

## **Regina v Parker (2000) 188 DLR (4th) 385**

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The Working Party on the Use of Cannabis for Medical Purposes (NSW) released its final report in August 2000. It recommended that the NSW Government begin long term research and development of marijuana for medical use.

The report concluded that in the short term, people who require marijuana for medical treatment should be protected from criminal prosecution. Cultivation of marijuana by carers was also anticipated, where a person benefits from the use of medical marijuana but is unable to cultivate it for him or herself. It was acknowledged that smoking marijuana may not be the most desirable method to benefit medically from marijuana, so longer term research and development was recommended to determine safe methods of administering the medical properties of cannabis.

These recommendations accord with reforms in other countries to permit the cultivation and possession of marijuana by individuals using it for medical purposes.<sup>1</sup> They also conform with international obligations. United Nations conventions, to which Australia is a party, recognise that certain illicit drugs may be useful for restricted medical purposes and specifically note the medicinal use of cannabis.<sup>2</sup>

The NSW Working Party report referred to specific conditions for which marijuana is accepted as being medically beneficial and recommended that people with those conditions should be entitled to compassionate protection. These include AIDS and cancer related wasting, effects of chemotherapy, neurological disorders and pain not relieved by conventional analgesics. The report referred only to case study evidence that marijuana was effective in controlling epileptic seizures.

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1 A number of states in the US have legalised marijuana for medicinal use despite the fact that it conflicts with federal law, including California, Oregon, Alaska and Hawaii. The Netherlands Government announced an intention to create an Office on Medicinal Cannabis in 2001.

2 *Single Convention on Narcotic Drugs*, 1961; *Convention on Psychotropic Substances*, 1971; *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 1988.

The Canadian Government has taken more substantive steps towards allowing marijuana for medicinal use. It has recently enacted regulations that provide access to marijuana for seriously ill Canadians, authorising possession and cultivation of marijuana for medical purposes.<sup>3</sup> These laws were made in response to the Ontario Court of Appeal decision in *R v Parker*. The case involved an appeal by the Crown of the first instance decision in the Ontario Court of Justice. The Crown argued that the trial judge erred in finding that the criminal prohibition of marijuana was overbroad and unconstitutional.

### **Criminal prosecution of Mr Parker**

The case began as a criminal prosecution of Terrance Parker, who has epilepsy. Epilepsy is a disorder that disturbs a person's electrical brain activity thereby causing seizures. Mr Parker found that using marijuana was the most effective treatment to prevent his seizures. He admitted to growing and smoking marijuana as well as giving small amounts to other people who he knew required it for their medical condition. He was charged with:

- (a) cultivating a narcotic (Cannabis Marijuana) contrary to s 6(1) of the *Narcotic Control Act 1985* (RSC, c N-1) (NCA);
- (b) unlawfully possessing for the purpose of trafficking a narcotic (Cannabis Marijuana) contrary to s 4 of the NCA;
- (c) unlawfully possessing a controlled substance (Cannabis Marijuana) contrary to s 4 of the *Controlled Drugs and Substances Act 1996* (SC, c19) (CDSA).<sup>4</sup>

In the Ontario Court of Justice, Sheppard J accepted Mr Parker's evidence that smoking marijuana was the most known effective treatment (when combined with his prescribed drugs) that generally eliminated the symptoms of his epilepsy. Mr Parker gave evidence that he had experienced no grand mal seizures when he smoked regularly and that if he could feel a seizure coming on, smoking marijuana would alleviate it within minutes. He also testified that if he ceased smoking marijuana, the seizures would begin again regularly within days.

The circumstances of the case were not in dispute. Mr Parker admitted to the criminal charges. However, Mr Parker argued that these criminal provisions infringed his constitutional rights under the *Canadian Charter of Rights and Freedoms*. If successful in his argument, the Court would either strike down the criminal marijuana provisions or read in an exemption allowing the use of marijuana for

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3 *Marihuana Medical Access Regulations* 2001.

4 The *Narcotic Control Act 1985* was repealed and replaced by the *Controlled Drugs and Substances Act 1996*.

medical purposes. Mr Parker would then be protected from criminal penalties.

The trafficking charge was not considered in the appeal and it did not relate to the constitutional issues.

