

**DRUG PROHIBITION AND THE CONSTITUTION**

**PREPARED FOR THE SENATE SPECIAL COMMITTEE  
ON ILLEGAL DRUGS**

**David Goetz  
Law and Government Division**

**1 March 2001**



Library of  
Parliament  
Bibliothèque  
du Parlement

**Parliamentary  
Research  
Branch**

## TABLE OF CONTENTS

	Page
ABSTRACT.....	i
INTRODUCTION .....	1
THE CONSTITUTIONAL DISTRIBUTION OF POWERS IN RELATION TO ILLICIT DRUGS.....	1
FUNDAMENTAL JUSTICE: THE RIGHTS TO LIBERTY AND SECURITY OF THE PERSON .....	3
A. Introduction.....	3
B. A Review of Section 7 Jurisprudence in General: the Evolution of “Liberty,” “Security of the Person” and “Fundamental Justice”.....	4
1. Introduction.....	4
2. Liberty.....	4
3. Security of the Person.....	8
4. Principles of Fundamental Justice.....	10
C. Section 7 of the Charter and the Prohibition on Illegal Drugs.....	14
1. Introduction.....	14
2. Section 7 and the Non-Medical Use of Marijuana .....	14
3. Section 7 and the Medical Use of Marijuana .....	20
OTHER CHARTER RIGHTS WHICH ARE OR MAY BE IMPLICATED BY THE DRUG PROHIBITION LAWS .....	26
A. Freedom of Expression.....	26
B. Freedom of Religion.....	28
C. Equality.....	29
D. Right Against Cruel and Unusual Treatment or Punishment .....	30



CANADA

LIBRARY OF PARLIAMENT  
BIBLIOTHÈQUE DU PARLEMENT

## ABSTRACT

This paper examines the constitutional jurisprudence relating to Canada's drug prohibition laws.

After reviewing the relevant aspects of the constitutional division of powers between the federal and provincial orders of government, the constitutional basis of the federal Parliament's proscription of illicit drugs is described.

The paper then turns to a consideration of the relevant provisions of the *Canadian Charter of Rights and Freedoms*, with a particular focus on the section 7 right to liberty and security of the person, and the right to fundamental justice, where those interests are affected.

In order to put the cases relating specifically to the drug legislation into perspective, relevant aspects of the general evolution of section 7 interpretation are described. The paper notes the following jurisprudential developments: a broadening of the liberty interest beyond freedom from physical restraint to include freedom from state interference in matters of "fundamental personal importance"; the interpretation of "security of the person" as protecting a broad autonomy over one's body and, in particular, the right to avail oneself of beneficial treatments for serious medical conditions; and the increasing tendency of the courts to critically review the substantive policy underlying legislation in ensuring conformity with the principles of fundamental justice. It is argued that these general developments in section 7 jurisprudence have had a noticeable impact on how the courts have handled section 7 challenges to the drug prohibition laws.

The paper then reviews and discusses cases in which drug prohibition legislation has been challenged under section 7 of the Charter. Although such challenges were readily rejected in the earlier cases, they have received more extensive judicial scrutiny in recent years. For those claiming a constitutional right to use banned drugs for medical purposes (specifically, marijuana), these challenges have met with success.

Finally, the paper briefly discusses cases where challenges to the drug laws were based on other Charter rights (freedom of expression and religion, equality, and the right against cruel and unusual punishment).



CANADA

LIBRARY OF PARLIAMENT  
BIBLIOTHÈQUE DU PARLEMENT

## DRUG PROHIBITION AND THE CONSTITUTION

### INTRODUCTION

This paper reviews and analyzes the constitutional jurisprudence related to Canada's prohibition of certain drugs under the *Controlled Drugs and Substances Act*<sup>(1)</sup> and its predecessor legislation.<sup>(2)</sup>

Under Canadian constitutional law, constraint on legislative action derives from two main sources:

- the distribution of jurisdiction over various policy areas between federal and provincial legislatures set out in the *Constitution Act, 1867*; and
- the rights and freedoms of individuals guaranteed by the *Canadian Charter of Rights and Freedoms* (the Charter) of 1982.

### THE CONSTITUTIONAL DISTRIBUTION OF POWERS IN RELATION TO ILLICIT DRUGS

The *Constitution Act, 1867* does not specifically mention drugs. At first glance, it would appear that the federal Parliament has the most obvious claim of jurisdiction because it has been assigned power over the criminal law (section 91(27)) and any residual matters not specifically assigned to the provinces (section 91, opening paragraph – i.e., the so-called “peace, order and good government” power).

---

(1) S.C. 1996, c. 19.

(2) Principally: the *Opium Act*, S.C. 1908, c. 50; the *Opium and Drug Act*, S.C. 1911, c. 17; the *Opium and Narcotic Drug Act*, S.C. 1923, c. 22, as amended; and the *Narcotic Control Act*, S.C. 1960-61, c. 35, as amended. See also Parts III and IV of the *Food and Drugs Act*, R.S.C. 1985, c. F-27 as it read prior to the enactment of the *Controlled Drugs and Substances Act* and previous legislation dealing with controlled and restricted drugs and substances other than narcotics.

However, in practice and through judicial interpretation, the provinces have acquired extensive authority over public health, a matter not specifically addressed in the 1867 Constitution. This was most clearly confirmed in the unanimous Supreme Court of Canada decision in *Schneider v. The Queen* (1982).<sup>(3)</sup> In that case, the majority of the Court decided that public health should be read into the provinces' jurisdiction over "all matters of a merely local or private nature" (section 92(16)); however, the provinces' express jurisdiction over hospitals (section 92(7)) and property and civil rights in the province (section 92(13)) have also been held to be relevant bases for health-related legislation.<sup>(4)</sup>

Both the therapeutic use of drugs and medicines, and their misuse and abuse, would appear to be concerns of public health. Indeed, in the *Schneider* case itself, the Supreme Court of Canada upheld the validity of a provincial law which provided for compulsory treatment of heroin addicts, even though the law had criminal law overtones to it, i.e., detention of persons in connection with a federally prohibited substance. Moreover, despite exclusive federal jurisdiction over criminal law, the Constitution does give the provinces the power to create offences to enforce their laws concerning matters which are otherwise within provincial jurisdiction (section 92(15)).

On the other hand, protection of public health has been recognized as a traditional and legitimate concern of the federal criminal law power.<sup>(5)</sup>

In the end, the courts have upheld Parliament's exclusive legislative jurisdiction over drug prohibition and control, despite some question as to the specific source of federal jurisdiction in the Constitution.

In 1953, the Supreme Court of Canada concluded, in *Industrial Acceptance Corp. v. The Queen*, that the *Opium and Narcotic Drug Act* was "criminal" law.<sup>(6)</sup> However, in 1979, the Court in *R. v. Hauser* (1979),<sup>(7)</sup> by a four to three majority, concluded otherwise deciding instead that the *Narcotic Control Act* was valid under the residual "peace, order and good government" power of Parliament.

---

(3) [1982] 2 S.C.R. 112.

(4) *Ibid.*, per Estey J.; and *Fawcett v. Attorney General of Ontario*, [1964] S.C.R. 625.

(5) *Canadian Federation of Agriculture v. Attorney General of Québec*, [1949] S.C.R. 1 (commonly referred to as the *Margarine Reference*), at p. 50, per Rand J.

(6) [1953] 2 S.C.R. 273.

(7) [1979] 1 S.C.R. 984.

However, the decision in *Hauser* has been subject to criticism.<sup>(8)</sup> Chief Justice Laskin, in a separate opinion in *Schneider*, indicated that “the majority judgment in the *Hauser* case ought not to have placed the *Narcotic Control Act* under the residuary power” and that he would have viewed “the Narcotic Control Act as an exercise of the criminal law power.”<sup>(9)</sup> Moreover, in light of the more recent jurisprudence affirming a very broad scope for the federal criminal law power,<sup>(10)</sup> it seems likely that Canada’s federal drug control legislation falls within Parliament’s exclusive legislative competence over criminal law under section 91(27) of the *Constitution Act, 1867*.

