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R. v. Smith and Judicially Reviewing the Scope of Criminal Law under the Charter

Christopher Sherrin*

I. INTRODUCTION

In *R. v. Smith*,[1] the Supreme Court of Canada assessed the constitutionality of criminal prohibitions against the possession of marijuana in light of regulations that carved out a medical exception exclusively for dried marijuana. The Court held that the exception was too narrow and declared the criminal prohibitions of no force and effect to the extent that they prohibit a person with a medical authorization from possessing marijuana derivatives for medical purposes.[2]

Smith was the Court's first real foray into the lengthy saga of medical marijuana Charter[3] litigation[4] and, at first glance, its decision appears to reflect a banal application of established law to a factual finding at trial. The Ontario Court of Appeal had decided 15 years earlier in *R. v. Parker* that it violated section 7 of the Charter to deprive an individual, by means of a criminal sanction, of access to marijuana reasonably required for the treatment of a serious medical condition.[5] The Supreme Court simply applied that principle to the factual finding that, in some cases,

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1 [2015] S.C.J. No. 34, 2015 SCC 34 (S.C.C.), varg [2014] B.C.J. No. 2097 (B.C.C.A.) [hereinafter "*Smith* SCC"].

2 By marijuana derivatives, the Court was referring to products containing the active medicinal compounds extracted from the marijuana plant.

3 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

4 Most of the history of the litigation is outlined in R. Solomon & M. Clarizio, "The Highs and Lows of Medical Marijuana Regulation in Canada" (2015) 62 Crim. L.Q. 536. The history also includes the latest decision from the Federal Court in *Allard v. Canada*, [2016] F.C.J. No. 195, 2016 FC 236 (F.C.T.D.). Prior to *Smith*, the Supreme Court's involvement was limited to denying leave to appeal in a couple of cases.

5 *R. v. Parker*, [2000] O.J. No. 2787, 49 O.R. (3d) 481 (Ont. C.A.), varg [1997] O.J. No. 4923 (Ont. Prov. Div.).

non-dried marijuana is reasonably required for the treatment of some medical conditions.

Scratching below the surface, however, uncovers issues that call into question the legitimacy of the Court's decision to override the government's regulatory choice. The trial record in *Smith* was problematic: the evidence regarding the medical benefits of marijuana derivatives was of questionable reliability; it was sometimes unclear what evidence had been accepted by the trial judge; the value of some of the evidence was open to question; the significance of some of the findings at trial was debatable; some significant issues were largely ignored. These problems raised some important matters for the Supreme Court to discuss, but its judgment failed to address a surprising number of them. What is open to criticism in the Court's judgment in *Smith*, therefore, is not so much the outcome or the discrete conclusions that led to it (although a couple of them were a little curious) as the extent to which the judgment overlooked issues and smoothed over problems in the record.

In a constitutional democracy, judicial review of the acceptable scope of the criminal law is entirely appropriate. But its legitimacy depends critically on courts engaging in a careful, comprehensive, and rigorous review of the evidence tendered and arguments made in support of (and against) a constitutional claim. In a constitutional *democracy*, the members of the public deserve no less. Regretfully, and with great respect, it is not apparent that in *Smith* we quite got what we deserved.

II. *R. v. SMITH*

Owen Smith worked for the Cannabis Buyers Club of Canada. The Club sold marijuana and marijuana products to people who the Club deemed had a medical condition for which marijuana might provide relief.[6] It sold not only dried marijuana for smoking, but edible and topical marijuana products — cookies, gel capsules, rubbing oil, topical patches, butters and lip balms. Smith's job was to help produce those marijuana derivatives by extracting the active compounds from the marijuana plant.

[6] For purposes of this article, I will eschew references to the scientific terminology used to refer to marijuana and its preparations and derivatives. Nothing turns on terminological precision so I will simply use the colloquial but familiar term "marijuana".

