January 20th, 2009

Medical Marihuana Suppliers and the Charter

By Jennifer Koshan

Cases Considered:

R. v. Krieger, 2008 ABCA 394

There have been several cases before the courts raising issues concerning the right to access medical marihuana as a defence to criminal charges under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Grant Krieger, a well known Calgary-based supporter of the legalization of marihuana and its use for medical purposes, and someone who suffers from multiple sclerosis himself, has brought several such claims. His attempts to raise the defence of necessity in criminal law have not been particularly successful (see *R. v. Krieger*, 2003 ABCA 85; *R. v. Krieger*, 2005 ABCA 202). Arguments based on Krieger's right to use and produce marihuana as an aspect of his security of the person under s.7 of the *Canadian Charter of Rights and Freedoms* have met with more success (see *R. v. Krieger* (2000), 225 D.L.R. (4th) 164, 2000 ABQB 1012, aff'd 2003 ABCA 85, leave to appeal refused, [2003] S.C.C.A. No. 114). More recently, Krieger tried to push the limits of the jurisprudence by claiming a *Charter* defence to charges of trafficking marihuana for medical purposes in circumstances where he was supplying others with the drug.

The discussion of Krieger's most recent case must begin with a description of the legal framework surrounding the use of marihuana for medical purposes. In July, 2001, the federal government enacted the *Marihuana Medical Access Regulations* (MMAR), SOR/2001-227. The regulations were enacted in response to the Ontario Court of Appeal decision in *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.), in which the criminal prohibitions against possessing and cultivating marihuana were struck down (with the declaration of invalidity suspended for a period of twelve months) after they were found to contravene s. 7 of the *Charter* in the case of persons who required marihuana for medically approved uses. As originally enacted, the MMAR provided as follows (as described in para. 7 of the affidavit of Valerie Lasher, Manager of the Marihuana Medical Access Division within the Drug Strategy and Controlled Substance Program with Health Canada, cited in *R. v. Krieger*, 2006 ABPC 259 at para 19):

> The MMAR … authorized activities related to marihuana that would otherwise be illegal, and provided seriously ill persons with a process by which they could obtain an authorization to possess, and a licence to produce marihuana for medical purposes. An authorization to possess is issued on compassionate grounds to persons ordinarily resident in Canada who, with the advice and support of their medical practitioner(s), can demonstrate medical need. A licence to produce marihuana is issued either to the authorized person, or a person designated by the authorized person to produce marihuana on their behalf. The licence allows the holder or [sic] the licence to, among other things, produce

> marihuana in quantities up to a specified maximum, with the maximum determined based on the daily amount approved for the authorized person.

The MMAR were then subjected to various court challenges and subsequent revisions by the government. In *Hitzig v. Canada* (2003), 171 C.C.C. (3d) 18, 2003 CanLII 3451 (Ont. Sup. Ct.), Lederman, J. held that there was an absence of a legal supply of medical marihuana and that this violated s. 7 of the *Charter* in the case of those persons who had a serious medical need to use marihuana. Justice Lederman declared the MMAR to be invalid, as the regulations did not adequately deal with issues related to the source and supply of the drug. The declaration of invalidity was suspended for six months to allow the government to amend the MMAR or otherwise provide for legal sources of marihuana for those persons authorized to possess marihuana under the MMAR.

While an appeal in *Hitzig* was pending, Health Canada developed an Interim Policy for the Provision of Marihuana Seeds and Dried Marihuana Product for Medical Purposes in Canada (the "Interim Supply Policy"), which came into effect on July 9, 2003. As noted in the trial decision in *Krieger*, "the key objective of The Interim Supply Policy was to ensure that the MMAR remained valid by providing persons authorized under the MMAR … with an option for obtaining access to a reliable, legal source of supply of marihuana seeds or dried marihuana" (at para. 25, citing the affidavit of Valerie Lasher at para. 19).

Eventually, the Ontario Court of Appeal found that certain provisions of the MMAR were contrary to the rights to liberty and security of the person under s. 7 of the *Charter*, as they failed to provide reasonable access to a legal source of supply of marihuana for medical purposes, required some applicants to have the support of two specialists to establish medical need (depending on the nature of their illness), and exposed those in need of medical marihuana to criminal liability if they could not comply with the MMAR (see *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104, 2003 CanLII 30796 (ON C.A.), leave to appeal refused, [2004] S.C.C.A. No. 5).

