COURT FILE No.: 02-Y11520

ONTARIO COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN	Edward J. Posliff, for the Crown
AND —	
J.P.	Brian F. McAllister, for the applicant young person

PHILLIPS, DOUGLAS W., J.:

RULING

Introduction

[1] J.P., a young person within the meaning of the ***Young Offenders Act*** stands charged on two of a three count information no. #02-Y115 20:

> On count one, that on or about the 12th day of April, 2002 at the town of Kingsville in the Southwest region he unlawfully did have in his possession under 30 grams of a controlled substance, to wit: cannabis marihuana, contrary to s. 4(1) of the ***Controlled Drugs and Substance Act;*** and that
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> On count two, while subject to a disposition made pursuant to paragraph 20(1)(j) of the ***Young Offenders Act*** to wit: a Probation Order issued in the Youth Court, Windsor, Ontario on the 18th day

of March, 2002 by Judge M. Rawlins did wilfully fail to comply with that Order to wit: the said young person shall abstain from the consumption of illegal substances as defined in the ***Controlled Drugs and Substances Act,*** contrary to s. 26 of the ***Young Offenders Act.***

[2] The Applicant has brought an application related solely to the two foregoing counts. He asserts simply, that in consequence of the Ontario Court of Appeal decision ***Regina v Parker*** (2000), 146 C.C.C. (3d) 193 (Ont. C.A.), s. 4(1) of the ***Controlled Drugs and Substances Act***[1] no longer prohibits the simple possession of marihuana. It follows, if that is so, that he has been charged with offences unknown in law.

Summary of facts

[3] I now summarize the facts cited by the Applicant in support of his claim.

[4] The Ontario Court of Appeal released the decision of ***R. v. Parker*** on July 31, 2000. Rosenberg J. A. wrote for the court, and concluded the judgement with the following disposition:

> "Accordingly, I would vary the remedy granted by the trial judge and declare the marihuana 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. The respondent is exempt from the marihuana prohibition is s.4 of the ***Controlled Drugs and Substances Act*** during the period of suspended invalidity for possession of marihuana for his medical needs."

[1] See ***Controlled Drugs and Substances Act 1996***, Chap. 19 (and amendments thereto) and s. 4(1) which provides: "Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III;" See also Schedule II (sections 2, 3, 4 – 7, 10, 29, 55 and 60);
No. 1 Cannabis, its preparations, derivatives and similar synthetic preparations, including:
(1) Cannabis resin
(2) Cannabis (marihuana)...

[5] The Crown has not obtained leave to appeal that judgment.

[6] More than twelve months have passed since the release of that judgment.

[7] It is submitted by the Applicant therefore, that Rosenberg, J. A.'s judgment had the effect of declaring invalid the marihuana prohibition in s. 4(1) effective on July 31, 2001 – twelve months after the release of the reasons in ***R. v. Parker***. It is therefore argued that in keeping with s. 2(2) of the ***Interpretation Act***[2], the enactment was deemed repealed. The timing of the repeal (if applicable) would be governed by s. 6(1) of the ***Interpretation Act***[3].

[8] The ***Controlled Drugs and Substances Act*** was not *amended* by Parliament, and no prohibition on the simple possession of marihuana has been *re-enacted*.[4]

[9] On June 14, 2001, the ***Marihuana Medical Access Regulations***, SOR/2001-227, were published in the *Canada Gazette*, and came into force July 30, 2001.[5]

[10] The offences for which the Applicant is charged are alleged to have been committed more than twelve months after the release of the ***Parker*** judgment.

[11] I have accepted the submission that the application is dependent on the law and hence that the specific facts of the Applicant's case are not germane to the determination of the application.

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[2] See the ***Interpretation Act***, R.S.C. 1985, c. I-21 at Section 2(2) which states:
"For the purposes of this Act, an enactment that has been replaced is repealed and an enactment that has expired, lapsed or otherwise ceased to have effect is deemed to have been repealed."

[3] See the ***Interpretation Act***, R.S.C. 1985, c. I-21 at Section 6(1) which states:
"Where an enactment is expressed to come into force on a particular day, it shall be construed as coming into force on the expiration of the previous day, and where an enactment is expressed to expire, lapse or otherwise cease to have effect on a particular day, it shall be construed as ceasing to have effect on the commencement of the following day."

