IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Simpson, 2006 NSSC 404

Date: 20061219
Docket: CR Am 255718
Registry: Amherst

Between:

Her Majesty the Queen

[Respondent on Application]

v.

Rickey Logan Simpson

[Applicant]

Restriction on publication: Section 648 Criminal Code

Revised decision: This decision has been revised to include the publication ban added by the erratum of February 15, 2007.

Judge: The Honourable Justice Felix A. Cacchione

Heard: December 18th and 19th, 2006, in Amherst, Nova Scotia

Written Decision: February 6th, 2007

Counsel: Douglas B. Shatford, Q.C. and
Monica G. McQueen, for the Respondent on Application
Jim O'Neil, for the Applicant

By the Court: Orally

[1] Rickey Logan Simpson (the applicant) brought a *Charter* challenge to the *Controlled Drugs and Substances Act* (CDSA) prohibition against the possession, possession for the purpose of trafficking of cannabis resin oil and the cultivation of cannabis marihuana. The applicant alleged that these prohibitions in the particular circumstances of this case infringed his s.7 *Charter* right to life, liberty and security of the person by making it an offence for him to cultivate, possess, and or distribute marihuana.

[2] The application was heard on December 18th and 19th, 2006 and dismissed. I indicated at that time that I would provide written reasons for the dismissal. These are the reasons.

FACTS

[3] The facts which gave rise to this application are uncomplicated. On August 3rd, 2005 the RCMP, armed with a search warrant issued under s.11 of the CDSA, searched the applicant's property and dwelling located at 344 Little Forks Road, Athol, Cumberland County, Nova Scotia. The police found 1,190 marihuana plants growing in the backyard of that property. Inside the applicant's dwelling the police found: 26 grams of marihuana bud; 52 grams of cannabis resin oil contained in syringes; marihuana seeds; a still used to condense liquids; various cooking pots with cannabis resin residue; grinders with marihuana residue; scales, lights, fans and other marihuana growing equipment; butane fluid, naphtha; a generator, a car battery hooked up to a water pump; and a solar panel, together with homemade smoking implements known as bongs.

[4] The applicant was charged with possession of marihuana not exceeding 30 grams contrary to s.4(1) of the CDSA; possession for the purpose of trafficking, not exceeding 3 kilograms of cannabis resin contrary to s.5(2) of the CDSA and unlawfully producing cannabis (marihuana) contrary to s.7(1) of the CDSA.

EVIDENCE

[5] In his oral testimony, the applicant admitted to growing the plants found on his property and to producing cannabis resin oil from those plants by using the

equipment found in his residence. The applicant gave a detailed description of how he produced the cannabis resin oil.

[6] The applicant also testified that the oil he produced cured cancerous lesions which were on his face and chest. He indicated that he applied the cannabis resin oil directly to the lesions and within four days the cancer was gone. Appended to his brief filed in support of this application, the applicant included several letters from various physicians attesting to a diagnosis of post concussion syndrome. As well the applicant attached to his affidavit a tissue report from the Cumberland Regional Health Care Centre stating that he had a lesion on the right side of his nose which was excised. This lesion was diagnosed as a basal cell carcinoma. No further medical reports were presented regarding such lesions being on his chest and face or that the carcinoma had returned.

[7] The applicant suffers from post concussion syndrome as the result of an injury he received at work. His evidence was that the medications prescribed by various physicians for this ailment were not beneficial and the side affects of those medications were bad. His testimony was that he then tried smoking marihuana which he found gave him some measure of relief from these symptoms. As well he indicated that he had asked his physician for a prescription for medical marihuana but this request was refused.

[8] The applicant also outlined how he tried, without success, to persuade various politicians and medical organizations of the benefits of his treatment using cannabis resin oil. In support of his position that cannabis resin oil was useful as a medicinal treatment for everything from psoriasis and depression to various forms of cancer, the applicant filed 46 affidavits from different individuals he had treated with this oil. The affidavits were for the most part from middle aged to older individuals. Each one stated that no money was ever paid to the applicant for the oil. All of the affidavits indicated that using the oil either improved or completely cured the medical conditions affecting the affiants. None of the affidavits presented included any medical reports confirming a diagnosis of the illness reported or the fact that such an illness, if it did exist, was no longer present.

