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C39738; C39740

COURT OF APPEAL FOR ONTARIO

DOHERTY, GOUDGE and SIMMONS JJ.A.

B E T W E E N:

WARREN HITZIG, ALISON MYRDEN, MARY-LYNNE CHAMNEY, CATHERINE DEVRIES, JARI DVORAK, STEPHEN VAN DE KEMP, DEBORAH ANNE STULTZ-GIFFIN AND MARCO RENDA	)	Alan Young, Paul Burstein & Leora R. Shemesh, for the Respondents/Appellants in Cross-Appeal
Respondents/Appellants in Cross-Appeal	)	
- and -	)	
HER MAJESTY THE QUEEN	)	Croft Michaelson, Christopher Leafloor and Vanita Goela, for the Appellant/Respondent in Cross Appeal
Appellant/Respondent in Cross-Appeal	)	
	)	Heard: July 29, 30, 31, 2003
AND BETWEEN:	)	
TERRANCE PARKER	)	
Appellant/ Respondent in Cross-Appeal	)	Terrance Parker in person
- and -	)	
HER MAJESTY THE QUEEN	)	
Respondent/Appellant in Cross-Appeal	)	Croft Michaelson, Christopher Leafloor and Vanita Goela for the Respondent/Appellant in Cross-Appeal

	)	Heard: July 29, 30, 31, 2003
	)	
AND BETWEEN:	)	
	)	
JOHN C. TURMEL AND MARC J.J. PAQUETTE	)	John C. Turmel in person and Marc JJ. Paquette (submissions in writing)
	)	
Appellants/Respondents in Cross-Appeal	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Croft Michaelson, Christopher Leafloor and Vanita Goela, for the Respondent/Appellant in Cross-Appeal
	)	
	)	
Respondent/Appellant in Cross-Appeal	)	
	)	
	)	Heard: July 29, 30, 31, 2003

On appeal from the judgment of Justice Sidney N. Lederman of the Superior Court of Justice, dated January 9, 2003, reported at (2003), 171 C.C.C. (3d) 18.

BY THE COURT:

I. Overview

[1] In *R. v. Parker* (2000), 146 C.C.C. (3d) 193, this court held that the criminal prohibition against the possession of marihuana in s. 4 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*") was of no force or effect, absent a constitutionally acceptable medical exemption from that prohibition. The court suspended its declaration for a year to allow the Government of Canada (the "Government") to address the constitutional deficiency. The Government responded with the *Marihuana Medical Access Regulations*, S.O.R./2001-227 (June 14, 2001) ("*MMAR*"). Those regulations permitted the possession, and in some cases, the

production of marihuana[1] by individuals (or in limited circumstances, production, by their designates) who met the medical criteria established in the *MMAR*. On these appeals, the court must decide whether Lederman J. erred in holding that the scheme set out in the *MMAR* was not a constitutionally acceptable medical exemption to the criminal prohibition against possession of marihuana.

[2] This case is not about the social or recreational use of marihuana, but is about those with the medical need to use marihuana to treat symptoms of serious medical conditions. We have concluded that for those people the *MMAR* as drafted by the Government do not create a constitutionally acceptable medical exemption. Our reasons for so concluding differ somewhat from those of Lederman J. So does the remedy we would impose, namely to declare invalid only five specific sections of the *MMAR*. This renders constitutional the medical exemption as described in the remaining provisions of the *MMAR*, thereby rendering the possession prohibition in s. 4 of the *CDSA* constitutional: *R. v. Parker*, *supra*. The interests of justice are best served by removing any uncertainty as to the constitutionality of the possession prohibition while at the same time providing for a constitutionally acceptable medical exemption.

II. History of the Proceedings

[3] The appeals come from three civil applications heard together by Lederman J. One application was brought on behalf of Mr. Hitzig and seven others (the "Hitzig application"). These applicants sought a declaration that the *MMAR* were unconstitutional and a further declaration that the prohibition against possession of marihuana in s. 4 of the *CDSA* was of "no force and effect" in accordance with the decision of this court in *R. v. Parker*, *supra*. The second application was brought by Mr. Parker in person. He also sought an order declaring the prohibition against possession of marihuana in the *CDSA* unconstitutional, and further asked the court to continue his personal exemption from that prohibition and the prohibition against cultivation of marihuana. The third application was brought by Mr. Turmel and Mr. Paquette in person. This application was broader than the Hitzig application. In addition to challenging the *MMAR*, these applicants argued that the prohibition against the possession of marihuana amounted to a "genocidal violation" of the right to life in s. 7 of the *Canadian Charter of Rights and Freedoms* of all persons, in that marihuana consumption could prevent healthy people from becoming ill. Messrs. Turmel and Paquette sought a declaration that the possession prohibition was of no force and effect, and requested "personal judicial exemptions" from that prohibition.[2]

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[1] The *MMAR* refer only to marihuana and not to other cannabis products.

[2] Lederman J. first dealt with standing issues raised by the Government in respect of several of the applicants and denied standing to Mr. Turmel. However, standing was not an issue in this court.

[4] In considering the merits of the s. 7 *Charter* claims advanced on the applications, Lederman J. rejected Mr. Turmel's contention that the criminalization of the possession of marihuana violated the right to life of all persons. He next analyzed the provisions of the *MMAR* and concluded that the applicants, save Mr. Turmel, had established a threshold violation of their right to liberty and their right to security of the person. Lederman J. completed his s. 7 analysis by considering whether those threshold violations were in accord with the principles of fundamental justice. He focused on two issues, the eligibility conditions set by the *MMAR* and the source of supply for those who did qualify for a medical exemption. He concluded that the process put in place by the regulations to determine eligibility for a licence to possess or grow marihuana "might be cumbersome" and some of the criteria "onerous", but that it was not inconsistent with the principles of fundamental justice. He went on, however, to hold that the absence of a legal supply of marihuana for those persons who were entitled to possess under the *MMAR* offended basic tenets of the legal system and was inconsistent with the principles of fundamental justice. He further held that the infringement was not saved by s. 1. His judgment reads:

> [1] This court orders and declares that the provision of the *Marijuana Medical Access Regulations*, S.O.R./2001-227 made by the Governor-in-Council on 14 June, 2001, pursuant to subsection 55(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the *MMAR*) are constitutionally invalid and are of no force and effect;
>
> [2] This court orders the suspension of the foregoing declaration for a period of six months.

[5] The Government appeals, alleging error in the holding that the Government's failure to provide a legal source of medical marihuana for those entitled to possess it constituted a violation of s. 7 of the *Charter*. The Hitzig applicants support this aspect of the judgment below. They cross-appeal, however, alleging that Lederman J. erred in holding that the eligibility criteria in the *MMAR* did not contravene s. 7 of the *Charter*. The Government resists the cross-appeal, relying on the reasons below. In the course of these proceedings, the issue raised on the Government's appeal was referred to as the "supply" issue and the issue raised on the cross-appeal was described as the "eligibility" issue.

[6] Messrs. Parker, Turmel and Paquette appeal, alleging that Lederman J. failed to address their claim that the criminal prohibition of the possession of marihuana amounted to a "genocidal violation" of the right to life found in s. 7. They also argue, having found that the *MMAR* were constitutionally inadequate, that Lederman J. should have declared s. 4 of the *CDSA* to be of no force and effect in accordance with this court's decision in

R. v. Parker, *supra*. The Government resists these appeals and also purports to cross-appeal, advancing the same argument it raises on its appeal in the Hitzig application.

[7] The appeals and cross-appeals described above were heard in a single proceeding along with four other related appeals.[3] These reasons address only the appeals described above. The other appeals are dealt with in separate reasons. We will consider the appeal and cross-appeal arising out of the Hitzig application first, followed by a consideration of any unresolved issues arising out of the appeals brought by Messrs. Parker, Turmel and Paquette.

III. The Hitzig Appeals

(i) The Medical Marihuana Problem

[8] There is a strong body of opinion supporting the claim that marihuana offers some individuals invaluable relief from a variety of debilitating symptoms associated with serious long-term illnesses such as AIDS, cancer and epilepsy. This support is based largely on personal experience and anecdotal evidence of individuals and their doctors. In 1999 the Government began to develop a policy with respect to the use of marihuana for medical purposes. That policy is a work in progress. Some of those who are seriously ill and gain significant relief from some of their symptoms by using marihuana see the government policy as a mean-spirited and grudging attempt to do only what the law absolutely demands. This viewpoint is understandable but ignores the complexity of the problem faced by the Government.

[9] On the one hand, the courts, relying on evidence of individuals' personal experiences and anecdotal evidence have determined that some seriously ill persons derive substantial medical benefit from the use of marihuana. The pronouncements in these cases reflect the normal process of judicial fact-finding made in the context of an adjudicative process based on the evidence and arguments led by the parties in a given case. These factual findings have in turn provided the basis for the legal conclusion that s. 7 of the *Charter* requires that a medical exemption be carved out of any criminal prohibition against the possession of marihuana.

[10] On the other hand, scientists, who approach questions of medical benefit and risk quite differently than do the courts, remain uncertain as to the benefits derived from the use of marihuana and concerned about the potential risks inherent in that use. The scientists regard the anecdotal evidence relied on by the courts as sufficient reason to conduct proper scientific inquiries into the medicinal use of marihuana, but not as

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[3] See *R. v. J.P.* (C40043), released concurrently with these reasons; *Parker v. Her Majesty the Queen* (C38113); *Parker et al. v. Her Majesty the Queen* (C39653); and *R. v. Turmel* (C40127), also released concurrently with these reasons.

justifying any conclusions as to the benefit of the drug. The scientists contend that the medicinal value of marihuana, if any, as a treatment for various symptoms can only be determined through properly conducted, rigorously reviewed long-term clinical studies. The same scientists have expressed strong concerns about the health risks attendant upon the long-term use of marihuana, particularly when it is smoked. There is some research indicating that the long-term smoking of marihuana carries with it many of the risks associated with cigarette smoking.

[11] In developing a medical marihuana policy, the Government must respect individual constitutional rights as defined by the courts but, at the same time, be guided by the opinions of its medical experts concerning the health and safety of its citizens. As a legal policy, the medical marihuana policy must meet the requirements of s. 7 of the *Charter*. As a medical policy, it must reflect current scientific understanding of the medicinal benefits and risks flowing from the use of marihuana, particularly when it is smoked.

(ii) Overview of the Arguments

[12] The Hitzig applicants accept, for the purposes of these proceedings, that the Government can constitutionally criminalize the possession of marihuana.[4] They also accept that the Government may regulate access to marihuana for medical purposes without violating s. 7 of the *Charter*. For its part, the Government accepts, in accordance with *R. v. Parker*, *supra*, that a criminal prohibition against the possession of marihuana will be constitutional only if it is accompanied by a medical exemption from that prohibition which is consistent with s. 7 of the *Charter*.

[13] Mr. Michaelson, counsel for the Government's appeal, acknowledges that under the *MMAR* many individuals who are entitled to possess and/or grow marihuana for medical purposes will have to go to the black market, at least initially, to obtain the necessary supply of marihuana or marihuana seeds. He submits that the absence of a legal supply of marihuana has nothing to do with state action, but reflects the fact that marihuana is not an approved drug under the regulatory scheme that applies to all therapeutic drugs in Canada. He emphasizes that the regulatory scheme contemplates a private sector manufacturer and distributor who are prepared to make the case for the approval and distribution of a particular drug. Marihuana is not approved because no one has stepped forward to take it through the regulatory process. Mr. Michaelson contends that Lederman J. misinterpreted s. 7 of the *Charter* as imposing a positive obligation on the Government to ensure the security of those individuals in need of medical marihuana by providing them with a safe and legal supply of the drug for them. He argues that s. 7

[4] The constitutionality of the criminalization of marihuana possession is now before the Supreme Court of Canada in *R. v. Clay* (2000), 146 C.C.C. (3d) 276 (Ont. C.A.); and *R. v. Malino-Lavine; R. v. Caine* (2000), 145 C.C.C. (3d) 225 (B.C.C.A.).

does not require positive action by the state, but instead interdicts governmental interference with individual liberty or security of the person where that interference does not accord with the principles of fundamental justice.

[14] Counsel next argues that even if individual liberty or security interests are infringed by the absence of a legal supply of marihuana, that violation is consistent with the principles of fundamental justice. In support of this contention, counsel argues that individuals who will obtain a licence to possess under the regulations will also obtain a licence to cultivate either personally or through a designate, or will access marihuana through the same "unlicensed suppliers" they used before the *MMAR* came into effect. Counsel argues that those who obtain licences to possess marihuana are long-term "self medicators" who will face no significant impediment to filling their medical needs albeit in many cases, through the black market. Lastly, counsel seeks refuge in s. 1 of the *Charter*, submitting that if the *MMAR* violate s. 7, that violation can be justified under s. 1.

[15] The Hitzig applicants respond that the *MMAR*, combined with the criminal prohibitions against possession, distribution and cultivation in the *CDSA*, impact on both their liberty interest and their right to security of the person. They argue that the Government's scheme significantly limits their ability to make fundamental personal medical choices involving the treatment of very serious illnesses. The Hitzig applicants argue that the absence of a legal source of supply from which their legitimate medical needs can be filled is a direct result of state action that permits the lawful possession of marihuana for medical purposes, but does not provide for a legal supply to meet that recognized need. They contend that the absence of a legal source of supply is a direct result of both the *MMAR* and the criminalization of the conduct of anyone who would supply medical marihuana to individuals entitled to possess it for medical purposes. Lastly, the Hitzig applicants contend that a scheme, which drives seriously ill people who have a demonstrated medical need for marihuana to the black market to meet that need, is obviously and profoundly contrary to the principles of fundamental justice and cannot be saved by s. 1.

[16] On the cross-appeal, the Hitzig applicants contend that the *MMAR* provisions governing eligibility for the medical exemption violate s. 7 in that they interfere with individual liberty and security of the person in a manner which is inconsistent with the principles of fundamental justice. Initially, the Hitzig applicants attacked several aspects of the regulatory scheme. However, in argument, counsel focused on the requirement that one, and sometimes two, medical specialists must complete detailed declarations establishing the medical prerequisites to the granting of a licence to possess or produce the drug. The Hitzig applicants submit that the limited availability of specialists, their relative ignorance of the medicinal qualities of marihuana, and the reluctance of many specialists to become involved in the *MMAR* process effectively renders the possession

exemption in the *MMAR* illusory for many individuals who have a medical need to use marihuana. The Hitzig applicants also contend that the specialist requirements are arbitrary in that they do not meaningfully advance any legitimate interest the Government has in controlling the use of marihuana for medical purposes.

[17] The Government responds that the eligibility requirements, and in particular the specialist requirements, strike a proper balance between individual rights and the Government's responsibility to protect public health and safety. The Government contends that the medicinal value of marihuana is largely unproved and that there are genuine risks associated with its use. Relying on comments by this court in *R. v. Parker, supra,* the Government says that medical approval, as a prerequisite to a licence to possess marihuana, is an obvious and justified requirement. The Government goes on to submit that the benefits/risk analysis will vary depending on the patient's condition and the symptom to which the marihuana use is directed. In some cases the risk will be lower and in others the potential benefit will be more problematic. The Government contends that a scheme requiring different levels of medical scrutiny is responsive to the different combinations of benefits and risk that may exist and reflects the reality of the current state of knowledge concerning the medical use of marihuana. The Government also submits that the record does not support the Hitzig applicants' contention that the specialist requirements have rendered the possession exemption illusory. The Government points out that Lederman J. rejected this argument and contends that his rejection constitutes a finding of fact which must be given deference. Lastly, the Government stresses that it is not for this court to determine whether the eligibility requirements in the *MMAR* are ideal or even necessary. The court's function is to determine only whether the scheme clears the constitutional hurdle of s. 7.

