***R. v. J.P.*, (2003-10-07) ONCA C40043**
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THIS IS AN APPEAL UNDER THE

YOUNG OFFENDERS ACT

AND IS SUBJECT TO s. 38 OF THE ACT WHICH PROVIDES:

38.(1) No person shall publish by any means any report

a) of an offence committed or alleged to have been committed by a young person, unless an order has been made under section 16 with respect thereto, or

b) of a hearing, adjudication, disposition or appeal concerning a young person who committed or is alleged to have committed an offence in which the name of the young person, a child or a young person who is a victim of the offence or a child or a young person who appeared as a witness in connection with the offence, or in which any information serving to identify such young person or child, is disclosed.

(2) Everyone who contravenes subsection (1)

a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

b) is guilty of an offence punishable on summary conviction.

DATE: **20031007**

DOCKET: **C40043**

COURT OF APPEAL FOR ONTARIO
DOHERTY, GOUDGE and SIMMONS JJ.A.

B E T W E E N:	)	
	)	
HER MAJESTY THE QUEEN	)	Peter DeFreitas, Rick Visca and Matthew Sullivan
	)	
	)	for the Appellant
Appellant	)	

	)	
- and -	)	
	)	
J.P. (A Young Person)	)	Brian F. McAllister
	)	for the Respondent
Respondent	)	
	)	
- and -	)	
	)	
CRIMINAL LAWYERS' ASSOCIATION	)	Paul Burstein for the Intervenor
	)	
Intervenor	)	
	)	Heard: July 30 and 31, 2003

On appeal from the judgment of Justice Steven Rogin of the Superior Court of Justice, dated May 16, 2003, reported at (2003), 174 C.C.C. (3d) 566, dismissing an appeal by the Crown from the order of Justice Douglas W. Phillips of the Ontario Court of Justice, dated January 2, 2003, reported at (2003), 8 C.R. (6th) 170, dismissing certain charges against the respondent.

BY THE COURT:

[1] The respondent was charged with possession of marihuana on April 12, 2002, breach of probation arising out of that possession, and a third charge which is irrelevant for the purposes of this appeal. He brought a motion before the trial judge seeking a dismissal of the charges, claiming that as of April 12, 2002, there was no offence of possession of marihuana in force. The trial judge accepted that submission and dismissed the two marihuana-related charges. The Crown appealed unsuccessfully to the Superior Court. The Crown now seeks leave to appeal and if leave is granted appeals from the order of the Superior Court judge on a question of law alone.

[2] We would grant leave to appeal and would dismiss the appeal.

[3] Section 4 of the *Controlled Drug and Substances Act*, S.C. 1996, c. 19 (*"CDSA*") states:

Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

[4] Marihuana is a Schedule II drug.

[5] On July 31, 2000, in *R. v. Parker* (2000), 146 C.C.C. (3d) 193, this court held that the prohibition against possession of marihuana in s. 4 of the *CDSA* was unconstitutional, absent a constitutionally acceptable medical exemption to that prohibition. The court's order read in part:

This court orders that the remedy granted by the trial judge is varied by declaring the marihuana

prohibition in s. 4 of the *Controlled Drug and Substances Act* to be invalid. The declaration of invalidity is suspended for a period of twelve months.

[6] By virtue of the order in *Parker*, the criminal prohibition against the possession of marihuana in s. 4 of the *CDSA* remained in effect until July 31, 2001.

[7] On July 30, 2001, the government brought into force the *Marihuana Medical Access Regulations* S.O.R./2001-227 ("*MMAR*"). These regulations purported to alter the criminal prohibition against the possession of marihuana set out in s. 4 of the *CDSA* by adding provisions that permitted possession and cultivation of marihuana for medical purposes by those who had received the requisite authorizations under the *MMAR*.

[8] In *Hitzig v. Her Majesty the Queen* (C39532; C39738; C39740), released concurrently with these reasons, the court determined that the *MMAR* as enacted did not provide a constitutionally acceptable medical exemption to the criminal prohibition against possession of marihuana. The court deleted the constitutionally offensive provisions of the *MMAR*, leaving a constitutionally valid medical exemption and a constitutional prohibition against possession of marihuana in s. 4 of the *CDSA*.

