IN THE SUPREME COURT OF NOVA SCOTIA
Citation: ***R*** v. ***Caldwell***, 2008 NSSC 67

Date: 20080305
Docket: 282722
Registry: Kentville

Between:

Her Majesty the Queen

Plaintiff

v.

Terry Ernest Caldwell

Defendant

Judge:	The Honourable Justice Gregory M. Warner
Heard:	February 27th, 2008, in Kentville, Nova Scotia
Written Decision:	March 7th, 2008 (Oral decision rendered on March 5th,2008)
Counsel:	Paul J. Carver, Crown Attorney Terry Ernest Caldwell, Self-represented

By the Court:

1 Terry Ernest Caldwell is charged with production and possession for the purpose of trafficking of *cannabis marihuana* contrary to Section 7(1) and 5(2) of the *Controlled Drugs and Substances Act* ("*CDSA*"). He is scheduled to be tried before a Judge with Jury at the term commencing May 5th, 2008 at Windsor, Nova Scotia.

2 He brings this application challenging the constitutionality of the charges against him on the basis that the prohibitions infringe his Section 7 Charter right to life, liberty and security of the person. In particular, he claims the right to grow and possess *cannabis marihuana* to treat his medical conditions and submits that the present law violates this right.

3 The Application was heard on February 28th, 2008 and adjourned for oral decision to today, March 5th, 2008.

Facts

4 By agreement and for the purpose of this *voir dire* only, the following facts are admitted:

a) On November 29th, 2006 the RCMP executed a search warrant at Mr. Caldwell's residence.

b) The search resulted in the location and seizure of a large number of marihuana plants or branches from a shed near the residence. A small amount of marihuana was seized from inside the residence.

c) Mr. Caldwell was transported to the Windsor RCMP detachment where early in the morning of November 30th he provided a video recorded statement. It is agreed that the video tape contains a record of the complete interview (lasting approximately 20 minutes).

d) During the brief interview Mr. Caldwell admitted he cultivated marihuana plants. He stated he did not sell marihuana but acknowledged his friends would come to his residence and he would share marihuana with them. He admitted he was addicted to marihuana and smoked 5 grams per day and consumed a further 30 grams every few days by baking and eating it.

e) During the interview Mr. Caldwell made reference to the tragic death of his son and his trouble to cope with that loss. He was not asked whether, and did not specifically

> indicate that, he consumed marihuana for medical purposes, in particular, to alleviate symptoms associated with chronic pain from muscle spasms in the bowels following several surgeries in the 1990's, glaucoma for which he recently received surgery, or for depression, although that may be reasonably inferred from his reference to not being able to cope with the loss of his son.

5 Subsequent to November 29th, 2006 (the date of the alleged offences), that is on February 27th, 2007, Mr. Caldwell applied for an authorization to possess and licence to produce marihuana under the **Marihuana Medical Access Regulations** ("**MMAR**"). A report accompanying the application signed by his supporting physician described his medical conditions as category 2 (chronic pain from muscle spasms related to surgeries in his lower bowel, glaucoma, and depression), and sought permission to possess and use up to 8 grams of dried marihuana daily to treat his medical conditions. Attached to the application was an assessment from the specialist in colorectal and general surgery who had performed his bowel operations in 1999.

6 In April 2007 Health Canada responded to his application requesting a more current assessment from the specialist, and a confirmation from the supporting physician on the correct form that conventional treatments were ineffective or inappropriate. Mr. Caldwell responded in May 2007 with a copy of the 1999 specialist's letter noting that the specialist said there is nothing more he can do for him. At the same time he provided the name and contact information for the eye specialist from whom he was receiving treatment concerning glaucoma and gave consent to Health Canada to contact him. In June 2007 Health Canada acknowledged the letter stating that they required an updated letter from the supporting physician stating that he had spoken with the specialist about treatment with marihuana and that the specialist concurred with his statements, and the return of Form B2 re-signed by the supporting physician.

7 Mr. Caldwell testified that as a result of these responses he gave up on his application for an authorization to possess and a licence to produce and did not pursue it further. He appeared to be frustrated by the request for further information, and contrasted it with his knowledge that other persons he knew had obtained authorization to possess and produce for lesser medical conditions than his.

