CANADA
PROVINCE OF NOVA SCOTIA
2003

IN THE PROVINCIAL COURT

HER MAJESTY THE QUEEN

versus

PAULA CLARKE

DECISION
[cite as: R. v. Paula Clarke, 2003NSPC012]

HEARD BEFORE: The Honourable Judge Flora Buchan, J.P.C.

PLACE HEARD: Dartmouth, Nova Scotia

DATE HEARD: February 26, 2003

DATE OF DECISION: March 31, 2003

CHARGE: That she, on or about the 4th day of December, 2001, at, or near 169 Candy Mountain, Minesville, in the County of Halifax, Province of Nova Scotia, did unlawfully have in her possession, not in excess of 30 grams, cannabis (marihuana), a substance listed in Schedule II of the **Controlled Drugs and Substances Act**, S.C. 1996, c. 19, and did thereby commit an offence contrary to Section 4(1) of the said **Act**.

COUNSEL: Paul Riley, for the Prosecution
Allan Doughty, for the Defence

Ms. Clarke stands charged that he did on or about December the 2001 at, or nea Minesville the Co nty of Halifax nlawfully have her possession not in excess of 30 grams of can bis marihuana substance sted in Schedule II of the **Controlled Drugs and Substances Act**, and did thereby commit an offence contrary to Section 4(of the said **Act**.

Counsel for M. Clarke M Doughty. makes this application to have this charge dismissed stayed or held in abeyance, pendi ıg the final determination of the cases of **Hitzig**[1], **J.P.**[2] from the Ontario Courts nd now most recentl **Stavert**[3], decision of the Provincial Court of Prince Edward Island all presently appeal

Based on he decisions in these cases Mı Doughty mits that the possession of mı ırlhuana charge is offence not known to law as result of the **Parker**[4] decision of the Ontario Co ırt of Appeal which declared Sectlon 4(1 of the **C.D.S.A.** invalid because it failed to allow for the legal possession of marihuana for medica reasons which was

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Hitzig **Canada**, [2003 O J. No .2 (On S. C.

R. **J.P.**, [2003] O J. No. Ont. Prov C:.)

R. **Stavert**, 2003 P.E.I. J. No. 28 (P.E.I. Prov Ct.

R. **Parker**, (2000), 46 C.C C (3d) 93 (Ont. C A.

interpreted and followed in the **J.P.** case in which the Court found that the government's response to the **Parker** decision failed to satisfy the intent of Justice Rosenberg in **Parker** and affirmed the invalidity of Section 4(1) of the **C.D.S.A.**, as have the Courts in **Barnes**[5], **Hitzig** and now **Stavert**.

Mr. Doughty further argues that to allow this prosecution to proceed would be an abuse of process; first, because of the state of flux of the law as the **Parker** decision was not appealed by the Crown; secondly, that simple possession of marihuana may soon be decriminalized, as noted in **Stavert** by Chief Judge Thompson where he acknowledged the September 2002 report of the Senate Special Committee on Illegal Drugs has recommended that the Government of Canada amend the **C.D.S.A.** to create a legislated criminal exemption scheme for the production and sale of cannabis; and thirdly, that should this prosecution proceed, that it would be the Federal Crown's fourth attempt to re-litigate the same issue.

In response, the Crown's position is that the Ontario Court of Appeal's declaration of invalidity has effect in Ontario only; and that **J.P.** and **Stavert** were ill-considered and wrongly decided.

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[5] **R.** v. **Barnes**, 2003 Carswell Ont. 259, (Ont. Prov. Ct.)

Further, the Crown contends that should this Court follow the rulings of the Ontario and Prince Edward Island Provincial courts without waiting for the appeal process to conclude, regardless of how long this may take, that legal chaos would ensue.

Both Counsel have presented excellent briefs, provided the appropriate authorities, delivered oral arguments, and filed supplementary briefs following the recent **Stavert** decision of March the 21st, 2003. Both have presented arguments concerning policy and common-sense issues. All submissions are a matter of record and I will not repeat them here.

