the *Controlled Drugs and Substances Act*. It points to fresh evidence placed before this court that the Minister has granted such exemptions to other persons who need marihuana for therapeutic purposes. Finally, the Crown says the remedy granted by the trial judge was wrong and he should not have, in effect, amended the legislation, that this is a matter for Parliament.

[9] Parker supports the decision of the trial judge. The Epilepsy Association of Toronto has intervened in this appeal and it also supports the trial judge's decision. In addition, the Association attempts to raise a new argument, that the statutes also violate the equality provisions of the *Charter*.

[10] I have concluded that the trial judge was right in finding that Parker needs marihuana to control the symptoms of his epilepsy. I have also concluded that the prohibition on the cultivation and possession of marihuana is unconstitutional. Based on principles established by the Supreme Court of Canada, particularly in *R. v. Morgentaler*, [1988] 1 S.C.R. 30, where the court struck down the abortion provisions of the *Criminal Code*, and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, where the court upheld the assisted suicide offence in the *Criminal Code*, I have concluded that forcing Parker to choose between his health and imprisonment violates his right to liberty

and security of the person. I have also found that these violations of Parker's rights do not accord with the principles of fundamental justice. In particular, I have concluded that the possibility of an exemption under s. 56 dependent upon the unfettered and unstructured discretion of the Minister of Health is not consistent with the principles of fundamental justice. I have not dealt with the equality argument raised by the Epilepsy Association because that argument was not raised at trial.

[11] Accordingly, I would uphold the trial judge's decision to stay the charges against Parker and I would dismiss that part of the Crown's appeal. However, I disagree with Sheppard J.'s remedy of reading in a medical use exemption into the legislation. I agree with the Crown that this is a matter for Parliament. Accordingly, I would declare the prohibition on the possession of marihuana in the *Controlled Drugs and Substances Act* to be of no force and effect. However, since this would leave a gap in the regulatory scheme until Parliament could amend the legislation to comply with the *Charter*, I would suspend the declaration of invalidity for a year. During this period, the marihuana law remains in full force and effect. Parker, however, cannot be deprived of his rights during this year and therefore he is entitled to a personal exemption from the possession offence under the *Controlled Drugs and Substances Act* for possessing marihuana for his medical needs. Since the *Narcotic Control Act* has already been repealed by Parliament, there is no need to hold it unconstitutional. If necessary, I would have found that Parker was entitled to a personal exemption from the cultivation offence for his medical needs.

[12] Following are my reasons for these conclusions. Because a principal part of the Crown's attack on the trial decision was on the trial judge's findings of fact, I will deal at some length with the evidence. I will then review the trial judge's findings on the law before setting out my own analysis of the legal issues. Finally, I will explain why I would grant a different remedy from the remedy granted by the trial judge.

THE FACTS

(i) The facts of the offences

[13] Marihuana was seized from the respondent on two different occasions. On July 18, 1996, police officers executed a warrant at the respondent's home and seized 71 marihuana plants. He was charged with cultivating cannabis marihuana contrary to s. 6(1) of the *Narcotic Control Act* and possession of cannabis marihuana for the purpose of trafficking contrary to s. 4(2) of the *Act.* On September 18, 1997, the police again attended at the respondent's home and seized three growing marihuana plants. By this time, the *Narcotic Control Act* had been repealed. On this occasion, the respondent was charged with possession of marihuana contrary to s. 4(1) of the *Controlled Drugs and Substances Act*.

[14] A short note on terminology. Section 3 of the *Narcotic Control Act* prohibits the unauthorized possession of a "narcotic". The term "narcotic" is defined in s. 2 of the Act as anything included in the schedule to the Act. Section 3 of the schedule lists "*Cannabis*

sativa, its preparations, derivatives and similar synthetic preparations" including "Cannabis (marihuana)", "Cannabidiol" (CBD), and "Tetrahydrocannabinol" (THC). Section 6 prohibits the unauthorized cultivation of "marihuana". Section 2 defines marihuana as "*Cannabis sativa L.*" In the evidence, the terms cannabis and marihuana tended to be used interchangeably. For simplicity, I will try to use only the term marihuana when referring to the plant and the raw part of it that is smoked by users. This appeal does not deal with "refined" marihuana such as cannabis resin (hashish). I will refer to the two active ingredients about which there was considerable evidence by their initials THC and CBD. Marinol is a synthetic form of THC.

[15] The *Controlled Drugs and Substances Act* is slightly different in form from the *Narcotic Control Act*. Section 4 prohibits the unauthorized possession of "substances" listed in certain schedules, including "Cannabis (marihuana)" and CBD and THC. Section 7 of the Act prohibits the unauthorized production of substances in the schedules and thus Cannabis (marihuana). Again, for simplicity I will use the term marihuana to refer to the substance grown and used by Parker.

[16] To return to the facts, the charge of possession for the purpose of trafficking was based on Parker's admission to the police that he gives some of his marihuana to other persons who need it for their epileptic seizures. He was found guilty of that offence. The

Charter challenge does not relate to that offence and it played no part in the proceedings in this court.

[17] There was no dispute about the facts upon which the cultivation charge under the *Narcotic Control Act* and the possession charge under the *Controlled Drugs and Substances Act* were based. At one point in the proceedings, Parker had apparently considered relying on a defence of necessity. However, he did not pursue that defence and the only issue at trial was the constitutionality of the prohibition against possession and cultivation of marihuana where an accused claims that he or she requires the marihuana for medicinal purposes.

(ii) Parker's health and experience with marihuana

[18] When he was four and six years of age, Parker suffered two serious head injuries. He was diagnosed with epilepsy after the first accident and thus has had epilepsy for almost 40 years. He suffers from the whole range of seizures associated with epilepsy. These range from *petit mal* seizures, which are brief spells where he almost collapses, to *status epilepticus* when he suffers a series of *grand mal* seizures and requires immediate emergency medical attention. *Grand mal* seizures leave Parker unconscious, violently twitching and writhing on the ground. He will sometimes vomit, lose control of his bowels, choke on his own saliva and smash his head against the ground.

[19] Parker also has various other types of seizures including the following:

> Jacksonian: Limbs shake and vibrate uncontrollably, lasts for up to 45 seconds.
>
> Complex partial (psychomotor): Vivid hallucinations and problems in perception that last up to three minutes; during one of these episodes Parker mistook the end of a subway platform for the back of a truck and jumped off; he was brought to his senses by the sound of an approaching train and was able to scramble to safety.
>
> Partial continuous: Uncontrollable grinding of teeth and loss of control of left arm and leg for short bursts up to a minute. An episode can include dozens of attacks lasting more than a day.
>
> Akinetic: Parker drops to the ground and lies unconscious for up to five minutes. He often injures his head and face in the fall.

[20] Parker has been prescribed many drugs for the treatment of his epilepsy. The primary drugs in his plan are Phenytoin (Dilantin) and Primidone (Mysoline). Both drugs have various side effects to which I will refer below when reviewing the expert evidence.

[21] The seizures associated with Parker's epilepsy severely disrupted his school attendance. As a child and young teen, Parker grew increasingly despondent over his medical condition and the terror he experienced with seizures. Aggressive medical treatment with various drugs did not improve his condition.

[22] At the age of 14, in an attempt to control his seizures, Parker underwent a right temporal lobectomy at the Toronto Hospital for Sick Children. The operation involved the opening of his cranium and the removal of brain matter. The operation was a complete failure and Parker suffered a *grand mal* seizure in the recovery room. Parker became depressed and suicidal and was hospitalized in various psychiatric hospitals. At the age of 16, Parker agreed to further surgery. Only local anesthetic was used and thus Parker was awake while his skull was opened and further brain material was scraped away. The operation did not reduce the seizures.

[23] In the late 1960's, Parker was introduced to marihuana while an in-patient at a provincial institution. Parker's use was originally recreational. By 1974, he was a regular user and he had observed that while under the influence of marihuana, the frequency and intensity of his seizures sharply declined.

[24] In 1980, Parker reported his experience with marihuana to his physician and started to diarize his marihuana use and seizure frequency. Over a six-month period, he found that he experienced *grand mal* seizures when he did not take marihuana and experienced no seizures when he took marihuana in addition to his prescription medicine.

[25] In 1987, Parker's physician advised that the side effects of the prescription medications were so severe that higher dosages could not be used. Therefore, the

physician advised him to regularly use marihuana in conjunction with his prescription medicine to control his seizures. The physician provided a report in September 1987 that included the following:

> Mr. Parker has had many side effects over the years due to his anti-convulsant medications, which have prevented their perhaps more efficacious use in higher doses. These side effects are well-recognized in the medical literature. Hence, from a medical and quality-of-life point of view, I am of the opinion that it is medically necessary, in order to obtain optimal seizure control, that Mr. Parker regularly use marijuana in conjunction with his other anti-convulsant medications.

[26] In 1987, Parker was charged with possession of marihuana. He was acquitted on the basis of the common-law defence of necessity. A Crown appeal to the Ontario District Court was dismissed. Shapiro Dist. Ct. J. noted Parker's lengthy history of *grand mal* epilepsy and his attempts at treatment with drugs and through surgery and concluded that the trial judge could properly find that the necessity defence was made out.

[27] Parker continued to derive substantial benefit from smoking marihuana in conjunction with his prescription drugs. If he consumes marihuana on a daily basis, he experiences virtually no seizures. Without marihuana, within three days he experiences seizures again and will have three to five *grand mal* seizures a week and many more other lesser seizures. Parker is also able to use marihuana to avert oncoming seizures.

When he experiences a prodrome, a precursor to a *grand mal* seizure, and consumes marihuana, he is able to combat the oncoming seizure.

[28] The seizures associated with Parker's epilepsy constitute a serious threat to his health and safety. He has been hospitalized over 100 times due to injuries sustained from seizures. He has been robbed while unconscious and arrested as being drunk, although he does not drink alcohol. Because of the severity of his symptoms, Parker is unable to work and is on a government disability pension.

[29] From 1980 to 1996, Parker was not under the care of an epilepsy specialist. He was under the care of a specialist at the time of the trial in 1997, having first seen him about three weeks before the trial. Parker has had his blood levels monitored about twice a year. The only change in medication that has been recommended by a physician in the recent past was from an emergency room physician who suggested that he increase the dosage of Dilantin from 300 mg to 400 mg per day. Parker declined due to his concern about liver damage at the increased dosage. Crown counsel conducted an extremely brief cross-examination of Parker, which showed that Parker had not asked to have Marinol prescribed for him.

[30] Parker's mother filed an affidavit on the appeal to update his medical condition. She states that Parker's health has greatly improved since the trial and she attributes this to the lack of seizures due to his use of marihuana.

[31] At trial, some evidence was given about Parker's participation in a study at the Addiction Research Foundation in 1979. He testified that he was given some pills containing what he was later told was some form of synthetic THC, a placebo, and a plant that had been sprayed with THC. He had little information at trial about the study or its conclusions. He believed that the study concluded that the use of THC had neither a beneficial nor detrimental effect on his seizures.

[32] On appeal, counsel for Parker produced the results of the study. No objection was taken to this evidence and indeed the appellant relied upon this material. This study assumed considerable importance on the appeal and therefore I set out its findings in some detail. The study was undertaken to assess Parker's claim that marihuana was beneficial in controlling his seizures. The authors of the study noted that "recently cannabidiol [CBD], a marijuana constituent which lacks psychotropic effects in man, has been studied in a wide variety of both natural and experimentally induced epileptic models and has been shown, almost uniformly, to be anti-convulsant". However, the ARF study of Parker dealt only with THC, in part, because it was available in a purified form.

[33] It is important to set out the conclusions from the study:

> From the study it would appear that [THC] had neither beneficial nor detrimental effects on either the clinical or electroencephalographic features of this man's seizure disorder. Several factors however, make it difficult to correlate our findings with what actually happens while he is out of hospital smoking crude marijuana. The marked decrease in seizure frequency during hospitalization is a well recognized occurrence. Hospitalization also ensured anticonvulsant drug compliance to Dilantin particularly since it was subtherapeutic on admission and also after discharge. The use of pure [THC] is also open to criticism since the patient's experience had been with crude marijuana in which [THC] is only one of several cannabinoids including cannibidiol which may be more exclusively anticonvulsant. This patient however was followed at weekly intervals for four weeks after discharge with his anticonvulsants being supplied in weekly allotments. During this time he was regularly smoking crude marijuana obtained on the street. Seizure frequency remained low with only two seizures in the four weeks. The EEG's showed no significant difference from those done in hospital and the marijuana urine levels were just slightly below those measured in hospital. Dilantin levels were subtherapeutic but Tegretol and Mysoline remained within the therapeutic range.
>
> Much more extensive clinical investigation is needed with both crude marijuana and the individual cannabinoids before any definitive statement can be made concerning either harmful or beneficial effects in epileptics. Perhaps different types of seizure disorders respond differently and Feeney has also suggested that the response depends to some extent on the pre-drug baseline seizure frequency and intensity, seizures being activated in individuals with a low baseline frequency and attenuated in those with a high baseline frequency. Until more work is done, however, we feel it prudent to advise epileptics against the use of marijuana. [Footnotes omitted.]

[34] The parties drew completely opposite conclusions from this study. Parker relies on the study as further evidence in support of the trial judge's findings of fact. On the other hand, the Crown suggests that the study supports its submission that findings made by the trial judge concerning Parker's need for marihuana to control his seizures are unsupported by the evidence. I will set out those findings of fact in some detail after my review of the expert evidence. Suffice it to say at this stage that the trial judge found as a fact that synthetic THC (Marinol) is not effective for Parker since it does not contain CBD, that Parker had shown control of seizures is best achieved through a combination of conventional medication and smoking marihuana, and that he had been reasonably diligent in attempting to control his seizures through conventional treatment.

[35] In my view, the ARF study confirms Parker's belief that THC does not have a therapeutic effect on him. The Crown overstates the case that the ARF study shows that if Parker properly monitored his intake of conventional medications he would not need to resort to marihuana use. As the authors point out, "marked decrease in seizure frequency during hospitalization is a well recognized occurrence". There was no suggestion that Parker's continued hospitalization was a reasonable alternative to his use of marihuana to control his seizure activity outside the hospital. It may be that hospitalization also ensured anticonvulsant drug compliance. However, the issue of Parker's use of

conventional medication and compliance with that regime was squarely before the trial judge. It was open to the trial judge to accept Parker's evidence that he took his medication as prescribed. The ARF study also confirms that Parker's decision not to seek a prescription for Marinol was a reasonable one. In addition, no physician has apparently suggested that Parker use Marinol. As counsel for Parker aptly pointed out in oral argument, the only person who has "prescribed" Marinol for Parker is Crown counsel. Finally, the ARF study marginally supports the theory that it is CBD rather than THC that is the medicinal ingredient in marihuana at least in respect of control of seizures. It therefore supports the trial judge's finding in that regard in respect of Parker.

(iii) The harmful and therapeutic effects of marihuana

[36] The parties placed a considerable body of evidence before Sheppard J. about the medicinal use of and claims about marihuana.[1] On consent, the parties filed the transcripts from the trial in *R. v. Clay*. The principal experts were Dr. Kalant, who had also testified for the Crown at the *Clay* trial, and Dr. Morgan, who testified on behalf of the defence. Both are highly qualified.

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[1] The parties also placed "fresh" evidence before this court. For the most part, this evidence falls within the category of legislative facts and, in my view, is properly admissible. See *Ford v. Quebec (Attorney-General)* (1988), 54 D.L.R. (4th) 577 (S.C.C.) at 624-26. The one category of evidence that may constitute adjudicative facts is an affidavit from the respondent's mother setting out the respondent's health since the judgment. The Crown objected to one paragraph of that affidavit as hearsay and I have ignored that paragraph.

[37] It appears to me that the differences between the Crown and defence experts lay mostly in the emphasis they placed on certain facts and the inferences they drew. One fact looms very large in this case, as it did in the *Clay* case. The experts agreed that there is a need for better studies about the long-term effects of regular marihuana use and for better studies about the therapeutic value of marihuana.

[38] As I have indicated, the transcripts from the trial in *R. v. Clay* were filed on consent in this trial. That evidence set the background for the issues in this case as it set out the existing state of knowledge about the harmful health effects of marihuana. Sheppard J. adopted the findings of fact made by McCart J. in the *Clay* trial. Since those findings are fully set out in my reasons in the *Clay* appeal, I will only briefly summarize the findings of particular relevance to this appeal.

[39] Consumption of marihuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol and there is no "hard evidence" that even long-term use can lead to irreversible physical or psychological damage. Marihuana use is not criminogenic (i.e. there is no causal relationship between marihuana use and criminality) and it does not make people more aggressive or violent. There have been no recorded deaths from consumption of marihuana. Marihuana does have an intoxicating effect and it would not be prudent to drive while intoxicated. As with tobacco smoking, marihuana smoking can cause bronchial pulmonary damage, especially in heavy users. There may

be other side effects from the use of marihuana and its effects are probably not as benign as was thought some years ago. However, these other effects are not acute except in very narrow circumstances, for example, people with schizophrenia. I will return to the question of the harmful effects of marihuana when discussing the objectives of the marihuana prohibition in the legal analysis.

