

To Smoke or Not to Smoke, That is the Question.

Introduction: Requiring medical marijuana to be in a dried form is unconstitutional because it violates section 7 of the [Charter of Rights and Freedoms](#), and cannot be justified. Medical marijuana is now legal in all forms, such as edibles and ointments.

Facts: Marijuana is illegal under the *Controlled Drugs and Substances Act*. However, there is an exemption for people authorized to have medical marijuana. Until this ruling, the exemption only applied if the medical marijuana was in a dried form.^[1] This meant that the user had to inhale it.^[2] ^[3] The accused, Owen Smith, made medical marijuana products that were not dried, such as cookies, gel capsules and ointments. The police charged him with possession and trafficking. Smith claimed that requiring medical marijuana to be in a dried form violated section 7 of the *Charter*, which protects [life, liberty and security of the person](#).^[4]

Procedural History: At his trial, the judge agreed that limiting the possession of medical marijuana to its dry form only was against section 7 and could not be justified. Therefore, the limitation was found to be unconstitutional. The Crown appealed to the British Columbia Court of Appeal, who also agreed it was unconstitutional.^[5]

Issue: The exemption that allowed medical marijuana required it to be only in a dried form. Did this requirement violate section 7 and the right to life, liberty and security of the person? If so, was it unconstitutional?

Analysis: To violate section 7, a law must violate life, liberty or security of the person. It must also do so in a way that is not in line with principles of fundamental justice.^[6]

The Supreme Court said the prohibition on non-dried medical marijuana violates these rights. The prohibition harms the **liberty** of Smith and medical marijuana users because they face a jail sentence if they have non-dried medical marijuana. It also limits the users' **liberty** since it requires them to use their medication in a certain way. It requires them to inhale dried marijuana, despite the health risks associated with smoking. It also means they cannot administer the medical marijuana in other ways that might be more effective. Evidence presented at trial showed that inhaling marijuana might not be as effective as receiving it in other forms.^[7] From this perspective, it also could harm a user's right to **security** of the person. Users would have to make a choice: follow the law and inhale the marijuana, despite evidence that it is possibly less effective, or break the law and perhaps receive better treatment.^[8]

The prohibition on non-dried medical marijuana violated these *Charter* protected rights, and it was not in line with principles of fundamental justice. The government said that purpose of the prohibition on having non-dried medical marijuana was health and safety.^[9]

However, prohibiting non-dried marijuana required users to inhale (which has health risks) and prevented them from using their medication in ways that might be more effective. In so doing, it actually undercut the purpose of health and safety. Therefore the prohibition on non-dried medical marijuana was found to be arbitrary and not in line with principles of fundamental justice.[\[10\]](#)

However, even if a law violates a protected right in the *Charter*, the government has an opportunity to justify that law and hence, the violation. The Supreme Court uses the *Oakes test* to balance the seriousness of the violation with the government's justification for that violation. In this case, the purpose for the prohibition on possessing non-dried medical marijuana was for health and safety, but the effects of the law actually worked against this purpose. The Supreme Court found that prohibiting medical marijuana in non-dried forms that are potentially more effective is not in the interest of health and safety. As well, requiring users to inhale medical marijuana, and expose themselves to the health risks, does not support the purpose of health and safety.[\[11\]](#) The Supreme Court found the prohibition to be unconstitutional since it could not be justified, and so declared it to be of no force. As such, they acquitted Smith.[\[12\]](#)

Significance: Because of *R v Smith*, Canadians authorized to have medical marijuana can do so in forms other than dried marijuana, such as edibles and ointments. The evidence presented at trial showed that different methods of using medical marijuana might be more effective in certain scenarios. This could lead to treatments that are more effective. As well, users are no longer restricted to inhaling dried marijuana and potentially suffering from the associated health risks.[\[13\]](#)

[\[1\]](#) *Marihuana for Medical Purposes Regulations*, SOR/2013-118, s 3(2) [The *Regulations*].

[\[2\]](#) *R v Smith* 2015 SCC 34 at paras 3-4 .

[\[3\]](#) The *Regulations* state that people authorized to have medical marijuana can possess "dried marihuana"; [s 3](#). This is defined as "harvested marihuana that has been subjected to any drying process"; [s 1](#). The Supreme Court stated that the prohibition "did not authorize medical marihuana users to convert dried marihuana into its active compounds. An authorization to possess medical marihuana is no defence for a patient found in possession of an alternate dosage form, such as cannabis cookies, THC-infused massage oil, or gel capsules filled with THC"; *Smith* at para 17. This essentially limits the use of the medical marijuana to inhaling, since you could not change the dried marijuana into something else to use it.

[\[4\]](#) *Ibid* at paras 5-7.

[\[5\]](#) *Ibid* at paras 7-9.

[6] *Ibid* at para 15.

[7] *Ibid* at para 19.

[8] *Ibid* at paras 17-18.

[9] *Ibid* at para 24.

[10] *Ibid* at paras 23-28.

[11] *Ibid* at para 29.

[12] *Ibid* at paras 30-34.

[13] *Ibid* at paras 7, 25.