[9] The applicant's evidence that he made no secret of his production, use and distribution of cannabis resin oil was supported by a copy of a newspaper article published in a local newspaper. This newspaper article outlined the applicant's

success in treating people for various illnesses by using cannabis resin oil. The article also referred to the applicant holding a public meeting in Springhill, Nova Scotia so that the community could be made aware of the beneficial effects of using the cannabis resin oil he produced.

[10] The respondent filed five affidavits in response to the application. These affidavits were from Valerie Lasher, the manager of the Marihuana Medical Access Division of Health Canada; Micheline Ho of the Therapeutic Products Directorate of Health Canada; Cynthia Sunstrum, Manager of the Policy and Regulatory Affairs Division, Office of Controlled Substances which is within the Drug Strategy and Controlled Substances Programme; Benoit Archambault, a Designated Analyst as defined in the Regulations to the CDSA for Health Canada, Drug Analysis Service, and Constable David Baldwin of the RCMP.

[11] Constable Baldwin's affidavit related to the search of the applicant's premises and what was found at that location. The affidavit included photographs of the interior and exterior of the premises together with photographs of the marihuana plants growing in the backyard and the equipment used to process the marihuana into cannabis resin oil.

[12] Ms. Lasher's evidence concerned the development and present implementation of Canada's regulatory scheme for individual medical access to marihuana under the Marihuana Medical Access Regulations (MMAR).

[13] In her affidavit Ms. Lasher stated at paras. 4 and 5:

> On December 10, 1997, Justice Sheppard stayed the proceedings brought against Terrance Parker for cultivating marihuana contrary to the (former) *Narcotic Control Act*, and for possessing marihuana contrary to the *Controlled Drugs and Substances Act* (the "CDSA"). In this decision, reported at *R. v. Parker*, (1997) C.R. (5th) 251 (Ont. C.J.), Sheppard J. concluded that Mr. Parker required marihuana to control his epilepsy, and that the prohibition against marihuana infringed on Mr. Parker's rights under section 7 of the *Canadian Charter of Rights and Freedoms*. The judge read into the legislation an exemption for persons possessing or cultivating marihuana for their "personal medically approved use", in order to protect Mr. Parker and others like him.
>
> The Crown appealed. On appeal, the Crown argued that, among other things, the legislation was not unconstitutional, and that Mr. Parker could have

> applied for an exemption from the Minister of Health under section 56 of the CDSA. The Ontario Court of Appeal, in a decision released in 2000 and reported at 49 O.R. (3d) 481 (C.A.), concluded that the trial judge was correct in finding that Parker needed marihuana to control the symptoms of his epilepsy, and that the prohibition on the cultivation and possession of marihuana was unconstitutional. The Court further held that the possibility of an exemption under s.56 was dependent upon the unfettered and unstructured discretion of the Minister of Health and as such, was not consistent with the principles of fundamental justice. However, the Court disagreed with Sheppard J.'s remedy of reading into the legislation an exemption for medical use, stating that this was a matter for Parliament to resolve. The Court, therefore, declared the prohibition against possession of marihuana as set out in subsection 4(1) of the CDSA to be invalid, but suspended the declaration of invalidity for one year to provide the Government of Canada with an opportunity to respond.

[14] Section 56 of the CDSA provides:

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

[15] The Canadian government responded to the *Parker* decision on July 30, 2001 by enacting the Marihuana Medical Access Regulations (MMAR) together with publishing the Medical Marihuana Access Regulations Impact Analysis Statement.

[16] Ms. Lasher summarized the impact of these regulations at para. 7 of her affidavit:

> The MMAR at that time authorized activities related to marihuana that would otherwise be illegal, and provided seriously ill persons with a process by which they could obtain an authorization to possess, and a licence to produce marihuana for medical purposes. An authorization to possess is issued on compassionate grounds to persons ordinarily resident in Canada who, with the advice and support of their medical practitioner(s), can demonstrate medical need. A licence to produce marihuana is issued either to the authorized person, or a person designated by the authorized person to produce marihuana on their behalf. The licence allows the holder of the licence to, among other things, produce

> marihuana in quantities up to a specified maximum, with the maximum determined based on the daily amount approved for the authorized person.