Suffice to say that have carefully reviewed all submissions and have given due consideration to same in reaching my decision in this application.

In **Parker**, Mr. Justice Rosenberg, on behalf of the Court of Appeal in Ontario, declared Section 4(1) of the **C.D.S.A.** to be invalid, providing a 12 month suspension of the declaration to allow Parliament to amend the legislation to comply with the **Charter**.

In **J.P.**, Mr. Justice Phillips of the Ontario Court of Justice, after careful review and analysis, found that no legislation as required in **Parker** had been passed by Parliament within the 12 months and, therefore, found that the offence the accused in his Court was

facing was not an offence known to law and quashed the Information.

The decisions from the Courts in **Barnes**, **Stavert** and **J.P.**, all courts of co-ordinate jurisdiction, lend support to the issue of *stare decisis* raised by Mr. Doughty, in the absence of strong reason to the contrary, as does the principle of Judicial Comity.

Chief Judge Thompson addressed this aspect in **Stavert** as follows, and I quote:

> "This Court is not bound by either level of the Ontario Courts, although in my view a decision of the Court of Appeal of a province, being at a level directly below the Supreme Court of Canada should be followed unless very good reasons can be given for not doing so."

There is support here, arguably strong support, for this Court to simply apply the rule of *stare decisis* and follow the principle of Judicial Comity; however; in my view, the real issue is whether it is an abuse of the Court process to permit the Federal Crown to litigate an issue already finally determined in **Parker** and now interpreted and followed by several lower courts in both Ontario and Prince Edward Island.

During oral arguments, I raised the concern that as things now stand, a Canadian citizen living in Ontario, and now since March the 21st, 2003 in Prince Edward Island, are presently and possibly permanently, immune from prosecution for marihuana possession.

To support the Federal Crown's contention that it is restricted by the **Parker** decision only within Ontario, would allow, in my view, a re-litigation of the same issue in every province and territory. This would have the potential of creating the legal chaos that the Crown suggests would occur if this prosecution were not permitted to continue.

Ms. Clarke is charge under national legislation. If she had been charged in Ontario or Prince Edward Island, the charge against her would be now stayed.

Surely, all Canadian residents are entitled in fairness to expect a uniformity of approach from the Federal Crown. Most importantly, where the Federal Crown has jurisdiction, the law must be applied consistently on a national level.

As Madame Justice L'Heureux-Dube states as pg. 302 of **Conway**[6], quote:

> "Where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings."

A trial judge has the discretion to stay proceedings in order to remedy an abuse of the court's process. This power may be exercised only in the clearest of cases.

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[6] **R.** v. **Conway**, (1989) 49 C.C.C. (3d) 289 (S. C. C.)

would agree with Chief Judge Thompson **Stavert** where he states that he fails to see how th Crown is not bound by **Parker** when we are dealing with single indivisible entity with jurisdiction throughout Canad

Certainly. the Crown should vigorousl defend the constitutionality of duly enacted egislation within the bounds of the aw; but when law has beei found to be invalid by several courts in separate jurisdictions in Canada for the Crown to continue to prosecute that aw certain provinces nd not in others, is abuse of process Until decision ppea to a higher Court is made, the decision of the lower courts stand

have considered **Power**[7] and **O'Connor**[8]. two of th most recent Supreme Court of Canada cases describi the abuse of process doctrine and setting out the test for the mpositlo of stay of proceedings

satisfied that the high test has been met in deciding whether this case rises to the level of an buse of process. I find that it would be oppressive and vexatious to allow the prosecution of Ms Clarke on the charge of marihuana possession to continue, iven

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R. Power, 994) 89 C.C C. (3d) (S C C.

R. O'Connor, 995 03 C C.C 3d) 1 (S. C. C

the state of this law in the Provinces of Ontario and Prince Edward Island. To do otherwise would undermine the fundamental justice of the system.

further find that this case is one of those "clearest of cases" where a stay of proceedings should be entered by this Court in order to avoid an abuse of its own process

A stay of proceedings is, therefore, entered in this matter.