IN THE PROVINCIAL COURT OF ,A. KATCHEWAN

R. **v.** *Timothy Hadwen*

R *Timothy Boser*

R. *Claude Langlois*

Roger Arendt, (Grayson & Company) for the Crown

Merv Shaw (Moose Jaw Legal Aid) for the accused persons

DECISION Orr, P C.J. April 15. 2003

Each of the above accused persons is charged with possession of controlled substance, namely cannabis marihuana, amount not exceeding thirty grams, contrary to section 4( ) of *The Controlled Drugs and Substances Act* of Canada.

Counsel have arranged for the three charges to be dealt with together Mr Shaw asks to find that section 4( ) of *The Controlled Drugs and Substances A* of Canada is longer of any force or ffect far as it relates to the possession of cannabis marihuana, following the Ontario of *R Parker*, 997) C R. (5th) 25 (Ont. Ct. Of Justice) *R. Parker*, (2000) 46 C.C C. (3d) 93 (Ont C.A., *Hitzig Canada*, [2003 O.J. N(12 (Ont. Sup Ct of ustice); *R. J.P.* [2003 O N((Ont. Ct. of Justice); and *R. Barnes*, [2003] O N((Ont. Ct. of Justice).

Counsel also referred me to *R. v. Clay*, (1997) 9 C.R. (5th) 349 (Ont.Gen. Div.) affd. (2000) 49 O.R. (3d) 577 post (C.A..).

In *R. v. Parker*, (1997) 12 C.R. (5th) 251 (Ont. Ct. of Justice), at trial, the accused was charged, among other things, with possession of marihuana under *The Controlled Drugs and Substances Act*, (hereinafter the *CDSA*). The accused testified that he needed marihuana for medical purposes, to control his epilepsy. The Crown informs me that the accused did not call any physician currently treating him to support this; rather, he put into evidence a ten-year-old letter from a physician on the topic. However, he led a good deal of scientific evidence to show the therapeutic value of marihuana in treating epilepsy, AIDS, cancer and glaucoma.

Mr. Parker argued that his Charter rights under section 7 were offended by sections 4(1) and 7(1) of the *CDSA*, because his rights to life, liberty and security of the person were infringed, in that the state by law forbade anyone to possess marihuana for any purpose, including medical purposes.

It appears that the trial judge may have been unaware of section 56 of the *CDSA*, which reads:

56. The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

The trial judge found that the accused required marihuana to control his epilepsy. He found that sections 4(1) and 7(1) of the *CDSA* are unconstitutional inasmuch as they prevent those who need marihuana for medical purposes from lawfully so employing it. He read into the legislation an exemption for medically approved personal possession, use and cultivation of marihuana.

The Crown appealed to the Ontario Court of Appeal at *R .v. Parker,* (2000) 146 C.C.C. (3d) 193 (Ont. C.A.). The Court of Appeal ruled that the prohibition on the possession and cultivation of marihuana for personal medical use deprived the accused of his rights to liberty and security of the person. The threat of prosecution and imprisonment amounted to a risk of deprivation of liberty, and therefore had to accord with the principles of fundamental justice. Liberty, they added, includes the right to make decisions of fundamental personal importance, including choice of medication in serious situations, and deprivation of this right must also accord with the principles of fundamental justice. Deprivation by criminal sanction of reasonably required medication in these circumstances is a deprivation of security of the person. The accused, the court ruled, was being forced to choose between commission of a crime, and inadequate treatment. In addition, the marihuana prohibition infringed the accused's security of the person by interfering with his physical and psychological integrity.

The principles of fundamental justice, the court ruled, are breached where the deprivation of the right in question does little to enhance the state's interest. The Court of Appeal commented that the regulation of marihuana in Canada has a very short history, and lacks a significant foundation in our legal tradition. Indeed, they commented that "It is, in fact, an embarrassing history based upon misinformation and racism...the marijuana prohibition was enacted in a climate of 'irrational fear' based upon wild and outlandish claims that its users are driven completely insane, immune from pain, and, while in this state of maniacal rage, kill or indulge in other forms of violence using the most savage methods of cruelty." (at pp. 240-241). The Court was relying on the decision in *R. v. Clay*, (1997) 9 C.R. (5th) 349 (Ont. Gen Div.) Affd (2000) 49 O.R. (3d) 577 post (C.A.), where evidence was led on this topic.

The Court held that a broad criminal prohibition which prevents access to necessary medicine is inconsistent with fundamental justice. The Court conceded that the state has an interest in protecting against marihuana's harmful effects. However, the Crown specifically renounced any suggestion that the use of marihuana leads to harder drug use, criminal activity, mental illness, or a lack of motivation. The Court of Appeal ruled that the blanket prohibition on marihuana

possession and cultivation, without medical exceptions, does little or nothing to enhance the state interest.

The Court quoted section 56 of the *CDSA*, and an "Interim Guidance Document" issued pursuant to it. It ruled that because both the section and the "Document" vested an unfettered discretion in the Minister as to whether or not to grant a medical exemption, the existing law at that time was inconsistent with the principles of fundamental justice in re the accused's right to liberty, and to security of the person.

Section 1 of the Charter could not save the several violations under section 7.

