SUPREME COURT OF CANADA

CITATION: R. *v*. Smith, 2015 SCC 34

DATE: 20150611
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BETWEEN:

Her Majesty The Queen
Appellant
and
Owen Edward Smith
Respondent
- and -
Santé Cannabis, Criminal Lawyers' Association (Ontario), Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Canadian AIDS Society, Canadian HIV/AIDS Legal Network and HIV & AIDS Legal Clinic Ontario
Interveners

CORAM: McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

REASONS FOR JUDGMENT: The Court
(paras. 1 to 34)

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R. *v.* SMITH

Her Majesty The Queen *Appellant*

v.

Owen Edward Smith *Respondent*

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2015 SCC 34

File No.: 36059.

2015: March 20; 2015: June 11.

Present: McLachlin C.J. and Abella, Cromwell, Karakatsanis, Wagner, Gascon and Côté JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Standing — Accused charged with possession and possession for purpose of trafficking of cannabis — Regulations limiting lawful possession of medical marihuana to dried forms — Accused not using marihuana for medical purposes but producing derivatives for sale outside regulatory scheme — Whether accused has standing to challenge constitutional validity of scheme — Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4(1), 5(2) — Marihuana Medical Access Regulations, SOR/2001-227.

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Accused charged with possession and possession for purpose of trafficking of cannabis — Regulations limiting lawful possession of medical marihuana to dried forms — Whether limitation infringes s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — Appropriate remedy — Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4(1), 5(2) — Marihuana Medical Access Regulations, SOR/2001-227.

S produced edible and topical marihuana derivatives for sale by extracting the active compounds from the cannabis plant. He operated outside the *Marihuana Medical Access Regulations* ("*MMARs*"), which limit lawful possession of medical marihuana to dried marihuana. S does not himself use marihuana for medical purposes. The police charged him with possession and possession for

purpose of trafficking of cannabis contrary to ss. 4(1) and 5(2), respectively, of the *Controlled Drugs and Substances Act* ("*CDSA*"). The trial judge held that the prohibition on non-dried forms of medical marihuana unjustifiably infringes s. 7 of the *Charter* and a majority of the Court of Appeal dismissed the appeal.

Held: The appeal should be dismissed, the Court of Appeal's suspension of the declaration of invalidity deleted and S's acquittal affirmed.

S has standing to challenge the constitutionality of the *MMARs*. Accused persons have standing to challenge the constitutionality of the law under which they are charged, even if the alleged unconstitutional effects are not directed at them, or even if not all possible remedies for the constitutional deficiency will end the charges against them.

The prohibition on possession of non-dried forms of medical marihuana limits the s. 7 *Charter* right to liberty of the person in two ways. First, the prohibition deprives S as well as medical marihuana users of their liberty by imposing a threat of imprisonment on conviction under s. 4(1) or 5(2) of the *CDSA*. Second, it limits the liberty of medical users by foreclosing reasonable medical choices through the threat of criminal prosecution. Similarly, by forcing a person to choose between a legal but inadequate treatment and an illegal but more effective one, the law also infringes security of the person.

These limits are contrary to the principles of fundamental justice because they are arbitrary; the effects of the prohibition contradict the objective of protecting health and safety. The evidence amply supports the trial judge's conclusions that inhaling marihuana can present health risks and that it is less effective for some conditions than administration of cannabis derivatives. In other words, there is no connection between the prohibition on non-dried forms of medical marihuana and the health and safety of the patients who qualify for legal access to medical marihuana.

In this case, the objective of the prohibition is the same under both the ss. 7 and 1 *Charter* analyses: the protection of health and safety. It follows that the same disconnect between the prohibition and its object that renders it arbitrary under s. 7 frustrates the requirement under s. 1 that the limit on the right be rationally connected to a pressing objective. The infringement of s. 7 is therefore not justified under s. 1.

However, ss. 4 and 5 of the *CDSA* should not be struck down in their entirety. The appropriate remedy is a declaration that these provisions are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes; however, that declaration is not suspended because it would leave patients without lawful medical treatment and the law and law enforcement in limbo.

Cases Cited

Referred to: *R. v. Parker* (2000), 146 C.C.C. (3d) 193; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. v. Latchmana*, 2008 ONCJ 187, 170 C.R.R. (2d) 128; *R. v. Clay* (2000), 49 O.R. (3d) 577; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Oakes*, [1986] 1 S.C.R. 103.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1, 7.