## **FUNDAMENTAL JUSTICE: THE RIGHTS TO LIBERTY AND SECURITY OF THE PERSON**

### **A. Introduction**

The Charter provision which is most relevant to Canada’s drug criminalization laws is section 7 which guarantees persons in Canada “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.” Although other Charter provisions – such as section 8 (right to be free from unreasonable search and seizure) – may be more extensively invoked in drug crime litigation, such provisions are more concerned with the manner in which drug prohibitions are applied and enforced, rather than with their inherent constitutional validity.

Both the recent success of litigants seeking recognition of a right to use marijuana for medical reasons, and the greater attention paid to the arguments of those attacking the ban on marijuana in general, can be traced to developments in Supreme Court of Canada jurisprudence relating to section 7 of the Charter and, in particular, that court’s conception of the scope of the protected interests of liberty and personal security, as well as its understanding of the sources and nature of the principles of fundamental justice.

---

(8) Peter W. Hogg, *Constitutional Law of Canada*, student ed., Toronto: Carswell, 1998, pp. 418-20 and 443.

(9) *Supra.*, at p. 115.

(10) See: *R.J.R. MacDonald v. Canada*, [1995] 3 S.C.R. 199; and *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213.

## **B. A Review of Section 7 Jurisprudence in General: the Evolution of “Liberty,” “Security of the Person” and “Fundamental Justice”**

### **1. Introduction**

The significance of court decisions applying section 7 of the Charter to Canada’s drug prohibition laws can only be properly understood if they are viewed within the context of the general case law interpreting that provision.

### **2. Liberty**

The scope of the liberty interest protected by section 7 of the Charter has been broadened significantly in the past few years as a result of a shift in attitudes among the justices of the Supreme Court of Canada.

Initially, the liberty interest in section 7 was thought to refer only to freedom from physical restraint, such as imprisonment, detention or confinement, and other restrictions on liberty arising from an individual’s interaction with the justice system. This was the view of former Chief Justice Lamer.<sup>(11)</sup> There was certainly nothing in the jurisprudence under the pre-Charter forerunner to section 7 – section 1(a) of the *Canadian Bill of Rights* of 1960 – to suggest that such a right to “liberty” would mean anything else.<sup>(12)</sup>

It was Madam Justice Wilson who first espoused the view of the liberty interest in section 7 as representing a broader general freedom of a person to make important life choices free from state interference, regardless of whether or not the person’s physical liberty was also at stake. She first appears to have asserted this interpretation in *Operation Dismantle v. The Queen* (1985)<sup>(13)</sup> and subsequently followed it up with further elaboration in *R. v. Jones* (1986)<sup>(14)</sup> and *R. v. Morgentaler* (1988).<sup>(15)</sup> In *Morgentaler*, Wilson J. wrote that:

---

(11) See, in particular: *Reference re sections 193 and 195.1(1)(c) of the Criminal Code* (the *Prostitution Reference*), [1990] 1 S.C.R. 1123, at paras. 49 to 73; and *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at paras. 2 to 38.

(12) Section 1(a) of the *Canadian Bill of Rights* protects: “the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;...” (emphasis added) Tellingly, the leading work on the subject – *The Canadian Bill of Rights* by Walter Surma Tarnopolsky (2nd ed., McClelland & Stewart Limited, Toronto, 1975) – contains no discussion, or any reference to discussion elsewhere, of the meaning of “liberty” in section 1(a) of the Bill of Rights.

(13) [1985] 1 S.C.R. 441, at para. 98.

(14) [1986] 2 S.C.R. 284, at pp. 318-19.

(15) [1988] 1 S.C.R. 30, at paras. 223-241.

... an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty... [T]his right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.<sup>(16)</sup>

In all these decisions, Justice Wilson was writing a separate opinion for herself alone.

However, in the 1995 Supreme Court of Canada decision in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,<sup>(17)</sup> Mr. Justice LaForest, writing for himself and three other justices (L'Heureux-Dubé, Gonthier and McLachlin) adopted the broader view of the section 7 "liberty" interest which had previously been advocated by Justice Wilson. Justice LaForest wrote:

Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. *On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her life and to make decisions that are of fundamental personal importance.*<sup>(18)</sup> [emphasis added]

He then proceeded to quote and endorse the passage from Justice Wilson's judgement in *Morgentaler* extracted above.<sup>(19)</sup> However, a bare majority of the Court either denied that the interest at stake in the case (the right of parents to refuse a blood transfusion for their child on religious grounds) fell within the scope of section 7 liberty, or felt that it was unnecessary to decide the issue.

Justice LaForest, writing for himself and Justices L'Heureux-Dubé and McLachlin, reiterated and endorsed the broader conception of section 7 liberty in *B. (R.)* in the 1997 case of *Godbout v. Longueuil*.<sup>(20)</sup> However, Justice LaForest also attempted to place some

---

(16) *Ibid.*, at para. 228.

(17) [1995] 1 S.C.R. 315.

(18) *Ibid.*, at para. 80.

(19) *Ibid.*

(20) [1997] 3 S.C.R. 844, at paras. 63 to 66.



limits on the potential scope of the expanding liberty interest being recognized in section 7 of the Charter. He wrote that:

... the right to liberty enshrined in section 7 of the *Charter* protects within its ambit the right to an *irreducible sphere of personal autonomy* wherein individuals may make *inherently private choices free from state interference*. I must emphasize here that ... *I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs... I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as “private”*. Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses *only those matters that can properly be described as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence... [a] narrow class of inherently personal matters*.<sup>(21)</sup>  
[emphasis added]

*Godbout* dealt with the legality of a municipal resolution which required city employees to reside within the city limits. Justices LaForest, L’Heureux-Dubé and McLachlin concluded that the choice of one’s neighbourhood was an aspect of the “liberty” protected by section 7, and thus held that the resolution violated the Charter. However, the majority of the Court preferred to determine the case under the Quebec *Charter of Human Rights and Freedoms*, without reference to section 7 of the (Canadian) Charter.

In the subsequent case of *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1999),<sup>(22)</sup> Madam Justice L’Heureux-Dubé, writing for herself and Justices Gonthier and McLachlin, gave further support to the broadened conception of the section 7 liberty interest approach expounded by Justice Wilson in *Morgentaler*, and subsequently endorsed and elaborated upon by Justice LaForest in *B. (R.)* and *Godbout*.<sup>(23)</sup> In *G. (J.)*, the issue was whether section 7 of the Charter mandated legal aid funding for parents in wardship proceedings. The Court unanimously decided that it did, and that such proceedings interfered with parents’ section 7 interests in “security of the person.” The minority concurring opinion of Justice L’Heureux-Dubé, however, held that the proceedings’ potential for depriving parents of

---

(21) *Ibid.*, at para. 66.

(22) [1999] 3 S.C.R. 46.

(23) *Ibid.*, paras. 117 and 118.

the right to make decisions concerning their children also implicated parents' liberty interest under section 7.<sup>(24)</sup>

The broader view of the section 7 liberty interest as extending beyond mere freedom from physical restraint finally succeeded in obtaining the support of a majority of the Supreme Court of Canada in the October 2000 decision in *Blencoe v. British Columbia (Human Rights Commission)*.<sup>(25)</sup> In that case, the majority of the Court rejected the respondent's claim that a lengthy delay in the handling of a sexual harassment complaint by the provincial human rights commission interfered with his section 7 interests in liberty or security of the person. Justice Bastarache, writing for himself and four other justices, reviewed with approval the development, in the decisions described above, of a broader conception of the section 7 liberty interest which extended to matters of "fundamental personal importance."<sup>(26)</sup> The four dissenting justices preferred to decide the case under administrative law principles and did not deal with section 7 of the Charter.