[4] Contrary to the submission made in the Respondent's factum (see paragraph 6), Parliament did not amend the ***Controlled Drugs and Substances Act***. Reference, in support to the language of s.4(1) i.e. "Except as authorized under the regulations..." does not alter that conclusion, given that that statutory language preceded the decision in ***Parker***.

[5] Parliament did not enact the ***MNA Regulations***, as claimed in the Respondent's factum (see paragraph 24). As correctly stated at paragraph 21 of the respondent's factum, the Governor General in council, on the recommendation of the Minister of Health, enacted the ***MNA Regulations***, pursuant to subsection 55(1) of the ***Controlled Drugs and Substances Act***. Subsection 55(1) similarly as s. 4(1), has not been amended by Parliament.

The issue

[12] Did the declaration of invalidity determined in ***R. v. Parker***, but suspended for a 12-month period, become effective in such way as to invalidate s.4 (1) of the ***Controlled Drugs and Substances Act***, in respect of an offense alleged to have been committed after July 31, 2001?

[13] Did Parliament take steps during the period of suspension and before the effective date of the declaration of invalidity that were effectual in saving s.4 (1) of the statute?

Standing

[14] While the accused Parker was a person who suffered epilepsy, and the Applicant here does not (as far as I am aware) the Court of Appeal determined that such was irrelevant to his standing to challenge constitutionality of the ***Controlled Drugs and Substances Act***. The Court found:

> "...it is also open to Parker to challenge the validity of the legislation on the basis that it was overbroad or unconstitutional in some other way in its application to other persons. The Crown respondent appeared to concede this in the *Clay* appeal. In any event, that conclusion follows from the decisions of the Supreme Court of Canada in ***R. v., Big M Drug Mart Ltd.***, [1985] 1 SCR 295 and ***R. v. Morgentaler***. In both cases, the accused were held to have standing to challenge the law under which they were charged although the alleged infringement of the ***Charter*** concerned the rights of some other person."

[15] As the Applicant has stipulated in his Factum:

> "... a defence founded upon the unconstitutionality of the charging legislation is open to anyone, regardless of whether the legislation is

unconstitutional solely in its application to the particular accused. The fact that s. 4 of the ***CDSA*** was declared invalid because of the manner in which it affected Terrence Parker is not a bar to the applicant in this case, notwithstanding that this applicant is not advancing a medical need for marihuana."

[16] I am satisfied that this Applicant has standing to bring this application (not withstanding that the Applicant is not advancing a medical need for marihuana).

Analysis of the Argument

[17] A careful review of Rosenberg J.A.'s opinion in ***R. v. Parker*** is crucial. In *that* case, the accused was charged *inter alia* with possession of marihuana under the ***Controlled Drugs and Substances Act***. The accused suffered from a severe form of epilepsy. Surgery and conventional medication had failed to control his frequent serious and life-threatening seizures. The accused found that by smoking marihuana he could substantially reduce the incidence of seizures. Without a legal source from which to acquire it, he had grown it himself. Police searched his home and seized marihuana, resulting in charges. Parker challenged the constitutionality of the marihuana prohibition under s. 7 of the ***Canadian Charter of Rights and Freedoms***.[6]

[18] Dismissing a Crown appeal, Rosenberg J. A. made critical findings including:

1. That the prohibition on the cultivation and possession of marihuana is unconstitutional;

[6] Section 7 of the *Charter* provides as follows: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The Court of Appeal in ***Regina v. Parker*** commented on the constitutional challenge to the legislation as determined by the trial judge at page 203 noting:
"In reasons reported at [1997], 12 C.R. (5th) 251, Sheppard J. of the Ontario Court of Justice concluded that Parker requires marihuana to control his epilepsy and that the prohibition against marihuana infringes Parker's rights under Section 7 of the *Charter*. Sheppard J. stayed the cultivation and possession charges against Parker. Further, in order to protect Parker and others like him who need to use marihuana as medicine, the trial judge read into the legislation an exemption for persons possessing or cultivating marihuana for their "personal medically approved use".