Health Canada responded this time by amending the MMAR, which it did in two phases. In the first phase, regulations amending the MMAR (SOR/2003-387) and a Regulatory Impact Analysis Statement came into effect on December 3, 2003, along with a new Policy on Supply of Marihuana Seeds and Dried Marihuana for Medical Purposes. The amendments and new policy were in force at the time of Krieger's alleged offences. A second phase of amendments to the MMAR came into force on June 7, 2005 (SOR/2005-117), after Krieger's charges were laid.

Significantly, the amendments to the MMAR in effect at the time of Krieger's charges eliminated the need for a second specialist's medical opinion. However, while the MMAR "provided a framework allowing people who were suffering from a serious illness to possess and produce marihuana for medical purposes under a defined set of circumstances", they "did not authorize the general sale or distribution of marihuana" (2006 ABPC 259 at para. 20).

Grant Krieger was charged with two counts of trafficking marihuana under s. 5(1) of the *Controlled Drugs and Substances Act*. In an agreed Statement of Facts, he admitted to trafficking in marihuana on December 3, 2003 and January 8, 2004. More specifically, Krieger acknowledged that he was sending the marihuana to a distributor in Manitoba for redistribution to persons who were in medical need of marihuana pursuant to a "Compassion Club" that he had established. At trial, Krieger testified that prospective members of the club had to complete an application supported by a doctor's signature, although it appears that this "requirement" was

only complied with 80% of the time. Alternatively, a pharmaceutical report from the applicant's pharmacist would be accepted. Further, Krieger testified that the Club did not supply recreational marihuana users. This last point is important given the Supreme Court of Canada's decision in *R. v. Malmo-Levine*, [2003] 3 S.C.R. 571, 2003 SCC 74, that the *Charter* does not provide a constitutional right to use marihuana for non-medical or recreational purposes.

Krieger sought to defend his charges under ss. 7 and 12 of the *Charter*. By way of remedy, he asked for a judicial stay of proceedings or a declaration of exemption from the provisions of the *Controlled Drugs and Substances Act* with respect to the distribution of marihuana to others in medical need. His main complaint was that doctors were reluctant to sign applications under the MMAR because they feared the insurance consequences of doing so. Krieger claimed that he had 420 to 430 clients who had been unable to find a doctor to sign for them (two of whom testified at the trial). Further, he had applied to Health Canada for a licence to grow marihuana for others but was refused.

At trial, Judge W. Pepler of the Alberta Provincial Court accepted evidence on the use of marihuana for medical purposes. The affidavit of Dr. Harold Kalant, Professor Emeritus (Pharmacology) at the University of Toronto and Director Emeritus (Biobehavioural Research) of the Addiction Research Foundation Division of the Centre for Addiction and Mental Health (para. 110, cited in 2006 ABPC 259 at para. 14) concluded as follows:

> [T]he international medical and scientific community is in reasonable agreement about marihuana for medical use. The US and UKcommunities agree that much research is needed. The Australians(New South Wales) concur with the IOM [United States Institute of Medicine] report recommendations [that marihuana had therapeutic value in relieving nausea and vomiting and in stimulating appetite, and potential in relieving symptoms of pain]. The only disagreement is with respect to the use of smoked marihuana for severe, possibly terminal, conditions, as a compassionate interim measure until research provides better and more selective cannabinoids that can be administered by other routes. The IOM and US National Institutes of Health support such an approach, whereas the UK and Australia do not. However, all agree that the long-term use of smoked marihuana for chronic diseases is not appropriate.

Judge Pepler accepted the evidence of two of Krieger's Compassion Club members that the marihuana he supplied to them was helpful in dealing with their medical conditions, and that traditional therapies had not worked for these individuals. Further, he held that "the MMAR regulations, as to the production and distribution of medical marihuana engage the liberty and security interests of seriously ill individuals" under s.7 of the *Charter*. However, "[i]t does not lie with individuals such as Mr. Krieger to take it upon themselves to augment what they perceive to be the shortcomings of the regulatory framework established for the production and distribution of medical marihuana" (at para. 59). Further, Judge Pepler found the evidence regarding the security of the production and distribution of marihuana by Krieger to be "wholly inadequate" (at para. 54). Accordingly, he found that the scheme for the production and distribution of marihuana under the MMAR did not violate Krieger's s. 7 *Charter* rights.