(iii) The Applicants

[18] All of the Hitzig applicants, with the exception of Mr. Hitzig, are seriously ill individuals who have used marihuana for many years to successfully treat one or more of the symptoms associated with their illnesses. These symptoms include pain, nausea, lack of appetite, seizures and spasticity. Four of the applicants have received licences to possess marihuana under the *MMAR*. One of those four, Mr. Dvorak, has also received a licence to personally produce marihuana to meet his medical needs. The three remaining applicants have not applied for licences to possess or produce. They contend that they cannot get the specialist support needed to obtain licences to possess under the *MMAR*. They attribute this to difficulties in getting access to a specialist, combined with the specialists' reluctance, based on advice from professional medical organizations and the primary insurer of doctors in Canada, to become involved in the *MMAR* process.

[19] The Government does not accept the applicants' explanations for their failure to get the support of a specialist. Ms. Devries, one of the three applicants without a licence

to possess, did not make any effort to obtain a specialist's support for her *MMAR* application until just days before she was to be cross-examined on her affidavit. Others with the same and similar conditions as Ms. Devries have received possession exemptions under the *MMAR*. The other two applicants who have not applied, Mr. Renda and Mr. Van de Kemp, suffer from medical problems for which the Government contends that current medical wisdom suggests marihuana is not an appropriate medication.

[20] Mr. Hitzig operated the Toronto Compassion Centre, which provided a supply of medicinal marihuana to seriously ill individuals for more than three years until it was raided by the police and closed down. He attempted to obtain an exemption for the Centre, prior to the *MMAR* coming into force, but eventually concluded, based on legal advice, that he could not. Mr. Hitzig's affidavit contains vivid evidence of the risks associated with cultivating marihuana under the present legal regime. He has been robbed and beaten by criminals, and raided and arrested by the police.

(iv) The Applicants' Supply of Medical Marihuana

[21] The applicants all meet their medical marihuana needs through a combination of self-cultivation and purchase on the black market. They described the significant problems associated with both sources of supply. Some are too ill and are physically unable to grow their marihuana. Others do not have the facilities to grow their own. Still others are concerned about exposing themselves and family members to the risks inherent in producing a product for which there is a thriving black market. Production by designates is also not a viable alternative to many for a variety of reasons. The applicants described the many problems associated with the actual cultivation. Growing marihuana that is suitable for medicinal use is no easy task. It is time consuming and labour intensive. Crops can fail entirely or yield insufficient marihuana to supply the grower's medical needs.

[22] The problems associated with the purchase of medicinal marihuana on the black market are numerous and, in most cases, obvious. As with any black market product, prices are artificially high. High prices cause real difficulty for seriously ill individuals, many of whom live on fixed incomes. Black market supply is also notoriously unpredictable. The supplier of marihuana today may have moved on by tomorrow or may have been closed down by the police. In addition to unpredictability, there is no quality control on the black market. Purchasers do not know what they are getting and have no protection against adulterated product. This is particularly problematic for some whose illnesses involve allergies, or stomach ailments that can be aggravated by the consumption of tainted products. Resort to the black market may also require individuals to consort with criminals who are unknown to them. In doing so, they risk being cheated and even subjected to physical violence. Finally, the evidence of the applicants makes it

abundantly clear that requiring law-abiding citizens who are seriously ill to go to the black market to fill an acknowledged medical need is a dehumanizing and humiliating experience.

[23] The Government accepts that reliance on the black market to fill a medical need would in most cases raise supply problems. It maintains, however, that marihuana is unique in that there is an established part of the black market, which the Government calls "unlicensed suppliers", that has for many years provided a safe source of medical marihuana. The Government argues that those who want to use marihuana for medical purposes have been "self-medicating" for years and know full well where to go to obtain the necessary medical marihuana. It is the Government's contention that this particular part of the black market does not present the problems that are generally associated with purchase of product on the black market. The application record offers some support for this contention. Many of the applicants do have well-established "friendly" sources in the black market from which they can safely acquire reliable medicinal marihuana. It is ironic, given the Government's reliance on this part of the black market to supply those whom the Government has determined should be allowed to use marihuana, that the police, another arm of the state, shut down these operations from time to time, presumably because they contravene the law.

(v) The Legislative Context

[24] Marihuana is a "drug" as defined under s. 2 of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 ("*FDA*"), and it is a "substance" as defined under s. 2 of the *CDSA*. Its distribution is controlled by both *Acts* and regulations passed under them. Its possession is controlled by the *CDSA*.

[25] Insofar as marihuana is said to have medicinal value, it qualifies as a drug under the *FDA*. With two exceptions, the distribution of marihuana, like the distribution of any drug to which the *FDA* applies, is prohibited unless that drug has been approved by the appropriate Government agency. The approval process is found in regulations enacted under the *FDA* and turns on an assessment of the potential risks and benefits flowing from the proposed therapeutic use of the drug. The Government acts as a regulator only. It does not develop or market new drugs. That process is left to private manufacturers and distributors. They develop new products through research and clinical trials and apply to the Government for approval of those products. The development of new drugs and obtaining approval for their distribution in Canada is a long process that may last many years and cost many millions of dollars.

[26] Although two synthetic cannabinoids containing some of the active ingredients found in marihuana have been developed and approved for distribution in Canada, the private sector has shown little interest in developing marihuana as an approved drug.

Various explanations are offered for this lack of commercial interest, including difficulties inherent in patenting a plant-based substance, the complexity of the various active agents found in marihuana, the uncertainty in the scientific community of the medicinal value of the drug, concerns as to the potential harm caused by the long-term smoking of marihuana, and the longstanding, virtual absolute criminal prohibition against its possession and distribution. In argument, we were told that marihuana is not an approved drug anywhere in the world.

[27] As indicated above, there are two exceptions to the prohibition in the *FDA* against the distribution of an unapproved drug. First, drugs may be distributed in the course of an approved clinical trial. These trials are part of the process which may eventually lead to the approval of a drug. Clinical trials have been part of the Government policy in relation to the medicinal use of marihuana since 1999. There are presently two small clinical trials underway in Canada. The Government does not suggest that these clinical trials could provide a licit source of medical marihuana for those authorized to possess it under the *MMAR*.

[28] The second exception to the prohibition against the distribution of an unapproved drug are found in the provisions of the *Food and Drug Regulations* which establish the Special Access Program ("SAP")[5], formerly known as the "Emergency Drug Release" program. Under these regulations, the Government may authorize a manufacturer to release an unapproved drug to a practitioner for distribution to a specific patient in an emergency situation. SAP is commonly used to obtain drugs that are not approved in Canada but have been approved in another jurisdiction for use by seriously ill persons suffering from diseases like AIDS and cancer. SAP depends on the existence of three things, a manufacturer who is willing to provide the drug, a doctor who is willing prescribe it, and a patient who is willing to give his or her informed consent to the use of an unapproved drug. SAP contemplates approval on a case-by-case basis. Each application may precipitate a dialogue among Health Canada officials, the manufacturer, and the doctor as to the advisability of the use of the drug for a specific patient and the availability of the drug.

[29] Unsuccessful attempts have been made in the past to access medical marihuana through SAP. The Government takes the position that the criteria governing SAP do not permit distribution of marihuana to many of the individuals who would qualify for a licence to possess under the *MMAR*. Counsel for the Hitzig applicants do not suggest that SAP, as presently administered, offers these individuals a licit source of medical marihuana. In any event, SAP assumes that there is a manufacturer available to supply the drug. Prairie Plant Systems ("PPS") is the only authorized grower of marihuana in Canada, but the marihuana it grows is owned by the Government. The availability of

[5] See C.R.C. 1978, c. 870, ss. C.08.010 and C.08.011.

marihuana through SAP would depend on the willingness of the Government to use its supply of marihuana to fill the needs of any who qualified for medical marihuana under SAP.

[30] In addition to the regulation of marihuana as a drug under the *FDA*, marihuana is a Schedule II controlled substance under the *CDSA*. Section 4 of the *CDSA* prohibits possession of marihuana "except as authorized by the regulations". Section 5 of the *CDSA* makes it a criminal offence to traffic in marihuana. Trafficking is defined so widely as to encompass virtually every form of distribution of the drug. Depending on the amount distributed, the offence is punishable by up to life imprisonment. Under the present law, unless he or she is a designated producer under the *MMAR*, a person who supplies the holder of a licence to possess marihuana with a supply of marihuana that is within the terms of the licence to possess is guilty of trafficking in a narcotic. The recipient of the drug is not a party to the trafficking: *R. v. Greyeyes*, [1997] 2 S.C.R. 825. The recipient commits no crime as long as the possession is consistent with the terms of the licence granted under the *MMAR*. In addition, s. 56 of the *CDSA* permits the Minister to "exempt any person or class of persons or any controlled substance" from the application of any of the provisions of the Act or regulations if, "in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose".

[31] The regulations referred to in s. 4 of the *CDSA* are the *Narcotic Control Regulations*, C.R.C. 1978, c. 1041 ("*NCR*") and the *MMAR*. The *NCR* control the distribution of narcotics through licensed dealers. There is no licensed dealer of marihuana in Canada who is able to supply marihuana to those with the medical need for it. All other *CDSA* Schedule I and II drugs, including heroin and cocaine, are commercially produced and available through licensed dealers in Canada, albeit under strict restrictions.

[32] In addition to its domestic legislation, Canada's drug laws must also accord with its international obligations. Canada is a party to several United Nations drug conventions controlling the importation, exportation, distribution and use of various drugs, including marihuana.[6] The basic aim of these conventions is to limit the use of drugs like marihuana to medical and scientific purposes only. The conventions require governments to control the importation and exportation, production and distribution of identified drugs like marihuana and also to combat the abuse of and the illicit trade in those drugs.

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[6] See *Single Convention on Narcotic Drugs, 1961*, March 30, 1961, Can. T.S. 1964 No. 30; *Protocol Amending the Single Convention on Narcotic Drugs, 1961*, March 25, 1972, UN Doc. E/Conf. 63/8, Can. T.S. 1976, No. 48; *Convention on Psychotropic Substances*, *1971*, February 21, 1971, UN Doc. E/Conf. 58/7, Can T.S. 1988 No. 35; and *Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, December 19, 1988, UN Doc. E/Conf. 82/15, Can. T.S. 1990 No. 42.

[33] Canada must report to various international organizations on its actions concerning marihuana and other drugs covered by the conventions. The Government argues that the *MMAR* has put Canada sufficiently in the forefront of the recognition of the use of marihuana for medical purposes that it has attracted concern from a leading international organization.

(vi) The Development of a Medical Marihuana Policy[7]

[34] Prior to 1999, there was no process by which persons using marihuana for medical purposes could be exempted from the general criminal prohibition against possession. In March 1999, the Government took its first steps towards developing a legislative response to the demand for medical marihuana. These steps were taken in response to court challenges to the constitutionality of the possession prohibition absent a medical exemption. The Minister of Health announced that the Government policy would include research into the medical use of marihuana, clinical trials, formulation of appropriate guidelines for medical use, and development of access to a safe supply of the drug. In June 1999, the Minister spoke of:

> Moving forward on a research plan that includes establishing a quality Canadian supply of medicinal marihuana and a process to access it …

[35] At the same time, he announced a $7.5 million program, the Medical Marihuana Research Program, which was designed to promote research and fund clinical trials into the medical use of marihuana.

[36] In June 1999, the Government issued its first exemption under s. 56 of the *CDSA*. While the terms of s. 56 were broad enough to permit the Minister to exempt individuals from all provisions of the *CDSA*, exemptions were granted only with respect to the prohibitions against possession and cultivation of marihuana. Individuals who received a s. 56 exemption could grow the marihuana they needed to meet their medical needs. If they could not do so, they had to continue to use the black market.

[37] In July 2000, this court held in *R. v. Parker*, *supra*, that the medical exemption scheme based on s. 56 of the *CDSA* was constitutionally inadequate in that it depended on the unfettered exercise of the Minister's discretion. The Government set to work fashioning a legislative response to *Parker* which would produce a constitutionally

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[7] The history of that policy is traced in the reasons of Lederman J. at paras. 9-21; in *R. v. Parker*, *supra*; and in *Wakeford v. Canada* (2002), 58 O.R. (3d) 65 (C.A.) (leave to appeal dismissed: [2002] S.C.C.A. No. 147 (QL)).

acceptable medical exemption within the one year for which the court had suspended its declaration of invalidity.

[38] In December 2000, the Minister of Health announced that the Government had entered into a five-year contract with PPS to produce a domestic supply of marihuana for the Government. He said:

> The marihuana will be made available to people participating in structured research programs and authorized Canadians using it for medical purposes who agree to provide information to my department for monitoring and research purposes.

[39] The *MMAR* came into force on July 30, 2001. The Regulatory Impact Analysis Statement (the "Statement") that accompanied the proclamation of the *MMAR* described them as providing seriously ill Canadians with "access" to marihuana for medical purposes while the medical efficacy of the drug is being investigated. By July 2001, when the *MMAR* came into effect, the Government had changed its position and decided that the marihuana being grown by PPS was not suitable for medical use and would be used exclusively for research purposes. Hence, those with medical need could not access the marihuana owned by the Government and being grown for it by PPS. The Statement observed that:

> Health Canada will be evaluating various options to ensure patients have access to a safe high quality supply of marihuana for medical purposes.

[40] The most recent Government response to the medical marihuana problem is an interim policy brought forward by regulation on July 8, 2003, shortly before these appeals were heard. The interim policy is a direct response to the declaration by Lederman J. that the *MMAR* was unconstitutional, combined with the expiry of the six month suspension of that order granted by Lederman J., and this court's refusal to stay that declaration pending these appeals. As a result of these developments, the Government was faced with a declaration that arguably rendered the crime of possession of marihuana in s. 4 of the *CDSA* of no force and effect for all purposes. The interim policy was an attempt to save the criminal prohibition in s. 4 as it applied to individuals other than those who qualified for a medical exemption under the *MMAR*.

[41] The Government announced in the interim policy that marihuana seeds and dried marihuana grown by PPS for the Government would be made available to individuals who had obtained a medical exemption under the *MMAR* or under s. 56 of the *CDSA*. It was made abundantly clear in the Statement that accompanied the regulation that this

interim policy would remain in place only "while clarification was being sought from the courts".

[42] The Crown placed this interim policy before the court by way of fresh evidence. Counsel for the Hitzig applicants advised the court that of the four Hitzig applicants who were entitled to possess marihuana under the *MMAR*, two had applied for a supply of marihuana under the interim policy and two were in the process of gathering the material needed to make their applications.

[43] The Government did not ask the court to pass on the constitutionality of the *MMAR* as modified by the interim policy, and it did not suggest that the interim policy should have any effect on the outcome of this appeal. The interim policy was put before the court so that we would be aware of the current state of affairs.

(vii) The *MMAR*

[44] The relevant parts of the *MMAR* are attached as an appendix to these reasons. Before examining specific provisions, it is helpful to take an overview. The regulations recognize that marihuana is a medically appropriate medication for the treatment of various symptoms associated with various serious illnesses. This recognition is consistent with the Government policy first announced in March 1999, well before this court's decision in *R. v. Parker*, *supra*. The regulations further recognize that the determination of when marihuana is a medically appropriate medication and the amount of marihuana which is appropriate for that purpose are decisions that should be made by qualified doctors and not by Government officials, or by the users of medical marihuana.