[9] The respondent's alleged possession of marihuana has nothing to do with medical need. He did not argue that the *MMAR* did not provide a constitutionally acceptable medical exemption to the criminal prohibition against possession. He submitted that even if the *MMAR* provided a constitutionally acceptable medical exemption, they did not have any effect on the declaration of the invalidity of s. 4 of the *CDSA* made in *Parker*, *supra*. He submitted that by its terms, the *Parker* order took effect on July 31, 2001, rendering s. 4 of no force and effect as it applied to marihuana, and absent a re-enactment of that section, there was no crime of possession of marihuana in Ontario from July 31, 2001 forward.

[10] For different reasons, the trial court and the Superior Court held that regardless of the constitutional validity of the medical exemption created by the *MMAR*, those regulations could not have any effect on the declaration of invalidity made with respect to s. 4 of the *CDSA* in *Parker, supra*. Both courts held that consequent upon that declaration, there was no crime of possession of marihuana in existence on the day the respondent was charged.

[11] This court enjoys an advantage over the trial court and the Superior Court. Having held in *Hitzig, supra*, that the *MMAR* did not create a constitutionally valid medical exemption, we can determine the merits of the respondent's claim that there was no charge of possession of marihuana in existence on April 12, 2002 on that basis. Viewed in light of our holding in *Hitzig*, the analysis of the respondent's claim becomes straightforward. As of April 12, 2002 when the respondent was charged, the prohibition against possession of marihuana in s. 4 of the *CDSA* was subject to the exemption created by the *MMAR*. As we have held, the *MMAR* did not create a constitutionally acceptable medical exemption. In *Parker*, this court made it clear that the criminal prohibition against possession of marihuana, absent a constitutionally acceptable medical exemption, was of no force and effect. As of April 12, 2002, there was no constitutionally acceptable medical exemption. It follows that as of that date the offence of possession of marihuana in s. 4 of the *CDSA* was of no force and effect. The respondent could not be prosecuted.

[12] The Crown attempts to counter this straightforward analysis with a novel argument. It submits that as long as the Government moved to cure the constitutional defect identified by the court in the criminal prohibition against possession of marihuana, during the time when the court's order in *Parker, supra,* was suspended, the possession offence in s. 4 of the *CDSA* remained in full force and effect, even if it was eventually determined that the Government's attempts to create a valid medical exemption were inadequate. As we understand this argument, the offence of possession of marihuana would only become of no force and effect if the court so declared it and either did not suspend its declaration or the Government did not alter the prohibition during the suspension period to bring it into compliance with the *Charter*.

[13] Applying this argument to the facts of the case, the Government submits that as the *MMAR* came into force before the one-year suspension had expired, the possession offence remained in effect unless and until the *MMAR* was found to be constitutionally inadequate. Lederman J. made that finding in *Hitzig v. Canada* (2003), 171 C.C.C. (3d) 18 (S.C.J.) in January 2003, but suspended his declaration that the *MMAR* was unconstitutional for six months. The Government argues that this means that the possession prohibition continued during the suspension period. The Government completes the argument by pointing to the interim policy brought into effect during the six-month suspension provided for by Lederman J. According to the Government, that policy, which further alters the nature of the possession prohibition, keeps the possession offence in place unless and until the courts declare that the interim policy does not provide an adequate medical exemption. Furthermore, according to the Crown's argument, if the court were to suspend that declaration, the possession prohibition would remain in effect during that suspension.

[14] The Crown's contention that the suspension of court declarations somehow cascade one through the other to preserve the validity of these charges is based on a misunderstanding of the nature of the order in *Parker*, *supra*, and the order made by Lederman J. in *Hitzig*. The *Parker* order by its terms took effect one year after its pronouncement. That order was never varied. After the *MMAR* came into effect, the question was not whether the enactment of the *MMAR* had any effect on the *Parker* order, but rather whether the prohibition against possession of marihuana in s. 4 of the *CDSA*, as modified by the *MMAR*, was constitutional. If it was, the offence of possession was in force. Paired with the suspension of the declaration in *Parker*, this would have the effect of keeping the possession prohibition in force continually. If the *MMAR* did not create a constitutionally valid exception, as we have held, then according to the ratio in *Parker*, the possession prohibition in s. 4 was unconstitutional and of no force and effect. The determination of whether there was an offence of possession of marihuana in force as of April 2002 depended not on the terms of the *Parker* order but on whether the Government had cured the constitutional defect identified in *Parker*. It had not.