### **Evidence of the medical properties of marijuana**

In 1987, Mr Parker's physician advised that the side effects of his prescription medications were so severe that higher dosages could not be used. His physician advised him to regularly use marijuana in conjunction with his prescription medicine to control his seizures. While the physician was entitled to make such recommendation, there is no legally available marijuana in Canada that Mr Parker could obtain.

The active ingredients in marijuana are called cannabinoids. The main ingredient in marijuana, which gives it the psychoactive effect, is tetrahydrocannabinol (THC). A synthetic form of THC is available in North America by prescription.<sup>5</sup>

Aside from THC, it is believed that other cannabinoids may have anti-seizure properties. Cannabidiol (CBD) is thought to be one of the most promising cannabinoids with anti-convulsant properties (Zimmer & Morgan 1997: 17). CBD does not have a psychoactive side effect and is not available by prescription.

There is a distinction between the beneficial properties of THC and CBD. The evidence showed that Mr Parker's condition appeared to benefit from the CBD rather than THC. Synthetic THC (Marinol) was ineffective for Mr Parker. Smoking marijuana was the only way that CBD could be administered.

### **Conventional medication or medical marijuana**

Studies presented to the Court suggested that cannabinoids increase the effectiveness of conventional medication used to treat epilepsy, but are not a replacement for those drugs.

Mr Parker's conventional medication included Phenytoin (Dilantin) and Primidone (Mysoline), which are common drugs used to treat epilepsy. The side effects of Dilantin include drowsiness, gum problems, brain and liver damage. Maintaining the prescribed dosage is particularly important, as an over-dosage could be toxic and a sudden withdrawal similarly dangerous. Mr Parker's physician testified that

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5 Dronabinol (synthetic THC) is known by the trade name Marinol. Synthetic THC is not available in Australia.

controlling Mr Parker's seizures was best achieved through a combination of conventional medications and smoking marijuana.

The harms associated with the use of marijuana for medicinal purposes must be weighed against harmful effects of conventional medication. Smoking marijuana is considered an inexact method of dispensing CBD or THC to the body. However, it may be beneficial in acute situations because it can be absorbed in the bloodstream more quickly than a synthetic version (Zimmer & Morgan 1997: 18).

The Court found that while smoking marijuana is also harmful to the lungs, it is thought that medicinal users smoke much less than an average cigarette smoker. Marijuana users may therefore not suffer as much pulmonary harm as tobacco smokers.<sup>6</sup> On the other hand, marijuana smoke provides more than twice the amount of tar and five times the amount of carbon monoxide to the lungs (Grinspoon & Bakalar 1997: 250).

The Court of Appeal accepted that on the basis of the known evidence, the benefits of medical marijuana use outweigh the harms associated with smoking marijuana. Rosenberg JA was careful to note that no concrete conclusion about the harmful effects of marijuana could be reached on the evidence. However, courts were typically required to make decisions on the available knowledge at the time. He stated that:

scientists can continue to study a problem until it is resolved ... The fact that on the current state of the research no such negative conclusion [on the harmful effects of marijuana] can be reached is not a statement for scientists that there is no harm, only that more studies may have to be done. Trial judges do not have that luxury. They are required to reach a conclusion on the basis of the record placed before them by the parties.

### Issues on appeal — breaching the Charter

Mr Parker sought a declaration that the criminal provisions under which he was charged were overbroad and unconstitutional as they relate to an individual who had a personal medical necessity for using marijuana. His case depended upon the interpretation and application of s 7 of the *Canadian Charter of Rights and Freedoms*.

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6 The court stated that cases of lung cancer or emphysema in marijuana only smokers are rare or unreported. However, the Working Party on the Use of Cannabis for Medical Purposes in New South Wales provided a more detailed report of the harmful effects of cannabis smoking, noting for example, that cannabis smokers use unfiltered cigarettes, increasing potential pulmonary damage (at 7.5.2).

Section 7 states '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'.

### *Security of the person*

Each part of s 7 was considered separately. Rosenberg JA (Catzman and Charron JJ concurring) based his judgment predominantly on the violation of security of the person.

The Court accepted that Mr Parker's epilepsy could be life threatening if his seizures were not properly controlled. Aside from the very real physical consequences, Mr Parker would also be living with the constant fear and anxiety that he may have a seizure. As a result, the marijuana prohibition interferes with his health and therefore his security interest.

