Hitzig & Ors v Canada [2003] O.J. No. 2873

Graham Irvine*

Introduction

In May 2003 the New South Wales Government announced a four year trial of the medicinal use of marihuana[1] involving seriously ill patients. This decision was reached by Premier Bob Carr on the basis of the recommendations of the Working Party on the *Use of Cannabis for Medical Purposes* established by his government in 2000 to report on this issue. In turn, the impetus to establish the Working Party came from a report to the government by the Australian Committee for the *Medical Use of Cannabis*, a group comprised of representatives from the Australian Medical Association, the Australian Law Council, university experts and others. Since the May 2003 announcement no details have emerged as to the conduct or evaluation of this trial, but it is in this context that the recent Canadian case of *Hitzig & Ors v Canada*[2] is instructive in indicating some of the issues such a trial will need to address.

This case note addresses the background to and issues in *Hitzig,* the arguments and judgment in the case, and then proceeds to derive some putative lessons from the case for the proposed New South Wales trial. It should be pointed out that neither New South Wales nor the Commonwealth have constitutional provisions such as the Canadian *Charter of Rights and Freedoms*. Nevertheless, it is argued that some of the same or similar legal and factual issues arise in both jurisdictions, thus giving rise to the writer's observations on the conduct of the New South Wales trial.

The focus of this case note is on the implications of the case for New South Wales and therefore this review does not seek to discuss in depth all issues in *Hitzig*.

---

* PhD candidate and part-time lecturer, School of Law and Justice, Southern Cross University.

1 Although the term "cannabis" is more widely used in Australian legal documentation, the term "marihuana", spelt with an "h" is used here as this is the term used in the Canadian legal literature.

2 *Hitzig & Ors v Canada* [2003] O.J. No. 3873.

Background to the Case

In keeping with its progressive tradition in dealing with social issues, the Canadian Federal Parliament legislated law the *Controlled Drugs and Substances Act 1996.*

Section 4 of the Act relevantly provides:

(1) Except as authorized under the regulations, no person shall possess a substance included in Schedule … II … .

(2) No person shall seek or obtain

(a) a substance included in Schedule … II

(b) …

(3)…

(4) Subject to subsection (5), every person who contravenes subsection (1) where the subject matter of the offence is a substance included in Schedule II

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or

(b) is guilty of an offence punishable on summary conviction …

Schedule II provides:

1. Cannabis, its preparations, derivatives and similar synthetic preparations, including:

(1) Cannabis resin

(2) Cannabis (marihuana)…

Section 56 provides:

> The Minister may, on such terms and conditions as the Minister deems necessary, 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.

In June 1999, pursuant to s 56, the Canadian Government commenced issuing ministerial permits allowing individuals to possess and/or cultivate marihuana for their own medicinal purposes. However, in the matter of *R v Parker*[3] the Ontario Court of Appeal held that s 4, in providing for the criminal prohibition against possession of marihuana, was unconstitutional. The court held it did not provide for a constitutionally acceptable exemption from that provision for Canadians who use marihuana for medicinal purposes, since the statutory exemption scheme depended on the unfettered exercise of the minister's discretion.[4] The declaration that s 4 was constitutionally invalid was suspended for a year to give the government time to remedy the deficiency.

The Canadian Government sought to do so by introducing the *Marihuana Medical Access Regulations* (the Regulations)[5] pursuant to s 55(1) of the Act. These Regulations allow exemptions from the provisions of the Act for three categories of seriously ill people by issuing an "Authorization To Possess" (an Authority) allowing the possession of "dried marihuana" for the treatment of various symptoms associated with serious illnesses.[6]

The Regulations also provide for licences to produce, store and transport marihuana in order to supply authorised medical users.[7] These renewable one year licences may be issued to authorised users themselves or to their designates. The Regulations also prescribe formulae to govern how many plants may be grown, proscribe provision of any consideration to these growers, restrict them to growing for only one user, and limit production in common with more than two other licence holders.[8]

Following promulgation of the Regulations, several medical marihuana users and the operator of the Toronto Compassion Club, an organisation set up to supply medical marihuana users, brought a joint

---

3 *R v Parker* (2000) 146 C.C.C. (3d) 193.

4 *Hitzig*, note 2, at [37].

5 S.O.R.2001-227 June 4 2001.

6 Regulations, Part 1, These illnesses were cancer, HIV, AIDS, severe nausea, cachexia, anorexia, weight loss, multiple sclerosis, spinal cord injury or disease, persistent muscle spasms, epilepsy, severe pain, severe arthritis and seizures.