Finally the Court held that the trial judge's stay of proceedings was appropriate. They disapproved, however, of his reading-in a medical exemption into the legislation. That, they said, was a matter for Parliament. They then granted this remedy: the prohibition on possession of marihuana in section 4 of the *CDSA* was declared to be of no force and effect. However, the declaration of invalidity was suspended for one year "to provide Parliament with the opportunity to fill the void." The Crown has not appealed this decision of the Ontario Court of Appeal.

The federal government then did move to attempt to fill the void, by enacting the *Marihuana Medical Access Regulations* (Registration: SOR 2001-227; P.C.: 1146)--henceforth the *MMAR*. These were passed on June 14, 2001, and became effective on July 30, 2001.

The *MMAR* set out a scheme whereby persons requiring marihuana for medical purposes can legally gain access to it. The regulations set out three categories of symptoms for the treatment of which marihuana would be useful. "Category 1" symptoms, are associated with terminal illness. "Category 2" symptoms are associated with cancer, AIDS, HIV infection, multiple sclerosis, spinal cord injury or disease, epilepsy, and severe forms of arthritis. "Category 3" symptoms are associated with medical conditions other than those in the first two categories.

The regulations provide a means whereby a sick person can acquire an "authorization to possess," which permits the holder legally to possess "dried marihuana" for medical purposes. An individual ordinarily resident in Canada can acquire such an authorization.

The regulations provide that a person seeking an authorization to possess is to submit an application to the Minister. The application will contain a declaration of the applicant, which

contains among other things a declaration that he has discussed with his medical practitioner the risks of using marihuana and consents to its medical use.

A medical declaration or declarations must also be submitted to the Minister. For category 1 symptoms, this must come from a medical practitioner; in the case of category 2 and 3 symptoms it must come from a specialist. Among other things, the medical declaration will contain an account of the applicant's medical condition and the symptom which is a basis for the application; and the daily dosage of marihuana recommended; and the period for which marihuana is recommended, if less than 12 months.

In the case of a category 1 symptom, the medical declaration will among other things contain information that the applicant suffers from a terminal illness; that all conventional treatments have been tried, "or at least been considered"; that marihuana use would mitigate the symptom; and that the benefits of marihuana use would outweigh the risks.

For category 2 symptoms, the medical declaration must also indicate among other things that all conventional treatments for the symptom have been tried, or at least considered, and that all are inappropriate, for various reasons, including the ineffectiveness of the conventional treatment, allergic or adverse drug reactions to conventional treatment, impermissible interaction of conventional treatment drugs with other drugs, and the like. There must be an indication that marihuana use would mitigate the symptom, and that the benefits of marihuana use would outweigh the risks.

For category 3 symptoms, the medical declaration must also indicate, as well as those considerations which fall under category 2, the conventional treatments which have been tried or considered for the symptom, and the reasons, selected from the category 2 considerations, why those treatments are inappropriate. A second medical declaration containing certain other details is required for category 3 symptoms.

Many other submissions must be made in the applicant's declaration and the medical declaration. The above gives an overview of some of the most important requirements. Section 11 of the *MMAR* states that if the declarations conform to the regulations, the Minister *"shall"* issue to the applicant an authorization to possess. (My emphasis.)

Section 12 sets forth the "grounds for refusal" of an application. The Minister shall refuse to issue an authorization to possess if: the applicant is not ordinarily resident in Canada; any information or statement in the application is false or misleading; the application involves a category 3 symptom and either all conventional treatments have not been tried or considered, or they are considered to be medically inappropriate; or the person mentioned in the application as a "licensed dealer" in marihuana under the relevant regulations does not in fact have a valid licence.

Any refusal to issue an authorization must be in writing, giving the reason for the refusal, and the aggrieved applicant must be given an opportunity to be heard.

I will not deal in such detail with the granting of licences to grow marihuana. The *MMAR* set forth procedures for attaining a "personal-use production licence." This would permit the holder of an authorization to possess to grow his or her own marihuana. The licence may be issued to a person ordinarily resident in Canada, of 18 or over, and who holds an authorization to possess or is applying for one. The application procedures are relatively simple and straightforward, and the Minister "shall" if the application requirements are met, issue a personal-use production licence.

Persons may also apply for a "designated-person production licence" under the second part of the *MMAR*. This would permit the holder of an authorization to possess to designate another person to grow marihuana for him or her. The eligibility to apply is similar to that re the personal-use production licence, the application procedures are relatively simple and straightforward; and the Minister "shall" issue the designated-person production licence if the application requirements have been complied with.

The grounds for the Minister to refuse to issue either kind of production licence are simple and clear and reasonable, and arguably flow reasonably from the wording of the regulations.

In *R. v. J.P.*, [2003] O.J. No. 1 (Ont. Ct. Of Justice), the sufficiency of the *MMAR* was ruled upon. The accused young person in *J.P.* was charged with possession of marihuana. He asserted that the offence of marihuana possession no longer existed in Ontario. Phillips J. agreed.

His reason for doing so was this: The Ontario Court of Appeal in *Parker* had declared the offence of marihuana possession to be of no force and effect, then suspended the declaration for a year to give Parliament the chance to enact a scheme whereby sick people could get marihuana for

medical purposes. The *MMAR* was the government's attempt at such a scheme. Phillips J. did not think the *MMAR* successfully addressed the Court's concerns in *Parker*.