[40] On this appeal, the Crown disputes some of the findings by McCart J. and hence their acceptance by Sheppard J. The Crown relies upon evidence that Dr. Kalant gave at the trial in commenting on the findings by McCart J.[2] Dr. Kalant's reservations about the findings made in the *Clay* trial are minor and, in any event, do not seriously affect the constitutional analysis in this case, which is concerned with the medical use of marihuana.[3] For example, Dr. Kalant repeated the testimony he gave at the *Clay* trial that if the level of use went up "dramatically", the amount of harm produced by "heavy use" would undoubtedly also go up. For the purposes of this case, I would accept that common-sense observation, but there is no indication that the medicinal use of marihuana would lead to a dramatic use in marihuana generally.

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[2] The reasons of McCart J. are reported at (1997), 9 C.R. (5th) 349 (Ont. Ct. (Gen. Div.)).

[3] I note that Howard Prov. Ct. J., who heard similar evidence in *R. v. Caine*, [1998] B.C.J. No. 885 came to almost the same conclusions as did McCart J. The accused in *Caine* appealed from that decision. The British Columbia Court of Appeal heard that appeal with another appeal raising the same issues. A majority of the court upheld the trial decisions in reasons cited as *R. v. Malmo-Levine* 2000 BCCA 335. I have made extensive reference to this decision in my reasons in *R. v. Clay*. *Malmo-Levine* does not deal with the therapeutic use of marihuana.

[41] Dr. Kalant also pointed out that the phrase “hard evidence” was not defined in the reasons for judgment, and therefore the statement should not be accepted as a “statement of fact”. In my view, this is a matter of semantics and reflects the difficulty of reconciling scientific proof with proof in litigation. In short, scientists can continue to study a problem until it is resolved. They find facts through continual testing, experimentation and research. A finding will only be accepted as a fact when it can be replicated under carefully controlled circumstances by many different researchers. This is a particularly onerous standard where, as with the harmful effects of marihuana, what is sought to be demonstrated is a negative, that marihuana does not cause serious physical or mental harm. The fact that on the current state of the research no such negative conclusion can be reached is not a statement for scientists that there is no harm, only that more studies may have to be done. Trial judges do not have that luxury. They are required to reach a conclusion on the basis of the record placed before them by the parties. When McCart J. said that there was no hard evidence of irreversible organic mental damage from the consumption of marihuana, he was making a finding that he was satisfied that no such harm had been demonstrated on the evidence presented in his courtroom. This finding was in any event qualified by the finding, accepted by Sheppard J., that there was a satisfactory body of evidence that heavy smoking of marihuana can cause bronchial pulmonary damage.

[42] I will now turn to the evidence concerning the medicinal use of marihuana. There are a number of active ingredients, cannabinoids, in marihuana. The main ingredient in marihuana that gives it the psychoactive effect is THC. As indicated earlier, THC is available in synthetic form and is available in pill by prescription under the trade name Marinol. There is a dispute between the parties as to whether Marinol is effective in treating seizures associated with epilepsy or any of the other symptoms of diseases for which patients have resorted to marihuana such as glaucoma and AIDS.

[43] Other cannabinoids may have anti-seizure properties. One of the most promising may be cannabidiol (CBD). CBD does not have a psychoactive side effect. It is not available by prescription. The studies that have been done indicate that the cannabinoids increase the effectiveness of conventional drugs used to treat epilepsy and are not a replacement for those drugs. The goal for effective treatment of epilepsy is to maintain a steady blood level of medication.

[44] The Crown's witness, Dr. Kalant, did, in general, provide strong support for the respondent's position that marihuana does have therapeutic properties for treating epilepsy and other illnesses. He testified, for example, that "there is a lot of evidence showing a variety of cannabinoids, that is the pure compounds contained in and extracted from cannabis, do have anti-seizure activity". Most of this evidence has come from animal studies. He testified that of the various cannabinoids tested the most promising

one was CBD. It has at least as much anti-convulsant effect as THC but is free of the psychoactive effects. Further, research shows that tolerance to the anti-convulsant action of THC occurs very quickly, “in a matter of days”, so it loses its effect. This does not happen with CBD. As well, there is a simpler dose response relationship with CBD, meaning the more that is given, the greater the effect. With THC, while low doses may be good at controlling seizures, high doses can produce seizures. As he pointed out, this makes smoking marihuana that contains both THC and CBD a problematic delivery system, especially since smoked marihuana contains more THC than CBD. He emphasized that not enough human studies had been done. One good human study done by the Cunha group found that pure CBD taken with patients’ regular medication improved the condition of all but one of the epileptic patients.

[45] Dr. Kalant also highlighted one of the paradoxical consequences of the drug laws. Marinol, which has these various side effects, especially that it causes the psychoactive effects of marihuana, is available in Canada while CBD, which does not have these side effects, is not. As he said:

> I’m not sure why not because since it is essentially free of psycho-active effect and it has a well demonstrated anti-epileptic activity, I should think that it would be well worthwhile to do clinical trials and I really just don’t understand why there has been no further clinical testing since the 1980 [Cunha] study.

[46] The defence witness, Dr. Morgan, testified that marihuana has been found useful for treatment of acute nausea and vomiting, as results, for example, from chemotherapy, and Marinol was originally approved for this purpose by the government. Smoking marihuana has been found to be effective in lowering fluid pressure in the eyes of patients with glaucoma. Marihuana is also effective in promoting weight gain and increase of appetite, which is particularly important, for example, for patients with AIDS who are suffering from HIV Related Wasting Syndrome. Marihuana was found to give relief to patients with pathologically elevated muscle tone such as patients with multiple sclerosis or spinal cord damage leading to spastic paralysis of the limbs. Marihuana is also an analgesic. Finally, marihuana has been found to have anti-seizure properties and thus is used by persons with epilepsy, like Parker. According to Dr. Morgan, there were a number of studies showing that THC or CBD have quite pronounced anti-epileptic activity. Dr. Morgan referred to the Cunha study and other literature suggesting that CBD was as effective as or more effective than THC in this respect. Dr. Morgan also referred to anecdotal reports of the effectiveness of marihuana for epileptics. In his view, marihuana is an effective anti-epileptic medication for some individuals.

[47] Dr. Morgan reviewed the side effects of the conventional medication that the respondent was taking. Dilantin, one of the most common drugs used to treat epilepsy, can produce sedation and drowsiness so the police have arrested patients because the police believe they are intoxicated. As well, the dose that produces the therapeutic effect

is very close to the toxic dose. In chronic use, it can produce gingival hyperplasia, overgrowth of the gums, which requires surgery to correct. It has also been known to produce damage to the brain and liver. In general, it is a dangerous drug. Another drug used by Parker, Primidone, metabolizes in the body to Phenobarbital and has the same side effects, namely, drowsiness, sedation and severe dysfunction. Another drug, Depakene, can produce outright failure of the liver and patients have been known to die from its effect. It also has adverse effects on the foetus of a pregnant woman.

[48] On the other hand, marihuana, although it has a variety of effects in humans, has no overdose liability. There has never been a proven overdose death caused by marihuana in humans. Unlike the conventional medications, marihuana has an extremely wide safety margin. There is no reliable evidence that even chronic use of marihuana has an adverse impact on cognition or memory. Marihuana is not known to harm the foetus. Since marihuana and tobacco smoke are similar in character, it can harm the lungs. However, a regular marihuana smoker, even a therapeutic marihuana smoker, smokes much less than a tobacco smoker (three to five marihuana cigarettes a day compared to 30 to 50 tobacco cigarettes) and therefore inhales much less smoke. There is, therefore, reason to believe that the marihuana user will not suffer as much pulmonary harm as tobacco smokers. There are no reports of marihuana-only smokers developing emphysema or lung cancer.

[49] According to Dr. Morgan, Marinol is not very effective because the THC is destroyed the first time it passes through the liver. Thus, only about 5% reaches the blood stream. Much more of the smoked marihuana becomes available to the body. Marinol is also essentially useless for acute situations. Smoked marihuana, on the other hand, can be used by persons who feel nausea coming over them, because it delivers the THC quickly and more effectively than Marinol. Marihuana gives acute relief of nausea and vomiting. Marinol is also very expensive. Marihuana is more effective, more efficient and much cheaper. Finally, Marinol, since it only contains THC, is of no use to individuals, particularly epileptic patients, who benefit from CBD.

[50] In summary, Dr. Kalant was wary of smoking as a way of delivering the therapeutic benefits of cannabis. He demonstrated greater concern about the risks from smoking marihuana, was concerned that smoking marihuana was a very inexact way to deliver the drug and that a very large amount of marihuana would have to be smoked to keep a therapeutic level of CBD in the patient's bloodstream. He was, in general, more cautious about the long-term effects of marihuana use because of the absence of research. Dr. Morgan was less concerned about the possible harmful side effects of smoking marihuana. He tended to discount the risks and dangers and thus could see little, if any, reason for refusing patients who need access to the drug.

[51] Dr. Morgan filed a further affidavit on the appeal and Dr. Kalant filed an affidavit in response. In his affidavit,[4] Dr. Morgan states that there have been no striking pharmacological advances in the treatment of epilepsy since the trial and that the respondent remains among the minority of sufferers who "are clearly not fully responsive to conventional pharmacological treatment for his condition". As to the use of marihuana to treat epilepsy, Dr. Morgan referred to studies released since the trial. A study by the British Medical Association entitled "Therapeutic Uses of Cannabis" concluded that cannabinoids appear to be effective for a number of ailments including epilepsy and as an anti-nauseant and while further research was needed, "cannabinoids have a margin of safety superior to many conventional drugs". In his affidavit, Dr. Kalant fairly points out that the BMA study referred to the therapeutic benefits of pure cannabinoids and that the study does not recommend the use of smoked marihuana except for terminally ill patients. Of course, this overlooks the fact that there is no legal source for the cannabinoids, other than THC (Marinol).

[52] Dr. Morgan also referred to the status of research specifically concerning CBD. He stated that animal studies and a few human studies have indicated that CBD, not THC, may be the therapeutically active cannabinoid for treating epilepsy and this is a reason why Marinol does not answer the needs of some patients. He referred to a report

[4] The Crown objected to certain parts of the Morgan affidavit that referred to material that could have been produced at trial. I have not found it necessary to rely upon any of the objected-to material.

by the United States Institute of Medicine. In general, that report recommended much more extensive study of the possible therapeutic effect of marihuana and the cannabinoids on a long list of illnesses. With respect to CBD, the report noted that the few human studies that had been done were likely too small to demonstrate efficacy and concluded that to date the potential anti-epileptic activity of CBD is not promising. The study emphasized that smoked marihuana is not recommended because of the risk factors (from smoking) but the authors also made these reasonable observations:

> The goal of clinical trials of smoked marijuana would not be to develop marijuana as a licensed drug, but rather as a first step towards the possible development of nonsmoked, rapid-onset cannabinoid delivery systems. However, it will likely be many years before a safe and effective cannabinoid delivery system, such as an inhaler, will be available for patients. In the meantime, there are patients with debilitating symptoms for whom smoked marijuana might provide relief. The use of smoked marijuana for those patients should weigh both the expected efficacy of marijuana and ethical issues in patient care, including providing information about the known and suspected risks of smoked marijuana use.

And

> Until a non-smoked, rapid-onset cannabinoid drug delivery system becomes available, we acknowledged that <u>there is no clear alternative for people suffering from *chronic* conditions that might be relieved by smoking marijuana, such as pain or AIDS wasting.</u> One possible approach is to treat patients as n-of-1 clinical trials, in which patients are fully informed of their status as experimental subjects using a harmful drug delivery system, and in which their condition is closely monitored and documented under medical supervision, thereby increasing the knowledge base of the risks and

> benefits of marijuana use under such conditions. [Emphasis added.]

[53] Dr. Morgan also discussed other studies of more general application. He referred to a symposium of the Society for Neuroscience on "Marijuana and Analgesia" which presented strong evidence that cannabinoids had direct diminishing effects on pain signals in animals. Dr. Kalant reasonably points out that the analegisic effect of cannabinoids described in the study is "well demonstrated, but it does not require the smoking of cannabis". Of course, again, this does not seem to meet the problem that these other cannabinoids are apparently not available in Canada.

[54] At trial, the defence called evidence from persons suffering from glaucoma and epilepsy who have used marihuana to treat their systems. The defence also called Dr. John Goodhue, a general practitioner doing primary care in Toronto for persons who are HIV positive. Some of his patients have developed AIDS. He testified that some of his patients have successfully used smoked marihuana to treat the side effects from the many drugs AIDS patients must take.

[55] Based on the evidence adduced at trial, the trial judge found that the defence had established that smoking marihuana has a therapeutic effect in the treatment of nausea and vomiting particularly related to chemotherapy, intraocular pressure from glaucoma,

muscle spasticity from spinal cord injuries or multiple sclerosis, migraine headaches, epileptic seizures and chronic pain. He accepted Parker's evidence as to the therapeutic effect of smoking marihuana in controlling his seizures. He also accepted that Parker's cultivation of marihuana was incidental to his need to possess marihuana for its therapeutic use for the treatment of his epilepsy. By cultivating marihuana he could control its quality. It was also an economic necessity since he has only disability benefits from the Canada Pension Plan to live on. He cannot afford to pay illicit street prices to obtain marihuana. The trial judge found as a fact that Parker had established he could best control his epileptic seizures through a combination of prescribed medications and the smoking of marihuana.

[56] At trial, the Crown argued that Parker had not shown that other legal means were not available to control his seizures. Crown counsel argued that Parker failed to seek sufficient medical attention, failed to request a prescription for Marinol, and failed to have his blood levels monitored by regular blood tests. The trial judge stated that he could "not accept" any of these failures as being supported by the evidence. He held that Parker had been receiving regular medical supervision for his prescribed drugs since 1969. He found that Parker had not sought a Marinol prescription because synthetic THC was not effective for him as demonstrated in the Addiction Research Foundation study. The drug reaches his blood stream much faster when it is inhaled. Further, Marinol does not contain CBD, which appears to have additional therapeutic value for him. Finally,

the trial judge concluded that Parker does have regular blood work done during numerous emergency hospital admissions and regular medical visits. The trial judge concluded that he "found no basis on which to fault Mr. Parker for his management of his serious medical condition".

[57] The trial judge found that smoking marihuana is more efficient and at least five times faster in delivering THC and CBD to the blood stream than oral medication and, for people like Parker, more effective.

(iv) The regulation of drugs in Canada: Legal means for obtaining marihuana as medicine

(a) The evidence at trial

[58] As indicated, there was evidence that Marinol is available in Canada by prescription. Leslie Rowsell, the director of the Bureau of Drug Surveillance, a division of Health Canada, testified at the trial about the lawful means of obtaining marihuana. There is no person authorized to distribute raw marihuana. Mr. Rowsell testified that, while it would be open to a physician to prescribe marihuana, the Canadian government would not look favourably upon a physician who did so and, in any event, no pharmacy could legally fill the prescription.

[59] Mr. Rowsell gave evidence as to the method by which a new drug may be approved by the Bureau. A protocol to expedite the availability of new drugs formerly

called the Emergency Drug Release Programme, now the Compassionate Use Programme, by which certain drugs were made available for the treatment of AIDS, would not be available since the programme does not apply to narcotics.[5]

[60] The other alternatives were for a person, usually a large drug company, to apply for a Drug Identification Number (D.I.N.) or for a physician to request permission to conduct a clinical trial. It is fair to say that neither alternative was a practical solution for Parker. Even the less costly clinical trial method would still require expenditure of hundreds of thousands of dollars and depend on a clinician willing to set up a clinical trial and the respondent then being selected as one of the participants. No one has applied for a D.I.N. to market marihuana and apparently no one has applied to do a clinical study of marihuana. Since marihuana does not have a D.I.N., it is not approved for dispensing by pharmacists. Other more dangerous narcotics such as heroin can be prescribed by a physician and dispensed by a pharmacy, albeit heroin can only be used in a hospital setting. The Bureau has not investigated the potential medicinal benefits of marihuana.

[61] At trial, neither Mr. Rowsell nor anyone else mentioned the possibility of an exemption from the marihuana prohibition through an application for a ministerial

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[5] The Crown submits that Mr. Rowsell is in error in this respect and it would be possible for someone to obtain a licence under the Regulations for the purposes of the programme. The Crown nevertheless concedes that no firm has been licensed to produce and distribute marihuana.

exemption under s. 56 of the *Controlled Drugs and Substances Act*. The trial judge accordingly made no findings in relation to that section.

