Conroy & company

# MEDICAL MARIJUANA

**ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)**

**Toronto Region**

B E T W E E N :

HER MAJESTY THE QUEEN
**Respondent**

- and -

TERRANCE PARKER
**Applicant**

SHEPPARD, PROV. DIV. J.:

Kevin Wilson, for the Crown

Aaron Harnett, for the Accused

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By agreement between Crown and Defense, Terrance Parker was tried before this court in one proceeding on the following two counts arising July 18, 1996:

> 1) cultivate a narcotic, to wit: Cannabis Marihuana, contrary to Section 6(l) of the *Narcotic Control Act*.
>
> 2) unlawfully did have in his possession for the purpose of trafficking, a narcotic, to wit: Cannabis Sativa, its preparations, derivatives, and similar synthetic preparations, namely Cannabis (Marihuana), contrary

> to Section 4(2) of the *Narcotic Control Act*, thereby Committing an Offense under Section 4(3) of the said Act.

and one count on September 18, 1997:

> unlawfully possess a controlled substance to wit: Cannabis Sativa, its preparations, derivatives and similar synthetic preparations, namely Cannabis Marihuana contrary to Section 4(1) of the *Controlled Drugs and Substances Act*.

**The Trial**

Crown evidence at the trial on counts I and 2 was by way of an agreed statement of facts (Appendix 1A to these reasons for judgment) and a statement by way of questions and answers in the arresting officer's notebook given immediately following the accused's arrest. This statement, typed from the officer's notebook, (Appendix 1B to these reasons for judgment) was agreed to be free and voluntary and were admitted without a voir dire. In addition, the Crown called the police officer who received, bagged and weighed the marihuana and an officer expert in aspects of the street trade (trafficking) in illicit drugs in Toronto.

The Crown's evidence read in at the trial on the simple possession count was the police synopsis which stated that, on September 18, 1997, the accused at his apartment was found to be in possession of three growing marihuana plants which he acknowledges were marihuana. The defense called no evidence at trial. The bulk of the nine-day proceeding was consumed by the defense’s application for *Charter relief.*

The Court ruled earlier (see reasons of October 30, 1997) that any ruling in respect of the *Charter* application ought to come at the conclusion of the trial so as not to fragment the trial process with appeals being launched at the conclusion of each motion or application. *R. v. Martin 63 C.C.C (3d) 71 @ 85 (Ont. CA.), R. v. DeSousa 76 C. C. C. (3d) 124 @ 132 (S.C.C.).*

As this application had no effect on count 2, the possession for the purpose of trafficking count, it can be addressed separately first.

The receiving police officer's evidence as to weights and the bagging of the fresh marihuana plants he received was unclear. The Court was left in a state of some confusion and therefore doubt, as to what quantity of smokable marihuana (as opposed to dirt, water, stems, and roots) that he had actually received. Therefore, I find no inference can be drawn based on the weight of marihuana seized.

The drug squad officer fairly testified that with this number of plants and no other paraphernalia of trafficking (papers, scales, bags, etc.) that he could not have formed the opinion that the accused's possession was for the purpose of trafficking. This officer has four times been found to be an expert on this issue by Ontario Provincial Courts.

Given this evidence, the Crown argues that Mr. Parker must be convicted by his own statement.

The defense argues that although the statement was a free and voluntary one, on the elements necessary to prove possession for the purpose of trafficking beyond a reasonable doubt, it is too vague. If it is found to be too vague, it ought to leave a reasonable doubt in the Court's mind resulting in the accused's acquittal.

The Court cannot agree. Mr. Parker is an experienced individual with respect to offenses under the *Narcotic Control Act*. He is a long-time user of marihuana and an advocate for the legalized medical use of marihuana. When the totality of the questions and answers with Officer McArthur are reviewed, it is absolutely certain what was asked and what was answered. There is a responsiveness and consistency to the answers. Nothing is left vague:

> Q: What do you do with this stuff, Terry?
>
> A: I use most of it and I GIVE (court's emphasis) some to some people who need it for seizures.

Beyond not identifying the people who receive his marihuana, this is a perfectly clear statement. It is confirmed by the next answer "Yeah, I help other people out".