7 Regulations, Part 2.

8 Regulations, Part 2.

application in the Superior Court of Justice challenging the constitutionality of the Regulations.[9]

The basis of their argument was that the government had a constitutional obligation to provide medical marihuana users, holding an Authority under the Regulations, with a legal supply of medical marihuana. Constitutionally they claimed that this followed from a consideration of s 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) which guarantees "the right to life, liberty and security of the person." The argument was that the lack of a legal supply of medical marihuana had the effect of forcing those with an Authority to procure it illegally, thereby rendering them liable to imprisonment and consequently depriving them of their liberty. On 9 January 2003, Lederman J held that because the Regulations failed to provide a legal supply of medical marihuana for persons holding an Authority, the Regulations were unconstitutional and thus invalid.[10] As in the earlier case of *Parker*, the declaration of constitutional invalidity was suspended, this time for six months, to enable the government to amend the Regulations. In the meantime, on 29 July 2003 the government appealed Lederman J's decision in the Ontario Court of Appeal before a bench consisting of three judges.[11]

The Factual Issues

Eligibility for exemptions under s 56 of the Act

The respondents argued that several of the Regulations' eligibility requirements for those seeking an Authority deprived them of their constitutionally guaranteed right to liberty and security. They claimed that the Regulations did not accord with the principles of fundamental justice because they created so many impediments in the application process for exemption that they rendered such exemptions effectively unavailable to many applicants. Thus the issue of fact here was whether or not specific regulations had that effect.

---

9 *Hitzig & Ors v Canada* [2003] O.J. No. 3873.

10 *Canada v Hitzig* (2003) 171 C.C.C. (3d) 18.

11 Doherty, Goudge and Simmons JJA.

The supply issue

Originally, the government had envisaged supplying the medical marihuana required by authorised users itself through licensed dealers. However, after complaints from medical marihuana users that the dried marihuana supplied by the government was not fit for their purposes, the only legal supply options left for medical marihuana users were to grow it themselves or designate someone to do grow it for them. Those unable to do either of these had, perforce, to procure their medical marihuana illegally.

The Arguments

Eligibility

The Appellant: The government contended that all the eligibility requirements for obtaining an Authority were necessary given the uncertainty of the evidence as to the medicinal value of marihuana and the real risks attendant upon its medicinal uses. In such a situation, the appellant argued, it behove the government to carefully balance the rights of individuals to use medical marihuana with the government's responsibility to protect public health and safety.

It was also the government's position that the Regulations had to set variable eligibility requirements in order to maintain flexibility in the face of the different equations of risks and benefits applying to different medical marihuana users.

Counsel for the government further pointed to Lederman J's finding that there was insufficient evidence that the respondents experienced practical difficulties in accessing appropriate specialists to endorse their applications.

The Respondents: The respondents referred to clauses in the Regulations relating to the requirement for the endorsement of a second specialist in the application for an Authority,[12] the role of doctors in the application process,[13] and the dosage limits imposed in Authorities.[14] On the first matter, they submitted that the limited

12 Regulations, s 7 and *Hitzig*, note 2, at [141].

13 Regulations, ss 6,7 and *Hitzig*, note 2, at [138].

14 *Hitzi*g, note 2, at [136].

availability of specialists, especially in rural areas, their lack of specific knowledge of the medicinal qualities of marihuana, and their professional associations' reluctance to cooperate with the medical marihuana scheme combined to make the Authority requirements onerous if not impossible for medical marihuana users to meet.[15]

It was further argued that the Regulations' requirement for the endorsement of a second specialist in one of the three categories of Authority was not justified by any information they were required to add to the application. As such, the requirement was an arbitrary intrusion of state control which did not meaningfully advance any legitimate government interest.[16]

In reference to the role of doctors, the respondents contended that the need for a doctor's support for an Authority application placed unwarranted power in their hands, especially since several medical associations opposed the medical marihuana scheme and refused to cooperate with it.[17]

On the dosage issue, the respondents claimed that the daily dosage limit set by the user's Authority was arbitrary, and potentially harmful, because the unpredictability of the potency of the marihuana might result in the user being deprived of sufficient medication to properly treat her/his symptoms.