2. The Justice considered that fashioning a remedy required that Parliament address the issue. His exact language is particularly instructive:

> "I agree with the Crown that this is a matter for Parliament. Accordingly, I would declare the prohibition on the possession of marihuana in the ***Controlled Drugs and Substances Act***, to be of no force and effect. However, since this would leave a gap in the regulatory scheme until Parliament could amend the legislation to comply with the ***Charter***, I would suspend the declaration of invalidity for a year. During this period, the marihuana law remains in full force and effect."

[19] Rosenberg J. A. goes further and states in respect of a statutory exemption (referring to Section 56 of the ***Act***) permitting marihuana possession[7]:

> "I am also of the view that, subject to the availability of a s. 56 exemption, Parker has established that the similar prohibition on possession and cultivation of marihuana in the ***Controlled Drugs and Substances Act*** violates his rights under s.7 of the ***Charter***."

I will return later to address the significance of this determination (as it relates to the interpretation and consequence of s.56 of ***Act***) to the application before the Court.

[20] Finally the Court of Appeal decision concludes:

> "Parker has established that the prohibition on possession of marihuana in the ***Controlled Drugs and Substances Act*** has deprived Parker of his right to security of the person and right to liberty in a

[7] See Section 56 of the ***Controlled Drugs and Substances Act*** which provides:
"Section 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."

manner that does not accord with the principles of fundamental justice."

[21] Having determined a ***Charter*** violation, the Court of Appeal decision discussed the appropriate remedy. In setting aside the Trial Judge's decision to "read in" a result, Rosenberg J. A. wrote:

> "...The Crown submits that, should this court find a violation of s.7 because the legislation fails to provide adequate exemptions for medical use, the "only available remedy" is to strike down those provisions and suspend the finding of invalidity for a sufficient period of time to allow Parliament to craft satisfactory medical exemptions."

[22] Simple possession of marihuana in s. 4(1) of the ***Controlled Drugs and Substances Act*** was struck down by the Court of Appeal. But the Court of Appeal went further in identifying whose task it was to address a remedy, writing:

> "...refusing to read in an exemption demonstrates a recognition of and respect for the different roles of the legislature and the courts. There is, in my view, no question that a medical exemption with adequate guidelines is possible. The fact that such exemptions exist in some states in the United States is testament to that. However, there are many options to consider and this is a matter within the legislative sphere. There is also a particular problem in the case of marihuana because of a lack of a legal source for the drug. This raises issues that can only be adequately addressed by Parliament."

[23] Repeatedly Rosenberg J. A. returns to the theme of Parliamentary authority to address the remedy: He wrote:

> "...To avoid an undue intrusion into the legislative sphere, any exemption crafted by a court should probably be the minimum necessary to cure the constitutional defect. However, faced with the need to open up the ***Controlled Drugs and Substances Act*** to address the constitutional defect Parliament has the resources to address the broader issue of medical use. By way of example only, people without the means to grow marihuana themselves, may be dependent upon caregivers to obtain the drug. This is a complex matter that,

> while not necessarily implicating *Charter* rights (although it may), is not something a court is equipped to deal with. *Put another way, Parliament is not bound to legislate to the constitutional minimum. It can adopt the optimal and most progressive legislative scheme that it considers just.* (Emphasis added)
>
> I also agree with the Crown that the declaration of invalidity should be suspended to provide Parliament with the opportunity to fill the void. ...I would suspend the declaration of invalidity for 12 months.[8]"

[24] In the wake of ***R. v. Parker*** and in accordance with s. 52 of the ***Constitution Act***[9], the Court of Appeal suspended the declaration of validity for twelve months[10].

[25] As already noted, no appeal to the Court's determination was initiated. Parliament never re-enacted the s.4 prohibition or marihuana and no statutory amendments to the ***Controlled Drugs and Substances Act*** were proclaimed.

[26] The Applicant therefore argued as follows, that as of July 31, 2001, the ***Controlled Drugs and Substances Act*** at s.4 (1), could no longer be

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[8] Throughout the *Parker dicta*, reference is made to the need to legislate by Parliament. Parliament was repeatedly identified as the body competent to create such a framework, not the Government. Rosenberg J. A. must be taken to have known the difference between Parliament and the Government.

[9] See *The Constitution Act*, 1982, Part VII: General at s.52 which provides:

Section 52(1) the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

(2) The Constitution of Canada includes:

(a) the *Canada Act 1982*, including this Act;

(b) Acts and orders referred to in the schedule;

(c) Any amendment to any Act or order referred to in paragraph (a) or (b).

