Federal Court | Cour fédérale

CANADA

Date: 20080110

Docket: T-1415-04

Citation: 2008 FC 33

Ottawa, Ontario, this 10th day of January, 2008

PRESENT: The Honourable Barry Strayer, Deputy Judge

BETWEEN:

DORA SFETKOPOULOS, DAVID MCGREGOR, PRISCILLA LAVELL, EUGENE HARACK, ROBIN TURNEY, RONALD FOLZ, MICHAEL GIBBISON, TIMOTHY DEGANS, MARK HUKULAK, LEONARD SISSON, PAUL MANNING, RON REID, RON SPECK, JOHN LOBRAICO, EDDIE WALLACE, MICHAEL DELARMEE, RONALD GEORGE WILSON, and JEFFREY LONG

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application for judicial review. The Applicants ask that the Court declare invalid subsection 41(b.1) of the *Marihuana Medical Access Regulations*, SOR/2001-227 (MMAR). A request in the original application for *mandamus* requiring the Minister of Health to authorize Carasel Harvest Supply Corporation (Carasel) to be a designated producer of medicinal cannabis for

all of the Applicants has been withdrawn. Instead the Applicants ask that the matter be referred back to the Minister for reconsideration. The Applicants also request that this Court retain supervisory jurisdiction over Health Canada's implementation of a revised process for allowing a single designated producer of medical marihuana to produce for more than one medical user.

FACTS

[2] The MMAR permit certain persons to apply to the Minister of Health for authorization to possess (ATP) dried marihuana. The application must show that the applicant suffers from a terminal disease specified in the Regulations, or from symptoms associated with such diseases, or certain other conditions where the medical opinions certify that marihuana might mitigate such conditions. The Regulations limit the lawful sources of supply of dried marihuana for the ATP holder to marihuana produced by that holder or by a person designated by him, or from a licensed dealer. If the ATP holder produces for himself he must have a personal production license (PPL). If he obtains from a person he designates, that person must obtain a designated-person production license (DPPL). That license holder can obtain a license to produce for only one user (MMAR, subsection 41(b.1), and may not produce marihuana in common with more than two other holders of DPPL's (MMAR, section 54.1). There is one licensed dealer in Canada, Prairie Plant Services (PPS) which grows marihuana under contract with the Government of Canada in a mine in Flin Flon, Manitoba. That production is further processed in Saskatoon, Saskatchewan.

[3] All of the present Applicants applied to the Minister of Health to designate as their producer Carasel of Smith Falls, Ontario. The manager of Carasel was licensed to produce marihuana for one of the Applicants and her husband was licensed to produce for another. Otherwise the Applicants' request for licenses designating Carasel as their DPPL were refused as advised in a letter dated May 20, 2004 to Carasel from the Director General, Drug Strategy and Controlled Substances Program of Health Canada basing the decision on subsection 41(b) of the MMAR. This subsection read as follows:

The Minister shall refuse to issue a designated-person production license [if]	Le ministre refuse de délivrer la licence de production à titre de personne désignée:
...	...
(b) the designated person would be the holder of more than one licence to produce;	b) dans le cas où la personne désignée deviendrait titulaire de plus d'une licence de production si la licence était délivrée;
...	...

(In point of fact, subsection 41(b) had by then been found invalid as described below, and had been replaced by an identical provision re-enacted as subsection 41(b.1).)

[4] This issue has a substantial history. Prior to the adoption of the MMAR there was no authorized system for persons with severe medical conditions to obtain dried marihuana. The possession of such marihuana was prohibited by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 4 and by the *Narcotic Control Act*, R.S.C. 1985, c. N-1, s. 6. While there had been some other cases touching on this problem, the first leading authority was the case of *R. v. Parker*

