Court File No. C53583

COURT OF APPEAL FOR ONTARIO

B E T W E E N

HER MAJESTY THE QUEEN

Appellant

- and -

MATTHEW MERNAGH

Respondent

- and -

THE CANADIAN AIDS SOCIETY, THE CANADIAN HIV/AIDS LEGAL NETWORK and THE HIV & AIDS LEGAL CLINIC ONTARIO

Intervenors

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PART I - STATEMENT OF THE CASE

1. The Respondent Mernagh "suffers from the debilitating effects of fibromyalgia, scoliosis, seizures and depression". As the trial Judge found, prescription medications have failed to provide him adequate relief from the constant pain associated with his medical conditions. Marihuana eases the Respondent's symptoms and allows him to function. The *Controlled Drugs and Substances Act* ("*CDSA*") brands the Respondent a criminal for his use of marihuana to treat his serious illnesses unless and until he can find a doctor who will sign his application for a criminal exemption pursuant to the *Marihuana Medical Access Regulations* ("*MMAR*"). Despite his diligent efforts over the years, the Respondent has been unable to find a doctor who will fairly consider the merits of his application. As a result of cultivating his own supply of medical marihuana while he continued his search for a supportive doctor, the Respondent was charged with production contrary to s. 7(2)(b) of the *CDSA*.

2. In defence of the charge, the Respondent challenged the constitutionality of the offence provision on the basis that Canada's most current medical marihuana regime, as set out in the *MMAR*, failed to provide an adequate means for a legitimate medical user like him to obtain a lawful exemption from the criminal prohibition. On April 11, 2011, after having heard eight days of *viva voce* evidence and considering "a large volume of documentary and affidavit evidence" (including the expert evidence filed in *R. v. Berens*), Taliano J. held that the current *MMAR* regime violates s. 7 of the *Charter* by effectively depriving seriously ill persons, such as the Respondent, of an effective means to access the Government's exemption from the criminal prohibition on medical marihuana. Taliano J. issued a declaration that the *MMAR* and ss. 4 and 7 of the *CDSA* were of no force and effect, commencing three months from that date. Taliano J. also issued the Respondent an immediate exemption from the criminal prohibitions in ss. 4 and 7 of the *CDSA*.

3. On April 18, 2011, the Crown appealed against the decision of Taliano J. On March 23, 2012, Associate Chief Justice O'Connor granted permission for the Canadian AIDS Society, the Canadian HIV/AIDS Legal Network and the HIV & AIDS Legal Clinic Ontario (hereinafter "the Intervenors") to jointly intervene in this appeal. (Permission to intervene was also granted to the CCLA and the BCCLA)

4. The Intervenors support the position of the Respondent in seeking to uphold the trial Judge's declaration. The Intervenors also endorse the submissions made by the CCLA and the BCCLA in support of the Respondent's position. The Intervenors, limit their submissions to the following three points:

(1) Contrary to the submissions of the Appellant Crown, certain legislative facts concerning the medicinal use of marihuana have been well established and have been repeatedly accepted by this and other appellate courts.

(2) In addition to the constitutional failings identified by the trial Judge, the "access" provisions in the *MMAR* are not in accordance with the principles of fundamental justice because they are not rationally connected to any of the state's objectives and/or because they fail to afford a medicinal marihuana applicant adequate procedural fairness on a matter of critical importance to their liberty and security of person interests.

(3) Assuming that this Court accepts that some period of temporary suspension of the declaration of constitutional validity is appropriate, this Court should also impose conditions allowing for the immediate protection of the s. 7 interests of medicinal marihuana applicants.

Each of these submissions will be dealt with more fully below.