Constitution Act, 1982, s. 52.

Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4, 5, 19, 55.

Food and Drugs Act, R.S.C. 1985, c. F-27.

Marihuana for Medical Purposes Regulations, SOR/2013-119.

Marihuana Medical Access Regulations, SOR/2001-227 [rep. 2013-119, s. 267], ss. 1 "dried marihuana", 24, 34.

APPEAL from a judgment of the British Columbia Court of Appeal (Levine, Chiasson and Garson JJ.A.), 2014 BCCA 322, 360 B.C.A.C. 66, 617 W.A.C. 66, 315 C.C.C. (3d) 36, 316 C.R.R. (2d) 205, 14 C.R. (7th) 81, [2014] B.C.J.

No. 2097 (QL), 2014 CarswellBC 2383 (WL Can.), setting aside in part a decision of Johnston J., 2012 BCSC 544, 290 C.C.C. (3d) 91, 257 C.R.R. (2d) 129, [2012] B.C.J. No. 730 (QL), 2012 CarswellBC 1043 (WL Can.). Appeal dismissed.

W. Paul Riley, Q.C., and *Kevin Wilson*, for the appellant.

Kirk I. Tousaw, *John W. Conroy, Q.C.*, *Matthew J. Jackson* and *Bibhas D. Vaze*, for the respondent.

Julius H. Grey and *Geneviève Grey*, for the intervener Santé Cannabis.

Gerald Chan and *Nader R. Hasan*, for the intervener the Criminal Lawyers' Association (Ontario).

Andrew K. Lokan and *Debra McKenna*, for the intervener the Canadian Civil Liberties Association.

Jason B. Gratl, for the intervener the British Columbia Civil Liberties Association.

Written submissions only by *Paul Burstein*, *Ryan Peck* and *Richard Elliott*, for the interveners the Canadian AIDS Society, the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario.

The following is the judgment delivered by

THE COURT —

[1] Regulations under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"), permit the use of marihuana for treating medical conditions. However, they confine medical access to "dried marihuana", so that those who are legally authorized to possess marihuana for medical purposes are still prohibited from possessing cannabis products extracted from the active medicinal compounds in the cannabis plant. The result is that patients who obtain dried marihuana pursuant to that authorization cannot choose to administer it via an oral or topical treatment, but must inhale it, typically by smoking. Inhaling marihuana can present health risks and is less effective for some conditions than administration of cannabis derivatives.

[2] The parties accept the conclusion of the Ontario Court of Appeal in *R. v. Parker* (2000), 146 C.C.C. (3d) 193, that a blanket prohibition on medical access to marihuana infringes the *Canadian Charter of Rights and Freedoms*. This appeal requires us to decide whether a medical access regime that only permits access to dried marihuana unjustifiably violates the guarantee of life, liberty and security of the person contrary to s. 7 of the *Charter*. The British Columbia courts ruled it did, and we agree.

I. Background

[3] The *CDSA* prohibits the possession, production, and distribution of cannabis, its active compounds, and its derivatives. In recognition of the fact that controlled substances may have beneficial uses, the *CDSA* empowers the government to create exemptions by regulation for medical, scientific or industrial purposes (s. 55). The *Marihuana Medical Access Regulations*, SOR/2001-227 ("*MMARs*"), created such an exemption for people who could demonstrate a medical need for cannabis. Applicants had to provide a declaration from a medical practitioner certifying that conventional treatments were ineffective or medically inappropriate for treatment of their medical condition. Once they had met all the regulatory requirements, patients were legally authorized to possess "dried marihuana", defined as "harvested marihuana that has been subjected to any drying process" (s. 1). Some patients were authorized to grow their own marihuana, under a personal-use production licence (s. 24), while others obtained the drug from a designated licensed producer (s. 34).

[4] The *MMARs* were replaced in 2013 with the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 ("*MMPRs*"). The new regime replaces the marihuana production scheme in the *MMARs* with a system of government-licensed producers. For the purposes of this appeal, however, the situation remains unchanged: for medical marihuana patients, the exemption from the *CDSA* offence is still confined to dried marihuana.