Rosenberg JA referred to the judgments in *R v Morgentaler*. *Morgentaler's* case was the landmark judgment by the Supreme Court of Canada in which Canada's abortion laws were struck down for violating the constitutional protection contained in s 7 of the Charter. Beetz J, in *Morgentaler* stated that security of the person 'must include a right to access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction'.

Rosenberg JA drew a clear parallel with Mr Parker's case, citing *Morgentaler* as authority. He agreed that:

If an Act of Parliament forces a person 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 hand, inadequate treatment or no treatment at all, the right to security of the person has been violated.

In Mr Parker's situation, the criminalisation of marijuana use forced him to choose between using an illegal substance to obtain effective medical treatment and fearing for his health. Rosenberg JA stated that the 'prohibition tells Parker that he cannot undertake a generally safe medical treatment that might be of clear benefit to him'.

Without access to reasonably required medical treatment, a person's security of health and life is jeopardised. The security of a person is deprived if he or she is threatened with criminal sanction in attempting to secure their health, particularly if he or she is imprisoned. Like *Morgentaler's* case, s 7 protects the right to make choices concerning one's own body and control over one's physical and psychological integrity free from interference by criminal prohibition.

## ***Liberty***

Rosenberg JA considered that Mr Parker's liberty was deprived in two ways. First, Mr Parker's liberty was infringed by being subject to criminal prosecution and possible incarceration. It was clear that incarceration would have a particularly serious effect on Mr Parker's condition as he would be prevented from obtaining effective treatment to control his seizures. However, Rosenberg JA noted that incarceration in itself was a deprivation of liberty, regardless of the particular impact on Mr Parker. Further, the threat to security of the person discussed above amounted to a serious deprivation of liberty.

Second, 'liberty includes a degree of personal autonomy over fundamental personal decisions'. Mr Parker was asserting more than a preference for marijuana in the circumstances. He presented sufficient evidence to show that smoking marijuana was a reasonable medical decision, in view of the health implications and the lack of viable alternative therapies. He also had his physician's approval.

Rosenberg JA stated that 'to intrude into that decision making process through the threat of criminal prosecution is a serious deprivation of liberty'.

## **Principles of fundamental justice**

The terms of s 7 provide that the right to liberty and security of the person must be evaluated in light of the principles of fundamental justice. Deprivation of an individual right may be justified in criminal law by protecting a societal (state) interest. The Crown argued that the objectives of the marijuana prohibition were to prevent the harms associated with smoking marijuana, including harm to human health and the necessary control of the domestic and international illegal drug trade.

The Court reviewed case law where the criminal law intersects with medical treatment and identified five principles of fundamental justice.<sup>7</sup>

1. The principles of fundamental justice are breached where the deprivation of the right in question does little or nothing to enhance the state's interest.
2. A blanket prohibition will be considered arbitrary or unfair and thus in breach of the principles of fundamental justice if it is unrelated to the state's interest in enacting the prohibition, and if it lacks a foundation in the legal tradition and societal beliefs that are said to be represented by the prohibition.

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<sup>7</sup> Rosenberg JA noted that this was not an exhaustive list.

3. The absence of a clear legal standard may contribute to a violation of fundamental justice.
4. If a statutory defence contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to persons who prima facie qualify for the defence, it will be found to violate the principles of fundamental justice.
5. An administrative structure made up of unnecessary rules, which result in an additional risk to the health of the person, is manifestly unfair and does not conform to the principles of fundamental justice.

When the state interest is weighed against the personal interest of Mr Parker, a blanket prohibition on possession and cultivation of marijuana, without an exception for medical use 'does little or nothing to enhance the state interest'. If the state's interest in prohibiting marijuana includes preventing a user from health related harms associated with marijuana use, it is irrational to deprive a person of the drug when he or she requires it to maintain their health.

Rosenberg JA also referred to common law doctrines that supported self-determination in relation to medical care. Principles such as informed consent and sanctity of life, as well as commonly held societal beliefs about medical treatment suggest that a broad criminal prohibition that prevents access to necessary medicine is not consistent with fundamental justice.

The Crown argued that the principles of fundamental justice are not breached because *Controlled Drugs and Substances Act 1996* (CDSA) provides for three procedures by which Mr Parker could legally possess marijuana. Although the regulations contained a procedure for the approval of new drugs, the Court considered this procedure a practical impossibility for Mr Parker. The Crown argued that it is not the fault of the legislation, but the fact that no one has come forward to obtain the new drug approval. However, the process for approval of a new drug involves the expenditure of hundreds of thousands of dollars and is a commercial rather than personal venture.