[45] The regulations provide for the issuing of an authorization to possess ("ATP") where an applicant can meet the medical criteria set out in the regulations. An applicant who acquires an ATP can possess marihuana without fear of criminal prosecution as long as the possession is within the terms and within the amounts provided for in the ATP. The regulations also provide for authorizations to grow the marihuana needed to fill an ATP holder's medical needs. The ATP holder may personally acquire a licence or a person designated to grow the marihuana for the ATP holder may acquire a licence to grow. As long as those individuals stay within the terms of their licences, the criminal prohibitions against the cultivation, trafficking and possession of marihuana do not apply to them.

[46] We turn now to the specifics of the *MMAR*. Lederman J. described these provisions very clearly and we borrow heavily from his reasons in our description. Part I of the *MMAR* creates the framework by which seriously ill people may obtain authorizations to possess marihuana for medical purposes. The regulations designate

three categories of application by reference to symptoms associated with medical conditions. Category 1 refers to persons whose symptoms are associated with a terminal illness. A terminal illness is defined as a medical condition for which the prognosis is death within 12 months. Category 2 applications refer to patients who have specific symptoms identified with specified, long-term or chronic conditions set out in a schedule to the regulations. For example, category 2 applies to cancer or AIDS patients who suffer from severe nausea. Category 3 is a "catch all" and potentially includes all patients with symptoms associated with medical conditions other than those who fall within category 1 or 2.

[47] Applications made by category 1 applicants must be supported by a declaration from a medical practitioner containing the information required in the regulations. Applications made by category 2 applicants must be supported by a declaration from a medical specialist. Applications made by category 3 applicants must be supported by declarations from two medical specialists. The Government attempts to justify these distinctions as to the medical material needed to support applications in the various categories on the basis that the medical conditions and symptoms associated with each category require a different level of medical scrutiny. For category 1 applicants, long-term risks are virtually irrelevant, thereby justifying a lower level of medical scrutiny. For category 2 patients, long-term risks are potentially significant, but there is an established body of scientific evidence, in the Government's view, that category 2 applicants may benefit from the use of marihuana. The requirement that a specialist make the medical declaration required for category 2 applicants reflects the benefits/risks assessment involved for patients who fall within category 2. Category 3 patients face the same long-term risks as category 2 patients, but, again according to the Government, there is virtually no scientific evidence that marihuana could benefit these persons. Because of the reduced potential benefit, the Government takes the position that it is appropriate to require that the application be vetted and supported by a second medical specialist.

[48] An individual who seeks an ATP must complete a personal declaration in addition to providing the required medical declaration or declarations. The applicant's declaration must contain the information set out in s. 5. Section 5(1)(e) is worth particular note:

> The declaration of the applicant under paragraph 4(2)(a) must indicate …
>
> (e) that the authorization as sought in respect of marihuana either
>
> (i) to be produced by the applicant or a designated person, in which case the designated person must be named, or

> (ii) to be obtained under the *Narcotic Control Regulations* in which case the licensed dealer who produces or imports the marihuana must be named. [Emphasis added.]

[49] To comply with s. 5(1)(e), an applicant must identify one of two legal sources from which the applicant indicates he or she intends to obtain the marihuana for which the ATP is sought. The form which must be completed by all applicants is consistent with the terms of s. 5(1)(e). In reality, many who apply for an ATP cannot identify a legal source from which they will obtain their marihuana. As indicated above, there are no licensed dealers of marihuana in Canada who could provide ATP holders with marihuana. Thus, no ATP applicant can possibly identify a licensed dealer as the potential source of supply for his or her marihuana. In addition, many ATP applicants do not apply for licences to produce either personally or through a designate. The Government acknowledges that some 30 percent of those who have received ATPs have not obtained a licence to cultivate marihuana either personally or through a designate. On a literal reading of s. 5(1)(e), it is difficult to understand how these applicants obtained an ATP.

[50] The contents of the medical declarations required for all three categories of applicants are set out in ss. 6 and 7 of the *MMAR*. Section 6(1) requires that all medical declarations identify:

- the applicant's medical condition and the symptom associated with the condition which gives rise to the application;
- the category into which the applicant falls;
- the daily dosage and suggested mode of administration;[8] and
- the period for which the use of the marihuana is recommended if it is less than 12 months.

[51] Section 6(2) requires that for category 1 applicants the medical declaration must be completed by a medical practitioner. The declaration must indicate that:

- the applicant has a terminal illness;
- all conventional treatments for the symptom have been tried or considered;
- the recommended use of marihuana would mitigate the symptom;
- the benefits from the use of marihuana would outweigh any risks associated with its use; and
- the medical practitioner is aware that marihuana is an unapproved drug under the *Food and Drug Regulations*.

[8] Section 9 of the *MMAR* requires additional information where the recommended daily dosage is above 5 grams.

[52] Section 6(3) refers to category 2 applications. The medical declaration must be made by a certified medical specialist. The specialist must indicate his or her area of specialty and its relevance to the treatment of the applicant's medical condition. He or she also must confirm that:

- all conventional treatments for the symptom have been tried or considered and each of them is inappropriate for one of the reasons specified in s. 6(3)(b);
- the recommended use of marihuana would mitigate the symptom;
- the benefit from the use of marihuana would outweigh any risks associated with its use, including long-term risks; and
- he or she is aware that marihuana is not an approved drug under the *Food and Drug Regulations*.

[53] Section 6(4) deals with category 3 applications. A specialist must complete a medical declaration like that required for category 2 applications, except he or she must specify why the other potential treatments are considered inappropriate.

[54] Section 7 of the *MMAR* requires that category 3 applications provide a second medical declaration from a specialist. As with category 2 applications, this specialist must identify his or her specialty and the relevance of that specialty to the treatment of the applicant's condition. The second specialist must also confirm that he or she is aware of the basis for the application and that the symptom identified in the application relates to the medical condition identified by the applicant. The second specialist must indicate that he or she has reviewed the applicant's medical file, discussed the case with the specialist making the first declaration, and agrees that the use of marihuana would mitigate the symptom and that the benefits would outweigh the risks, including the long-term risks. The second specialist is not required to consider whether all other treatments have been tried or at least considered, or whether they would be medically inappropriate. Finally, the second specialist, like the first, must acknowledge that he or she is aware that marihuana is not an approved drug under the *FDR*.

[55] Pursuant to ss. 11 and 12 of the *MMAR*, the Minister has very little discretion to refuse an ATP once the necessary personal and medical declarations have been completed. The limited role played by the Minister is no doubt an attempt to cure the major defect in the previous scheme identified in *R. v. Parker*, *supra*.

[56] Section 23 allows an individual to assist an ATP holder in the administration of the daily dosage of marihuana. The assistance is limited to the rather narrow circumstances described in s. 23.

[57] Part 2 of the *MMAR* addresses licences to produce marihuana to fill the needs of ATP holders. As indicated above, there are two kinds of licences described in the regulations, a personal-use production licence ("PPL") and a designated-person production licence ("DPL"). The former is issued to an ATP holder and the latter is issued to an individual who will grow the necessary medical marihuana for an ATP holder. Applications for licences to produce must identify the site where the proposed production is to take place, where the marihuana will be stored, and describe the security measures that will be implemented at the proposed production and storage sites.

[58] Persons applying for a DPL must be eighteen years of age and must not have been convicted, inside or outside of Canada, of a designated drug offence in the previous ten years. A designated person may hold only one DPL and production must be strictly in accordance with the terms of the licence. He or she may grow marihuana for only one person and may not produce it in common with more than two other licensed holders. A person who serves as a designated producer cannot be compensated. These restrictions effectively eliminate the potential licensing of "compassion clubs" like the one formerly operated by Mr. Hitzig.

[59] If the application meets the criteria in the *MMAR*, the Minister may refuse to issue a licence only on limited grounds. Where a licence is issued, it must include:

- the address of the site where the marihuana is to be produced and stored;
- the maximum number of marihuana plants that may be grown and the maximum amount of marihuana that may be stored. These amounts are calculated by formulae set out in the *MMAR*.

[60] There are also provisions in the *MMAR* which require licensed producers to keep detailed records. Inspectors may enter property where marihuana is being grown or stored without prior authorization to inspect and to examine the records of the licensed producer.

[61] The *MMAR* appear to contemplate two other licit sources of marihuana to meet the medical needs of ATP holders. First, as described above, there are references to licensed dealers in Part 1 of the *MMAR*. In addition to those references, s. 70 of the *MMAR* refers to a medical practitioner obtaining marihuana from a licensed dealer for the purpose of selling or furnishing it to an ATP holder. These provisions are meaningless, at least at present, as there is no licensed marihuana dealer in Canada.

[62] Section 51 of the *MMAR* refers to the second potential legal source of marihuana for ATP holders. That section authorizes the Minister or a designate to import and possess marihuana seeds for the purpose of delivery to a holder of a licence to produce.

It is doubtful whether, under present international laws governing the importation of marihuana, the Minister could import marihuana seeds from a licit source outside of Canada to supply those seeds to a person authorized to possess or produce under the *MMAR*. In any event, there is no suggestion that the Minister has any intention of using s. 51 to supply ATP holders with a legal source of supply to meet their medical needs.

[63] There was considerable evidence adduced on the Hitzig application concerning the actual operation of the *MMAR* since their implementation in July 2001. From the applicants' perspective, the regulations are cumbersome, slow and unnecessarily impede access to, what for the applicants is a vital medical treatment. The Government's evidence describes the steps that have been taken by Health Canada to make the application process "user friendly". These steps include the developments of forms that are said to be easy to complete and the preparation of brochures that explain to applicants and their doctors how the various forms should be completed.

[64] Statistics for the first ten months of the operation of the *MMAR* (July 30, 2001 – June 7, 2002) indicate that 565 applications for ATPs were made, and 299 were granted. Sixteen had been abandoned, and of the remaining 250 outstanding applications, 28 had not yet been reviewed by the authorities and 222 had been reviewed and found to be incomplete.[9] Only a small number of the incomplete applications were lacking the necessary medical documentation. Applications for ATPs increased gradually over the ten-month period. Once an application is complete, Health Canada takes two or three weeks to complete its assessment and if the application meets the criteria, issue the appropriate licence.

[65] Of the 299 ATPs granted, 39 were for category 1 applications, 254 were for category 2 applications and 6 were for category 3 applications. About 20 percent of the medical declarations required for the category 1 applications had been completed by specialists, although under the regulations they could have been completed by a general practitioner. All of the other approved ATP required declarations from at least one medical specialist.

[66] During this initial period, the Government issued 194 PPLs and 14 DPLs. The remaining 91 ATP holders (30%) have no possible legal source for their medical marihuana. Even those with a licence to produce must acquire the initial seeds on the black market unless they have a crop under cultivation at the time they receive their licence to produce.

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[9] The Government has released more timely *MMAR* application and authorization statistics on the website of its Office of Cannabis Medical Access. This material is available at http://www.hc-sc.gc.ca/hecs-sesc/ocma/stats/stats.htm However, the court did not consider the more recent statistics because they did not form part of the record in these appeals and because the parties did not have an opportunity to address them.

(viii) The Supply of Medical Marihuana under the *MMAR*

[67] It is acknowledged by the Government that despite references to licensed dealers, and the importation of marihuana seeds, the *MMAR* were not intended to provide for the supply of marihuana to those with the medical need for it, apart from strictly limited self cultivation and designated-producer growing. As Ms. Cripps-Prawak, the principal Government affiant said:

> These regulations do not authorize the sale or distribution of marihuana. Instead by way of overview, the regulations establish a compassionate framework to allow people who are suffering from serious illnesses to possess and cultivate marihuana for medical purposes while the substance is being researched as a possible medicine … . [Emphasis added.]

[68] Although references have already been made to the effect of the absence of any legal source of supply on potential ATP holders, it is helpful to summarize those effects, given the issue raised on the Government's appeal.

- an ATP holder who does not have a licence to produce marihuana and for whom a designated person is not authorized to produce marihuana can only obtain the drug from the black market;
- an ATP holder who obtains a licence to produce marihuana or for whom a designated person is authorized to produce marihuana can only obtain the seeds necessary to commence production on the black market;
- an ATP holder who has a licence to produce or for whom a designated person is authorized to produce who has an adequate supply at the time authorization to produce is granted and who can maintain that supply, can obtain the marihuana necessary to meet his or her medical needs without going to the black market;
- a designated producer who is not already growing marihuana must go to the black market to obtain the first seed; and
- a designated producer must expend the time and cost required to grow the marihuana without being paid, and with no economies of scale.

[69] Under the *MMAR*, no one with an ATP risks criminal conviction for the possession of marihuana if that possession is within the terms of the ATP. Similarly, no person with a licence to produce risks criminal conviction if the cultivation and possession are within the terms of that licence. To this extent, the *MMAR* have clearly addressed the constitutional problem confronted in *R. v. Parker*, *supra*. If they can comply with the *MMAR*, persons are not required to choose between using a medically necessary drug and committing a crime.

[70] The *MMAR*, however, address access only for those who can grow their own marihuana or get a designate to do it for them. The evidence leaves no doubt that many individuals who have received ATPs and many who would be entitled to receive ATPs under the *MMAR* cannot possibly grow their own marihuana. Many of these individuals are not only seriously ill, but they are significantly physically handicapped. Cultivation by a designate is an answer for some, but by no means all, of these people. Mr. Hitzig's affidavit makes it clear that serving as a designate has real costs and risks. The possibility of getting someone else with the requisite skill to grow the necessary marihuana for an ATP holder is further restricted by the provisions in the *MMAR* which prohibit a designate from being compensated for his or her services, limit designates to growing for only one ATP holder, and restrict the pooling of licences to produce to no more than three growers.

[71] The record here makes clear that these limitations on supply in the *MMAR* present real and significant challenges to ATP holders. Many individuals who establish the requisite medical need under the *MMAR* and obtain ATPs will have to go to the black market on a more or less regular basis to maintain their supply of medical marihuana. As the Government acknowledged in argument, the *MMAR* scheme assumes the existence of the black market in marihuana. Indeed, it depends on the black market. Without the black market, the scheme set out in *MMAR* would be a sham. In short, in their actual operation, the *MMAR* require what is, as far as we know, a unique partnering of the Government and the black market to fill serious and recognized medical needs.

[72] The premise underlying the *MMAR*, that seriously ill people, some of whom are so sick it is anticipated they will die within a year, can grow their own medicine, have a friend grow it, or get it on the black market, is puzzling. It is explained, in our view, by the assumption implicit in the *MMAR* and specifically articulated by the Government in its factum, that those who will seek an ATP will be long-time medical marihuana users who have an established pattern of self-medication. According to this assumption, these persons will have no difficulty filling their medical marihuana needs either through cultivation or from "unlicensed" reliable sources. This first assumption reveals a second. In relying on the scheme in the *MMAR* as an appropriate response to the problem identified in *R. v. Parker*, *supra*, the Government must assume that a segment of the black market has provided and will continue to provide a reliable and suitable source of medical marihuana for those in need.

[73] The evidence adduced on the Hitzig application belies both of the assumptions described above. Many long-term users of marihuana for medical reasons are unable to produce their own marihuana for a variety of reasons and cannot obtain a designate to produce it for them. Those individuals must go to the black market and have experienced significant difficulties in doing so safely. They go to the black market only because they

have no choice. Moreover, the assumptions have no application to potential ATP holders who have not established a pattern of self-medication and have no prior contact with the marihuana black market. Nothing in the *MMAR* suggests that the scheme is limited to experienced medical marihuana users.

