City of Toronto Clamps Down on Medical Marihuana Dispensaries

By Peter Gross

Background

On May 26, 2016, the City of Toronto (the "City") by-law enforcement officers laid charges against 79 medical marihuana dispensaries for zoning by-law contraventions, pursuant to Section 67 of the *Planning Act*.

The City's enforcement action came as local politicians became increasingly concerned about the proliferation of dispensaries in certain neighbourhoods, in particular Kensington Market, Queen Street West and the Danforth. In laying charges, it was not clear whether the City intended to draw a distinction between dispensaries providing marihuana for medical use pursuant to a valid prescription versus dispensaries providing marihuana for recreational purposes.

Prior to laying charges, the City's Director of Investigation Services, Municipal Licensing and Standards provided written warnings to the dispensaries' landlords, advising them that allowing their properties to be used for marihuana distribution was not permitted under the Former City of Toronto Zoning By-law 438-86. The warning letters also advised that the City's zoning by-laws which permit medical marihuana production facilities and include permission to distribute, also require a licence issued by Health Canada.

Health Canada previously issued licences to produce medical marihuana under both the *Marihuana Medical Access Regulations* ("MMAR") and the newer *Marihuana for Medical Purposes Regulations* ("MMPR"). However, prior to the City's enactment of zoning by-law amendments in 2014, the City's zoning by-laws did not link production of medical marihuana to a Health Canada licence. Since 2014, a medical marihuana use pursuant to the City's zoning by-laws require a licence pursuant to the MMPR.

Courts considering the issue of medical marihuana have affirmed many times since 2001 that reasonable access to medical marihuana for those in need is a *Charter* right. Efforts by the government to restrict access, with the stated objective of protecting health and safety, have repeatedly been struck down by courts as unjustified infringements on *Charter* rights.

Most recently, in February 2016, the Federal Court in *Allard v. Canada* declared the MMPR unconstitutional, subject to a six month suspension of the declaration of invalidity.[1] The purpose of the

[1] *Allard v. Canada*, 2016 FC 236 (CanLII)

suspension was to allow the federal government to respond by enacting a new or parallel regulatory regime for medical marihuana.

As a result of the Court's decision, municipalities face an uncertain and shifting landscape in regard to dispensaries. The jurisprudence since 2001 clearly establishes that overbroad and arbitrary actions that unreasonably restrict access to medical marihuana under the threat of criminal prosecution are unconstitutional.

Further, as Chief Justice McLachlan explained for the Supreme Court in *Gosselin v. Quebec (Attorney General)*[2], engagement of *Charter* rights is not limited to the area of criminal law stating:

> *…the dominant strand of jurisprudence on s. 7 sees its purpose as guarding against certain kinds of deprivation of life, liberty and security of the person, namely, those "that occur as a result of an individual's interaction with the justice system and its administration": New Brunswick (Minister of Health & Community Services) v. G. (J.), [1999] 3 S.C.R. 46 (S.C.C.), at para. 65. "[T]he justice system and its administration" refers to "the state's conduct in the course of enforcing and securing compliance with the law", (G. (J.), at para. 65).*[3]
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> *This Court has indicated in its s. 7 decisions that the administration of justice does not refer exclusively to processes operating in the criminal law, as Lamer C.J. observed in G. (J.), supra. Rather, our decisions recognize that the administration of justice can be implicated in a variety of circumstances: : see Blencoe , supra (human rights process); B. (R.) , supra, (parental rights in relation to state-imposed medical treatment); G. (J.), supra, (parental rights in the custody process); Winnipeg Child & Family Services (Northwest Area) v. G. (D.F.), [1997] 3 S.C.R. 925 (S.C.C.), (liberty to refuse state-imposed addiction treatment). Bastarache J. argues that s. 7 applies only in an adjudicative context. With respect, I believe that this conclusion may be premature. An adjudicative context might be sufficient, but we have not yet determined that one is necessary in order for s. 7 to be implicated.*
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> *In my view, it is both unnecessary and undesirable to attempt to state an exhaustive definition of the administration of justice at this stage, delimiting all circumstances in which the administration of justice might conceivably be implicated. The meaning of the*

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[2] *Gosselin v. Québec (Attorney General)*, 2002 SCC 84 (CanLII)

[3] *Gosselin*, supra at para. 77.