8 Mr. Caldwell's evidence as to his medical conditions was supported by medical records and to the effect that:

(1) In the 1990s he had a series of surgeries with regard to his bowels and as a result has had chronic pain since then, except as made tolerable by the use of *cannabis marihuana*;

(2) he has glaucoma resulting in eye pressure readings as high as 36 (the normal range is 12 to 20), which glaucoma has been to some degree alleviated by recent eye surgery; and

(3) he suffers depression by reason of the death in motor vehicle accidents of his

younger brother and more recently his son.

9 Mr. Caldwell's evidence made it clear that the supporting physician was prepared to support him in his application for authorization to possess and produce *cannabis marihuana* to treat his medical conditions.

10 Mr. Caldwell has not established on a balance of probabilities that, if he had had the patience to respond to the inquiries of Health Canada, His application would have been denied.

Section 7 of the Charter

11 Section 7 of the *Charter of Rights and Freedoms* provides that 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.

12 "Everyone" is confined to natural persons. The Court asked the Crown whether it was challenging the standing of the accused to make this application, based on the facts in this case. The Crown said no. Presumably this is based on the fact that, regardless of whether he did or did not apply for authorization to possess and produce marihuana under the **MMAR**, he is charged with CDSA offences, and as such this brings him within the principles with respect to standing enunciated by the Supreme Court of Canada in **R** v. **Big M Drug Mart** [1985] 1 SCR 295, and **R** v. **Wholesale Travel Group** [1991] 3 SCR 153.

13 The traditional approach to interpretation of Section 7 (despite some dissents in Supreme Court decisions) describes the section as creating one right analyzed by a two-step process; in step 1, the question is whether there has been a deprivation of the right to life, liberty or security of the person, and in step 2, if the answer to step 1 is yes, the question is whether the deprivation is in accordance with the principles of fundamental justice.

14 The Supreme Court of Canada in **R** v. **Morgentaler (No. 2)** [1988] 1 SCR 30 described the analytical approach as follows:

> "In **Singh** v. **Minister of Employment and Immigration** [1985] 1 SCR 177, Justice Wilson emphasized that there are three distinct elements to the Section 7 right, that life, liberty and security of the person are independent interests, each of which must be given independent significance by the Court. This interpretation was adopted by a majority of the Court in **Re B.C. Motor Vehicle Act** [1985] 2 SCR 486. It is therefore possible to treat only one aspect of the first part of Section 7 before determining whether an infringement of that interest accords with the principles of fundamental justice."

15 The right to the security of the person has two dimensions: physical and psychological. It is engaged when state action may lead to bodily harm or deprivation.

16 In **R** v. **Morgentaler (No.2)**, the Supreme Court held that the risk to health that was caused by the law that caused delays in treatment which increased the risk to health of women was a deprivation of the right to security of the person. In **Chaoulli** v. **Quebec**, 2005 SCC 35, the Supreme Court held that excessive waiting times in the public health care system of Quebec caused unnecessary pain and stress to those awaiting surgery and other medical procedures and thus breached the right to security of the person. In **R. v. Parker**, 2000 CarswellOnt 2627 (OCA), Rosenberg J.A. wrote: "to prevent his accessing a treatment by threat of criminal sanction constitutes a deprivation of his security of the person."

17 The right to life under Section 7 was advanced in **Hitzig** v. **Canada**, 2003 CarswellOnt 37 (OCA), the Court rejected the argument that the prohibition against the possession of marihuana amounted to a violation of Section 7 because the consumption of marihuana could prevent healthy people from becoming ill. The Court said: "There was no medical evidence presented that the smoking of marihuana by healthy individuals have any prophylactic effect whatsoever".

18 In **Chaoulli,** the Supreme Court held that excessive waiting times for treatment in the public health care system of Quebec increased the risk of death and were violations of the right to life, as well as to security of the person.

19 The right to liberty is engaged where state compulsions or prohibitions affect important and fundamental life choices. Choices must be basic choices going to the core of what it means to enjoy individual dignity and independence. In **Blencoe** v. **British Columbia** [2000] 2 SCR 307, the Supreme Court asserted that liberty in Section 7 is no longer restricted to mere freedom from physical restraint; it applies whenever the law prevents a person from making fundamental personal choices.