Section 2, the interpretation section of the *Narcotic Control Act*, defines traffic as:

(a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or

(b) to offer to do anything referred to in paragraph (a)

This definition includes the exact word "give" as used by the accused in his statement. Since "for gain" need not be an element of the offense, this court finds that the accused's possession of the marihuana found on July 18, 1996 was, at least in part, with the intent and for the purpose of physically making the marihuana available to others as selected by him. Further, Mr. Parker's statement indicates this intent had on occasion been carried out. Therefore, there will be a finding of guilt on count 2.

On the remaining counts to which the *Charter* application refers, it is conceded that the facts to support a finding of guilt both under Section 6, Cultivation, of former *Narcotic Control Act* (the *N.C.A.*) and Section 4, Possession, of the *Controlled Drugs and Substances Act* (the *C.D.S.A.*) are established in the Crown's evidence. Should the *Charter* application fail, the accused would be guilty of both offenses.

**Charter Application**

In short, the Applicant/Accused seeks a declaration of invalidity of each of the above Sections as they relate to an individual who can establish a personal medical necessity for his use of marihuana. This relief is sought pursuant to both Section 52

of the *Constitution Act, 1982*, and 24(l) of the *Canadian Charter of Rights and Freedoms (the "Charter")*.

Alternatively, the accused would seek to be exempted from the impugned sections while Parliament considers the possession and production of personal use medicinal marihuana prior to the effective date of any declaration of invalidity. In both alternatives, the accused argues these sections are over-broad and unconstitutional as they violate Section 7 of the *Charter*.

In support of the application, the accused filed materials and called evidence as follows:

1. his extensive affidavit with numerous exhibits attached on which he was cross-examined;
2. his mother, Helen Cork's affidavit giving the history and treatment of Mr. Parker's epileptic seizures. The affidavit describes in layman's language the positive effect smoking marihuana has on Mr. Parker when he shows signs of imminent seizure;
3. the affidavit of Dr. Lester Grinspoon one of the foremost authorities on marihuana including two published works Marihuana: The Forbidden Medicine and Marihuana: Reconsidered;
4. the affidavit of Robert Carl Randall an American glaucoma sufferer who has become a leading expert on marihuana's medical use. He is an advocate for such medical use;
5. the affidavit of Dr. John P. Morgan, Professor of Pharmacology at the City University of New York Medical School, an expert/advocate on medical uses of marihuana. Dr. Morgan also testified and advised that research and studies indicate that Tetrahydrocannabinol and Cannabidiol appear to be the effective elements within marihuana which have medical therapeutic effect for a significant list of ilnesses. This list includes victims of epilepsy;
6. Dr. Lynn Zimmer, Associate Professor at the University of New York, co-author with Dr. Morgan of Marijuana Myths, Marijuana Facts testified on marihuana policies in foreign jurisdictions. The trend described was to an increasing recognition of the medically therapeutic value of smoked marihuana. She described how formally and informally its use was being recognized or tolerated in several foreign jurisdictions;
7. Valerie Corral, an epileptic and a medical user and cultivator of marihuana in California, testified on her medical needs and on a non-profit growing and distribution organization for medical users,
8. Diane Riley, an academic and former member of the Canadian Centre on Substance Abuse - National Policy Group, now defunded, orally reviewed studies and policy in a number of foreign jurisdictions. She reviewed a rare long-term study from New South Wales which concluded "no significant finding" could be attributed to marihuana smoking. Although this study was

done in the 1980's, it has not to date been challenged. Finally, the witness reviewed the course of passage of the new Controlled Drug and Substance Act by Parliament, expressing her disappointment at the legislators' rejection of submissions for a medical exemption for marihuana possession; and:

9. Dr. John Goodhue, M.D., a General Practitioner doing primary care in Toronto for over 200 HIV reactive (positive) patients, 70 of whom have developed AIDS. He described negative side effects of Marinol (synthetic Tetrahydrocannabinol) in some patients. His perception is that smoked marihuana is not a "particularly risky drug". He does warn users not to drive after use. The smokable marihuana does not have the side effect of Marinol. AZT, prescribed in AIDS treatments, and other drugs in "drug cocktails" for these patients often produce the side effects of nausea and vomiting. He prescribes Marinol for control of this side effect but is aware many of his patients prefer and use smokable marihuana.