(b) The evidence on appeal

[62] Parker filed an affidavit from Eugene Oscapella, a director of the Canadian Foundation for Drug Policy. Mr. Oscapella had testified at the *Clay* trial. In the affidavit, he provides information about Health Canada's use of the exemption in s. 56 of the *Controlled Drugs and Substances Act*. In May 1999, Health Canada released the Interim Guidance Document that outlines the process for Canadians to obtain exemptions under s. 56. This document is attached as an exhibit to Mr. Oscapella's affidavit. Among other things, the applicant must identify:

> [The] name and address of the fabricator or distributor who is licensed under *CDSA*, the *Narcotic Control Regulations* and the *Food and Drug Regulations* and who has the capacity to fabricate and distribute in accordance with international drug treaties, if applicable.

[63] Mr. Oscapella also attached a recent government document entitled "Marijuana for Medicinal Purposes: A Status Report". This report states that "the safety and efficacy of marijuana as a medicine has not been demonstrated in any country of the world" and therefore the first step is to gather scientific information and conduct clinical trials. The document states that the government is considering a proposal from a pharmaceutical company to conduct trials on inhaled cannabinoids. There was no indication when and if

this proposal would be approved. The document also refers to the Compassionate Use Programme, but points out that there is no "licit, licensed, non-governmental supplier anywhere from whom research-grade marijuana can be obtained" under that programme. This document indicates that as of June 3, 1999, just over 30 requests have been made under s. 56 for marihuana for medical purposes. According to the document:

> After all of the required information has been submitted, the Department aims to review the request within 15 working days. The Minister's decision to exercise discretion for each case is made in the context of the recommendation formulated as part of the review and the circumstances of each individual applicant.

[64] In addition, the document indicates that Health Canada, "will determine, on a case-by-case basis, the necessity of imposing other terms and conditions, particularly for use within the research context".

[65] According to Mr. Oscapella, the Minister of Health had granted two cannabis exemptions under s. 56. It was unclear what had happened to the other applicants or the 15 working day guideline for processing applications, except that the Minister may have required further information, notwithstanding that according to Health Canada 15 applications were said to have been sufficiently well-detailed to be assessed as of August 26, 1999. Mr. Oscapella was cross-examined on his affidavit on September 21,

1999. He was told by officials at Health Canada that as of that date no further exemptions had been granted by the Minister.

[66] The day prior to the hearing of this appeal, the Minister issued a press release concerning the granting of further s. 56 exemptions. At the opening of the appeal we asked Crown counsel if he wished to apply for an adjournment to file fresh evidence on the operation of s. 56. He declined the invitation.

THE TRIAL JUDGE'S FINDINGS ON THE LAW

[67] The trial judge held that Parker had shown that there was a risk of deprivation of his right to life, liberty or security of the person by the marihuana prohibition. Most obviously, there was the risk of deprivation of liberty should Parker be convicted of an offence under the former *Narcotic Control Act* or the *Controlled Drugs and Substances Act*. There was an additional risk of injury or death to Parker because he would not have access to marihuana in the prison setting to prevent seizures. Thus, prison would be a particularly dangerous place for Parker because of his medical condition. The anxiety about worrying about a seizure would "be a cruel and unusual punishment in itself". In terms of s. 7, jail not only would result in a deprivation of liberty, but also would put his life at risk and threaten the security of his person.

[68] The trial judge was satisfied that the possibility of Parker's obtaining Marinol in prison was not an answer since he was satisfied on the evidence that synthetic THC was not effective for Parker and he would need to receive CBD. He was also of the view that due process through the trial procedure did not afford Parker sufficient protection. Barring a medical discovery, Parker has a chronic need for marihuana and is therefore subject to arrest, search and seizure, and detention every day. The fact that he might succeed in defending a prosecution on the basis of a necessity defence, as he had in 1987, was no answer since each prosecution entailed financial cost, stress, uncertainty, arrest and loss of his stock of marihuana and marihuana plants thus interfering with his security of the person. The evidence established that Parker was traumatized by the police raids on his home.

[69] The trial judge was satisfied that the deprivation of life, liberty or security of the person was contrary to the principles of fundamental justice. He held that it is an aspect of fundamental justice that a person "possess an autonomy to make decisions of personal importance", including decisions as to health. Serious decisions regarding the management of illness and medical disability in consultation with a physician fall within this area of personal autonomy. Parker has made such a decision respecting his use of marihuana, the use of marihuana has allowed him to control his illness with some success and his decision has been supported by his physicians over the years. The trial judge made this critical finding:

> I find he has established that this control is best achieved through a combination of prescribed medications and the smoking of marihuana. For this Applicant/Accused to be deprived of his smokable marihuana is to be deprived of something of fundamental personal importance.

[70] The trial judge found that the marihuana prohibition is overbroad because the legislation does not provide a procedural process for an exemption for an individual in Parker's circumstances. 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. While the purpose of the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* is to safeguard the health of Canadians, that legislation has the dramatically opposite effect for Parker. The legislation prevents him from having access to a relatively safe drug that has demonstrated therapeutic benefit to him.

[71] In response to the Crown's argument that a continued marihuana prohibition was required so that Canada fulfilled its international obligations, the trial judge pointed out that, for example, the United Nations *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* provides that the measures adopted by the contracting states to criminalize marihuana possession and prevent illicit cultivation must be "necessary" and respect fundamental human rights.

[72] The Crown conceded before the trial judge that if he found a violation of Parker's rights under s. 7, the violation could not be saved by s. 1 of the *Charter.*

[73] The trial judge adopted the following remedy. He concluded that rather than striking down the prohibition the proper remedy was to read in, pursuant to s. 52 of the *Constitution Act, 1982,* an exemption for "persons possessing or cultivating *Cannabis* (marihuana) for their personal medically approved use". This exemption applied to the marihuana possession and cultivation provisions of the former *Narcotic Control Act* and the *Controlled Drugs and Substances Act*, being ss. 3(1) and 6(1) of the former Act and ss. 4(1) and 7(1) of the latter. Parker was also entitled to the personal remedy, under s. 24(1) of the *Charter of Rights,* of a stay of proceedings of the charges laid against him and the return of the plants seized during the September 1997 arrest.

THE ISSUES

[74] The Crown makes the following arguments:

> 1. The conduct in respect of which Parker seeks *Charter* protection is outside the scope of s. 7 of the *Charter.*
>
> 2. The trial judge erred in finding that Parker had no legal alternative to control his epilepsy. This submission identifies two errors: (i) that Parker had not shown that Marinol could not treat his epilepsy and (ii) that Parker had not shown that if he maintained a proper regime of conventional medication and regular attendance at a specialist he could not control his epilepsy. The Crown argues that the trial judge erred by reversing the burden of proof by requiring it to establish that

Parker's rights were not infringed and that any infringement was consistent with the principles of fundamental justice.

3. The trial judge erred in finding the legislation was overbroad because there was a possibility for legally obtaining marihuana. The fact that no one had taken the steps to have marihuana approved through the legal procedure set out in the legislation did not render the legislation unconstitutional.

4. The trial judge erred in finding that the *Controlled Drugs and Substances Act* violated Parker's rights because Parker could have applied for an exemption under s. 56 of the Act but had failed to do so and that the process for granting exemptions under s. 56 conforms with the principles of fundamental justice.

5. Assuming there was a breach of s. 7, the trial judge erred in his choice of remedy.

ANALYSIS

Introduction

[75] In the course of these reasons, I intend to address the arguments made by the Crown. However, it will be more convenient to deal with those arguments through an analysis that is structured around s. 7. Accordingly, I will consider these issues under the following headings. These headings should be understood as dealing with the therapeutic use of marihuana, not the broader claims dealt with in the *Clay* case.

1. The context

2. The right to liberty implicated by the marihuana prohibition

3. The right to security of the person implicated by the marihuana prohibition

4. Does the marihuana prohibition deprive Parker or persons similarly situated of their rights to liberty and security of the person?

5. The principles of fundamental justice and the right to liberty and security of the person

6. Is there a different analysis of fundamental justice under the *Controlled Drugs and Substances Act?*

7. Can any violations be saved by s. 1?

8. The appropriate remedy for any violations

1. The context

[76] This case depends upon the interpretation and application of s. 7 of the *Charter*:

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

[77] In the companion case of *R. v. Clay*, I have already dealt with the submission that, broadly speaking, the marihuana prohibition violates s. 7 because it criminalizes people who have done nothing wrong. This case raises the narrower issue of the impact upon individuals claiming a need for marihuana as a matter of medical necessity, not recreational use.

[78] This aspect of the case raises an issue akin to the standing issue that I have touched upon in the *Clay* case. The Crown's approach to this appeal was to try to demonstrate that as a matter of fact Parker did not need marihuana to control his epilepsy. I deal with that issue below. However, it is also open to Parker to challenge the validity of the legislation on the basis that it was overbroad or unconstitutional in some other way in its application to other persons. The Crown respondent appeared to concede this in the *Clay* appeal. In any event, that conclusion follows from the decisions of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 and *R. v. Morgentaler*. In both cases, the accused were held to have standing to challenge the law under which they were charged although the alleged infringement of the *Charter* concerned the rights of some other person.

[79] The decision of the Supreme Court of Canada in *Morgentaler* is of particular assistance because the issues in that case were similar to the issues here. The accused physicians relied upon s. 7 of the *Charter* to challenge a criminal offence based upon the interference with the health of pregnant women seeking abortions. In his dissenting reasons at p. 133, McIntryre J. suggested that the question of the s. 7 violation was hypothetical since, "[t]here is no female person involved in the case who has been denied a therapeutic abortion". However, Dickson C.J.C. was satisfied that the accused physicians had standing. As he said at p. 63:

> As an aside, I should note that the appellants have standing to challenge an unconstitutional law if they are liable to conviction for an offence under that law even though the unconstitutional effects are not directed at the appellants *per se*: *R. v. Big M Drug Mart Ltd*., at p. 313. The standing of the appellants was not challenged by the Crown.

[80] Therefore, it is open to Parker to challenge the validity of the marihuana prohibition not only on the basis that it infringes his s. 7 rights because of his particular illness, but that it also infringes the rights of others suffering other illnesses.

[81] The trial judge identified a number of ways in which Parker's liberty and security interests were affected by the marihuana prohibition. In one sense, it would have been sufficient to identify the clearest of those infringements, the possibility of imprisonment upon conviction for the offence. This interference with Parker's liberty interest would conceivably be sufficient to require a determination of whether the deprivation was in accordance with the principles of fundamental justice.

[82] However, in my view, this would not adequately capture the defects in the legislation and would fail to come to grips with the context in which the issue arises. As Wilson J. said in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1355-56 a right or freedom may have different meanings in different contexts. "The contextual approach attempts to bring into sharp relief the aspect of the right or freedom

which is truly at stake in the case as well as the relevant aspects of any values in competition with it." Thus, the importance of the right or freedom must be assessed in context rather than in the abstract and its purpose must be ascertained in context.

[83] Although Wilson J. was particularly concerned about the importance of context for the s. 1 analysis, context is important for analyzing a right, such as s. 7, that to some extent contains its own balancing test and which may or may not be amenable to further balancing under s. 1. The dominant aspect of the context in this case is the claim by Parker and other patients that they require access to marihuana for medical reasons. They do not, like the appellant in the *Clay* case, assert a desire for marihuana for recreational use. Parker does not claim a right to use marihuana on the basis of some kind of abstract notion of personal autonomy. The validity of the marihuana prohibition must be assessed in that particular context. The context here is not simply that the marihuana prohibition exposes Parker, like all other users and growers, to criminal prosecution and possible loss of liberty. Rather, Parker alleges that the prohibition interferes with his health and therefore his security interest as well as his liberty interest.

[84] Related to this aspect of the case is that Parker does not seek to avoid the marihuana prohibition to assist in the treatment of some mild discomfort. If it is not properly controlled, his seizure activity can be life-threatening. Further, the evidence concerning the use of marihuana to assist in the treatment of other illnesses centred on

patients with profound symptoms: AIDS patients suffering from wasting disease, cancer patients receiving chemotherapy and patients suffering from glaucoma, to name just a few.

[85] Having said that, it must be acknowledged that the scope of the liberty and security interests protected by s. 7 is still a matter of considerable debate. See for example, *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1999), 177 D.L.R. (4th) 124 (S.C.C.), per Lamer C.J.C. at 146. As I will explain, it is important for the purposes of this case that, although Parker raises important concerns about health and access to drugs for therapeutic purposes, those concerns are raised in the criminal context.

[86] As framed by the appellant, the question of whether Parker's conduct attracts s. 7 protection is intertwined with its assertion that Parker had a legal alternative to marihuana, either Marinol or better management through conventional medication, and thus his choice to smoke marihuana is nothing more than a personal preference. Thus, the Crown asserts that the marihuana prohibition does not affect Parker's physical or mental integrity in any fundamental way and so his security of the person is not engaged.

[87] I cannot agree with this characterization of the issues for a number of reasons. I am satisfied that the trial judge had ample evidence from which he could conclude that

Parker was not asserting a mere preference for an illegal treatment over a legal one. I will deal with that below. The Crown's focus on the evidence respecting Parker also fails to come to grips with the compelling evidence placed before the trial judge that marihuana is of therapeutic benefit to other patients.

2. The right to liberty implicated by the marihuana prohibition

[88] The leading decision on the *Charter* implications where medical treatment and the criminal law intersect is *R. v. Morgentaler*. In that case, three judges wrote for the five-person majority, each adopting different reasons for finding that the abortion provisions of the *Criminal Code* infringed the guarantee to liberty or security under s. 7 of the *Charter*. Wilson J. took the broadest view as she found that the decision of a woman to terminate her pregnancy is protected by the right to liberty. She held, at p. 166, that the right to liberty, "properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance" and again, at p. 171, that the right to liberty "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives". The woman's decision to terminate a pregnancy is within this protected zone of personal autonomy, since, as she wrote at p. 171, it "will have profound psychological, economic and social consequences" for her. Dickson C.J.C., writing for himself and Lamer J., found it unnecessary to consider this aspect of liberty since he preferred to rest his decision on the right to security of the person. Beetz J., writing for himself and Estey J., also based his decision on security of

the person. He noted, however, at p. 112 in his discussion of the principles of fundamental justice that certain aspects of the law that he found did comport with fundamental justice, such as a second opinion as to the need for the abortion, "would need to be reevaluated if a right of access to abortion is founded upon the right to 'liberty' in s. 7 of the *Charter*".

[89] In subsequent cases, a majority of the Supreme Court of Canada has accepted that liberty includes a degree of personal autonomy over fundamental personal decisions. The most restrictive view is that of Lamer C.J.C., and summarized in his reasons in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at 341: "the principle that must be adopted is that generally speaking s. 7 was not designed to protect even fundamental individual freedoms if those freedoms have no connection with the physical dimension of the concept of 'liberty'". He reiterated this view in his reasons in *New Brunswick (Minister of Health and Community Services) v. G. (J.).* Also see his earlier reasons in *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, especially at 1174-75.

[90] The broader view was adopted by La Forest J., writing for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ. on this issue in *B. (R.)* at p. 368:

> Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has

> the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. [Emphasis added.]

[91] L'Heureux-Dubé J., writing for herself and Gonthier and McLachlin JJ. in *G. (J.)* at para. 117, again adopted this position in the context of a mother's right to legal representation at a hearing that would give the Minister of Health and Community Services custody of her children for a further six months. She also noted that Bastarache J.A., as he then was, had taken a broader approach in his dissenting opinion in the Court of Appeal. Bastarache J.A. wrote as follows at (1997), 145 D.L.R. (4th) 349 (N.B.C.A.) at 368:

> No clear majority exists on the question of the applicability of s. 7 to parental control. I have already indicated that I personally favor a more generous interpretation of the "liberty" interest than that proposed by Chief Justice Lamer. I would however restrict the scope of the "liberty" interest in s. 7 to essential personal rights that are inherent to the individual and consistent with the essential values of our society, as suggested by La Forest J. at p. 389 [in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*]. I would hold that this is a case where a close analogy can be made with the application of s. 7 to the criminal law and where an extension of the traditional interpretation of the "liberty" interest advocated by Lamer C.J. is required.

[92] Accordingly, I believe that I am justified in considering Parker's liberty interest in at least two ways. First, the threat of criminal prosecution and possible imprisonment itself amounts to a risk of deprivation of liberty and therefore must accord with the principles of fundamental justice. Second, as this case arises in the criminal law context (in that the state seeks to limit a person's choice of treatment through threat of criminal prosecution), liberty includes the right to make decisions of fundamental personal importance. Deprivation of this right must also accord with the principles of fundamental justice. I have little difficulty in concluding that the choice of medication to alleviate the effects of an illness with life-threatening consequences is such a decision. Below, I will discuss the principles of fundamental justice that would justify state interference with that choice.