In December 2009, the police found Smith in possession of dried marijuana as well as cookies, massage oils, and lip balms that contained tetrahydrocannabinol ("THC"), the main active compound in marijuana. He was charged with possession of marijuana and with possession of THC for the purpose of trafficking, contrary to sections 4 and 5 of the *Controlled Drugs and Substances Act* ("CDSA").[7]

Smith defended the charges on the basis that the offence provisions were unconstitutional, being in violation of section 7 of the Charter. His argument was that the CDSA did not provide an adequate exemption for possession of marijuana for medical purposes. At the relevant time, the *Marihuana Medical Access Regulations* ("MMARs") promulgated under the CDSA[8] only authorized medically approved individuals to possess dried marijuana. Smith argued that for the exemption to be constitutional it had to extend beyond dried marijuana to medically required marijuana derivatives. Smith did not use medical marijuana himself, and the club for which he worked did not have a production licence under the MMARs.[9]

Smith's argument succeeded at trial and on appeal. The trial judge declined to stay the proceedings after the Charter ruling but Smith was acquitted because the Crown elected to call no evidence. The Crown was not permitted to reopen its case following its unsuccessful appeals.

The Supreme Court held that the criminal prohibition against possession of marijuana derivatives infringed the liberty and security of the person interests, protected by section 7 of the Charter, of both Smith and medical marijuana users. Most significantly, the Court held that the prohibition against possession of marijuana derivatives "for medical purposes limits liberty 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 choice, the law also infringes security of the person."[10]

That holding was key to the entire decision. The Crown argued that the evidence led at trial established only that some individuals preferred

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7 S.C. 1996, c. 19.

8 SOR/2001-227 [repealed by s. 267 of and replaced by SOR/2013-119].

9 *Smith* was held to have standing to make the argument on the basis that 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 and even if the remedy for the constitutional deficiency will not necessarily end the charges against them: *supra*, note 1, at para. 12.

10 *Supra*, note 1, at para. 18.

oral and topical marijuana treatments, not that the treatments had any therapeutic benefit. The Court responded as follows:

> … 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 ... . 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.
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> … 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.[11]

Once the Court accepted the medical benefits of marijuana derivatives, everything else quickly followed. The primary objective of the restriction to dried marijuana was deemed to be the protection of health and safety.[12] Since using non-dried marijuana is, for some patients who qualify for legal access to medical marijuana, more effective and less dangerous as a treatment than inhaling dried marijuana, prohibiting non-dried marijuana undermines rather than protects the health and safety of medical marijuana users, rendering the prohibition arbitrary and contrary to the principles of fundamental justice.[13] For the same

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[11] *Id.*, at paras. 19-20.

[12] The Crown argued that, more specifically, the objective was the protection of 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. The Court replied, *supra*, note 1, at para. 24, that "[t]his 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." The Crown argued that another objective of the regulatory restriction was to assist in combatting diversion of medical marijuana into the illegal market. The Court quickly dismissed that argument as unsupported by the evidence: *supra*, note 1, at para. 27.

[13] Relying on *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72 (S.C.C.), varg [2012] O.J. No. 1296 (Ont. C.A.), the Court noted that a law is arbitrary if it imposes limits on liberty or security of the person that have no connection to its purpose.

reason, the regulatory restriction failed under section 1 of the Charter, there being no rational connection between the means and the objective. The Court declared the criminal prohibitions on possession of marijuana in sections 4 and 5 of the CDSA of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing marijuana derivatives for medical purposes.

III. THE TRIAL RECORD

In order to properly understand the Supreme Court's decision in *Smith*, it is necessary to understand the record on which the decision was based. For that, one must refer to the trial decision of Johnston J.[14]

Justice Johnston made the following findings regarding the benefits of using marijuana derivatives rather than dried marijuana in the course of medical treatment:

- For gastro-intestinal conditions such as Crohn's disease or Irritable Bowel Syndrome, oral ingestion of the main active compounds of marijuana (THC and CBD)[15] would "arguably" deliver the therapeutic benefit more directly to the site of pathology.[16]
- Oral ingestion prolongs the effects of the drug in a person's system and thus would be "better" for someone with a chronic condition of pain or glaucoma, as some level of therapeutic dosage would remain while the person slept.[17]
- For someone who needs speedy assimilation of the active compounds, spraying a solution containing those compounds under the tongue can, like smoking dried marijuana, provide faster assimilation, but without the health risks associated with smoking.[18]