In this application and trial, the Court was advised that the Applicant/Accused had faced trial for simple possession in Brampton in 1987. The agreed history of this criminal litigation is found in the filed materials of the Applicant/Accused as follows:

> On December 15, 1987 His Honour Judge Langdon, as he then was, ruled in favour of the applicant. His brief reasons are as follows:
>
> > I have reviewed the evidence and the defence of necessity as the Supreme Court of Canada defined it in the case of Perka. Having reviewed all of the evidence, it is my view that the evidence fairly raises the "defence". I am not satisfied beyond a reasonable doubt that the prosecution has negated each and every element. For that reason I will enter a verdict of not guilty.
>
> The Department of Justice appealed the decision to the District Court on the basis that His Honour Judge Langdon had erred in his application of the decision of Perka et. al v. The Queen. On November 8, 1988 His Honour Mr. Justice B. Shapiro heard the appeal. On November 17, 1988 His Honour released his reasons for dismissing the appeal. The endorsement of His Lordship is as follows:
>
> > I have reviewed the evidence in this matter and considered that law as set out in Perka v. The Queen (194) 14 C.C.C. (3d) 385.
> >
> > In light of the long history (27 years) of grand mal epilepsy of the respondent, age 31, and the continuing attempts at treatment including two surgical procedures, there was evidence upon which the learned trial judge could have found as he did that the accused respondent was entitled to the benefit of reasonable doubt in his defence of necessity. Particularly is this so in light of the comments of Dickson J. (As he then was) at pages 398 and 399 of Perka with reference to "moral and normative involuntariness". The appeal will

> therefore be dismissed.
>
> B. Barry Shapiro
> Judge
>
> I should add that it may be appropriate for the respondent to pursue further the matters referred to in the letters filed as Ex. #1 at trial.
>
> B.B.S.

This final sentence of the appeal reasons was reference to Mr. Parker's medical opinion that his marihuana use was "medically necessary". The final paragraph of Dr. D.M. Sider's medical report dated November 6, 1987 reads:

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

No further appeal of this decision was filed by the Respondent/Crown.

As no evidence was called by the Applicant/Accused at this trial, the defence of necessity often described as the Perka defence, was not raised before this court.

The Respondent/Crown filed the judgment of The Honourable Justice McCart in *R. v. Clay* dated August 14, 1997 now at *35 W. C.B. (2nd) 440*. In addition to this judgment, both parties have agreed to file three volumes of expert evidence heard during the *Clay* trial. They have asked to incorporate these transcripts as if they were evidence heard at this trial. This Court has agreed to this procedure to save needless expense to the parties and also to save trial court time. There are no findings of credibility to be made in relation to any of this evidence. There is a strong

agreement among these experts with only some alterations of emphasis or in their caveats.

This Court is aware that notice of application for leave to appeal and notice of appeal of conviction was filed September 5, 1997 by Christopher Clay and the appeal is pending at this date of judgment.

The Respondent/Crown called:

1. Professor Harold Kalant, a pharmacist expert who had given evidence at the *R. v. Clay* trial. He took very limited issue with that Court's findings in assuming continued current levels of use of marihuana by each consumer except to advise that synthetic Tetrahydrocannabinol (hereinafter THC) sold under the name Marinol was available in Canada contrary to the previous Court's review of the evidence at the *Clay* trial. He further confirmed that synthetic Cannabidiol (hereinafter CBD) did not exist, although it may well be useful for treatment of epileptic patients and that the cannabinoids in marihuana increase the effectiveness of other regularly prescribed medications. He "would be much happier if CBD was available". CBD is only available in smokable marihuana.

   And

2. Leslie Bruce Rowsell, Federal Director of the Bureau of Drug Surveillance, who advised there was no authorized producer of smokable marihuana in Canada. There are two licensed synthetic THC drugs. He reviewed the $100,000 - $200,000 process for testing and licensing a drug in Canada. No application for marihuana has been made; therefore, no tests have been done. He acknowledged that there is no realistic way today for this Applicant/Accused to obtain "legal" marihuana in Canada.