PART II - SUMMARY OF THE FACTS

A) Introduction

5. The Appellant Crown contends that, without the requisite medical opinion supporting their *MMAR* applications, the patient witnesses who testified at trial cannot rightly be classified as "legitimate" medical marihuana users. The Respondent answers by pointing out that, like the courts in *Parker* and *Hitzig*, Taliano J. was presented with sufficient medical information from which he could make findings that the patient witnesses were seriously ill people for whom marihuana provided relief. The real issue, however, is the fact that all of these patients were legitimate medical marihuana ***applicants*** who were entitled to have their requests for criminal exemptions considered fairly and in a timely manner, that is, other than by getting arrested and charged with an offence under the *CDSA* (like the Respondent) or by having to volunteer to be a witness in someone else's criminal trial (like the other patient witnesses). Regrettably, despite more than a decade of court challenges and a number of decisions emphasizing the need for effective access to such medical

exemptions, the evidence in the Case at Bar shows that the *MMAR* scheme continues to deprive seriously ill Canadians of a fair and timely means of applying for an exemption from the criminal prohibition on their medical use of marihuana.

B) Marihuana as medicine

6. In an apparent effort to justify the overly restrictive ***effects*** of the *MMAR*, the Appellant suggests that marihuana must be viewed as a potentially dangerous substance whose medicinal benefits are largely still speculative. Such claims must once again be rejected by this Court.

- Appellant's Factum, paras. 4, 6 and 8

7. The Intervenors adopt the outline of the scientific evidence which Taliano J. heard on these points as set out in the Respondent's Factum at paragraphs 79 to 83. In addition, however, the Intervenors note that, based on extensive evidentiary records, this Court in *Parker* and *Hitzig* has previously recognized that there is a strong body of opinion supporting the claim that marihuana offers some individuals relief from a variety of debilitating symptoms associated with serious long-term illnesses such as HIV/AIDS, cancer and epilepsy. In those cases, this Court also recognized that, unlike many other powerful drugs used to treat those debilitating symptoms, there is no risk of death or even of overdose when using marihuana.

8. Medical marihuana is relatively unique in that this medicine can be produced by anyone capable of growing the marihuana plant. Indeed, the *MMAR* contemplate that authorized users will produce their own medical marihuana. As the Belle-Isle Study showed, many serious ill patients

who are unable to find a doctor to support their *MMAR* application will nevertheless be willing to risk suffering the criminal consequences of obtaining their marihuana illegally (as outlined in the Respondent's Factum at paragraph 86) in order to immediately gain the medicinal benefits.

9. The nature of the Government's drug approval process also determines the method by which doctors acquire information about the benefits and risks of new pharmaceutical drugs. As Dr. Lexchin testified in the Court below, the "education" many doctors receive about drug therapies comes in the form of the marketing efforts of the pharmaceutical manufacturers. The various medical associations in Canada do not educate doctors on the benefits and risks of new drug therapies, and especially not medical marihuana. The only information provided to doctors by the various Canadian medical associations on medical marihuana has been a series of cautions and warnings about the potential liability doctors face from supporting a patient's medical marihuana application. Other than publishing a very lengthy pseudo-monograph outlining the benefits and risks of medical marihuana, the Government has done nothing to ensure that the doctors being asked to consider the merits of their patients' *MMAR* applications are informed about the issues the doctors are being asked to decide. The Government has not created a registry of doctors who have demonstrated a willingness to educate themselves on the subject or who have previously signed other patients' medical marihuana applications. The *MMAR* rely upon the patient's ability (or fortune) to find a properly informed doctor or one willing to properly educate himself or herself on the subject.

- Reasons for Judgment, at paras. 174-177 and 182-186

C) A profile of medical marihuana users and *MMAR* applicants

10. As the trial Judge correctly found, a number of reliable surveys and studies have estimated the population of Canadians believed to use marihuana for medicinal purposes to be in the hundreds of thousands. According to Ms. Belle-Isle's study, as many as 14% to 37% of people living with HIV/AIDS use marihuana for medicinal purposes. In view of the estimated 58,000 people in Canada living with HIV/AIDS (at the time of trial), Ms. Belle-Isle's research suggests that the number of actual medical marihuana users in this group alone (*i.e.,* 8,000 to 21,000) exceeds the number of persons who have successfully applied for a criminal exemption under the *MMAR.*