> *administration of justice, and more broadly the meaning of s. 7, should be allowed to develop incrementally, as heretofore unforeseen issues arise for consideration.*[4]

In this regard, the Ontario Court of Appeal in *Hitzig v. Canada,* confirmed that regulatory constraints on access to medical marihuana, even without consideration of criminal sanctions that support the regulatory structure, can have *Charter* implications.[5]

As municipalities take action to enforce zoning by-laws in regard to medical marihuana dispensaries, they may find their actions subject to *Charter* challenges in regard to restriction of access. Enforcement may be further complicated by the fact that some dispensaries have been operating openly for years as compassion clubs.

Wading into Charter Territory

R. v. Parker

Starting with the Ontario Court of Appeal's seminal decision in *R. v. Parker*[6], courts have repeatedly found the federal government's attempts to regulate the use of marihuana for medical purposes unconstitutional. *Parker* held that the prohibition against cultivation and possession of medical marihuana, under the threat of fine or imprisonment pursuant to the *Controlled Drugs and Substances Act* (the "CDSA"), breached section 7 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). Section 7 protects the right to life, liberty and security of the person and the right not to be deprived of those rights, except in accordance with the principles of fundamental justice.[7]

The Court found that forcing users of medical marihuana to choose between their health and imprisonment, violated section 7 and declared the prohibition against medical marihuana to be of no legal effect, absent a constitutionally acceptable medical exemption from the prohibition. However, the declaration of invalidity was suspended for one year to allow the government time to respond.

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[4] See *Gosselin*, supra at para. 78.

[5] *Hitzig v. Canada*, 2003 CanLII 30796 (ON CA)

[6] *R. v. Parker*, 2000 CanLII 5762 (ON CA)

[7] *Canadian Charter of Rights and Freedoms*

MMAR

In 2001, the federal government responded to *Parker* by enacting the MMAR regime. The MMAR authorized individuals with the support of a medical practitioner, to possess marihuana for medical purposes. Once authorized to possess ("ATP"), such individuals could obtain licences through which they could obtain lawful access to medical marihuana in one of three ways:

1. by purchasing marihuana directly from Health Canada.

2. through a Personal Use Production Licence ("PUPL") that permitted the license holder to grow his or her own marihuana; or

3. through a Designated Person Production Licence ("DPPL") that permitted a designated person to grow marihuana at a designated site, for an individual with an ATP.

There were no restrictions as to the location of the production facility except that, if outdoors, it could not be adjacent to a school, public playground, daycare facility or other public place frequented by persons under 18 years of age.[8] Municipalities historically did not enforce zoning by-laws with respect to a MMAR use.

Hitzig v. Canada

Following *Parker*, in 2003 the Ontario Court of Appeal released its decision in *Hitzig*. *Hitzig* considered the constitutional validity of the newly-enacted MMAR and concluded that the regulation failed to satisfy the requirement of *Parker* to provide a constitutionally acceptable exemption. The Court struck down five provisions of the MMAR, including prohibitions on compensation of DPPL producers and limitations on the number of persons for which a producer could grow.

In its decision, the Court recognized that imposing regulatory constraints on access to medical marihuana can infringe the *Charter* right to security of the person. In this regard, the Court stated:

> *In this case, the MMAR, with their strict conditions for eligibility and their restrictive provisions relating to a source of supply, clearly present an impediment to access to marihuana by those who need it for their serious medical conditions. By putting these regulatory constraints on that access, the MMAR can be said to implicate the right to security of the person even without considering the criminal sanctions which support the regulatory structure. Those sanctions apply not only to those who need to take*

[8] *Marihuana Medical Access Regulations*, SOR/2001-227, para. 53.

marihuana but do not have an ATP or who cannot comply with its conditions. They also apply to anyone who would supply marihuana to them unless that person has met the limiting terms required to obtain a DPL. As seen in Rodriguez v. British Columbia (A. G.), 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, a criminal sanction applied to another who would assist an individual in a fundamental choice affecting his or her personal autonomy can constitute an interference with that individual's security of the person. Thus, we conclude that the MMAR implicate the right of security of the person of those with the medical need to take marihuana.[9]

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It is undeniable that the effect of the MMAR is to force individuals entitled to possess and use marihuana for medical purposes to purchase that medicine from the black market. As Lederman J. put it at para. 159:

> *As a result, the regulatory system set in place by the MMAR to allow people with a demonstrated medical need to obtain marijuana simply cannot work without relying on criminal conduct and lax law enforcement.*
> …