This Court has reviewed the key aspects of the witnesses' evidence both heard, or filed during evidence in *R. v. Clay*, from Dr. Lester Grinspoon, Robert Carl Randall, Dr. John P. Morgan, Dr. Harold Kalant and Leslie Bruce Rowsell. The latter three were heard for the second time in the past six months in air Ontario trial Court in this trial. This Court has their evidence for review in transcripts, provided on consent to me, from the *Clay* trial. Having heard and read fresh evidence in this trial directed particularly to this and other accused who receive effective medical benefit from the

use of marihuana, this court can conclude it has been established to the necessary level on this application that the timely smoking of marihuana has a therapeutic effect in the treatment of:

a) nausea and vomiting particularly related to Chemotherapy
b) intra-occular pressure from glaucoma
c) muscle spasticity from spinal cord injuries or multiple sclerosis
d) migraine headaches
e) epileptic seizures
f) chronic pain

The Parker affidavit sworn October 7, 1997 notes that, in the control of epileptic seizures, Mr. Parker has found:

Paragraph 18:

> Between December 19, 1980 and March 1981, 1 recorded in my journal that I consumed marihuana in addition to my prescription medicine every day. I suffered no grand mal attacks at all, but did suffer some petit mal seizures. As a result of this phenomenon, he (Mr. Parker's physician) formed the opinion that marihuana was of medical benefit to me. Attached as exhibit "D" to this affidavit is a copy of a letter from my then physician Dr. Douglas Sider to this effect dated November 6,1987. (Reproduced in part earlier in this judgment.)

Paragraph 19:

> I continue to derive very substantial medical benefit from marihuana since 1969 to this day. My current prescription of pharmaceutical drugs is Dilant'm, 300 mg per day and Mysoline, 750 mg per day since 1969. If I consume marihuana on a daily basis in addition to this, I experience virtually no seizures of any kind. However, if I am without marihuana, within 3 days I will begin to experience seizures again, and have approximately 3-5 grand mal seizures per week, and anywhere from 15-80 petit mal, partial complex, fall and Jacksonian seizures per week.

Paragraph 20:

> In fact, the use of marihuana can help me overcome a seizure as it descends upon me. When I feel the prodrome, I can consume marihuana and actually combat the oncoming seizure. The effects of the marihuana helps me confront the anxiety, and I feel as if I can literally fight off the coming seizure. After 38 years of this terrible affliction, and hundreds, if not more than a thousand seizures, I can

> say that it is only with the assistance of marihuana that I have ever been able to fight through the prodrome and stave off an oncoming grand mal.

The Court has again looked at the same statistical evidence reviewed by Mr. Justice McCart and would conclude as he did at p. 11-12 of his oral reasons:

1. Consumption of marihuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marihuana;
3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
4. There is no hard evidence that cannabis consumption induces psychoses;
5. Cannabis is not an addictive substance;
6. Marihuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of marihuana probably does not lead to "hard drug" use for the vast majority of marihuana consumers, although there appears to be a statistical relationship between the use of marihuana and a variety of other psychoactive drugs;
8. Marihuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marihuana;
10. There is no evidence that marihuana causes anti-motivational syndrome;
11. Less than 1% of marihuana consumers are daily users;
12. Consumption in so-called "decriminalized states" does not increase out of proportion to states where there is no decriminalization;
13. Health-related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

The only established negative effect, as with tobacco smoking, is bronchial pulmonary damage. The greater the usage, the greater this risk becomes.

The general agreement of experts appears to be that regular moderate use of marihuana causes no physical or psychological harm for the vast majority of users.

Further, from the evidence of Dr. Morgan and others, it is established that in patients suffering from nausea, an oral medication may cause vomiting. The smoke of marihuana is more efficient and at least five times faster in delivering THC (and of course CBD) to the blood stream and in some cases like Mr. Parker's, more effective.

This Court has noted Mr. Justice McCart's aside at page 16 of his reasons:

> As an aside, Parliament may wish to take a serious look at easing the restrictions that apply to the use of marihuana f6r the medical uses as outlined above as well as for alleviating some of the symptoms associated with multiple sclerosis, such as pain and muscle spasm. There appears to be no merit to the widespread claim that marihuana has no therapeutic value whatsoever. In any event, as I understand it, Marinol is not available in Canada.

The learned trial judge erred regarding the availability of Marinol (synthetic THC). Marinol has been available in Canada for several years. However, it is correct that no form of synthetic CBD is available which may, in fact, be the most medicinally effective element in smokeable marihuana. This element does not exist in Marinol.

It is clear on the evidence specific to the facts of this case that Mr. Parker's cultivation of marihuana was incidental to his need to possess marihuana for its therapeutic medical use for the treatment of his epilepsy. It allowed him to control the quality of the drug smoked to maximize its benefit and minimize any risks from a tainted or adulterated product.