- Reasons for Judgment, at paras. 212-3

11. In 2005 and 2006, Ms. Belle-Isle headed up a research study aimed at trying to uncover the reasons for why so many persons living with HIV/AIDS who used marihuana medicinally had not obtained exemptions under the *MMAR*. While some of that gap was explained by a lack of information about the availability of the *MMAR* scheme, a significant percentage of unauthorized medical marihuana users identified the stigma surrounding marihuana and their doctors' reluctance to support such an application as the reason for not pursuing an exemption. This conclusion was consistent with what the *Nolin Report* had concluded only a few years earlier.

- Reasons for Judgment, at paras. 169-172

D) *MMAR* applications and doctor-shopping

12. The evidence of the individual patients whose evidence was presented at trial demonstrated two consistent themes:

(1) Many of the doctors with whom the patients had consulted over the years refused to even consider the merits of the patients' request to use marihuana to treat their serious illnesses.

(2) Patients struggled for many months, if not years, seeking out doctors who might be willing to fairly consider their medical marihuana application.

This anecdotal evidence was confirmed by the Belle-Isle Study and by the institutional statements of various medical associations in Canada. Relying on ***all of this evidence***, the trial Judge in the Case at Bar held that "the number of patients who have sought and continue to seek their doctors' approval for the medicinal use of marihuana greatly exceeds the number of applicants who have actually been licensed under the *MMAR*".

- Respondent's Factum, at paras. 7, 13, 19, 23, 28, 32, 35, 38, 43, 45, 51, 53, 55, 59, 61, 73;
- Reasons for Judgment, at paras. 145-146, 148, 150, 152-154, 158-160, 163-166 and 169-173

13. Across the country, there are shortages of doctors taking on new patients and even fewer who are willing to take on patients with serious illnesses. As the Belle-Isle Study found, the difficulties in finding a "new" doctor have deterred some seriously ill patients from even asking their existing doctor to consider supporting an application under the *MMAR*. Of the approximately 60,000 doctors across Canada, no more than 2700 have ever participated in the *MMAR* scheme in any one year. Of that limited number of doctors across the country who have evidenced a willingness to consider the merits of their patients' medical marihuana applications, some have long wait-times before they are able to see a patient and even longer wait-times before being able to see a new patient.

- Respondent's Factum, at paras. 48, 57, 75;
- Reasons for Judgment, at paras. 118, 203-4, 218, 220 and 224

PART III - ISSUES AND THE LAW

OVERVIEW

14. It is the Intervenors' position that the Crown's attacks on some of the trial Judge's factual findings are misplaced; that is, contrary to the Appellant's submissions, it does not matter whether there was evidence capable of establishing that ***most*** medical marihuana users were frustrated in their exemption applications by a "massive national boycott" of the *MMAR* in the medical community. In both *Hitzig* and *Morgentaler,* the legislative schemes for accessing medical exemptions from criminal liability ("criminal exemptions") were still found to violate the *Charter* even though those schemes seemed to work adequately for many of the persons affected. In terms of the "principles of fundamental justice", a criminal exemption scheme will amount to an unconstitutional "illusory defence" where the effect of that scheme is to deny ***some*** persons who are in need of treatment timely access to those medical services. The Intervenors submit that the evidence of the patient witnesses in the Case at Bar provided a reasonable basis for the trial Judge to find that there was a constitutionally significant problem with the manner by which the *MMAR* have operated in practice. The additional systemic evidence, relied upon by the Appellant Crown to challenge the trial Judge's ultimate conclusions on the constitutional issues, was superfluous. Put differently, any errors the trial Judge may have made in respect of his assessment of that additional systemic evidence do not affect the validity of his findings and conclusions based on the evidence of the patient witnesses.