Not a single scientific study is referenced in the trial judgment, or in the judgments on appeal, in support of these findings. Justice Johnston appeared to base his findings regarding the sometimes superior medical benefits of marijuana derivatives almost exclusively on the testimony

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[14] [2012] B.C.J. No. 730, 2012 BCSC 544 (B.C.S.C.), vard [2014] B.C.J. No. 2097 (B.C.C.A.) [hereinafter "*Smith* Trial"].

[15] THC, as noted above, is short for tetrahydrocannabinol. CBD is short for cannabidiol.

[16] *Supra*, note 14, at para. 45.

[17] *Id.*, at para. 45.

[18] *Id.*, at para. 45.

provided by the one expert witness called by the defence, Dr. David Pate.[19] At the same time, he also offered some rather negative assessments of Dr. Pate's testimony:

- While well-meaning and honest, Dr. Pate "strayed from objective opinion into advocacy, and … appeared at times argumentative when testifying".[20]
- A Crown expert's criticism of Dr. Pate "for making assertions with little scientific support was well taken".[21]
- "Dr. Pate seemed a bit too willing to accept some benefits of cannabis products as possible, based on his common sense or extrapolation from other evidence".[22]
- "The way in which Dr. Pate gave some of his evidence suggested that he was both amused and frustrated by government attitudes toward cannabis marihuana and its components, given its pervasiveness in both the underground economy and its growing acceptance as medicine. This has lessened the weight I put on Dr. Pate's evidence."[23]

In addition to the findings regarding the relative benefits of marijuana derivatives, the trial judge also found or accepted that:

- Because of the slow build-up of the drug in the body with oral ingestion, dosages are more difficult to manage, as it takes some time to determine when the optimum therapeutic level has been reached.[24]
- Oral ingestion has the "detriment of taking longer to build a therapeutic level of the drug than would occur with smoking dried marihuana".[25]
- Topical administration of the drug, by applying it directly to the site of skin infections, or to inflamed joints, is controversial.[26]

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[19] All of the findings reproduced above were listed in a single paragraph, introduced by the words: "From Dr. Pate's evidence I accept".

[20] *Supra*, note 14, at para. 38. The same criticism was levelled against one of the Crown's expert witnesses.

[21] *Id.*, at para. 39. A similar criticism was made against one of the Crown's expert witnesses.

[22] *Id.*, at para. 41.

[23] *Id.*, at para. 43.

[24] *Id.*, at para. 45.

[25] *Id.*, at para. 45.

[26] *Id.*, at para. 64.

- Smoking would be a better way to take a therapeutic dose of marijuana in case of a sharp increase in pain or discomfort, although smoking marijuana poses added health risks associated with inhaling smoke.[27]
- The precise basis for the therapeutic benefits of marijuana "is masked to some extent by the belief set or faith with which many medical users have approached their use, and has been made more difficult to … measure by the historical proscriptions against marihuana use".[28]

IV. A Weak Record Raising Many Questions

The trial record in *Smith* was not strong. The British Columbia Court of Appeal twice noted that, beyond question, the evidentiary record in the case was weaker than it was in the seminal case of *Parker*.[29] The obvious question is whether the record was strong enough. Was the evidence at trial, and were the findings at trial, sufficient to establish a reasonable need for marijuana derivatives in the treatment of serious medical conditions?

The technical answer, of course, is that they were because they were sufficient to establish, on a balance of probabilities, reasonable medical need in the eyes of the trier of fact. But *should* the trial record have been deemed sufficient, both by the trial judge and the judges on appeal? The record in support of the applicant's position may actually have been stronger than is suggested by the trial judgment, but on its face the judgment causes concern for a number of reasons.