3. The right to security of the person implicated by the marihuana prohibition

[93] This case also clearly implicates the right to security of the person of Parker and others who claim to need marihuana for therapeutic purposes. In *Morgentaler*, Dickson C.J.C. held at p. 56 that "state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person". Beetz J. held in the same case at p. 90 that security of the person "must include a right to access to medical treatment for a condition

representing a danger to life or health without fear of criminal sanction". Wilson J. held at p. 173 that the security of the person guarantee protects "both the physical and psychological integrity of the individual".

[94] In *R. v. Monney* (1999), 133 C.C.C. (3d) 129 (S.C.C.) at 156, Iacobucci J. held, relying upon *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, that "state action which has the likely effect of impairing a person's health engages the fundamental right under s. 7 to security of the person".

[95] In *G. (J)*, Lamer C.J.C. writing for all members of the court on this issue held, at p. 147 that, "the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action". However, he held at p. 147 that it does protect against "serious and profound effect on a person's psychological integrity". The effects of the state interference "must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility" (at p. 147).

[96] The Supreme Court also had to deal with s. 7 in the context of the criminal law and medical treatment in *Rodriguez v. British Columbia (Attorney General)*, a case concerning the validity of the assisted suicide provisions of the *Criminal Code* and their

impact on a terminally ill woman. Sopinka J., speaking for the majority of the court at pp. 587-88, summarized security of the person in that context as follows:

> 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. In *Reference re: ss. 193 and 195.1(1)(c) of Criminal Code (Man.), supra*, Lamer J. (as he then was) also expressed this view, stating at p. 106 that "[s]ection 7 is also implicated when the state restricts individuals' security of the person by interfering with, or removing from them, control over their physical or mental integrity". There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these. [Emphasis added.]

[97] In view of these very broad statements, I conclude that deprivation by means of a criminal sanction[6] of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of security of the person. Such a deprivation fits easily within any of the above statements. It falls squarely within the holding by Beetz J. in *Morgentaler*. Depriving a patient of

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[6] The much more difficult question whether security of the person would be engaged if the lack of access is due not to a criminal sanction but government inaction is not before the court and should be left to another day. It is raised only in passing in this case by the Minister's s. 56 approval, which requires the applicant to disclose the legal source for the marihuana.

medication in such circumstances, through a criminal sanction, also constitutes a serious interference with both physical and psychological integrity.

4. Does the marihuana prohibition deprive Parker or persons similarly situated of their rights to liberty and security of the person?

(i) Introduction

[98] In my view, Parker demonstrated at trial that the prohibition on the possession and cultivation of marihuana for personal use to treat his epilepsy deprived him of his rights to liberty and security of the person.

[99] The appellant argues that the trial judge's findings are tainted by error because he placed the burden on the Crown to prove that there was no deprivation of his rights. This submission appears to be based, in part, on a statement by the trial judge that he could not "accept" the Crown's submissions that Parker failed to seek sufficient medical attention, failed to request a prescription for Marinol and failed to have his blood levels monitored on a regular basis. The trial judge's reasons for judgment, read as a whole, do not disclose any error as to the burden of proof. The trial judge began his analysis of s. 7 by noting that the onus to establish the violation rested with Parker. He then went on to make the factual and legal findings I have set out above. I have undertaken the factual review to also show that the trial judge's findings are supported by the evidence. It

remains to situate those findings within the legal analysis of liberty and security of the person.

[100] Before doing so, I would make this comment. Much of the Crown's submissions in this court were an attempt to isolate various parts of the evidence. Thus, Mr. Wilson referred to individual pieces of the expert evidence and contrasted them with Parker's evidence. As I have indicated, he placed a great deal of weight on the ARF study to demonstrate that Parker had a legal alternative. However, the trial judge was required to consider all of the evidence. He had the benefit of the testimony of Parker and the other witnesses who gave *viva voce* testimony. That evidence established to the trial judge's satisfaction that Marinol was not a viable alternative for Parker and that he has received a clear benefit from smoking marihuana that is unavailable to him through conventional treatment alone. These factual findings, for which there is support in the evidence, are entitled to deference by this court and I would not interfere with them.

(ii) Right to liberty

[101] I agree with the trial judge that the onus of establishing a violation of the right to liberty is easily satisfied because upon conviction Parker is liable to imprisonment. The trial judge went on to hold that the impact of incarceration was particularly severe for Parker since, deprived of access to marihuana in the jail setting, he was at a real risk of death or injury from seizures. Since any form of incarceration is sufficient to trigger this

aspect of the right to liberty, I do not think it necessary or advisable to attempt to quantify the severity of the deprivation. Like the trial judge, I would consider this collateral consequence of deprivation of liberty, if necessary, as an aspect of security of the person.

[102] In my view, Parker has also established that the marihuana prohibition infringed the second aspect of liberty that I have identified—the right to make decisions that are of fundamental personal importance. As I have stated, the choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance. In my view, it ranks with the right to choose whether to take mind-altering psychotropic drugs for treatment of mental illness, a right that Robins J.A. ranked as "fundamental and deserving of the highest order of protection" in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (Ont. C.A.) at 88.

[103] To intrude into that decision-making process through the threat of criminal prosecution is a serious deprivation of liberty. For the purposes of this appeal, it is unnecessary to decide whether the decision-making must meet some objective standard to fall within this aspect of liberty. The evidence established that Parker's choice was a reasonable one. He has lived with this illness for many years. He has tried to treat the illness through highly invasive surgery and continues to take conventional medication notwithstanding the significant side effects. He has studied his illness, he has studied the effects of marihuana, and he has produced a reasonable explanation for why Marinol is

not an effective form of treatment. He has found relief from some of the debilitating effects of the illness through smoking marihuana, a drug that, aside from the psychotropic effect, has limited proven side effects in a mature adult. That drug helps protect him from the serious consequences of seizures—consequences that could threaten his life and heath. In those circumstances, a court should not be too quick to stigmatize his choice as unreasonable.

[104] In view of my conclusion with respect to Parker's liberty rights, it is not strictly necessary to consider the situation of other persons seeking to use marihuana to alleviate their symptoms from other serious, even terminal, disease. Suffice it to say that Parker presented sufficient evidence that marihuana is a reasonable choice for those persons that I would have found that their liberty interests are infringed by the marihuana prohibition.

(iii) Right to security of the person

[105] In his reasons, the trial judge focused on the impact of the criminal justice system in considering Parker's assertion that he was deprived of his security of the person. As I mentioned, he noted the serious risk to Parker's health if he were incarcerated without access to marihuana. He also noted the psychological stress from the police raids upon his home, the questioning, the arrest and the ultimate loss of his marihuana. I would accept that protection from some of these stresses may constitute an aspect of security of the person. However, concentrating only on these effects may miss the context in which

this case arises and lead to a narrow, solely procedural, view of the principles of fundamental justice. For example, the powers to search and to arrest upon reasonable and probable grounds have generally been considered to accord with the principles of fundamental justice. The exercise of those powers will have a different impact depending upon the individual. However, as of yet, it has not been suggested that the principles of fundamental justice require distinctions to be made depending on the personal make-up of the suspect. Similarly, if this case were only about criminal procedure, the Crown could argue that the right to a fair trial, including access to the common law necessity defence, could provide Parker with fundamental justice. Accordingly, I would prefer to rest my analysis upon security of the person as it was explained in *Morgentaler*, *Rodriguez* and the other cases I have discussed above.

[106] In *Morgentaler*, Beetz J. summarized the right to security of the person as a right to access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. As he said at p. 90:

> Generally speaking, the constitutional right to security of the person must include some protection from state interference when a person's life or health is in danger. The *Charter* does not, needless to say, protect men and women from even the most serious misfortunes of nature. Section 7 cannot be invoked simply because a person's life or health is in danger. The state can obviously not be said to have violated, for example, a pregnant woman's security of the person simply on the basis that her pregnancy in and of itself represents a

> danger to her life or health. There must be state intervention for "security of the person" in s. 7 to be violated.
>
> If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. “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. If an Act of Parliament forces a person whose life or health is in danger to choose between, on the one hand, the commission of a crime to obtain effective and timely medical treatment and, on the other hand, inadequate treatment or no treatment at all, the right to security of the person has been violated. [Emphasis added.]

[107] That holding applies in this case. The state has not violated Parker’s rights simply because epilepsy in and of itself represents a danger to his life or health. However, to prevent his accessing a treatment by threat of criminal sanction constitutes a deprivation of his security of the person. Based on the evidence, the marihuana laws force Parker to choose between commission of a crime to obtain effective medical treatment and inadequate treatment.

[108] In his reasons in *Morgentaler*, Dickson C.J.C. described the infringement of security of the person in these terms at pp. 56-7:

> At the most basic physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear

> benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person. Section 251, therefore, is required by the *Charter* to comport with the principles of fundamental justice. [Emphasis added.]

[109] The same may be said of the marihuana prohibition in this case. That prohibition tells Parker that he cannot undertake a generally safe medical treatment that might be of clear benefit to him. Under the former *Narcotic Control Act* there was no procedure that he could effectively access that would allow him to grow or possess marihuana without threat of criminal sanction. Under the *Controlled Drugs and Substances Act*, the Crown submits that there are lawful means by which he can possess marihuana. I will deal with this aspect of the case below in considering the principles of fundamental justice and s. 1 of the *Charter*. It is sufficient to say that those procedures involve criteria unrelated to Parker's own priorities and aspirations. They involve criteria concerned with much larger questions of drug policy and controls unrelated to Parker's own needs.

[110] Finally, the marihuana prohibition infringes Parker's security of the person in the same way as explained by Sopinka J. in *Rodriguez*. That holding, similar to the holding

of Beetz J. in *Morgentaler*, protects the right to make choices concerning one's own body and control over one's physical and psychological integrity free from interference by criminal prohibition. Preventing Parker from using marihuana to treat his condition by threat of criminal prosecution constitutes an interference with his physical and psychological integrity.

[111] Accordingly, Parker established that the marihuana prohibition in the two statutes deprived him of his right to security of the person. Again, in light of this finding it is unnecessary to consider the impact upon other patients seeking to use marihuana to treat their illnesses. However, as with the right to liberty I would have found that Parker established that the marihuana prohibition deprives other persons of their security of the person because it prevents them on pain of criminal prosecution from using medication found to be effective to treat the symptoms of their very serious illnesses.

5. The principles of fundamental justice

(i) Introduction

[112] In *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 503, Lamer J. held that the principles of fundamental justice "are to be found in the basic tenets of our legal system". According to Sopinka J. in *Rodriguez* at p. 591, they must not be so broad "as to be no more than vague generalizations about what our society considers to be ethical or moral". This is an important qualification because it would be too easy to resolve this case simply

by imposing a moral or ethical standard from one side or the other. Many would consider it immoral to keep medicine from a patient with a serious illness. Others might consider it unethical to expose anyone to the potential harm from a drug where the expert opinion is unanimous that further research is required. Therefore, to quote Sopinka J. in *Rodriguez* at p. 591, the principles of fundamental justice "must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result". They must be "legal principles".

[113] In *Rodriguez*, Sopinka J. identified a principle of fundamental justice that, in my view, has particular application to this case. He held at p. 594 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 purpose." Thus, in determining whether there has been a breach of the principles of fundamental justice, it is necessary to consider the state interest. As McLachlin J. said in *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 151-52:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental

> justice requires that a fair balance be struck between these interests, both substantively and procedurally…[7]

[114] In *Rodriguez*, at p. 595, Sopinka J. characterized the issue as "whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition". He then engaged in a comprehensive review of the history of criminalization of assisted suicide, the common-law right to refuse medical care and a review of legislation in other countries in order to identify the state interest, the nature of the legal tradition and societal beliefs at stake. From this analysis, he was able to determine whether the deprivation of Ms. Rodriguez's rights enhanced the state interests.

[115] In *Morgentaler*, Dickson C.J.C. identified a number of procedural deficiencies in the therapeutic abortion provisions that may assist in understanding the principles of fundamental justice that apply in this case. The therapeutic abortion committee could issue a certificate to permit a therapeutic abortion if the continuation of the pregnancy would be likely to endanger the life or "health" of the woman. Dickson C.J.C. held at p. 69 that the absence of any clear legal standard to be applied by the committee in

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[7] The need to take into account state or societal interests under s. 7, especially where the court is asked to conduct substantive review of legislation, is discussed more fully in this court's decision in *R. v. Pan* (1999), 134 C.C.C. (3d) 1 (leave to appeal to S.C.C. granted January 27, 2000) at para. 177 – 187.

making the determination as to whether the continuation of the pregnancy would endanger the health of the woman was a "serious procedural flaw". After reviewing several other problems with the legislative scheme that contributed to unnecessary delay, at pp. 72-3 he concluded that while Parliament must be given latitude to design an appropriate procedural structure, if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of *fundamental* justice" [emphasis added by Dickson C.J.C.], that structure must be struck down. This was the problem with the therapeutic abortion provisions of the *Code*. It contained so many potential barriers to its own operation that "the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available".

[116] While Beetz J. did not agree that the health criterion created an unworkable standard, at pp. 109-10 he too found a breach of the principles of fundamental justice in the nature of the administrative structure mandated by the legislation. Adopting the same test of "so manifestly unfair, having regard to the decisions it is called upon to make",[8] he found that the scheme was made up of "unnecessary rules, which result in an additional

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[8] From *R. v. Jones*, [1986] 2 S.C.R. 284 at 304, per La Forest J.

risk to the health of pregnant women". It was thus manifestly unfair and did not conform to the principles of fundamental justice. This unfairness was manifested in two ways: some of the procedural requirements had no connection whatsoever with Parliament's objectives and others were manifestly unfair because they were not necessary to assure that the objectives were met.

[117] To summarize, a brief review of the case law where the criminal law intersects with medical treatment discloses at least these principles of fundamental justice:

> (i) The principles of fundamental justice are breached where the deprivation of the right in question does little or nothing to enhance the state's interest.
>
> (ii) A blanket prohibition will be considered arbitrary or unfair and thus in breach of the principles of fundamental justice if it is unrelated to the state's interest in enacting the prohibition, and if it lacks a foundation in the legal tradition and societal beliefs that are said to be represented by the prohibition.
>
> (iii) The absence of a clear legal standard may contribute to a violation of fundamental justice.
>
> (iv) If a statutory defence contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to persons who would *prima facie* qualify for the defence, it will be found to violate the principles of fundamental justice.
>
> (v) An administrative structure made up of unnecessary rules, which result in an additional risk to the health of the person, is manifestly unfair and does not conform to the principles of fundamental justice.

[118] Before turning to the application of these principles, I wish to make a few comments about the relationship between s. 1 and s. 7 of the *Charter*. There was some doubt whether a violation of s. 7 could be upheld as a reasonable limit under s. 1, absent extraordinary circumstances such as war. However, in several recent cases the Supreme Court of Canada has signalled that it may be possible to apply s. 1 in less exceptional circumstances. For example, in *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.) at 359-60 McLachlin and Iacobucci JJ. writing for the majority held as follows:

> [65] It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the *Charter*. The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. As McLachlin J. stated for the Court in *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at p. 152, 80 C.C.C. (3d) 492, regarding the latter: "The . . . question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society." Much the same could be said regarding the central question posed by s. 1.
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> [66] However, 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. <u>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</u>

> bears the burden of justifying the infringement of the Charter rights.
>
> [67] Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act, supra*, at p. 503: "the principles of fundamental justice are to be found in the basic tenets of the legal system." In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, Dickson C.J. stated, at p. 136, that these values and principles "embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society". In *R. v. Keegstra*, [1990] 3 S.C.R. 697 at p. 737, 61 C.C.C. (3d) 1, Dickson C.J. described such values and principles as "numerous, covering the guarantees enumerated in the *Charter* and more". [Emphasis added.]

[119] Thus, the difference between the s. 1 and the s. 7 analysis is important not only because of the different interests to be considered but also because of the shift in the burden of proof. For example, the Crown argued that in considering whether the law struck the right balance between the accused's interests and the interests of the state under s. 7, the court should consider Canada's international treaty obligations. It may be, however, that such interests are more properly a matter for consideration under s. 1, in which case the Crown would bear the onus of demonstrating that the violation of s. 7 was necessary to uphold Canada's treaty obligations. See *R. v. Malmo-Levine* 2000 BCCA 335 at para. 151.

[120] Further, an important aspect of the Crown's defence of the *Controlled Drugs and Substances Act* was the availability of a Ministerial exemption under s. 56 of the Act. Again, it may be that the availability of such an exemption is more properly dealt with under s. 1, in which cases the burden would be on the Crown to demonstrate that the availability of such an exemption could save the *prima facie* violation of s. 7. This is of some importance in view of the paucity of evidence on the operation of s. 56.