(2000), 49 O.R. (3rd) 481 decided by the Ontario Court of Appeal in July, 2000. Mr. Parker suffered from epilepsy and found that smoking marihuana helped him avoid serious symptoms. He was charged with possession and cultivation of marihuana. Evidence from his doctor and from experts generally supported the beneficial effects of marihuana, particularly for those suffering from epilepsy. The trial judge had found that the evidence established the therapeutic effects of marihuana in treatment of epilepsy and that its denial to the defendant was an infringement of section 7 of the *Charter*. He therefore granted an exemption to the defendant from the statutes prohibiting possession of marihuana. On appeal, the Ontario Court of Appeal confirmed that section 4 of the *Controlled Drugs and Substances Act* (the *Narcotics Control Act* having been repealed in the interim) was invalid in that it deprived Mr. Parker of his rights to liberty and security contrary to section 7 of the *Charter*. In its judgment of July 31, 2000, the Court declared section 4 invalid but suspended the declaration for a year to allow the government to provide some substitute arrangement consistent with the Court's decision. One day before the expiry of that suspension, on July 30, 2001, the Governor in Council enacted the MMAR. Those regulations, while providing a system for medical users with ATP's to grow and possess marihuana legally or to obtain it legally from a DPPL, drastically restricted the use of DPPL's. The MMAR prohibited compensation being paid to a designated producer and more seriously, limited the production of a DPPL to one customer. These regulations came under attack in *Hitzig v. Canada* (2003), 171 CCC (3rd) 18 in the Superior Court of Ontario. On January 9, 2003, that Court found the regulations limiting an ATP's supply to either marihuana grown by the user or by a DPPL (where the DPPL could not be paid and could only grow for one user) were so restrictive as to force many users to obtain marihuana illicitly on the black market. (PPS had not at that time been licensed as a dealer to provide its production to

users: at that time its production was being used for research only). The Superior Court held the regulations to infringe Mr. Hitzig's rights of liberty and security under section 7 of the *Charter*. The learned judge found that the restrictions were not in accordance with the principles of fundamental justice because there was no rational connection between the restrictions and the state's interests. In response, in July, 2003, Health Canada developed the *Interim policy on Distribution of Marihuana Seeds and Dried Marihuana Product for Medical Purposes in Canada*. This policy, combined with some amendments to the MMAR, allowed people with an ATP to obtain dried marihuana or a marihuana seed directly from PPS. While this was announced before the hearing by the Ontario Court of Appeal of *Hitzig* the Court was not asked to take into account the constitutionality of that policy or whether it affected the constitutionality of the regulations held by the Superior Court of Ontario to be invalid. The Ontario Court of Appeal rendered its judgment in *Hitzig* on October 7, 2003. It held various aspects of the MMAR to be invalid. The portions of concern to us are those relating to access to supply. The Court struck down the requirements that a DPPL not be compensated and that he be confined to one customer. The Court was particularly concerned that even the government recognized that many holders of an ATP could not obtain a licit supply of marihuana but would have to resort to the black market. Requiring medical users to obtain their supplies illicitly infringed their liberty and security interests, which interests embraced a right of reasonable access to a substance which the government acknowledges they may possess and consume. It found that the principles of fundamental justice include the recognition of the rule of law, and that state conduct which leads to – indeed countenances - violation of the law is contrary to those principles. Further, it applied the test of whether the restrictions furthered some substantial and compelling collective interest, and it could find none. In considering the government's

invocation of section 1 of the *Charter*, the Court held that for similar reasons the restrictions imposed in the regulations on access to marihuana for medical purposes were not rationally connected to such legitimate objectives as the state had in controlling access to marihuana. As a result, the Court struck down several provisions in the MMAR. We are only concerned here with provisions concerning access by authorized persons. The Court struck down subsection 41(b), the successor to which is in issue before me in the present case. The Court also struck down the provisions on compensation for DPPL's and the limitations on them that they could only produce for one user and could grow jointly with only two other producers.

[5] On December 3, 2003, the Governor in Council adopted several amendments to the MMAR (see SOR/2003-387). While it repealed a number of provisions which the Court in *Hitzig* had found to be invalid, including subsection 41(b), it re-enacted subsection 41(b) in virtually identical terms as subsection 41(b.1) which requires the Minister to refuse to issue a designated person production license:

> [if] the designated person would be the holder of more than one licence to produce....