In *J.P.*, Phillips J. says:

"41 But, and in my view this is the nub of the issue: Can Parliament provide a total discretion to the federal Cabinet (through the mechanism of a Governor General-in-Council order) in creating the remedy to address *Parker*? How is that fundamentally different from the authority granting power to the Minister of Health to stipulated exemptions in s. 56 of the Act? Regulations can be changed with every publication of the Canada Gazette, without consideration of Parliament and the debate that that would entail."

It will be recalled that in *Parker*, the Ontario Court of Appeal ruled that section 56 of the *CDSA* and the "Interim Guidance Document" issued pursuant to it violated Parker's rights to security of the person and to liberty because they put an unfettered discretion in the hands of the Minister as to whether or not to grant a medical exemption for the possession of marihuana.

Another quotation from *J.P.*:

"43 Additionally in *Parker* Rosenberg J.A. addressed the Crown's defence having to do with the availability of a Ministerial exemption and wrote:

> '...an important aspect of the Crown's defence of the Controlled Drugs and Substances Act was the availability of a Ministerial exemption under s. 56 of the Act. Again, it may be that the availability of such an exemption is more properly dealt with under s. 1, in which cases the burden would be on the Crown to demonstrate the availability of such an exemption could save the prima facie violation of s. 7. *[sic]* This is of some importance, in view of the paucity of evidence on the operation of s. 56...The question remains; does this unfettered discretion (referring to s. 56 of the Act) meet constitutional standards? In my view, notwithstanding the theoretical availability of the s. 56 process, the marihuana prohibition does not accord with the principles of fundamental justice. In Morgentaler,

Dickson C.J.C. found the therapeutic abortion scheme invalid in part because the provincial Ministers of Health could impose so many restrictions as to make therapeutic abortions unavailable in the province and because there was no standard provided in the section for the committee to use in determining whether the woman's health was in danger... The same must be said about s. 56. It reposes in the Minister an absolute discretion based on the Minister's opinion whether an exception is "necessary for a medical purpose", a phrase that is not defined in the Act.'

44 Finally, Rosenberg J.A. wrote:

'In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered legislative discretion in the Minister, the deprivation of Parker's right to security of the person does not accord with the principles of fundamental justice. In effect, whether or not Parker will be deprived of his security of the person is entirely dependent upon the exercise of ministerial discretion. While this may be sufficient legislative scheme for regulating access to marihuana for scientific purposes, it does not accord with fundamental justice where security of the person is at stake.' "

Then Phillips J. in *J.P.* says this:

"45 Based on the opinion in Parker, it is the absence of suitable guidelines and structure in the legislation that leads to the Charter violation. It is not the ever present potential of unreasonable exercise of discretion at the ministerial level or the unwieldy administrative process that is the problem. These are cited as proof that the legislation itself, which can only be changed by Parliament, must contain suitable guidelines fettering the discretion of the cabinet or the Minister--- in such a way that, if they comply with the legislation, a reasonable medical exemption system must be in place, and not just possibly could be.

46 While Regulations were enacted, but the legislation was not amended, the 'gap in the regulatory scheme' (to use the language of Rosenberg J.A. in Parker) was not addressed. In my view, the establishment by Parliament of suitable guidelines in legislation fettering administrative

discretion was requisite, but lacking. This is simply not the sort of matter that Parliament can legitimately delegate to the federal cabinet, a Crown minister or administrative agency. Regulations, crafted to provide the solution (even were these fashioned to create sufficient standards governing exemptions) cannot be found to remedy the defects determined by the Parker dicta. Therefore, since a statutory framework with guiding principles was not enacted within the period of the suspension of the declaration of invalidity, it follows in my view that the declaration is now effectively in place."

Seven days after the decision in *J.P.* came that in *Hitzig v. Canada* [2003] O.J. No. 12 (Ont. Sup. Ct., of Justice). *Hitzig* came to the same conclusion as *J.P.*, albeit by a different route. *J.P.* was not considered in *Hitzig*.

It is to be noted that in *Hitzig*, the Court was evidently provided with extensive evidence as to the medical profession's response to the *MMAR*, the practical difficulties in growing marihuana, (in terms of light, temperature, soil conditions and the like), the supposed inactivity of the federal Department of Justice in providing an "official" source of the drug, and other areas.

The Court in *Hitzig* found that the government has not availed itself of the section of the *MMAR* authorizing it to import and possess marihuana seed for the purpose of then distributing it to persons holding a licence to produce. Accordingly, the Court found that there is a "first-seed" problem, inasmuch as the first seed necessary to start growing a "licensed" crop of marihuana would have to be illegally obtained from criminals dealing in drugs. Other findings of fact were made as to the ability of the accused persons in the case to grow their own marihuana. It was found that several of the accused persons were finding it very difficult or impossible for various reasons to grow the marihuana. Many other findings of fact were made.

The Court found that the *MMAR* were in violation of the constitutional rights of the applicants. The following quotation is from the case:

"168 To sum up, regulations which allow for the possession of marihuana without providing for any legal means to obtain this drug, to say nothing of maintaining access to a reliable supply of it on an ongoing basis, violate the applicant's s. 7 rights in a manner inconsistent with the principles of fundamental justice. While it is not surprising that the MMAR focus on the possession aspect of medical marijuana use at issue in Parker, the applicants' right to use marijuana therapeutically must be understood purposively. Marijuana possession and production rights offer little relief to seriously ill individuals when there is no legal and safe way to take advantage of them."

