CANADA

PROVINCE OF PRINCE EDWARD ISLAND

COUNTY OF PRINCE

IN THE PROVINCIAL COURT

BEFORE THE HONOURABLE JUDGE RALPH C. THOMPSON
BETWEEN:

HER MAJESTY THE QUEEN
INFORMANT

AND:
RONALD BARRY STAVERT
ACCUSED

CROWN ATTORNEY: Marie-France Theriault

DEFENCE ATTORNEY: Clifford McCabe
HEARD AT: Summerside

DATES: January 28, 2003 Trial; March 14, 2003 Decision

CHARGE: 4(1) Controlled Drugs and Substances Act

[1] The accused is charged with illegal possession of marijuana pursuant to s. 4(1) of the Controlled Drugs and Substances Act ("CDSA"). He has made application to quash the information arguing that it does not disclose an offence known to law. The accused bases his application, essentially, on the Ontario Court of Appeal decision in R. v. Parker (2000) 146 CCC (3d) 193, which declared the prohibition against possession of marijuana in s. 4 of the CDSA invalid due to its failure to provide for legal possession of marijuana for medical uses.

[2] The status of the Parker decision in this Province and the scope of the declaration rendered in Parker are very much in issue in this application.

[3] The applicant submits that the Federal Crown is estopped from arguing that s. 4 of the CDSA is valid legislation on the basis that the Parker decision is binding on the Federal Crown throughout Canada. It must therefore be determined, inter alia, whether the prerequisites exist here for the operation of issue estoppel and, if so, whether issue estoppel should be applied.

[4] The applicant has not alleged any medical need for marijuana, as was present in Parker. He argues that s. 4 is now inoperative regardless of the reason for the alleged possession. The Parker case involved a severely epileptic accused, whose life threatening seizures were eased

by marijuana use. The decision in R. v. Clay (2000) 49 O.R. (3d) 577 rendered on the same day by the same Justices of the Ontario Court of Appeal, dealt with possession of marijuana for recreational use contrary to the Narcotic Control Act.

[5] The Crown here contends that the decision in Clay, which held that the marijuana prohibitions in the Narcotic Control Act were valid except for the lack of an exemption for medical use, should be read in conjunction with Parker in order to narrow the scope of application of the Parker decision to cases involving possession for medical use only. I cannot agree with this contention.

[6] Rosenberg J.A. indicated at the outset of his judgment on behalf of the Ontario Court of Appeal in Parker that the appeal in Clay concerned the criminal law power to penalize the possession of marijuana while the Crown appeal in Parker concerned the medical use of marijuana.

[7] The Court in the Clay decision clearly indicated its view that it is intra vires Parliament to pass legislation which governs the possession of marijuana. The Court in Clay made reference to its ruling in Parker.

[8] The Ontario Court of Appeal's decision in Parker is not in conflict with its decision in Clay. In fact there is reference in both decisions to the Court's view that the possession prohibitions in the applicable legislation were only invalid because of Parliament's failure to properly safeguard the right to possess marijuana for medical uses where such use was shown to be medically justified.

[9] Having found s. 4 of the CDSA to be invalid in its present form because of its failure to provide an appropriate mechanism for medical exemption where an ill person's rights under the Charter warranted it, Rosenberg J.A. then went on to consider whether a reading in of the medical exemption was justified in order to avoid a declaration of invalidity.

[10] At page 39 of the decision Rosenberg J.A. states: I also do not agree with the trial judge that it was appropriate to read a medical exemption into the legislation. In this respect, I agree with the submissions of the Crown. In light of the leading decisions on remedy in Schachter v. Canada, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203, 173 D.L.R. (4th) 1 and Rodriguez, 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. Since the federal Crown takes this position in defending its own legislation, it is only necessary for me to briefly indicate my reasons for reaching the same conclusion with respect to the Controlled Drugs and Substances Act. Since the Narcotic Control [page 265] Act has been repealed by Parliament, it is unnecessary to strike down the offending provision.