(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

[10] The Applicant argues that on the commencement of the day following July 31, 2001 (i.e. August 1, 2001), the prescription on marihuana possession ceased to have effect. The Applicant refers the court to the special consideration had for the particular language used by the Court of Appeal. Rosenberg J. A. suspended the declaration of invalidity, not the finding of invalidity. The declaration of invalidity was dependent, so argues the Applicant, on nothing but the passage of time. The Applicant argues that it was not contingent on either the inaction or the insufficiency of any Parliamentary action. The declaration was categorical. It was not dependent on any event, or lack thereof. But for the suspension of the declaration of invalidity, the marihuana prohibition would have ended effective July 31, 2000. The Applicant further suggests that the courts' expressed purpose for suspending the declaration of invalidity was to allow Parliament to fill the legislative gap left once s. 4 of the Act became inoperative vis-à-vis marihuana.

said to prohibit the simple possession of marihuana[11]. This would be entirely consistent with the effect of a declaration that the statutory provision, against, simple possession of marihuana, was indeed invalid. However, that becomes now the issue: Can the declaration of invalidity truly be said to have taken effect?[12]

[27] If it can be so said then the Applicant must succeed. If, however, it can be found by reason of an *effective* remedy having been applied (before the 12-month suspension applied in *Parker)* to cure the provision of its constitutional defects, then the statutory provision remains in effect and the young person stands charged with a legitimate offense known to law.

[28] In the wake of release of the reasons in *R. v. Parker,* July 31, 2000, Parliament had 12 months within which to remedy the constitutional breach. During that time the provisions of s.4 (1) of the ***Controlled Drugs and Substances Act*** remained valid and effective.[13]

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[11] The Applicant refers the court to the consequences of repealed addressed in s. 43 of the *Interpretation Act*, R.S.C. 1985 c. I-21 at s. 43 which states:

s. 43 Where an enactment is repealed in whole or in part, the repeal does not

(a) revive any enactment or anything not in force or existing at the time when the repeal takes effect,

(b) affect the previous operation of the enactment so repealed or anything duly done or suffered thereunder,

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,

(d) affect any offense committed against or contravention of the provisions of the enactment so repealed, or any punishment, penalty or forfeiture incurred under the enactment so repealed, or

(e) affect any investigation, legal proceeding or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (c) or in respect of any punishment, penalty or forfeiture referred to in paragraph (d), and an investigation, legal proceeding or remedy as described in paragraph (e) made be instituted, continued or enforced, and the punishment, penalty or forfeiture may be imposed as if the enactment had not been so repealed.

[12] To be clear, the Applicant's position is forged on a narrow technical construct. If the declaration of invalidity was in place, the impugned section has no validity. The young person is then the subject of a criminal charge not known in law. The Applicant was quite plain that he was not asserting a constitutional challenge to the provisions of the *Controlled Drugs and Substances Act* nor that he was asserting a constitutional right to possess marihuana for recreational purposes, see *R. v. Clay* (2000) 49 O.R.(3d)5: 7 (C.A.) and in particular the opinion of Rosenberg J. A. at paragraph 18 where Rosenberg J.A. states:

"I agree with the trial judge that the recreational use of marijuana, even in the privacy of one's home, does not qualify as a matter of fundamental, personal importance so as to engage the liberty and security interests under Section 7 of the *Charter*."

[13] See *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.) where Rosenberg J. A. stated at paragraph 11, page 7: "Accordingly I would uphold the trial judge's decision to stay the charges against Parker and I would dismiss that part of the Crown's appeal. However, I disagree with Sheppard J.'s remedy of reading in a medical use exemption into the legislation. I agree with the Crown that this is a matter for Parliament. Accordingly, I would declare the prohibition on the possession of marihuana in the *Controlled Drugs and Substances Act* to be of no force and effect. However, since this would leave a gap in the regulatory scheme until Parliament could amend the legislation to comply with the *Charter*, I would suspend the Declaration of invalidity for a year. During this period, the marihuana law remains in full force and effect."

[29] What was done prior to July 31, 2001, the date upon which the declaration of invalidity would have had effect?