[121] However, this case was argued by both parties on the basis that all of these issues were part of the s. 7 analysis and that the burden was therefore on the respondent throughout. I have dealt with the case on that basis. The fact that I have taken into account a broader range of state interests in the s. 7 analysis, if an error, would benefit the Crown, since at the s. 7 stage the burden was on the respondent. I will return to the relationship between ss. 1 and 7 after the s. 7 analysis.

(ii) History of use and prohibition of marihuana

[122] It will be seen that at the core of the analysis of the principles of fundamental justice that apply in this case is the state interest in enacting the prohibition. Identifying the state interest informs the analysis in both the *Morgentaler* and *Rodriguez* cases. In *Rodriguez*, in particular, the issues were more complex than here. In that case, the court had to contend with the dilemma posed by the applicant's claim to choose the time and manner of her death as an aspect of security of the person protected by s. 7 of the

Charter, and the public interest in sanctity of life that also finds expression in s. 7 of the *Charter*. At the heart of that dilemma was the apparently arbitrary distinction in the blanket statutory prohibition on assisted suicide on one hand and, on the other hand, the common law that allows a physician to withhold or withdraw life-saving or life-maintaining treatment on the patient's instructions and to administer palliative care, which has the effect of hastening death.

[123] While this appeal does not present the same level of complexity nor the need to make the same kinds of agonizing distinctions, the form of analysis engaged in by Sopinka J. in *Rodriguez* will assist in applying the principles of fundamental justice to this case. It is only by considering the history of the use of and prohibition on marihuana, the common law respecting patients' rights, law reform and legislative initiatives, and legislation in other countries that the court can put some legal content into the application of the principles of fundamental justice that I have identified above.

[124] For reasons that will become apparent, the Crown does not now support the marihuana prohibition on the basis of its historical roots. In the *Clay* trial and appeal, the Crown expressly renounced any reliance on the theories that marihuana is a "gateway" drug to harder drugs; that it provokes criminal activity; that marihuana use leads to lack of motivation; or causes psychosis. The Crown argues that the objectives of the prohibition are first to prevent the harms associated with smoking marihuana, including

harm to human health. In addition, it claims the prohibition is necessary to control the domestic and international trade in illicit drugs and to satisfy Canada's international treaty obligations.

[125] The parties filed an abundance of evidence about the history of marihuana use. I have found of greatest assistance the 1998 report of the House of Lords Select Committee on Science and Technology, "Cannabis, the Scientific and Medical Evidence". Like many other herbs, marihuana has been used in Asian and Middle Eastern countries for at least 2600 years for medicinal purposes. It first appeared in Western medicine in 60 A.D. in the Herbal (i.e. pharmacopoeia) of Dioscorides and was listed in subsequent herbals or pharmacopoeia since that time. Marihuana was widely used for a variety of ailments, including muscle spasms, in the nineteenth century. In the 1930's, the advent of synthetic drugs led to the abandonment of many ancient herbal remedies including marihuana, although an extract of cannabis and a tincture of cannabis remained in the British Pharmaceutical Codex of 1949.

[126] In *R. v. Clay* at pp. 356-57, McCart J. provided a summary of the early history of regulation of marihuana in Canada. That history shows that, unlike the regulation of assisted suicide, for example, regulation of marihuana has a very short history and lacks a significant foundation in our legal tradition. It is, in fact, an embarrassing history based upon misinformation and racism. As McCart J. observed, the marihuana prohibition was

enacted in a climate of “irrational fear” based upon wild and outlandish claims that its users are driven completely insane, immune from pain and, while in this state of maniacal rage, kill or indulge in other forms of violence using the most savage methods of cruelty.

[127] In 1961, the United Nations *Single Convention on Narcotic Drugs* was adopted by many countries including Canada and the United Kingdom and this led to new legislation in both countries, the *Narcotic Control Act* in Canada and the *Dangerous Drugs Act 1965* in the United Kingdom. Under the *Dangerous Drugs Act 1965*, physicians could still prescribe marihuana. In the *Narcotic Control Act*, marihuana was put in the same category as heroin and its possession was prohibited. Theoretically, a physician could prescribe marihuana under the *Narcotic Control Act*, but since no firm has ever been licensed to produce marihuana, there is no pharmacy to fill such a prescription and thus it is practically not possible to legally possess marihuana pursuant to a prescription.

[128] In *R. v. Hauser* (1979), 46 C.C.C. (2d) 481, the Supreme Court of Canada held that the *Narcotic Control Act* should be classified as legislation enacted under the general residual federal power. In reviewing the history of the legislation, Pigeon J. noted that the Act appeared to have been a response to Canada’s signing of the *Single Convention of Narcotic Control 1961.* At p. 497, he compared the Act with the preamble to the *Convention*:

The conditions under which narcotics may be sold, had in possession, or otherwise dealt in, are now determined by regulations. A large number of those drugs are authorized for sale or administration under medical prescription. In fact, a certain number are enumerated in the list of drugs to be supplied at Government expense which list was published in the *Quebec Official Gazette*, December 13, 1978, pp. 6737 to 6982, pursuant to the *Quebec Health Insurance Act*, 1970 (Que.), c. 37. These include among others, codeine, cocaine, morphine and opium.

It does not appear to me that the fact that the specific drugs with which we are concerned in this case are completely prohibited, alters the general character of the Act which is legislation for the proper control of narcotic drugs rather than a complete prohibition of such drugs. In the preamble of the 1961 convention one reads:

> *The Parties*,
>
> > *Concerned* with the health and welfare of mankind,
> >
> > *Recognizing* that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,
> >
> > *Recognizing* that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,
> >
> > *Conscious* of their duty to prevent and combat evil,
> >
> > *Considering* that effective measures against abuse of narcotic drugs require co-ordinated and universal action.

> *Understanding* that such universal action calls for international cooperation guided by the same principles and aimed at common objectives ... [Emphasis added.]

[129] In this case, the Crown asserts that one of the objectives of the marihuana prohibition is to satisfy Canada's international treaty obligations with respect to the control of illicit drugs. It is ironic then that the preamble of the international convention that led to the enactment of the *Narcotic Control Act* recognizes what Parker asserts—that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes".

[130] In 1971, the United Nations adopted the *Convention on Psychotropic Substances*. Cannabis appeared in Schedule I to the Convention and parties were therefore obliged to ban marihuana "except for scientific and very limited medical purposes by duly authorized persons" (House of Lords Select Committee report at para. 2.9). This led to new legislation in the United Kingdom, the *Misuse of Drugs Act 1971*. Cannabis was moved to a new schedule and subject to an absolute ban thereby prohibiting its medical use altogether.

[131] In 1988, the United Nations adopted the *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*. A party to the Convention is, *inter alia*,

required to adopt measures "subject to its constitutional principles and the basic concepts of its legal system" to prohibit the possession of cannabis and the cultivation of cannabis for personal use. In 1997, Parliament repealed the *Narcotic Control Act* and enacted the *Controlled Drugs and Substances Act*. Marihuana has now been removed from the same category of drugs such as heroin (Schedule I) and is included in Schedule II. The effect is to lower the maximum penalty for possession and cultivation of marihuana. As under the *Narcotic Control Act*, it is theoretically possible for a physician to prescribe marihuana but since there is no legal source for the drug, the prescription could not be filled.

[132] While the marihuana prohibition is not firmly rooted in our history, there is a well-established history of regulation of drugs in this country. However, of all of the drugs with potential therapeutic effects, marihuana stands out because it is subject to a complete prohibition. This prohibition results from the web of legislation that makes it impossible as a practical matter for a physician to prescribe marihuana and therefore for a patient to legally possess it pursuant to a prescription.

[133] Far more dangerous drugs such as morphine and heroin are subject to regulation, not outright prohibition, and a patient can obtain these drugs through a physician's prescription, although in the case of heroin, there are added safeguards. One telling piece of history is that Marinol, which contains THC and has the psychoactive effects

associated with smoked marihuana, has been approved for use in Canada and can be obtained by prescription. In 1999, the House of Commons overwhelmingly passed a motion, M-381, urging the government to legalize the medicinal use of marihuana and to establish clinical trials and a legal supply of the drug.

[134] It seems to me that a reasonable conclusion to draw from this history is that a blanket prohibition including medical use of marihuana does not have a long-standing foundation in our legal tradition and societal beliefs. I recognize that the Quebec Court of Appeal drew a somewhat different conclusion in *R. v. Hamon* (1993), 85 C.C.C. (3d) 490 at 494 in meeting an argument that marihuana is less dangerous than alcohol and yet alcohol use is not absolutely prohibited. In that context, Beauregard J.A. held that "we do not have a cultural tradition which would prevent the state from acting". That is not, however, the same as a finding that marihuana prohibition is part of our cultural tradition. As McCart J. demonstrated, it is of recent origin and then was based on a very fragile foundation.

(iii) Common law access to treatment

[135] We were not directed to any common law history of entitlement to drug therapy. The closest analogue is the doctrine of informed consent, which makes it a civil wrong to impose treatment without the consent of the patient. The patient may also demand that treatment, once commenced, be withdrawn or discontinued. See *Rodriguez* at

pp. 598-99. While there is obviously a difference between a right to refuse treatment and a right to demand treatment, they can also be seen as two points on a continuum rooted in the common-law right to self-determination with respect to medical care. This includes the right to choose to select among alternative forms of treatment. Robins J.A. summarized the common law in *Malette v. Shulman* (1990), 67 D.L.R. (4th) 321 (Ont. C.A.) at 328:

> The right of self-determination which underlies the doctrine of informed consent also obviously encompasses the right to refuse medical treatment. A competent adult is generally entitled to reject a specific treatment or all treatment, <u>or to select an alternate form of treatment, even if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community. Regardless of the doctor's opinion, it is the patient who has the final say on whether to undergo the treatment.</u> The patient is free to decide, for instance, not to be operated on or not to undergo therapy or, by the same token, not to have a blood transfusion. If a doctor were to proceed in the face of a decision to reject the treatment, he would be civilly liable for his unauthorized conduct notwithstanding his justifiable belief that what he did was necessary to preserve the patient's life or health. The doctrine of informed consent is plainly intended to ensure the freedom of individuals to make choices concerning their medical care. For this freedom to be meaningful, people must have the right to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others … [Emphasis added.]

[136] Some common-law support for access to drugs with a therapeutic value, notwithstanding a legal prohibition, can also be found in the defence of necessity. In

Perka v. The Queen, [1984] 2 S.C.R. 232 at 250, Dickson J. described the moral and legal basis for the defence:

> At the heart of this defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available; the act was wrong but it is excused because it was realistically unavoidable.

[137] Using a criminal prohibition to bar access to a drug for a person, such as Parker, who requires it to treat a condition that threatens his life and health, is antithetical to our notions of justice. It is inconsistent with the principle of sanctity of life which, according to Sopinka J. in *Rodriguez* at p. 605, as a general principle "is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail".

[138] Permitting access to medicine that may relieve debilitating symptoms of illness is consistent with the common understanding about the purpose of proper medical care. In *Airedale N.H.S. Trust v. Bland*, [1993] A.C. 789 at 857, Lord Keith of Kinkel stated that the object of medical treatment and care is to benefit the patient. Where illness can neither be prevented nor cured, "efforts are directed towards preventing deterioration or relieving pain and suffering".

[139] To summarize, the common-law treatment of informed consent, the sanctity of life and commonly held societal beliefs about medical treatment suggest that a broad criminal prohibition that prevents access to necessary medicine is not consistent with fundamental justice.

(iv) Legislation in other countries

[140] A survey of legislation in other countries shows an increasing tolerance for possession of marihuana for personal use, although no country has fully decriminalized possession. There is some movement towards actual decriminalizing of marihuana for medical uses. In the United States, 34 states have legislation that recognizes the medical value of marihuana and theoretically makes the substance available as a medicine. Only a few states, such as California and Hawaii, have actually enacted legislation to implement these initiatives. I have attached as appendices to these reasons the *California Compassionate Use Act of 1996*, which added s. 11362.5 to the *Health and Safety Code*, and the recent Hawaiian legislation. The matter is also complicated in the United States because of the federal government's position on legalization. Federal legislation still makes the possession, use, prescription or sale of marihuana illegal regardless of the state medical exemptions. However, even at the federal level there is now some change. In March 2, 1999, a Bill was introduced in Congress titled *Medical Use of Marijuana Act*. This Act would allow state laws to become fully operative and exempt medical marihuana from federal drug legislation.

[141] The House of Lords report, mentioned earlier, recommended that the government transfer cannabis from Schedule 1 to Schedule 2 of the *Misuse of Drugs Regulations* to permit physicians to prescribe it and pharmacists to supply it as an unlicensed medicine. The U.K. government has refused to do so, although it has agreed to approve clinical trials of cannabis for treatment of MS and chronic pain.

[142] In *Rodriguez,* Sopinka J. placed some reliance on the fact that the official position of various medical associations was against decriminalizing assisted suicide. I have earlier reviewed Dr. Morgan's testimony concerning recent studies by the British Medical Association and the United States Institute of Medicine. These studies strongly support the view that marihuana has medicinal value and urge more study of the medical use of marihuana. There is no apparent support for a blanket prohibition on medicinal use of marihuana and to the contrary some recognition that at the moment there may be no alternative than to permit patients to smoke marihuana to relieve the symptoms for certain serious illnesses. For example, the House of Lords Select Committee on Science and Technology in its Report on "Cannabis: The Scientific and Medical Evidence" provided this comment at para. 8.7:

> [P]eople who use cannabis for medical reasons are caught in the front line of the war against drug abuse. This makes criminals of people whose intentions are innocent, it adds to the burden on enforcement agencies, and it brings the law into disrepute. Legalising medical use on prescription, in the way that we recommend, would create a clear separation between

> medical and recreational use, under control of the health care professions. We believe it would in fact make the line against recreational use easier to hold.

(v) Conclusion on the principles of fundamental justice and the blanket prohibition on marihuana possession and cultivation

[143] In the companion case of *R. v. Clay*, I have reviewed at greater length the state's objectives in prohibiting marihuana. First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs. It remains to consider whether the deprivation of Parker's rights to liberty and security of the person enhance these objectives.

[144] The blanket prohibition on possession and cultivation, without an exception for medical use, does little or nothing to enhance the state interest. To the extent that the state's interest in prohibiting marihuana is to prevent the harms associated with

marihuana use including protecting the health of users, it is irrational to deprive a person of the drug when he or she requires it to maintain their health. As in *Morgentaler,* the court must consider the actual effect of the legislation. While the exemption for therapeutic abortions was designed to preserve the pregnant woman's health, it had the opposite effect in some cases by imposing unreasonable procedural requirements and delays.[9] If the purpose of the marihuana prohibition is to protect the health of users and thereby eliminate the related costs to society,[10] the overbroad prohibition preventing access to the drug to persons like Parker, who require it to preserve their health, defeats that objective. Other harms, such as impaired driving, must be considered in context. For example, prohibiting the small number of seriously ill patients who require it from having access to marihuana does little to enhance the state interest in the safety of the highways.

[145] It is also fair to take into account the extent of harm the marihuana prohibition is designed to protect against. As McLachlin J. said in *Cunningham v. Canada* at pp.151-52, fundamental justice requires that a fair balance be struck between the interest of the person who claims his liberty or security interest has been limited and the protection of society. If the harm against which society must be protected is relatively limited, less limitation on the liberty and security interests will be tolerated especially when the

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[9] See *R. v. Keegstra* (1990) 61 C.C.C. (3d) 1 (S.C.C.) per McLachlin J. dissenting at 114.

[10] See the discussion of those issues in *R. v. Malmo-Levine supra,* at para. 142-43.

infringement on the person's rights is grounded in a risk to life and health. The evidence at trial demonstrated that the side effects of marihuana use are almost trivial compared to the side effects of the conventional medicine Parker also takes. As pointed out, no one has ever died from ingestion of marihuana.

[146] As to Canada's international treaty obligations with respect to the control of illicit drugs, I have already referred to the decision of the Supreme Court of Canada in *R. v. Hauser* and its reliance on Canada's being a party to the *Single Convention of Narcotic Control 1961*. As I noted, the first objective of that Treaty, as set out in the preamble, recognizes that "the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes". The former *Narcotic Control Act*, which made no provision for the legal medical use of marihuana, does not further this objective.

[147] Subsequent Conventions have tightened the control on all narcotics and psychotropic substances, including marihuana. The 1971 Convention permitted use of marihuana for limited medical purposes by duly authorized persons. The 1988 Convention requires states to prohibit possession, purchase and cultivation of marihuana for personal use, subject to the country's "constitutional principles and the basic concepts of its legal system". It is self-evident that if under our Constitution, namely s. 7 of the

Charter of Rights and Freedoms, the prohibition of possession and cultivation of marihuana for medical purposes is unconstitutional, it would be open to Parliament to enact such an exemption and still comply with its treaty obligations.[11] Prohibiting possession or cultivation of marihuana for personal medical use does nothing to enhance the state's interest in fulfilling its international obligations. In *R. v. Clay* at p. 357, McCart J. noted that in their hard-line approach to marihuana possession, the United States (and Canada) appear "somewhat out of step with most of the rest of the western world". The fact that state and federal lawmakers in the United States now seem to favour making marihuana available for medical use suggests that such a move in Canada would not be inconsistent with our international obligations.