15. The Intervenors' submissions focus on two additional ways by which the evidence in the Court below, and the trial Judge's findings, demonstrate that the *MMAR* do not accord with the principles of fundamental justice:

(i) the way by which some patients obtain the favourable medical decision required by the *MMAR* demonstrates that the scheme is arbitrary and not rationally connected to the state's valid legislative objectives, and/or

(ii) the *MMAR* fail to afford a medicinal marihuana applicant adequate procedural fairness on a matter of critical importance to their liberty and security of person interests.

The Intervenors also submit that, in the unique circumstances of a third successful constitutional challenge to the Government's medical marihuana exemption scheme, any appropriate constitutional remedy must include immediate interim relief for all seriously ill medical marihuana users.

I. THE *MMAR* VIOLATE SECTION 7 OF THE *CHARTER*

A) Introduction

16. In *Hitzig*, this Court set out the two-stage framework for analyzing a s. 7 challenge to the *MMAR*. There is no need to re-invent the analysis for the purposes of the Case at Bar. As in *Hitzig*, it is clear that the combined effect of ss. 4 and 7 of the *CDSA* and the related exemption scheme in the *MMAR* is to violate ***both*** the liberty and security of person rights of seriously ill persons. The trial Judge correctly relied upon the *Hitzig* analysis in that regard. The issue in the Case at Bar is whether those deprivations are in accordance with the principles of fundamental justice.

- *R. v. Hitzig, supra* at paras. 98-105

B) The broader "context" for the section 7 analysis

17. Before turning to the analysis of whether the s. 7 deprivations in this case are in accordance with the principles of fundamental justice, it is important to consider "the specific context in which the [constitutional] claim is made". As this Court explained in *Hitzig*:

> ... Context for the present purposes includes the factual matrix in which the claims are advanced, the nature of the alleged rights affected by the state conduct, the nature of the interference with those rights by the state, and the interests relied on by the state in support of its conduct. Context encompasses the effect as well as the purpose of the impugned state conduct. Where legislative provisions are in play, context refers to the language of the statute and the legislative and common law history leading up to the enactments of the challenged provisions....
>
> - *R. v. Hitzig*, *supra* at paras. 78 and 107-8

18. In this case, the legal "context" within which the principles of fundamental justice must be analyzed includes:

* the nature of the rights affected by the state conduct include both the risk of incarceration for seriously ill persons but also the profound effects to their psychological and physical health occasioned by the impediments created by the legislative scheme;

* the nature of the rights affected by the state conduct also include the important autonomy right of determining the course of one's own medical treatment;

* the interest relied upon by the state to justify the *MMAR* scheme is attenuated by the fact that, as this Court has recognized, marihuana has a low level of toxicity, especially as compared to other powerful drugs which are commonly prescribed (*e.g.*, opiates) and which may be abused; and

* the "history" of litigation concerning the medical marihuana issue in Canada is such that the Government's failure to monitor the deficiencies of its ***fourth attempt*** at creating a constitutionally adequate scheme undermines any claim to deference from this Court.

C) The *MMAR*'s decision-making scheme is arbitrary and therefore does not accord with the principles of fundamental justice

19. The objective of the *MMAR* is to allow the state to determine fairly and reliably which patients should properly be exempted from the criminal prohibition on medical marihuana. The evidence in the Case at Bar, however, shows that for some patients the *MMAR* scheme has devolved into nothing more than a scavenger hunt for one of a minority group of doctors who are willing to

support the medicinal use of marihuana. When a patient receives a "negative" decision (including a non-decision) from a doctor regarding the patient's request to use marijuana medicinally, there is nothing in the *MMAR* preventing that patient from taking their health record and going to see another doctor, and then another, and another. The *MMAR* contemplate that many seriously ill persons will have to invest considerable time (*i.e.*, often months or even years), energy (*i.e.*, travelling long distances) and expense in such a search until he or she finally finds one of the few doctors in Canada who will support the patient's application for a medical marihuana exemption.