(ix) Section 7 of the *Charter*

(a) The approach

[74] Section 7 of the *Charter* reads:

> 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.

[75] The analytical approach to a s. 7 claim has been described both as a two-step and a three-step process: *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 at 562; *R. v. White*, [1999] 2 S.C.R. 417 at 436; and *R. v. Malmo-Levine; R. v. Caine* (2000), 145 C.C.C. (3d) 225 at 244 (B.C.C.A.) (now on appeal to the Supreme Court of Canada: [2000] S.C.C.A. No. 361 (QL)). Choreographical differences aside, the approaches are the same in substance. We will address the s. 7 claim, as Lederman J. did, in two stages.

- Has the government action resulted in a threshold violation of one or more of the rights described in s. 7?
- If there is a threshold violation, is it inconsistent with the principles of fundamental justice?

[76] The inquiry at the first stage requires the identification of the individual interests said to be infringed and a determination of whether those interests fall within the meaning of the phrase "life, liberty and security of the person" in s. 7: *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 at 339. At the first stage the court must also decide whether any identified individual interest which it has found to be sheltered under s. 7 has been infringed by some form of state conduct. This need not be by way of the criminal law, but encompasses any state action taken in enforcing and securing compliance with the law: *Gosselin v. Quebec (A.G.)*, [2002] S.C.J. No. 85 at paras. 77, 81 (QL).

[77] The second stage of the s. 7 inquiry is reached only if there is a threshold violation of a right protected by s. 7. At the second stage the court must articulate the principle or principles of fundamental justice engaged in the circumstances of the case. Once the operative principle or principles have been identified, the court must decide whether the

threshold infringement found in the first stage of the analysis is inconsistent with the pertinent principle or principles of fundamental justice: *R. v. White, supra*.

[78] All parts of the s. 7 analysis must be sensitive to the specific context in which the claim is made. Context for the present purposes includes the factual matrix in which the claims are advanced, the nature of the alleged rights affected by the state conduct, the nature of the interference with those rights by the state, and the interests relied on by the state in support of its conduct. Context encompasses the effect as well as the purpose of the impugned state conduct. Where legislative provisions are in play, context refers to the language of the statute and the legislative and common law history leading up to the enactments of the challenged provisions: *R. v. Parker, supra*, at 224-25; *Winnipeg Child and Family Services*, *supra*, at 562; and *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 61-63, per Dickson C.J.C.

[79] The Government's appeal and the cross-appeal brought by the Hitzig applicants both engage the s. 7 analysis. The former is directed at the absence of a legal source of supply of medical marihuana and the latter at the eligibility requirements, particularly the specialist requirements, controlling access to an ATP. The first stage of the s. 7 analysis, that is whether there is a threshold violation of individual rights, is the same for both the supply issue raised in the Government's appeal and the eligibility issue raised on the cross-appeal. The second stage of the inquiry, that is whether any threshold infringement is inconsistent with the principles of fundamental justice, requires a separate consideration of the two issues.

(b) Stage one: is there a threshold violation of s. 7?

[80] This question must be addressed in the context of those with the medical need to take marihuana. It is they who are entitled to a constitutionally sound medical exemption from criminal sanction for possession. However, before going further, we should note that there is no need in this case to define the precise extent of that group. For example, we need not address what need be shown to establish the medical necessity to take marihuana or how grave a medical condition must be in order to qualify. There is no dispute that the Hitzig applicants include persons with such a need and that those with this need must be afforded a constitutionally sound medical exemption if the criminal sanction against the possession of marihuana is to stand.

[81] Equally, we should make clear that this case is not about those whose "need" to consume marihuana is not medical but simply social or recreational. These people have no s. 7 rights that are engaged by the discussion in this case: *R. v. Clay* (2000), 146 C.C.C. (3d) 276 (Ont. C.A.) (now on appeal to the Supreme Court of Canada: [2000] S.C.C.A. No. 492 (QL)).

[82] For the purposes of this discussion the *MMAR* are best viewed in the context of the *CDSA* as constituting a regulatory regime which places strict controls, backed by criminal sanctions, on the acquisition and the use of marihuana by those who have medical need of it.

[83] Our analysis at stage one is greatly assisted by the reasons of this court in *R. v. Parker, supra*. In that case, the context in which the rights to liberty and security of the person were considered was identical to this case in its most important aspect. There, as here, those whose s. 7 rights were at stake require access to marihuana for medical reasons, to treat the symptoms of serious medical conditions. There, as here, the state had placed barriers between them and the marihuana necessary for their health.

[84] However, in one particular respect, the context in *Parker* was somewhat different. There Mr. Parker's rights to liberty and security of the person had to be considered in the context of a simple and unqualified criminal prohibition against possessing marihuana. Here the context is the *MMAR*, which permit the possession of marihuana without criminal sanction but only if specific eligibility conditions are met and only by making certain presumptions concerning the source of supply.

[85] As we have described, the main eligibility conditions set by the *MMAR* begin by requiring that an individual have a symptom associated with a medical condition that fits within one of three specific categories. The individual must have support from a physician willing to declare that all conventional treatments have been tried or at least considered and that marihuana would mitigate the symptom, with benefits that outweigh the risks. The physician must also specify the daily dosage limit for the individual. For categories two and three the physician cannot be the individual's general practitioner but must be a specialist. And for category three, the support of a second specialist is required.

[86] An individual with the medical need to take marihuana who cannot meet these conditions cannot obtain a medical exemption and is subject to the criminal sanction against possessing marihuana found in s. 4 of the *CDSA*. An individual with the same need who has not obtained a medical exemption for any other reason is subject to the same sanction. In the same way, an individual with this need who possesses more than the authorized amount of the medication is subject to the criminal sanction, even if that individual has obtained a medical exemption.

[87] Thus, while the medical exemption scheme means that individuals who need to take marihuana for medical reasons are not automatically subjected to criminal sanction, the *MMAR* set up stringent conditions with which these individuals must attempt to

comply in order to use the medication they require. If they do not do so they must risk conviction and imprisonment or forego their serious medical needs.

[88] We have also described the constraints on the sources of supply of marihuana for those with the medical need to use it that accompany the *MMAR*. Apart from the wholly theoretical option of obtaining marihuana from a licensed dealer, an individual must declare that the exemption is sought in respect of marihuana that comes from one of two sources in order to get a medical exemption. Either the individual is to produce it personally or it is to be produced for him or her by a licensed designated person who cannot be paid for doing so and who can neither grow marihuana for more than that individual nor in combination with more than two other designated producers. The third option in the *MMAR* (that is, obtaining the marihuana from a dealer licensed under the *NCR*) is theoretical only since there are now no such dealers.

[89] Where individuals cannot grow the marihuana they require (and many cannot for a variety of reasons, including their health) and cannot secure a designated producer (for a various reasons, including the constraints imposed by the *MMAR* on these producers) they go beyond the declarations they have made if they seek to acquire the medication they need in any other way. And anyone who would supply marihuana to them would face the criminal prohibition in s. 5 of the *CDSA*.

[90] Given this context, we turn to whether the rights to liberty and security of the person of those with the medical need to take marihuana are engaged by this scheme of medical exemption.

[91] As *R. v. Parker*, *supra* points out, the liberty interest of these individuals can be considered in two ways. First, viewed more narrowly, their right to liberty is at risk in the context of this medical exemption due to the threat of criminal prosecution and imprisonment arising from their need to possess and use marihuana for medial purposes. This risk manifests itself in several ways. The risk clearly exists for those who do not have an ATP because they cannot clear the eligibility hurdles set up by the *MMAR*. It also exists for those with medical need who do not have an ATP for any other reason (although in each case that other reason may be a factor in assessing compliance with the principles of fundamental justice). Further, even for those with an ATP, this aspect of the liberty interest is at risk should they stray outside the conditions set for their possession by the *MMAR*. For example, the *MMAR* authorize an ATP holder to possess marihuana, but only in a strictly limited quantity, beyond which there is no exemption.

[92] The right to liberty can also be properly viewed more broadly, to include the right to make decisions of fundamental personal importance. See *R. v. Parker, supra,* at 228-29. Viewed in this way, s. 7 requires that if the state seeks to interfere with these decisions, it must comply with the principles of fundamental justice in doing so. Like the

other rights encompassed by s. 7 this aspect of the right to liberty is protected not just in the context of the criminal law, but against any deprivation that occurs as a result of an individual's interaction with the justice system and its administration.

[93] Here, as in *Parker*, there is no doubt that the decision by those with the medical need to do so to take marihuana to treat the symptoms of their serious medical conditions is one of fundamental personal importance. While this scheme of medical exemption accords them a medical exemption, it does so only if they undertake an onerous application process and can comply with its stringent conditions. Thus, the scheme itself stands between these individuals and their right to make this fundamentally important personal decision unimpeded by state action. Hence the right to liberty in this broader sense is also implicated by the *MMAR*.

[94] It is equally clear that the right to security of the person of those with the medical need to use marihuana is implicated in the circumstances of this case. In *Parker, supra,* this court reviewed the jurisprudence and concluded that this right encompasses the right to access medication reasonably required for the treatment of serious medical conditions, at least, when that access is interfered with by the state by means of a criminal sanction. In *Gosselin, supra*, (which postdated *Parker* by two and one-half years) the Supreme Court of Canada made clear that this interference by the state need not be by way of the criminal law, provided it results from the state's conduct in the course of enforcing and securing compliance with the law.

[95] In this case, the *MMAR*, with their strict conditions for eligibility and their restrictive provisions relating to a source of supply, clearly present an impediment to access to marihuana by those who need it for their serious medical conditions. By putting these regulatory constraints on that access, the *MMAR* can be said to implicate the right to security of the person even without considering the criminal sanctions which support the regulatory structure. Those sanctions apply not only to those who need to take marihuana but do not have an ATP or who cannot comply with its conditions. They also apply to anyone who would supply marihuana to them unless that person has met the limiting terms required to obtain a DPL. As seen in *Rodriguez v. British Columbia (A. G.)*, [1993] 3 S.C.R. 519, a criminal sanction applied to another who would assist an individual in a fundamental choice affecting his or her personal autonomy can constitute an interference with that individual's security of the person. Thus, we conclude that the *MMAR* implicate the right of security of the person of those with the medical need to take marihuana.

[96] Having found that this scheme of medical exemption engages the rights of liberty and security of the person of those with the medical need to use marihuana, we must determine whether it can be said to deprive these individuals of those rights for the purposes of the s. 7 analysis.

[97] In its narrower aspect, the right to liberty is clearly violated because those with the medical need to use marihuana are exposed to conviction and imprisonment if they do not meet the eligibility conditions for or otherwise do not possess an ATP or if they acquire and possess marihuana outside the strict conditions of the ATP. In those circumstances, they are subject to the criminal prohibition in s. 4 of the *CDSA*.

[98] It is no answer at this stage of the s. 7 analysis to say that there is no risk to the right to liberty because those in medical need can possess marihuana lawfully simply by applying for an ATP, meeting the eligibility conditions and observing the other conditions that are part of the ATP process. While the reasonableness of these conditions may be relevant in determining whether the *MMAR* conform to the principles of fundamental justice they clearly represent significant barriers imposed by the state standing between those with medical need and their use of marihuana, unaffected by criminal sanction. Simply put, the *MMAR* do not remove the real risk of conviction and imprisonment for those who must acquire and use marihuana to meet their medical needs. The *MMAR* thus interfere with this aspect of their right to liberty.

[99] As we have said, the right to liberty, viewed more broadly, encompasses the right to make decisions that are of fundamental personal importance, such as the decision to use marihuana when necessary to control symptoms of serious medical conditions. For those with that need, the *MMAR* undoubtedly constitute a serious intrusion into a decision of fundamental personal importance. In order to use the marihuana they require, they must comply with the various conditions specified in the ATP process or face the threat of criminal prosecution. In placing these significant hurdles in their way the state has interfered with this broader aspect of their right to liberty.

[100] Turning to the right to security of the person, this court concluded in *R. v. Parker*, *supra*, that the marihuana prohibition in s. 4 of the *CDSA* deprives those with the medical need to use marihuana of that right because it prevents them from using that medication on pain of criminal prosecution.

[101] In coming to its conclusion, this court in *Parker* relied on the description by Sopinka J. of the right to security of the person in the context of medical treatment which is found in *Rodriguez, supra*, at 587-88:

> 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 the Criminal Code*

> *(Man.), supra,* Lamer J. (as he then was) also expressed this view, stating at p. 1177 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.]

[102] As we have said, *Gosselin*, *supra*, at para. 77, affirmed that s. 7 protects the individual against the state impinging on life, liberty or security, not just through the process of the criminal law, but more generally through state action taken in the course of enforcing and securing compliance with the law.

[103] The medical exemption scheme puts those people at risk of prosecution and imprisonment when they use the medication they need but do not have an ATP or cannot observe its conditions. Moreover, the *MMAR* provide them with very limited and ineffective access to marihuana through their own PPL or from a DPL holder. Apart from this, the criminal prohibition in s. 5 of the *CDSA* applies to anyone who would supply them with marihuana. The reality of supply thus is that this criminal sanction stands between those in medical need and the marihuana they require. That is the effect of the *MMAR*.

[104] Even apart from these criminal sanctions for non-compliance, the *MMAR* constitute significant state interference with the human dignity of those who need marihuana for medical purposes. To take the medication they require they must apply for an ATP, comply with the detailed requirements of that process, and then attempt to acquire their medication in the very limited ways contemplated by the *MMAR*. These constraints are imposed by the state as part of the justice system's control of access to marihuana. As such, they are state actions sufficient to constitute a deprivation of the security of the person of those who must take marihuana for medical purposes. They are state actions within the administration of justice that stand between those in medical need and the marihuana they require.

[105] In summary, we conclude that the *MMAR* constitute a scheme of medical exemption which deprives those who need to take marihuana for medical purposes of the rights to liberty and security of the person. This is a threshold violation of s. 7. We are therefore required to turn to the question of whether this deprivation is in accordance with the principles of fundamental justice.

(c) Stage two: Is the threshold violation inconsistent with the principles of fundamental justice?

(1) *Introduction*

[106] The phrase "the principles of fundamental justice" in s. 7 is of necessity general and abstract. The court must articulate with as much precision as possible the core principles of our legal system engaged by the specific state action in issue and the specific alleged deprivation of the individual's rights. In articulating the operative principles, the court must avoid describing those principles at a level of generality that suggests little more than a personal assessment of the wisdom of the impugned state conduct. The principles of fundamental justice are not the constitutional equivalent of equity's Chancellor's foot: *Rodriguez*, *supra*, at 590-91.

[107] Context is crucial to both the identification of the operative principles of fundamental justice and the determination of whether any threshold violation of an individual's rights under s. 7 is consistent with the principles of fundamental justice at play: *R. v. White*, *supra*, at 436-40. The Hitzig applicants assert the right to make a fundamental personal decision concerning how best to treat serious symptoms associated with life threatening medical problems: *R. v. Parker*, *supra*, at 228-29. The Government has recognized since 1999, that for some seriously ill individuals, marihuana is a medically useful and appropriate medication. The Government has accepted that those individuals must be able to obtain and use marihuana for medical purposes without fear of criminal prosecution. At the same time, however, the Government is obliged to protect the public health and safety of all of its citizens through the regulation of the medicinal use of substances like marihuana. The Government contends that public health and safety concerns include potential health risks from long-term use, the Government's need to comply with stringent international controls on the use and distribution of marihuana, and the Government's obligation to combat the criminal drug trade, which includes the illicit distribution of marihuana for non-medical purposes.

