Greetings! and thank you for consulting my **legal self-defence kit.** |Print a copy|
It is free of charge, but it comes with instructions and warnings and advice.

Equipment required: a printer with paper, a stapler, a pen, and a literate mind.
Instructions: print the 10 pages, keep this page of instructions separate from the other pages, and staple the other 9 pages together, in the following order:

a letter to a judge, beginning 'Your Honour'
a 2-page application for absolute dismissal
a 6-page document outlining the legal argument

Now put your pen away in your purse or your pocket, and read the stapled pages carefully, in order. The letter to the judge is the easy part. The next page is full of details that you don't need to worry about unless and until you are presenting your case in court. Read the 6-page legal argument, which has been written as clearly as I can manage.

If you don't understand it, discuss it with someone else who might. But don't expect to understand every detail of it. You are not required to understand it, or even agree with it, however, to have the right to make your case based on it.

If you wish to understand it further, please consult my more detailed and articulated analysis.

Will this legal defence succeed in your case? I don't know. It represents both the best understanding I can personally reach of this area of the law as well as the best prospect for a dismissal of charges or even a general stay of proceedings. I believe it will persuade many judges, but I know it will not persuade all of them.

The more often it is used, the more often it will succeed, I think; and the more often it succeeds, the less credible the law will become; and this line of defence will become more powerful. So do use it if necessary; it may be sufficient.

If you have been arrested and are in legal jeopardy, then your best hope of safety is a good lawyer who knows your individual situation, together with these constitutional argument materials, which can easily be assembled by your lawyer into the appropriate motion.

If you choose to defend yourself without the assistance of someone qualified to plead for you, then you are acting against my advice, and I need to warn you that nothing is entirely predictable in a courtroom; it has often happened before that a correct and logically irresistible argument has been incorrectly rejected by a judge, and the accused has been incorrectly convicted. Please don't make light of this risk.

I take hope from noting that the first time that Ed Pearson tried this line of defence, in the Oshawa case, it worked. Having worked, and with the Oshawa declaration as well, this winning technique is even stronger. But 'stronger' does not mean 'invincible', and Canadians accused under this discredited and invalidated law will still need to struggle for justice, and some will be convicted unjustly, until the enforcement of the law is abandoned.

I would appreciate detailed feedback from Canadians who have been accused and have presented this defence to a trial judge. Please take notes if you can, during or soon after your court hearing, about what was said, and what was decided. Your feedback based on your court experience may contribute to a stronger version of this self-defence.

Send your information to: thepotheadprofessor@thepotlawhasfallen.ca

Good luck! I hope you meet with success, as did the lads in Oshawa.

Prof. Doug Hutchinson
Fellow of Trinity College
Professor of Philosophy
University of Toronto

Disclaimers: the philosophical and other opinions expressed in these pages are my own responsibility; they may or may not be the same as those of Trinity College or the University of Toronto. I speak for myself, not on behalf of such institutions. I am not a lawyer. For advice about your individual legal situation, you should consult a qualified lawyer. Last revised: 2007xi14.

Your Honour,

my name is ______________________________________
and I am appearing before you because I have been charged with the alleged offence of simple possession of marijuana under section 4(1) of the *Controlled Drugs and Substances Act*.

I respectfully request that you dismiss the charges against me, as I personally believe that the legislated prohibition of marijuana is legally invalid. A large and increasing number of Canadian judges share my belief, and have therefore judicially declared the prohibition to be invalid. Please consider the legal information and the arguments set out on my application and on the following 6 pages.

Thank you for giving my application your judicious consideration.

Yours sincerely,

(signed)

(dated)

APPLICATION TO STAY ALL PROCEEDINGS

Jurisdiction: Criminal Code of Canada s. 788 [2] [c]

Province of ______________________________________

County of ______________________________________

Territorial Division of ________________________________

Information No: ___________________________________

Indictment No: ___________________________________

HER MAJESTY THE QUEEN

against

____

(name of accused)

WRITTEN REQUEST of the defendant

I, __________________________________ stand charged that on the _________ day of ________________ 200____, I was in possession of marijuana contrary to CDSA section 4(1).