[11] Later on page 39 of the decision Rosenberg J.A. relies upon the decision of the Supreme Court of Canada as follows: In Schachter, Lamer C.J.C. reviewed the factors to be considered in determining whether or not reading in is an appropriate remedy by reference to the factors developed by the Court in R. v. Oakes, [1986] 1 S.C.R. 103, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200. Reading in is particularly appropriate where the legislation fails because it is not carefully tailored to be a minimal intrusion or it has effects that are disproportionate

to its purpose. The defects in the Controlled Drugs and Substances Act fall within this rationale and thus reading in is a potential remedy. Even so, reading in will not be appropriate if "the question of how the statute ought to be extended in order to comply with the Constitution cannot be answered with a sufficient degree of precision on the basis of constitutional analysis": Schachter at p. 705. To read in an exemption in such circumstances would "amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. This is the task of the legislature not the courts": Schachter at p. 707.

[12] The Crown had argued on its appeal in Parker that the complexity of the issues to be addressed in reading in a medical exemption was such as to preclude reading in as an appropriate remedy. At page 40 of the decision Rosenberg J.A. states:
I do not necessarily accept that all of these problems necessarily flow from the remedy chosen by the trial judge. [FN21] I do accept, however, that the Crown has raised matters of sufficient complexity that reading in is not an appropriate remedy. For these reasons, I agree with the Crown that the prohibition on simple possession of marihuana in s. 4 of the Controlled Drugs and Substances Act must be struck down.
-...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 Sates 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.
-...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 [page 267] 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.

[13] At page 41 of the decision, the court in Parker rejected the submission of an intervener that the appropriate remedy was a constitutional exemption for persons requiring marijuana for medical purposes.

[14] What the Ontario Court of Appeal clearly did in Parker was declare the marijuana possession prohibition in s. 4 of the CDSA to be invalid without exception. It also suspended the declaration of invalidity for a period of twelve months " ...to provide Parliament with the opportunity to fill the void". (Parker at page 40)

[15] The Federal Crown did not appeal the Ontario Court of Appeal decision in Parker, and there has been nothing presented to the court in the instant application to indicate that Parliament did anything to avail itself of the opportunity to pass remedial legislation to cure the defect in s. 4. The foregoing preceded the Ontario Court of Justice decision in R. v. J.P. [2003] O.J. 1 of January 2, 2003, which in turn appears to have prompted this application.

[16] In J.P. an application to quash an information alleging a marijuana possession offence

contrary to s. 4 of the CDSA was granted on the basis that the accused was charged with offences unknown in law. At issue in J.P. was whether the enactment of regulations by the Governor General in Council, which provided for an exemption for medical use, was sufficient to comply with the constitutional requirements indicated by the Ontario Court of Appeal in Parker. In granting the application to quash, Phillips J. at page 12 of the decision stated:

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.

[17] The Ontario Court of Justice decision in J.P. is currently under appeal. Furthermore the lower court in Ontario, in deciding J.P., was bound by the Ontario Court of Appeal decision in Parker. This court is not bound by either level of the Ontario Courts, although in my view a decision of the court of appeal of a province, being at a level directly below the Supreme Court of Canada, should be followed unless very good reasons can be given for not doing so.

[18] What then of the position of the Federal Crown in other jurisdictions across Canada? Is the Federal Crown bound throughout Canada, as the prosecutor throughout Canada, of all CDSA offences by the decision of the Ontario Court of Appeal in Parker which it chose not to appeal? Put another way, is the Crown estopped from arguing that its marijuana possession law is valid in Prince Edward Island when it has been declared invalid in a decision which, as a final judgment, binds it in Ontario? Does issue estoppel apply in this matter to preclude the Crown from relitigating the issue of the validity of its legislation which was found to be invalid in Parker? And finally, even if issue estoppel does not apply, would it constitute an abuse of this court's process if the Crown were permitted to relitigate the issue which was finally determined in Parker when the Crown chose not to appeal the Parker decision? IS ISSUE ESTOPPEL AVAILABLE?