20 In **B R.** v. **Children's Aid Society of Metropolitan Toronto** [1995] 1 SCR 315, the majority decision of the Supreme Court held that liberty, while not the right to do as one wishes, included the right to chose medical treatment for ones' children.

21 A second aspect to the liberty interest of Mr. Caldwell is the fact that under the *CDSA* a sentence of imprisonment could be imposed for each of the offences. The possibility of a term of imprisonment brings into play Section 7. **R. v. Malmo-Levine**, paragraphs 84, 89,220.)

22 The two aspects of the liberty interest were described by Justice Rosenberg of the Ontario Court of Appeal in **R** v. **Parker** as follows:

> "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 decision 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."

23 As noted, the analysis of a Section 7 Charter challenge is a two-step inquiry. The second step requires a determination as to whether the deprivation is in accordance with the principles of fundamental justice.

24 The principles of fundamental justice are found in the basic tenants of our legal system. They must be legal principles (**Re B.C. Motor Vehicle Act**). The principles must be of a sufficient consensus that the principle is vital or fundamental to our societal notion of justice. The principle must be capable of being identified with precision and applied in a manner that yields predictable results (**Canadian Foundation for Children, Youth and the Law** v. **Canada** [2004] 1 SCR 76). Principles of fundamental injustice include both substantive and procedural justice.

25 In determining the content of the substantive element of fundamental justice, the Court is required to look at the common law and legislative history of the provision in question as well as the statutory and common law in other jurisdiction (**U.S.** v. **Burns** [2001] 1 SCR 283).

26 Identification of the principles of fundamental justice does not require a balancing of the interest of the individual and of the state except to elucidate a particular principle of fundamental justice **R.** v. **Malmo-Levine** [2003] 3 SCR 571, paragraph 98). They apply where the state, in pursuing a legitimate objective, use means that are broader than necessary to accomplish the objective. The affect of overbreadth is that in some applications the law is arbitrary or disproportionate **R. v. Heywood** [1994] 3 SCR 761). The term "arbitrary" in this sense means bearing no real relation to the goal and hence being manifestly unfair. The more serious the infringement on the person's liberty and security the more clear must be the connection. So said the majority in **Chaoulli**.

Application of Section 7 Analysis to the Charges in this Case

27 In **R** v. **Malmo-Levine**, the accused challenged the criminalization of the possession of marihuana on the basis that the penalty of imprisonment impaired the accused's liberty, thus engaging Section 7. It was argued that a "harm principle" was a principle of fundamental justice which was offended by criminalizing conduct which did not cause harm to others. The Supreme Court held, at Paragraph 113, that three requirements existed for a rule to qualify as a basic tenant of the legal system and therefore as a principle of fundamental justice. Firstly, the rule must be a legal principle; secondly, there must be a significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate; and thirdly, the rule must be capable of being identified with sufficient precision to yield a manageable standard. The Court held that the "harm" principle did not satisfy any of the three requirements; therefore, it was open to parliament to impose a sentence of imprisonment for crimes that did not involve harm to others.

28 In upholding the offense of possession of marihuana, **Malmo-Levine** addressed only the recreational use of marihuana. While marihuana has never been approved as a drug for therapeutic purposes, some users claim that it provides relief for some medical conditions. The Court in **Malmo-Levine** specifically declined to consider the application of Section 7 for those who used marihuana for treatment of medical conditions, saying: "A very different issue would arise if marihuana was required for medical purposes."

29 Can possession be prohibited for those who had a medical use for the drug? In **R** v. **Parker**, the Ontario Court of Appeal said no. Possession could not be prohibited with imprisonment as a potential penalty unless the prohibition did included an exemption for those for whom marihuana was required for medical purposes. An absolute prohibition that threatened health was a breach of the principles of fundamental justice. The court suspended the declaration of invalidity for one year. At about the same time, the Alberta Court of Queen's Bench came to a similar conclusion in **R** v. **Kreiger** (2000) A.J. 163, a finding upheld by the Alberta Court of Appeal in 2002. Leave to appeal **Kreiger** to the Supreme Court of Canada was dismissed in 2003. Within a year of the **Parker** decision, the Federal Government responded by enabling the **Medical Marihuana Access Regulations** which created a process that enabled certain categories of ill people to obtain an authorization to cultivate and possess marihuana for therapeutic purposes.