[148] Finally, in considering Canada's treaty obligations, it should be borne in mind that Canada is also a party to the *International Covenant on Economic, Social and Cultural Rights*, (1976), 993 U.N.T.S. 3.[12] Article 12 of the Covenant includes the following:

> 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
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> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
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> …

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[11] In any event, the Constitution takes precedence over any treaty obligations: *Attorney-General for Canada v. Attorney General for Ontario and Others*, [1937] A.C. 326 (P.C.).

[12] Canada acceded to the Covenant on May 19, 1976 and it came into force in Canada on August 19, 1976.

> (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness. [Emphasis added.]

[149] I have already noted the Crown's argument that the trial judge "expressly" reversed the onus of proving that the legislation was in accord with the principles of fundamental justice. This is based in part on the emphasized excerpt from the following portion of the trial judge's reasons:

> However, these schedules include also numerous narcotic drugs which are possessed and used by Canadians with medical approval. The Convention therefore, is not a prohibition against all possession or distribution. As article 3(2) states, the Convention must be read subject to Canada's constitutional principles and it is up to Canada to "adopt such measures, AS MAY BE NECESSARY" (Court emphasis) to criminalize the possession of marihuana. The respondent/Crown, on these facts and based on any of the tests of the principles of fundamental justice, has not demonstrated the necessity of a legislative enactment so broad as to prevent therapeutic use of this non-manufactured grown plant product. [Emphasis added.]

[150] In my view, when read in context, this part of the reasons only refers to the discussion about Canada's international obligations. Resolution of that issue did not depend on the burden of proof. In this passage, the trial judge is making the common-sense observation, not disputed at trial or on appeal, that a medical exemption is consistent with international obligations. By this point in his reasons, the trial judge has already held that a blanket prohibition does not accord with the principles of fundamental

justice since it does little or nothing to enhance the state interest. Given the Crown position that a medical exemption is possible under the Conventions, the apparent reversal of the burden is of no consequence.[13]

[151] The Crown also supports the legislation as necessary to control the domestic and international trade in illicit drugs. While such an objective suggests a need for some form of control on the distribution of marihuana, the complete prohibition on the possession or cultivation of marihuana for personal therapeutic use does little to enhance this state interest. The Crown has never asserted that the number of persons who could legitimately claim access to marihuana for medical purposes is very large. They could have little impact on the huge market for illicit marihuana. Prohibiting these patients access to marihuana does little to enhance these state interests. What is required is regulation of this drug, as with tranquilizers, morphine and other much more dangerous and addictive drugs, for which there is also no doubt a large illicit market.

[152] To conclude, the deprivation of Parker's rights to liberty and security of the person because of the complete prohibition on the possession or cultivation of marihuana in the former *Narcotic Control Act* does little or nothing to enhance the state's interest. In my view, Parker established that his rights under s. 7 were violated by the absolute

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[13] The Crown, of course, claims that the legislation already contains sufficient exemptions. In any event, if treaty obligations are a matter more properly considered under s. 1, the Crown did bear the burden of proof on that issue.

prohibition on cultivation of marihuana in the *Narcotic Control Act*. Parker has no other practical means of obtaining the drug for his medical needs. I did not understand the Crown to suggest that we should distinguish between the possession and cultivation for personal medical use, for the purpose of the s. 7 analysis. Since the cultivation offence is the only provision at issue under that Act, strictly speaking I need not consider the validity of the possession offence. However, it is obvious from this discussion that were that provision before this court, I would have found that it also violates Parker's rights under s. 7.

[153] I am also of the view that, subject to the availability of a s. 56 exemption, Parker has established that the similar prohibition on possession and cultivation of marihuana in the *Controlled Drugs and Substances Act* violates his rights under s. 7 of the *Charter*. Again, since, strictly speaking, the possession offence is the only provision at issue under that Act, it is unnecessary to consider the validity of the cultivation offence. Before turning to s. 56, it will be convenient to deal with other principles of fundamental justice.

(vi) Does the practical unavailability of a defence under the legislation infringe the principles of fundamental justice?

[154] In *Morgentaler,* Dickson C.J.C. rested his finding that the abortion prohibition was unconstitutional on the practical unavailability of the defence that was theoretically available through the therapeutic abortion committee procedure. He reviewed the

extensive evidence that demonstrated that therapeutic abortions were unavailable in many parts of the country and that even where it was available the delays created by the administrative structure often required physicians to use a riskier procedure when the abortion was finally approved. He explained at pp. 72-3, in a passage that I have previously quoted, why this was inconsistent with the principles of fundamental justice. To summarize, he held that it was manifestly unfair to create a defence that contained so many barriers to its operation that it was practically unavailable to women who would *prima facie* qualify for the defence. Dickson C.J.C. also explained at p. 76 why this violation of s. 7 could not be saved under s. 1:

> I conclude, therefore, that the cumbersome structure of s-s. (4) not only unduly subordinates the s. 7 rights of pregnant women but may also defeat the value Parliament itself has established as paramount, namely, the life and health of the pregnant woman. As I have noted, counsel for the Crown did contend that one purpose of the procedures required by subs. (4) is to protect the interests of the foetus. State protection of foetal interests may well be deserving of constitutional recognition under s. 1. Still, there can be no escape from the fact that Parliament has failed to establish either a standard or a procedure whereby any such interests might prevail over those of the woman in a fair and non-arbitrary fashion. [Emphasis added.]

[155] The same may be said of the theoretical defence available in the *Narcotic Control Act* and the *Controlled Drugs and Substances Act.* Under s. 3 of the *Narcotic Control Act* and s. 4 of the *Controlled Drugs and Substances Act* it is an offence to have possession of

any narcotic or scheduled substance respectively including marihuana except as authorized by the Act or regulations. While the regulations theoretically contemplate that a physician could prescribe marihuana, the evidence from the government witness was that since there is no legal source for marihuana, no pharmacist could fill the prescription and that the government would not look favourably upon a physician who purported to write such a prescription. That witness also established the practical impossibility of Parker obtaining a legal source of marihuana. For example, the process for approval of a new drug involves the expenditure of hundreds of thousands of dollars. For most of his life, Parker has been on government assistance as a result of his disability.

[156] The Crown says that it is not the fault of the legislation, but the fact that no one has come forward to attempt to comply with the legislation to obtain new drug approval. The practical unavailability of marihuana due to the administrative structure prevents Parker and people like him who require the drug for medical purposes from obtaining a prescription for the drug because of the absence of a legal supply. Put simply, the expense for Parker in obtaining a legal source of the drug through the new drug approval procedure established by the state makes the defence held out under the legislation practically unavailable.

[157] Although we heard little argument on the point, I do not doubt the importance of the state interest in ensuring that new drugs meet stringent standards before they are made

widely available to the public. One only has to remember the tragedy of Thalidomide to understand the need for the regulatory structure. However, the problem facing this court is different. I have found that Parker established that the criminal prohibition against possession of marihuana infringed his security of the person. He requires marihuana to treat his epilepsy and without it, his life and health are endangered. He has also established that the side effects of his use of marihuana are minor, compared to the side effects from the prescription drugs he is required to take as part of his conventional treatment. The state interest in strict regulation of new drugs must be balanced against the risk to Parker's life and health posed by the administrative structure established by Parliament and the government. The state cannot hold out as a generally available defence the possibility of possessing the drug in accordance with a prescription when Parker is practically precluded from availing himself of the defence.

[158] In *Morgentaler,* the Crown made essentially the same argument. As summarized in the reasons of Dickson C.J.C. at p. 61, the Crown argued that any impairment to the physical or psychological interests of individuals caused by the abortion provisions of the Code "does not amount to an infringement of security of the person because the injury is caused by practical difficulties and is not intended by the legislator".

[159] Dickson C.J.C. rejected the argument for two reasons. First, as a practical matter it was not possible to erect a rigid barrier between the purposes of the section and the

administrative procedures established to carry those purposes into effect. For example, the delay resulted not simply from the practical problems, but was inherent in the cumbersome operating requirements of the section itself. Second, even if it were possible to dissociate purpose and administration, the Supreme Court had previously held that both purpose and effect must be considered. As Dickson C.J.C. said at pp. 62-3:

> Even if the purpose of legislation is unobjectionable, the administrative procedures created by law to bring that purpose into operation may produce unconstitutional effects, and the legislation should then be struck down. It is important to note that, in speaking of the effects of legislation, the court in *R. v. Big M Drug Mart Ltd.* was still referring to effects that can invalidate legislation under s. 52 of the Constitution Act, 1982 and not to individual effects that might lead a court to provide a personal remedy under s. 24(1) of the Charter. In the present case, the appellants are complaining of the general effects of s. 251. If s. 251 of the *Criminal Code* does indeed breach s. 7 of the Charter through its general effects, that can be sufficient to invalidate the legislation under s. 52. [Emphasis added.]

[160] I need only consider the second reason referred to by Dickson C.J.C. Even if the purpose of the regulatory scheme created by the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* and Regulations is valid, the administrative procedures created to bring the purpose into operation produce unconstitutional effects for the group of people like Parker who require marihuana for medical purposes.[14]

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[14] I will deal with the question of remedy, raised in the passage quoted above, later in my reasons. Suffice it to say that I do not consider the defect in the legislation to be merely an individual effect requiring simply a remedy under s. 24(1) alone.

[161] Even if I am wrong on this aspect of the case, the theoretical availability of marihuana through the new drug programme does not answer Parker's claim that the prohibition infringes his right to liberty. I have described that right as the right to make decisions that are of fundamental personal importance, which includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. There may be circumstances in which the state interest in regulating the use of new drugs prevails over the individual's interest in access. This, however, is not one of those circumstances. The evidence establishes that the danger from the use of the drug by a person such as Parker for medical purposes is minimal compared to the benefit to Parker and the danger to Parker's life and health without it. It may be that the state is entitled to require the approval of the patient's choice by a physician in much the same way that in *Morgentaler*, Beetz J. contemplated that even if there was a right of access to abortion founded upon the right to liberty, a second medical opinion as to the mother's health could be justified in some circumstances (Wilson J. suggested the second trimester) because of the state interest in the protection of the foetus. However, the current legal and administrative structure completely deprives Parker of any choice, even with the approval of his physician.[15]

[162] In summary, like the defence for women who required an abortion because the continuation of the pregnancy would endanger their health, the defence in the *Narcotic*

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[15] Subject to a possible s. 56 exemption discussed below.

Control Act and the *Controlled Drugs and Substances Act* is practically unavailable to Parker and others like him who require marihuana for conditions threatening their life or health. This constitutes a violation of the principles of fundamental justice. Again, as Dickson C.J.C. said in *Morgentaler* at p. 70:

> One of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically illusory. The criminal law is a very special form of governmental regulation, for it seeks to express our society's collective disapprobation of certain acts and omissions. When a defence is provided, especially a specifically-tailored defence to a particular charge, it is because the legislator has determined that the disapprobation of society is not warranted when the conditions of the defence are met. [Emphasis added.]

[163] Parliament has created a defence to the possession and cultivation offences if the person can comply with the regulations. Those regulations, for example, permitted a person to legally possess the drug under prescription from a physician. The government’s own witness established that this defence or exemption is illusory. This is not consistent with the principles of fundamental justice.

6. Is there a different analysis of fundamental justice under the *Controlled Drugs and Substances Act?*

(i) Introduction

[164] The Crown argues that even if Parker has established a deprivation of his right to liberty or security of the person (as opposed to a mere preference for an illegal form of

treatment), the *Controlled Drugs and Substances Act* does comply with the principles of fundamental justice because of the three legal means by which Parker could possess marihuana. They are:

> (i) The Health Canada procedure for approval of new drugs,
>
> (ii) The Emergency Drug Release (Compassionate Use) Programme,
>
> (iii) An application to the Minister of Health under s. 56 of the Act.

[165] I have already briefly dealt with the Health Canada procedure for approval of new drugs. As to the Emergency Drug Release Programme or Compassionate Use Programme under the *Narcotic Control Regulations*, the theoretical availability of this programme to Parker runs up against the practical and, for Parker, insuperable barrier that there is no licensed source of marihuana because it is a controlled substance. Thus, while the Programme allows applications to be made for access to otherwise non-marketed drugs, marihuana is not available because Health Canada has not licensed any firm to produce and distribute it. The Crown says this is because no one has come forward seeking a licence. The same considerations that applied to my discussion of the new drug approval process apply. Parker simply does not have the means to become a licensed dealer in marihuana and therefore no means of taking advantage of the Compassionate Use Programme.

(ii) Section 56 of the **Controlled Drugs and Substances Act**

[166] The third alternative source for legal possession of marihuana is through s. 56 of the *Controlled Drugs and Substances Act*. That section provides as follows:

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

[167] The trial judge held that there was no provision under the former *Narcotic Control Act* or the *Controlled Drugs and Substances Act* for an exemption for a person requiring marihuana for medical purposes. This statement is true about the *Narcotic Control Act*. It is not the case under the *Controlled Drugs and Substances Act*. In fairness to the trial judge, s. 56 was never drawn to his attention and Mr. Rowsell, the government witness, who should have known about s. 56, made no mention of it in his evidence. In summary, at trial, the Crown did not advance the availability of an exemption under s. 56 as a basis for upholding the legislation.

[168] Counsel for Parker argues that the Crown should not now be permitted to rely upon s. 56. This court is reluctant to permit litigants to raise constitutional arguments for the first time on appeal, even where the argument is to support a defence for an accused.

Thus, at the opening of the appeal we indicated to the intervener Epilepsy Association of Toronto that it would not be permitted to challenge the validity of the Act under s. 15 of the *Charter*, notwithstanding the potential force of such a submission, because no such challenge was made at trial.[16]

[169] There are important institutional and practical reasons underlying our reluctance to allow constitutional arguments to be raised for the first time on appeal. If the matter is not raised at trial, the necessary adjudicative facts may not be before the court to enable the court to adequately address the new issue. An appellate court also does not have the benefit of findings of fact by the trial judge concerning disputed adjudicated and legislative facts. Where the Crown raises a new issue for the first time on appeal, double jeopardy concerns may arise. See *R. v. Varga* (1994), 90 C.C.C. (3d) 484 (Ont. C.A.) at 494.

[170] The Crown's new-found reliance on s. 56 involves many of these considerations. We have only a sparse record concerning the operation of s. 56, especially since the Crown declined this court's offer to adjourn the hearing of the appeal to obtain further evidence. What information there is comes from the decisions of LaForme J. of the Superior Court of Justice in *Wakeford v. Canada* (1998), 166 D.L.R. (4th) 131 and

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16 The Association argues that the marihuana prohibition discriminates on the basis of disability.

(1999), 173 D.L.R. (4th) 726 to which I will refer and the fresh evidence put forward by Parker through the affidavit and cross-examination of Mr. Oscapella.

[171] Nevertheless, in my view, it is necessary for this court to consider the application of s. 56. Although there was no evidence about s. 56 at trial, the section was part of the statute under consideration and in that sense the issue was before the court. Failure to consider, even on this sparse record, the application of s. 56, which has become central to the government's defence of the legislation, could undermine the legitimacy of this court's judgment.

[172] I have reviewed the fresh evidence concerning s. 56 applications earlier. In summary, in May 1999, Health Canada released the Interim Guidance Document that outlines the process for Canadians to obtain exemptions under s. 56. At the time of Mr. Oscapella's cross-examination, two exemptions had been granted for cannabis possession. This trial took place in 1997 and, as I have indicated, there was no practical way for Parker to have obtained an exemption under s. 56. Parker submits that the government's new-found interest in s. 56 is the result of the *Wakeford* decisions. It is worth examining those decisions.

[173] Mr. Wakeford suffers from AIDS. His illness and the various drugs he must take to control it leave him with many debilitating side effects including nausea and loss of

appetite. He tried using Marinol, but this only made him sicker. He began to use marihuana under a physician's supervision in 1996. He found that the marihuana controlled his nausea and stimulated his appetite and countered many of the side effects he experienced from the prescription drugs. In 1998, he applied to the Ontario Court (General Division) (now the Superior Court of Justice) for a constitutional exemption. His submissions were similar to those made in this case, although he also relied upon s. 15 of the *Charter*. In his first judgment released September 8, 1998, LaForme J. held that Wakeford's s. 7 rights were not infringed because he had not demonstrated that he could not obtain an exemption under s. 56 of the Act. However, he also held at pp. 150-51 that if there was no real process or procedure whereby an individual could apply for an exemption, he would "have no hesitation in granting, perhaps even all, the relief Mr. Wakeford seeks".