Section of the Charter was found to be unavailing to the Crown. The Court went on to say:

"179" [The Court has] "found the MMAR to be unconstitutional in not allowing seriously ill Canadians to use marijuana because there is no legal source or supply of the drug..."

I will not go into greater detail about the *Hitzig* case, for reasons which will emerge later.

In *R. v. Barnes*, [2003] O.J. No. 261 (Ont. Ct. of Justice), the Court was asked to follow the decision in *J.P.* It did so.

Reference was made by defence counsel to a number of cases from the Provincial Court level, where the *J.P.* decision has been followed. In most cases I was referred only to press reports of these decisions, or discussion of them on the Internet. It seems that a number of judges have followed *J.P.* I have the impression that they did so substantially to avoid the potential situation which I called during counsels' arguments "the Balkanization of Canada," with respect to the marihuana possession laws–i.e., the situation which may develop where inferior court judges in one or more provinces may differ as to whether the law is still in effect or not, thereby producing a patchwork quilt (to mix metaphors) whereby marihuana possession may be legal in one town and illegal in the next, or even legal in one courtroom and illegal in the courtroom down the hall.

I was, however, provided with the written decision in *R. v. Stavert* [2003] P.E.I.J. No. 28 (P.E.I. Prov. Ct.), in which several of these cases were considered. The Court explored the

availability to the accused of issue estoppel, with regard to the possibility that the federal Crown is estopped from the prosecution of this charge anywhere in Canada (based on the proposition that Stavert has privity with Parker as fellow-citizens under the Charter). In the Court's opinion, issue estoppel was not available, since no plea of not guilty had yet been entered.

The Court went on to explore the availability of abuse of process to the accused. The Court found that the doctrine of abuse of process did apply, stating:

"47 In my view, the Federal Crown cannot be permitted to successfully contend that it is restricted by the final judgment of the Court of Appeal of Ontario only within that province. To hold otherwise would permit the Federal Crown to relitigate an identical issue in each provincial and territorial jurisdiction. The potential for conflicting decisions which could easily result in widely varied legal rights from province to province or territory is obvious. If this prosecution is permitted to continue, in effect it would be tantamount to a ruling that more than one third of the population of Canada is immune from prosecution while the residents of Prince Edward Island are not."

The prosecution was then judicially stayed.

Mr. Shaw, for the defence, argues that I should follow the Ontario line of cases referred to previously because of the rule of *stare decisis*. He urges me not to descend "into the mechanics" of the facts, reasoning and logic of those cases in order to determine whether I should follow them. Rather, he urges me in the spirit of *stare decisis*, as he understands it, to follow those cases and thereby rule the marihuana possession law unconstitutional.

He quotes the following, (itself taken from *Re Horne and Evans* (1986) 54 O.R. (2d) 510) from the *Barnes* decision:

"22 ...The law is that a decision of a court of co-ordinate jurisdiction ought to be followed in the absence of strong reason to the contrary."

Mr. Shaw also quotes the following (itself taken from *R. v. Koziolek* [1999] O.J. No. 657) from the *Barnes* decision:

"24 ....In my opinion, it is imperative in a large trial court such as the Ontario Court of Justice that as much certainty as possible be brought to the law until the Court of Appeal rules on a point."

And Mr. Shaw notes that in *Barnes*, the Court implied that it agreed with the remark made in *Koziolek* wherein the Court in that case said that although it found much merit in certain submissions of counsel, in fact the Court would rule to the contrary and follow the decision of a fellow-judge, apparently of the same court, because there was no indication that the fellow-judge gave his decision without considering the appropriate case law.

Mr. Shaw's argument essentially is that "Mr. Hadwen...is entitled to have a law with regard to the possession of marihuana [and that is within the sole jurisdiction of the Parliament of Canada] which is clear, easy to understand and uniform across this country."

Clearly, it is highly desirable that a uniform law exist nation-wide with regard to any federal offence, and perhaps particularly so with regard to this one. I say "particularly so," because the offence of marihuana possession has long been controversial, as the Ontario Court of Appeal tacitly acknowledged in *Parker*; the charges are frequently laid, thereby impacting on many persons; the charges bring with them the risk of a criminal record and severe penalties, including imprisonment; and because the question of the marihuana possession law's being unconstitutional has become notorious, with the added risk of public disillusionment with the system of justice if a "patchwork quilt" of different situations arises in Canada whereby in some jurisdictions the possession of the substance is legal while in other areas persons are being sentenced for its possession.

It is evident that the decision in *Stavert*, and insofar as I can gather from press and internet reports, the decisions in other jurisdictions outside Ontario, are founded on the proposition that the requirement for a uniform, predictable, understandable, nation-wide law with respect to

marihuana possession, effectively, so to speak, trumps all other considerations, such that without much or any examination of the Ontario cases, they should be followed, and the marihuana possession law declared unconstitutional and not in force. And this is the argument of defence counsel in this case.