There were obviously some credibility concerns with Dr. Pate's testimony; they were for the trial judge to resolve. Of greater interest is the fact that there were also reliability concerns with Pate's evidence. He made at least some assertions with little scientific support. He was too willing to accept as possible some benefits of cannabis products. He sometimes took on the role of an advocate. He did not appear to rely on scientific studies (at least to a degree significant enough to be worthy of mention). He was forced, at least sometimes, to fall back on common sense and extrapolation. Over and above all this, the trial judge noted that

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[27] *Id.*, at para. 45.

[28] *Id.*, at para. 46.

[29] *R. v. Smith*, [2014] B.C.J. No. 2097, 2014 BCCA 322, at paras. 94, 104 (B.C.C.A.), varg [2012] B.C.J. No. 730 (B.C.S.C.) [hereinafter "*Smith* CA"].

any evidence about the medical benefits of marijuana suffers from the problem that the precise basis for those benefits is masked by faith and the historical proscriptions against the use of marijuana.

The question naturally arises whether that was the sort of foundation on the basis of which courts should be drawing conclusions regarding medical facts that are mostly dispositive of a constitutional issue.[30] The lack of reference to supporting scientific studies is of particular note. In the absence of research, one must typically rely, at least to some extent, on untested suppositions, inferences, and extrapolations. I do not suggest that sufficient proof can never be found in such reasoning, but its use must, at the very least, command careful scrutiny of the assertions advanced and the premises underlying them.

The trial judgment contains a rudimentary description of the basic premises underlying Dr. Pate's assertions but no dissection of the premises nor any analysis of their validity. The Supreme Court's decision similarly contains no real discussion of the quantity and quality of the evidence led at trial. The Court mostly just asserted that "[t]he evidence amply supports the trial judge's conclusions on the benefits of alternative forms of marihuana treatment."[31] That is a rather surprising statement. If the trial evidence in *Smith* was ample, one is left to wonder what sorts of evidentiary frailties the Supreme Court would be willing to tolerate, without discussion, when intruding on Parliament's legislative authority in criminal law.

The Supreme Court was comforted by Health Canada materials filed at trial by the Crown's expert witness. In the words of the Court, "even the Health Canada materials … indicated that oral ingestion of cannabis may be appropriate or beneficial for certain conditions."[32] That is a rather limited assertion by Health Canada. The materials were not referenced in any relevant way in the trial judgment but the judgment of the Court of Appeal contains some added information. The materials refer to "some possible" improvement in asthma patients.[33] To say that oral ingestion

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[30] The adequacy of the evidentiary record was raised by the Crown on appeal, although it focused more on the gaps in the evidentiary record rather than the reliability of the evidence that was introduced. See *id.*, at paras. 34 and 66. See also the Supreme Court's judgment, *supra*, note 1, at para. 19.

[31] *Supra*, note 1, at para. 19.

[32] *Id.*, at para. 19.

[33] *Smith* CA, *supra*, note 29, at para. 112. The Court wrote that "it is early days in terms of conclusive clinical trials on the use of cannabis but the research that has been done is replete with references to the benefits of orally ingested cannabis." The example in the main text, however, was the only one given.

"may" be appropriate or produce "some possible" improvement seems to add very little to the evidence in support of the medical benefits of marijuana derivatives. It is curious that the Supreme Court thought to attach any real significance to the materials.

The British Columbia Court of Appeal was clearly concerned about the evidentiary record. In defence of the trial judge's conclusions, it elaborated at some length on the testimony given at trial. It paid particular attention to the four "patient witnesses" called by the defence who testified to their experiences administering marijuana orally and topically to treat the diseases from which they suffered. The Court explained that the witnesses found products made with marijuana more effective in treating certain of their symptoms and disorders than smoking dried marijuana.[34] It noted that "[t]he relief they reported from cannabis products was significant and, in some cases, life changing."[35] The Supreme Court similarly relied on the evidence of the patient witnesses in upholding the trial decision.[36]