[108] The nature of the individual right asserted and the purpose animating the Government action are important contextual considerations at the second stage of the s. 7 analysis. The actual effect of the state action is an equally important contextual consideration. State action that may on its face be benign or even promote individual interests may, in its actual operation, be inconsistent with the principles of fundamental justice: *R. v. Morgentaler*, *supra*. The Hitzig applicants stress the effects of the scheme implemented by the *MMAR* in asserting a violation of their s. 7 rights both in respect of the supply issue and the eligibility issue.

(2) *The supply issue and the principles of fundamental justice*

[109] It is undeniable that the effect of the *MMAR* is to force individuals entitled to possess and use marihuana for medical purposes to purchase that medicine from the black market. As Lederman J. put it at para. 159:

> As a result, the regulatory system set in place by the *MMAR* to allow people with a demonstrated medical need to obtain marijuana simply cannot work without relying on criminal conduct and lax law enforcement. …

[110] Lederman J. found that the absence of a legal supply of marihuana for people entitled to possess and use it under the *MMAR* resulted in a breach of s. 7, holding at para. 160:

> To my mind, this aspect of the scheme offends the basic tenets of our legal system. It is inconsistent with the principles of fundamental justice to deny a legal source of marijuana to people who have been granted ATPs and licences to produce. Quite simply, it does not lie in the government's mouth to ask people to consort with criminals to access their constitutional rights. …

[111] We agree with the conclusion reached by Lederman J. He does not, however, expressly identify the principle or principles of fundamental justice which he finds are violated by the failure to provide for a legal source of supply. In attempting to identify that principle or principles, we begin with the words of Lamer J. (as he then was) in the seminal case of *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)*, [1985] 2 S.C.R. 486 at 503, 512:

> In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy, but in the inherent domain of the judiciary as guardian of the justice system. …
>
> [T]hey [the principles of fundamental justice] represent principles which have been recognized by common law, the international conventions, and by the very fact of entrenchment in the *Charter*, as essential elements of a system for the administration of justice which is founded upon a belief in the dignity of the human person and the rule of law.

[112] The rule of law, identified by Lamer J. as a bulwark of our administration of justice, has been described as "the root of our system of government" and a "highly

textured expression, importing many things": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at 257. Several principles of fundamental justice, including some which are entrenched in the *Charter*, trace their roots to various components of the rule of law (*e.g.*, s. 9, s. 11(g), s. 11(h)). At its most general level, the rule of law refers to the regulation of the relationship between the state and individuals by pre-established and knowable laws. The state, no less than the individuals it governs, must be subject to and obey the law: *Reference Re Manitoba Language Rights*, [1985] 1 S.C.R. 730 at 748-51; *Reference Re Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753 at 805-06; and *R. v. Campbell; R. v. Shirose*, [1999] 1 S.C.R. 565 at 582-83.

[113] The state's obligation to obey the law is central to the very existence of the rule of law. Without this obligation, there would be no enforceable limit on the state's power over individuals. Human dignity, the second essential component of the administration of justice identified by Lamer J. in *Reference re s. 94(2) of the Motor Vehicle Act*¸ *supra*, could not long survive a system where the Government was free to do as it saw fit without regard to established laws.

[114] The state's obligation to obey its own laws not only serves as an invaluable brake on the exercise of state power against the individual, it also makes the state a role model for its citizens. By adhering to the law, the state encourages its citizenry to do likewise: *Rodriguez*, *supra*, at 608. Because it obeys and honours the law, the state can assume the moral high ground, which justifies state prosecution and punishment of individuals who break the law. As the entrapment jurisprudence demonstrates, loss of that moral high ground, through for example, active solicitation of criminal conduct, will foreclose prosecution by the state: *R. v. Mack*, [1988] 2 S.C.R. 903.

[115] The state's obligation to obey the law is fundamental to our system of justice. No one would argue that it does not have general acceptance among reasonable people: *Rodriguez*, *supra*, at 607. The state's obligation to obey the law is well established at common law through the process of judicial review, is implicitly recognized in the preamble to the *Constitution Act, 1867*, (U.K.), 30 and 31 Vict., c. 3, is expressly recognized in the preamble to the *Constitution Act, 1982*, and is further recognized in s. 52 of the *Constitution Act, 1982*. We have no hesitation in concluding that the state's obligation to obey the law is a principle of fundamental justice.

[116] The *MMAR* do not require the state to violate the law. They do, however, create an alliance between the Government and the black market whereby the Government authorizes possession of marihuana for medical purposes and the black market supplies the necessary product. The *MMAR* provide a viable medical exemption to the prohibition against possession of marihuana only as long as there are individuals who are prepared to commit a crime by supplying the necessary medical marihuana to the individuals that the Government has determined are entitled to use the drug. At the same time, the *MMAR*

force seriously ill individuals who have been found to be in need of medical marihuana to consort with criminals to fill that medical need. Forcing sick people to go to the black market to get their medicine can only discourage respect for the law and at the same time signal that the medical needs of these people are somehow not worthy of the same kind of consideration as other medical needs.

[117] A Government scheme that depends on the criminal element to deliver the medically necessary product, and that drives those in need of that product to the black market strikes at the same values that underlie the state's obligation to obey the law. The *MMAR*, far from placing the Government in the position of a positive role model or on the moral high ground, are calculated to bring the law into disrepute and devalue the worth and dignity of those individuals to whom the *MMAR* are applied. The Government's obligation to obey the law must include an obligation to promote compliance with and respect for the law.

[118] The inevitable consequences of the absence of a legal source of marihuana for those who have been determined to be in medical need of the drug are inconsistent with the fundamental principle that the state must obey and promote compliance with the law. In our view, the absence of a legal source of supply renders the *MMAR* inconsistent with the principles of fundamental justice.

[119] There is an alternative approach to the second stage of the s. 7 inquiry which also leads to the conclusion that the provisions in the *MMAR* are inconsistent with the principles of fundamental justice. This alternative approach begins by recognizing that it is a principle of fundamental justice within our legal system that the individual rights identified in s. 7 may be subordinated, at least to some extent, to substantial and compelling collective interests: *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844 at 898-900, per La Forest J.; and *R. v. Pan* (1999), 134 C.C.C. (3d) 1 at 61-62 (Ont. C.A.), aff'd [2001] 2 S.C.R. 344 at 386-89.

[120] The application of this approach to the principles of fundamental justice requires that the court determine whether there is a substantial and compelling state interest served by the impugned state action which has resulted in the threshold violation of the individual rights identified in s. 7. If the action is in furtherance of a substantial and compelling interest, then the question becomes whether the state action imposes an undue burden on the individual's rights: *R. v. Beare*, [1988] 2 S.C.R. 387 at 401-04. Determining when the balance struck by the state can be said to effect a fair balance between state interests and individual rights can be a very difficult question which pushes the court to the brink of the forbidden world of policy-driven decision making.

[121] In this case, however, the Government's attempt to rely on the assertion that the *MMAR* serve a substantial and compelling collective interest justifying the absence of any

legal source of medical marihuana fails at its most basic level. The substantial and compelling interest advanced by the Government is the need to preserve and promote public health and safety. We accept that this can be a substantial and compelling collective interest for the purposes of s. 7 of the *Charter*. However, a scheme which depends on the criminal black market and which forces individuals to go to the black market to obtain necessary medical treatment cannot possibly further public health and safety. In fact, it has the opposite effect. By failing to provide for a lawful source of medical marihuana, the *MMAR* not only compromise individual rights, but undermine the very collective interests which the Government contends are promoted by these regulations. Lederman J. made this point at paras. 161, 163:

> That the Government relies on the criminal underworld in this manner is rather surprising when it has declared that the goals of the *MMAR* and its interlocking regulatory scheme include controlling the illicit drug trade and upholding Canada's international narcotics control obligations. …
>
> As a result, production licences offer the applicants an illusory remedy which can only be accessed through reliance on black market distributors. Despite ostensibly being concerned with avoiding diversion and illegal use of marihuana, to say nothing of conforming with international drug conventions, the *MMAR* force medical marihuana users into the arms of suppliers whom the state has deemed criminal drug dealers. This position is untenable, and is certainly not consistent with the principles of fundamental justice.

[122] Our conclusion that a scheme which does not provide for lawful access to medical marihuana is inconsistent with s. 7 of the *Charter* should not surprise anyone who has read this court's decision in *R. v. Parker*, *supra*, or the decision of the Alberta Court of Queen's Bench in *R. v. Krieger* (2000), 225 D.L.R. (4th) 164, aff'd (2003), 225 D.L.R. (4th) 183 (C.A.), leave to appeal sought by Canada: [2003] S.C.C.A. No. 114 (QL). Although neither case dealt with the *MMAR*, both made it clear that any medical exception to the criminal prohibition against possession of marihuana would have to address not just possession, but also the means of obtaining the drug needed for the medical purpose. In determining that the prohibition against cultivation of marihuana in the former *Narcotic Control Act* was unconstitutional absent an adequate medical exception, Rosenberg J.A. said in *Parker*, at 249-50:

> To conclude, the deprivation of Parker's right to liberty and security of the person because of the complete prohibition on the possession of cultivation of marihuana in the former *Narcotics Control Act* does little or nothing to enhance the

> state interest. In my view, Parker established that his rights under s. 7 were violated by the absolute prohibition of cultivation of marihuana in the *Narcotics Control Act*. Parker has no 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 medical use, for the purpose of the s. 7 analysis.

[123] Rosenberg J.A. reached the same conclusion with respect to the cultivation prohibition in the *CDSA*, saying, at 262-63:

> However, it is apparent from these reasons and the reasons dealing with the cultivation offence under the *Narcotics Control Act* that if the cultivation prohibition 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 it. In this way, he avoids having to interact with the illicit market and can provide some quality control. [Emphasis added.]

[124] We read Rosenberg J.A. as requiring "a practical way of obtaining" the necessary medical marihuana as an integral part of any legitimate medical exemption. We also read him as clearly eliminating the black market as a suitable means of obtaining the necessary medical marihuana.[10]

[125] The trial judge in *R. v. Krieger*, *supra*, concluded that the cultivation prohibition in the *CDSA* was unconstitutional, opining at 178-79:

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

[10] We see no inconsistency between the holding in *Parker* and this court's refusal in the subsequent case of *Wakeford v. Canada* (2002), 58 O.R. (3d) 65 (C.A.) to make an order compelling the Government to supply marihuana to the holder of a medical exemption. Nothing said in *Parker*, or in this case, compels the Government to supply marihuana to anyone. Furthermore, the refusal to make the order in *Wakeford* was based on specific findings of fact, including the fact that the Government did not have access to a safe supply of marihuana. Those facts were supported by the evidence adduced in *Wakeford*, but some of them are inconsistent with the evidence heard in this case.

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

[126] In affirming the trial decision, the Alberta Court of Appeal said, at para. 5:

> We agree with the trial judge that s. 56 [*CDSA*] creates an absurdity because there was no legal source of marihuana. That absurdity is not removed by the fact that the respondent had a personal supply at the time the charge was laid. There is no evidence as to how long the supply would last nor as to the duration of the potential s. 56 exemption.

[127] The previous appellate decisions dealing with the constitutionality of medical exemptions to the prohibition against marihuana possession point directly at the result reached by Lederman J. on the supply issue.

[128] Thus, we conclude that in setting up a scheme of medical exemption which depends on an illicit source of supply, the *MMAR* do not accord with the principles of fundamental justice.

(3) The eligibility issue and the principles of fundamental justice

[129] Before Lederman J., the Hitzig applicants argued that in depriving those who need to use marihuana of their rights to liberty and security of the person, the *MMAR* do not accord with the principles of fundamental justice because they throw up so many barriers to eligibility for a medical exemption for marihuana that it effectively remains unavailable to many seriously ill people who need it.

[130] Lederman J. rejected this argument, concluding that the application process, the specialist requirement and the daily dosage provisions are neither arbitrary nor unrelated to the objectives of the *MMAR* and they did not render the scheme an illusory medical exemption from the criminal prohibition.

[131] On their cross-appeal, the Hitzig applicants seek to reverse that finding in this court. In addressing the eligibility issue, they raised a number of aspects of the *MMAR* in

their written material: the daily dosage limits imposed by the scheme; the reliance on physicians to determine if marihuana is needed by the individual; and the requirement for support from specialists to qualify, unless the individual is terminally ill. In argument, the focus was very much on the last of these.

[132] We will deal with each of these in turn, but in the end we differ with Lederman J.'s. conclusion in only one respect. In our view, only the requirement for a second specialist for individuals in category 3 has been shown by these applicants not to accord with the principles of fundamental justice.

[133] The legal context for this analysis is best provided by the balancing approach to the principles of fundamental justice that we already have described. Here, it is useful to begin with the words of McLachlin J. (as she then was) 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. [Emphasis added.]

[134] This approach is elaborated in *Godbout*, *supra*, at 899-900, where La Forest J. said this on behalf of the three judges who dealt with s. 7 in that case:

> But just as this Court has relied on specific principles or policies to guide its analysis in particular cases, it has also acknowledged that looking to "the principles of fundamental justice" often involves the more general endeavour of balancing the constitutional right of the individual claimant against the countervailing interests of the state. In other words, deciding whether the principles of fundamental justice have been respected in a particular case has been understood not only as requiring that the infringement at issue be evaluated in light of a specific principle pertinent to the case, but also as permitting a broader inquiry into whether the right of life, liberty or security of the person asserted by the individual can, in the circumstances, justifiably be violated given the interests or purposes sought to be advanced in doing so. To my mind, performing this balancing test in considering the fundamental justice aspect of s. 7 is both eminently sensible and perfectly consistent with the aim and import of that provision, since the notion that individual rights may, in

> some circumstances, be subordinated to substantial and compelling collective interests is itself a basic tenet of our legal system lying at or very near the core of our most deeply rooted juridical convictions. We need look no further than the Charter itself to be satisfied of this. Expressed in the language of s. 7, the notion of balancing individual rights against collective interests itself reflects what may rightfully be termed a "principle of fundamental justice" which, if respected, can serve as the basis for justifying the state's infringement of an otherwise sacrosanct constitutional right.

[135] Related to this principle is the concept described by Sopinka J. in *Rodriguez*, *supra*, where he said that if the state action which causes the deprivation does little or nothing to enhance the state's interest, it can properly be seen as arbitrary and not in accordance with fundamental justice. In such circumstances there cannot possibly be a fair balance between the individual's rights and the collective interests. Sopinka J. put it this way, at 594:

> 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. This is, to my mind, essentially the type of analysis which E. Colvin advocates in his article "Section Seven of the Canadian Charter of Rights and Freedoms" (1989), 68 *Can. Bar Rev.* 560, and which was carried out in *Morgentaler*. That is, both Dickson C.J. and Beetz J. were of the view that at least some of the restrictions placed upon access to abortion had no relevance to the state objective of protecting the foetus while protecting the life and health of the mother. In that regard the restrictions were arbitrary or unfair.

[136] The first way in which the Hitzig applicants say that the conditions of the *MMAR* do not comply with fundamental justice is the daily dosage limit they place on the amount of marihuana that an ATP holder can possess at any point in time. They argue that this is unreasonable because, given the unpredictability of the strength and quality of the marihuana that is available, this limit may well deprive the individual of sufficient medication to properly control the symptoms of his or her serious medication condition.