20. The Intervenors submit that the *MMAR*'s overt acceptance of forced "doctor-shopping" by patients seeking a criminal exemption for their medical marihuana use reveals the arbitrary and unprincipled nature of the scheme's putative reliance upon doctors' medical assessments of the legitimacy of their patients' claims:

(i) As with the second specialist requirement struck down in *Hitzig*, compelled doctor-shopping does nothing to promote more reliable or more accurate medical decisions: see *R. v. Hitzig, supra* at paras. 145 and 150.

(ii) Requiring a party to shop for a favourable decision-maker undermines the integrity of the decision-making process: see *R. v. Regan,* [2002] 1 S.C.R. 297.

(iii) As the evidence in the Case at Bar demonstrated, compelling patients to doctor-shop for *MMAR* support often causes significant delays in gaining lawful access to a beneficial treatment and can worsen the medical conditions for which the treatment is being sought: see *R. v. Morgentaler, supra* and *Chaoulli v. Quebec (A.-G.)*, *supra*.

It is submitted that the arbitrary nature by which some seriously ill patients ultimately "luck in" to finding a doctor willing to support the merits of their application exemplifies why the *MMAR*'s current approach to making doctors the gatekeeper of their patients potential criminal liability for use of a medicine does not accord with the principles of fundamental justice.

- *Canada (A.-G.) v. PHS Community Services Society*, *supra* at para. 132

D) The *MMAR*'s lack of procedural safeguards also deprive patients of their s. 7 rights in a manner that does not accord with the principles of fundamental justice

21. When important (*i.e.*, section 7) interests are engaged, the state may only deprive a person of those interests through a process that is fundamentally fair. The constitutionally required elements of such procedural fairness will depend upon the nature of the interests at stake and the overall legislative context. While the Government may have a legitimate interest in demanding a medical opinion to support the medical use of marihuana, that does not relieve the Government of ensuring that the *MMAR*'s decision-making process for granting the criminal exemption accords with fundamental procedural fairness. As Dickson C.J.C. held in *R. v. Morgentaler, infra*:

> It is no answer to say that "health" is a medical term and that doctors who sit on therapeutic abortion committees must simply exercise their professional judgment. A therapeutic abortion committee is a strange hybrid, part medical committee and part legal committee....
>
> When the decision of the therapeutic abortion committee is so directly laden with consequences, the absence of any clear legal standard to be applied by the committee in reaching its decision is a serious procedural flaw.

- *Canada (A.-G.) v. PHS Community Services Society*, [2011] S.C.J. No. 44 at paras. 117 and 128;
- *Charkaoui v. Canada (C.I.),* [2007] 1 S.C.R. 350;
- *Suresh v. Canada (M.C.I.)*, 2002 SCC 1;
- *B.(R.) v. C.A.S. of Metropolitan Toronto*, [1995] 1 S.C.R. 315;
- *New Brunswick (M.O.H.C.S.) v. G.(J.),* [1999] 3 S.C.R. 46 at paras. 71-73;
- *R. v. Morgentaler,* [1988] 1 S.C.R. 30 at para. 47

22. As gatekeepers of the Government's legislative scheme for granting medical users exemptions from the criminal prohibition, doctors are acting as agents of the state and therefore their decisions must satisfy the "principles of fundamental justice". It is not enough for the Government

to say that "the problem ... is not the fault of the legislation, but with the doctors whose decision to sign or not to sign a declaration for a patient is theirs alone and is not subject to government control". As the Supreme Court held in *Godbout v. Longueuil*, *infra*:

> ... Were the *Charter* to apply only to those bodies that are institutionally part of government but not to those that are – as a simple matter of fact – governmental in nature (or performing a governmental act), the federal government and the provinces could easily shirk their *Charter* obligations by conferring certain of their powers on other entities and having those entities carry out what are, in reality, governmental activities or policies....

Doctors' decisions of whether or not a patient should be exempted from potential criminal liability for their medicinal use of marihuana determine whether or not the Government will issue such an exemption under the *MMAR*. Consequently, given the overhanging threat of criminal prosecution for patients without a medical exemption, decisions by doctors ***under the MMAR*** take on a "governmental quality" and are thereby subject to *Charter* scrutiny.