[17] Her evidence was that part of the regulatory scheme, which came in response to public consultations and various court decisions, involved the development of a government source of marihuana for both individual authorized users and research projects. Ms. Lasher's affidavit addressed, as one of the goals of the medical access regime, the balancing of compassionate access with the prevention of diversion of marihuana from medical purposes to the illicit drug market and to uncontrolled access by vulnerable individuals.

[18] The MMAR, and s.4 of the CDSA were challenged in civil proceedings. Paragraph 15 of Ms. Lasher's affidavit summarized the result of those challenges.

> 15. In 2002, three civil applications concerning marihuana for medical purposes were heard together by Justice Lederman of the Ontario Superior Court of Justice. One of these applications was brought on behalf of Warren Hitzig and seven others, in which these applicants sought a declaration that the prohibition against possession of marihuana in section 4 of the CDSA was of "no force and effect". On January 9, 2003, Lederman J. released his decision (now reported at (2003), 171 C.C.C. (3d) 18 (Ont. Sup. Ct.)) which concluded that the absence of a legal supply of marihuana for authorized persons offended basic tenets of the legal system and was inconsistent with the principles of fundamental justice. Lederman J. therefore declared the MMAR to be unconstitutional and invalid on the grounds that the framework failed to adequately resolve issues related to source and supply. However, Lederman, J. suspended the declaration of invalidity for six months so as to permit the Government of Canada an opportunity to amend the MMAR or otherwise provide for a legal source of supply of marihuana for those persons authorized to possess under the MMAR...

[19] All parties appealed Justice Lederman's decision and in the summer of 2003 pending the outcome of the appeal Health Canada developed, the *Interim Policy for the Provision of Marihuana Seeds and Dried Marihuana Product for Medical Purposes in Canada* (the "Interim Supply Policy"). This policy required an amendment to the *Food and Drugs Act* and its Regulations which was

accomplished on July 8, 2003, the day before implementation of the Interim Supply Policy.

[20] The provisions of The Interim Supply Policy were put before the Court of Appeal so that they would be aware of the current status of affairs but the court was not asked to rule on the constitutionality of the MMAR as modified by The Interim Supply Policy.

[21] The key objective of The Interim Supply Policy was to ensure that the MMAR remained valid by providing persons authorized under the MMAR or persons exempted under Section 56 of the *Controlled Drugs and Substances Act* with an option for obtaining access to a reliable, legal source of supply of marihuana seeds or dried marihuana (para.19).

[22] The Ontario Court of Appeal declared certain provisions of the MMAR invalid in that they did not provide reasonable access to a legal source of supply of marihuana for medical purposes and in that for no valid purpose they required some applicants to have the support of two specialists to establish medical need. In the result the medical exemption in the remainder of the MMAR was constitutional thus saving Section 4 of the *Controlled Drugs and Substances Act* as likewise constitutional. Leave to appeal to the Supreme Court of Canada was refused.

[23] Health Canada responded to the Court of Appeal decision in *Hitzig* by amending the MMAR in two phases. The first of which, regulations amending the MMAR (SOR/2003-387) together with the accompanying Regulatory Impact Analysis Statement came into effect December 3, 2003.

[24] These amendments came into force before the charges faced by the applicant were alleged to have been committed.

[25] In cross-examination Ms. Lasher acknowledged that the production of cannabis resin oil was not covered under the MMAR or the legislation. She pointed out that marihuana was not an approved therapeutic product and its use for medical purposes was only allowed with the approval of licensed medical practitioners.

[26] Ms. Ho's affidavit addressed the sale and distribution of all substances for which therapeutic claims are made. The sale and distribution of these substances is regulated under the *Food and Drugs Act* and its regulations R.S.C. 1985, c. F-27, as amended. The regulations under this Act were designed to ensure that only those drugs that have received proper evaluation, that have shown beneficial effects, and do not expose the users to unjustifiable risks receive approval for distribution. Her evidence was that the essential components of a drug development program are things such as laboratory and animal studies which set out the basic pharmacological properties of the substances; animal studies which establish how a substance is absorbed, distributed, metabolized and excreted within a body; and clinical trials on humans that follow accepted practices regarding the examination of comparator groups, use of placebos, use and assurances against user or tester bias.