However, Justice Bastarache, for the majority of the Court, also strongly endorsed the earlier caution of Justice LaForest in *Godbout* (discussed above): section 7 liberty covers only those matters of fundamental personal importance which represent "a narrow sphere of inherently personal decision-making deserving of the law's protection;" and not even all matters which can be characterized as private are necessarily within its scope.<sup>(27)</sup> Justice Bastarache ended his general analysis of section 7 liberty with the basic proposition that the personal autonomy which it protects "is not synonymous with unconstrained freedom."<sup>(28)</sup> This qualification has been reiterated throughout the evolution of the jurisprudence on section 7.<sup>(29)</sup>

This relatively recent expansion in the scope of personal liberty protected by section 7 has potentially far-reaching consequences in the evolution of the *Canadian Charter of Rights and Freedoms*. Now, governments must be prepared to defend the fundamental justice of certain legislative policy choices and not just the manner in which these policies are vindicated through enforcement. To this extent, the recent jurisprudence can be seen as a positive

---

(24) *Ibid.*, para. 118.

(25) 2000 SCC 44.

(26) *Ibid.*, paras. 49-52.

(27) *Ibid.*, paras. 51-52.

(28) *Ibid.*, para. 54.

(29) *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 524 (*per* Wilson J.); *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 785-86 (*per* Dickson C.J.C.); and *S. (R.J.) v. The Queen*, [1995] 1 S.C.R. 451, at para. 31, *per* Iacobucci J.

development from the point of view of decriminalization of illegal drugs. However, as the drug-related Charter cases discussed below seem to confirm, the scope of the constitutional right to liberty does not yet appear broad enough to protect the recreational use of such substances – even on a strictly private and personal basis.

### 3. Security of the Person

The right to security of the person set out in section 7 of the Charter has not undergone the same degree of transformation as the liberty interest; however, it has been interpreted as going well beyond freedom from direct physical interference with a person's body. Although an interference with security of the person must be state-caused in order to violate section 7, this right may be infringed by state action which either interferes with, or results in a threat to, a person's physical or psychological integrity, including the person's physical or mental health.

In the 1988 *Morgentaler* case, Chief Justice Dickson, also writing for Justice Lamer, held that “state interference with bodily integrity and serious state-imposed psychological stress, at least in the criminal law context, constitute a breach of security of the person;” and, to paraphrase, forcing a person to abstain from a “generally safe medical procedure that might be of clear benefit” to that person on the basis of “criteria unrelated to [his or] her own priorities or aspirations” represents “a profound interference with a [person's] body and thus a violation of security of the person.”<sup>(30)</sup> Justice Beetz, writing for himself and Justice Estey, wrote:

If a rule of criminal law precludes a person from obtaining appropriate medical treatment when his or her life or health is in danger, then the state has intervened and this intervention constitutes a violation of that man's or that woman's security of the person. “Security of the person” 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 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.<sup>(31)</sup>

---

(30) *Supra.*, at paras. 20 and 22.

(31) *Ibid.*, at p. 90.

A majority of the Court in *Morgentaler* recognized that security of the person referred to a person's psychological as well as physical well-being,<sup>(32)</sup> and this has been reiterated in subsequent decisions. However, this psychological dimension of personal security is restricted to situations which, viewed objectively, involve serious psychological or emotional stress. Although the impugned state action need not result in nervous shock or psychiatric illness, there must be something greater than ordinary stress or anxiety for the state action to trigger the security of the person interest in section 7.<sup>(33)</sup> Based on the various opinions in *Morgentaler*, Justice Sopinka, writing for the majority of the Supreme Court of Canada in *Rodriguez v. British Columbia (Attorney General)* (1993),<sup>(34)</sup> described security of the person in section 7 in even broader terms:

... a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from state interference and freedom from state-imposed psychological and emotional stress... There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.<sup>(35)</sup>

As some of the drug-related cases discussed below attest, the conception of security of the person endorsed by the Supreme Court of Canada has implications for Canada's drug prohibition laws. The recognition by a plurality of the Court in *Morgentaler* of a right to be free from criminal prohibitions interfering with access to beneficial medical treatments has fairly obvious implications for those seeking access to banned substances on medical grounds. Indeed, such claims have met with success in the recent cases of *Wakeford* and *Parker* discussed below. Also, the even broader definition of security of the person asserted by Justice Sopinka for the majority in *Rodriguez* – which suggests a more general autonomy with respect to decisions concerning one's own body – seems at least *prima facie* relevant to the debate over personal use of illegal drugs generally.

---

(32) *Ibid.*, at paras. 16-20 (Dickson C.J.C.), paras. 112 and 118 (Beetz J.), and para. 243 (Wilson J.).

(33) *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, *supra.*, at paras. 59 and 60. See also: *Blencoe v. British Columbia (Human Rights Commission)*, *supra.*, at paras. 56-57.

(34) [1993] 3 S.C.R. 519.

(35) *Ibid.*, at para. 137.

#### 4. Principles of Fundamental Justice

Even if a law or state action impinges upon a person's right to liberty or security of the person, this in and of itself does not constitute a violation of section 7 of the Charter. For section 7 to be violated, there must be state interference with one or more of the protected interests (i.e., life, liberty, security of the person) in a manner which is contrary to the "principles of fundamental justice." A key challenge to understanding the scope and content of section 7 is the lack of certainty as to what is meant by "principles of fundamental justice."

One of the earliest Supreme Court of Canada cases to seriously consider the matter was *Reference re Motor Vehicle Act (British Columbia) s. 94(2)* (1985).<sup>(36)</sup> In that case, the Supreme Court unanimously agreed that the principles of fundamental justice in section 7 went beyond rules of procedure and included a substantive dimension. In other words, the substance of a law and not just the manner of its application could be challenged under section 7. However, Justice Lamer, writing for the majority, went on to indicate that the more specific protections for criminal accused in sections 8 through 14 of the Charter (unreasonable search and seizure, arbitrary detention, right to counsel, presumption of innocence, right against cruel and unusual punishment, etc.) were "illustrative" of principles of fundamental justice,<sup>(37)</sup> and that:

the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardians of the legal system.

While ensuring that the "principles of fundamental justice" would be broad enough to enable the courts to review the substance of legislation challenged under section 7, the majority in the *B.C. Motor Vehicle Act* reference was at the same time attempting to place some parameters on the nature and source of those principles. After all, confining the criteria against which impugned legislation is to be measured to the rules, doctrines and precepts of the legal system is consistent with an appropriate and legitimate division of labour between the judiciary and the legislature. As the "guardians of the legal system," the courts are well positioned to distill its principles. Moreover, by looking to the tenets of the legal system, rather than "the realm of general public policy," as the source for the standards to be used in section 7, the courts could avoid straying into "adjudication of policy matters" or merely "question[ing] the wisdom

---

(36) [1985] 2 S.C.R. 486.

(37) *Ibid.*, at para. 28.

of enactments” under the guise of performing a judicial function. In practice, however, the courts have had difficulty maintaining this distinction.

In *Cunningham v. Canada* (1993),<sup>(38)</sup> Madam Justice McLachlin, writing for a unanimous Court, made two important points about section 7 of the Charter and the principles of fundamental justice. First, it was held that, in addition to there being a deprivation of one or more of the protected interests of life, liberty and security of the person, that deprivation must be “sufficiently serious” to warrant constitutional protection under section 7: “[t]he Charter does not protect against insignificant or ‘trivial’ limitations of rights...”<sup>(39)</sup> Turning to the principles of fundamental justice, the Court – without reference to “the basic tenets of the legal system” and with little elaboration – announced that fundamental justice was about striking “the right balance” between the interests of the individual and those of society.<sup>(40)</sup> This view of fundamental justice as encompassing a balancing of societal interests and individual rights was expressed in some earlier decisions by Justice LaForest,<sup>(41)</sup> and has since been endorsed by the Court in the subsequent case of *Rodriguez* (1993),<sup>(42)</sup> and more recently in *United States v. Burns* (2001).<sup>(43)</sup>

In *Rodriguez*, Justice Sopinka, for the majority, echoed and expanded upon some of the concerns implicit in Justice Lamer’s observations in the *B.C. Motor Vehicle Act* reference about limiting to some degree the potential scope of the principles of fundamental justice in section 7. Justice Sopinka observed:

The principles of fundamental justice leave a great deal of scope for personal judgment and the Court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only.

...

---

(38) [1993] 2 S.C.R. 143.