- Reasons for Judgment, at para. 5;
- *Godbout v. Longueuil*, [1997] 3 S.C.R. 844 at paras. 47 and 48;
- *Eldridge v. B.C. (A.-G.)*, [1997] 3 S.C.R. 624 at paras. 41-52

23. In recognizing a patient's substantive right to determine the course of his or her own treatment, Canadian appellate courts have recognized that patients have ***a procedural right*** to challenge medical decisions which substantially affect them and with which they do not agree – decisions which both compel patients to take treatments against their will and which deny patients treatments of their choice. Unlike any other "medical" decision which may be made by a doctor concerning their patient, the decision of whether or not to support a seriously ill patient's choice of marihuana as medicine has constitutional significance in so far as it determines whether that patient will be insulated from the threat and risk of criminal sanctions for their use of medical marihuana.

- *Fleming v. Reid* (1991), 4 O.R.(3d) 74 (C.A.);
- *Ciarlariello v. Schacter*, [1994] 2 S.C.R. 119;
- *A.C. v. Manitoba,* [2009] S.C.J. No. 30;
- *Rasouli v. Sunnybrook Health Sciences Centre*, [2011] O.J. No. 2984 (C.A.)

24. In determining the minimum procedural safeguard required for the *MMAR*'s decision-making scheme to comport with the principles of fundamental justice, it is helpful to consider the most basic "natural justice" requirements identified by the Supreme Court of Canada in *Baker v. Canada (M.C.I.), infra.* Even if the medical exemption decision under the *MMAR* was properly classified as purely administrative, given the serious criminal consequences of an adverse decision on a patient's exemption application, the dicta in *Parker* and *Hitzig* make clear that the *MMAR* should afford a patient at least as much procedural fairness as a case like *Baker*; namely,

(i) that the person responsible for making the key decision be impartial and free of any reasonable apprehension of bias;

(ii) the provision of a written explanation for a decision; and

(iii) a full and fair consideration of the issues and a meaningful opportunity to present the various types of evidence relevant to the case.

- *Baker v. Canada (M.C.I.)*, [1999] 2 S.C.R. 817

(i) a lack of impartial decision-makers

25. It is submitted that as the ones deciding whether or not a patient should qualify for the *MMAR*'s criminal exemption permitting the medicinal use of marihuana, doctors must be impartial and free from any reasonable apprehension of bias. Regardless of whether the record in the Court below establishes that the entire Canadian medical community lacks the requisite impartiality on the

issue of medical marihuana, the evidence clearly establishes that many doctors (including those seen by the patient witnesses) have been biased by the warning of the various medical associations against getting involved in a patient's medical marihuana application. Those admonitions suggest that it is contrary to the doctors' own interests to support such applications. Consequently, because there is no obligation on a doctor to even make a decision, rather than risk jeopardizing their own interests, many doctors have opted to avoid deciding the merits of their patients' *MMAR* application.

26. It may be reasonable, as this Court has held, for the Government to require a supportive medical opinion before issuing a criminal exemption for medical marihuana. However, having imposed this requirement as part of its deliberate decision to maintain a broader criminal prohibition on marihuana, it is also the Government's responsibility to ensure that the requisite medical decisions are made on the merits of the patients' applications. As in *Chaoulli v. Quebec (A.-G.)*, *infra,* it is the Government's century-old scheme for dealing with marihuana that has created the informational deficit and stigma that now impairs the decision-making process in the context of medical marihuana. As the evidence in the Case at Bar demonstrates, for years the Government has been aware that many doctors (and their associations) have had serious reservations about lending any support to the medical use of marihuana because of the continued criminal prohibition. Rather than take legislative steps to ensure that doctors must actually consider the patient's application on the merits in light of the relevant scientific data, the *MMAR* simply delegate that constitutionally significant decision to a group, the large majority of which has made clear its preference for ***avoiding having to decide the issue***: see Paragraph 12 above.