The appellate courts inferred that the trial judge accepted and relied on the evidence of the patient witnesses in determining the medical benefits of marijuana derivatives.[37] That inference was technically available; the trial judge did hold that, by limiting the patient witnesses to using dried marijuana, the law interposed "the threat of criminal prosecution between them and the form of medication found effective to treat the symptoms of their very serious illnesses".[38] The inference, however, was far from inevitable. The quoted statement was the only one in the judgment suggesting that the trial judge accepted and relied on the testimony of the patient witnesses in finding medical benefit. It was included in the discussion of the law, roughly two-thirds of the way through the judgment and long after the trial judge outlined the evidence and described his findings regarding medical benefit. Indeed, when the patient witnesses were first mentioned, the trial judge wrote that they "testified as members of the Club who obtain products other than dried marihuana"[39] (rather than as people who claimed to derive medical benefit from the products). The judge also seemed to accept that

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[34] *Id.*, at para. 9.

[35] *Id.*, at para. 11.

[36] See, *e.g.*, *supra*, note 1, at paras. 19-20.

[37] *Smith* CA, *supra*, note 29, at para. 95; *Smith* SCC, *supra*, note 1, at paras. 19-20.

[38] *Supra*, note 14, at para. 89. I am assuming that the trial judge was referring to marijuana derivatives having been found effective by the patient witnesses themselves, and not just by someone like Dr. Pate.

[39] *Id.*, at para. 75.

"[a]necdotal reports of the efficacy of cannabis products in the treatment or management of various diseases and conditions should be approached with some caution."[40] Even if, despite all that, one can still assume that the trial judge accepted and relied on the testimony of the patient witnesses, there was ambiguity as to exactly which parts of their testimony he accepted. The trial judge clearly did not accept all the parts, since the witnesses testified to benefits from topical administration of marijuana[41] but the trial judge did not find any medical benefits from topical administration. The trial judgment contained no discussion, or even description, of the testimony given by the patient witnesses regarding the medical benefits of marijuana derivatives. The judge referred to "the form of medication found effective" to treat the symptoms of the witnesses' illnesses, but he did not explain the ways in which, or the extent to which, it was found to be effective. Surely some of this was worthy of discussion on appeal before the testimony of the patient witnesses was used to justify the trial judge's findings regarding medical benefit. Yet nowhere in the decision of the Supreme Court is there mention of any of it.

Even assuming that the trial judge did accept and rely on the testimony of the patient witnesses, it is not obvious their evidence added much. Their evidence was anecdotal. It was not supported by any expert medical evidence confirming that edible or topical forms of marijuana were effective in treating their individual illnesses.[42] All of the witnesses smoked marijuana in addition to using it topically and ingesting it orally,[43] raising the concern that they may have mistakenly attributed benefits from one form of administration to another. And their testimony asserting medical benefits from topical administration clearly added nothing, since no such benefits were ultimately found at trial. At the very least, this necessitated that the witnesses' evidence be dissected so as to assess its value absent that aspect of their testimony — assuming that was even possible.

The Supreme Court addressed one of these concerns. It held that the absence of supporting medical evidence was not determinative.[44]

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[40] *Id.*, at para. 62. It is not entirely clear whether, in this passage, the trial judge was simply summarizing the evidence given by one of the Crown's witnesses or was referring to a portion of the witness's evidence that he accepted.

[41] See *Smith* CA, *supra*, note 29, at paras. 104, 107 and 109.

[42] See *id.*, at paras. 107-108.

[43] See *id.*, at para. 108.

[44] *Supra*, note 1, at para. 20.

Given the debatable significance of the patient witnesses' testimony, and the ambiguous manner in which the trial judge used it, that seems like an inadequate analysis of the value and reliability of their anecdotal evidence, and maybe of such evidence generally in Charter cases.[45] Even more curious is the fact that the Court seemed to hold that the evidence established a reasonable medical need for marijuana in topical form. The Court held that the evidence "did more than establish a subjective preference for oral *or topical* treatment forms".[46] It also struck down the criminal prohibitions on possession of marijuana to the extent that they prohibit authorized individuals from possessing *all* forms of marijuana derivatives for medical purposes, rather than just orally administered derivatives. All of this suggests some lack of rigour in scrutinizing the evidence allegedly justifying intrusion upon Parliament's choice as to the scope of the criminal law.