Further, it was an economic necessity for him to grow his own marihuana. All witnesses agree that at illicit street prices, the marihuana used by Mr. Parker would cost approximately $5,000.00 annually. Mr. Parker lives on disability benefits from C.P.P. Therefore, little income would remain for the other necessities of life, food, shelter, transportation and clothes, if he had to pay street prices for his marihuana.

It seems clear to this court that given the unique set of circumstances present in this Applicant/Accused, this application can be seen as a "best case scenario" for the liberalization/review of legislation governing possession and cultivation of marihuana in Canada. In *R. v. Clay* , no such medical need could be claimed by the applicant. The similar application in that proceeding was based on a preference for marihuana smoking as a recreational activity.

By not raising the *Perka* defence at trial, the Applicant/Accused has chosen to rely entirely on his *Charter* application. He does so because of the limited protection afforded by the *Perka* defence.

The Respondent/Crown was aware of this situation. The counsel for the Applicant/Accused as much as acknowledged this in his submissions. In other words, if a *Charter* attack in support of the possession and personal use of marihuana could successfully be mounted, then for the Applicant/Accused, this was the case to do so.

**Does the Applicant/Accused Stand a Risk of Being Deprived of His Right to Life, Liberty and Security as Protected by Section 7 of the *Charter?***

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.

The onus to establish this rests with the Applicant/Accused. As in *Clay*, however, this onus can quickly be satisfied given that for both these offences a custody sentence may be imposed. This is a peril faced by any able-bodied individual so charged. However, the peril becomes dramatically intensified for an individual suffering under the disabilities of Mr. Parker.

Although prescribed medication should be available to an incarcerated person, the beneficial therapeutic effects of smoking marihuana would not be available. In a jail setting, if a seizure followed, then Mr. Parker could be at real risk of injury or death. A jail cell containing hard objects, wall and floor would be a most dangerous environment in which to suffer a seizure. The anxiety from worrying about such an event could be a cruel and unusual punishment in itself. It appears from his evidence that such an event would just be a matter of time. Therefore, for this

Applicant/Accused, jail is far more than a temporary loss of liberty. It puts his very life at risk and threatens the security of his person.

Although the Crown mounted a general rebuttal to the position adopted by this Court, it could not bring Mr. Parker into the general situation. For example, the Crown argued since medical treatment is not denied inmates, then Mr. Parker could receive his prescription drugs plus Marinol while in custody. Further, in custody, he could have his blood level monitored for THC so as to control his seizures. This ignores the evidence that synthetic THC is not effective for this individual and in any event he would not be receiving CBD which is believed to be of further assistance to him.

Finally, the trial process itself cannot provide protection for this Applicant/Accused's liberty. He is an admitted daily possessor, cultivator and user of marihuana. He is and has been guilty of an offence arising from his admissions every day of his life for at least two decades. He is a chronic offender. Barring a medical discovery, his need for marihuana will not abate.

A common law defence of necessity has previously succeeded (1987) but it would have to be made afresh at each trial. In addition to financial cost, stress, trial uncertainties and arrest, failure to have his defence accepted creates a serious daily risk. Security of the person is lost; therefore, the trial process is no protection for Mr. Parker.

Mr. Parker suffers the loss of his plants or dry product each and every time he is arrested. Having accepted the Applicant/Accused's daily need for marihuana and his inability to pay illicit street prices for it, as in itself, severely affects the security of his person by reducing the availability of marihuana to him.

The evidence established that the Applicant/Accused with his medical disability is traumatized by police raids at his premises, the questioning, the arrest and the ultimate loss of his marihuana.

> "Security of the person" within the meaning of; s.7 of the *Charter* must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an Act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one, hand, the commission of a crime to obtain effective and timely medical treatment and, on the other had, inadequate treatment or no treatment at all, her night to security of the person has been violated.
>
> *Morgentaller, Smolling and Scott v. the Queen* 37 C.C.C. (3d) at p. 465, 485.

Therefore, in conclusion, Mr. Parker stands a daily risk of being deprived of his night to life, liberty and security. The Court now moves to consider whether legislation which puts a person in such a position can be in accord with the principles of fundamental justice.

**Is this Deprivation Contrary to the Principles of Fundamental Justice?**

If liberty is the right a person has under the *Charter*, then a person must possess an autonomy to make decisions of personal importance. Good health is of personal importance. The achievement and maintenance of the best individual level of health possible is of personal importance. Further, it is of personal importance to be as free of illness and medical disability or their effects as is possible for each individual. Health is fundamental to life and the security of each person.