Lederman J. found that the absence of a legal supply of marihuana for people entitled to possess and use it under the MMAR resulted in a breach of s. 7, holding at para. 160:

> *To my mind, this aspect of the scheme offends the basic tenets of our legal system. It is inconsistent with the principles of fundamental justice to deny a legal source of marijuana to people who have been granted ATPs and licences to produce. Quite simply, it does not lie in the government's mouth to ask people to consort with criminals to access their constitutional rights. …*

We agree with the conclusion reached by Lederman J[10]

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The MMAR provide a viable medical exemption to the prohibition against possession of marihuana only as long as there are individuals who are prepared to commit a crime by

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[9] See *Hitzig*, supra at para. 95.

[10] See *Hitzig*, supra at para. 109.

> *supplying the necessary medical marihuana to the individuals that the Government has determined are entitled to use the drug.*[11]

Therefore, it is clear from the Court's holding, that state action which restricts the supply of medical marihuana, to the extent that patients who require it cannot reasonably obtain it without resorting to the black market, results in an unjustified *Charter* breach.

Sfetkopoulos v. Canada (Attorney General)

In 2008, five years after *Hitzig*, the question of what constitutes reasonable access pursuant to the MMAR was again considered, this time by the Federal Court in *Sfetkopoulos v. Canada (Attorney General)*.[12] At issue was the same provision struck down by the Court in *Hitzig* which limited the number of persons for which a DPPL could produce. The same access restriction, subsection 41(b.1) of the MMAR, previously declared unconstitutional in *Hitzig*, had been re-enacted by Health Canada in virtually identical terms in an updated version of the regulation.[13]

In striking down the restriction, the Court stated:

> *Fourthly, the government says that paragraph 41(b.1) is necessary to "maintain an approach that is consistent with movement toward a supply model" whereby medical marihuana would be produced and made available like other therapeutic drugs, on prescription and through pharmacies. That may well be a laudable goal and if ever reached would make unnecessary litigation such as the present case. But we do not know when this new age will dawn and in the meantime the courts, in their wisdom, have concluded that persons with serious conditions for which marihuana provides some therapy should have reasonable access to it. It is no answer to say that someday there may be a better system. Nor does the hope for the future explain why a designated producer must be restricted to one customer.*
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> *Consequently, I have concluded that the restraint on access which paragraph 41(b.1) provides is not in accordance with the principles of fundamental justice.*[14]

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[11] See *Hitzig*, supra at para. 116.

[12] *Sfetkopoulos v. Canada (Attorney General),*

[13] See *Sfetkopoulos*, supra at para. 5.

[14] See *Sfetkopoulos*, supra at para. 18.

…

> *In my view it is not tenable for the government, consistently with the right established in other courts for qualified medical users to have reasonable access to marihuana, to force them either to buy from the government contractor, grow their own or be limited to the unnecessarily restrictive system of designated producers. At the moment, their only alternative is to acquire marihuana illicitly and that, according to Hitzig, is inconsistent with the rule of law and therefore with the principles of fundamental justice.*[15]

Not surprisingly, the Court's rationale and conclusion mirrored the decision in *Hitzig.*

R. v. Beren

A year later, in 2009, in *R. v. Beren*, the Supreme Court of British Columbia considered whether the section 7 *Charter* right to liberty and security was infringed when a producer, supplying medical marihuana to members of a compassion club, was charged with production, possession and control of marihuana for the purpose of trafficking pursuant to the CSDA.[16] Adopting the analysis from *Hitzig*, the court found that the defendant's section 7 interests were engaged by restrictions imposed on producing marihuana for persons with a medical need.[17]

Quoting *Rodriguez v. British Columbia (Attorney General),* the Court stated:

> *…a criminal sanction applied to another who would assist an individual in a fundamental choice affecting his or her personal autonomy, can constitute an interference with that individual's security of the person. Thus, we conclude that the MMAR implicate the right of security of the person of those with the medical need to take marihuana.*[18]

R. v. Smith

In 2015, the Supreme Court released its decision in *R. v. Smith*.[19] The defendant in *Smith* worked at a cannabis compassion club and was charged under the CSDA with possession and trafficking of cannabis

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[15] See *Sfetkopoulos*, supra at para. 19.