1. That the prohibition of the possession of marijuana in CDSA s.4(1) has been declared unconstitutional and of no force and effect by the Ontario Court of Appeal in *R. v. Parker* [2000 CanLII 5762 (ON C.A.)], and by the Honourable Mr. Justice Rogin in *R. v. J.P.* [2003 CanLII 45115 (ON S.C.)] (and the verdict of Rogin J. was upheld on final appeal in *R. v. J.P.* [2003 CanLII 17492 (ON C.A.)]); that, according to the Constitution Act

1982, part VII, s.52, any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect; that no person may be convicted under an unconstitutional law, as ruled in *R. v. Big M Drug Mart Ltd*. [(1985 CanLII 69 (S.C.C.)].

2. Even if not 1, then 2: that the prohibition of the possession of marijuana in CDSA s.4(1) has been declared unconstitutional and of no force and effect by the Ontario Court of Appeal in the case of *R. v. Parker* [2000 CanLII 5762 (ON C.A.)]; that, according to the Constitution Act 1982, part VII, s.52, any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect; that no person may be convicted under an unconstitutional law, as ruled in *R. v. Big M Drug Mart Ltd*. [(1985 CanLII 69 (S.C.C.)]; *R. v. Long*, 2007 July 13; *R. v. Bodnar/Hall/Spasic*, 2007 October 19.

The present charges must be dismissed.

Dated this day of 200__:

Respectfully submitted:

____

defendant-accused

Your Honour, here are the legal authorities for what I believe.

1. On 2000 July 31, three Justices of the Ontario Court of Appeal dismissed charges against the accused Terrance Parker, and declared that the prohibition would be invalid in a year's time unless Parliament passed fresh law on the subject; Parliament did not do so, and so the prohibition passed into invalidity on 2001 August 1.
2. In *R. v. Parker* <2000 CanLII 5762 (ON C.A.)> Justice Rosenberg declared, "I agree with the Crown that this is a matter for Parliament. Accordingly I would declare the prohibition on the possession of marijuana in the Controlled Drugs and Substances Act to be of no force and effect" [11]. The disposition of the case: "I … would declare the marijuana prohibition in s.4 of the Controlled Drugs and Substances Act to be invalid. I would suspend the declaration of invalidity for a period of twelve months from the release of these reasons" [210].
3. This decision was not appealed by the Government, and it became final.

4. On 2003 May 16, Justice Rogin of the Ontario Superior Court agreed with an Ontario Court of Justice decision which had previously dismissed the charges against the accused J.P..
5. In *R. v. J.P.* <2003 CanLII 45115 (ON S.C.)>, Rogin J. reviewed the law and concluded that "since s.4 of the Controlled Drugs and Substances Act has not been re-enacted, as it relates to marihuana, "It follows from these reasons, that neither Count 1 nor Count 2 contains an offence known to law" [15]. "The Crown Appeal from the judgment of Phillips J. is dismissed" [16].
6. This order was appealed to the Ontario Court of Appeal, which declined to reverse the order; i.e. the Government lost its appeal on 2003 October 7, and charges were dismissed against J.P. (The remarks made by the OCA *obiter dicta* at [17] – [33] of *R. v. J.P.* <2003 CanLII 17492 (ON C.A.)> are not binding on other courts.)
7. On 2003 October 7, in *R. v. J.P.* <2003 CanLII 17492 (ON C.A.)>, the Ontario Court of Appeal relied upon their judgement, simultaneously released in the companion case of *Hitzig* (below), which held that "the MMAR did not create a constitutionally acceptable medical exemption. In *Parker*, this court made it clear that the criminal prohibition against possession of marihuana, absent a constitutionally acceptable medical exemption, was of no

force and effect. As of April 12, 2002, there was no constitutionally acceptable medical exemption. It follows that as of that date the offence of possession of marihuana in s. 4 of the CDSA was of no force and effect. The respondent could not be prosecuted" [11]. "We would dismiss the appeal" [34].