[19] In the case of Danyluk v. Ainsworth Technologies Inc

[2001] 2 S.C.R. 460, the Supreme Court of Canada dealt with issue estoppel in relation to an employment law case. At p. 9 of the unanimous decision of the court, delivered by Binnie J., the preconditions to the operation of issue estoppel were restated as follows: (1) that the same question has been decided; (2) that the judicial decision which is said to create the estoppel was final; and (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[20] There is no question that the applicant here raises the same issue as was involved in Parker . He challenges the validity of the law prohibiting simple possession of marijuana by virtue of this application, as did Mr. Parker.

[21] Secondly, there is no question that the decision of the Ontario Court of Appeal in Parker

is a final judgment since the Crown made no attempt to appeal to the Supreme Court of Canada.

[22] The only contentious aspect of the question as to whether issue estoppel is applicable arises out of the third precondition. Is there sufficient privity of the parties in order to justify a finding that issue estoppel is available to the applicant?

[23] It is not in issue that the Crown in this case, Her Majesty the Queen in Right of Canada, is the same party which prosecuted Mr. Parker. What privity then, if any, exists between Mr. Parker and the applicant here, Mr. Stavert? The Crown contends that there is no privity whatsoever. The applicant contends that there is privity between Mr. Parker and Mr. Stavert because they have both been charged with similar offences and because, there having been a Charter issue involved in Parker, Mr. Stavert therefore has standing as a citizen under the Canadian Charter of Rights and Freedoms to claim privity with Mr. Parker as a fellow citizen.

[24] Clearly, any person charged in Ontario, with simple possession of marijuana, could rely on the Parker decision in an application such as the accused has brought before this Court. Since the Crown is bound in relation to all simple possession of marijuana charges arising in Ontario due to the operation of stare decisis, all persons in the Province of Ontario, all 12 million of them, have acquired an immunity from prosecution for marijuana possession which may be anything from short term to permanent and in fact counsel indicated on this application that all simple possession charges were being adjourned in Ontario pending the outcome of the appeal in the J.P. case. It may well be, however, that it is stretching the concept of privity to the breaking point to hold that there is privity between Mr. Parker and Mr. Stavert.

[25] The case law and legal articles which deal with issue estoppel and abuse of process and the relationship of one to the other indicate an area of law which is in flux. (See e.g. G.D. Watson's Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality, 69 Can. Bar Review 623)

[26] The whole question of whether the courts in Canada are moving away from the strict rules which govern the application of issue estoppel in order to permit a broader application of issue estoppel and a corresponding narrower application of abuse of process is less than entirely clear.

[27] Counsel have referred the court to the case of LeBar v. Canada [1987] 1 F.C. 585, a decision of the Federal Court - Trial Division, where the issue was whether the Federal Crown could relitigate a matter previously decided in the Federal Court of Appeal in relation to another inmate where the Crown had not appealed the prior decision and the only lack of mutuality in the two actions was identity of the plaintiffs. At p. 6 of the decision, Muldoon J. states: Here, in the case at bar, the issue being indeed eadem questio, and the Appeal Division's resolution of that same question having been a final decision, the only deficiency from perfect issue estoppel is that, whereas the Crown is the same defendant both in the MacIntyre case and the case at bar, this present plaintiff is LeBar and not MacIntyre. Thus there is no exact mutuality of parties, but in light of the circumstances it will be observed that such lack affords no comfort to the defendant.

[28] There is no specific reference to issue estoppel actually being applied. In LeBar,

Muldoon J. discusses the Supreme Court of Canada decision in Emms v. The Queen [1979] 2 S.C.R. 1148. That case involved the applicability of an unappealed Federal Court of Appeal decision which had decided the same question which was in issue in Emms. Muldoon J. made the following observation about the Supreme Court's decision at p. 7: It will be noted that the majority express neither concern about, nor mention of, the question of res judicata. Nor does the majority judgment trouble even to consider mutuality of parties. They simply applied the pronouncement that the impugned sub-regulation was ultra vires asserted by and in the Ouimet case, to the issues raised by, and the plight of, the plaintiff Emms, in the matter before them. They accepted that the unappealed decision of the Appeal Division in Ouimet was correct and, that being so, it interpreted and proclaimed the law to which servants of the Crown, and the Crown itself, are bound to render acquiescence and obedience. That surely is little different, if at all, from the state of affairs in the case here at bar.