[27] Ms. Ho's evidence also addressed the availability of an emergency release program for access to not yet approved drugs and the significant regulatory requirements for medical practitioners and patients who wish to make use of these yet to be approved drugs.

[28] Ms. Ho's evidence in cross-examination was that any remedies approved by her department for self-medication, such as herbal remedies, are not dangerous if used as prescribed on the label. She acknowledged that her department does not study the safety and efficacy of proposed medication but instead relies on studies which are provided to the department by the manufacturers of these products. Her testimony was that the safety and efficacy of cannabis resin oil has not been studied in Canada. She also stated that no one has ever applied to have her department authorize use or sale of cannabis resin oil.

[29] Ms. Sunstrum's affidavit dealt with the various international conventions governing controlled substances and narcotics and the requirements and limitations these place on Canada's development of a safe and effective program of access to marihuana for medical purposes. These conventions were designed to reduce or eliminate the illicit sale and distribution of controlled substances throughout Canada.

[30] Ms. Sunstrum acknowledged in cross-examination that the conventions signed by Canada regarding international drug control do not make provision for compliance with the *Canadian Charter of Rights and Freedoms.*

[31] Mr. Archambault's affidavit and *viva voce* evidence spoke of the inherent dangers in the process of converting cannabis marihuana into cannabis resin oil. The dangers identified were, among other things, the use of chemical solvents to extract the oil from the plant; the release of toxic substances during the process which endanger the producer and bystanders; the highly flammable and explosive nature of the solvents used, in this case naphtha, and the use of makeshift equipment. His evidence was that the last step in the extraction process, being the evaporation of a solvent through the use of heat, increases the danger of fire.

[32] In cross-examination Mr. Archambault admitted that he had never seen the equipment used by the applicant nor had he tested it. He acknowledged that the use of an enclosed element, as in the present case, posed less risk than the use of an open flame or element which is what is usually found in clandestine processing facilities. His evidence however was that despite the enclosed element used in the applicant's extraction process, there was still a risk of fire or explosion because the solvent used (naphtha) is a volatile substance and any heat source including sparks or static electricity could cause ignition.

POSITION OF THE PARTIES

[33] The applicant's central submission was that the state has no business in becoming involved through the use of criminal law in cases where adults choose to consume cannabis resin oil purely for medicinal purposes and where no exchange of money is involved. It was argued that the decisions of the Supreme Court of Canada in *R. v. Clay* (2003), 179 C.C.C. (3d) 540 (S.C.C.); *R. v. Caine* and *R. v. Malmo-Levine* (2003), 179 C.C.C. (3d) 417 (S.C.C.) are distinguishable from the present case in that these decisions all dealt with the non-medical use of marihuana and involved lifestyle arguments. The applicant pointed to the court's comment in these cases that although the "harm principle" is not a principle of fundamental justice, Parliament is entitled to consider public harm when drafting criminal law.

[34] The applicant instead relied on the Supreme Court of Canada decision in *R. v. Labaye*, [2005] S.C.C. 80 and argued that in the present case because the

applicant was simply producing and distributing free of charge cannabis resin oil for medicinal purposes there was no harm caused by his action but rather a substantial public good was being accomplished by his production and distribution of such oil.

[35] The applicant also submitted that there was no need for scientific evidence to establish the efficacy of cannabis resin oil. He relied on the affidavits filed by persons who had used the oil and argued that this evidence showed the substance to be medicinally beneficial.

[36] Finally the applicant submitted that his s.7 *Charter* right to life, liberty and security of the person was infringed by the CDSA prohibition against the possession; possession for the purpose of trafficking; and the cultivation of cannabis marihuana and cited the Supreme Court of Canada decision in *R. v. Morgentaler*, [1988] 1 S.C.R. 30 in support for his position that his s.7 *Charter* right has been infringed.

[37] The respondent's position was straightforward. It submitted that the applicant failed to establish that his s.7 *Charter* right had been infringed by the applicable provisions of the CDSA. The respondent accepted that the applicant had a liberty interest which was at stake because of the risk of imprisonment created by the relevant CDSA provisions but argued that this did not create an onus on the government to create a medical exemption for possession or production of cannabis resin oil because in the present case there was no evidence of a serious medical need that could actually and verifiably be helped by the use of this product. The respondent argued that the closest case to the one before this court was the decision of the Ontario Court of Appeal in *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.) where the court found that Mr. Parker did not have adequate access to marihuana under the exemption created by s.56 of the CDSA.