Does the rule of *stare decisis*, in itself, without reference to any public-policy issues of legal uniformity in our country, mandate that I must or should follow the Ontario line of cases? It is trite law that I am not *bound* by the decisions of the Ontario courts. According to the rules of *stare decisis*, they have strong persuasive effect. They must be carefully and respectfully read, and I must give effect to their reasoning in the absence of compelling reasons to do otherwise. The rule with respect to my own situation is not so stringent as it was in the situation referred to in *Kaziolek*, and approvingly quoted in *Barnes*, where the judge was confronted by a decision of a fellow-member of his or her own Court.

However, it is clearly the argument of the defence in this case that I should follow the Ontario cases *without any real examination of their internal logic and reasoning*. This argument clearly is founded on the reasoning in *Stavert*, (and apparently in a number of unreported cases), which is, essentially, that the Ontario cases must be followed because not to do so would be to permit the Crown to perpetrate an abuse of process. That supposed abuse of process was defined by Thompson, Prov. Ct. J. in *Stavert* as "the affront to the community's sense of fair play and decency which could occur if this charge before the court is permitted to proceed notwithstanding that greater than one third of the population of Canada is now apparently immune from similar prosecution."

The immediate question is whether I should follow the Ontario cases for this essentially public-policy reason. Judges must not pretend to be legislators, or social philosopher-kings, and no issue of public policy, no matter how pressing, can be the sole determinative issue of any case. I do not deny that it is highly desirable that there be nation-wide uniformity with respect to the marihuana possession law.

I regret to say that I am unable to agree with defence counsel's submission that I should follow the Ontario cases, without examination of their merits, based on *stare decisis*, and/or simply to

ensure a uniform nation-wide approach to marihuana possession. The argument is superficially attractive, but in my respectful view deeply flawed.

First, it is with all respect, not strictly correct to say, as was done in *Stavert* and in argument before me, that the marihuana possession law is now not in force in Ontario by reason of a decision of the Ontario Court of Appeal. That court held in *Parker* that the marihuana possession law was not in effect because it offended section 7 of the Charter by denying medical access to marihuana to sick people who needed it. The Court of Appeal then suspended the declaration of invalidity to give the federal government an opportunity to "fill the void" by passing remedial legislation which would provide such medical access to the drug. Eventually, the government did enact the *Marihuana Medical Access Regulations,* and it is the argument of the Crown in this and other cases that the *MMAR* .effectively do fill the void and comply with the Ontario Court of Appeal's requirements, thus making the marihuana possession prohibition good law once again in Ontario according to the Ontario Court of Appeal's own standards.

Without commenting now on the sufficiency of the *MMAR*, the current situation whereby the marihuana possession laws are invalid in Ontario results, as I understand it, from a decision of an Ontario Court of Justice trial judge, Phillips J., in *J.P.*, in early 2003; on a decision of a justice of the Ontario Superior Court of Justice, Lederman J., in *Hitzig*, a few days later; and on the decision of Moore J. of the Ontario Court of Justice in *Barnes*. In these cases, for various reasons, the *MMAR* were found insufficient to fill the void. To my knowledge, the Ontario Court of Appeal has not ruled yet as to whether the *MMAR* fulfill the requirements which the Court of Appeal set down in *Parker*.

The defence argument in this regard is founded essentially on the *Stavert* decision. Obviously, this scholarly and eloquent decision was made by a judge keenly alert to the perils of non-uniform application of criminal law. Yet, with respect, I think that its logic is flawed. First, there is no reason why the ratio in this case should apply only to the federal Crown. If it is an abuse of process for the federal Crown to prosecute section 4(1) of the *CDSA* anywhere in Canada in the aftermath of the Ontario cases, then logically it would be an abuse of process for any provincial

Crown to prosecute a section of the Criminal Code which has been declared constitutionally invalid in Canada by a superior trial court judge, where rulings to the contrary from the same or a higher court do not exist in this country.

This proposition, whereby any superior trial judge in this country might be able nationally to halt all prosecutions under a given criminal section, is self-evidently not correct. It is inconceivable, here, that the decision of a judge of the inferior trial court that a certain section of the criminal law is unconstitutional, concurred in later for somewhat different reasons by a decision of a superior trial court judge of the same province can *automatically* be taken to paralyze the operation of the criminal law with respect to that section in nine other provinces and three territories. Or, to mix metaphors again, to create a kind of judicial domino effect by which decisions in one province automatically and immediately produce analogous effects throughout the nation.

I also, with respect, question the several references in *Stavert* to the fact that 12 million people, or over one third of Canada's population, are now immune to the operation of the marihuana possession law, this being a reason for the Prince Edward Island court to follow the Ontario decisions. Would the situation be different if some Provincial and Queen's Bench judges in tiny Prince Edward Island had ruled the marihuana possession laws to be invalid, and the question fell to be considered in Ontario? Clearly, if the proposition is valid, it should work both ways, and references to Ontario's large population are not germane.

In my respectful view the arguments put forth by the defence here are incorrect. I am not bound to follow the Ontario decisions without examining their logic and merit, either for reasons of *stare decisis*, or for the sake of nation-wide uniformity of law in this area. This latter argument does violence to the most fundamental fact about the Canadian nation–i.e., the fact that is a federal state, with parallel separate and independent provincial legal jurisdictions.