[29] Since the Federal Court - Trial Division in LeBar was bound by the earlier decision of the Federal Court of Appeal, LeBar in fact was decided on the basis of stare decisis (see LeBar at paragraph 20). Therefore no determination was required as to whether issue estoppel or a stay of proceedings for abuse of process should have been ordered.

[30] In any event the availability of issue estoppel in the present application to quash the information before plea is governed by s. 606(1) and s. 613 of the Criminal Code. Section 606(1) states: An accused who is called upon to plead may plead guilty or not guilty, or the special pleas authorized by this Part, and no others.

[31] The special pleas of autrefois acquit, autrefois convict, pardon and justification are provided for in s. 607 and s. 609 of the Criminal Code. Section 613 states: Any ground of defence for which a special plea is not provided by this Act may be relied upon under the plea of not guilty.

[32] In The Law of Evidence in Canada, the second edition, Sopinka, Lederman and Bryant state at p. 1107: There is no plea to raise an issue estoppel; the accused must plead not guilty.

[33] Issue estoppel therefore cannot be raised at this time in these proceedings since no plea has yet been entered. ABUSE OF PROCESS

[34] There are various ways in which an abuse of a court's process can occur. The two Supreme Court of Canada cases which in my view are most on point are R. v. Jewitt (1985) 21 CCC (3d) 7 and R. v. Conway (1989) 49 CCC (3d) 289. In Jewitt the trial court judge entered a stay of proceedings where a jury had found that there had been unlawful entrapment by an undercover police officer. Dickson C.J.C. for a unanimous court, at p. 14 of the above report, sets out the prerequisites for the exercise of a court's discretion to enter a stay of proceedings. In Conway L'Heureux-Dube J. at pp. 301-302 restated Jewitt and elaborated as follows: A trial judge has discretion to stay proceedings in order to remedy an abuse of the court's process. This court affirmed the discretion "where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community's sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings": R. v. Jewitt (1985), 21 C.C.C. (3d) 7 at p. 14, 20 D.L.R. (4th) 651, [1985] 2 S.C.R. 128 (S.C.C.) borrowing from R. v. Young (1984), 13 C.C.C. (3d) 1, 46 O.R. (2d) 520, 40 C.R. (3d) 289 (Ont. C.A.). The judge's power may be exercised only in the " clearest of cases": Jewitt, supra, at p. 14. Under the doctrine of abuse of process, the unfair or oppressive treatment of an appellant disentitles the Crown to carry

on with the prosecution of the charge. -... It acknowledges that courts must have the respect and support of the community in order that the administration of criminal justice may properly fulfil its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[35] L'Heureux-Dube J. goes on to state at p. 302 of Conway: Stays for abuse of process are not limited to cases where there is evidence of prosecutorial misconduct.

[36] L'Heureux-Dube J relied upon the unanimous decision of the Supreme Court of Canada in R. v. Keyowski (1988) 40 CCC (3d) 481 where Wilson J. stated at p. 482: To define "oppressive" as requiring misconduct or an improper motive would, in my view, unduly restrict the operation of the doctrine.

[37] Although Wilson J. in Keyowski makes reference to the common law doctrine of abuse of process possibly being subsumed in s. 7 of the Charter at p. 484, she indicates that the court preferred to leave the relationship of s. 7 of the Charter and the doctrine of abuse of process to another day.

[38] There are in fact now numerous decisions where stays of proceedings have been entered when courts have determined that permitting charges to proceed would be contrary to the principles of fundamental justice applicable under s. 7 of the Charter. Many of those cases do not appear to have involved prosecutorial misconduct or improper motive. [See R. v. Quinn (1989) 54 CCC (3d) 157, (Que. C.A.); R. v. Lee (1995) 26 W.C.B. 67 (B.C. Prov. Ct.); R. v. Leibel (2000) 202 Sask. R. 206 (Sask. Q.B.).]