[5] The accused, Owen Edward Smith, worked for the Cannabis Buyers Club of Canada, located on Vancouver Island, in British Columbia. The Club sold marihuana and cannabis derivative products to members — people the Club was satisfied had a *bona fide* medical condition for which marihuana might provide relief, based on a doctor's diagnosis or laboratory test. It sold not only dried marihuana for smoking, but edible and topical cannabis products — cookies, gel capsules, rubbing oil, topical patches, butters and lip balms. It also provided members with recipe books for how to make such products by extracting the active compounds from dried marihuana. Mr. Smith's job was to produce edible and topical cannabis products for sale by extracting the active compounds from the cannabis plant. Mr. Smith does not himself use medical marihuana, and the Club did not have a production licence under the *MMARs*.

[6] On December 3, 2009, the police, responding to a complaint about an offensive smell, paid Mr. Smith a visit at his apartment in Victoria, and saw marihuana on a table. They obtained a search warrant and seized the apartment's inventory, which included 211 cannabis cookies, a bag of dried marihuana, and 26 jars of liquids whose labels included "massage oil" and "lip balm". Laboratory testing established that the cookies and the liquid in the jars contained tetrahydrocannabinol ("THC"), the main active compound in cannabis. THC, like the other active compounds in cannabis, does not fall under the *MMARs* exemption for dried marihuana. The police charged Mr. Smith with possession of THC for the

purpose of trafficking contrary to s. 5(2) of the *CDSA*, and possession of cannabis contrary to s. 4(1) of the *CDSA*.

[7] At his trial before Johnston J., Mr. Smith argued that the *CDSA* prohibition on possession, in combination with the exemption in the *MMARs*, was inconsistent with s. 7 of the *Charter* and unconstitutional because it limits lawful possession of marihuana for medical purposes to "dried marihuana". Many witnesses, expert and lay, were called. At the end of the *voir dire*, the judge made the following findings (2012 BCSC 544, 290 C.C.C. (3d) 91):

> (1) The active compounds of the cannabis plant, such as THC and cannabidiol, have established medical benefits and their therapeutic effect is generally accepted, although the precise basis for the benefits has not yet been established.
>
> (2) Different methods of administering marihuana offer different medical benefits. For example, oral ingestion of the active compounds, whether by way of products baked with THC-infused oil or butter, or gel capsules filled with the active compounds, may aid gastro-intestinal conditions by direct delivery to the site of the pathology. Further, oral administration results in a slower build-up and longer retention of active compounds in the system than inhaling, allowing the medical benefits to continue over a longer period of time, including while the patient is asleep. It is therefore more appropriate for chronic conditions.

(3) Inhaling marihuana, typically through smoking, provides quick access to the medical benefits of cannabis, but also has harmful side effects. Although less harmful than tobacco smoke, smoking marihuana presents acknowledged risks, as it exposes patients to carcinogenic chemicals and is associated with bronchial disorders.

[8] The trial judge found that the restriction to dried marihuana deprives Mr. Smith and medical marihuana users of their liberty by imposing a threat of prosecution and incarceration for possession of the active compounds in cannabis. He also found that it deprives medical users of the liberty to choose how to take medication they are authorized to possess, a decision which he characterized as "of fundamental personal importance", contrary to s. 7 of the *Charter* (para. 88). These limits offend the principles of fundamental justice because they are arbitrary; limiting the medical exemption to dried marihuana does "little or nothing" to enhance the state's interest in preventing diversion of illegal drugs or in controlling false and misleading claims of medical benefit (para. 114). For the same reason, the trial judge held that the restriction is not rationally connected to its objectives, and hence not justified under s. 1 of the *Charter*.

[9] The majority of the Court of Appeal upheld the trial judge's conclusions on the evidence and the constitutional issues, although it characterized the object of the prohibition more broadly, as the protection of health and safety (2014 BCCA 322, 360 B.C.A.C. 66). Chiasson J.A., dissenting, held that Mr. Smith did not have

standing to raise the constitutional issue, and that in any event the restriction did not violate s. 7 because medical users could legally convert dried marihuana into other forms.

II. Discussion

[10] Three issues arise: Mr. Smith's standing to challenge the constitutionality of the prohibition; the constitutionality of the prohibition; and the appropriate remedy.