It is indeed extremely undesirable that within a nation, and probably for a time even within Saskatchewan until the Court of Appeal rules on the issue, citizens will be subject to differing laws with respect to the possession of marihuana. In my opinion, if we did not mean such a situation to be possible, we had no business enacting the Charter, or if it were enacted, we had no

business interpreting it in such a fashion as to give courts the broad power to suspend laws for unconstitutionality. But enacted it is, and interpreted it has been, and accordingly non-uniformity of laws in Canada must always have been in contemplation. Nor is this an unprecedented situation. It is only a rather notorious one amongst the general public. The Crown points out that the law with respect to the constitutionality of law office searches was not uniform throughout Canada for some time. In *R. v. Lavallee*, (2000) 143 C.C.C. (3rd) 187 (Alta. C.A.), section 488.1 of the Criminal Code was struck down and immediately became inoperative in Alberta. Later, in Newfoundland, in *R. v. White*, (2000) 146 C.C.C. (3rd) 28 (Nfld. C.A.) a different conclusion was reached whereby essentially section 488.1 was found to be constitutional, and it remained in effect while invalid in Alberta. Still later, in *R. v. Fink*, (2000) 149 C.C.C. (3rd) 321 (Ont. C.A.), the law was struck down in Ontario. The discrepancy was not cured until the Supreme Court of Canada finally struck down the law in the appeal of the *Lavallee* case, in 2002. Undoubtedly, many other situations of this type could be found.

This decision of mine does not relieve me of the responsibility actually to examine the Ontario cases, to determine if I should follow them. Accordingly, I turn to this issue.

It is necessary, however, to note that another trite principle of law requires judges to have some factual foundation for their findings. The Ontario Court of Appeal in *Parker* relied on the trial judge's findings of fact in that case. The judge in *Hitzig* relied upon extensive findings of fact. Only in *J.P.* and *Barnes* were no findings of fact made. In those cases, the judges simply ruled that the *MMAR* were inadequate to fill the void in law which the Ontario Court of Appeal had identified in *Parker*, and upon which its declaration of invalidity of the marihuana possession law was based. Even in *J.P.* and *Barnes*, though, the situation of the judges was different from that of a judge in another jurisdiction, like me, in the sense that their own Court of Appeal, acting upon findings of fact, had created the foundation upon which they could rule that the *MMAR* were inadequate, and hence that the Court of Appeal's declaration of invalidity was in force.

I expressed to counsel in this case from the beginning my concern about the fact that absolutely no evidence of any kind has been placed before me. Counsel simply handed me the cases and defence counsel asked me to follow them for the reasons which I have already rejected. Looking

forward to the situation in which I now find myself, I wistfully asked Mr. Arendt, for the Crown, if the federal government was prepared to make any admissions of fact for the purpose of my decision. After checking with the main office of the federal prosecutors in Saskatoon, and then with Ottawa, Mr. Arendt provided me with the following, in writing:

"I have been instructed to respond to the Government's position as to the medical use of marihuana as follows:

- It is not their position that marihuana has some medical benefit but rather that in response to the Parker decision it enacted the Medical Marihuana Regulations [*sic*] and to enable the medical efficacy of marihuana to be determined by the doctor and patient."

No other concessions of fact were made by either side. It seems to me that the starting-point of my inquiries must be: is there evidence upon which I can act that marihuana has medical uses? Certainly, I cannot take judicial notice of this controversial question. The alleged medical usefulness of marihuana is not "a fact or state of affairs that is of such general or common knowledge in the community that proof is dispensed with." (*Canadian Criminal Evidence, third edition,* by P.K. McWilliams, Q.C., p. 24–1). I have no personal knowledge at all of such matters, I am satisfied that the general community does not, and indeed judicial notice of the proposition in its usual sense is, I think, forbidden where the federal government exhibits its apparent willingness to contest the question in the Saskatchewan courts.

Am I permitted to adopt the findings of fact in this regard made by other judges in another jurisdiction, without the permission of counsel? Well, not unless this matter is of such over-riding national importance that I am permitted to ignore all the commonly-recognized rules of criminal law, and perhaps I have already illustrated that I am not disposed to do that.

I do think, however, that the very fact that the *Marihuana Medical Access Regulations* exist is in itself some evidence that marihuana is medically efficacious. This is taking judicial notice in a different sense from the usual. Notwithstanding the attitude of the federal government expressed in its instructions to Mr. Arendt, I conclude from the fact that the government enacted

the *MMAR* that marihuana can be efficacious in treatment of those diseases and conditions specifically mentioned in the regulations. These include terminal illness, cancer, AIDS, HIV infection, multiple sclerosis, spinal cord injury or disease, epilepsy, and severe forms of arthritis. Since the *MMAR* also refer to symptoms which are associated with diseases or conditions other than the above, it seems a fair deduction that marihuana is also medically efficacious in dealing with symptoms which arise other than from the stated diseases or conditions.

I think it is only fair to the accused persons in this case that I make these findings. To do otherwise would be to take judicial conservatism too far, and to put undue obstacles in the path of the three accused men here. In my view, the federal government cannot be heard to say what I think, perhaps uncharitably, that I hear in their instructions to Mr. Arendt, which I paraphrase as: "We don't concede that marihuana has medical usefulness. Even though the *MMAR* say that the Minister 'shall' grant an authorization to possess marihuana on receipt of the appropriate medical advice, we really only enacted the *MMAR* because the Court of Appeal of Ontario made us, and therefore no one can take judicial notice of the medical efficaciousness of marihuana from the existence of the *MMAR*." Maybe, as I say, this is uncharitable of me.