30 In **Hitzig** v. **Canada**, 2003 CarswellOnt 3795 (OCA), a challenge was brought to the new regulations. The Ontario Court of Appeal held that some of the regulations were still constitutionally inadequate because in practice they did not create a legal source of supply for many of those persons who were permitted to have the drug for medical purposes. To require those persons to purchase the drug from criminals was inconsistent with the fundamental principle that the state must obey and promote compliance with the law. The Court struck down those parts of the new regulations that created barriers to access to a lawful source of supply by authorized users.

31 The analysis of the Court of Appeal in **Hitzig** found two ways in which the **MMAR** were too restrictive and therefore arbitrary. One had to do with the ability to obtain an authorization to possess and produce, the other had to do with the lack of a real legal access by those with authorizations to possess and produce to obtain a legal source of marihuana.

32 At Paragraph 166, the Court held that the **MMAR**, as modified by the nullification of three subsections, became a constitutionally sound medical exemption to the marihuana prohibition in the *CDSA*. The Court noted that it was conceivable that as events unfold, further serious barriers could emerge either to eligibility for an authorization or licence, or reasonable access to a legal source of supply.

33 In response to **Hitzig** the Government made further revisions to the **MMAR** in both December 2003 and July 2005; in doing so they re-enacted some of the provisions struck down in **Hitzig**.

34 Since the 2005 revisions the constitutional validity of the *CDSA* in terms of the Section 7 right of persons to access marihuana for medical purposes, at least five noteworthy decisions have

been reported: three of which upheld the constitutionality of the **MMAR** and therefore the *CDSA*, and two of which held otherwise.

35 In **Kubby** v. **Canada**, 2005 BCCA 640, an applicant, not charged with a crime, applied for a medical exemption but was denied for several reasons. She did not attempt to address the deficiencies in her application but instead applied to the court for a declaration that the **MMAR**s were of no force and effect. The application was dismissed on the basis of the applicant's questionable standing and insufficient evidence. The court noted at Paragraph 40 that the **MMAR**s must be taken to have effectively addressed the constitutional deficiencies in relation to the *CDSA* with respect to the blanket prohibition against the possession of marihuana. At this point, the **MMAR** and *CDSA* constitute valid legislation.

36 In **R** v. **Simpson**, 2006 NSSC 407, Justice Cacchione considered a Section 7 application contesting the validity of Section 4(1), 5(2) and 7(1) of the *CDSA* by an individual charged with growing marihuana and possessing it for the purpose of trafficking. The Court specifically found that the evidence produced by the Applicant fell short of establishing that either the "life" or "security of the person" interests of the accused had been engaged. The Court held that, while his "liberty" interest was engaged, because the MMAR and policy provided a viable scheme of access to marihuana by those who could show their security interest would be adversely affected without legal access, the requirements satisfied the principles of fundamental justice.

37 In **R** v. **Wood** 2006 NBCA 49, the accused, charged with trafficking and possession for the purpose of trafficking, argued that the prohibition against the possession of marihuana was unconstitutional because of the deficiencies in the **MMAR**s. The court held that the **MMAR**, as amended, put into effect a significantly more liberal regulatory scheme than the one considered in **Hitzig**, which scheme satisfactorily answered the concerns raised in **Parker** and **Hitzig,** and easily passed constitutional muster.

38 Not all of the case law goes the same way.

39 In **R** v. **Long** 2007 ONCJ 340, Judge Borenstein of the Ontario Court of Justice held that the amended **MMAR** created a constitutionally unacceptable medical marihuana exemption. To implement the new approach, the government enacted permissive regulations. He noted that these permissive regulations merely permitted the government to supply marihuana under its new policy, and did not require the government to supply marihuana or permit authorized persons to seek it elsewhere. He held a resort to policy, even if permitted by regulation, cannot save a criminal prohibition that unduly restricted legal access to marihuana; the medical exemption must be prescribed by law. It was therefore unconstitutional.