(39) *Ibid.*, at para. 15. See also: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at p. 759 (*per* Dickson C.J.C.); *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 314; *Lavigne v. Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211, at p. 259; and *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at pp. 168-69.

(40) *Cunningham*, *supra.*, at para. 17.

(41) *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 833; *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539; *R. v. Beare*, [1988] 2 S.C.R. 387, at pp. 402-3; and *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 327.

(42) *Supra.*, *per* Sopinka J., for the majority, at para. 147.

(43) 2001 SCC 7, at paras. 65 and 67.

Principles of fundamental justice must not ... be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.<sup>(44)</sup>

However, after rejecting Justice McLachlin's conclusion (in her dissenting opinion with Justice L'Heureux-Dubé) that respect for human dignity qualifies as a principle of fundamental justice, Justice Sopinka proceeded to identify the "sanctity of human life" as the operative principle in the case (which dealt with the constitutionality of the criminal prohibition on assisted suicide).<sup>(45)</sup> He then went on to review its evolution and to balance it against the appellant's security of the person and liberty interests. It is difficult to see how either of these values relate specifically to the legal system, as opposed to society in general, and thus fall within "the inherent domain of the judiciary," as opposed to that of legislators or, for that matter, the clergy or the medical profession.

Possibly in an effort to rein in the scope of the principles of fundamental justice, the majority of the Supreme Court of Canada – in the recent case of *R. v. Mills* (1999)<sup>(46)</sup> – made the point that the balancing of interests which takes place in applying the principles of fundamental justice under section 7 of the Charter must be distinguished from that which is done under section 1.<sup>(47)</sup> Section 1, of course, is concerned with determining whether a limitation of a Charter right is "reasonable" and "demonstrably justified in a free and democratic society." Justices McLachlin and Iacobucci, for the majority, affirmed that the principles of fundamental justice in section 7 were not as broad in nature as the values and beliefs underlying a free and democratic society which the courts may need to consider under section 1.<sup>(48)</sup> The Justices quoted from former Chief Justice Dickson in *R. v. Oakes* (1986),<sup>(49)</sup> who described these broader section 1 values as including, among others, "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs,

---

(44) *Ibid.*, at paras. 140 and 142.

(45) *Ibid.*, at paras. 146, 130, 131, 150 and 151.

(46) [1999] 3 S.C.R. 668.

(47) *Ibid.*, at para. 65.

(48) *Ibid.*, at para. 67.

(49) [1986] 1 S.C.R. 103.

respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.”<sup>(50)</sup> However, these examples of values which are relevant to section 1, but which are apparently too broad to qualify as principles of fundamental justice, are quite similar to those previously recognized as principles of fundamental justice in *Rodriguez*, both in the majority opinion of Justice Sopinka and in the dissenting opinion of Justice McLachlin.

Recently, in *United States v. Burns* (2001), the Court acknowledged that certain principles, despite being reflected in the legal system, are not specifically legal principles *per se* as “they also reflect philosophic positions informed by beliefs and social science evidence outside ‘the inherent domain of the judiciary’.”<sup>(51)</sup> However, although the Court held that the narrower aspect of such principles which are manifested within the framework of the legal system *per se* engage “the special responsibility of the judiciary,” the Court did not necessarily indicate that it intended to refrain from applying the broader “general public policy” aspects of such principles as principles of fundamental justice under section 7.<sup>(52)</sup> It may be that the Court simply intends to be more aggressive in applying the narrower legal aspects of such principles.

The foregoing review of Supreme Court of Canada jurisprudence on the principles of fundamental justice in section 7 suggests that it is difficult to predict in any given case what will be the operative principle of fundamental justice, and how that principle will be derived and applied. Despite the Court’s declarations in the *B.C. Motor Vehicle Act* reference and *Rodriguez* that it should only apply precise legal principles, rather than principles of general public policy, as principles of fundamental justice, the Court has found it difficult to uphold this distinction in practice. No doubt the expanded scope of the protected interests in section 7 (most notably the liberty interest) has helped to fuel the outward pressure on the nature of the principles of fundamental justice. Moreover, the balancing approach to applying the principles of fundamental justice has so far not been significantly fleshed out in any useful way (in contrast, e.g., to the *Oakes* test for section 1). As a result, the jurisprudence on the principles of fundamental justice seems to be rather vague and context-specific. All one can really say at the

---

(50) *Mills, supra.*, at para. 67, quoting *Oakes, supra.*, at p. 136.

(51) *Burns, supra.*, at para. 71.

(52) *Ibid.*



moment is that fundamental justice demands that a law achieve “the right balance” between the rights of the individual to life, liberty or security of the person, and the interests of society.

## **C. Section 7 of the Charter and the Prohibition on Illegal Drugs**

### **1. Introduction**

The preceding review and discussion of the general jurisprudence concerning section 7 of the Charter and its evolution is necessary to understand how the courts have dealt with challenges under this provision to Canada’s drug prohibition laws and the legal context in which these cases have been decided. Moreover, the reported cases in which the ban on illegal drugs *per se* has been challenged under section 7 are relatively few in number and have all been decided below the level of the Supreme Court of Canada. Reviewing these cases in light of a firm grounding in the Supreme Court’s section 7 jurisprudence is useful in predicting whether the results and reasoning flowing from these lower court decisions are likely to prevail in the country’s highest court.

Not surprisingly, the cases which have challenged the substantive validity of drug prohibition laws under the Charter have so far specifically dealt with marijuana, rather than harder drugs, such as cocaine and heroin.

The relevant jurisprudence can be divided into two categories: 1) cases where a right to use illegal drugs for medical purposes is claimed; and 2) cases where a right to non-therapeutic (or recreational) drug use is claimed. Although the first category of cases has met with greater success, Charter challenges to marijuana prohibition from recreational users have been taken more seriously by the courts than they were a few years ago.

### **2. Section 7 and the Non-Medical Use of Marijuana**

So far, Canada’s legislative prohibition on marijuana – as it relates to non-therapeutic use – has been consistently upheld by the courts. However, the court’s reasons have become more elaborate and more extensive in the more recent cases than in earlier cases. Undoubtedly, this reflects, at least in part, a change in judicial perceptions of the scope of section 7 of the Charter.

No cases could be found which dealt with challenges to the ban on marijuana or other drugs under the *Canadian Bill of Rights*. Undoubtedly, this can at least in part be explained by the courts’ approach to the Bill of Rights generally, and to the “due process” clause

specifically. The courts took a rather cautious approach to applying the Bill of Rights which, being an ordinary statute, was not taken to “reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.”<sup>(53)</sup> Moreover, the prevailing view of the “due process of law” standard was that it was restricted to procedural fairness, and the “liberty” interest was undoubtedly assumed to refer only to freedom from physical restraint.

The earliest case in which there was a Charter challenge to the offence of possession of an illegal narcotic – in this case, marijuana – was the Quebec Superior Court judgement in *R. v. Lepage* (8 May 1989, unreported).<sup>(54)</sup> However, this case was unreported and a copy of the decision could not be found, so the reasons for the decision, including the provisions of the Charter under which the decision was made, are not available.

The British Columbia Supreme Court decision of *R. v. Cholette* (1993)<sup>(55)</sup> was the first located case which dealt squarely with a section 7 challenge to the ban on marijuana. In that case, the accused claimed that the ban violated his right to security of the person under section 7. The accused cited the benefits which he derived from using marijuana and questioned the motivation of the government’s original decision to ban marijuana in 1923 (on the basis that it reflected anti-Asian bias and stereotyping) and its continued retention of the ban on the ground that there is no evidence of any significant harmful effect to society. Justice Dorgan rejected the accused’s argument and concluded that the accused had failed to demonstrate that the ban on marijuana “interferes in any real way with the right of access to medical treatment for a condition representing a danger to the life or health of the accused...”<sup>(56)</sup>

Four months after the *Cholette* case, similar arguments were being weighed by the Quebec Court of Appeal in *R. v. Hamon* (1993).<sup>(57)</sup> This time, the accused relied on the broader conception of the liberty interest advanced by Wilson J. in *Morgentaler* (see above) arguing that the decision to use marijuana was a fundamental personal decision. He further claimed that, as marijuana is not really harmful to society – or, at least, no more harmful than tobacco or alcohol – the ban is arbitrary and irrational, and thus contrary to the principles of fundamental justice.