[174] In March 1999, Mr. Wakeford applied to re-open the original application. The evidence adduced on the new hearing demonstrated that in fact there was no process by which Mr. Wakeford could have obtained a s. 56 exemption. As LaForme J. put it, the availability of the exemption was illusory. At the time of the new hearing, the process for obtaining s. 56 exemptions was under development but it was unknown how the process would work, how long it would take to process an application and when Mr. Wakeford's application would be dealt with. Accordingly, on the new hearing, LaForme J. granted

Mr. Wakeford an interim constitutional exemption from the operation of the possession and cultivation offences under the Act until the Minister decided upon his application.

[175] The Crown submits that if this court were to find that Parker's right to liberty or security of the person is infringed by the marihuana prohibition, that infringement is in accordance with the principles of fundamental justice because of the availability of the s. 56 exemption. Mr. Wilson submits that the fresh evidence shows that there is now a process in place for the Minister to consider such applications. He submits that the Minister would have to comply with the dictates of the *Charter* in considering such applications and further should there be a refusal of the exemption in any particular case, the applicant's remedy is to judicially review the Minister's decision, not strike down the legislation.

[176] Before dealing with the Crown's submissions concerning s. 56, it is important to make some preliminary comments. I do not wish the following reasons to be misinterpreted. I do not doubt that the present Minister of Health takes the issue of medical use of marihuana seriously nor do I question his good intentions. On June 9, 1999, in response to a question from a member, the Minister informed the House that he

was exercising his power under s. 56 for “two very sick people to use marijuana for medical purposes”.[17] In doing so he said the following:

> Let us remember what this is about. This is about showing compassion to people, often dying, suffering from grave and debilitating illness. I want to thank the member and all the members here for pushing this issue so that we behave properly on behalf of those who are sick and dying.

[177] The question remains; does this unfettered discretion meet constitutional standards? In my view, notwithstanding the theoretical availability of the s. 56 process, the marihuana prohibition does not accord with the principles of fundamental justice. In *Morgentaler*, Dickson C.J.C. found the therapeutic abortion scheme invalid in part because the provincial Ministers of Health could impose so many restrictions as to make therapeutic abortions unavailable in the province and because there was no standard provided in the section for the committee to use in determining whether the woman’s health was in danger. He held as follows at pp. 67-8:

> The requirement that therapeutic abortions be performed only in "accredited" or "approved" hospitals effectively means that the practical availability of the exculpatory provisions of subs. (4) may be heavily restricted, even denied, through provincial regulation. In Ontario, for example, the provincial government promulgated O. Reg. 248/70 under *The Public Hospitals Act*, R.S.O. 1960, c. 322, now R.R.O. 1980, Reg. 865. This regulation provides that therapeutic abortion

[17] One of those people was Mr. Wakeford.

committees can only be established where there are ten or more members on the active medical staff (Powell Report, at p. 13). A minister of health is not prevented from imposing harsher restrictions. During argument, it was noted that it would even be possible for a provincial government, exercising its legislative authority over public hospitals, to distribute funding for treatment facilities in such a way that no hospital would meet the procedural requirements of s. 251(4). Because of the administrative structure established in s. 251(4) and the related definitions, the "defence" created in the section could be completely wiped out.

A further flaw with the administrative system established in s. 251(4) is the failure to provide an adequate standard for therapeutic abortion committees which must determine when a therapeutic abortion should, as a matter of law, be granted. Subsection (4) states simply that a therapeutic abortion committee may grant a certificate when it determines that a continuation of a pregnancy would be likely to endanger the "life or health" of the pregnant woman. It was noted above that "health" is not defined for the purposes of the section. The Crown admitted in its supplementary factum that the medical witnesses at trial testified uniformly that the "health" standard was ambiguous, but the Crown derives comfort from the fact that "the medical witnesses were unanimous in their approval of the broad World Health Organization definition of health". The World Health Organization defines "health" not merely as the absence of disease or infirmity, but as a state of physical, mental and social well-being.

I do not understand how the mere existence of a workable definition of "health" can make the use of the word in s. 251(4) any less ambiguous when that definition is nowhere referred to in the section. There is no evidence that therapeutic abortion committees are commonly applying the World Health Organization definition. Indeed, the Badgley report indicates that the situation is quite the contrary… [Emphasis added.]

[178] The same must be said about s. 56. It reposes in the Minister an absolute discretion based on the Minister's opinion whether an exception is "necessary for a medical … purpose", a phrase that is not defined in the Act. The Interim Guidance Document issued by Health Canada to provide guidance for an application for a s. 56 exemption sets out factors that the Minister "may" consider in deciding whether an exemption is necessary for a medical purpose. This document does not have the force of law and, in any event, merely sets out examples of factors the Minister may consider. It does not purport to exhaustively define the circumstances. In fact, the document explicitly states that the Minister may take into account considerations unrelated to medical necessity such as "the potential for diversion".[18] The document also suggests that the power under s. 56 is only to be exercised in "exceptional circumstances", a qualification not found in the statute itself.

[179] Even if the Minister were of the opinion that the applicant had met the medical necessity requirement, the legislation does not require the Minister to give an exemption. The section only states that the Minister "may" give an exemption. The Crown did not suggest that "may" should be interpreted as "shall".

[180] The problem is not unlike the issue confronting the court in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139. That case concerned

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[18] Presumably, into the illicit market.

freedom of expression and the validity of s. 7 of the Government Airport Concession Operations Regulations, SOR/79-373, which prohibited the conducting of any business or undertaking, commercial or otherwise, and any advertising or soliciting at an airport, “except as authorized in writing by the Minister”. There were several sets of reasons and only some members of the court reached the constitutional issue. The comments of L’Heureux-Dubé J., concurred in in this respect by Gonthier and Cory JJ., are instructive, even taking into account that the case involved a fundamental freedom under s. 2 rather than a guaranteed right under s. 7 and that the relevant part of the discussion comes in the s. 1 analysis.

[181] L’Heureux-Dubé J. held that the violation of freedom of expression could not be saved because an applicant could apply for authorization. At p. 214, she wrote as follows:

> Rights and freedoms must be nurtured not inhibited. Vague laws intruding on fundamental freedoms create paths of uncertainty onto which citizens fear to tread, fearing legal sanction. Vagueness serves only to cause confusion and most people will shy from exercising their freedoms rather than facing potential punishment.
>
> In addition, the Regulations provides that “except as authorized in writing by the Minister, no person shall …”. It is clear that the Minister is given a “plenary discretion to do whatever seems best”. That in itself may create a standard which is so vague as to be incomprehensible. In any event, vagueness by virtue of the lack of a comprehensible standard

> does not accord with the requirement that a limit on a right or freedom be "prescribed by law". [Emphasis added.]

[182] Further, in concluding that the regulation did not meet the *Oakes* test under s. 1, she held at pp. 225-26 as follows:

> This particular provision does not even come close to meeting that standard. As a result of its vagueness and overbreadth, there is no foreseeability as to what activity is in fact being proscribed. Furthermore, the unfettered discretion vested in the Minister itself undermines the reasonableness and predictability of the provision's application. Those affected by the Regulation cannot be left to speculate or surmise how or in what circumstances it will be implemented. Such conjecture is incompatible with the spirit, purposes and goals of our *Charter*, and will not pass constitutional muster: it has not been demonstrably justified in a free and democratic society. [Emphasis added.]

[183] McLachlin J. reached a similar conclusion in her consideration of s. 1. She held at pp. 246-47 that the limit on the right should contain sufficient safeguards to ensure that as the law is applied the right will not be infringed more than necessary. This latter danger may occur "if too much discretion is granted to administrators charged with applying the limit or law in question".

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

[185] In effect, whether or not Parker will be deprived of his security of the person is entirely dependent upon the exercise of ministerial discretion. While this may be a sufficient legislative scheme for regulating access to marihuana for scientific purposes, it does not accord with fundamental justice where security of the person is at stake.[19]

[186] The problem is not unlike that faced by the court in *R. v. Smith (Edward Dewey)*, [1987] 1 S.C.R. 1045 in considering the validity of the seven-year minimum term of imprisonment for importing narcotics under the former *Narcotic Control Act*. The Crown argued that violations of the right to protection against cruel and unusual punishment under s. 12 of the *Charter* could be avoided by prosecutorial discretion. At pp. 1078-1079 Lamer J. explained why this could not save the provision:

> In its factum, the Crown alleged that such eventual violations could be, and are in fact, avoided through the proper use of prosecutorial discretion to charge for a lesser offence.
>
> <u>In my view, the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application</u>

[19] Section 56 also gives the Minister the power to impose "such terms and conditions" as he deems necessary. It would thus be possible for a Minister of Health to impose conditions that would make the exemption illusory. The fact that the present application requires the applicant to name the source of his or her supply gives some reason for concern when the government must know that at present there is no legal source for marihuana in Canada.

> would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty-bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter. Therefore, to conclude, I find that the minimum term of imprisonment provided for by s. 5(2) of the *Narcotic Control Act* infringes the rights guaranteed by s. 12 and, as such, is a *prima facie* violation of the *Charter*. Subject to the section's being salvaged under s. 1, the minimum must be declared of no force or effect. [Emphasis added.]

[187] In my view, this is a complete answer to the Crown's submission. The court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights. Section 56 fails to answer Parker's case because it puts an unfettered discretion in the hands of the Minister to determine what is in the best interests of Parker and other persons like him and leaves it to the Minister to avoid a violation of the patient's security of the person.

[188] If I am wrong and, as a result, the deprivation of Parker's right to security of the person is in accord with the principles of fundamental justice because of the availability of the s. 56 process, in my view, s. 56 is no answer to the deprivation of Parker's right to liberty. The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject

that decision to unfettered ministerial discretion. It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marihuana does not enter the illicit market. However, I need not finally determine those issues, which, as I will explain in considering the appropriate remedy, are a matter for Parliament.

[189] I have one final concern with the availability of the s. 56 process. An administrative structure made up of unnecessary rules that results in an additional risk to the health of the person is manifestly unfair and does not conform to the principles of fundamental justice. We were provided with little evidence as to the operation of the s. 56 procedure as established by the government. The Oscapella affidavit includes the Interim Guidance Document, that is, as I have indicated, to provide guidance for a s. 56 application. The document envisages a detailed application and entitles the Minister to request further information. Since the Crown declined the opportunity to present further fresh evidence about s. 56, the only evidence as to the actual operation of the programme comes from the cross-examination of Mr. Oscapella, which was hearsay based on information he had obtained from government employees, presumably persons who could

have provided evidence for the Crown.[20] Mr. Oscapella testified that, despite the statement by the Minister in the House of Commons that he intended there be a "15-day turnaround period", only two exemptions had been granted as of June 9, 1999. As of August 26, 1999, a further 15 applications were complete but had still not been dealt with by the Minister as of the date of the cross-examination on September 14th. These kinds of delays, which may be due to the administrative procedure, would further endanger the health of a person like Parker.

[190] To conclude, in my view, Parker has established that the prohibition on possession of marihuana in the *Controlled Drugs and Substances Act* has deprived Parker of his right to security of the person and right to liberty in a manner that does not accord with the principles of fundamental justice. Since Parker was not charged with the cultivation offence, that offence is not expressly before this court. However, it is apparent from these reasons and the reasons dealing with the cultivation offence under the *Narcotic Control Act* that if the cultivation provision had been before this court, I would hold that it too infringes Parker's s. 7 rights. 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

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[20] As Cory J. said in *MacKay v. Manitoba* (1989), 61 D.L.R. (4th) 385 (S.C.C.) at 388, in light of the importance and impact that some Charter decisions may have, "the courts have every right to expect and indeed to insist upon the careful preparation and presentation of a factual basis in most Charter cases". While the burden was on the respondent to demonstrate the violation of s. 7, given the importance the Crown placed upon the s. 56 exemption it would have been helpful if the Crown produced expert evidence from the officials in Health Canada in charge of the s. 56 programme.

it. In this way, he avoids having to interact with the illicit market and can provide some quality control.

7. Can any violations be saved by s. 1?

[191] The onus was on the Crown to establish that the violations of Parker's rights could be saved under s. 1 of the *Canadian Charter of Rights and Freedoms.* The Crown did not suggest that the violations could be saved by s. 1. In any event, many of the defects in the legislation that contribute to the deprivations of Parker's rights practically preclude the legislation from meeting the proportionality test under s. 1.

[192] In particular, one of the purposes of the law is to prevent harm to the health of Canadians and the resulting costs to society. However, the broad nature of the marihuana prohibition has the effect of impairing the health of Parker and others who require it for medical purposes. In this sense, the legislation works in opposition to one of the primary objectives and thus could be described as "arbitrary" or "unfair": *R. v. Keegstra* (1990) 61 C.C.C. (3d) 1 (S.C.C.) per Dickson C.J.C. at 53 and per McLachlin J. (dissenting) at 114.

[193] The only possible basis for holding that the provision of the *Controlled Drugs and Substances Act* constituted a reasonable limit is that s. 56 tempers the facial overbreadth of the prohibition. However, for the reasons of L'Heureux-Dubé J. and McLachlin J. in

Committee for the Commonwealth of Canada v. Canada, the plenary discretion vested in the Minister precludes a finding that this is a reasonable limit. Thus, whether the s. 56 exemption is considered under s. 1 or s. 7, it cannot save the legislation.

[194] Finally, the broad prohibition means that the section fails the minimal impairment test: *R. v. Heywood* (1994), 94 C.C.C. (3d) 481 (S.C.C.) at 523. There is no need to prosecute people like Parker who require marihuana for medical purposes to achieve any of the three objectives identified by the Crown: preventing harm, international treaty obligations, and control of the trade in illicit drugs. Less intrusive means are available to meet these objectives. The Californian and Hawaiian legislative schemes are but two examples of how these objectives might be reconciled with the needs of patients requiring access to marihuana.

8. The appropriate remedy for the violations

[195] The trial judge granted remedies through the combination of s. 24(1) of the *Charter* and s. 52 of the *Constitution Act, 1982.* He stayed the charges against Parker and declared that the marihuana possession and cultivation prohibitions in both the *Narcotic Control Act* and the *Controlled Drugs and Substances Act* be read down to exempt "persons possessing or cultivating cannabis marihuana for the personal medically approved use". The trial judge also ordered that the plants seized from Parker on September 18, 1997 be returned to him.

[196] I cannot agree with the trial judge's choices of remedies. First, in my view, it was inappropriate to require the police to return the plants as there was no evidence that these perishable items were still available. I would strike out that part of the judgment.

[197] I also cannot agree that it was open to the trial judge to grant a declaration in relation to the possession offence under the *Narcotic Control Act* or the cultivation offence under the *Controlled Drugs and Substances Act.* The trial judge's jurisdiction to deal with the constitutional issues before him was dependent upon the criminal charges in issue. He did not have the jurisdiction a superior court would have had on an application for a declaration. I would therefore also set aside those parts of the judgment.

[198] I also do not agree with the trial judge that it was appropriate to read a medical exemption into the legislation. In this respect, I agree with the submissions of the Crown. In light of the leading decisions on remedy in *Schachter v. Canada*, [1992] 2 S.C.R. 679, *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 and *Rodriguez*, the Crown submits that, should this court find a violation of s. 7 because the legislation fails to provide adequate exemptions for medical use, the "only available remedy" is to strike down those provisions and suspend the finding of invalidity for a sufficient period of time to allow Parliament to craft satisfactory medical exemptions.

[199] Since the federal Crown takes this position in defending its own legislation, it is only necessary for me to briefly indicate my reasons for reaching the same conclusion with respect to the *Controlled Drugs and Substances Act*. Since the *Narcotic Control Act* has been repealed by Parliament, it is unnecessary to strike down the offending provision.

[200] In *Schachter,* Lamer C.J.C. extensively reviewed the various remedies available to a court that finds legislation violates a *Charter* provision. Reading in is a remedial option under s. 52 of the *Constitution Act, 1982*, which requires the court to strike down any law that is inconsistent with the Constitution, but only "to the extent of the inconsistency". The purpose of reading in "is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature": *Schachter* at p. 700. Reading in is also sometimes required in order to respect the purposes of the *Charter*.

[201] In *Schachter*, Lamer C.J.C. reviewed the factors to be considered in determining whether or not reading in is an appropriate remedy by reference to the factors developed by the Court in *R. v. Oakes*, [1986] 1 S.C.R. 103. Reading in is particularly appropriate where the legislation fails because it is not carefully tailored to be a minimal intrusion or it has effects that are disproportionate to its purpose. The defects in the *Controlled Drugs and Substances Act* fall within this rationale and thus reading in is a potential remedy. Even so, reading in will not be appropriate if "the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient

degree of precision on the basis of constitutional analysis": *Schachter* at p. 705. To read in an exemption in such circumstances would "amount to making *ad hoc* choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature not the courts": *Schachter* at p. 707.