[137] This argument fails for two reasons. First, the state has a substantial and compelling interest in ensuring that the dosages of this medication are no greater than necessary both to protect vulnerable patients from an untested drug and to ensure against

the diversion of any excess to the illicit drug trade. A daily limit fixed by a doctor is a reasonable way to achieve both ends. Second, if the daily dosage limit proves inadequate to treat the symptom properly, the *MMAR* provide for it to be raised on medical recommendation, so that the individual's medical need is met. Thus, the daily dosage limit cannot be said to impose an undue burden on individual rights and represents a fair balance between the individual interest and the state interest.

[138] The second attack on the eligibility barriers created by the *MMAR* focuses on the use of physicians as gatekeepers in the sense that every application must be supported by a doctor and it is that doctor who must declare that marihuana is recommended to mitigate the symptom involved. It is argued that this places unwarranted power to determine whether an individual receives a medical exemption in the hands of physicians rather than letting the individual decide for him or herself or having the Minister of Health do so. It is further argued that the serious concerns of several central medical groups about the gatekeeper role for physicians means that doctors will not assist individuals to obtain medical exemptions.

[139] Again, we do not agree. Whether marihuana will mitigate the particular symptom of an individual with a particular serious medical condition is fundamentally a medical question. Just as physicians are relied on to determine the need for prescription drugs, it is reasonable for the state to require the medical opinion of physicians here, particularly given that this drug is untested.[11] The second argument is answered by Lederman J.'s finding that despite the concerns of central medical bodies, a sufficient number of individual physicians were authorizing the therapeutic use of marihuana that the medical exemption could not be said to be practically unavailable. This finding of fact is entirely reasonable on the record in this case and we would not interfere with it. Of course, if in future physician co-operation drops to the point that the medical exemption scheme becomes ineffective, this conclusion might have to be revisited.

[140] The third attack on the eligibility conditions of the *MMAR*, and the one focused on in the argument before us, rests on the requirement that the physician support for a medical exemption for individuals in category 2 and category 3 must come from specialists. Again, the Hitzig applicants make two arguments in mounting the attack.

[11] Every jurisdiction in the United States that has enacted a law to permit the medical use of marihuana by seriously ill persons requires the prior approval of a physician in order to access this drug. As of the time these appeals were heard, eight states had enacted such laws: Alaska, California, Colorado, Hawaii, Maine, Nevada, Oregon and Washington. Similar bills were before the state Legislatures in Iowa, Massachusetts, Minnesota, New York, Rhode Island, Vermont and Wyoming.

[141] First, they say that because marihuana is an untested medication there is no justification for requiring medical support beyond the individual's own general practitioner since the specialist has no knowledge advantage. They say that when this is combined with the practical difficulties that exist in accessing specialists, particularly in rural areas, the specialist requirements for categories 2 and 3 constitute an unreasonable barrier which significantly interferes with those in medical need from accessing the medication they require.

[142] In our view, this argument too does not succeed. In order to qualify for a medical exemption, both individuals in category 2 and those in category 3 must have a declaration from a specialist practising in an area of medicine relevant to the treatment of the individual's medical condition causing the symptom to be mitigated. The declaration must say that all conventional treatments for the symptom have been tried or considered and why each is medically inappropriate. The requirement for a declaration in this form serves substantial and compelling state interests. First, it serves the state interest in protecting the health and safety of its citizens in relation to an untested drug. Second, it serves the state interest in complying with international conventions aimed at restricting the use of drugs such as marihuana save for legitimate medical and scientific purposes. A specialist in the treatment of the particular medical condition is likely to have more knowledge than a general practitioner of the complete range of possible treatments, including ones that may just be emerging. The specialist requirement thus better assures that marihuana is used only if no other more conventional medication is effective. Given that marihuana is an untested drug, this is a substantial and compelling state interest. So too is compliance with international conventions that are designed to restrict the use of drugs save for legitimate medical and scientific purposes a state interest which the specialist requirement also serves.

[143] Moreover, on this record, the Hitzig applicants simply have not shown that the specialist requirement is a significant impediment to obtaining a medical exemption. Only one of these applicants, Ms. Devries, can point to any difficulty, due to a lack of access, in getting specialist support for her application, and there is some doubt that this individual sought actively to meet this requirement, because she first spoke to a specialist only a few days before her cross-examination in this proceeding. Here as well, Lederman J.'s finding of fact, at paras. 154-56, that the specialist requirement does not make the medical exemption practically unavailable, is entirely reasonable and not open to interference by this court. However, as with the concern over physician co-operation, should the passage of time reveal that access to specialists is a significant practical impediment a different conclusion might be reached. Thus, on this record we conclude that the specialist requirement does not constitute an undue constraint on the individual's ability to get a medical exemption and represents a fair balance between the interests of the individual and the state.

[144] However, in our view, the second argument in this attack does have merit. The Hitzig applicants simply say that the requirement to have a second specialist support the application for an individual in category 3 does little or nothing to enhance the state's interest and in that sense represents an arbitrary restriction.

[145] We agree. The second specialist requirement is clearly an additional restriction on the acquisition of a medical exemption by those in category 3. Yet it is hard to see that the second specialist adds anything that could be said to advance the state interest. The second specialist is no differently qualified than the first. Ironically, the second specialist is not asked at all to opine about the availability of other possible treatments, which is the principal justification advanced by the state for any specialist involvement. Rather, the second specialist is required only to agree with the first specialist that marihuana would mitigate the symptom and that the benefits outweigh the risks. And in doing so the second specialist does not see the individual but merely reviews the medical file. In these circumstances the requirement for a second opinion adds so little if any value to the assessment of medical need that it is no more than an arbitrary barrier standing between an individual in category 3 and a medical exemption. In this particular respect only, the eligibility conditions of the *MMAR* do not accord with the principles of fundamental justice.

(x) The s. 1 Analysis

[146] Having found that this scheme of medical exemption violates s. 7, it remains to consider s. 1. Can the Government demonstrate that the offensive aspects of the *MMAR* constitute a reasonable limit that is demonstrably justified in a free and democratic society? We agree with Lederman J. that the answer to this is no. Indeed, we are in substantial agreement with his reasons.

[147] In the course of our s. 7 analysis, with respect to both eligibility and supply, we have undertaken a balancing between the interests of the state and the interests of the individual and have concluded that the offending provisions of the *MMAR* do not advance the collective interest sufficiently to justify the limitation which they place on the individual's rights. The factors which we considered there are also germane to the s. 1 analysis. Hence, we do not think it necessary to repeat in detail the balancing exercise in relation to s. 1, particularly since there, unlike s. 7 the onus of justification rests on the state, making the state's task that much harder.

[148] Suffice it to say that we agree with Lederman J. that the *MMAR* seek to provide a medical exemption while pursuing the objectives of better public health and safety and

effective narcotic drug control consistent with Canada's international treaty obligations. We accept that these objectives are pressing and substantial.

[149] However, like Lederman J., we conclude that both offending aspects of the *MMAR* clearly fail the first step in the proportionality test required by s. 1. There is simply no rational connection between either of the two offending aspects of the scheme of medical exemption and these important objectives.

[150] The first aspect is the eligibility requirement that those individuals in category 3 have the support of a second specialist. As we have said, this requirement is at best redundant. It adds no value to the application and does little or nothing to advance the state objective. In particular it does nothing to promote public health and safety. And it is entirely irrelevant to effective narcotic drug control. There is no rational connection between this requirement and the state objectives.

[151] The second aspect is the maintenance of significant barriers between individuals with the medical need to use marihuana and a licit supply of the medication which they require. As we have described, the effect of the *MMAR* is to force seriously ill individuals to seek the medication they need from the black market with all the risks of tainted product that this presents. Exposing these individuals to these risks does not advance the objective of better public health and safety. Rather, it is contrary to it. Equally, driving business to the black market is contrary to better narcotic drug control. Here again there is an absence of rational connection with the state objectives.

[152] Thus, neither aspect of the *MMAR* which we have found to contravene s. 7 can be saved by s. 1.

(xi) The Appropriate Remedy

[153] Having found that the *MMAR* do not create a constitutionally valid medical exemption to the criminal prohibition in s. 4 of the *CDSA*, we must now shape a declaration under s. 52 of the *Charter* which responds to the constitutional shortcomings of the *MMAR*. We must then determine whether that order should be suspended. As we shall explain, we have concluded that a precisely targeted declaration is appropriate and that it should not be suspended. In this case, the same considerations which dictate the relatively narrow focus of our declaration of invalidity militate against any suspension of that order. We will identify and address those factors subsequently, as they apply to both the scope and timing of the remedy we would grant. First, however, we must turn to the order proposed by the Hitzig applicants.

[154] The Hitzig applicants argue that the appropriate remedy for the constitutional deficiency in the scheme of medical exemption crafted by the Government is the declaration granted by Lederman J., namely that the *MMAR* in their entirety are constitutionally invalid and of no force or effect. In their cross-appeal they also seek a declaration that the criminal prohibition against possession in s. 4 of the *CDSA* is of no force or effect in relation to marihuana. Of course, without the invalidity of the marihuana prohibition in s. 4, an order declaring the *MMAR* to be of no force or effect would leave those in medical need of marihuana with no way to possess it without criminal sanction.

[155] We find the remedy contended for by the Hitzig applicants to be overly broad and inadequately tailored to the constitutional deficiencies in the MMAR. Section 52(1) of the *Constitution Act, 1982* requires the court to strike down any law that is inconsistent with the Constitution, but only "to the extent of the inconsistency". This invites some precision in selecting a remedy.

[156] Dealing first with the eligibility deficiencies in the *MMAR*, it is true that the declarations sought by these applicants have the effect of removing the barrier of criminal sanction for possession of marihuana by those in medical need of it. However, the remedy proposed by the respondents achieves this result only by striking down the *MMAR* in their entirety and by coupling this with the invalidation of the marihuana prohibition in s. 4 of the *CDSA*. The latter declaration would exempt from criminal sanction all those who possess marihuana, not just those who must do so out of medical necessity. Thus, the remedy sought goes well beyond the eligibility deficiencies in the medical exemption crafted by the appellant. In that sense the remedy sought by these respondents is simply too broad.

[157] Turning to the supply deficiency in the *MMAR*, the remedy proposed by these respondents does nothing to address this constitutional defect. Even if the entirety of the *MMAR* and the marihuana prohibition in s. 4 of the *CDSA* were declared invalid, those with a medical need for marihuana would remain without a licit source of supply. The proposed solution is simply not tailored to meet that problem.

[158] Rather, we think that the remedy must be more specifically targeted to the constitutional shortcomings that we have identified in the *MMAR*.

[159] First, as to its eligibility provisions, we have found that the requirement for a second specialist is unnecessary and violates the s. 7 rights of those in medical need who come within category 3. We would simply declare that requirement, found in ss. 4(2)(c) and s. 7 of the *MMAR*, to be of no force or effect.

[160] We have also found that the *MMAR* violate the s. 7 rights of those with a medical need for marihuana because they fail to effectively remove the state barriers to a licit source of supply. As we have described, these barriers encompass a broad array of state actions: the *MMAR*, the provisions of the *FDA* and the *CDSA* and the regulations made thereunder and ultimately the criminal sanction applied to anyone (except a DPL holder) who supplies marihuana to an individual with a medical need for it.

[161] We have earlier described the ineffectiveness of the DPL provisions of the *MMAR* to ensure a licit supply to ATP holders. That ineffectiveness appears to stem very largely from two prohibitions in the *MMAR*. First, a DPL holder cannot be remunerated for growing marihuana and supplying it to the ATP holder (s. 34(2)). Second, a DPL holder cannot grow marihuana for more than one ATP holder (s. 41(b)) nor combine his or her growing with more than two other DPL holders (s. 54). These barriers effectively prevent the emergence of lawfully sanctioned "compassion clubs" or any other efficient form of supply to ATP holders. Indeed, when asked in argument which specific barriers had to be removed to provide for a lawful source of supply, counsel for the Hitzig applicants immediately cited these provisions.

[162] As the record makes clear, there are a number of people who already have a source of marihuana and wish to engage in compassionate supply of it to those in medical need. Indeed the Government's case rested in large part on their existence. It argued that they effectively serve as "unlicensed suppliers" for ATP holders. It may be that not all of these people would satisfy the requirements to become DPL holders set out in the *MMAR*. However, we are satisfied that, on this record, enough would do so that taken together with existing DPL holders, the DPL mechanism as modified could then provide a licit source of supply to ATP holders. Once this modification is implemented, ATP holders would therefore no longer need to access the black market to get the marihuana they need.

[163] Nor for DPL holders drawn from "unlicensed suppliers" is there a "first seed" problem requiring that they enter the black market. They already have their first seed. For future DPL holders who do not have their first seed, the constitutional problem presented by their need to access the black market once in order to get that first seed is far less than the problem under the *MMAR*, where ATP holders themselves are mostly unable to obtain designated producers and, not being healthy enough to grow their own marihuana, must regularly and repeatedly access the black market.

[164] However, even this limited first seed difficulty would be eliminated if future DPL holders who did not already have their first seed could access the Government supply to obtain it. The regulation that was brought into force on July 8, 2003 would appear to provide for just that solution.

[165] Taking these considerations together, we conclude that the remedy which most directly addresses the constitutional deficiency presented by the absence of a licit supply of marihuana is to declare invalid sections 34(2), 41(b) and 54 of the *MMAR*. This will allow all DPL holders to be compensated, to grow for more than one ATP holder, and to combine their growing with more than two other DPL holders. Provided that the regulation of July 8, 2003 remains in place and is acted upon, there is no need to declare that the Government has a constitutional obligation to provide the first seed to those DPL holders who do not have one.

[166] The declarations of invalidity we propose remove the single unconstitutional barrier to eligibility and sufficient barriers to supply that ATP holders will be reasonably able to meet their medical needs from licit sources. As a result, the *MMAR* as modified become a constitutionally sound medical exemption to the marihuana prohibition in s. 4 of the *CDSA*. While the record before us sustains this conclusion, it is conceivable that, as events unfold, further serious barriers could emerge either to eligibility or to reasonable access to a licit source of supply. Should that happen, the issue of the appropriate remedy might have to be revisited in a future case.

[167] The final question we must consider is whether to suspend our declarations. We address this in the context of the guidance provided by Lamer C.J.C. in *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 717:

> The question whether to delay the application of a declaration of nullity should therefore turn not on considerations of the role of the court and the legislature, but rather on considerations listed earlier relating to the effect of an immediate declaration on the public.

[168] Chief Justice Lamer was referring to any potential public danger, threat to the rule of law, or denial of benefit to deserving persons that could arise if there were no suspension. None are applicable here. Indeed an immediately effective order would reduce any potential public danger and the threat to the rule of law by providing ATP holders with an effective alternative to the black market.

[169] Not only is the suspension of our order not justified under the ratio of *Schachter*. There are five factors specific to this case which weigh against any suspension of our order. As will be apparent, these considerations have also shaped the scope of our remedy albeit viewed from a somewhat different perspective. Viewed in that context, they speak to the targeted declaration we have determined to be appropriate. Viewed in the context of the timing of that declaration, they also speak against any suspension.