- *Chaoulli v. Quebec (A.-G.)*, [2005] S.C.J. No. 33 at paras. 106 and 111

27. The Intervenors further submit that it is no answer for the Appellant Crown to claim that Health Canada's statistics show there are at least ***some*** doctors in ***some*** parts of Canada who will fairly consider (and support) *MMAR* applications and, thus, patients need only travel the country to seek them out. This same argument was rejected by Dickson C.J.C. in *R. v. Morgentaler, infra*, in relation to an exemption scheme that, comparatively, posed even less of a barrier than the *MMAR*[1]:

> ... the structure [of] the system regulating access to therapeutic abortions is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available.

- *R. v. Morgentaler, supra* at para. 52;
- *R. v. Hitzig, supra*

(ii) no duty to give reasons

28. The *MMAR* do not require a doctor to provide any reasons for rejecting a patient's request to use medical marihuana. While not much may be required of the doctor, basic procedural fairness requires a few sentences (even if by way of checking off certain boxes in a list) to show that the doctor has actually considered the patient's request on the merits and had a valid medical reason for refusing the exemption. Indeed, a patient whose request for a medical marihuana exemption is effectively "denied" by their doctor may well end up in front of a criminal court having to justify his or her unauthorized medical use of marihuana. A judge deciding on the merits of that same patient's medical use of marihuana ***would*** have a duty to provide the patient with reasons for rejecting the

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[1] According to the Badgley Report, relied upon by Dickson C.J.C., about 75 percent of hospitals in Canada had enough doctors to satisfy the legislative requirements for a therapeutic abortion committee. Only about 40 percent of Canadian hospitals had acquired the requisite accreditation, of which only half had actually established the authorizing therapeutic abortion committee. The combined effect of these constraints was that, in 1976, only about 20 percent of the hospitals in Canada would issue criminal exemptions for access to an abortion.

patient's medical marihuana claim. As with the need for impartiality in the doctor's decision-making process, a duty to provide reasons would help guarantee that doctors' *MMAR* decisions, which effectively determine a patient's criminal liability, are actually made on the medical merits.

(iii) no second level, or alternative, review so that the patient's application is guaranteed a timely full and fair consideration on the merits

29. Given the importance of the liberty and security of person interests at stake, and the history of the medical community's reluctance to participate in the exemption scheme, the Intervenors submit that the principles of fundamental justice require some mechanism for a patient to review a doctor's decision or, just as importantly, an alternative mechanism in the event a doctor refuses to decide or is not reasonably available to the patient. An effective mechanism for the timely review of a doctor's refusal of support for a seriously ill patient's choice of marihuana as medicine would help ensure that the doctors' *MMAR* decisions were made fairly and based on the evidence and that those patients who cannot otherwise access a knowledgeable doctor can still obtain the legal protection offered by the *MMAR*. It is submitted that a system which denies some patients a timely opportunity to have their case for a medical exemption considered on the merits does not advance the state's interest in creating an advance exemption scheme for legitimate medical marihuana users to avoid having to defend their marihuana use in a criminal court. As the Respondent's case well shows, the *MMAR*'s lack of a timely alternative review process simply shifts consideration of some patients' medical marihuana cases to the criminal courts, at an unacceptable personal cost to those patient-accused and at an undue cost to the admnistration of justice.

30. The Supreme Court has recognized that, in some circumstances, the *Charter* may impose positive obligations on government to take steps which better protect the rights of those who will otherwise miss out on the benefits of the existing legislation. In light of the unique circumstances surrounding the recent history of medical marihuana in Canada, the Intervenors submit that the Government has a constitutional obligation to create a viable alternative means for medical marihuana applicants to have their case heard and decided on the merits when they are otherwise unable to obtain a fair assessment of their case by a doctor. If the patient's doctor at first instance refuses to decide the issue or is not reasonably available to the patient, the patient must be entitled to apply to a special medical committee set up by the Government for consideration of the merits of the patient's *MMAR* application. Such medical committees already exist to provide patients with a timely review of other decisions by doctors which may compel or withhold significant medical treatments; see, for example, *Rasouli v. Sunnybrook Health Sciences Centre, supra* and the Consent and Capacity Review Board.