Serious decisions regarding the management of illness and medical disability are, for most Canadians, made following consultation with a doctor. Canada has an elaborate and costly health care system to ensure this opportunity is available to all Canadians. This has been the lengthy course followed by Mr. Parker. The negative side effects or "harms" in the use of any medication is a significant part of that medical decision-

making process between a doctor and patient. Mr. Parker has made his decision in the management of his epilepsy. It has apparently met with some success. It has been known and supported by some of his doctors over the years.

This is an entirely different factual situation than has been before other courts in the past. This was not the situation before Mr. Justice McCart in *R. v. Clay*; nor would it be for the huge majority of persons charged with this offence. These situations are ones of occasional recreational use. The parallel with the recreational consumption of beverage alcohol is obvious. Courts have consistently rejected arguments that the personal possession of marihuana was of "fundamental personal importance". *R v. Clay* at p. 23.

This same reasoning cannot apply to the Parker facts. The control of his epileptic seizures is of critical personal importance to him and in the interest of the greater community of which he is a part, the same community who pay his health care costs. I find he has established that this control is best achieved through a combination of prescribed medications and the smoking of marihuana. For this Applicant/Accused to be deprived of his smokable marihuana is to be deprived of something of fundamental personal importance.

It is accepted that beverage alcohol and tobacco, although both potentially individually addictive and carrying with their use a huge taxpayers' cost, are tolerated in our society (although regulated) as part of the cultural tradition of the majority of our community. This cannot be said of marihuana and therefore it is argued it ought to be prohibited. This argument is to ignore that for many prohibited drugs, use is permitted for a controlled therapeutic medical purpose - morphine and heroin being such examples of long-standing. Therefore, when considering cultural tradition as a curb on the state's legislative action, the setting for the tradition must

also be considered. On the facts before this Court, the "setting" is therapeutic and not recreational. Therefore, consideration of the difference in cultural traditions in a recreational setting between beverage alcohol or tobacco and marihuana is not relevant.

The Respondent/Crown argued that Mr. Parker's choice of an illegal form of therapy for the control of his epilepsy is an unnecessary choice. Although the Respondent/Crown did not challenge the Applicant/Accused's affidavit, they allege Mr. Parker had:

a) failed to seek sufficient medical attention,
b) failed to request a prescription for Marinol, and
c) failed to have his blood levels of THC monitored by regular blood tests.

The Court on the evidence cannot accept any of these three alleged failures as having been supported in the evidence.

In fact, Mr. Parker has received regular medical supervision for his prescribed drugs since 1969. He has not sought a Marinol prescription because synthetic THC was not effective for him in a clinical trial. It does not reach his blood stream quickly enough to prevent a seizure when he is first aware of an impending attack. THC and CBD from smoked marihuana reach the blood stream many times more quickly through lung absorption. Finally, Marinol does not contain CBD which appears to have additional therapeutic value for him. Parker does have regular blood work done during numerous emergency hospital admissions and regular medical visits. The Court has found no basis on which to fault Mr. Parker for his management of his serious medical condition. This is not an answer to this application.

It is overbroad not to provide by legislation a procedural process for an individual in these circumstances to be exempt from prosecution when personal possession and

cultivation is for legitimate medical use. It does not accord with fundamental justice to criminalize a person suffering a serious chronic medical disability for possessing a vitally helpful substance not legally available to him in Canada.

It is accepted that in large measure both the *N.C.A.* and *C.D.S.A.* are statutes designed to protect the health and well-being of Canadians. However. the effect as it relates to this Applicant/Accused is to do, if not the exact opposite, certainly significantly less by leaving him vulnerable to arrest and imprisonment, to the loss of the therapeutic assistance of marihuana, and to greater risk of physical injury in the community by more frequent seizures. Thus, a balance between the state's interest to protect the health of Canadians and the effect it has on this individual is not met. Therefore, the Court concludes that deprivation to the Applicant/Accused arising from a blanket prohibition denying him possession of marihuana, in the circumstances of this case, does little or nothing to enhance the state's interest in better health for this individual member of the community.

It is a principle of fundamental justice that the legislation not be overbroad. *Morgentaller* p. 511. As Mr. Justice Cory wrote for the majority in *R. v. Heywood*:

> In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the state objective? If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because an individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> *R. v. Heywood*, 94 C.C.C. (3d) 481 at 514.