---

(53) *R. v. Therens*, [1985] 1 S.C.R. 613, at p. 639, per Le Dain J.

(54) Bruce A. MacFarlane, Robert J. Frater and Chantal Proulx, *Drug Offences in Canada*, Aurora, Ont.: Canada Law Book, 1996 (rev. November 2000) (loose-leaf), p. 4-27.

(55) [1993] B.C.J. No. 2616.

(56) *Ibid.*, at para. 9.

(57) 20 C.R.R. (2d) 181, [1993] A.Q. no. 1656.

Justice Beauregard, for the court, was prepared to assume that an arbitrary criminal prohibition would be contrary to the principles of fundamental justice.<sup>(58)</sup> However, the Court concluded that the ban was not arbitrary and accepted the expert evidence adduced by the government to the effect that cannabis use did have harmful effects on individual users and society.<sup>(59)</sup> Moreover, the court rejected the suggestion that there was anything unjust in the government's decision to treat cannabis differently from tobacco or alcohol.<sup>(60)</sup> Leave to appeal this decision to the Supreme Court of Canada was refused.

In the 1997 case of *R. v. Hunter*,<sup>(61)</sup> Justice Drake of the British Columbia Supreme Court addressed a challenge to the prohibitions on marijuana and psilocybin under various Charter provisions. With respect to the accused's arguments that the prohibitions violated his section 7 liberty and security of the person interests, Justice Drake summarily dismissed them, stating simply that "the two statutes contain reasonable prohibitions against certain conduct, and these are not unduly broad in their application" and referring with approval to the Quebec Court of Appeal decision in *Hamon*.<sup>(62)</sup>

In the preceding cases involving challenges to the ban on marijuana (and psilocybin, in the case of *Hunter*) under section 7 of the Charter, the courts dismissed the arguments with little detailed reasoning. However, in two provincial courts of appeal decisions released in 2000, similar arguments were the subject of more extensive analysis.

The first of these two cases was *R. v. Malmo-Levine*,<sup>(63)</sup> a decision of the British Columbia Court of Appeal released on 2 June 2000. In that case, a majority of the court upheld the criminal prohibition on simple possession of marijuana as being in conformity with section 7 of the Charter.

First, the Court decided that the accused's section 7 liberty interest was engaged by the fact that the penalty for the offence provided for possible imprisonment; and that it was therefore unnecessary to decide whether personal recreational use of marijuana was independently protected as an element of "liberty."<sup>(64)</sup>

---

(58) *Ibid.*, at p. 183 C.R.R. and para. 14, [1993] A.Q.

(59) *Ibid.*, at p. 183-84 C.R.R. and paras. 17-20, [1993] A.Q.

(60) *Ibid.*, at p. 185 C.R.R. and paras. 22-26, [1993] A.Q.

(61) [1997] B.C.J. No. 1315.

(62) *Ibid.*, at para. 15.

(63) [2000] B.C.J. No. 1095.

(64) *Ibid.*, at para. 69.

Justice Braidwood, for the majority, then turned to the task of identifying and defining the principles of fundamental justice applicable in the case. After considering relevant common law and constitutional jurisprudence, scholarly legal and philosophical writings (in particular, those of John Stuart Mill), and law reform commission reports, the Court accepted the accused's argument that the principles of fundamental justice as set out in section 7 of the Charter include a precept referred to as the "harm principle," pursuant to which a person ought not to be imprisoned unless there is a potential that his or her activities will otherwise cause harm to others.<sup>(65)</sup> Moreover, this principle requires that the degree of harm involved "must be neither insignificant nor trivial."<sup>(66)</sup>

Recognition of the "harm principle" as a principle of fundamental justice is consistent with the assumption made by the Quebec Court of Appeal in *Hamon* (see above), that a prohibition which was arbitrary and irrational would be contrary to section 7 of the Charter.

As in *Hamon*, the majority of the Court in *Malmo-Levine* found that the prohibition was not arbitrary. Justice Braidwood, for the majority of the Court, held that the criminal prohibition on possession of marijuana satisfied the harm principle. The majority concluded that Parliament had a "reasonable basis" to ban marijuana based on the following findings concerning the health risks associated with its use:

1. Impairment of ability to drive, fly, or operate complex machinery – in this regard, users represent a risk of harm to others in society as well as to themselves (however, the number of accidents attributable to marijuana use cannot be said to be significant).
2. Risk that the person will become a "chronic" user. Approximately 5% of marijuana users are chronic users; and it is impossible to tell in advance who is likely to become a chronic user. There is a risk that marijuana use, and with it the total number of chronic users, would increase if it were legalized.
3. Increased health risks to "vulnerable persons" such as young adolescents.
4. Risk of added costs to the health care and welfare system with increased use of marijuana (although, at current rates of use, such costs would be "negligible" compared with those associated with tobacco or alcohol use).<sup>(67)</sup>

---

(65) *Ibid.*, para. 134.

(66) *Ibid.*, para. 138.

(67) *Ibid.*, para. 142.

Justice Braidwood then proceeded to weigh the interests of the state versus the rights of the individual, as prescribed by the Supreme Court of Canada in *Cunningham* (discussed above), to determine if the criminal prohibition on marijuana possession struck “the right balance” between the individual and society. On the side of the individual, the Court weighed the deleterious effects on the individual and his or her family of imprisonment, and of having a criminal record. The Court also noted the disrespect and distrust for the drug laws fostered by the prohibition on marijuana possession. With respect to the state interest in retaining the ban on marijuana possession, the Court weighed the fact that it serves to minimize the harm to potential users and to society associated with cannabis use which, “however small, ... is neither insignificant nor trivial.”<sup>(68)</sup> The Court also noted that, in practice, a person convicted of simple possession of marijuana can likely expect a minor fine or a discharge, unless the person is a repeat offender.<sup>(69)</sup> Nonetheless, the Court observed, the threat of imprisonment remains and, in any event, “every year thousands of Canadians are branded with criminal records for a ‘remarkably benign activity.’”<sup>(70)</sup>

In the end, Justice Braidwood observed that the result of the balancing of interests was “quite close,” and that “there is no clear winner.”<sup>(71)</sup> However, he noted that Parliament is owed some deference in matters of public policy and returned to his conclusion that, although the threat posed by marijuana was not large, it did not need to be for Parliament to act.<sup>(72)</sup> The principles of fundamental justice demand only a “reasoned apprehension of harm.”<sup>(73)</sup> As this had been demonstrated, the majority dismissed the accused’s section 7 challenge to the prohibition on marijuana possession.

In a dissenting opinion, Justice Prowse, while agreeing with much of Justice Braidwood’s analysis, found that section 7 and the harm principle required a greater degree of harm to justify a criminal prohibition than merely non-trivial or not insignificant. Because the accused was able to demonstrate the absence of evidence indicating a reasonable apprehension of

---

(68) *Ibid.*, at para. 150.

(69) *Ibid.*, at para. 153.

(70) *Ibid.*, at para. 155.

(71) *Ibid.*, at paras. 155 and 156.

(72) *Ibid.*, at paras. 156 and 158.

(73) *Ibid.*, at para. 158.

“serious, substantial or significant” harm, Justice Prowse would have ruled that the criminal prohibition on simple possession violated section 7 of the Charter.<sup>(74)</sup>

The Ontario Court of Appeal decision in *R. v. Clay*,<sup>(75)</sup> released on 31 July 2000, dealt with almost the same issues and arguments as those in *Malmo-Levine*. Moreover, a unanimous panel of the Ontario Court of Appeal reached the same conclusion as the majority in the British Columbia Court of Appeal judgement released the previous month.