- *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 52-62;
- *Eldridge v. B.C.(A.-G.), supra*;
- *Dunmore v. Ontario (A.-G.)*, 2001 SCC 94 at paras. 20 and 26

II. REMEDY: ANY SUSPENSION OF INVALIDITY MUST INCLUDE INTERIM RELIEF

31. The Respondent's case is now the ***third*** time in less than 11 years that the superior courts in Ontario have told the Government that its medical marihuana exemption scheme must be more sensitive to the needs of the seriously ill. Studies commissioned by, and presented to, the Government have made clear that the *MMAR* continue to delay or prevent many seriously ill persons from obtaining an exemption to the criminal prohibition on their medical use of marihuana. In the

meantime, seriously ill persons such as the Respondent continue to find themselves being prosecuted for using medical marihuana while they continue their search for a doctor willing to consider the merits of their *MMAR* application.

32. Once charged criminally, a seriously ill person, such as the Respondent, is forced to either engage in a complex constitutional challenge to the legislation or try and meet the very high threshold of a medical "necessity" defence. As the saga of the *Little Sisters* constitutional litigation shows, sequel challenges to ongoing *Charter* infringements from the same legislative scheme are time consuming for the courts and costly for the litigants, costs which are likely to be especially prohibitive for vulnerable litigants. Advancing a necessity defence for a medical marihuana user is not only costly, but also very difficult considering the "no other legal alternative" branch of the defence. Given the significant number of seriously ill persons who continue to use medical marihuana without the benefit of a legal exemption, it would be contrary to the public interest to expect medical marihuana users to defend their choice in criminal courts while the Government takes up to a year to come up with yet a ***fourth*** legislative attempt at constitutional compliance. Accordingly, the Intervenors submit that ***if*** a suspension of the declaration of constitutional invalidity of ss. 4 and 7 of the *CDSA* is considered necessary to permit the Government to revise its approach yet again, then any suspension must be accompanied by temporary measures to prevent future violations of other patients' s. 7 rights in the interim. Such temporary measures could include a moratorium on laying marihuana possession and production charges during the period of the suspension against anyone who can document that they suffer from one of the illnesses set out in the *MMAR*. A temporary reprieve from such criminal charges would ensure that the Government works

expeditiously to remedy the constitutional defects of the *MMAR*. The Intervenors submit that these temporary measures are within the scope of the remedial authority conferred by s. 52.

- *R. v. McCrady* (2011), 108 O.R.(3d) 550 at para. 30 (C.A.);
- *Little Sisters Book and Art Emporium v. Canada*, [2007] S.C.J. No. 2

PART IV - ORDER REQUESTED

33. The Intervenors respectfully submit that the Appellant Crown's appeal should be dismissed.

34. Further, and in the alternative, the Intervenors submit that this Court should, as a condition of any temporary suspension of the declaration of constitutional invalidity, impose conditions which ensure that legitimate medical marihuana users are able to validate the legitimacy of their use other than through having to defend their medical use and the diligence of their search for medical support in a criminal court when facing a charge pursuant to ss. 4 and/or 7 of the *CDSA*.

Dated at Toronto, this 25th day of April, 2012.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

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Court File No. C53583

COURT OF APPEAL FOR ONTARIO

B E T W E E N

HER MAJESTY THE QUEEN

Appellant

- and -

MATTHEW MERNAGH

Respondent

- and -

THE CANADIAN AIDS SOCIETY, THE CANADIAN HIV/AIDS LEGAL NETWORK and THE HIV & AIDS LEGAL CLINIC ONTARIO

Intervenors

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