[170] First, if we do not suspend our order, there will immediately be a constitutionally valid exemption in effect and the marihuana prohibition in s. 4 of the *CDSA* will immediately be constitutionally valid and of full force and effect. In *R. v. Parker, supra*, this court declared the prohibition invalid as of July 31, 2001 if by that date the Government had not enacted a constitutionally sound medical exemption. Our decision in this case confirms that it did not do so. Hence the marihuana prohibition in s. 4 has been of no force or effect since July 31, 2001. Since the July 8, 2003 regulation did not address the eligibility deficiency, that alone could not have cured the problem. However, our order has the result of constitutionalizing the medical exemption created by the Government. As a result, the marihuana prohibition in s. 4 is no longer inconsistent with the provisions of the Constitution. Although Parliament may subsequently choose to change it, that prohibition is now no longer invalid, but is of full force and effect. Those who establish medical need are simply exempted from it. This consequence removes the cloud of uncertainty from the marihuana prohibition in s. 4 of the *CDSA* – a cloud which we were told in argument has created very considerable confusion for courts and law enforcement agencies alike. A suspension of our remedy would simply have continued that undesirable uncertainty for a further period of time.

[171] Second, in argument, counsel for the Government strongly urged that if we found the *MMAR* to be constitutionally flawed, we should be as precise as possible in specifying the corrective measures to be taken. Our remedy quite precisely determines the barriers in the *MMAR* which, if removed, would render it a constitutionally sound medical exemption to s. 4 of the *CDSA*. Our order represents a minimal intrusion on the Government's scheme of medical exemption. It leaves untouched the licensed possession aspect of the scheme and modifies the licensed production aspect of it only enough to make it constitutionally acceptable.

[172] Third, we acknowledge that the Government could choose to address the constitutional difficulty by adopting an approach fundamentally different from that contemplated in the *MMAR*. The alternatives range from the Government acting as the sole provider, to the decriminalization of all transactions that provide marihuana to an ATP holder. Indeed, even if the Government is content with the solution contained in the *MMAR* as modified by our order, it may seek to impose reasonable limits, provided they do not impede an effective licit supply, for example on the amount of compensation that a DPL holder can claim or on the size of the operation that a DPL holder can undertake.

[173] If the Government wishes to adopt any of these alternatives, that decision could be taken quickly, given the obvious thought that has gone into the development of its policy on the medical use of marihuana. Moreover, it can easily be implemented with dispatch,

simply by regulation. An amendment to the *CDSA* is not necessary.[12] In the meantime, the constitutional rights of those in medical need will be respected.

[174] Fourth, a central component of the Government's case is that there is an established part of the black market, which has historically provided a safe source of marihuana to those with the medical need for it, and that there is therefore no supply issue. The Government says that these "unlicensed suppliers" should continue to serve as the source of supply for those with a medical exemption. Since our remedy in effect simply clears the way for a licensing of these suppliers, the Government cannot be heard to argue that our remedy is unworkable.

[175] Finally an order that is not suspended gives immediate recognition to the s. 7 rights of those whose serious illnesses necessitate that they use marihuana. Some of these people are terminally ill. To suspend our remedy if they may die in the meantime is, in our view, inconsistent with fundamental *Charter* values.

[176] In summary, we would dismiss the Government's appeal and allow the cross-appeal of the Hitzig applicants, but only in one specific respect. However, because of our conclusion about the proper remedy, we would alter the judgment appealed from by setting aside its first two paragraphs and substituting an order declaring that the second specialist requirement (s. 4(2)(c) and s. 7) and sections 34(2), 41(b) and 54 of the *MMAR* are of no force and effect. We would not disturb the order as to costs made below nor order costs in this court.

IV. The *Parker*, *Turmel* and *Paquette* Appeals

[177] The applications brought below by Mr. Turmel, Mr. Parker and Mr. Paquette attack the constitutionality of the criminal prohibition against the possession of marihuana in the *CDSA* on the basis that marihuana is a medically necessary drug. Because the issues were so common, these applications were heard together with the application brought by the Hitzig applicants. All these applications were disposed of by Lederman J. in one set of reasons.

[178] Mr. Turmel, Mr. Parker and Mr. Paquette all brought in-person appeals from Lederman J. In argument, we heard submissions from Mr. Turmel and Mr. Parker. Mr. Paquette was not present, although he did file a factum.

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[12] See the reasons of this court in *R. v. J.P.* (C40043), at paras. 19-27, being released concurrently with these reasons.

[179] The position put forward in this court by these appellants differ in only two respects from the case as put forward by the Hitzig applicants. Thus, we need only deal with these two arguments.

[180] First, Mr. Turmel and Mr. Parker argue that the criminal prohibition on the possession of marihuana in s. 4 of the *CDSA* is a "genocidal" violation of the s. 7 right to life in that it prohibits healthy Canadians from using marihuana to prevent the onset of serious medical conditions such as epilepsy.

[181] The simple answer to this is that, as Lederman J. found, there was no medical evidence presented that the smoking of marihuana by healthy individuals has any prophylactic effect whatsoever. Moreover, as this court found in *R. v. Clay*, *supra*, s. 4 is overbroad only in that it extends to those who need to use marihuana because they already have a serious medical condition. The "prophylactic use" argument, particularly, where there is no evidence upon which to found it, cannot be squared with *Clay*.

[182] For his part, Mr. Paquette argued in his factum that the marihuana prohibition in s. 4 of the *CDSA* violates his own right to life. This too is an argument with no evidence to support it. While Mr. Paquette has not applied for a medical exemption under the *MMAR*, he has been granted a series of exemptions under s. 56 of the *CDSA* which have permitted him to lawfully possess marihuana. The *MMAR* therefore have not prevented him from possessing marihuana without criminal sanction, and thus could pose no threat to his right to life.

[183] Thus, it is unnecessary to examine either argument further. In summary, we reject both of them and would dismiss the Turmel, Parker and Paquette appeals.

RELEASED: "OCT 07 2003"
"DD"

"Doherty J.A."
"S.T. Goudge J.A."
"Janet Simmons J.A."

Appendix

Marihuana Medical Access Regulations, S.O.R./2001-227 (June 14, 2001) in force July 31, 2001

Her Excellency the Governor General in Council, on the recommendation of the Minister of Health, pursuant to subsection 55(1) of the *Controlled Drugs and Substances Act*, hereby makes the annexed *Marihuana Medical Access Regulations*.

1. (1) The following definitions apply in these Regulations. …

"Act" means the *Controlled Drugs and Substances Act*. …

"authorization to possess" means an authorization to possess dried marihuana issued under section 11.

"category 1 symptom" means a symptom that is associated with a terminal illness or its medical treatment.

"category 2 symptom" means a symptom, other than a category 1 symptom, that is set out in column 2 of the schedule and that is associated with a medical condition set out in column 1 or its medical treatment.

"category 3 symptom" means a symptom, other than a category 1 or 2 symptom, that is associated with a medical condition or its medical treatment.

"conventional treatment" means, in respect of a symptom, a medical or surgical treatment that is generally accepted by the Canadian medical community as a treatment for the symptom.

"designated drug offence" means

(a) an offence against section 39, 44.2, 44.3, 48, 50.2 or 50.3 of the *Food and Drugs Act,* as those provisions read immediately before May 14, 1997;
(b) an offence against section 4, 5, 6, 19.1 or 19.2 of the *Narcotic Control Act*, as those provisions read immediately before May 14, 1997;
(c) an offence under Part I of the Act, except subsection 4(1); or
(d) a conspiracy or an attempt to commit, being an accessory after the fact in relation to or any counselling in relation to an offence referred to in any of paragraphs (a) to (c).

"designated marihuana offence" means

(a) an offence, in respect of marihuana, against section 5 of the Act, or

against section 6 of the Act except with respect to importation; or

(b) a conspiracy or an attempt to commit or being an accessory after the fact in relation to or any counselling in relation to an offence referred to in paragraph (a).

"designated person" means the person designated, in an application made under section 37, to produce marihuana for the applicant.

"designated-person production licence" means a licence issued under section 40.

"dried marihuana" means harvested marihuana that has been subjected to any drying process.

"licence to produce" means either a personal-use production licence or a designated-person production licence.

"marihuana" means the substance referred to as "Cannabis (marihuana)" in subitem 1(2) of Schedule II to the Act.

"medical practitioner" means a person who is authorized under the laws of a province to practise medicine in that province and who is not named in a notice given under section 58 or 59 of the *Narcotic Control Regulations*.

"medical purpose" means the purpose of mitigating a person's category 1, 2 or 3 symptom identified in an application for an authorization to possess.

"personal-use production licence" means a licence issued under section 29.

"production area" means the place where the production of marihuana is conducted, that is

(a) entirely indoors;
(b) entirely outdoors; or
(c) partly indoors and partly outdoors but without any overlapping period between the two types of production.

"specialist" means a medical practitioner who is recognized as a specialist by the medical licensing authority of the province in which the practitioner is authorized to practise medicine.

"terminal illness" means a medical condition for which the prognosis is death within 12 months.

(2) For the purpose of sections 28 and 53, a site for the production of marihuana is considered to be adjacent to a place if the boundary of the land on which the site is located has at least one point in common with the boundary of the land on which the place is located.

PART 1
AUTHORIZATION TO POSSESS

2. The holder of an authorization to possess is authorized to possess dried marihuana, in accordance with the authorization, for the medical purpose of the holder.

3. A person is eligible to be issued an authorization to possess only if the person is an individual ordinarily resident in Canada.

4. (1) A person seeking an authorization to possess dried marihuana for a medical purpose shall submit an application to the Minister.

(2) An application under subsection (1) shall contain
(a) a declaration of the applicant;
(b) a medical declaration that is made
(i) in the case of an application based on a category 1 symptom, by the medical practitioner of the applicant, or
(ii) in the case of an application based on a category 2 or 3 symptom, by a specialist;
(c) if the application is based on a category 3 symptom, a second medical declaration made by another specialist, that supports the medical declaration made under subparagraph (b)(ii); and
(d) Two copies of a current photograph of the applicant.

5. (1) The declaration of the applicant under paragraph 4(2)(a) must indicate
(a) the applicant's name, date of birth and gender;
(b) the full address of the place where the applicant ordinarily resides as well as the applicant’s telephone number and, if applicable, facsimile transmission number and e-mail address;
(c) the mailing address of the place referred to in paragraph (b), if different;
(d) if the place referred to in paragraph (b) is an establishment that is not a private residence, the type and name of the establishment;
(e) That the authorization is sought in respect of marihuana either
(i) to be produced by the applicant or a designated person, in which case the designated person must be named, or

(ii) to be obtained under the *Narcotic Control Regulations*, in which case the licensed dealer who produces or imports the marihuana must be named;

(f) That the applicant is aware that no notice of compliance has been issued under the *Food and Drugs Act* concerning the safety and effectiveness of marihuana as a drug and that the applicant understands the significance of that fact; and

(g) That the applicant has discussed the risks of using marihuana with the medical practitioner providing the medical declaration under paragraph 4(2)(b), and consents to using it for the recommended medical purpose.

(2) The declaration must be dated and signed by the applicant attesting that the information contained in it is correct and complete.

6. (1) The medical declaration under paragraph 4(2)(b) must indicate, in all cases

(a) the medical practitioner's or specialist's name, business address and telephone number, provincial medical licence number and, if applicable, facsimile transmission number and e-mail address;

(b) the applicant's medical condition, the symptom that is associated with that condition or its treatment and that is the basis for the application and whether the symptom is a category 1, 2 or 3 symptom;

(c) the daily dosage of dried marihuana, in grams, and the form and route of administration, recommended for the applicant; and

(d) the period for which the use of marihuana is recommended, if less than 12 months.

(2) In the case of a category 1 symptom, the medical declaration must also indicate that

(a) the applicant suffers from a terminal illness;

(b) all conventional treatments for the symptom have been tried, or have at least been considered;

(c) the recommended use of marihuana would mitigate the symptom;

(d) the benefits from the applicant's recommended use of marihuana would outweigh any risks associated with that use; and

(e) the medical practitioner is aware that no notice of compliance has been issued under the *Food and Drug Regulations* concerning the safety and effectiveness of marihuana as a drug.

(3) In the case of a category 2 symptom, the medical declaration must also indicate that

(a) the specialist practices in an area of medicine, to be named by the specialist in the declaration, that is relevant to the treatment of the applicant's medical condition;

(b) all conventional treatments for the symptom have been tried, or have at least been considered, and that each of them is medically inappropriate

because

(i) the treatment was ineffective,

(ii) the applicant has experienced an allergic reaction to the drug used as a treatment, or there is a risk that the applicant would experience cross-sensitivity to a drug of that class,

(iii) the applicant has experienced an adverse drug reaction to the drug used as a treatment, or there is a risk that the applicant would experience an adverse drug reaction based on a previous adverse drug reaction to a drug of the same class,

(iv) the drug used as a treatment has resulted in an undesirable interaction with another medication being used by the applicant, or there is a risk that this would occur,

(v) the drug used as a treatment is contra-indicated, or

(vi) the drug under consideration as a treatment has a similar chemical structure and pharmacological activity to a drug that has been ineffective for the applicant;

(c) the recommended use of marihuana would mitigate the symptom;

(d) the benefits from the applicant's recommended use of marihuana would outweigh any risks associated with that use, including risks associated with the long-term use of marihuana; and

(e) the specialist is aware that no notice of compliance has been issued under the *Food and Drug Regulations* concerning the safety and effectiveness of marihuana as a drug.

(4) In the case of a category 3 symptom, the medical declaration must also indicate

(a) the matters referred to in subsection (3); and

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

7. In the case of a category 3 symptom, the second medical declaration under paragraph 4(2)(c) must indicate

(a) the specialist's name, business address and telephone number, provincial medical licence number and, if applicable, facsimile transmission number and e-mail address;

(b) that the specialist practices in an area of medicine, to be named by the specialist in the declaration, that is relevant to the treatment of the applicant's medical condition;

(c) that the specialist is aware that the application is in relation to the mitigation of the symptom identified under paragraph 6(1)(b) and that the symptom is associated with the medical condition identified under that paragraph or its treatment;

(d) that the specialist has reviewed the applicant's medical file and the

information provided under paragraph 6(4)(b) and has discussed the applicant's case with the specialist providing that information and agrees with the statements referred to in paragraphs 6(3)(c) and (d); and

(e) that the specialist is aware that no notice of compliance has been issued under the *Food and Drug Regulations* concerning the safety and effectiveness of marihuana as a drug.

8. A medical declaration under section 6 or 7 must be dated and signed by the medical practitioner or specialist making it and must attest that the information contained in the declaration is correct and complete.

9. If the daily dosage recommended under paragraph 6(1)(c) is more than five grams, the medical practitioner or specialist providing the medical declaration under paragraph 4(2)(b) must also indicate that

(a) the risks associated with an elevated daily dosage of marihuana have been considered, including risks with respect to the effect on the applicant's cardio-vascular, pulmonary and immune systems and psychomotor performance, as well as potential drug dependency; and

(b) the benefits from the applicant's use of marihuana according to the recommended daily dosage would outweigh the risks associated with that dosage, including risks associated with the long-term use of marihuana.

…

11. (1) Subject to section 12, if the requirements of sections 4 to 10 are met, the Minister shall issue to the applicant an authorization to possess for the medical purpose mentioned in the application, and shall provide notice of the authorization to the medical practitioner or specialist who made the medical declaration under paragraph 4(2)(b).

(2) The authorization shall indicate

(a) the name, date of birth and gender of the holder of the authorization;

(b) the full address of the place where the holder ordinarily resides;

(c) the authorization number;

(d) the name and category of the symptom;

(e) the medical condition, or its treatment, with which the symptom is associated;

(f) the maximum quantity of dried marihuana, in grams, that the holder may possess at any time;

(g) the date of issue; and

(h) the date of expiry.