The Supreme Court cited the need to defer to a trial judge's conclusions on issues of fact unless they are unsupported by the evidence or otherwise manifestly in error.[47] Although it was not specifically mentioned, presumably the Court had in mind its pronouncement in *Bedford* extending that well-established principle to cover findings regarding social science evidence as well as adjudicative facts.[48] Presumably as well, the Court was extending the holding in *Bedford* to cover what can loosely be described as the "hard sciences", like many of the medical sciences, in which hypotheses can often be tested and scientifically validated.[49] It may be that the need for deference justifies the failure of the Supreme Court to analyze in greater depth the reliability and value of the evidence tendered to establish the medical benefits of marijuana derivatives. But, given the apparent frailties of the evidence and ambiguities as to which parts of it were accepted at trial, the laconic approach of the Court in *Smith* comes across as a rather vigorous

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[45] In *R. v. Mernagh*, [2013] O.J. No. 440, 2013 ONCA 67, at paras. 63-65 (Ont. C.A.), leave to appeal refused [2013] S.C.C.A. No. 136 (S.C.C.), the Ontario Court of Appeal offered some thoughts about the value of anecdotal evidence in medical marijuana cases. It would have been helpful to hear the Supreme Court's thoughts on the issue.

[46] *Supra*, note 1, at para. 20 (emphasis added).

[47] *Id.*, at para. 19.

[48] *Bedford*, *supra*, note 12, at paras. 48-56. Adjudicative facts are the facts of the case at bar.

[49] See *R. v. Abbey*, [2009] O.J. No. 3534, 2009 ONCA 624, 97 O.R. (3d) 330, at paras. 104-120 (Ont. C.A.), leave to appeal refused [2010] S.C.C.A. No. 125 (S.C.C.), in which the Court discusses the different types of sciences and the different criteria relevant to assessing their reliability.

application of the principle of deference.[50] As indicated by its extensive review of the trial evidence (more extensive than is contained in the trial judgment), the British Columbia Court of Appeal did not feel content to rest on the need for deference.[51] The approach of the Supreme Court also seems inconsistent with the increasing trend to subject the reliability of expert scientific testimony to greater scrutiny.[52]

Even if the Supreme Court was fully justified in deferring to the factual findings of the trial judge, additional issues arose in light of what was actually found. The trial judge found that, for gastro-intestinal conditions, oral ingestion of the main active compounds of marijuana would "arguably" deliver the therapeutic benefit more directly to the site of pathology.[53] Surely that is not a finding of any constitutional significance. Surely Mr. Smith had to establish more than an *arguable* medical benefit. Yet the Supreme Court cited this finding as one that justified the ultimate conclusion that use of marijuana derivatives can be of medical benefit.[54] It is very hard to characterize this as a cautious and careful approach to constitutional review.

The trial judge also found, more definitively, that oral ingestion of marijuana compounds is better for a chronic condition of pain or glaucoma. That may well be a finding of constitutional significance. But the trial judge also found that dosages are more difficult to manage with oral ingestion and that oral ingestion has the "detriment" of taking longer to build a therapeutic level of the drug than would occur with smoking dried marijuana.[55] In other words, the trial judge found both benefits and costs of oral ingestion. One can presumably infer that he also found that

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[50] The evidence in *Bedford* seemed materially stronger, including "personal evidence of the applicants, the evidence of affiants and experts, and documentary evidence in the form of studies, reports of expert panels and Parliamentary records": *supra*, note 13, at para. 54.

[51] See, *e.g.*, *Smith* CA, *supra*, note 29, at paras. 9, 11, 44-52, 94-95, 104-115. The appeal court's decision post-dated the Supreme Court's decision in *Bedford*.