[39] I make no finding in this case of any prosecutorial misconduct or improper motive on the part of the Federal Crown. What is of greater concern is 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.

[40] Counsel for the applicant has argued that although this court may not be bound by the Parker decision, the Federal Crown is bound by Parker. I fail to see how it could be otherwise. We are not dealing here with divergent approaches to prosecutions by various autonomous Attorneys General of different provinces. We are here dealing with a single, indivisible entity which had jurisdiction throughout Canada to prosecute offences such as those with which Mr. Parker was charged and with which Mr. Stavert now stands charged.

[41] When the Ontario Court of Appeal rendered its judgment in Parker, the Federal Crown essentially had two options. It could have appealed or it could have elected not to appeal and accept Parker as a final judgment. It chose the latter approach.

[42] The decision in Parker was not a judgment in personam which applied only to Mr. Parker. The Ontario Court of Appeal's ruling struck down that part of s. 4 of the CDSA which prohibited marijuana possession. Clearly, that ruling became the law in Ontario as of July 31, 2000, subject to the one year suspension of the operation of the declaration, which afforded Parliament what should have been an ample opportunity to pass remedial legislation if it had chosen to do so.

[43] Notwithstanding the clear and unequivocal language in the Parker decision, Parliament chose not to act and on July 31, 2001, the declaration granted in Parker came into effect. The Governor General in Council did pass the Marihuana Medical Access Regulations which the Federal Crown has attempted unsuccessfully to argue are sufficient compliance with what was required by Parker.

[44] The inadequacy of those regulations has already been ruled upon by the Ontario Court of Justice in the J.P. decision of January 2, 2003, and more recently by the Ontario Superior Court of Justice decision of January 9, 2003, in Hitzig v. Canada [2003] O.J. No. 12. In Hitzig, Lederman J. assessed the validity of the Marihuana Medical Access Regulations and declared them to be of no force or effect because their violation of the applicant's s. 7 Charter rights was not saved by s. 1 of the Charter. [45] In R. v. Barnes [2003] O.J. No. 261, a January 10, 2003, decision of the Ontario Court of Justice, Moore J. followed the decision in J.P..

[46] The law in Ontario therefore continues to be unchanged from Parker except that later decisions, now including the Ontario Superior Court decision in Hitzig, have ruled that the Federal Government's action in passing regulations has not brought it into compliance with the Charter, and the invalidity of the impugned legislation continues.

[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. [48] At page 1 of the Hitzig decision, Lederman J. makes reference to a recent announcement by the Minister of Justice of his intention to introduce legislation to decriminalize the simple possession of less than 30 grams of marijuana.

[49] In September of 2002 the Senate Special Committee on Illegal Drugs released its report entitled Cannabis: Our Position For a Canadian Public Policy. That four volume report contains eleven recommendations on the direction in which the Senate Special Committee considers the Government of Canada should move in relation to the control of cannabis. Recommendation #6 of the Report states: The Committee recommends that the Government of Canada amend the Controlled Drugs and Substances Act to create a criminal exemption scheme. This legislation should stipulate the conditions of obtaining licenses as well as for producing and selling cannabis; criminal penalties for illegal trafficking and export; and the preservation of criminal penalties for all activities falling outside the scope of the exemption scheme.

[50] There are societal interests to be protected here. There is at present an apparent need for some form of regulatory scheme to control the use of marijuana, whether it carries criminal or non-criminal sanctions. What is more important is that the law have a national application where the Federal Crown has jurisdiction. To restate L'Heureux- Dube J. at p. 302 of Conway: Where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[51] This in my view is one of those "clearest of cases" referred to in Jewitt where a stay of proceedings should be entered by this court in order to avoid an abuse of its own process. All residents of Canada, wherever they are situated, are entitled, in fairness, to expect a uniformity of approach from the Federal Crown, wherever it performs its prosecutorial function. Until such time as the law is changed by Parliament, or the higher courts provide a ruling which will enable such approach, this charge involving the simple possession of marijuana will not proceed in this court.

[52] A stay of proceedings is therefore entered in this matter.

Ralph C. Thompson PCJ