It also re-enacted, as section 54.1, previous section 54 which prohibited a DPPL from producing in common with more than two other DPPL's. It is the re-enacted subsection 41(b.1) that the Applicants seek to have declared invalid for essentially the same reasons as its predecessor was declared invalid in *Hitzig* by the Ontario Court of Appeal.

[6] The Minister, however, lays some stress on the fact that on December 3, 2003 with the coming into force of the amendments to the MMAR, Health Canada announced, as referred to above, its *Interim Policy on Distribution of Marihuana Seeds and Dried Marihuana Product for Medical Purposes*. This was designed to give authorized persons reasonable access to a legal source of supply. Essentially it facilitated ATP holders obtaining dried marihuana or seed from the government's contractor, PPS. It is not in dispute that as of the summer of 2007, fewer than 20% of persons with ATP's were obtaining their marihuana from PPS (in July, 2007, 392 out of a total of 1,983 ATP holders).

ANALYSIS

Introduction

[7] The issue before me is that of reasonable access to a supply of dried marihuana or seed for those who already possess an authorization to possess marihuana. I have some misgivings about the Court prescribing therapeutic substances which are neither drugs approved under the elaborate and scientific processes of the *Food and Drug Act*, and on which there is far from a scientific consensus as to their benefits. But matters have moved well beyond that issue. The courts would not find themselves in the business of prescribing medical treatment were it not for the decision over 20 years ago that section 7 authorizes them, (see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 481), in the determination of what is contrary to the principles of fundamental justice, to pass judgment not only on the procedural fairness but also on the substantive correctness of the law. But we must

apply the constitution as the Supreme Court of Canada has found it to be. It is clear that the Government of Canada has accepted, by adopting the MMAR and the *Interim Policy*, (*supra*), that undue restraints on access to marihuana for those to whom it has given authority to possess such substance do attract the strictures of section 7 of the *Charter*. These were the central findings by the Ontario Court of Appeal in the *Parker* and *Hitzig* decisions (*supra*). It appears that the Crown never sought to appeal *Parker* and an application for leave to appeal in the *Hitzig* case was dismissed by the Supreme Court of Canada ([2004] S.C.C.A. No. 5), that appeal apparently being framed on the correctness of the remedies chosen by the Ontario Court of Appeal. After each of these decisions by the Ontario Court of Appeal, the Government of Canada took steps to make its law and practices conform to the *Charter* requirements identified by the Court. While the Attorney General in the present case sought to argue again the applicability of the principles of fundamental justice, it appears to me that the real issues in dispute here are as to whether the remedial steps taken by the Government have brought it into conformity with the *Charter* requirements identified in *Parker* and *Hitzig*. The Attorney General has, correctly I believe, pointed out that those requirements do not include an obligation on the part of government to supply marihuana to medical users. What the *Charter* requires is that government not hinder for no good reason those with demonstrated medical need to obtain this substance.

Standard of Review

[8] While neither party raised this issue, I take it that it is incumbent on me to address it as this is a judicial review of a decision of the Minister or his delegate with respect to applications for

designation of a supplier. Such decisions are of course reviewable under the *Federal Courts Act* without any privative clause. The nature of the question is essentially one of constitutional law. As such it is more amenable to authoritative determination by the courts rather than the Minister. While the parties have put some facts in issue, they were not facts which were put before the Minister: they are "legislative" facts presented to assist the constitutional analysis in this Court and are for determination by the Court. For these reasons I am satisfied the standard of review of the Minister's decision is correctness.

Issues

[9] It appears to me that there are essentially two questions for me to determine. First, is subsection 41(b.1) contrary to the *Charter*? Second, in determining this does the *Interim Policy* of December 3, 2003, whereby greater access is provided to PPS product, provide a factual context in which subsection 41(b.1) can be seen as a permissible limitation on one form of supply, namely that from designated producers?