8. This order has never been varied or reversed on appeal by any Canadian court.

9. On 2003 January 9 Justice Lederman of the Ontario Superior Court ruled in favour of an application by Warren Hitzig and others, agreeing that the Medical Marijuana Access Regulations, promulgated by non-Parliamentary decree S.O.R./2001-227, were unconstitutional and of no force and effect. Since these regulations were promulgated to support the invalidated marijuana prohibition which had been reinserted in the CDSA, this invalid set of regulations was the foundation on which rested the alleged validity of the statute, if it had any.
10. In *Hitzig v. Canada* <2003 CanLII 3451 (ON S.C.)>, "I find the MMAR to violate the applicant's s.7 rights to liberty and security of the person in a manner inconsistent with the principles of fundamental justice. … By way of remedy, the MMAR are declared to be of no force and effect. This declaration of invalidity is suspended for six months" [8], ordered Justice Lederman.
11. The order from this case was appealed to the Ontario Court of Appeal, which did not reverse it. The OCA agreed with the Superior Court ruling that the MMAR were unconstitutional. The OCA chose instead a narrower remedy, to strike down as invalid certain provisions of the MMAR, with immediate effect as of 2003 October 7.
12. On 2003 October 7, in *Hitzig v. Canada* <2003 CanLII 30796 (ON C.A.)>, the Court of Appeal "found that the MMAR do not create a constitutionally valid medical exemption to the criminal prohibition in s.4 of the CDSA," and so they undertook to "shape a declaration under s.52 of the Charter which responds to the constitutional shortcomings of the MMAR" [153]. "We have found that the requirement for a second specialist is unnecessary and violates the s.7 rights of those in medical need who come within category 3. We would simply declare that requirement, found in ss. 4(2)(c) and s.7 of the MMAR, to be of no force or effect" [159]. And, "taking these considerations together, we conclude that the remedy which most directly addresses the constitutional deficiency presented by the absence of a

licit supply of marihuana is to declare invalid sections 34(2), 41(b), and 54 of the MMAR" [165].

13. The Crown sought to appeal to the Supreme Court of Canada; but their application for leave to appeal was denied.

14. One opinion expressed by the Ontario Court of Appeal within their reasoning about the above case was that the prohibition of marijuana, which had been invalid, was going to become freshly valid again after 2003 October 7. "Our order has the result of constitutionalizing the medical exemption created by the Government. As a result, the marihuana prohibition in s. 4 is no longer inconsistent with the provisions of the Constitution. Although Parliament may subsequently choose to change it, that prohibition is now no longer invalid, but is of full force and effect" [170].

15. It is however submitted, that after having lost both Ontario Court of Appeals cases (*J.P.* and *Hitzig*), the Government errs in saying that the law has returned to validity. It is further submitted that the failure to pass fresh Parliamentary legislation after the fall of the law in Parker means that the prohibition has been continuously invalid since 2001 August 1.

16. Even should this Court consider the above submissions to be in error, in my claim that the connected *J.P.* and *Hitzig* rulings by the OCA did not succeed in re-establishing the validity of the prohibition, two more Justices have recently and independently declared the prohibition to be invalid.

17. On 2007 July 13, Justice Borenstein of the Ontario Court of Justice dismissed charges against the accused Clifford Long, noting the previous judicial declaration that the prohibition was invalid in the absence of a constitutional MMAR. Borenstein J. found that fresh non-Parliamentary regulatory revisions to the MMAR promulgated on 2003 December 3 had had the effect of making the MMAR again unconstitutional, which entails the invalidity of the overall prohibition.

18. In *R. v. Long*, <2007 ONCJ 341 (CanLII)>, Justice Borenstein declared on 2007 July 26, **"**I am not declaring the criminal prohibition unconstitutional. The Court of Appeal did that in *Parker*. That Court stated that the criminal prohibition on possession of marijuana is

unconstitutional absent a constitutionally acceptable medical exemption. Given my finding that the Government has not enacted a constitutionally acceptable exemption, then, in accordance with *Parker*, the law prohibiting possession of marijuana is unconstitutional" [9]. Mr. Long "cannot be found guilty of a law that is unconstitutional. Therefore, the charges against him will be dismissed" [10].