Krieger's second *Charter* argument under s. 7 focused on eligibility for medical marihuana. Here, he cited the principle from *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 70, that "one of the basic tenets of our system of criminal justice is that when Parliament creates a defence to a criminal charge, the defence should not be illusory or so difficult to attain as to be practically

illusory." Judge Pepler was not prepared to find that the MMAR's requirements "were so onerous as to preclude the support of the medical profession thus rendering the defence illusory" (at para. 71). In the end, Krieger's *Charter* arguments were all dismissed and he was convicted of two counts of trafficking marihuana.

Krieger appealed this ruling to the Alberta Court of Appeal, arguing that Judge Pepler had applied too onerous a burden of proof to his *Charter* arguments.

Interestingly, given the significance of the issues raised, the Court delivered a very short Memorandum of Judgment from the Bench. Justices Ronald Berger, Keith Ritter, and Peter Martin rejected Krieger's argument as to burden of proof. More significantly, they noted a fatal flaw in Krieger's *Charter* application. As noted earlier, the remedy sought by Krieger was a judicial stay of the charges against him under s.24(1) of the Charter. Section 24(1) provides that:

> Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The difficulty with Krieger's application was that he was not alleging that his own *Charter* rights had been infringed, rather that the lack of access to medical marihuana violated the rights of those who required the drug for medical purposes. However, s.24(1) only provides a personal remedy for those whose *Charter* rights have been infringed. As a supplier, Krieger was hard placed to present his own case as one involving any *Charter* rights. The Court of Appeal made it clear that:

> A statutorily mandated exemption for users of marijuana for medical purposes, if practically unavailable, violates the fundamental principle of justice that a statutory defence must not be illusory. Indeed, in broader terms, the Supreme Court of Canada has made clear that if the Government introduces a scheme it must be reasonably adequate and effective. If it is not, those adversely affected who might otherwise enjoy, as in the case of users of marijuana for medicinalpurposes, the benefit of such use and the ancillary statutory exemption from criminal sanction, might well invoke their s. 7 remedies.

However,

> The desire of the Appellant to supply others with marijuana is not on the same footing (at para. 8).

While the Court of Appeal's reasons are brief, they do refer to an interesting argument made by Krieger - that as a supplier, he should be entitled to "adjunct constitutional protection." The Court rejected that argument, holding that there was no "constitutional obligation upon Parliament to make accommodation for the Appellant to achieve that purpose" (at para. 9).

The Court of Appeal thus maintains a bright line between the rights of those who possess marihuana for their own medical purposes, and the interests of those who seek to supply them with marihuana. The latter interests are not protected by the *Charter*, and indeed it is difficult to imagine a court finding in favour of such an argument, even if the supplier is acting out of compassion rather than for purely commercial reasons.

The Court's holding is also in line with previous interpretations of s.24(1) of the *Charter*. Most recently, in *R. v. Ferguson*, 2008 SCC 6, the Supreme Court confirmed that this section "can be invoked only by a party alleging a violation of that party's own constitutional rights" (at para. 61).

There is no mention of s.52(1) of the Constitution Act, 1982 in the Court of Appeal's reasons in *Krieger*. Section 52(1) provides that:

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

Section 52 remedies can be sought by those who are charged with unconstitutional laws, even if the basis for the *Charter* violation is grounded upon someone else's rights. For example, Henry Morgentaler defended his charges of unlawfully procuring abortions on the basis of the rights of pregnant women (see *R. v. Morgentaler*, supra). Remedies under s.52 may involve striking down the unconstitutional law, or reading in to cure a constitutional defect. A s.52 remedy may have been available to Krieger if he had shown that the MMARs violated the rights of persons who require medical marijuana to receive a reasonable supply of the drug. This, in fact, was the position of Warren Hitzig in the decision noted earlier. He too ran a Compassion Club (although in Ontario), and his standing in the case was based on the interests of those to whom he supplied medical marihuana rather than his own alleged right to supply them with the drug (although there were other claimants in the case whose own *Charter* rights were at issue). Even if Krieger had properly applied for s.52 remedies, however, he would still have needed to convince the Court that the 2003 version of the MMAR was unconstitutional.