If I make the finding that marihuana has medical efficaciousness, which I do, than I can start down the path of seeing whether or not I agree with some of the Ontario cases. The Ontario Court of Appeal in *Parker* ruled that the marihuana possession law was unconstitutional, and declared it invalid, then suspending the declaration of invalidity to give the government the chance to pass remedial legislation giving sick people legal access to marihuana.. The government enacted the *MMAR*. The Crown thinks that these effectively answer the concerns in *Parker* and that the marihuana possession law in Ontario is effectively in force. In *J.P.* and *Barnes*, two Ontario judges found that the *MMAR* do not effectively address the concerns of the Ontario Court of Appeal in *Parker*, and the current invalidity of the marihuana possession laws in Ontario results in part from this.

As it happens, and for what it is worth, I agree with the decision of the Ontario Court of Appeal in *Parker*. No lengthy discussion is necessary; the interested reader can read *Parker* for

him or herself. It seems entirely just to me that the Ontario Court of Appeal should use its powers to help sick people get access to a drug which they need, and indeed, the federal Crown seems to agree, since I am informed that they never appealed *Parker*.

The question then arises, however: do I agree with *J.P.* and *Barnes* that the *MMAR* fail to address adequately the Ontario Court of Appeal's perception that there is a need for a law permitting sick people to get marihuana, and that therefore the Ontario Court of Appeal's declaration of invalidity is still in effect?

I have quoted extensively earlier in this decision from *J.P.* (*Barnes* follows *J.P.*) The reasons in *J.P.* for considering the *MMAR* to be inadequate to address the concerns raised by the Court of Appeal in *Parker* may perhaps be summarized in this way:

(1) The enactment of the *MMAR* is not fundamentally different from section 56 of the *CDSA*, which the Ontario Court of Appeal had found to be inadequate in *Parker*. [Section 56, quoted earlier, states that the Minister may exempt any person or class of persons from any provision of the *CDSA* if in the Minister's opinion, the exemption is necessary for medical purposes.] Parliament has provided a total discretion to the federal Cabinet through the mechanism of a Governor General-in-Council order to address the *Parker* concerns. Regulations can be changed in every issue of the *Canada Gazette*, without Parliamentary debate.

(2) Based on *Parker*, the absence of suitable guidelines and structure in the legislation [presumably section 56 of the *CDSA*] leads to the Charter violation. "...the ever present potential of unreasonable exercise of discretion at the ministerial level or the unwieldy administrative process" are not the problem. They are "...cited as proof that the legislation itself, which can only be changed by Parliament, must contain suitable guidelines fettering the discretion of the cabinet or the Minister—in such a way that, if they comply with the legislation, a reasonable medical exemption system must be in place and not just possibly could be."

(3) Where regulations were enacted but the legislation was not amended, the "gap in the regulatory scheme" identified by the Ontario Court of Appeal in *Parker* was not addressed. Parliament had to establish suitable guidelines in legislation fettering administrative discretion,

but did not. Parliament cannot delegate this matter to the Cabinet, a minister or administrative agency. Regulations cannot remedy the defects identified by *Parker*, even if these are fashioned to create sufficient standards governing exemptions. In the absence of "a statutory framework with guiding principles," the declaration of invalidity in *Parker* is now in place.

I am unable to agree with these reasons. First, it seems to me that the *MMAR* are fundamentally different from section 56 of the *CDSA* in obvious ways. There is a rather important distinction between a 5-line section in the *CDSA* vaguely setting forth that the Minister may, on such terms and conditions as he deems necessary, exempt in some unspecified fashion a person falling into an unspecified category from an unspecified provision of the Act for some unspecified medical purpose; and on the other hand a detailed set of regulations carefully and in immense detail setting forth what the terms and conditions of exemption are, what categories of persons are eligible for exemption, what many of the medical purposes are, as well as providing a simple and reasonable framework within which applications may be made for a licence to possess marihuana, or to produce it for medical purposes.

However, the fundamental difference which matters in *J.P.* is that between legislation on the one hand, and regulations on the other. It is quite true that regulations can be changed in subsequent editions of the *Canada Gazette*. It is also quite inconceivable that fundamental changes to the *MMAR* which harmed the ability of a sick person to access marihuana for medical purposes would fail to attract massive public attention, through the press, or that these changes would fail to set off debate in the House of Commons. A government commanding a majority in the House can as easily pass an amendment to legislation as it can enact a regulation, and to me there is not so much practical difference between legislation and regulations in this respect as *J.P.* suggests.

Essentially, I am not so sure as the judge in *J.P.* was, that "this is simply not the sort of matter" which can be delegated by Parliament to the Cabinet, a minister, or an administrative agency. Clearly, Parliament's actions in doing so, rather than enacting legislation, would necessarily attract careful scrutiny to ensure that the concerns identified by the Ontario Court of Appeal in

Parker were properly addressed. There does indeed have to be, to paraphrase *J.P.*, enactment of "a...framework with guiding principles...," to comply with the concerns identified in *Parker*. The question is: does it have to be a *statutory* enactment?