[10] I am satisfied from the decisions of the Ontario Court of Appeal in *Parker* and in *Hitzig*, *supra*, that subsection 41(b.1) is a restriction on section 7 liberty and security rights of the Applicants. This is the subsection which has been evoked by the Minister to prevent them from being able to choose their designated producer, namely Carasel. In determining whether there is a breach of section 7 of the *Charter*, one must first find an infringement of an interest protected by section 7 and then consider whether, if there is a restriction on that interest, it is in accordance with

the principles of fundamental justice. For the reasons given by the Ontario Court of Appeal in *Hitzig* at paras. 97-104, I conclude that both the liberty and security interests of the Applicants are negatively affected by subsection 41(b.1). As for the liberty interests, "liberty" comprehends the right to make decisions of fundamental personal importance. This would include the right to choose, on medical advice, to use marihuana for treatment of serious conditions, that right implying a right of access to such marihuana. It would also include the right not to have one's physical liberty endangered by the risk of imprisonment from having to access marihuana illicitly. With respect to security, this interest includes the similar right for those with medical need to have access to medication without undue state interference.

[11] In determining whether these limits on section 7 interests are in accordance with the principles of fundamental justice, one can consider whether the individual rights in section 7 may nevertheless be subordinated to substantial and compelling collective interests (see *Hitzig*, para. 119, and authorities cited therein). Such a limitation, if it does little or nothing to enhance the state's interest, can be regarded as arbitrary: see *Rodriguez v. British Columbia (Attorney General)* 1993 3 SCR 519 at page 594; *R. v. Heywood* (1994), 94 C.C.C. (3rd) 481 SCC at 514; and *Chaoulli v. Attorney General of Quebec*, [2005] 1 S.C.R. 791 at paras. 130, 131, 231. I believe that subsection 41(b.1) fails this test.

[12] First it must be observed that, according to the government's own statistics, some 80% of persons with ATP's who have been duly authorized to have and use marihuana are not obtaining it from the government source, namely PPS. The evidence shows that many users are unable to grow

their own marihuana, either because they are too ill or because their home circumstances do not make it possible. While I have no statistics on the percentage of the market supplied by DPPL's, the regulations remain almost as restrictive as those which were struck down by the Ontario Court of Appeal as creating an undue restraint on an ATP's recognized right to access. The Ontario Court of Appeal held that, by inference, a large percentage of ATP's were getting their marihuana from illicit sources. The only things that have changed in this respect since that decision is the amendment to the MMAR permitting designated producers to be compensated, and the availability of marihuana and seeds from the government's producer, PPS. I will discuss the latter factor later.

[13] The government's justification for re-enacting the previously invalidated subsection 41(b) as a new subsection 41(b.1) was stated in the Regulatory Impact Analysis Statement published with the regulations of December 3, 2003 amending the MMAR. That justification is as follows: (The reference to section 54 is not directly relevant but shows the policy being pursued.)

Paragraph 41(b) will be re-enacted to reinstate on a national basis, the limit on the number of persons for whom one designated person can produce marihuana; under the MMAR, one DPL holder can cultivate for only one ATP holder; and	L'alinéa 41b) sera remis en vigueur pour réintégrer au plan national la limite du nombre de personnes pour lesquelles une personne désignée peut produire; en vertu du RAMM, une seule personne désignée peut produire pour un seul détenteur d'une autorisation de possession; et
Section 54 will be re-enacted to reinstate on a national basis, the limit on the number of DPL holders who can produce marihuana in common; under the MMAR, a DPL holder is not permitted to produce	L'article 54 sera remis en vigueur pour réintégrer au plan national la limite du nombre de personnes désignées qui peuvent produire de la marihuana en commun; en vertu du RAMM, un détenteur

marihuana in common with more than two other DPL holders.

de licence de production à titre de personne désignée n'est pas autorisé à produire de la marihuana en commun avec plus de deux autres détenteurs.