[38] The respondent pointed to the fact that the applicant in this case did not have nor had he applied for an exemption under s.56. It submitted that the applicant had presented no evidence that he had a medical need for marihuana nor had he offered any scientific evidence that using marihuana in the form of cannabis resin oil had any beneficial therapeutic value.

ANALYSIS

[39] In order to establish a violation of s.7 of the *Charter*, the applicant must establish some interference by the state with his life, liberty or security of the person interests and also that such interference was done in a manner that does not accord with the principles of fundamental justice.

[40] The Supreme Court of Canada in *R. v. Morgentaler*, supra at p.52 sets out the analytical approach which must be taken when dealing with s.7 arguments. The court stated:

> In *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 204, Justice Wilson emphasized that there are three distinct elements to the s. 7 right, that "life, liberty, and security of the person" are independent interests, each of which must be given independent significance by the Court (p.205). This interpretation was adopted by a majority of the Court, per Justice Lamer, in *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486, at p.500. It is therefore possible to treat only one aspect of the first part of s.7 before determining whether any infringement of that interest accords with the principles of fundamental justice: (See *Singh, Re B.C. Motor Vehicle Act*, and *R. v. Jones*, [1986] 2 S.C.R. 284.

[41] In the present case there was no evidence adduced to establish that the applicant's "life interest" under s.7 of the *Charter* were invoked. The right to "life" under s.7 of the *Charter* was advanced in *Hitzig v. Canada* (2003), 177 C.C.C. (3d) 449 (Ont. C.A.). The court there rejected the argument that the prohibition against possession of marihuana amounted to a violation of s.7 of the *Charter* in that the consumption of marihuana could prevent healthy people from becoming ill. At p.507 the court stated:

> ...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*.

[42] The evidence presented by the applicant does not establish any serious or life-threatening medical condition either as it relates to him or to others who filed

affidavits. At best, the affidavits filed provided anecdotal evidence that applying the cannabis resin oil topically or ingesting that oil either improved or cured the alleged medical condition. The affidavits did not contain, as appendices, any medical reports from licensed medical practitioners attesting to the alleged medical condition and the improvement or disappearance of such condition as a result of using the cannabis resin oil provided by the applicant. These affidavits failed to indicate whether the alleged medical condition constituted a serious threat to health or life and as well failed to establish that traditional medical treatment was insufficient.

[43] The applicant invoked his own medical condition together with that of the persons who filed affidavits on his behalf and by implication appeared to argue that his security of the person was affected by the prohibition against possessing, distributing and cultivating cannabis marihuana in the form of cannabis resin oil. In order to succeed on this point the applicant would be required to establish that the state action, in this case the prohibition, has the effect of seriously impairing a person's physical or mental health and also that the deprivation of security of the person, if proven, is not in accordance with the principles of fundamental justice.

[44] Chief Justice McLachlin writing for the majority in *Chaoulli v. Quebec*, [2005] S.C.J. No. 33 stated at para. 123:

> Not every difficulty rises to the level of adverse impact on security of the person under s.7. The impact, whether psychological or physical must be serious...

[45] A finding that certain state action violates security of the person does not end the inquiry. The court must take into account that Parliament can do so but only if it is done in a manner that is consistent with the principles of fundamental justice: *Morgentaler,* supra at p.56.

[46] For the reasons previously stated the evidence presented does not establish any serious or life-threatening medical condition on the part of the applicant or the affiants. I am unable to conclude on the evidence presented that the applicant's security of the person interests have been violated by the state's action.

[47] The applicant's strongest argument is in relation to his liberty interests. Under the CDSA, the sentence that could be imposed for each of the offences faced by the applicant includes the potential of a term of imprisonment. The possibility

of a term of imprisonment brings into play s.7 of the *Charter*: *Re: B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at para. 76; *R. v. Malmo-Levine*, supra at p. 457. As stated above, a finding that life, liberty or security of the person is affected by the state's actions does not end the inquiry. The court is then required to determine if that action, in this case the potential of a term of imprisonment, is in accordance with the principles of fundamental justice.