[16] *R. v. Beren*, 2009 BCSC 429 (CanLII)

[17] See *Beren*, supra at para. 86.

[18] See *Beren*, supra at para. 95.

[19] *R. v. Smith*, 2015 SCC 34 (CanLII)

derivatives. The MMAR only provided an exemption for possession of dried marihuana and there was evidence before the Court that derivatives provided better relief and were less harmful than smoking dried marihuana. The Court struck down sections 4 (possession) and 5 (trafficking) of the CSDA, to the extent that the law prohibited a person with medical authorization from possessing cannabis derivatives for medical purposes.

As a threshold matter, *Smith* confirmed that a person has standing to raise a constitutional challenge with respect to restrictions on access to medical marihuana and does not need to be a user of medical marihuana or a licensed producer. [20]

The Court found that the *Charter* was engaged in three ways. First, Smith's liberty interest was infringed by exposing him to the threat of imprisonment for possession of cannabis derivatives. Second, the prohibition on derivatives limited the liberty interest by foreclosing reasonable medical choices under the threat of prosecution. Third, by forcing a person to choose between a legal but inadequate treatment and an illegal but more effective choice, the law infringed security of the person. [21]

The Court also determined that the infringement was arbitrary in that it did not further the stated objective of protecting health and safety. In that regard it was contrary to principles of fundamental justice.[22] Similarly, because the restriction was arbitrary, it could not be rationally connected to the stated objective and therefore, could not be a justified infringement under section 1 of the *Charter*.[23]

Allard v. Canada

In 2016, the Federal Court first considered the constitutionality of the newly enacted MMPR. The Court determined that the regulation infringed section 7 Charter rights and was not justified under section 1.[24]

In defending the MMPR, Health Canada justified the restrictions in part on the basis of ameliorating risks associated with cannabis production in dwellings. MMAR allowed production in dwellings but the MMPR did not. Under the MMPR, all users would have to obtain their product from a producer licensed under the new regulation.

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[20] See *Smith*, supra at para. 12.

[21] See *Smith*, supra at para. 17.

[22] See *Smith*, supra at para. 28.

[23] See *Smith*, supra at para. 29.

[24] See *Allard*, supra at para. 289.

The risks identified by the government included mould and other contamination, fire, home invasion, violence and diversion of product and community impacts. All such assertions were rejected by the Court. The government's roster of witnesses included an RCMP corporal about whom the Court stated:

> *[101 Many "expert" witnesses were so imbued with a belief for or against marihuana - almost a religious fervour - that the Court had to approach such evidence with a significant degree of caution and scepticism.*
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> [Corporal] *Holmquist was the most egregious example of the so-called expert discussed earlier in paragraph 101. He was shown, in cross examination, to be so philosophically against marihuana in any form or use that his Report lacked balance and objectivity. He possessed none of the qualifications of the usual expert witness. His assumptions and analysis were shown to be flawed. His methodologies were not shown to be accepted by those working in his field. The factual basis of his various opinions was uncovered as inaccurate. I can give this evidence little or no weight. It does not establish that there was a sound basis for the new regulatory scheme.*[25]

The Court concluded that the restrictions in the MMPR, requiring users to purchase medical marihuana from licensed producers, imposed restrictions that were arbitrary and overbroad and bore no connection to the stated objective of reducing risks to health and safety and improving access.[26]

Although the Court found that medical marihuana users might not be forced into obtaining their supply from the black market, the court found that the cost of obtaining product from licensed producers would cause some users to choose between medication and basic necessities.[27] The Court also rejected as a justification, the purported cost of inspections that would be imposed on municipalities to ensure compliance with local by-laws.[28]

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[25] See *Allard*, supra at para. 126.

[26] See *Allard*, supra at para. 270.

[27] See *Allard*, supra at para. 236.

[28] See *Allard*, supra at para. 264.

In terms of remedy, the Court declared the MMPR invalid but suspended the declaration of invalidity for six months to allow the government to enact a new or parallel medical marihuana regime.[29]

Conclusion

Until Health Canada responds to the latest direction from the Federal Court in regard to medical marihuana, municipalities are likely to face continued pressure to address dispensaries. However, even once a new or modified regulation is in force, given the history of regulatory action by Health Canada to date, it is possible that the landscape will continue to shift for municipalities as the courts revisit, yet again, the issue of reasonable access to medical marihuana.

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[29] See *Allard*, supra at para. 296.