In *Clay*, Justice Rosenberg, for the court, accepted the “harm principle” elucidated by Justice Braidwood in *Malmo-Levine*.<sup>(76)</sup> Justice Rosenberg noted, among other things, that the notion of a “harm principle” encompassed by section 7 would be consistent with Justice Sopinka’s statement in *Rodriguez* that where the “deprivation of the right in question does little or nothing to enhance the state’s interest (whatever it may be), it seems ... that a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid purpose.”<sup>(77)</sup>

Moreover, in applying the “harm principle” to the criminal prohibition on marijuana possession, the Court came to the same conclusion as the majority in *Malmo-Levine*: because there is some evidence of harm caused by marijuana use that is neither trivial nor insignificant, Parliament has a rational basis to act as it has done and the marijuana prohibition is therefore consistent with the principles of fundamental justice in section 7.<sup>(78)</sup>

Justice Rosenberg, for the Court in *Clay*, noted that while the original basis for extending the ban on narcotics to include marijuana may have involved “racism” as well as “irrational, unproven and unfounded fears,” the valid objective of protecting Canadians from harm has remained constant.<sup>(79)</sup> The Court also rejected the relevance (for the purposes of constitutional analysis) of arguments and evidence showing that other legal substances, such as alcohol and tobacco, cause greater harm than marijuana: “[t]he fact that Parliament has been unable or unwilling to prohibit the use of other more dangerous substances does not preclude its

---

(74) *Ibid.*, at paras. 165 and 167-86.

(75) (2000), 49 O.R. (3d) 577.

(76) *Ibid.*, at paras. 28-31.

(77) *Ibid.*, at para. 31.

(78) *Ibid.*, at paras. 34 and 37.

(79) *Ibid.*, at para. 34.

intervention with respect to marijuana, provided Parliament had a rational basis for doing so.”<sup>(80)</sup> The Court concluded that it did and upheld the prohibition on marijuana possession, except as it related to persons who need it for medical reasons (which was dealt with by the Court in the companion case of *R. v. Parker* – discussed below).<sup>(81)</sup>

As in *Malmo-Levine*, the Court in *Clay* found that section 7 of the Charter was triggered by the possibility of imprisonment which implicated the accused’s liberty interest. However, the Court in *Clay* went further and addressed the argument that personal use of marijuana *per se* was protected as an aspect of liberty and/or security of the person based on the expanded conception of these interests recognized by Justices of the Supreme Court of Canada in decisions such as: *B. (R.) v. Children’s Aid Society of Metropolitan Toronto; New Brunswick (Minister of Health and Community Services) v. G. (J.)*; and *Rodriguez* (all discussed above). The Court concluded that personal marijuana use (apart from genuine medicinal use) did not engage the “wider aspect of liberty” which protected the freedom to make decisions of “fundamental personal importance.”<sup>(82)</sup> Nor did it fall within the sphere of personal autonomy, which encompassed the right to “make choices concerning one’s own body” and a right to “basic human dignity” as aspects of security of the person.<sup>(83)</sup>

### 3. Section 7 and the Medical Use of Marijuana

Unlike recreational users, relatively recent Charter challenges to the marijuana ban by those using the substance for medical reasons have met with some success. THC – the active ingredient in marijuana – has recognized beneficial effects in combatting medical symptoms and disorders such as nausea (which is often a side-effect of treatments for cancer and HIV/AIDS), epilepsy and glaucoma. Marijuana’s effectiveness in dealing with disease symptoms and treatment side-effects associated with serious medical problems helps to make the case that its prohibition engages the section 7 liberty and personal security interests of those who suffer from these problems. Another important factor in such cases is that legally available substitutes, including those containing a synthetic version of THC, do not seem to be as effective in many cases. Thus, in the cases (discussed below) in which persons have successfully

---

(80) *Ibid.*, at para. 36.

(81) *Ibid.*, at paras. 37 and 38.

(82) *Ibid.*, at para. 13.

(83) *Ibid.*, at paras. 14-18.

challenged the prohibition on marijuana under section 7 of the Charter, the impugned legislation effectively forced the individuals in question to choose between their own physical health and compliance with the law.

In *Wakeford v. Canada* (1998),<sup>(84)</sup> a person suffering from AIDS sought a constitutional exemption from the marijuana prohibition in the *Controlled Drugs and Substances Act*. A constitutional exemption is a case-specific remedy, available under section 24(1) of the Charter, which enables courts to exempt an individual from complying with a law where its application to them would infringe their Charter rights, but where the law, in its general application, is not contrary to the Charter. In this case, the applicant sought permission to continue using marijuana to fight nausea and loss of appetite which were side-effects of the drugs he was taking to fight AIDS.

Justice LaForme of the Ontario Court, General Division found that by denying the individual the autonomy to choose how to treat his illness, the law infringed his rights to liberty and security of the person under the Charter. The Court adopted the broader conception of the section 7 liberty interest as extending to decisions of “fundamental personal importance” endorsed by a plurality of the Supreme Court of Canada in *B. (R.) v. Children’s Aid Society of Metropolitan Toronto* (discussed above).<sup>(85)</sup> Weighing the state’s interest in criminalizing marijuana against the individual’s interests in his physical health, Justice LaForme found that the applicant’s interests clearly outweighed those of the state. The Court concluded that “[p]ersonal health and medical care must surely qualify as fundamental matters of personal choice.”<sup>(86)</sup> For similar reasons, the Court found that the security of the person interest was also engaged.

With respect to security of the person, Justice LaForme applied a formulation of this right based on the opinion of Justice Beetz in *Morgentaler* (discussed above), which was later endorsed by Justice Sopinka for the majority of the Supreme Court of Canada in *Rodriguez* (discussed above): “ ‘security of the person’ must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction.”<sup>(87)</sup> In this case, the Court found that “[t]he evidence is clear that Mr. Wakeford finds marijuana to be

---

(84) [1998] O.J. No. 3522 (Ont. Gen. Div.).

(85) *Ibid.*, at para. 28.

(86) *Ibid.*, at para. 29.

(87) *Ibid.*, at para. 38.



the best treatment for his nausea and for the stimulation of his appetite.”<sup>(88)</sup> The Court went on to observe that Mr. Wakeford’s conclusion seemed reasonable in the circumstances and concluded: “[i]t cannot be said, on the facts of this case, that Mr. Wakeford is not entitled to choose his method of treatment... [t]he [*Controlled Drugs and Substances Act*], by denying him that right, I find, infringes upon his right to security of the person.”<sup>(89)</sup>

Consistent with the approach taken in the cases of *Hamon*, *Malmö-Levine* and *Clay* (discussed above), the Court in *Wakeford* indicated that the prohibition on marijuana was not arbitrary inasmuch as there is some risk of harm associated with its use.<sup>(90)</sup> To this extent, the law, in its general application, is consistent with the principles of fundamental justice as set out in section 7 of the Charter. However, the law’s impact on medical users raised additional considerations. As applied to those users, the blanket prohibition is overbroad and does not support the state’s rationale for prohibition. Justice LaForme held that:

it would be contrary to the principles of fundamental justice to prohibit marijuana where marijuana can be shown to be a significant medical treatment for a debilitating and deadly disease and where there was no procedural process for obtaining an exemption from prosecution.<sup>(91)</sup>

However, Justice LaForme noted that such a process was provided for in section 56 of the Act, which empowers the Minister of Health to “exempt any person or class of persons ... 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” [emphasis added]. Therefore, the Court found that the law was in accordance with fundamental justice – even in respect of medical users – and denied Mr. Wakeford a constitutional exemption. However, Justice LaForme emphasized that without a ministerial exemption process for medical users, the case would have been decided differently.<sup>(92)</sup>

Indeed, seven months after his case was initially decided, Mr. Wakeford was back before the Court seeking to reopen his application on the basis of “fresh evidence” indicating that

---

(88) *Ibid.*, at para. 42.

(89) *Ibid.*, at para. 43.

(90) *Ibid.*, at paras. 49-50.

(91) *Ibid.*, at para. 54.

(92) *Ibid.*, at para. 66.

no real process had been established to deal with applications for exemptions under section 56 of the *Controlled Drugs and Substances Act*. Because the statutory exemption turned out to be “illusory,” Justice LaForme reopened the case and granted an interim constitutional exemption to Mr. Wakefield with respect to the offences of possession and production/cultivation of marijuana.<sup>(93)</sup> The exemption would remain in effect until the Minister of Health had made a decision on Mr. Wakeford’s application for an exemption under section 56 of the Act.