The regulations also provide an Emergency Drug Release (Compassionate Use) Program. This allows an application to be made for access to an otherwise non-marketable drug. Again, the Court held that the theoretical availability of this program to Mr Parker runs up against the practical barrier that there is no legally licensed source of marijuana.

The practical unavailability of marijuana due to the administrative structure prevents Mr Parker and other people who require marijuana for medical purposes

from obtaining a prescription for the drug because of the absence of a legal supply. The theoretical possibility of a legal supply of marijuana did not address Mr Parker's direct need and involved much larger questions of drug policy. Therefore it did not accord with the principles of fundamental justice.

The CDSA also provided a process of personal exemption in s 56, which is discussed below.

### **Personal exemption — section 56**

Under s 56 of the CDSA, a person could apply for a ministerial exemption from the criminal provisions of the Act.<sup>8</sup> Rosenberg JA referred to an Interim Guidance Document released by Health Canada in May 1999 that outlined the process for Canadians to obtain exemptions under s 56. Witnesses in the case testified that, at the time of the appeal, the Minister of Health had granted only two cannabis exemptions under s 56.<sup>9</sup>

Whilst s 56 was not raised at the initial trial, Rosenberg JA nevertheless considered whether an exception that relies on the discretion of the Minister was sufficient to meet the constitutional standards. To this question, his Honour held that 'notwithstanding the theoretical availability of the s 56 process, the marijuana [sic] prohibition does not accord with the principles of fundamental justice'.

Section 56 provided an absolute discretion based on the Minister's opinion as to whether an exception is 'necessary for a medical ... purpose', a phrase not defined in the Act. Further the guidelines issued by Health Canada provided only a list of non-exhaustive circumstances in which an exemption may be granted but did not limit the Minister's discretion.

The Court held that without an adequate legislated standard and in view of the unfettered discretion of the Minister, the deprivation of Parker's right to security of the person did not accord with the principles of fundamental justice. Rosenberg JA stated that:

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8 Section 56: 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.

9 While no evidence contradicting these testimonies was presented at trial, Health Canada has claimed that 71 personal exemptions have been granted (September 2000).

The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject that decision to unfettered ministerial discretion. It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marijuana does not enter the illicit market.

## International obligations

In 1961, Canada adopted the *Single Convention on Narcotic Drugs* and this led to the enactment of the NCA. The preamble to that Convention begins:

The Parties,

Concerned with the health and welfare of mankind,

Recognizing that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes ...

The Crown asserted that one of the objectives of the marijuana prohibition is to comply with Canada's international obligations in relation to illicit substances. Rosenberg JA noted that the preamble to the Single Convention allowed a medical regulation of otherwise illegal substances. Further still, the *Convention on Psychotropic Substances* (1971) and the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988), while requiring parties to outlaw the cultivation and possession of cannabis for personal use, continue to permit cannabis for restricted medical purposes.

The Conventions oblige countries to introduce such measures 'as may be necessary'.<sup>10</sup> This must be read in the context of Canada's own constitutional principles, as contained in the Canadian *Charter of Rights and Freedoms*.

The NCA, replaced in 1996 by the CDSA, was enacted to fulfil Canada's international

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10 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, art 3 (1): 'Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law ...'.

obligations. Under both Acts the prescription of marijuana for medical use was theoretically possible but because there was no legal source of marijuana, this prescription could not be filled. The Court noted that far more dangerous drugs such as morphine and heroin are subject to regulation, not outright prohibition, and a patient can obtain these drugs through a physician's prescription. Marijuana, however, is subject to complete prohibition.

### **Remedial options**

After establishing that the criminal marijuana provisions violated s 7 of the Charter, the Court had to then determine what remedy would be the most appropriate. Mr Parker was entitled to an exemption from the criminal charges. As the criminal provisions were unconstitutional, the Court could either sever the provisions in their entirety from the relevant Acts or it could read into the sections an exemption for medical purposes.

At first instance, Sheppard J held that the appropriate remedy was one of reading in an exemption. This could be seen as either a 'reading in' or a 'reading down' of the criminal provisions, in that it added an exemption to the legislation.