These limits on the production of marihuana are necessary to:

Ces limites sur la production de marihuana sont nécessaires pour :

- maintain control over distribution of an unapproved drug product, which has not yet been demonstrated to comply with the requirements of the FDA/FDR;

- maintenir le contrôle sur la distribution d'une drogue non approuvée, dont la conformité aux exigences de la LAD et du RAD n'a pas encore été démontrée;

- minimize the risk of diversion of marihuana for non-medical use;

- minimiser le risque de détournement de la marihuana à des fins non médicales;

- be consistent with the obligations imposed on Canada as a signatory to the United Nations' Single Convention on Narcotic Drugs, 1961 as amended in 1972 (the 1961 Convention), in respect of cultivation and distribution of cannabis; and

- être compatible avec les obligations du Canada comme signataire de la Convention unique sur les stupéfiants des nations Unies de 1961, telle que modifiée en 1972 (la convention de 1961), concernant la culture et la distribution de cannabis; et

- maintain an approach that is consistent with movement toward a supply model whereby marihuana for medical purposes would be: subject to product standards; produced

- maintenir une approche qui est compatible avec le mouvement vers un modèle d'approvisionnement selon lequel la marihuana à des fins médicales serait

under regulated conditions; and distributed through pharmacies, on the advice of physicians, to patients with serious illnesses, when conventional therapies are unsuccessful. Such a model would also include a program of education and market surveillance.	assujettie à des normes du produit, serait produite sous des conditions réglementées et serait distribuée par les pharmacies, sur avis des médecins, aux patients gravement malades lorsque les thérapies conventionnelles échouent. Un tel modèle comprend également un programme d'éducation et la surveillance du marché.

In its argument, the government has essentially adopted this rationale for the re-enactment of subsection 41(b.1). It is therefore necessary to consider whether such reasons provide a basis for saying that subsection 41(b.1) is in accordance with the principles of fundamental justice. In the particular context of this case I will consider criteria such as that adopted by the Ontario Court of Appeal in *Hitzig*, *supra*, at paras. 109-28, holding that fundamental justice requires respect for the rule of law and thus cannot countenance a system which forces authorized medical users of dried marihuana to obtain it illicitly. Also I will have regard to the question of whether the limitation in subsection 41(b.1) is arbitrary, not genuinely connected to the protection of the interests of the state. In this, I rely on the authority of cases such as *Rodriguez* and *Chaoulli*, cited above with relevant passages.

[14] The first justification offered by the Respondent for subsection 41(b.1) as set out in the 2003 regulatory impact statement quoted above, is that such a restriction on designated producers limiting

them to produce for only one user is for the purpose of maintaining control over distribution of an unapproved drug product. It has not been demonstrated to me why limiting the production of a designated producer to one customer will have this effect. The Regulations only permit such producer to produce marihuana for persons already authorized by the Minister to possess and use marihuana: that is, holders who have an ATP license. ATP holders are persons adjudged by the Minister to be legitimate users of this "unapproved drug" and whether the producer grows for one ATP holder or thirty ATP holders the distribution of marihuana would be to persons, and for purposes, already countenanced by the regulations. Some mention was made of quality control being jeopardized if designated producers could produce for more than one customer. I am unaware that Health Canada imposes any quality control on designated producers now but if it does, or even if it does not, it can put in place the same kind of quality controls for designated producers with one or many customers. Indeed it seems logical that if designated producers were authorized to produce for many customers there would be economies of scale and a level of income that might make possible even better quality control by the producer. At the same time, a host of one-customer designated producers would be made unnecessary and therefore any control and inspection system Health Canada might wish to impose on designated producers would be simpler and cheaper to operate with fewer producers.

[15] As a second rationale, it is said by the government that subsection 41(b.1) will "minimize the risk of diversion of marihuana for non-medical use". That, too, has not been explained to my satisfaction. Again, designated producers, no matter how many customers they have, must confine their sales to persons with an ATP. A designated producer, since he is authorized to grow marihuana

now, has a present potential for producing more than his one customer needs and diverting the surplus for illicit sale. This would be true whether he grows for one customer or twenty-five. I suppose that it might be easier, in a grow operation large enough to supply twenty-five legitimate customers, to conceal a larger potential surplus of production for illicit sale. This is hypothetical and it might equally be said that, as noted above, with fewer designated producers having larger operations, a system of inspection would be much easier to sustain than in the present plethora of single-customer producers. The government also argues that a larger grow operation run by a designated producer with multiple customers would, because of its size, attract theft. But it is also argued by the Applicants that a larger operation, because of efficiencies of scale, could have a better security system and indeed could be more secure than the typical home-based self producer or single-customer designated producer.