A. *Standing*

[11] The first question is whether Mr. Smith has standing to challenge the constitutionality of the prohibition. We conclude that he does. The Crown took no issue with Mr. Smith's standing at trial. On appeal, although the issue was canvassed in oral argument, the Crown acknowledged that the principle "that no one can be convicted of an offence under an unconstitutional law" applied to Mr. Smith (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 313; C.A. reasons, at para. 147). Before this Court, the Crown adopted Chiasson J.A.'s dissenting position, arguing that Mr. Smith does not have standing because he does not himself use medical marihuana and operated outside the regulatory scheme. The restriction to dried marihuana therefore has "nothing to do with him" (C.A. reasons, at para. 151).

[12] This overlooks the role the *MMARs* play in the statutory scheme. They operate as an exception to the offence provisions under which Mr. Smith was

charged, ss. 4 and 5 of the *CDSA*. As the majority of the Court of Appeal said, the issue is whether those sections of the *CDSA*, "as modified by the *MMARs*, deprive people authorized to possess marijuana of a constitutionally protected right by restricting the exemption from criminal prosecution to possession of dried marijuana" (para. 85). Nor does the fact that Mr. Smith is not a medical marihuana user and does not have a production licence under the regime mean he has no standing. Accused persons have standing to challenge the constitutionality of the law they are charged under, even if the alleged unconstitutional effects are not directed at them: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *Big M Drug Mart*. Nor need accused persons show that all possible remedies for the constitutional deficiency will as a matter of course end the charges against them. In cases where a claimant challenges a law by arguing that the law's impact on other persons is inconsistent with the *Charter*, it is always possible that a remedy issued under s. 52 of the *Constitution Act, 1982* will not touch on the claimant's own situation: see *R. v. Latchmana*, 2008 ONCJ 187, 170 C.R.R. (2d) 128, at para. 16; *R. v. Clay* (2000), 49 O.R. (3d) 577 (C.A.).

[13] In this case, the constitutionality of the statutory provision under which Mr. Smith is charged is directly dependent on the constitutionality of the medical exemption provided by the *MMARs*: see *Parker*. He is therefore entitled to challenge it.

B. *The Constitutionality of the Prohibition*

[14] This appeal asks the Court to determine whether restricting medical access to marihuana to dried marihuana violates s. 7 of the *Charter*:

> **7.** 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.

[15] Section 7 permits the law to limit life, liberty and security of the person, provided it does so in a way that is not contrary to the principles of fundamental justice.

[16] The first question in the s. 7 analysis is whether the law limits life, liberty or security of the person. We conclude that it does. The legislative scheme's restriction of medical marihuana to dried marihuana limits s. 7 rights in two ways.

[17] First, the prohibition on possession of cannabis derivatives infringes Mr. Smith's liberty interest, by exposing him to the threat of imprisonment on conviction under s. 4(1) or 5(2) of the *CDSA*. Any offence that includes incarceration in the range of possible sanctions engages liberty: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 515. The prohibition also engages the liberty interest of medical marihuana users, as they could face criminal sanctions if they produce or possess cannabis products other than dried marihuana. We cannot accede to the dissenting judge's position on this point: the *MMARs* do not authorize medical marihuana users to convert dried marihuana into its active compounds. An authorization to possess

medical marihuana is no defence for a patient found in possession of an alternate dosage form, such as cannabis cookies, THC-infused massage oil, or gel capsules filled with THC.

[18] Second, the prohibition on possession of active cannabis compounds for medical purposes limits liberty by foreclosing reasonable medical choices through the threat of criminal prosecution: *Parker*, at para. 92. In this case, the state prevents people who have already established a legitimate need for marihuana — a need the legislative scheme purports to accommodate — from choosing the method of administration of the drug. On the evidence accepted by the trial judge, this denial is not trivial; it subjects the person to the risk of cancer and bronchial infections associated with smoking dry marihuana, and precludes the possibility of choosing a more effective treatment. Similarly, by forcing a person to choose between a legal but inadequate treatment and an illegal but more effective choice, the law also infringes security of the person: *Morgentaler*; *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104 (Ont. C.A.).