If the original purpose in 1923 for the inclusion of marihuana in *N.C.A.* and now the *C.D.S.A.* was to protect the good health of Canadians from something that would

jeopardize that health, then current knowledge of its effects, as summarized earlier, ought now to cause a review of this purpose.

The Respondent/Crown argues that one rationale for the continuation of the current legislative prohibition is to assure that Canada will continue to legislate in accordance with its treaty obligations under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3(2) (hereinafter called the Convention). The schedules to this treaty included cannabis (marihuana).

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

Article 14(2) of the Convention reads:

> Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or Psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

Life, liberty and security of the person are just such fundamental human rights which Canada is obligated to respect under this article. Therefore, a finding that the Applicant/Accused's rights under Section 7 of the *Charter* have been violated fully

rebuts the proposition that impugned legislation enhances Canada's interest by appearing to adhere to the Convention.

The Respondent/Crown submits that, having found a breach of the principles of fundamental justice and thereby a breach of Section 7 of the *Charter*, a like analysis would apply to Section I of the *Charter*.

Section I reads:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Respondent/Crown conceded that finding Section 3(l) and 6(l) of the *N.C.A.* and Section 4(l) and 7(i) of the *C.D.S.A.* inconsistent with Section 7 of the *Charter*, would result in the Court answering the question under Section I in the negative. The Court accepts the logic of the submission and therefore answers the question imposed by the section in the negative.

This *Charter* application must, for the above reasons, succeed. The violation of the fundamental principles of justice which underlies this community's sense of fair play and decency require this result.

This judgment ought not to be read as a decriminalization initiative by one Court in the face of the legislative competence of the Parliament of Canada. A review of *Rodriguez v. British Columbia Attorney General* [1993] 3 S.CR., 519 assists in delineating this Court's role in relation to that of the Parliament of Canada.

**The Remedy: To Strike Down or Read In?**

The Applicant/Accused has sought in his application alternative remedies in respect of section 3(t) and 6(l) of the former *N.C.A.* sections 4(l) and 7(l) of the new *C.D.S.A.* Mr. Parker is assisted by either alternative.

Without question, the provincial court in a criminal proceeding has the power to declare legislation invalid ("of no force or effect") by reason of a *Charter* violation. A dismissal in such circumstance can follow without reference to Section 24(l) of the Charter. *R. v. Big M Drug Mart* [1985] 1. S. CR. 295. Equally, the Court, rather than a declaration of invalidity, can create an exception *R. v. Seaboyer and The Oueen* (1987), 37 CCC (3d) 53.

It has not proved difficult on the facts of the case at bar for the Applicant/Accused to prove on a balance of probabilities the Section 7 *Charter* violation and his entitlement to an exemption. There is no direct evidence of how many individuals in Canada could be in a similar position. How often the impugned sections of the *N.C.A.* or *C.D.S.A.* would produce a result inconsistent with the *Charter* is unknown. However, it is clear from the expert evidence accepted by the Court that Mr. Parker is not alone in having his Section 7 rights violated in this manner.

In *Schacter v. Canada* [1992] 2. S. CR., 679 the Supreme Court of Canada discussed reading in or down versus striking down, and Section 52 versus 24(l). In *Schacter*, the Court said that an individual remedy under section 24(l) of the *Charter* would rarely be available in conjunction with action under section 52 of the *Constitution Act*. This is one of those rare situations. The nature of the *Charter* violation in this application requires remedies under both sections. Otherwise, it is doubtful Mr. Parker could have the return of his property as part of an order of this Court.

The *N.C.A.* did not and the *C.D.S.A.* does not include an exemption for a person who requires smokable marihuana for therapeutic medically sanctioned use. It does not

provide the opportunity for lawful marihuana use in Canada. Reading in such an exemption is necessary to protect the *Charter* rights of Mr. Parker. To do so reduces the breadth of those sections of the statutes.

This Court concludes therefore, the appropriate remedy on this application is one of reading in an exemption. This remedy could be seen as a reading down or a reading in. It pulls back the breadth of legislation and so it reads the legislation down. It adds an exemption to legislation and so reads that exemption into the legislation.