Supply

The Appellant: Counsel for the government contended that the judge at first instance had misinterpreted s 7 of the *Charter* because it does not impose a positive obligation on the government to ensure the security of medical marihuana users by the provision of a safe and legal marihuana supply to them. Rather, the government's obligation is not to interfere by its policies and actions with individuals' liberty and security where such interference is inconsistent with the principles of fundamental justice.

15 *Hitzig*, note 2, at [16].

16 *Hitzig*, note 2, at [16].

17 *Hitzig*, note 2, at [16,138].

Alternatively, counsel argued that there was no infringement of fundamental justice because of the lack of a legal supply of marihuana as medical marihuana users could access it by cultivating it personally, or through a designate, or through the same "unlicensed suppliers" they had used prior to the Regulations coming into force.

The Respondents: Hitzig and the medical marihuana users claimed that, with the withdrawal of government supplies of medical marihuana, there were many who were so ill that they were physically incapable of growing their own supply, or did not have the facilities to grow it, or were unwilling to expose themselves and their families to the risks of criminality or the attention of criminals who might rob them.[18] Similarly, many such medical marihuana users could not persuade a designate to grow marihuana for them because the Regulations prohibited the offer of any consideration. At the same time, the Regulations proscribed any economies of scale by the prohibition against producing for more than one person or pooling resources with more than two other licence holders. Hitzig's personal testimony was that he had been bashed, robbed, raided and arrested in the course of acting as a designated distributor.[19]

The respondents' case was that such overwhelming difficulties left many would-be medical marihuana users with no effective choice other than to resort to illegally procuring their medication. In turn, this caused its own problems for the price of illegal marihuana is artificially high and many of the medical marihuana users on low fixed incomes could not afford to pay such inflated prices.[20] In addition, such supplies are unreliable over time and in quality, and may also be adulterated with substances inimical to the health of already very sick people.

The upshot of this reliance on illegally obtaining marihuana was that such medical marihuana users risked their constitutional right to liberty through risking imprisonment for purchasing an illegal drug and/or their security by exposing themselves to dealing with potentially dangerous criminals.

18 *Hitzig*, note 2, at [21].

19 *Hitzig*, note 2, at [20].

20 *Hitzig*, note 2, at [22].

Even those medical marihuana users whose supply was legal were vulnerable to the failure or spoilage of their crops, so that they could not be assured of producing enough for their ongoing needs.[21]

The Constitutional Issues and the Court's Findings

Section 7 of the *Charter*

Section 7 of the *Charter* reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Canadian courts use a two-stage approach in determining whether these rights have been breached:

1. whether the (government) action complained of resulted in a threshold violation of one or more rights, and
2. whether, having found a threshold violation, such violation is inconsistent with the principles of fundamental justice.

The first stage involves a consideration of whether the interests alleged to have been infringed come under the rubric of the section's operative words, and whether such interests have been infringed by some form of state conduct.[22]

If a stage one violation is established, the court must then determine and enunciate the principles of fundamental justice involved in the particular case and, having done so, must decide if the threshold infringement found in stage one is inconsistent with the relevant principle(s) found in stage two.[23]

Determination of the questions in both stages must take into account the specific context of the claim made, including the factual matrix, the nature of the alleged rights and of the state's action, the nature of the alleged interference, and the interests on which the state relies in support of its conduct. For these purposes, "context" comprehends the purpose and effect of the state's actions and may include the language and history of relevant statutes.[24]

---

21 *Hitzig*, note 2, at [22].

22 *Gosselin v Quebec (A.G.)* [2002] S.C.J. No. 85 at [87, 91] (Q.I.).

23 *R v White* [1999] 2 S.C.R. 417, p 436.

24 *R v Morgentaler* [1988] 1 S.C.R. 30, at [61.3], per Dickson CJC.

The court drew on the earlier related case of *Parker*[25] to find that the threshold liberty interest was engaged in two ways. In a narrow sense, medical marihuana users' rights to liberty were jeopardised by their risk of prosecution and imprisonment if they had no Authority, either because they could not meet the eligibility requirements or because they exceeded their production or dosage limits. More broadly, the court found that the right to liberty includes the right of individuals to make decisions of fundamental personal importance.[26] Therefore, if the state seeks to intervene in such decisions, it must justify such intervention on the basis of the operation of the principles of fundamental justice. As to this ground the court stated:

> [T]here is no doubt that the decision by those with the medical need to take marihuana to treat the symptoms of their serious medical conditions is one of fundamental personal importance. While this scheme of medical exemption accords them a medical exemption, it does so only if they undertake an onerous application process and can comply with stringent conditions. Thus, the scheme itself stands between those individuals and their right to make this fundamentally important personal decision unimpeded by state action.[27]

