C.O.A. FILE NOS: C39532; C39738; C39740

Synopsis of *Hitzig et al. v. Her Majesty the Queen*; *Parker v. Her Majesty the Queen*; and *Paquette and Turmel v. Her Majesty the Queen*

The federal government has recognized since 1999 that the possession and use of marihuana for medical purposes by individuals who can demonstrate medical need should not be a crime under the *Controlled Drugs and Substances Act*. In June 1999, the government began to issue ministerial permits allowing individuals to possess and cultivate marihuana for medicinal purposes. In July 2000, this court held in *R. v. Parker* that a scheme that depended entirely on how the Minister of Health chose to exercise his or her discretion was unconstitutional. The court gave the government one year to fix the constitutional defect.

The government responded in July 2001 with the *Marihuana Medical Access Regulations* (*MMAR*). The *MMAR* recognize that marihuana is a medically appropriate medication for the treatment of various symptoms associated with various serious illnesses. They also recognize that the determination of when marihuana is a medically appropriate medication and the amount of marihuana that is appropriate are decisions that should be made by qualified physicians and not by government officials or by the users of marihuana.

The *MMAR* provide that an authorization to possess (ATP) marihuana shall be issued where an applicant meets the medical criteria set out in the regulations. They 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 (PPL) or a person designated to grow the marihuana for the ATP holder may acquire a licence (DPL).

Following promulgation of the *MMAR*, several seriously ill individuals brought a joint application in the Superior Court of Justice challenging their constitutionality. On January 9, 2003, Justice Sidney N. Lederman concluded that, because the *MMAR* failed to provide a legal supply of marihuana for persons entitled to possess it for medicinal purposes, the regulations are constitutionally invalid and of no force and effect. However, he suspended his declaration of invalidity for a period of six months.

On July 8, 2003, shortly before these appeals were heard, the government brought forward an interim policy making available for approved medical users marihuana seeds and dried marihuana grown for the government. However, the interim policy was to be in place "only while clarification was being sought from the courts" and the government did not ask the court to pass on the constitutionality of the *MMAR*

as modified by the interim policy nor suggest that the interim policy should have any effect on the outcome of these appeals.

In a judgment released today, a panel of the Court of Appeal, consisting of Justices David Doherty, Stephen Goudge and Janet Simmons unanimously dismissed the federal government's appeal of Justice Lederman's decision.

The court accepted that the evidence filed on the application establishes that many individuals who have or would be entitled to receive an ATP will have to go to the black market on a more or less regular basis to maintain their supply of medical marihuana. The court observed that many of these individuals are not only seriously ill, they are also significantly physically handicapped and therefore cannot possibly grow their own marihuana. Moreover, because of restrictions in the *MMAR*, cultivation by a designate (DPL holder) will be an answer for only some of the persons who qualify.

The court noted that the *MMAR* scheme assumes the existence of the black market and indeed depends on it, but that medical marihuana users have experienced significant difficulties in accessing the black market safely. The court concluded that a scheme that authorizes possession of marihuana by seriously ill individuals but which drives some of them to the black market to meet their recognized medical needs undermines the rule of law and fails to create a constitutionally valid medical exemption to the criminal prohibition against possession of marihuana contained in s. 4 of the *Controlled Drugs and Substances Act*.

In addition to holding that the absence of a legal supply of medical marihuana makes the *MMAR* constitutionally defective, the court determined that the requirement in the *MMAR* that some applicants have the support of a second specialist physician to establish medical need is unconstitutional. Primarily because the second specialist is not asked to opine about the principal justification advanced by the government to support specialist involvement, namely, the availability of other possible treatments, the court determined that the second specialist requirement is an arbitrary barrier that adds little or nothing to the assessment of medical need.

Rather than strike down the *MMAR* in their entirety and declare that the marihuana prohibition contained in s. 4 of the *Controlled Drugs and Substances Act* continues to be of no force and effect, the court crafted a narrower remedy more specifically targeted to the constitutional shortcomings it had identified, striking down only the following specific provisions of the *MMAR*:

- the prohibition against compensating a DPL holder for growing marihuana and supplying it to an ATP holder;

- the provision preventing a DPL holder from growing marihuana for more than one ATP holder;
- the prohibition against a DPL holder producing marihuana in common with more than two other DPL holders; and
- the second specialist requirement.

The court concluded that the same considerations that justified the narrow focus of its remedy militated against suspending it. The court said that unlike a broader declaration, this narrow remedy would create a constitutionally valid medical exemption, making the marihuana prohibition in s. 4 of the *Controlled Drugs and Substances Act* immediately constitutionally valid and of full force and effect and removing any uncertainty concerning the validity of the prohibition. In addition, the court noted that its order represents a minimal intrusion on the government's scheme of medical exemption. It leaves untouched the licensed possession aspect of the *MMAR* and modifies the licensed production aspect only enough to make it constitutionally acceptable. Moreover, the remedy crafted by the court merely clears the way for licensing those suppliers upon whom the government scheme attempted to rely. Finally, the court said that if the government chooses to adopt a fundamentally different approach to the medical exemption issue or if it chooses to impose additional reasonable limits on the present scheme, the government can do so easily and with dispatch, by way of regulation.

The court emphasized that its decision applies only in respect of persons who establish a medical need to use marihuana to relieve symptoms of serious illnesses and that it does not apply to persons who wish to use or possess marihuana for social or recreational purposes.

The court dismissed two additional related appeals brought by three individuals whose applications for constitutional declarations were also heard by Justice Lederman, holding that no further relief was warranted based on the evidence adduced in those applications.

C.O.A. FILE NO.: C40043

Synopsis of *R. v. J.P.*

In its concurrently released decision of *R. v. J.P.*, the court confirmed that the offence of possession of marihuana in s. 4 of the *Controlled Drugs and Substances Act* was of no force and effect on April 12, 2002 (the date the young person was charged) because, as of that date, there was no constitutionally valid medical exemption to the marihuana prohibition as required by *Parker*. However, the court concluded that the scope of the marihuana possession prohibition is subject to change by regulation.

Synopsis of *R. v. Turmel.*

In its concurrently released decision of *R. v. Turmel*, the court rejected the appellant's argument that its decision in *R. v. Parker* had the effect of removing marihuana from Schedule II of the *Controlled Drugs and Substances Act*. The court confirmed that the declaration in *Parker* was limited to the offence of possession of marihuana contained in s. 4 of the *Controlled Drugs and Substances Act* and that the offence of possession of marihuana for the purpose of trafficking contained in s. 5(2) of the *Act* continued to exist on May 26, 2003 (the date Mr. Turmel was charged).