[16] At this point it may be observed, in respect of both the first and second rationales that it may well be that there could be justification for limiting the size of operations of designated producers, to facilitate supervision and inspection for quality and security. But any new regulations to this end will have to be justified as having a demonstrable purpose rationally related to legitimate state interests. No such justification has been offered to me for subsection 41(b.1).

[17] As the third justification for subsection 41(b.1) the government has invoked the United-Nation's *Single Convention on Narcotic Drugs, 1961* which, the government says, imposes on it obligations "in respect of cultivation and distribution of cannabis..." I have studied the convention and the affidavit of the Minister's witness on this subject and remain puzzled. The convention

appears to require the Government of Canada to control marihuana as a narcotic drug and to limit its use to medical and scientific purposes. It requires a medical prescription for the supply or dispensation of drugs to individuals and a system of limiting quantities of drugs available to them. It requires that Canada maintain a system to control all persons and enterprises engaged in the trade or distribution of drugs which must be carried out under license. It would appear that Canada complies with these requirements except for the requirement of a prescription for any cannabis authorized for individual medical use, although the MMAR system may constitute an adequate substitute. The Minister lays particular stress on Article 23 of the Convention which requires that a state permitting the cultivation of marihuana have an Agency to carry out functions under that article. Paragraph 2(d) of Article 23 requires that cultivators of marihuana be required to deliver their total crops to the Agency. According to the Minister, Health Canada has been designated as the Agency for Canada. The Minister argues as follows:

> To allow growers to supply to more than one person who is authorized to possess and use marihuana for medical purposes would obligate the Government, in compliance with the *1961 Convention*, to collect all marihuana produced.

This appears to me to be a *non sequitur*. If the convention requires that all "cultivators" of marihuana must deliver their "total crops" to the Agency (as Article 23 specifies) then presumably holders of PPL's and DPPL's, even though they produce for one person, should deliver their "total crops" to Health Canada. That is not done: the MMAR contemplates that production is consumed by a user, whether produced by himself or by his designated producer. I have failed to see how allowing a designated producer to produce for multiple users creates some new problem vis-à-vis the Convention which does not already exist. Counsel agreed that the Convention has not been

made part of the law of Canada as such although parts of it have been implemented by Canadian law. To the extent that the MMAR, if they were to permit the holder of the TPL to produce for more than one ATP holder, might conflict with the Convention, this domestic law must prevail over an unimplemented international treaty. Further if to follow the requirements of the Convention were to conflict with Canadian constitutional requirements such as the guarantees in section 7 of the *Charter* then the Canadian constitution must prevail in this Court.

[18] Fourthly, the government says that subsection 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.

[19] Consequently, I have concluded that the restraint on access which subsection 41(b.1) provides is not in accordance with the principles of fundamental justice. First, it does not adequately respond to the concerns motivating the Ontario Court of Appeal judgment in *Hitzig*: that is it leaves those ATP holders who cannot grow for themselves and who cannot engage a designated producer because of the restrictions imposed on the latter by the MMAR, to seek marihuana in the black market. The Ontario Court of Appeal said that this is contrary to the rule of law, to pressure a citizen