As to the right to security of the person, the court found that this right encompasses the right to access medication reasonably required for the treatment of serious medical conditions when such access is interfered with by the state by means of criminal sanctions.[28] Moreover, the right to security is interfered with when the state applies criminal sanctions to a person assisting another person to make a decision of fundamental personal importance.[29]

Having determined that the operation of the Regulations engaged the constitutional rights of citizens to liberty and security, the court concluded that, because "the *Medical Marihuana Access Regulations* do not remove the real risk of conviction and imprisonment … [they]

25 *R v Parker*, note 3.

26 *Hitzig*, note 2.

27 *Hitzig*, note 2, at [93].

28 *Hitzig*, note 2, citing *Gosselin*, note 22.

29 *Hitzig*, note 2, citing *Rodriguez v British Columbia (A.G.)* [1993] 3 S.C.R. 579.

thus interfere with this aspect of their liberty"[30] and further that, by "placing … significant hurdles in their way the state has interfered with this broader aspect of their right to liberty".[31]

The court also found that, since s 7 of the *Charter* applies to an individual's right to make choices about their own body, their physical and psychological integrity and human dignity,[32] the Regulations also raise criminal prohibitions which interfere with the constitutional right to security of the person. The court concluded that their operation constituted state actions "that stand between those in medical need and the marihuana they require".[33]

This led the court to conclude that:

> [T]he *Medical Marihuana Access Regulations* constitute a scheme of medical exemption which deprives those who need to take marihuana for medical purposes of the rights to liberty and security of the person. This is a threshold violation of s 7. We are therefore required to turn to the question of whether this deprivation is in accordance with the principles of fundame*NTA*l justice.[34]

Applying the principles of fundamental justice to the supply issue, the court ruled, "[i]t is undeniable that the effect of the *Medical Marihuana Access Regulations* is to force individuals entitled to possess and use marihuana for medical purposes to purchase that medicine from the black market".[35]

Even more strongly, they went on to agree with Lederman J that, "this aspect of the scheme offends the basic tenets of our legal system … [for] it does not lie in the Government's mouth to ask people to consort with criminals to access their constitutional rights".[36] Such a scheme "can only discourage respect for the law, …bring the law into

---

30 *Hitzig*, note 2, at [99].

31 *Hitzig*, note 2, at [100].

32 ss 193 and 195.1 of the *Criminal Code (Man).*

33 *Hitzig*, note 2, at [104].

34 *Hitzig*, note 2, at [105].

35 *Hitzig*, note 2, at [109].

36 *Hitzig*, note 2, at [110].

disrepute and devalue the worth and dignity of those individuals to whom the *Medical Marihuana Access Regulations* are applied".[37]

The court concluded that "the absence of a legal source of supply renders the *Medical Marihuana Access Regulations* inconsistent with the principles of fundamental justice…".[38]

Turning to the eligibility issue, the court dismissed the respondents' arguments in relation to dosage limits and the role of doctors, but accepted their contention that the requirement for the support of a second specialist in a Category 3 Authority application was unnecessary and thus an arbitrary restriction. In coming to this view, the court stated that "the requirement for a second opinion adds so little if any value to the assessment of medical need that it is no more than an arbitrary barrier …[and] [i]n this particular respect only, the eligibility conditions in the *Medical Marihuana Access Regulations* do not accord with the principles of fundamental justice."[39]

Section 1 of the *Charter*

Section 1 of the *Charter* entitles the government to override the rights granted under s 7 if to do so constitutes the setting of reasonable limits on these rights "which are demonstrably justified in a free and democratic society".[40]

The court, for the same reasons they gave in reply to the section 7 arguments put by the appellant, held: "that the offending provisions of the *Medical Marihuana Access Regulations* do not advance the collective interest sufficiently to justify the limitation which they place on the individual's rights…thus, neither aspect of the *Medical Marihuana Access Regulations* which we have found to contravene section 7 can be saved by section 1."[41]

37 *Hitzig*, note 2, at [116-117].

38 *Hitzig*, note 2, at [116-118].

39 *Hitzig*, note 2, at [145].

40 *Hitzig*, note 2, at [146].

41 *Hitzig*, note 2, at [147, 152].

The Section 52 Remedy

Section 52 of the *Charter* enables the court to make a declaration to address unconstitutional conduct. The court's application of this section is referred to below.