[52] See, *e.g.*, *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] S.C.J. No. 23, 2015 SCC 23, at para. 1 (S.C.C.), affg [2013] N.S.J. No. 259 (N.S.C.A.): "Expert opinion evidence can be a key element in the search for truth, but it may also pose special dangers. To guard against them, the Court over the last 20 years or so has progressively tightened the rules of admissibility and enhanced the trial judge's gatekeeping role."

[53] *Supra*, note 14, at para. 45.

[54] The Court cited this finding near the start of its judgment when it summarized the findings of the trial judge (although it said the judge found that oral ingestion "may" aid gastro-intestinal conditions): *supra*, note 1, at para. 7. As discussed immediately below, the Court also cited one other finding of medical benefit made by the trial judge. In the remainder of its decision, the Court did not distinguish between the two findings, always discussing them collectively in concluding that the evidence established medical benefit.

[55] *Supra*, note 14, at para. 45.

the benefits outweighed the costs, but that was a judgment call, not a pure factual finding.[56] It seemed to invite at least some brief discussion of the competing considerations by the Supreme Court. Yet none was offered.

Even if the findings at trial were sufficiently unambiguous as to establish *some* medical benefit of marijuana derivatives, an issue remained as to whether the findings, and the evidence led in support of them, established *enough* of a benefit. There is ambiguity in the trial record relating to the extent of the benefit derived from the use of marijuana derivatives. The trial judge found that, for gastro-intestinal conditions, oral ingestion would arguably deliver the therapeutic benefit "more directly to the site of pathology".[57] A more direct delivery is presumably a better delivery, but whether it is a significantly or marginally better delivery is not clear. The judge also found oral ingestion would be "better" for someone with a chronic condition of pain or glaucoma,[58] but how much better was left unexplored. The patient witnesses may have described a substantial benefit from using marijuana derivatives,[59] but the reported record is not entirely clear[60] and, as stated above, it is not clear that the trial judge accepted all aspects of the patient witnesses' testimony (regarding oral ingestion). The case seemed ripe for some analysis of the degree of benefit necessary to establish a constitutional claim. The Supreme Court, however, did not specifically mention this issue, stating simply that marijuana derivatives offer "more effective" treatment, to some undefined degree.[61] Perhaps any amount of benefit is constitutionally sufficient; it seems like the compassionate position. But given the content of the lower court judgments, some discussion of the necessary degree of benefit seemed appropriate — at least to the extent of referring to a few more details in the evidentiary record.

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[56] There was no indication in the trial decision, or in the judgment of the Court of Appeal, that the judgment call was based on an opinion given by a witness.

[57] *Supra*, note 14, at para. 45.

[58] *Id.*, at para. 45.

[59] The Court of Appeal wrote, for example, that "the relief they [the patient witnesses] reported from cannabis products was significant and, in some cases, life changing. In the words of one witness, being able to use different forms of cannabis to treat her symptoms helped her 'get her life back' from the debilitating effects of her illness": *supra*, note 29, at para. 11.

[60] From the information in the Court of Appeal's decision, it is not always easy to determine precisely what benefit the witnesses reported from administering marijuana orally and topically rather than by smoking. The matter is further complicated by the fact that, in the absence of any finding at trial of a medical benefit from topical use, any asserted benefit from such use would be irrelevant.

[61] *Supra*, note 1, at paras. 18 and 25.

Arguably, the Court indirectly addressed the sufficiency of the medical benefits from marijuana derivatives when it responded to the Crown's assertion that the evidence established nothing more than a subjective preference by the patient witnesses for oral and topical treatment forms. The Court wrote that "[w]hile it is not necessary to conclusively determine the threshold for the engagement of s. 7 in the medical context, we agree … 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."[62] That reflects some sort of consideration of the significance of the available evidence. Unfortunately, it is also basically a statement of a conclusion without any meaningful explanation of the reasons for it.