[202] In its factum, the Crown has listed a number of problems with the reading in remedy adopted by the trial judge. They include the following:

> (a) what constitutes "medically approved use"?
>
> (b) who may grant medical approval? on what basis? on whose onus? to what standard of proof?
>
> (c) given that this is a constitutional protection (i.e. the highest form of protection allowed by our law), what degree of illness is required to engage it? must it be life-threatening? chronically disabling? disruptive? generally inconvenient? merely bothersome?
>
> (d) what quantities of marijuana may an authorized person possess? enough for one day? a week? a year? should there be a presumption that any amount in excess of immediate need is not covered by the exemption? If so, who decides what the threshold amount should be?
>
> (e) what quantities of marijuana may an authorized person cultivate? how much of the plant should be considered useable for the purpose of that determination? just the flowers? the flowers and the leaves? who decides?
>
> (f) does the exemption extend in any way to roommates, family members or caregivers? if an unauthorized individual cares for an otherwise 'exempt' plant while its authorized

> owner is away, is that individual insulated from prosecution for cultivation? on what basis, if the exemption is personal?

[203] I do not necessarily accept that all of these problems necessarily flow from the remedy chosen by the trial judge.[21] I do accept, however, that the Crown has raised matters of sufficient complexity that reading in is not an appropriate remedy. For these reasons, I agree with the Crown that the prohibition on simple possession of marihuana in s. 4 of the *Controlled Drugs and Substances Act* must be struck down.

[204] I point out, however, that this is not a case like *Rodriguez* where creating an exception might frustrate the purpose of the legislation because adequate guidelines to control abuse are difficult or impossible to develop. Rather, refusing to read in an exemption demonstrates a recognition of and respect for the different roles of the legislature and the courts. There is, in my view, no question that a medical exemption with adequate guidelines is possible. The fact that such exemptions exist in some states in the United States is testament to that. However, there are many options to consider and this is a matter within the legislative sphere. There is also a particular problem in the

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[21] I also do not accept all of the Crown's submissions, based on *Schachter*, for refusing the reading-in remedy. For example, the Crown argues that a medical exemption would undermine the "comprehensive code" governing right of access to controlled substances for medical purposes or would constitute judicial intrusion into the very core of Parliament's legislative authority over criminal law to decide what conduct should be criminalized. This significantly overstates the issue. The *Controlled Drugs and Substances Act* already contains a significant number of exemptions for medical use of drugs. It is obvious that absolute prohibition is not at the core of the power to criminalize conduct. The "comprehensive code" rationale for refusing to read in is based on the theory that reading in would so markedly change the legislation that it could not be safely assumed that Parliament would have enacted the non-offending provisions. Given the various existing exemptions for medical use of other more dangerous drugs, this theory hardly seems credible.

case of marihuana because of a lack of a legal source for the drug. This raises issues that can only be adequately addressed by Parliament.

[205] There is one other factor that is also worth considering. To avoid an undue intrusion into the legislative sphere, any exemption crafted by a court should probably be the minimum necessary to cure the constitutional defect. However, faced with the need to open up the *Controlled Drugs and Substances Act* to address the constitutional defect, Parliament has the resources to address the broader issue of medical use. By way of example only, people without the means to grow marihuana themselves may be dependent upon caregivers to obtain the drug. This is a complex matter that, while not necessarily implicating *Charter* rights (although it may), is not something a court is equipped to deal with. Put another way, Parliament is not bound to legislate to the constitutional minimum. It can adopt the optimal and most progressive legislative scheme that it considers just.

[206] Finally, I believe it is appropriate to sever the marihuana possession prohibition from the other parts of s. 4. That section is central to the control of many dangerous drugs and there was no suggestion by any of the parties that severance in this limited respect was inappropriate.

[207] I also agree with the Crown that the declaration of invalidity should be suspended to provide Parliament with the opportunity to fill the void. Such a declaration is required where striking down a provision "poses a potential danger to the public": *Schachter* at p. 715. I would suspend the declaration of invalidity for 12 months.

[208] I do not accept the submissions of the intervener that the appropriate remedy is a constitutional exemption for persons requiring marihuana for medical purposes. In *Corbiere* at p. 225, the court held that the remedy of a constitutional exemption has only been recognized in a very limited way, "to protect the interests of a party who has succeeded in having a legislative provision declared unconstitutional, where the declaration of invalidity has been suspended".[22] Thus, Parker is entitled to a constitutional exemption from the possession offence under the *Controlled Drugs and Substances Act* during the period of the suspended invalidity for possession of marihuana for his medical needs. I have also made it clear in these reasons that if the cultivation offence under that Act were before this court, I would have held that provision to be invalid. I expect that the authorities would not subject Parker to further prosecution under that section in view of these reasons.

[22] Also see Lamer C.J.C. dissenting in *Rodriguez* at p. 577. This part of his reasons was adopted by the court in *Corbiere.*

[209] Finally, Parker is entitled to the personal remedies granted to him by the trial judge under s. 24(1) of the *Charter*. Thus, I would uphold the trial judge's order staying the proceedings for cultivation under the former *Narcotic Control Act* and for possession under the *Controlled Drugs and Substances Act*.

DISPOSITION

[210] Accordingly, I would vary the remedy granted by the trial judge and declare the marihuana prohibition in s. 4 of the *Controlled Drugs and Substances Act* to be invalid. I would suspend the declaration of invalidity for a period of twelve months from the release of these reasons. The respondent is exempt from the marihuana prohibition in s. 4 of the *Controlled Drugs and Substances Act* during the period of suspended invalidity for possession of marihuana for his medical needs. I would set aside those parts of Sheppard J.'s judgment reading in a medical exemption into the former *Narcotic Control Act* and the *Controlled Drugs and Substances Act* and ordering the return of the plants seized in the September 1997 search. In all other respects, I would dismiss the Crown appeal.

RELEASED: July 31, 2000

APPENDIX I
California Compassionate Use Act of 1996

11362.5. (a) This section shall be known and may be cited as the Compassionate Use Act of 1996.

(b) (1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:

(A) To ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

APPENDIX II

STATE OF HAWAII
A Bill for an Act relating to Medical Use of Marihuana

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that modern medical research has discovered a beneficial use for marijuana in treating or alleviating the pain or other symptoms associated with certain debilitating illnesses such as cancer, glaucoma, human immunodeficiency virus, acquired immune deficiency syndrome, multiple sclerosis, epilepsy, and crohn's disease. There is sufficient medical and anecdotal evidence to support the proposition that these diseases and conditions may respond favorably to a medically controlled use of marijuana.

The legislature is aware of the legal problems associated with the legal acquisition of marijuana for medical use. However, the legislature believes that medical scientific evidence on the medicinal benefits of marijuana should be recognized. Although federal law expressly prohibits the use of marijuana, the legislature recognizes that a number of states are taking the initiative in legalizing the use of marijuana for medical purposes. Voter initiatives permitting the medical use of marijuana have passed in California, Arizona, Oregon, Washington, Alaska, Maine, and the District of Columbia.

The legislature intends to join in this initiative for the health and welfare of its citizens. However, the legislature does not intend to legalize marijuana for other than medical purposes. The passage of this Act and the policy underlying it does not in any way diminish the legislature's strong public policy and laws against illegal drug use.

Therefore, the purpose of this Act is to ensure that seriously ill people are not penalized by the State for the use of marijuana for strictly medical purposes when the patient's treating physician provides a professional opinion that the benefits of medical use of marijuana would likely outweigh the health risks for the qualifying patient.

SECTION 2. Chapter 329, Hawaii Revised Statutes is amended by adding a new part to be appropriately designated and to read as follows:

"PART .

MEDICAL USE OF MARIJUANA

§329-A Definitions. As used in this part:

"Adequate supply" means an amount of marijuana that is not more than reasonably necessary to assure, throughout the projected course of treatment, the uninterrupted availability of marijuana for purposes of treating or alleviating the pain or other symptoms associated with a qualifying patient's debilitating medical condition or the treatment of such condition; provided that an "adequate supply" shall be between 1 ounce and 10.5 ounces, but no more than a sixty-day supply.

"Debilitating medical condition" means:

(1) Cancer, glaucoma, positive status for human immunodeficiency virus, acquired immune deficiency syndrome, or the treatment of these conditions;

(2) A chronic or debilitating disease or medical condition or its treatment that produces one or more of the following:

(A) Cachexia or wasting syndrome;

(B) Severe pain;

(C) Severe nausea;

(D) Seizures, including those characteristic of epilepsy; or

(E) Severe and persistent muscle spasms, including those characteristic of multiple sclerosis or crohn's disease; or

(3) Any other medical condition approved by the department of health pursuant to administrative rules in response to a request from a physician or qualifying patient.

"Marijuana" shall have the same meaning as "marijuana" and "marijuana concentrate" as provided in sections 329-1 and 712-1240.

"Medical use" means the acquisition, possession, cultivation, use, distribution, or transportation of marijuana or paraphernalia relating to the administration of marijuana to alleviate the symptoms or effects of a qualifying patient's debilitating medical condition.

"Physician" or "treating physician" means a person who is licensed under chapters 453 and 460.

"Primary caregiver" means a person, other than the qualifying patient and the qualifying patient's physician, who is eighteen years of age or older who has agreed to undertake significant responsibility for managing the well-being of no more than three qualifying patients at any one time with respect to the medical use of marijuana. In the case of a minor or an adult lacking legal capacity, the primary caregiver shall be a parent, guardian, or person having legal custody.

"Qualifying patient" means a person who has been diagnosed by a physician as having a debilitating medical condition.

"Written certification" means the qualifying patient's medical records or a statement signed by a qualifying patient's physician, stating that in the physician's professional opinion, the qualifying patient has a debilitating medical condition and the potential benefits of the medical use of marijuana would likely outweigh the health risks for the qualifying patient.

§329-B Medical use of marijuana; conditions of use.

(a) Notwithstanding any law to the contrary, the medical use of marijuana by a qualifying patient, or the furnishing of marijuana for medical use by the qualifying patient's primary caregiver pursuant to this chapter, shall be permitted only if:

(1) The qualifying patient has been diagnosed by a physician as having a debilitating medical condition;

(2) The qualifying patient's physician has certified in writing that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient; and

(3) The amount of marijuana does not exceed an adequate supply.

(b) Subsection (a) shall not apply to a qualifying patient under the age of eighteen years, unless:

(1) The qualifying patient's physician has explained the potential risks and benefits or the medical use of marijuana to the qualifying patient and to a parent, guardian, or person having legal custody; and

(2) A parent, guardian, or person having legal custody consents in writing to:

(A) Allow the qualified patient's medical use of marijuana;

(B) Serve as the qualifying patient's primary caregiver; and

(C) Control the acquisition of the marijuana, the dosage, and the frequency of the medical use of marijuana by the qualifying patient.

(c) The authorization for medical use of marijuana in this section shall not apply to:

(1) Medical use of marijuana that endangers the health or well-being of another person;

(2) Medical use of marijuana:

(A) In a school bus, public bus, or any moving vehicle;

(B) In the workplace of one's employment;

(C) On any school grounds;

(D) At any public park, public beach, public recreation center, recreation or youth center; or

(E) Other place open to the public; and

(3) Use of marijuana by a qualifying patient, parent, or primary caregiver for purposes other than medical use permitted by this chapter.

§329-C Registration requirements.

(a) The qualifying patient shall register with, and provide a copy of the written certification to, the department of health within ten working days of receipt of the written certification by the treating physician. The department of health shall issue to the qualifying patient a registration certificate, and may charge a reasonable fee, not to exceed $25.

(b) Upon an inquiry by a law enforcement agency, the department of health shall verify whether the particular qualifying patient has registered with the department and may provide reasonable access to the registry information for official law enforcement purposes.

§329-D Insurance not applicable. This part shall not be construed to require insurance coverage for the medical use of marijuana.

§329-E Protections afforded to a qualifying patient or primary caregiver.

(a) A qualifying patient or the primary caregiver may assert medical use of marijuana as an affirmative defense to any prosecution involving marijuana under this chapter or chapter 712; provided that the qualifying patient or the primary caregiver strictly complied with the requirements of this part.

(b) No person shall be subject to arrest or prosecution for being in the presence or vicinity of the medical use of marijuana as permitted under this part.

§329-F Protections afforded to a treating physician. No physician shall be subject to arrest or prosecution, penalized in any manner, or denied any right or privilege for providing written certification for the medical use of marijuana for a qualifying patient; provided that:

(1) The physician has diagnosed the patient as having a debilitating medical condition, as defined in section 329-A;

(2) The physician has explained the potential risks and benefits of the medical use of marijuana, as required under section 329-B; and

(3) The certification is based upon the physician's professional opinion after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship.

§329-G Protection of marijuana and other seized property. Marijuana and any property used in connection with the medical use of marijuana shall not be subject to search and seizure. Marijuana, paraphernalia, or other property seized from a qualifying patient or primary caregiver in connection with claimed medical use of marijuana under this part shall be returned immediately upon the determination by a court that the qualifying patient or

primary caregiver is entitled to the protections of this part, as evidenced by a decision not to prosecute, dismissal of charges, or an acquittal; provided that law enforcement agencies seizing live plants as evidence shall not be responsible for the care and maintenance of such plants.

329-H Fraudulent misrepresentation; penalty. Notwithstanding any other law to the contrary, fraudulent misrepresentation to a law enforcement official of any fact or circumstance relating to the medical use of marijuana in order to avoid arrest or prosecution under this part or chapter 712 shall be a petty misdemeanor and subject to a fine of $500.

SECTION 3. Section 453-8, Hawaii Revised Statutes, is amended by amending subsection (a) to read as follows:

"(a) In addition to any other actions authorized by law, any license to practice medicine and surgery may be revoked, limited, or suspended by the board at any time in a proceeding before the board, or may be denied, for any cause authorized by law, including but not limited to the following:

(1) Procuring, or aiding or abetting in procuring, a criminal abortion;

(2) Employing any person to solicit patients for one's self;

(3) Engaging in false, fraudulent, or deceptive advertising, including, but not limited to:

(A) Making excessive claims of expertise in one or more medical specialty fields;

(B) Assuring a permanent cure for an incurable disease; or

(C) Making any untruthful and improbable statement in advertising one's medical or surgical practice or business;

(4) Being habituated to the excessive use of drugs or alcohol; or being addicted to, dependent on, or a habitual user of a narcotic, barbiturate, amphetamine, hallucinogen, or other drug having similar effects;

(5) Practicing medicine while the ability to practice is impaired by alcohol, drugs, physical disability, or mental instability;

(6) Procuring a license through fraud, misrepresentation, or deceit or knowingly permitting an unlicensed person to perform activities requiring a license;

(7) Professional misconduct, hazardous negligence causing bodily injury to another, or manifest incapacity in the practice of medicine or surgery;

(8) Incompetence or multiple instances of negligence, including, but not limited to, the consistent use of medical service which is inappropriate or unnecessary;

(9) Conduct or practice contrary to recognized standards of ethics of the medical profession as adopted by the Hawaii Medical Association or the American Medical Association;

(10) Violation of the conditions or limitations upon which a limited or temporary license is issued;

(11) Revocation, suspension, or other disciplinary action by another state or federal agency of a license, certificate, or medical privilege for reasons as provided in this section;

(12) Conviction, whether by nolo contendere or otherwise, of a penal offense substantially related to the qualifications, functions, or duties of a physician, notwithstanding any statutory provision to the contrary;

(13) Violation of chapter 329, the uniform controlled substances act, or any rule adopted thereunder[;] except as provided in section 329-B;

(14) Failure to report to the board, in writing, any disciplinary decision issued against the licensee or the applicant in another jurisdiction within thirty days after the disciplinary decision is issued; or

(15) Submitting to or filing with the board any notice, statement, or other document required under this chapter, which is false or untrue or contains any material misstatement or omission of fact."

SECTION 4. Section 712-1240.1, Hawaii Revised Statutes, is amended to read as follows:

"§712-1240.1 Defense to promoting.

(1) It is a defense to prosecution for any offense defined in this part that the person who possessed or distributed the dangerous, harmful, or detrimental drug did so under authority of law as a practitioner, as an ultimate user of the drug pursuant to a lawful prescription, or as a person otherwise authorized by law.

(2) It is an affirmative defense to prosecution for any marijuana-related offense defined in this part that the person who possessed or distributed the marijuana was authorized to possess or distribute the marijuana for medical purposes pursuant to part of chapter 329."

SECTION 5. This Act shall not affect rights and duties that matured, penalties that were incurred, and proceedings that were begun, before its effective date.

SECTION 6. If any provision of this Act, or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 7. In codifying the new sections added section 2, and referred to in sections 3 and 4 of this Act, the revisor of statutes shall substitute the appropriate section numbers for the letters used in designating the new sections of this Act.

SECTION 8. Statutory material to be repealed is bracketed. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.