[15] The order made by Lederman J. in *Hitzig* in January 2003 did not address the prohibition against possession in s. 4 of the *CDSA*. While, according to the ratio in *Parker, supra,* Lederman J.'s determination that the *MMAR* did not provide an adequate medical exemption meant that there was no constitutional prohibition against possession of marihuana in s. 4 of the *CDSA*, Lederman J. did not make that declaration. Nothing in his order was relevant to whether the offence of possession of marihuana existed in April 2002, when the respondent was charged. The suspension of that order could have no effect on the status of the offence of possession of marihuana.

[16] The policy put in place in July 2003, fourteen months after these charges were laid, was irrelevant to whether the offence of possession of marihuana existed in April 2002. An accused must be able to know on the day that he is charged whether the offence with which he is charged exists. The accused cannot be told that the validity of the charge will depend on what the Government may choose to do at some future date. The determination of whether there was a crime of possession of marihuana in force on the day the respondent was charged turned on whether s. 4 combined with the *MMAR* created a constitutional prohibition against the possession of marihuana.

[17] Although we agree with the conclusion reached by the trial judge and the Superior Court judge, we do not agree with their analyses. As the analyses may have application in future cases, we will set out our reasons for disagreeing with their approaches.

[18] The essence of the trial judge's reasoning is found in para. 46 of his reasons:

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. [Emphasis in original].

[19] Our holding in *Hitzig* makes it clear that we do not agree with the trial judge's conclusion that the defect identified in *Parker* could not be remedied by regulation. Section 4 of the *CDSA* prohibits possession of marihuana "except as authorized under the regulations ...". These words clearly indicate Parliament's intention that the scope of the possession prohibition should be subject to change by regulation. By s. 55 of the *CDSA,* Parliament delegated broad legislative powers to the Governor-in-Council. Section 55(1)(a) specifically addresses regulations relating to possession:

The Governor in Council may make regulations for carrying out the purposes and provisions of this Act including ...

(a) governing, controlling, limiting, authorizing the importation into Canada exportation from Canada, production, packaging, sending, transportation, delivery, sale, provision, administration, possession or obtaining of or other dealing in any controlled substances ... .

[20] Parliament's power to delegate its lawmaking authority to a subordinate entity such as the Governor-in-Council, while not absolute, is very broad: P.W. Hogg, *Constitutional Law of Canada,* loose-leaf edition (Toronto: Carswell) at pp. 14-1-14-4. The breadth of the power to delegate the law of Parliament's lawmaking function is demonstrated in *Re Gray* (1918), 57 S.C.R. 150, a case involving a provision of the *War Measures Act*, *1914*, S.C. 1914 (2d Sess.), c. 2, which delegated very broad lawmaking powers to the Governor-in-Council. The majority of the Supreme Court upheld the delegation of those sweeping powers to the Governor-in-Council. Chief Justice

Fitzpatrick said, at 157:

Parliament cannot, indeed, abdicate its functions, but within reasonable limits at any rate it can delegate its powers to the executive government. Such powers must necessarily be subject to determination at any time by Parliament, and needless to say the acts of the executive, under its delegated authority, must fall within the ambit of the legislative pronouncement by which its authority is measured.

[21] Anglin J. described the scope of Parliament's power to delegate in these terms, at 176:

A complete abdication by Parliament of its legislative functions is something so inconceivable that the constitutionality of an attempt to do anything of the kind need not be considered. Short of such an abdication, any limited delegation would seem to be within the ambit of a legislative jurisdiction ... .

[22] Anglin J. went on to observe that any attempt by the court to limit Parliament's power to delegate its lawmaking function was in fact a court imposed restriction on the legislative powers of Parliament.

[23] Duff J. provided an excellent explanation of subordinate legislation, at 170:

There is no attempt to substitute the executive for Parliament in the sense of disturbing the existing balance of constitutional authority by aggrandizing the prerogative at the expense of the legislature. The powers granted could at any time be revoked and anything done under them nullified by parliament, which parliament did not, and for that matter could not, abandon any of its own legislative jurisdiction. The true view of the effect of this type of legislation is that the subordinate body in which the law-making authority is vested by it is intended to act as the agent or organ of the legislature and that the acts of the agent take effect by virtue of the antecedent legislative declaration (express or implied) that they shall have the force of law. ...

[24] Stripped to their essentials, the *MMAR* are regulations governing "the possession or obtaining of or other dealing in" marihuana. As such, they are clearly within the regulation making power entrusted to the Governor-in-Council by s. 55(1)(a) of the *CDSA*. Like any other Government action, those regulations were subject to *Charter* challenge. The outcome of that challenge, however, depended on whether the substance of the regulations were consistent with *Charter* demands and not on the fact that the substance appears in regulations rather than in the statute.