In *R. v. Parker* (2000),<sup>(94)</sup> the Ontario Court of Appeal reached a similar conclusion to that in *Wakeford* with respect to the impact of the blanket prohibition on marijuana use on the liberty and security of the person interests of medical users.

In *Parker*, the accused – who had been charged with cultivation and possession of marijuana – grew and used marijuana to control his epileptic seizures, which were otherwise frequent and serious, and potentially life-threatening.

As in *Wakeford*, the Court held that the criminal prohibition on marijuana, *vis-à-vis bona fide* medical users, engaged their section 7 right to liberty due to the possibility of imprisonment. In addition, by depriving such individuals of the ability to choose marijuana as medication to alleviate the effects of a serious illness, the prohibition also infringed their rights to liberty and security of the person independent of the potential for imprisonment. Applying the broader conception of the section 7 liberty interest endorsed by various members of the Supreme Court of Canada in cases such as *B. (R.)* and *G. (J.)* (and subsequently endorsed by a majority of that Court in *Blencoe, supra.*), Justice Rosenberg for the Court in *Parker* had “little difficulty in concluding that the choice of medication to alleviate the effects [of Mr. Parker’s condition]” is a decision of “fundamental personal importance.”<sup>(95)</sup> Similarly, consistent with the decisions of Chief Justice Dickson and Justice Beetz in *Morgentaler* and that of Justice Sopinka for the majority in *Rodriguez*, Justice Rosenberg concluded that the blanket prohibition on marijuana infringed on Mr. Parker’s right to security of the person by preventing him from availing himself of a medical treatment which is beneficial to him in respect of a very serious illness.<sup>(96)</sup>

---

(93) [1999] O.J. No. 1574, at paras. 11, 31 and 32.

(94) 49 O.R. (3d) 481. This judgement, dated 31 July 2000, was released along with the court’s judgement in *Clay, supra.*

(95) *Ibid.*, at para. 92.

(96) *Ibid.*, at paras. 110 and 111.

The Court in *Parker* further concluded that the blanket prohibition on marijuana possession did not accord with the principles of fundamental justice.

First, the Court held that the marijuana prohibition lacked a significant foundation in Canada's legal traditions and in the societal beliefs which the prohibition is supposed to represent (a standard which was used by the majority of the Supreme Court of Canada in *Rodriguez, supra.*). The Court noted that the ban on marijuana is relatively recent (1923) and was based largely upon misinformation and racism.<sup>(97)</sup> Moreover, the common law requirement of informed consent for medical treatment, the sanctity of life and societal beliefs about access to necessary medical treatment suggest that such a broad prohibition which prevents access to necessary medicine is not consistent with fundamental justice.<sup>(98)</sup>

Second, the Court ruled that the prohibition on marijuana possession and cultivation, without any exception for medical use, breached the principles of fundamental justice because it did little or nothing to advance the state's legitimate interest in regulating marijuana. With respect to preventing health risks to users and related costs to society, the application of the prohibition to those who need it to preserve their health actually defeats the state's objective.<sup>(99)</sup> With respect to the state interest in highway safety, the Court held that preventing the small number of seriously ill patients who require marijuana from having access to it does little to enhance road safety.<sup>(100)</sup> With respect to Canada's international obligations, the obligation on states to prohibit the possession, purchase and cultivation of marijuana for personal use under the 1988 *United Nations Convention Against Traffic in Narcotic Drugs and Psychotropic Substances* is subject to a country's "constitutional principles and the basic concepts of its legal system," and earlier conventions expressly recognized the medical value of narcotics and even contained limited medical use exceptions.<sup>(101)</sup> Moreover, Canada has other international obligations, including the *International Covenant on Economic, Social and Cultural Rights* which, in Article 12, recognizes the right of every person "to the enjoyment of the highest attainable standard of physical and mental health," and the obligation of states to create

---

(97) *Ibid.*, at paras. 126 and 134.

(98) *Ibid.*, at paras. 135-39.

(99) *Ibid.*, at para. 144.

(100) *Ibid.*

(101) *Ibid.*, at paras. 146-47.

conditions which assure all persons access to medical treatment.<sup>(102)</sup> Finally, although the state's legitimate interest in controlling the domestic and international trade in illicit drugs suggests a need to control the distribution of marijuana, its complete prohibition for personal therapeutic use does little to further this state interest.<sup>(103)</sup>

Finally, the Court in *Parker* concluded that the exceptions and exemptions contemplated by the legislation which could cover approved medical use were contrary to the principles of fundamental justice.

Although the Act and the regulations theoretically contemplate that someone could obtain marijuana by a doctor's prescription, the evidence in the case established that: no pharmacist would fill such a prescription; the government would not look favourably on any physician who prescribed marijuana; and it was practically impossible to find a legal source of marijuana in Canada.<sup>(104)</sup> Thus, this exception to the prohibition was held by the Court to be illusory.<sup>(105)</sup>

With respect to ministerial exemptions under section 56 of the *Controlled Drugs and Substances Act*, the Court in *Parker*, as in the second *Wakeford* judgement, found this procedure to be inadequate and not in accordance with the principles of fundamental justice. In *Parker*, the Court ruled that section 56 vested an unfettered discretion in the Minister of Health, an inappropriate basis for decisions relating to individuals' security of the person or liberty interests in the context of access to medical treatment to alleviate the effects of serious illness.<sup>(106)</sup>

Therefore, the Court in *Parker* concluded that the broad prohibition on possession of marijuana was contrary to section 7 of the Charter. For many of the same reasons that it was found not to be in accordance with the principles of fundamental justice, the Court held that the prohibition did not constitute a reasonable and justified limit under section 1 of the Charter.<sup>(107)</sup>

Unlike *Wakeford*, the Court in *Parker* proceeded to declare the legislative provision prohibiting marijuana possession to be constitutionally invalid. However, the Court

---

(102) *Ibid.*, at para. 148.

(103) *Ibid.*, at para. 151.

(104) *Ibid.*, at para. 155.

(105) *Ibid.*, at para. 163.

(106) *Ibid.*, at paras. 184-85 and 188.

(107) *Ibid.*, at paras. 191-94.

suspended the effect of the judgement for 12 months in order to give Parliament the opportunity to amend the law to include adequate exemptions for medical use. The Court also strongly hinted that in making the necessary changes to respond to the constitutional failings noted in its judgement, Parliament should also seriously consider extending some exemption to those caregivers on whom persons entitled to a medical exemption may be dependent.<sup>(108)</sup> In the interim, Mr. Parker was granted a personal exemption from the prohibition on possession of marijuana.

The federal government did not appeal the decision in *Parker* and, as of 1 March 2001, legislation to provide for adequate medical exemptions had not been tabled in Parliament.

The Court in *Parker* suggested that its finding that the prohibition on possession of marijuana violated section 7 of the Charter would likely apply to the prohibition on cultivation as well.<sup>(109)</sup> Just over four months after the *Parker* decision, in the case of *R. v. Krieger* (decided 11 December 2000), Justice Acton of the Alberta Court of Queen's Bench declared the prohibition on cultivation of marijuana to be unconstitutional on the basis that it violates section 7.<sup>(110)</sup> The court suspended the declaration of invalidity for one year to give Parliament the chance to enact exemptions on the cultivation ban for medical use. In the interim, Mr. Krieger – who uses marijuana to help him cope with the symptoms of multiple sclerosis – was granted a personal constitutional exemption from the cultivation ban.

## **OTHER CHARTER RIGHTS WHICH ARE OR MAY BE IMPLICATED BY THE DRUG PROHIBITION LAWS**

### **A. Freedom of Expression**

Subsection 2(b) of the Charter guarantees the following as fundamental freedoms:

2. ...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

---

(108) *Ibid.*, at para. 205.

(109) *Ibid.*, at para. 190.

(110) "Pot law ruled unconstitutional: Feds given one year to change marijuana-cultivation law," *The Star-Phoenix*, 12 December 2000, p. A6; and "Pot Law Again Ruled Unconstitutional," *The London Free Press*, 12 December 2000, p. A9.