[19] The Crown says that the evidence adduced on the *voir dire* did not establish that the prohibition on alternative forms of cannabis intruded on any s. 7 interest, beyond the deprivation of physical liberty imposed by the criminal sanction. It says that the evidence did not prove that alternative forms of medical marihuana had any therapeutic benefit; at most it established that the patient witnesses preferred cannabis products to other treatment options. This submission runs counter to the

findings of fact made by the trial judge. After a careful review of extensive expert and personal evidence, the trial judge concluded that in some circumstances the use of cannabis derivatives is more effective and less dangerous than smoking or otherwise inhaling dried marihuana. A trial judge's conclusions on issues of fact cannot be set aside unless they are unsupported by the evidence or otherwise manifestly in error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. The evidence amply supports the trial judge's conclusions on the benefits of alternative forms of marihuana treatment; indeed, even the Health Canada materials filed by the Crown's expert witness indicated that oral ingestion of cannabis may be appropriate or beneficial for certain conditions.

[20] The expert evidence, along with the anecdotal evidence from the medical marihuana patients who testified, did more than establish a subjective preference for oral or topical treatment forms. The fact that the lay witnesses did not provide medical reports asserting a medical need for an alternative form of cannabis is not, as the Crown suggests, determinative of the analysis under s. 7. While it is not necessary to conclusively determine the threshold for the engagement of s. 7 in the medical context, we agree with the majority at the Court of Appeal that it is met by the facts of this case. The evidence demonstrated that the decision to use non-dried forms of marihuana for treatment of some serious health conditions is medically reasonable. To put it another way, there are cases where alternative forms of cannabis will be "reasonably required" for the treatment of serious illnesses (C.A.

reasons, at para. 103). In our view, in those circumstances, the criminalization of access to the treatment in question infringes liberty and security of the person.

[21] We conclude that the prohibition on possession of non-dried forms of medical marihuana limits liberty and security of the person, engaging s. 7 of the *Charter*. This leaves the second question — whether this limitation is contrary to the principles of fundamental justice.

[22] The trial judge found that the limits on liberty and security of the person imposed by the law were not in accordance with the principles of fundamental justice, because the restriction was arbitrary, doing "little or nothing" to further its objectives, which he took to be the control of illegal drugs or false and misleading claims of medical benefit. The majority of the Court of Appeal, which found that the objective of the prohibition was the protection of public health and safety (relying on *Hitzig* and *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134), likewise concluded it did not further that objective and was thus arbitrary and contrary to the principles of fundamental justice.

[23] It is necessary to determine the object of the prohibition, since a law is only arbitrary if it imposes limits on liberty or security of the person that have no connection to its purpose: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 98.

[24] The Crown does not challenge the Court of Appeal's conclusion that the object of the prohibition on non-dried forms of medical marihuana is the protection of health and safety. However, it goes further, arguing that the restriction protects health and safety by ensuring that drugs offered for therapeutic purposes comply with the safety, quality and efficacy requirements set out in the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and its regulations. This qualification does not alter the object of the prohibition; it simply describes one of the means by which the government seeks to protect public health and safety. Moreover, the *MMARs* do not purport to subject dried marihuana to these safety, quality and efficacy requirements, belying the Crown's assertion that this is the object of the prohibition. We therefore conclude that the object of the restriction to dried marihuana is simply the protection of health and safety.

[25] The question is whether there is a connection between the prohibition on non-dried forms of medical marihuana and the health and safety of the patients who qualify for legal access to medical marihuana. The trial judge concluded that for some patients, alternate forms of administration using cannabis derivatives are more effective than inhaling marihuana. He also concluded that the prohibition forces people with a legitimate, legally recognized need to use marihuana to accept the risk of harm to health that may arise from chronic smoking of marihuana. It follows from these findings that the prohibition on non-dried medical marihuana undermines the health and safety of medical marihuana users by diminishing the quality of their

medical care. The effects of the prohibition contradict its objective, rendering it arbitrary: see *Bedford*, at paras. 98-100.

[26] The Crown says there are health risks associated with extracting the active compounds in marihuana for administration via oral or topical products. It argues that there is a rational connection between the state objective of protecting health and safety and a regulatory scheme that only allows access to drugs that are shown by scientific study to be safe and therapeutically effective. We disagree. The evidence accepted at trial did not establish a connection between the restriction and the promotion of health and safety. As we have already said, dried marihuana is not subject to the oversight of the *Food and Drugs Act* regime. It is therefore difficult to understand why allowing patients to transform dried marihuana into baking oil would put them at greater risk than permitting them to smoke or vaporize dried marihuana. Moreover, the Crown provided no evidence to suggest that it would. In fact, as noted above, some of the materials filed by the Crown mention oral ingestion of cannabis as a viable alternative to smoking marihuana.