(3) The maximum quantity of dried marihuana referred to in paragraph (2)(f) or resulting from an amendment under subsection 20(1) or 22(3) is the amount determined according to the following formula:

A x 30

where A is the daily dosage of dried marihuana, in grams, recommended for the holder under paragraph 6(1)(c), 19(1)(c) or 22(2)(b), whichever applies.

12. (1) The Minister shall refuse to issue an authorization to possess if
(a) the applicant is not eligible under section 3;
(b) any information, statement or other item included in the application is false or misleading;
(c) the application involves a category 3 symptom and either all conventional treatments have not been tried or considered or they are considered to be medically inappropriate for any reason not mentioned in paragraph 6(3)(b); or
(d) the person mentioned in the authorization application as a licensed dealer under the *Narcotic Control Regulations* does not have a valid licence to distribute marihuana under those Regulations.

(2) If the Minister proposes to refuse to issue an authorization to possess, the Minister shall
(a) notify the applicant in writing of the reason for the proposed refusal; and
(b) give the applicant an opportunity to be heard.

13. An authorization to possess expires 12 months after its date of issue or, if a shorter period is specified in the application for the authorization under paragraph 6(1)(d), at the end of that period.
…
23. While in the presence of the holder of an authorization to possess and providing assistance in the administration of the daily dosage of marihuana to the holder, the person providing the assistance may, for the purpose of providing the assistance, possess a quantity of dried marihuana not exceeding the recommended daily dosage for the holder.

PART 2
LICENCE TO PRODUCE

24. The holder of a personal-use production licence is authorized to produce and keep marihuana, in accordance with the licence, for the medical purpose of the holder.

25. (1) Subject to subsection (2), a person is eligible to be issued a personal-use production licence only if the person is an individual ordinarily resident in Canada who has reached 18 years of age.

(2) If a personal-use production licence is revoked under paragraph 63(2)(b), the person who was the holder of the licence is ineligible to be issued another personal-use production licence during the period of 10 years after the revocation,

26. (1) An application for a personal-use production licence shall be considered only if it is made by a person who

(a) is the holder of an authorization to possess on the basis of which the licence is applied for; or

(b) is not the holder of an authorization to possess but either has applied for an authorization to possess, or is applying for an authorization to possess concurrently with the licence application.

(2) If paragraph (1)(b) applies, the Minister must grant or refuse the application for an authorization before considering the licence application.

27. (1) A person mentioned in subsection 26(1) who is seeking a personal-use production licence shall submit an application to the Minister.

(2) The application must include

(a) a declaration of the applicant; and

(b) if the proposed production site is not the ordinary place of residence of the applicant and is not owned by the applicant, a declaration made by the owner of the site consenting to the production of marihuana at the site.

(3) The application may not be made jointly with another person.

28. (1) The declaration of the applicant under paragraph 27(2)(a) must indicate

(a) the applicant's name, date of birth and gender;

(b) the full address of the place where the applicant ordinarily resides as well as the applicant’s telephone number and, if applicable, facsimile transmission number and e-mail address;

(c) the mailing address of the place referred to in paragraph (b), if different;

(d) if the applicant is the holder of an authorization to possess, the number of the authorization;

(e) the full address of the site where the proposed production of marihuana is to be conducted;

(f) the proposed production area;

(g) if the proposed production area involves outdoor production entirely or partly indoor and partly outdoor production, that the production site is not adjacent to a school, public playground, day care facility or other public place frequented mainly by persons under 18 years of age;

(h) that the dried marihuana will be kept indoors and indicating whether it is proposed to keep it at

(i) the proposed production site, or

(ii) the ordinary place of residence of the applicant, if different; and

(i) a description of the security measures that will be implemented at the proposed production site and the proposed site where dried marihuana will be kept.

(2) The declaration must be dated and signed by the applicant and attest that the information contained in it is correct and complete.

29. (1) Subject to section 32, if the requirements of sections 27 and 28 are met, the Minister shall issue a personal-use production licence to the applicant.

(2) The licence shall indicate

(a) the name, date of birth and gender of the holder of the licence;

(b) the full address of the place where the holder ordinarily resides;

(c) the licence number;

(d) the full address of the site where the production of marihuana is authorized;

(e) the authorized production area;

(f) the maximum number of marihuana plants that may be under production at the production site at any time;

(g) the full address of the site where the dried marihuana may be kept;

(h) the maximum quantity of dried marihuana, in grams, that may be kept at the site referred to in paragraph (g) at any time;

(i) the date of issue; and

(j) the date of expiry.

30. (1) In the formulas in subsection (2),

(a) "A" is the daily dosage of dried marihuana, in grams, recommended for the applicant under paragraph 6(1)(c), 19(1)(c) or 22(2)(b), whichever applies;

(b) "C" is a constant equal to 1, representing the growth cycle of a marihuana plant from seeding to harvesting; and

(c) "D" is the maximum number of marihuana plants referred to in subsections 20(2) and 22(5) and paragraphs 29(2) (f) and 40(2)(g).

(2) The maximum number of marihuana plants referred to in paragraph (1)(c) is determined according to whichever of the following formulas applies:

(a) if the production area is entirely indoors,

$$D = [(A \times 365) \div (B \times 3C)] \times 1.2$$

where B is 30 grams, being the expected yield of dried marihuana per plant,

(b) if the production area is entirely outdoors,

$$D = [(A \times 365) \div (B \times C)] \times 1.3$$

where B is 250 grams, being the expected yield of dried marihuana per plant; and

(c) if the production area is partly indoors and partly outdoors,

(i) for the indoor period

$$D = [(A \times 182.5) \div (B \times 2C)] \times 1.2$$

where B is 30 grams, being the expected yield of dried marihuana per plant, and

(ii) for the outdoor period

$$D = [(A \times 182.5) \div (B \times C)] \times 1.3$$

where B is 250 grams, being the expected yield of dried marihuana per plant.

(3) If paragraph (2)(c) applies, the maximum number of marihuana plants for both periods of production shall be mentioned in the licence to produce.

(4) If the number determined for D is not a whole number, it shall be rounded to the next-highest whole number.

31. (1) In the formula in this subsection (2),

(a) "D" is,

(i) if the production area is entirely indoors or outdoors, the maximum number of marihuana plants that the holder of the licence to produce is authorized to produce, calculated under paragraphs 30(2)(a) or (b), whichever applies,

(ii) if the production area is partly indoors and partly outdoors, the maximum number of marihuana plants that the holder of the licence to produce is authorized to produce, calculated under subparagraph 30(2)(c)(ii); and

(b) "E" is the maximum quantity of dried marihuana mentioned in paragraphs 20(2) and 22(5) and in paragraphs 29(2)(h) and 40(2)(i).

(2) The maximum quantity of dried marihuana referred to in paragraph (1)(b) is determined according to whichever of the following formulas applies:

(a) if the production area is entirely indoors,

$$E = D \times B \times 1.5$$

where B is 30 grams, being the expected yield of dried marihuana per plant,

(b) if the production area is entirely outdoors,

$$E = D \times B \times 1.5$$

where B is 250 grams, being the expected yield of dried marihuana per plant, and

(c) if the production area is partly indoors and partly outdoors,

$$E = D \times B \times 1.5$$

where B is 250 grams, being the expected yield of dried marihuana per plant.

32. The Minister shall refuse to issue a personal-use production licence if
(a) the applicant is not a holder of an authorization to possess;
(b) the applicant is not eligible under section 25;
(c) any information or statement included in the application is false or misleading;
(d) the proposed production site would be a site for the production of marihuana under more than three licences to produce; or
(e) the applicant would be the holder of more than one licence to produce.

33. A personal-use production licence expires on the earlier of
(a) 12 months after its date of issue, and
(b) the date of expiry of the authorization to possess held by the licence holder.

34. (1) The holder of a designated-person production licence is authorized, in accordance with the licence,
(a) to produce marihuana for the medical purpose of the person who applied for the licence;
(b) to possess and keep, for the purpose mentioned in paragraph (a), a quantity of dried marihuana not exceeding the maximum quantity specified in the licence;

(c) if the production site specified in the licence is different from the site where dried marihuana may be kept, to transport directly from the first to the second site a quantity of marihuana not exceeding the maximum quantity that may be kept under the licence;

(d) if the site specified in the licence where dried marihuana may be kept is different from the place where the person who applied for the licence ordinarily resides, to transport directly from that site to the place of residence a quantity of dried marihuana not exceeding the maximum quantity specified in the authorization to possess on the basis of which the licence was issued; and

(e) to transfer, give or deliver directly to the person who applied for the licence a quantity of dried marihuana not exceeding the maximum quantity specified in the authorization to possess on the basis of which the licence was issued.

(2) No consideration may be obtained for any activity authorized under subsection (1).

35. A person is eligible to be issued a designated-person production licence only if the person is an individual ordinarily resident in Canada who

(a) has reached 18 years of age; and

(b) has not been found guilty, within the 10 years preceding the application, of

(i) a designated drug offence, or

(ii) an offence committed outside Canada that, if committed in Canada, would have constituted a designated drug offence.

36. (1) An application for a designated-person production licence shall be considered only if it is made by a person who

(a) is the holder of an authorization to possess on the basis of which the licence is applied for; or

(b) is not the holder of an authorization to possess, but either has applied for an authorization to possess or is applying for an authorization to possess concurrently with the licence application.

(2) If paragraph (1)(b) applies, the Minister must grant or refuse the application for an authorization before considering the licence application.

37. (1) A person mentioned in subsection 36(1) who is seeking to have a designated-person production licence issued to a designated person shall submit an application to the Minister.

(2) The application must include
(a) a declaration by the applicant;
(b) a declaration by the designated person;
(c) if the proposed production site is not the ordinary place of residence of the applicant and is not owned by the applicant, a declaration made by the owner of the site consenting to the production of marihuana at the site;
(d) a document issued by a Canadian police force establishing that, in respect of the 10 years preceding the application, the designated person does not have a criminal record as an adult for a designated drug offence; and
(e) two copies of a current photograph of the designated person that complies with the standards in paragraphs 10(a) to (c) and is certified by the applicant, on the reverse side, to be an accurate representation of the designated person.

(3) The application may not be made jointly with another person.

38. (1) The declaration of the applicant under paragraph 37(2)(a) must
(a) include the information referred to in paragraphs 28(1) (a) to (d);
(b) indicate the name, date of birth and gender of the designated person;
(c) indicate the full address of the place where the designated person ordinarily resides as well as the designated person's telephone number and, if applicable, facsimile transmission number and e-mail address; and
(d) indicate the mailing address of the place referred to in paragraph (c), if different.

(2) The declaration must be dated and signed by the applicant and attest that the information contained in the declaration is complete and correct.

39. (1) The declaration of the designated person under paragraph 37(2)(b) must
(a) include the information referred to in paragraphs 28(1) (e) to (g) and (i);
(b) indicate that the dried marihuana will be kept indoors and whether it is proposed to keep it at:
(i) the proposed production site, or
(ii) the ordinary place of residence of the designated person, if the proposed production site is not the ordinary place of residence of the applicant; and
(c) indicate that, within the 10 years preceding the application, the designated person has not been convicted of
(i) a designated drug offence, or
(ii) an offence that, if committed in Canada, would have constituted a

designated drug offence.

(2) The declaration must be dated and signed by the designated person and attest that the information contained in it is correct and complete.

40. (1) Subject to section 41, if the requirements of sections 37 to 39 are met, the Minister shall issue a designated-person production licence to the designated person.

(2) The licence shall indicate

(a) the name, date of birth and gender of the holder of the licence;
(b) the name, date of birth and gender of the person for whom the holder of the licence is authorized to produce marihuana and the full address of that person's place of ordinary residence;
(c) the full address of the place where the holder of the licence ordinarily resides;
(d) the licence number;
(e) the full address of the site where the production of marihuana is authorized;
(f) the authorized production area;
(g) the maximum number of marihuana plants that may be under production at the production site at any time;
(h) the full address of the site where the dried marihuana may be kept;
(i) the maximum quantity of dried marihuana that may be kept at the site authorized under paragraph (h) at any time;
(j) the date of issue; and
(k) the date of expiry.

41. The Minister shall refuse to issue a designated-person production licence

(a) if the designated person is not eligible under section 35;
(b) the designated person would be the holder of more than one licence to produce; or
(c) for any reason referred to in paragraphs 32(a) to (d).

42. A designated-person production licence expires on the earlier of

(a) 12 months after its date of issue, and
(b) the date of expiry of the authorization to possess on the basis of which the licence was issued.

…

51. (1) The Minister, and any person designated by the Minister under section 57 of the Act, is authorized to import and possess marihuana seed for the purpose of selling, providing, transporting, sending or delivering the seed in accordance with this section.

(2) The persons referred to in subsection (1) may sell, provide, transport, send or deliver marihuana seeds only to

(a) the holder of a licence to produce; or

(b) a licensed dealer under the *Narcotic Control Regulations*.

52. The holder of a licence to produce may produce marihuana only at the production site authorized in the licence and only in accordance with the authorized production area.

53. If the production area for a licence to produce permits the production of marihuana entirely outdoors or partly indoors and partly outdoors, the holder shall not produce marihuana outdoors if the production site is adjacent to a school, public playground, day care facility or other public place frequented mainly by persons under 18 years of age.

54. The holder of a licence to produce shall not produce marihuana in common with more than two other holders of licences to produce.

55. The holder of a licence to produce may keep dried marihuana only indoors at the site authorized in the licence for that purpose.

56. (1) The holder of a designated-person production licence must, at either the production site or the site where dried marihuana may be kept, maintain records of the following information in respect of the licence:

(a) the number of plants grown;

(b) the date each plant was planted from seed or by transplant;

(c) the date each plant was harvested; and

(d) for each plant harvested, the weight in grams of dried marihuana obtained.

(2) The information referred to in subsection (1) shall be retained for at least two years after it is recorded.

(3) On request, the holder of a designated-person production licence must provide the Minister with a copy of any record referred to in subsection (1).

57. (1) To verify that the production of marihuana is in conformity with these Regulations and a licence to produce, an inspector may, at any reasonable time, enter any place where the inspector believes on reasonable grounds that marihuana is being produced or kept by the holder of the licence to produce, and may, for that purpose,

(a) open and examine any container found there that could contain marihuana;

(b) examine anything found there that is used or is capable of being used to produce or keep marihuana;

(c) examine any records, electronic data or other documents found there

dealing with marihuana, other than records dealing with the medical condition of a person, and make copies or take extracts;

(d) use, or cause to be used, any computer system found there to examine electronic data referred to in paragraph (c);

(e) reproduce, or cause to be reproduced, any document from electronic data referred to in paragraph (c) in the form of a printout or other output;

(f) take any document or output referred to in paragraph (c) or (e) for examination or copying;

(g) examine any substance found there and, for the purpose of analysis, take samples, as reasonably required; and

(h) seize and retain any substance found there, if the inspector believes, on reasonable grounds, that it is necessary.

(2) Despite subsection (1), an inspector may not enter a dwelling-place without the consent of an occupant.

…

PART 4
SUPPLY BY A MEDICAL PRACTITIONER

70. A medical practitioner who has obtained marihuana from a licensed dealer under subsection 24(2) of the *Narcotic Control Regulations* may sell or furnish the marihuana to the holder of an authorization to possess under the practitioner's care.