To me, the sensible approach, rather than a blanket condemnation of the *MMAR* for not being legislation, is to try to analyze whether the *MMAR* actually do address the *Parker* concerns, and whether they fetter the Minister's discretion, and put in place a reasonable medical exemption system.

I have decided not to append the *MMAR* to this decision. I have tried in some detail to summarize them, earlier. The interested reader can easily obtain them. I can only say that in my respectful view the *MMAR* are an adequate attempt to address the concerns which I understand the Ontario Court of Appeal to have expressed in *Parker*. There is no unfettered discretion permitted by those regulations to the Minister. On the contrary, as I said earlier, the *MMAR* provide an explicit, reasonable and simple framework within which to apply for an authorization to possess marihuana for medical purposes, or indeed to grow it for a person holding an authorization to possess. The criteria for obtaining these licences flow logically and sensibly from the concerns addressed in the *Parker* case. I do not perceive any of the criteria as being included without cause, or for the apparent purpose of hindering medical access to the drug.

If the criteria are satisfied, the Minister "shall," not "may," grant the appropriate licence. If the application for the authorization to possess is not granted, the reasons must be given in writing, and the applicant must be given an opportunity to be heard. Throughout, the Minister is bound by the principles of administrative law to act fairly, and in accord with the principles of fundamental justice.

It is quite true that the regulations provide grounds for refusal of the applications. These seem to me to be reasonable grounds, which, again, flow logically and sensibly from the purposes of the regulations, and which do not contain any ground which appears arbitrary, or to be included simply to hinder legitimate applications to possess or produce marihuana for medical purposes. The grounds for refusal of an application for an authorization to possess are: that the applicant is not a resident of Canada, that false or misleading information is provided in the application, that

the application involves a category 3 symptom and either all conventional treatments have not been tried or considered, or they are considered (by the Minister, apparently) to be medically inappropriate, or that the person from whom the holder of the authorization to possess intends to obtain marihuana is not himself licensed to produce the drug. It is quite true that there is discretion here, but in my view there is nothing arbitrary about it. These kinds of judgment calls would have to be made by someone in any scheme to permit persons to obtain marihuana for medical purposes.

The same considerations apply to the grounds for refusal of licences to produce marihuana under the *MMAR*. The grounds are somewhat analogous to those employed in refusing application for an authorization to possess, and, again, although discretion is called for, it is neither unfettered or arbitrary.

I am unable to agree with *J.P.* and *Barnes* that the *MMAR* are insufficent to address the *Parker* concerns. Accordingly, this argument for the invalidity of the marihuana possession law in Saskatchewan fails.

This leaves to be considered the principles in *Hitzig*. It will be remembered that *Hitzig* ruled that the marihuana possession law is unconstitutional for somewhat different reasons than did *J.P.* and *Barnes*. Specifically, *Hitzig*, essentially makes the point that the federal government has allegedly not availed itself of the section of the *MMAR* which permits it to import and possess marihuana seeds for the purpose of then distributing them to persons who hold a lawful licence to produce. The section 7 rights of the accused person were violated , it was held, by a situation where allegedly there is no legal means by which to obtain the drug, or to access it on an ongoing basis. The judge spoke about the "first-seed" problem i.e., the problem where even holders of legitimate licences to produce marihuana for medical purposes would be forced allegedly to purchase these from criminals.

This finding that there is no lawful original source of the drug or the seeds evidently rests upon findings of fact made by the Court. Indeed, this was only one of the findings of fact. The Court also made findings of fact about the medical profession's response in Ontario to the *MMAR*, and the practical difficulties in growing marihuana in terms of light, temperature, soil conditions, and

so forth.

This takes one back to the fundamental requirement that evidence be supplied to the Court, upon which findings of fact can be made. No evidence whatever is before me. This is a pre-trial Charter application. In my view, I can only follow *Hitzig* if I can take judicial notice of the facts upon which the learned judge in that case founded the decision. I have already quoted Mr. McWilliams to the effect that judicial notice can be taken of "a fact or state of affairs that is of such general or common knowledge in the community that proof is dispensed with."

Certainly the difficulties in growing marihuana do not fit into this category. Can I take judicial notice of the federal government's failure to supply a legal source of marihuana to holders of licences lawfully obtained under the *MMAR*? I think not. It is my perception that the community in this city, and others elsewhere in the nation, have only the vaguest idea as to whether the federal government is supplying marihuana or its seeds to persons who need it for medical purposes. The Crown Prosecutor in this case in response to a question from me cheerfully admitted that he knew virtually nothing of the area. The failure of this sophisticated lawyer to understand the current situation in this regard is merely emblematic of a complete lack of knowledge about it within the community at large. I cannot take judicial notice in this area.

The only alternative would seem to be the (to me) unpalatable one of ignoring the normal rules of criminal law because of the allegedly over-riding importance of the controversy surrounding the marihuana possession laws. Judicial notice in the ordinary sense cannot be taken. Under any normal legal rules I know, it is also impermissible for me simply to adopt the findings of fact made in *Hitzig* without any evidentiary foundation in my own case.

Accordingly, the reasons in *Hitzig* form no part of this decision. There is no evidentiary basis in this case to make the findings of fact necessary to follow *Hitzig*.

Based upon the specific arguments raised, and as of this moment, I rule that the marihuana possession laws are fully in force in Saskatchewan. The prosecutions of the three accused persons in this matter will proceed.