Mr. Parker will be granted immediate protection under Section 24(l) of the *Charter* of a stay of proceeding with respect to count I (cultivate a narcotic, Section 6(l) *N.C.A.*) and the September 18, 1997 count (possession of a controlled substance, Section 4(l) of the *C.D.S.A*). All plant material (three plants) seized from him by the Metropolitan Toronto Police Services on September 18, 1997 is to be returned to him forthwith.

Notwithstanding that the *N.C.A.* was repealed by Parliament effective May 14, 1997, many alleged offences under Section 3(l) and Section 6(l) remain in the criminal justice system to be adjudicated. It is ordered pursuant to Section 52, that Section 3(1) and Section 6(l) of the *N.C.A*.

It is ordered pursuant to Section 52, that Section 4(1) and Section 7(l) of the *C.D.S.A.* be read down so as to exempt from its ambit persons possessing or cultivating Cannabis (a schedule II substance) for their personal medically approved use.

Delivered in writing and filed.
December 10, 1997.

Judge P.A. Sheppard

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**Appendix 1A**

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISON)

(Toronto Region)

BETWEEN:
HER MAJESTY THE QUEEN
- and -
TERRANCE PARKER

AGREED STATEMENT OF FACTS

1. On July 18, 1996 members of the Metropolitan Toronto Police Service received information that large quantities of marihuana were being grown on the balcony at 55 Triller Avenue, Apt. 2209, Toronto. Officers from 11 Division attended at that location and observed a number of three-to-four-foot-tall marihuana plants growing on the balcony of apartment 2209. They returned to 11 Division and prepared a search warrant.

2. At approximately 8:10 p.m. that evening a search team arrived at 55 Triller Avenue to execute the search warrant. During the course of the search officers seized marihuana plants and marihuana consisting of the following:

- 14 marihuana plants growing in a hydroponic set-up in the bedroom;
- 57 marihuana plants growing on the balcony; and
- a quantitiy of marihuana in a white plastic shopping bag.

3. A female, who was the sole occupant of the apartment when the search began, was arrested and charged with cultivating marihuana. That charge was ultimately withdrawn against her.

4. During the search, at approximately 8:25 p.m., the accused Terrance PARKER arrived at the apartment. There was a conversation between Mr. Parker and officers at that time. The substance of that conversation is not agreed upon and therefore does not form part of this statement. *Viva voce* evidence with respect to that conversation will be addressed at trial. Mr. Parker was arrested and was charged with cultivating marihuana and with possession of marihuana for the purpose of trafficking.

5. It is admitted that at all material times the accused Terrance Parker lived at 55 Triller Avenue, Apt. 2209, Toronto.

6. It is admitted that the plants and plant substances seized as set out above are cannabis marihuana.

7. It is admitted that the plants and plant substances seized as set out above were the property of the accused Terrance Parker and that the plants were being cultivated by him.

8. It is agreed that Mr. Parker suffers from a serious form of epilepsy.

DATED at Toronto in the Province of Ontario this 7th day of October, 1997.

Aaron Harnett, Counsel for Terrance Parker

Kevin Wilson, Counsel for the Crown

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**Appendix 1B**
I then advised Parker he was under arrest for:

1) cultivating marihuana and

2) possession marihuana F.T.P.

Q.(1431) Do you understand?

R.(Parker) Ya, I understand, but the Courts say I can have it!

I also advised Parker of his right to counsel, toll free duty counsel #1 800 265-1451.

Q.(1431) Do you understand?

R. (Parker) I can't believe this, I have a court order to possess it!

Q. (1431) Do you wish to call a lawyer now?

R. (Parker) Ya, I guess I'll have to...

Q. (1726) Terry, do you understand your rights?

R. (Parker) Yeah, I know them, but I'm allowed to have it!

Q. (1726) Do you understand that you don't have to say anything unless you wish to do so, but whatever you say may be given in evidence.

A. (Parker) I know all that, but I can have the stuff.

Q. (1726) You might be able to have it, but you can't grow it!

R. (Parker) Ah, come on I'm straight up with you guys, you all know I can have it!

Q. (1726) Look at all this stuff Terry.

R. (Parker) There's not much here, it's probably only 10 or 12 oz. once its dried. How do you guys think I can get it. Nobody's going to give me a prescription for it!

Q. (1726) What do you do with all this stuff Terry?

A. (Parker) I use most of it, and I give some to some people hwo need it for their seizures.

Q. (1726) So you are giving it to other people?

- A. (Parker) Ya, I help other people out.