[30] The answer is that regulations were enacted namely the ***Marihuana Medical Access Regulations.***

Discussion of the Implications of the Regulations

[31] Is the statutory prohibition against marihuana saved by the regulation scheme promulgated after ***R. v. Parker,*** i.e. the ***Marihuana Medical Access Regulations SOR/2001-227***[14]?

[32] The Applicant does not challenge the constitutionality of the regulations[15]. In fact, the Applicant's argument concedes a recognition that

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[14] The ***Marihuana Medical Access Regulations*** were enacted (pursuant to Section 55 (1) of the ***Controlled Drugs and Substances Act***) to "...provide seriously ill Canadian patients with access to marihuana while it is being researched as a possible medicine. These Regulations have been developed in recognition of a need for a more defined process than the one currently used under section 56 of the ***Controlled Drugs and Substances Act*** (CDSA) for these Canadian patients.

"On July 31, 2000, the Court of Appeal for Ontario rendered its decision in the case of Terrence Parker who uses marihuana to help control his epilepsy. The Court dealt exclusively with the issue of medical use of marihuana.

" The Court upheld a 1997 lower court decision to stay the charges against Mr. Parker on constitutional grounds and raised issues related to the section 56 exemption process of the CDSA, such as the broad discretion given by the law to the Minister of Health to grant exemptions, transparency of the process, and what constitutes medical necessity.

"As a result, the Court declared the prohibition of marihuana in the CDSA to be unconstitutional and of no force and effect. The declaration of invalidity was suspended for a year, however, to avoid leaving a gap in the regulatory scheme.

"Subsequent to this Court decision, Health Canada announced on September 14, 2000, its intention to develop a new regulatory approach would bring greater clarity to the process for those Canadians who may request the use of marihuana to alleviate symptoms.

"The new Regulations clearly define the circumstances and the manner in which access to marihuana for medical purposes will be permitted. These Regulations appropriately and efficiently address concerns raised in the Parker decision concerning the process currently used under section 56 of the CDSA. These Regulations apply only to marihuana."

From the ***Regulatory Impact Analysis Statement*** authored by Bruce Erickson, Office of Controlled Drugs Strategy and Controlled Substances programs, Healthy Environments and Consumer Safety Branch of the federal government.

[15] The Applicant, to be clear, challenges neither purpose nor effect of the Regulations acknowledging that such a challenge would be considerably more burdensome and would require significant evidentiary foundation. Arising out of the argument that the Crown makes relying on the passage of the Regulations as evidence of the intent of Parliament to validate the s. 4 proscription on marihuana possession, the Applicant refers the court to the provisions of s. 7 of ***The Interpretation Act***, R.S.C. 1985, c. I-21 at s. 7 which states:

"Where an enactment is not in force and it contains provisions conferring power to make regulations or do any other thing, that power may, for the purpose of making the enactment effective on its commencement, be exercised at any time before its commencement, but a regulation so made or things so done has no effect until the commencement of the enactment, except in so far as may be necessary to make the enactment effective on its commencement."

these Regulations, "...may have been necessary" to address *R. v. Parker*. Further the Applicant has speculated that, had the Regulations been in place at the time *R. v. Parker* was considered, s.4 (1) of the ***Controlled Drugs and Substances Act*** would have perhaps been deemed constitutional.[16]

[33] Clearly these Regulations were in response to *R. v. Parker*.[17]

[34] While s.4 (1) of the ***Controlled Drugs and Substances Act*** remained valid (that is during the 12 months following *R. v. Parker*) steps were taken to create regulations providing exceptions to meet the deficiencies determined in *R. v. Parker*.

[35] The enactment of such Regulations clearly was contemplated (given the language of s. 4(1) of the *Act* which, to repeat, reads, in part: "Except as authorized under the Regulations..."). Authority is vested in the

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The Applicant argues that the Regulations were likely necessary to cure another defect under the *Controlled Drugs and Substances Act*. The Applicant refers to the judgment of Rosenberg, J. A. wherein the Court of Appeal panel found that the s. 7 prohibition on production of marihuana was also inconsistent with the *Charter*. Rosenberg, J. A. did not declare invalid that section as well, given that the issue of production was not properly before the court. The Applicant therefore argues that accordingly regardless of whether Parliament wanted or intended to preserve the s. 4 prescription on marihuana, a new regulatory scheme was needed to address the unconstitutionality of s. 7 (see page 267 of *R. v. Parker*).