The Orders of the Court

The eligibility issue

For the reasons outlined above, the requirement for the endorsement of a second specialist in an application for a Category 3 Authority in ss 4(2)(c) and 7 of the Regulations was declared to be constitutionally invalid.[42]

The Supply Issue

The court held that the licence provisions of the Regulations were ineffective to ensure a legal supply of marihuana to Authority holders and:

> [T]hat ineffectiveness appears to stem very largely from two provisions in the *Medical Marihuana Access Regulations*. First, a Designated Producer's Licence holder cannot be remunerated for growing marihuana and supplying it to the Authority holder (section 34(2)). Second, a Designated Producer's Licence holder cannot grow marihuana for more than one Authority holder (section 41(b)) nor combine his or her growing with more than two other Designated Producer's Licence holders. (section 54). These barriers effectively prevent the emergence of lawfully sanctioned 'compassion clubs' or any other efficient form of supply to Authority holders.[43]
>
> Taking these considerations together, we conclude that the remedy which most directly addresses the constitutional deficiency presented by the absence of a licit supply of marihuana is to declare invalid sections 34(2), 41(b) and 54 of the *Medical Marihuana Access Regulations*. This will allow all Designated Producer's Licence holders to be compensated, to

---

42 *Hitzig*, note 2, at [159].

43 *Hitzig*, note 2, at [161].

> grow for more than one Authority holder, and to combine their growing with more than two other Designated Producer's Licence holders.[44]

Whilst the court felt that its judgment restored the constitutionality of the medical marihuana scheme it nevertheless adverted to the possibility that "further serious barriers could emerge either to eligibility or to reasonable access to a licit source of supply".[45]

The Significance and Implications of the Case

It is submitted that the above warning of the court, concerning future possible legal problems associated with the Canadian medical marihuana scheme, was warranted. Given its nature and operation, it is this writer's view that it is only a matter of time before a court will be called on to address the same and other issues arising from this seemingly ill-considered scheme.

However, the immediate and salutary consequences of the judgment may be to make it easier and cheaper to grow and obtain marihuana for Authority holders. Indeed, supporters of the Canadian "compassion clubs", set up to assist medical marihuana users to access marihuana, welcomed the ruling. They claimed that it would allow them to perform their functions legally, and would lead to a significant reduction in the price of marihuana sold to Authority holders.[46]

The *Hitzig* decision is timely for its implications for the proposed New South Wales Medical Marihuana trial. It is submitted that there are two key lessons to be learnt from the Canadian experience – the inappropriateness of dispensing raw smokeable marihuana to medical marihuana users and the need for the government to directly control its distribution.

There are a number of reasons why dispensing raw smokeable marihuana is misguided. First, as the British Medical Association

---

44 *Hitzig*, note 2, at [165].

45 *Hitzig*, note 2, at [166].

46 *Hamilton Spectator*, Ontario, 8/10/03, http://www. hamiltonspectator.com.

concludes, "smoking cannabis is clearly undesirable because of toxic constituents in the smoke."[47]

Secondly, the above fact coupled with the general lack of conclusive evidence regarding the medicinal value of cannabis is likely to lead to the reluctance of the medical profession in New South Wales to cooperate in the trial, just as it did in Canada.

Thirdly, the use of raw, untreated cannabis runs the risk of the plant material being contaminated with pathogenic organisms.[48]

Finally, provision of the medication in raw plant form creates immediate problems of control over its distribution. It constitutes an open invitation to the criminal and the unscrupulous to abuse any distribution system by the leakage of cannabis intended for medicinal purposes onto the recreational use black market. This in turn creates further policing and law enforcement problems.

It is self-evident that a centralised government medical marihuana distribution system poses fewer potential problems of control than the system adopted in Canada. There, the government effectively contracts out supply to hundreds of producers and distributors who then have to be supervised and policed because of the potential for the abuse of their licences. Moreover, in a situation where quality control is essential, this is more easily achieved by utilising one source of the medication rather than many sources.

It remains to be seen whether the New South Wales Government will heed the warnings implicit in the *Hitzig* case, but, following the issues raised in the case, it cannot say that it was not put on notice of the potential pitfalls involved in the conduct of a medical marihuana trial.

---

47 British Medical Association, *Therapeutic Uses of Cannabis*, Amsterdam, Holland, Harwood Academic Publishers, 1997, p. 38.

48 Note 47, p 69.