[27] Finally, the evidence established no connection between the impugned restriction and attempts to curb the diversion of marihuana into the illegal market. We are left with a total disconnect between the limit on liberty and security of the person imposed by the prohibition and its object. This renders it arbitrary: see *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 83.

[28] We conclude that the prohibition of non-dried forms of medical marihuana limits liberty and security of the person in a manner that is arbitrary and hence is not in accord with the principles of fundamental justice. It therefore violates s. 7 of the *Charter*.

[29] The remaining question is whether the Crown has shown this violation of s. 7 to be reasonable and demonstrably justified under s. 1 of the *Charter*. As explained in *Bedford*, the s. 1 analysis focuses on the furtherance of the public interest and thus differs from the s. 7 analysis, which is focused on the infringement of the individual rights: para. 125. However, in this case, the objective of the prohibition is the same in both analyses: the protection of health and safety. It follows that the same disconnect between the prohibition and its object that renders it arbitrary under s. 7 frustrates the requirement under s. 1 that the limit on the right be rationally connected to a pressing objective (*R. v. Oakes*, [1986] 1 S.C.R. 103). Like the courts below, we conclude that the infringement of s. 7 is not justified under s. 1 of the *Charter*.

C. *Remedy*

[30] A law is "of no force or effect" to the extent it is inconsistent with the guarantees in the *Charter:* s. 52 of the *Constitution Act, 1982*. We have concluded that restricting medical access to marihuana to its dried form is inconsistent with the *Charter*. It follows that to this extent the restriction is null and void.

[31] The precise form the order should take is complicated by the fact that it is the combination of the offence provisions and the exemption that creates the unconstitutionality. The offence provisions in the *CDSA* should not be struck down in their entirety. Nor is the exemption, insofar as it goes, problematic — the problem is that it is too narrow, or under-inclusive. We conclude that the appropriate remedy is a declaration that ss. 4 and 5 of the *CDSA* are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.

[32] We would reject the Crown's request that the declaration of invalidity be suspended to keep the prohibition in force pending Parliament's response, if any. (What Parliament may choose to do or not do is complicated by the variety of available options and the fact that the *MMARs* have been replaced by a new regime.) To suspend the declaration would leave patients without lawful medical treatment and the law and law enforcement in limbo. We echo the Ontario Court of Appeal in *Hitzig*, at para. 170: "A suspension of our remedy would simply [continue the] undesirable uncertainty for a further period of time."

III. Disposition

[33] We would dismiss the appeal, but vary the Court of Appeal's order by deleting the suspension of its declaration and instead issue a declaration that ss. 4 and 5 of the *CDSA* are of no force and effect to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.

[34] At no point in the course of these proceedings did the British Columbia courts or this Court issue a declaration rendering the charges against Mr. Smith unconstitutional. In fact, following the *voir dire*, the trial judge refused to grant a judicial stay of proceedings. Despite this, the Crown chose not to adduce any evidence at trial. As a result of the Crown's choice, Mr. Smith was acquitted. We see no reason why the Crown should be allowed to reopen the case following this appeal. Mr. Smith's acquittal is affirmed.

Appeal dismissed.

Solicitor for the appellant: Public Prosecution Service of Canada, Vancouver.

Solicitors for the respondent: Tousaw Law Corporation, Duncan, British Columbia; Conroy and Company, Abbotsford; Henshall Scouten, Vancouver; Bibhas D. Vaze, Vancouver.

Solicitors for the intervener Santé Cannabis: Grey Casgrain, Montréal.

Solicitors for the intervener the Criminal Lawyers' Association (Ontario): Ruby Shiller Chan Hasan, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare Roland Rosenberg Rothstein, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Gratl & Company, Vancouver.

Solicitors for the interveners the Canadian AIDS Society, the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario: Burstein Bryant Barristers, Toronto; HIV & AIDS Legal Clinic Ontario, Toronto; Canadian HIV/AIDS Legal Network, Toronto.