19. An appeal from this decision has apparently been filed by the Government, but as of 2007 October 19, no date had yet been set for the appeal in Ontario Superior Court.

20. On 2007 October 19 in Oshawa in R. v. Bodnar/Hall/Spasic (Information No. 998 06 07272), Justice Edmondson of the Ontario Court of Justice dismissed charges against the three accused individuals, declaring that the prohibition is invalid, having read the above judgement of Borenstein J. and having been persuaded by it.

***

Please study the attached 2007 July 26 ruling of Justice Borenstein. I hope that you too will find it persuasive, and so will declare also in your own voice that the prohibition is invalid, and dismiss the charges against me.

COURT FILE No.: Toronto

DATE: July 26, 2007

Citation: *R. v. Long*, 2007 ONCJ 341

ONTARIO COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

— AND —

CLIFFORD LONG

Before Justice H. Borenstein; heard on March 28 and May 2, and July 26, 2007

Reasons for Judgment July 26, 2007

BORENSTEIN J.:

[1] On July 13, 2007, I ruled that the medical marijuana exemption created by the Government was unconstitutional as reasonable access depended on policy rather than law. Given my finding, the question of remedy arises. The matter was adjourned at the Crown's request so that further submissions could be made with respect to what remedy or result should follow.

[2] If I had the jurisdiction to do so, I would read into the regulation an obligation on the Government to provide eligible persons[1] with reasonable access to the Government's supply of marijuana. That is the way the exemption is intended to, and does in fact, operate. Yet the Government is resistant to taking on that legal obligation.

[3] As I indicated in my ruling, had the Government obligated itself by law to supply marijuana to eligible persons, the regulatory exemption would be constitutionally acceptable. Reading in that obligation would be seamless and consistent with the exemption scheme created by the Government and would respect the rights and interests of all. It would maintain the ability of the Government to criminalize possession of marijuana and would also ensure that eligible exempt persons would be legally entitled to reasonable access to marijuana for medical purposes.

[4] Creating such an obligation does no harm to the scheme created by the Government. It would not erode the Government's ability to enhance access or to be flexible in the *implementation* of this obligation. The Government can continue a consultative approach to the issue of supplying marijuana for medical purposes. It can continue to change the policy to streamline and improve it. Details of what amounts to reasonable access can continue to be developed through policy. Complaints by eligible persons about the reasonableness of their access could be determined in the context of an existing obligation to provide reasonable access, nothing more.

[5] In my view, we are well past the time in *Parker* where the numerous options of dealing with this issue rendered reading in an inappropriate remedy. The Government has chosen the manner in which it seeks to address the issue of a medical marijuana exemption.

[6] In my view, reading in an obligation to provide reasonable access to eligible persons would be the most appropriate remedy. However, only a Superior Court has that declaratory power.

[7] Turning now to the issue of striking down section (4)1 of the *CDSA*.

[8] The Crown submits that I have no jurisdiction to declare s, 4(1) of the *CDSA* unconstitutional. I can find it to be unconstitutional but I cannot declare it to be unconstitutional. My jurisdiction is to deal with the issues presented in the case before me. General declaratory powers are the exclusive jurisdiction of the Superior Courts.

[9] I am not declaring the criminal prohibition unconstitutional. The Court of Appeal did that in *Parker*. That Court stated that the criminal prohibition on possession of marijuana is unconstitutional absent a constitutionally acceptable medical exemption. Given my finding that the Government has not enacted a constitutionally acceptable exemption, then, in accordance with *Parker*, the law prohibiting possession of marijuana is unconstitutional.

[10] Mr. Long is charged with a law that is unconstitutional. Even though he himself is not in medical need of marijuana, it is certainly open to him to challenge the law on the basis that it is unconstitutional. It is well within his right to argue that the current criminal prohibition is unconstitutional as it fails to provide a constitutional exemption for those in medical need – even though he is not one of those persons. Having succeeded, he cannot be found guilty of a law that is unconstitutional. Therefore, the charges against him will be dismissed.

Released: July 26, 2007.