In a relatively recent decision, the British Columbia Supreme Court was asked if the *Narcotic Control Act* and the *Food and Drugs Act* violated this freedom of expression. The Court in *R. v. Hunter* (1997) (*supra.*), stated that “these statutes are directed to the control of activities alone, not to speech or publication of opinion by anyone by any means such as conduct.”<sup>(111)</sup> Consequently, the Court concluded that the accused’s right to freedom of expression had not been infringed.

Although the narcotic prohibitions *per se* may not run afoul of the right to freedom of expression, the issue is more directly raised by a related prohibition on the distribution, production or promotion of literature for illicit drug use in section 462.2 of the *Criminal Code*.

In *R. v. Ramji* (1989),<sup>(112)</sup> the prohibition on instruments and literature for illicit drug use was attacked on the basis that it violated the accused’s freedom of expression under section 2(b) of the Charter. The Alberta Provincial Court judge concluded that the prohibition did not infringe any Charter rights.

However, in *Iorfida v. MacIntyre* (1994),<sup>(113)</sup> the Court stated that section 462.2, as far as it affects literature, was inconsistent with the Charter. The Ontario Court, General Division indicated that the “merits of any given expressive activity cannot be a relevant factor in a determination of whether the expressive activity is deserving of constitutional protection.”<sup>(114)</sup> Justice Macdonald referred to Supreme Court of Canada cases which adopted a “broad and inclusive approach, excluding only those rare cases where expression is communicated in a physically violent form.”<sup>(115)</sup> The Court further concluded that section 462.2 was not a reasonable limit under section 1 of the Charter, reasoning that the provision’s objective was not to prevent imminent criminal conduct but to prevent the free flow of information. The Court also held that the legislation was overly broad:

---

(111) *Supra.*, at para. 10.

(112) *R. v. Ramji*, [1989] A.J. No. 864, 103 A.R. 23. (Alta. Prov. Ct.).

(113) *Iorfida v. MacIntyre*, [1994] O.J. No. 2293, 93 C.C.C. (3d) 395 (Ont. Gen. Div.).

(114) *Ibid.*, para. 37.

(115) *Ibid.*, para. 34. See: *Quebec (A.G.) v. Irwin Toy Ltd.*, [1989] 1 S.C.R. 927; *Reference re Sections 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123; *R. v. Keegstra*, [1990] 3 S.C.R. 697; *R. v. Zundel*, [1992] 2 S.C.R. 731; and *R. v. Butler*, [1992] 1 S.C.R. 452.

It catches not only literature which glamorizes or promotes the use of drugs, but also political speech advocating law reform, religious speech, medical and health related speech, scholarly speech, artistically inspired speech and popular speech.<sup>(116)</sup>

## **B. Freedom of Religion**

Certain individuals accused of possession of marijuana have argued that the marijuana prohibition infringed their freedom of religion as guaranteed by subsection 2(a) of the Charter, which reads:

2. Everyone has the following fundamental freedoms:
  - (a) freedom of conscience and religion.

In *R. v. Baldasaro* (1985), the Ontario Court of Appeal simply concluded that the Charter afforded no defence to the charge that the accused had possession of the marijuana for use as part of their ritual and practice of their Church.<sup>(117)</sup>

The Nova Scotia Court of Appeal arrived at a similar conclusion in *R. v. Kerr* (1986).<sup>(118)</sup>

In my view, where one claims exemption on grounds of religion or conscience to a particular government regulation or requirement, one must be prepared to show that the objection is based upon a sincerely held belief based upon a lifestyle required by one's conscience or religion. Otherwise, s. 2(a) of the Charter might become a limitless excuse for avoiding all unwanted legal obligations.<sup>(119)</sup>

The Court in *R. v. Kerr* was satisfied that the accused had not established such a belief.

In *R. v. Hunter* (1997),<sup>(120)</sup> the accused indicated that, as a minister of the Church of the Universe, he required the use of hemp as a sacrament and thus the *Narcotic Control Act* and the *Food and Drugs Act* violated his Charter right to freedom of religion. The British Columbia Supreme Court held otherwise:

---

(116) *Iorfida v. MacIntyre, supra.*, at para. 54.

(117) [1985] O.J. No. 2033, Ont. C.A.).

(118) [1986] N.S.J. No. 321, (N.S.C.A.).

(119) *Ibid.*, quoting from *R. v. Videoflicks Ltd.* (1985), 48 O.R. (2d) 395, p. 423 (Ont. C.A.).

(120) *Supra.*, appeal quashed (June 18, 1997), Doc. Victoria CA V03040 (B.C.C.A.).

Unfortunately, this use is an unlawful act, and it is difficult to see how the *Charter* can protect such. If it did, for instance Thuggee and other murderous faiths would be quite legitimate in Canada. I have to find that a religion which encourages or at least condones the commission of indictable offences, in this case under the *Narcotic Control Act* and *Food and Drugs Act*, is no religion at all so far as the *Charter of Rights and Freedoms* is concerned.<sup>(121)</sup>

### C. Equality

Section 15(1) of the *Charter* guarantees everyone “the right to the equal benefit and protection of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

In *R. v. Hamon* (1993), the Quebec Court of Appeal tersely rejected the argument that the ban on cannabis affects equality rights under section 15 of the *Charter*: “[c]annabis users are not a class of persons covered by the s. 15 protection.”<sup>(122)</sup>

In *R. v. Hunter* (1997),<sup>(123)</sup> the British Columbia Supreme Court also quickly rejected the argument that the prohibitions on marijuana and psilocybin unconstitutionally discriminated against users of these substances contrary to section 15 of the *Charter*. Justice Drake simply stated that the statutes in question objectively applied to everyone and did not single out any group protected by section 15.<sup>(124)</sup>

In *Wakeford v. Canada* (1998),<sup>(125)</sup> Justice LaForme of the Ontario Court, General Division rejected the arguments of an AIDS-sufferer that the ban on marijuana violated his equality rights. While accepting that the applicant, as an AIDS-sufferer, was a person with a disability and thus protected by section 15(1) of the *Charter*, the Court concluded that the ban on marijuana was not discriminatory against such persons. The law did not deny AIDS-sufferers access to any drugs that were available to others; nor do other persons who are ill have an unrestricted choice of medications.<sup>(126)</sup> Moreover, the state was reasonably accommodating such persons by making other medications available for their symptoms (notwithstanding that they

---

(121) *Supra.*, at para. 14.

(122) *Supra.*, at p. 182 C.R.R. and para. 11, [1993] A.Q.

(123) *Supra.*

(124) *Ibid.*

(125) *Supra.*

(126) *Ibid.*, at paras. 72, 74 and 82.



might not be as effective as marijuana) and by providing for ministerial exemptions from the prohibition under section 56 of the Act.<sup>(127)</sup>

#### **D. Right Against Cruel and Unusual Treatment or Punishment**

In general, the penalties prescribed by Canada's drug prohibition for simple possession, trafficking or production have not *per se* raised issues of cruel and unusual punishment. However, the previous statute – the *Narcotic Control Act* – provided for a mandatory minimum sentence of seven years' imprisonment for importing or exporting narcotics. This provision was challenged in the courts on a number of occasions and, although it was upheld by lower courts as not amounting to cruel and unusual punishment,<sup>(128)</sup> in 1987, the Supreme Court of Canada ruled it unconstitutional in *R. v. Smith* as contrary to section 12 of the Charter.<sup>(129)</sup>

---

(127) *Ibid.*, at paras. 76, 84 and 86.

(128) *R. v. Shand* (1976), 30 C.C.C. (2d) 23, 70 D.L.R. (3d) 395 (Ont. C.A.); *R. v. Randall* (1983), 7 C.C.C. (3d) 363, 1 D.L.R. (4th) 722 (N.S.C.A.); and *R. v. Guiller* (1985), 48 C.R. (3d) 226, 25 C.R.R. 273 (Ont. Dist. Ct.).

(129) [1987] 1 S.C.R. 1045.