[25] In his reasons, at para. 41, the trial judge equated Parliament's delegation of the regulation making power to the Governor-in-Council with s. 56 of the *CDSA*, which gave the Minister absolute discretion to decide who should receive a medical exemption. The two are fundamentally different. Using the regulation-making power, the Governor-in-Council set out a legislative scheme for determining entitlement to the medical exemption. That scheme is subject to *Charter* challenge. Under s. 56 of the *CDSA*, there was no scheme. Instead, the Minister was given a total discretion. That law, like the regulations, was subject to *Charter* challenge. Both withstood or failed that challenge based on their content. Section 56 failed the test because it gave the Minister untrammelled discretion. The *MMAR* do not suffer from that defect. If the Governor-in-Council had

purported to regulate by way of a provision that gave the Minister absolute discretion to decide who should receive a medical exemption, then the regulation, like the discretion granted by s. 56, would be constitutionally invalid.

[26] The trial judge read the references by Rosenberg J.A. in *Parker, supra*, to Parliament's responsibility to legislate as indicating that any constitutionally acceptable medical exemption had to be in the statute itself. We do not read his reasons that way. As explained by Duff J., in *Re Gray, supra,* subordinate legislation in the form of regulations is as much an expression of Parliament's will as is a provision in a statute. When Rosenberg J.A. in *Parker*, at para. 204, referred to issues being "addressed by Parliament", he in no way excluded the exercise of lawmaking authority properly delegated to the Governor-in-Council by Parliament. Regulations are also legislation, albeit subordinate legislation. When Rosenberg J.A. referred to a "legislative scheme" at para. 205, he did not exclude the possibility of a scheme brought forward by way of regulation.

[27] Nothing in the order of this court in *Parker, supra*, or in the provisions of the *CDSA* precluded resort to the regulation making power to remedy the constitutional defect identified in *Parker*.

[28] The Superior Court judge did not adopt the reasoning of the trial judge. He held that since Parliament had not re-enacted s. 4 of the *CDSA* after it was declared to be of no force and effect in *Parker,* there was no prohibition against the possession of marihuana in existence as of July 31, 2001, when the suspension of the order made in *Parker* expired. As we understand his reasons, the Superior Court judge held that had Parliament simply re-enacted s. 4 of the *CDSA* unaltered when it brought in the *MMAR,* then there would have been an offence of possession of marihuana in existence after the one-year suspension granted in *Parker* expired.

[29] The Superior Court judge treated this court's order in *Parker* as the equivalent of a Parliamentary repeal of s. 4 of the *CDSA* as it applied to marihuana. We do not share that interpretation. For convenience, we repeat the salient words of the order:

The remedy granted by the trial judge is varied by declaring the marihuana prohibition in s. 4 of the *Control Drug and Substances Act* to be invalid.

[30] The order was directed at the marihuana prohibition in s. 4 as it existed when *Parker* was decided. The authority to make the declaration emanates from s. 52 of the *Constitution Act, 1982*, which provides that:

[A]ny law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.

[31] The court in *Parker, supra*, declared that the marihuana prohibition in s. 4 was inconsistent with the *Charter* and consequently of no force or effect absent an adequate medical exemption. In making the declaration, the court did not and could not repeal or otherwise alter the terms of the statute. The court could only declare the constitutionally offensive part of the legislation to be of no force or effect.

[32] By bringing forward the *MMAR*, the Government altered the scope of the possession prohibition in s. 4 of the *CDSA*. After the *MMAR* came into force, the question therefore became whether the prohibition against possession of marihuana as modified by the *MMAR* was constitutional. If it was, then the possession prohibition was in force. If the *MMAR* did not solve the constitutional problem, then the possession prohibition, even as modified by the *MMAR*, was of no force or effect.

[33] There was no need to amend or re-enact s. 4 of the *CDSA* to address the constitutional problem in *Parker*. That problem arose from the absence of a constitutionally adequate medical exemption. As our order in *Hitzig* demonstrates, the prohibition against possession of marihuana in s. 4 is in force when there is a constitutionally acceptable medical exemption in force.

[34] We would dismiss the appeal

RELEASED: "OCT 07 2003"

"DD"

"Doherty J.A."

S.T. Goudge J.A."

"Janet Simmons J.A."