Even if the trial record established constitutionally significant medical benefit from the use of marijuana derivatives, there still remained a number of questions that received very little attention in all of the judgments in *Smith*. They are questions that a responsible medical practitioner would consider before prescribing medication. Are there any possible side-effects? If so, what and potentially how serious are they? Do we know anything about the effects of long-term use of the medication? Do we know anything about the interaction of the medication with other medications or treatments? Is there any risk of adverse impact on medical conditions not to be treated by the medication (but from which a patient using the medication may suffer)? An individual only has a constitutional right to access medication *reasonably* required for the treatment of a serious medical condition.[63] Surely those sorts of questions inform an analysis of whether medication is reasonably required. I do not suggest that a court must have definitive, or extensive, answers to those sorts of questions before finding reasonable medical need, but on the face of the written record in *Smith* the courts knew almost *nothing* about the answers, because no one seemed to be asking the questions. The only thing that was clearly known was that the psychoactive effects of marijuana are an unwanted side effect from a medical point of view.[64] No indication was given whether oral ingestion removes this side-effect.

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[62] *Id.*, at para. 20.

[63] This precise standard was not clearly articulated either in *Parker* or in the Supreme Court's decision in *Smith*, but both judgments seem to apply that standard. See *Parker*, *supra*, note 5, at paras. 103-104; *Smith* SCC, *supra*, note 1, at paras. 18 and 20.

[64] *Smith* Trial, *supra*, note 14, at para. 45.

That so much was, on the basis of the record, unknown about the use of oral and topical marijuana products may have been partly behind the Crown's argument before the Supreme Court that there are health risks associated with using such products, and thus that the restriction to dried marijuana was justified on the basis that it restricted access to drugs to only those shown by scientific study to be safe and therapeutically effective.[65] The Court responded to that argument as follows:

> … 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.[66]

This passage, like the Crown's argument, is open to interpretation, but it is a little concerning if it shows that the Court was willing to assume there are no adverse consequences from oral and topical administration of marijuana in the absence of any evidence that there are. That does not exemplify a careful, rigorous approach to constitutional review. The burden was on Mr. Smith to show reasonable medical need for marijuana derivatives. Was the burden not also on him, therefore, to at least show that there was no real cause for concern about adverse effects (even if the Crown shared the obligation to address this issue)? The Supreme Court was correct that dried marijuana has not been subject to regulatory review for safety, but seems to ignore the fact that that is the result of a court decision — a decision that left it to the government to design appropriate (and constitutional) rules regulating access to marijuana.[67] The Court also seems to ignore the possibility that transforming dried marijuana into another product by mixing it with other components could alter its chemical properties in ways that may be adverse to health.

V. CONCLUSION

I do not know whether a proper medical case can be made out for oral and/or topical administration of marijuana derivatives. I cannot say

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65 See *supra*, note 1, at paras. 24 and 26.

66 *Id.*, at para. 26.

67 See *Parker*, *supra*, note 5, at paras. 202-203.

exactly what issues the members of the Supreme Court contemplated in coming to their decision in *Smith*. But I can say that, on the face of the written record, the Court neglected to address a number of what appeared to be live issues germane to the resolution of the constitutional issue. That is troubling from the perspective of democratically appropriate judicial review.

Perhaps I expect too much. Maybe it was not necessary for the Supreme Court to address all of the issues identified in this article; admittedly, some of them are less problematic than others. But I cannot help but think it was necessary for the Court to address more of them than it did.

It seems that the Crown evidence at trial did not assert any negative effects from using marijuana derivatives.[68] It is also true that the trial judge found that adverse health effects can come from smoking marijuana.[69] But neither fact relieved Mr. Smith from the burden of demonstrating reasonable medical need for using marijuana derivatives (which could come with their own dangers and be less effective than smoking marijuana). Neither fact relieved the Court from the obligation to carefully and rigorously scrutinize the finding of medical need.

R. v. Smith is just one case in a long and ever-expanding history of constitutional review of the acceptable scope of criminal law. Its influence in the long term may be negligible. But it was the first opportunity for our highest court to demonstrate its approach to constitutional review in the medical marijuana context. It is regretful that the judgment did not offer us a little more.

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[68] See *Smith* CA, *supra*, note 29, at paras. 111 and 130.

[69] *Supra*, note 14, at para. 45.