[16] See argument in the Applicant's Factum:

"17: It is, with little doubt, anticipated that the Crown will rely on the coming into force of the Regulations as "saving" the section for prohibition on the simple possession of marihuana. The anticipated argument is that the Regulations provide for the distribution of marihuana to those in medical need of it; the absence of a real source of medical marihuana for those who needed it was the basis for the Court's finding of invalidity in *Parker*. That, the Crown will undoubtedly argue, has been corrected by the promulgation of the *MMAR Regulations*.

"18: The Applicant's response is that the Regulations may have been necessary to address the void that was in issue in *Parker*; in addition, however, it was incumbent on Parliament to re-enact s.4 of the *CDSA* as it relates to marihuana, if the legislature's intent was to criminalize its simple possession.

"19: The conflict between the position of the Applicant and the Crown on this issue goes to the heart of this case. The Applicant respectfully submits that twelve months after the release of the *Parker* decision s.4 of the *CDSA* became invalid as it related to the simple possession of marihuana. That is the only interpretation of *Parker* that is consistent with a plain reading of that case. In the absence of a new statutory enactment proscribing marihuana possession, there is no legislative authority, which bans it.

"20: The Applicant does not challenge the constitutionality of the Regulations —either in their purpose or effect, as such a challenge would be considerably more burdensome, and would require a significant evidentiary foundation. It may be that had the Regulations been in place at the time that the Ontario Court of Appeal decided *Parker*, s.4 of the *CDSA* would have been deemed constitutional."

[17] It is arguable that the new Regulations may provide a sufficiently effective medical exception to remedy the obstacles raised in *Parker* having to do with the reasonable limitation of Section 7 rights under Section 1 of the *Charter*. The Crown has the onus on the balance of probabilities to establish this. Trial Judges have the duty to raise *Charter* issues on their own *if a breach is apparent on the record*: *R. v. Arbour*, [1990] O.J.No. 1353, 4, C.R.R. (2d) 369 (ONT. C.A.). Hence, before embarking on any trial for possession *simpliciter* a court may require the Crown to establish that the regime under the new regulations, in practice (not just looking at the regulations alone) is such that persons who *prima facie* have need of marihuana for medical purposes are actually getting it. It is not enough under *Parker* simply to show that such persons are getting medical exemptions, if the framework still prevents legal, or at the very least, non-criminal access to marihuana.

Governor General in Council to enact regulations under the ***Controlled Drugs and Substances Act*** [18].

[36] To repeat: the Regulations were designed to meet the demands of *R. v. Parker*. *Did the Regulations achieve that result?* The Applicant did not put that in issue directly before this Court.[19]

[37] The Regulations, designed to meet the needs of R. ***v. Parker***, were brought into play in a timely enough fashion (albeit coming into force at the very end of the suspension period July 30th, 2001[20]) pursuant to legitimate statutory authority. Wasn't that the point and purpose of the Court of Appeal's suspension? Wasn't Parliament to have the time and opportunity within which to fashion a remedy? But isn't that exactly what the *government* did in trying to save the provisions of the statute from invalidity?

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[18] See the *Controlled Drugs and Substances Act* at s.55 which reads in part: "Section 55(1) The Governor in Council may make Regulations for carrying out the purposes and provisions of this *Act*, including the Regulation of the medical, scientific and industrial applications and distribution of controlled substances and precursors and the enforcement of this Act and, without restricting the generality of the foregoing, may make Regulations..."

[19] The Respondent drew the attention of the Court to *Wakeford v. Canada* (2001), 162 C.C.C. (3d) 51 (ONT. C.A.). That case presented an opportunity for the Court of Appeal to make *obiter* observations about the validity of the new regulations. The Court declined this opportunity since the issue was not relevant to the appeal. The Application was personal, not a motion to strike down legislation. *Wakeford* applied for a prerogative order for either a government source of marihuana or a broader caregiver exemption to cultivation. The issue was solely whether the judgment under appeal was decided incorrectly as matters stood at the time. To repeat, the decision in *Wakeford* was not approval of the steps taken to remedy the defect noted in *Parker*. The Court did not consider the new Regulations and made no indication of approval. Some excerpts from *Wakeford* emphasize this conclusion including:

"Paragraph 26 The *Marihuana Medical Access Regulations* S.O.R. 2001 – 227, came into force on July 30, 2001. The Regulations define the circumstances in which patients and caregivers will be authorized by the Minister to possess and cultivate marihuana. We do not propose to summarize the effect of the Regulations or their apparent operation. It is possible that cases will arise in the future where the validity or operation of the Regulations will be an issue. (Emphasis added)

"Paragraph 62 Moreover, asserts the Appellant, the *Marihuana Medical Access Regulations* which came into force on July 30, 2001, after the appeal hearing, do not improve the supply situation for Canadian patients.

"Paragraph 64 We're also declined to admit the post-July fresh evidence as it relates to the supply issue. The operation of the recently promulgated Regulations and the results of the supply contract with Prairie Plant Systems are unknown with respect to the Appellant. Accordingly, we proceed on the basis of the record that was before the applications Judge.

"Paragraph 71 For these reasons, we conclude that the applications Judge did not err by concluding that the Appellant's Section 7 rights were not violated by the Respondent's failure to supply the appellant with a safe supply of marihuana. It is, therefore, not necessary to consider either the principles of the fundamental justice component of the Section 7 analysis or the appropriateness of making the type of positive order the Appellant seeks under Section 24 (1). In our view, in light of the major change in the legislative landscape represented by the new Regulations, it would be unwise to comment on these issues in the context of the previous legislative regime."

[20] It is a moot question whether the Applicant's request would have a different result had the Regulations been enacted *after* the one-year suspension period had expired as declared in *R. v. Parker*.

[38] In answer, it may very well be that the Regulations ***do not*** meet the rigorous objectives of the Court of Appeal decision in ***R. v. Parker***. Were the Regulations to fail to meet the required standards as stipulated in ***R. v. Parker***, then the declaration (having been determined effective at the end of the twelve-month July 31, 2001) would be in place and the impugned section currently of no force and effect.

[39] The Applicant's submission distilled to its core, is that the Court of Appeal in ***Parker***, having determined that s.4 (1) of the ***Act*** (as it applied to the possession of marihuana) was constitutionally invalid, and having suspended *that* finding for 12 months, had left Parliament with no choice but to *amend or re-enact* it (prior to lapse of the suspension) if Parliament were to preserve the prohibition on marihuana possession. As it turns out, Parliament did ***neither*** instead Regulations were enacted. In my view, that is entirely within Parliament's prerogative (i.e. Parliament could choose to do nothing and allow another mechanism, namely approval of a regulation by order-in council, to remedy the defect), provided that there is a correction addressing the underlying faults found in ***Parker***. In this instance, it appears that Parliament acquiesced in the choice of the remedy, allowing enactment (clearly sanctioned by it) of a set of comprehensive regulations.

[40] Through this expedient, statutory amendment or re-enactment of the impugned section was avoided.

[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 Govenor 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.

[42] Again, it is instructive on this point to return to the *dicta* in ***Parker***. Rosenberg J. A. wrote:

"I have concluded that the trial judge was right in finding that Parker needs marihuana to control the symptoms of his epilepsy. I have

also concluded that the prohibition on the cultivation and possession of marihuana is unconstitutional. Based on principles established by the Supreme Court of Canada, particularly in *R.v. Morgentaler*, [1988] 1 S.C.R. 30, 37 C.C.C. (3d) 449, 44 D.L.R. (4th) 385, where the court struck down the abortion provisions of the *Criminal Code*, and *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, 85 C.C.C. (3d) 15, 107 D.L.R. (4th) 342, where the court upheld the assisted suicide offence in the *Criminal Code*, I have concluded that forcing Parker to choose between his health and imprisonment violates his right to liberty and security of the person. I have also found that these violations of Parker's rights do not accord with the principles of fundamental justice. In particular, I have concluded that the possibility of an exemption under s. 56 dependent upon the unfettered and unstructured discretion of the Minister of Health is not consistent with the principles of fundamental justice."

[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 s7. 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 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."

[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.

Conclusion

[47] In light of that analysis the young person's application must succeed.

Released: January 2, 2003

Signed: Justice D W Phillips"