to break the law in order to have access to something he medically requires. The only factor which has changed since the *Hitzig* case arose is the advent of PPS as a licensed dealer. The Minister argues that any ATP holder, who cannot grow for himself or cannot find a designated producer prepared to dedicate himself solely to that ATP holder, may obtain his dried marihuana or seed from a government contractor, namely PPS. That certainly does provide an alternative avenue of access. But the evidence shows that after four years of this new policy of the government supply of marihuana, fewer than 20% of ATP holders resort to it. The Applicants take the position that the PPS product is inferior and not to the taste of most users. They say that PPS only makes available one strain of marihuana for medical use whereas there are several strains which have different therapeutic effects depending on the condition of the user. The evidence as to the quality of the PPS product was almost all hearsay and anecdotal. The expert scientific evidence as to the different therapeutic effects of various strains mainly indicates that there is great uncertainty and the subject requires further research. I am therefore not prepared to lead a judicial incursion into yet another field of medicine and pass judgment on the quality of the PPS product. 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.

[20] I also find that subsection 41(b.1) is inconsistent with the principles of fundamental justice because it is arbitrary in the sense that it causes individuals a major difficulty with access while providing no commensurate furtherance of the interests of the state.

[21] For these reasons I find subsection 41(b.1) to infringe the Applicants' rights to liberty and security under section 7 of the *Charter* and therefore to be invalid.

[22] In written submissions the Respondent invoked, as an alternative, section 1 of the *Charter*. His position is even more difficult under section 1 as there he has the onus of establishing that such a limitation is demonstrably justified. His argument in this respect adds little to the justification offered under section 7. Assuming that there are some legitimate objectives being pursued by adoption of the MMAR, for the same reasons that I found subsection 41(b.1) to be arbitrary and thus contrary to the principles of fundamental justice I find that it is not rationally connected to the objectives stated for it and its restraint is disproportional to any state interests promoted.

[23] The Applicants argued certain other grounds which I will not go into in any detail. It was argued that the current regulations were adopted without adequate consultation with the "stakeholders" and therefore they are invalid. The evidence did not entirely support the claim of no consultation, and in any event, I know of no authority for the proposition that there is a constitutional requirement in the legislative process for consultation to occur with parties who may have an interest. However desirable consultation may be, it has not yet become a constitutional imperative in the legislative process. The Applicants also cited to me the recent case of *R. v. Long*,

[2007] O.J. No. 2774 (Ont. Ct.). In this case an Ontario Court judge held invalid subsection 4(1) of the *Control Drugs and Substances Act*, *supra*, which prohibits the possession of marihuana because in his view, the Government of Canada had not yet adequately removed barriers to access. The MMAR still limits access. While the policy adopted in 2003 could make it possible for anyone in need of marihuana to obtain it from PPS, the government contractor, the learned judge did not consider this to be enough because that policy is not expressed in law. Therefore, while persons who have a constitutional right to access might in fact get it through PPS, they could not be said to have a legal right to that access, only the benefit of an administrative policy permitting it. I do not intend to deal with this case further. It is under appeal. Further, I have found that the unnecessary restrictions on access in subsection 41(b.1) cannot be overcome by a forced monopoly for PPS product for those who cannot grow for themselves or find an available designated producer. Therefore the question of whether the policy should be embodied in law is not relevant to my finding.

[24] In conclusion, it can be said that the Minister in assuming the validity of subsection 41(b.1) did not take a correct view of the law.

REMEDIES

[25] The Applicants requested that I declare subsection 41(b.1) of the MMAR to be of no force or effect on the basis that it violates section 7 of the *Charter of Rights and Freedoms*. I will so declare. They have also requested that, in lieu of their original request for *mandamus*, I refer their

applications for the designation of Carasel as their producer back to the Minister for reconsideration consistently with my reasons. I will so direct.

[26] Further, the Applicants have asked that I should, under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*,

> retain supervisory jurisdiction over Health Canada's creation and implementation of a new process for allowing multiple patients to designate a single designated producer by requiring Health Canada to submit periodic reports on the status and progress of the new process...