40 In **Sfetkopoulos** v. **Canada**, 2008 FC 33, Justice Strayer of the Federal Court of Canada dealt with an application brought for judicial review of a decision by the Minister of Health to refuse issuance of designated person productions licenses to persons who wanted to grow marihuana for more than one holder of an authorization to possess. The issue before him was one of reasonable access to a supply of dried marihuana or seed for those who already held an authorization to possess

marihuana.

41 He found as a fact that 80% of persons with authorizations to possess marihuana did not obtain it from a government source, meaning that a large percentage of those authorized to possess marihuana were getting their marihuana or seeds from illegal sources. He reviewed the four justifications (in the Regulatory Impact Analysis Statement) for reinstating two of the limitations persons with licences to produce marihuana for others that had been declared invalid in **Hitzig**, and determined that they did not support the restriction that a designated producer could only produce for one authorized user. The restraint on access was arbitrary and therefore inconsistent with the principles of fundamental justice.

42 The Crown submitted a transcript of an unreported oral but comprehensive decision of Clements, J., of the Ontario Court of Justice of December 7th, 2007, in **Terence Parker v. The Queen**, respecting an application for return of seized marihuana on the basis of a claimed medical exemption and challenge to the validity of the *CDSA* pursuant to Section 7 of the Charter.

43 In support of his argument that the **MMAR** provide inadequate lawful access to marihuana for medical purposes and were a breach of his Section 7 rights, Parker relied on the **Long** decision. The Crown argued that **Long** was under appeal, and that there was no requirement that the access to marihuana regime be authorized by regulation, rather than policy, to be Charter compliant. The court cited **Little Sisters Book and Art Empoium v. Canada** 2000 SCC 69 as deciding that implementation of legislation may be constitutionally accommodated by Ministerial direction. Justice Clements wrote:

> "In the context of **Hitzig**, a permissive policy of supply authorized by regulation is for all practical purposes binding on the government, unless and until they implement another scheme providing for the licit supply of marihuana. The obligation of the government to supply licit marihuana must be distinguished from the methodology used to implement the scheme. If the government fails to provide for the licit supply of marihuana, then they arguably have contravened the ruling in **Hitzig** with the result that the MMAR is likely unconstitutional. The evidence in **Long** indicated the government is maintaining a reasonable supply of marihuana under its current policy."

44 He dismissed the application. I agree with Justice Clement's analysis and application of the Supreme Court's conclusion in **Little Sisters**, to the method by which the state could comply with the principles of fundamental justice in effecting the medical marihuana exemption to the prohibitions in the CDSA. In this case, there was no evidence that the MMAR, as presenting implemented, limits arbitrarily access to an authorization, or access to a legal supply of marihuana, by those who need it for medical purposes.

45 Mr. Caldwell also claims that, having established a medical need for marihuana, he is not required to comply with the **MMAR** at all. Simply establishing a medical need entitles him use it. The **MMAR** deprive him of the right to liberty and security of the person under Section 7 of the

Charter. Parliament has legislated that possession, possession for the purpose of trafficking, and cultivation are offences. The courts have imposed on the legislation a requirement to accommodate access to marihuana for those who need it for medical purposes. The government's method of accommodation has not been shown to deprive Mr. Caldwell of his right to liberty or security of the person in a manner that breaches the principles of fundamental justice. On the contrary, entitling Mr. Caldwell, and therefore everyone in a similar position, to an exemption from the marihuana laws in an unregulated way would for all practical purposes defeat the lawful objectives of the legislation prohibiting possession, cultivation, and trafficking in marihuana for non-medical purposes. That may be Mr. Caldwell's wish, but it is a wish that should be expressed in the political forum, and has no place in the judicial forum reserved for determination of legal issues in accordance with the rule of law.

46 There is no evidence presented in this *voir dire* to suggest or establish on a balance of probability that either:

a) the process for accessing an authorization to possess and licence to produce marihuana is arbitrary or unnecessarily restricted so as to breach the principles of fundamental justice; or,

b) that the present **MMAR**, as implemented by the state, restrict arbitrarily or access by those with authorizations to possess, access to a legal source of marihuana.

47 The application is dismissed.

J.