[48] Rosenberg J.A. In *R. v. Parker* (2000), 146 C.C.C. (3d) 193 Ont. C.A. dealt with a situation similar to that which is before this court and stated at pp. 228-229:

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

[49] Although the applicant has shown that his s.7 right to liberty has been triggered by the potential of a term of imprisonment under the CDSA offences charged, he is also required to establish that any violation of this right is not in accordance with the principles of fundamental justice. In the present case this has not been done.

[50] The principles of fundamental justice are legal principles that are capable of being identified with some precision and are fundamental in that they have general acceptance among reasonable people: *Chaoulli v. Quebec*, supra at para. 127.

[51] The applicant raises the "harm principle" by stating that there is no aspect of evil intent, personal gain or harm by his actions in providing and distributing cannabis resin oil. It is argued that the applicant's actions are in fact beneficial in that the use of the product he produces has the effect of substantially improving his health and that of those who use his product. The applicant relies on the case of *R. v. Lebaye* for his submission that the Supreme Court in that decision was developing a new approach to the application of the criminal law. The applicant

attempts to elevate the harm principle to that of being a principle of fundamental justice. This, however, is not correct.

[52] The *Labaye* decision dealt with the proper interpretation of the concept of indecency and not the constitutional validity of s.210 of the *Criminal Code* which was the section addressed in that case. The court in *Labaye* did not consider the *Criminal Code* provision as against the provisions of the *Charter* and in particular s.7 of the *Charter*.

[53] Whether the harm principle is a principle of fundamental justice was specifically addressed in the drug prosecution cases of *R. v. Malmo-Levine* and *R. v. Caine*. In both of these cases the Supreme Court of Canada refused to elevate the harm principle to a principle of fundamental justice. Justices Gonthier and Binnie writing for the majority stated at p.464:

> ...in our view the harm principle is not the constitutional standard for what conduct may or may not be the subject of the criminal law for the purposes of s.7.

[54] The principles set out in *R. v. Malmo-Levine* have not been reversed by the Supreme Court's decision in *Labaye* given that the *Labaye* decision did not deal with the constitutional validity of the *Criminal Code* provision. The applicant's submission regarding the harm principle is therefore rejected.

[55] What is noteworthy and relevant to the present application is that the applicant does have a viable medical defence to the charge of possession of marihuana in the form of the Marihuana Medical Access Regulations however he has chosen not to avail himself of this. The applicant's evidence concerning the difficulty he encountered in attempting to obtain a prescription from his physician for marihuana is insufficient for a finding that the defence afforded by the regulations is illusory.

[56] Under those regulations a person who wishes to gain access to marihuana for medical purposes must obtain a declaration from a medical doctor stating that the person requires marihuana for either a "category one symptom" which includes any symptoms treated within the compassionate end of life care, as well as symptoms associated with HIV/Aids, cancer, multiple sclerosis, spinal cord injury, epilepsy or a severe form of arthritis or a "category two symptom" which is defined as "a

debilitating symptom that is associated with a medical condition or with the medical treatment of that condition and that is not a category one symptom."

[57] In order to qualify under the MMAR the applicant would be required to apply to Health Canada for an authorization to possess marihuana. If such an authorization were granted then the applicant could either get a license to grow marihuana, known as a Personal Use Production Licence (PPL); have a designated person grow the marihuana on his behalf under a Designated Person Production License (`DPL); or obtain the marihuana from the Government through its contracted supplier. The applicant has not followed this course nor is there any evidence that any of the persons who filed affidavits on his behalf have done so.

[58] In the absence of expert medical evidence such as that presented in the case of *R. v. Parker* relating to the particular benefits of marihuana and in this case to cannabis resin oil, I am unable to conclude that the prohibition against possessing marihuana under the CDSA is a violation of the applicant's s.7 *Charter* right. In order to reach a conclusion that his rights have been violated by the prohibitions contained in the CDSA extensive medical and scientific evidence concerning the medicinal properties of cannabis resin oil would be required. No such evidence was presented to this court.

[59] Accordingly the application is dismissed and the matter will proceed to trial.

Cacchione J.