While upholding the trial judge's finding that the criminal marijuana provisions were overbroad and unconstitutional, the Court of Appeal varied the remedy granted by the trial judge. Rosenberg JA considered that reading in an exemption created an unacceptable degree of uncertainty. Reading in an exemption would provide no clarity or guidance as to who is entitled to the exemption and how a person becomes entitled to the exemption.

Instead, the Court of Appeal struck down the marijuana prohibition contained in the CDSA. The Court suspended the declaration of invalidity for a period of 12 months and stayed the charges against Mr Parker.

Rosenberg JA noted that refusing to read in an exemption respected the different roles of the courts and the legislature. His Honour believed an exemption with adequate guidelines could be established but that this was best achieved by Parliament. Parliament would also be able to consider more complex situations, such as where a person requires a caregiver to grow marijuana.

### **Government response**

The Canadian Government responded to the Court of Appeal decision by passing new regulations for patients and caregivers to grow and use marijuana. The regulations

came into effect on 31 July 2001 in order to meet the deadline imposed by the Court of Appeal. Under the *Marihuana Medical Access Regulations 2001*, patients can apply for authorisations to possess marijuana in three categories, defined according to the patient's symptoms and prognosis. The Regulations are intended only to provide access to marijuana in special medical circumstances, as it is still considered that there is a lack of clear evidence of the medical benefits of marijuana.

Category 1 is for patients with terminal illnesses who have a prognosis of death within 12 months. Category 2 is for patients who suffer from specific symptoms associated with some serious medical conditions. Category 3 is for patients who have symptoms associated with medical conditions other than those in the other two categories.

It is most likely that authorisations will be granted to people with particular conditions for which there has been an acceptance of the medical benefits of marijuana. Like the *Parker* judgment, the Regulations refer to specific conditions where smoking marijuana has been considered to have medical benefit — nausea and vomiting from cancer and AIDS treatments, wasting syndrome for people with cancer or AIDS, pains and spasms related to multiple sclerosis and the control of seizures for people with epilepsy.<sup>11</sup>

The Regulations also allow possession of amounts to be prescribed by the person's treating doctor. Cultivation is regulated by licensing, and the licence application will take into account the amount needed to be grown for the patient's dosage.

The Canadian Government has also contracted with a private company for the cultivation of a reliable source of affordable, quality, standardised marijuana for medical and research purposes.

The right to have access to appropriate and effective medical treatment is clearly stated in the *Parker* decision. Australians with disabilities who use or require marijuana for medical use are no less entitled to this protection. However, Australian laws do not provide the same constitutional safeguard of individual rights as the Canadian *Charter of Rights and Freedoms*. For this reason, the recommendations made by the NSW Working Party on the Use of Cannabis for Medical Purposes must be seriously considered and adopted. ●

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11 It should be noted that the NSW Working Party on the Use of Cannabis for Medical Purposes supports the use of medical marijuana in slightly different situations. The Working Party specifically refers to a broad range of neurological disorders (including multiple sclerosis), general pain management and do not refer specifically to epilepsy.

## Domestic cases

*R v Morgentaler* (1988) 1 SCR 30

*Regina v Parker* (cited as *R v Parker*) (1997) 12 CR (5th) 251 (Ont Prov Div)

*Regina v Parker* (cited as *R v Parker*) (2000) 188 DLR (4th) 385

## Domestic legislation

*Narcotic Control Act 1985* (RSC, c N-1)

*Controlled Drugs and Substances Act 1996* (SC, c19)

*Regulations Exempting Certain Precursors and Controlled Substances from the Application of the Controlled Drugs and Substances Act 1997* (PC 627)

## International legal material

*Single Convention on Narcotic Drugs*, opened for signature 30 March 1961, 520 UNTS 151 (entered into force 13 December 1964)

*Protocol amending the Single Convention on Narcotic Drugs*, opened for signature 25 March 1972, 976 UNTS 3 and 105 (entered into force 8 August 1975)

*Convention on Psychotropic Substances*, opened for signature 21 February 1971, 1019 UNTS 175 (entered into force 16 August 1976)

*United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, opened for signature 20 December 1988, 1696 UNTS 449 (entered into force 11 November 1990)

## References

Working Party on Use of Cannabis for Medicinal Purposes (NSW) *Final Report 2000*

Grinspoon L, Bakalar J *Marihuana: the forbidden medicine* Yale University Press, London 1997

Zimmer L and Morgan J *Marijuana Myths Marijuana Facts: a review of the scientific evidence* Lindesmith Center, New York 1997