The Applicants mainly rely on the decision of the Supreme Court of Canada in *Glenda Doucet-Boudreau et al. v. Attorney General of Nova Scotia*, [2003] 3 SCR 3 where, by a majority of 5-4, that Court reversed the Court of Appeal of Nova Scotia and upheld the decision of the trial judge to retain such jurisdiction. He had declared that francophones in five school districts in Nova Scotia were entitled to "homogeneous French-language facilities and programs at the secondary school level". While the Government of Nova Scotia did not deny the entitlement of the Plaintiffs to such facilities under section 23 of the *Constitution Act, 1982*, some years had passed without those facilities being provided. In his judgment declaring the entitlement, the trial judge ordered the respondents to use their best efforts to comply with the orders requiring these facilities to be provided, and the Court retained jurisdiction to hear reports from the respondents respecting their compliance with this order. This order was set aside by the Nova Scotia Court of Appeal, on the grounds that the trial judge was *functus officio* once he made the order and could not continue "supervisory jurisdiction". The majority in the Supreme Court of Canada reversed this decision. The Court listed several considerations which should be taken into account when deciding whether to

retain supervisory jurisdiction. It also said that in this case the trial judge was not *functus officio* because although continuing a supervisory role he did not purport to retain any jurisdiction to change the declarations of entitlement.

[27] I am not persuaded that I should retain supervisory jurisdiction in this case. First, it should be noted that the *Doucet-Boudreau* case did not involve a determination under subsection 52(1) of the *Constitution Act, 1982* that a law is invalid, as does the present case. In *Doucet-Boudreau*, the duty owed under section 23 of that Act was not in dispute, only its implementation and this was a remedial order under subsection 24(1) of the *Constitution Act, 1982*, a matter of implementation by the construction of facilities and the organization of courses to comply with the requirements of the declaration. In the present case I am making a declaration of invalidity under subsection 52(1) of the *Constitution Act, 1982*. That declaration will be self-executing, making invalid subsection 41(b.1) of the MMAR. As I have signaled in my Reasons, I cannot preclude the Governor in Council amending the Regulations yet again if to do so it would achieve some legitimate goal while preserving reasonable access by ATP holders to marijuana. That is always a possibility after every declaration of invalidity. But the Supreme Court of Canada, both the majority and the minority, in *Doucet-Boudreau* recognized that one of the factors to be taken into account in choosing a remedy of supervisory jurisdiction is the separation of powers. What would be required of me if I were to retain supervisory jurisdiction would be the monitoring of future legislation and, if such jurisdiction were to be of any use to the Applicants, I would have to exercise a veto over new proposed regulations which appear to me to be inconsistent with that right of access. Under the circumstances, I do not think that is appropriate and I will not so order.

[28] The Applicants will, of course, be entitled to their costs.

JUDGMENT

THIS COURT HEREBY ORDERS AND ADJUDGES that

1. Subsection 41(b.1) of the *Marihuana Medical Access Regulations*, SOR/2001-227 as amended be declared invalid as contrary to section 7 of the *Canadian Charter of Rights and Freedoms*;

2. The refusal of the applications by the Applicants for designated-person production licenses designating Carasel Harvest Supply Corporation as their designated producer be set aside and these matters be referred back to the Minister for reconsideration in accordance with these Reasons;

3. The Applicants be awarded costs.

"Barry L. Strayer"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1415-04
STYLE OF CAUSE:	**DORA SFETKOPOULOS, DAVID MCGREGOR, PRISCILLA LAVELL, EUGENE HARACK, ROBIN TURNEY, RONALD FOLZ, MICHAEL GIBBISON, TIMOTHY DEGANS, MARK HUKULAK, LEONARD SISSON, PAUL MANNING, RON REID, RON SPECK, JOHN LOBRAICO, EDDIE WALLACE, MICHAEL DELARMEE, RONALD GEORGE WILSON, and JEFFREY LONG and THE ATTORNEY GENERAL OF CANADA**
PLACE OF HEARING:	Toronto
DATE OF HEARING:	December 3, 2007
REASONS FOR ORDER:	STRAYER, J.
DATED:	January 10, 2008

APPEARANCES:

Mr. Ron Marzel Mr. Alan Young	FOR THE APPLICANT
Mr. Christopher Leafloor Mr. James Gorham	FOR THE RESPONDENT

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