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2003 BCPC 0328		File No:	62876-1
		Registry:	New Westminster

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

Criminal Division

REGINA

v.

KURTIS LEE MASSE

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE P. CHEN

Counsel for the Crown:	David Greenbank
Counsel for the Defendant:	Troy Anderson
Place of Hearing:	New Westminster, B.C.
Dates of Hearing:	July 18 and July 30, 2003
Date of Judgment:	September 4, 2003

[1] Kurtis Lee Masse stands charged on information 62876-1, that on or about the 21st day of February, 2003 at or near the City of New Westminster, he did unlawfully possess a controlled substance, to wit: Cannabis (marihuana), contrary to Section 4(1) of the Controlled Drugs and Substances Act. This is an application pursuant to section 601 of the Criminal Code of Canada to quash the information on the ground that it does not name an offence known to law as required by section 581(1) of the Code.

[2] The issue before me is simply this; is possession of cannabis (marihuana) an offence known to law in British Columbia?

[3] Counsel have presented, during submissions, the following cases: to consider: **Regina v. J.P.** [2003] O.J. No. 2354 (Ont. C.A.), **Regina v. J.P.** [2003] O.J. No. 1949 (Ont. S.C.J.), **Regina v. J.P.** [2003] O.J. No. 1 (Ont. C.J.), **Regina v. Peddle** [2003] O.J. No 2096 (Ont. C.J.), **Hitzig v. Canada** [2003] O.J. No. 12 (Ont. S.C.J.), **Regina v. Nicholls** [2003] B.C.J. No. 881 (B.C.P.C.), **Regina v. Ocoin** [2003] A.J. No. 633 (Alta. P.C.), **Regina v. Hadwen** [2003] S.J. No. 269 (Sask. P.C.), **Regina v. Clarke** [2003] N.S.J. No. 124 (N.S.P.C.), **Regina v. Stavert** [2003] P.E.I.J. No. 28 (P.E.I.P.C.), **Regina v. Barnes** [2003] O.J. No. 261 (Ont. C.J.), **R. Malmo-Levine,** [2000] (BCCA) 335, **R. v. Parker,** [2000] Docket No. C28732 (Ont. CA), **R. v. Clay,** 49 O.R. (3d) 577 (Ont. CA), **Wakeford v. Canada,** [2001] 162 C.C.C. (3d) 51 (Ont. CA), **R. v. Beaney,** [1969] 2 O.R. 71-85 (Co.Ct.J.), **R. v. Sandmoen,** [1986] O.J. No. 2745 (Ont. CA), **R. v. Dick,** [2002] B.C.J. No. 402 (BCPC), **R. v. Van Vliet,** [1988] B.C.J. No. 2480 (BCCA), **R. v. Turpin,** [1989] 1 S.C.R. 1296 (SCC), **R. v. Noyes,** [1986] B.C.J. No. 3127 (BCSC), **Lucas v. Toronto Police Service Board,** [2001] 54 O.R. (3d) 715 (Ont. S.C.J.), **R. v. R. (A.C.),** [2003] File No. 2365 (BCPC), **R. v Hansard Spruce Mills Ltd.,** [1954] 4 D.L.R. 590 (BCSC). After submissions I was presented with a further case, **R. v. Ryan Therrien,** (File No. 165-01, Smithers Registry, June 30, 2003, B.C. Provincial Court).

[4] I have read these cases but will not refer to all of them in this decision.

Court of Appeal Decisions in Ontario and British Columbia

[5] On July 31, 2000, the Ontario Court of Appeal in **R. v. Parker** severed the marihuana possession prohibition from other parts of section 4(1) of the Controlled Drugs and Substances Act and declared it to be invalid, but suspended the declaration of invalidity for a period of one year "to provide Parliament with the opportunity to fill the void". Mr. Parker was given a personal constitutional exemption from the possession offence during the period of suspended invalidity for possession of marihuana for his medical needs.

[6] Mr. Parker had epilepsy and needed marihuana to control his life-threatening grand mal seizures. He had been charged with cultivation of marihuana under the former Narcotic Control Act and with possession of marihuana under section 4(1) of the Controlled Drugs and Substances Act. The court held that forcing Mr. Parker to choose between his health and imprisonment constituted an unreasonable infringement on Mr. Parker's section 7 rights to liberty and security of the person.

[7] The court in **Parker** considered, in coming to its decision, Crown arguments that Mr. Parker had available to him the exemptions for his medical use of marihuana in the regulations and in section 56 of the Controlled Drugs and Substances Act.

[8] With respect to the regulations, Rosenberg, J.A. described their inadequacy at paragraph 155:

...Under s. 3 of the Narcotic Control Act and s. 4 of the Controlled Drugs and Substances Act it is an offence to have possession of any narcotic or scheduled substance respectively including marihuana except as authorized by the Act or regulations. While the regulations theoretically contemplate that a physician would prescribe marihuana, the evidence from the government witness was that since there is no legal source for the marihuana, no pharmacist could fill the prescription and that the government would not look favourably upon a physician who purported to write such a prescription. That witness also established the practical impossibility of Parker obtaining a legal source of marihuana...

[9] He concluded his analysis of the regulations at paragraph 163:

Parliament has created a defence to the possession and cultivation offences if the person can comply with the regulations. Those regulations, for example, permitted a person to legally possess the drug under the prescription of a physician. The government's own witness established that this defence or exemption is illusory. This is not consistent with the principles of fundamental justice.

[10] Rosenberg, J. then considered at paragraph 166 the Crown's argument with respect to the availability to Mr. Parker of an exemption under section 56 of the Controlled Drugs and Substances Act. That section states:

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.

[11] Rosenberg, J.A. at paragraph 177 stated:

The question remains; does this unfettered discretion 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...

[12] Later at paragraph 186, he compared the Crown's argument with respect to the availability of an exemption under s. 56 with Lamer, J.'s response to the Crown argument in **R. v. Smith (Edward Dewey)**, [1987] 1 S.C.R. 1045 that prosecutorial discretion could avoid violations of the right to protection against cruel and unusual punishment under s. 12 of the Charter, with respect to the validity of a 7 year minimum term of imprisonment for importing narcotics under the former Narcotic Control Act. He cited Lamer J. at pp. 1078-1079 as follows:

In its factum, the Crown alleged that such eventual violations could be, and are in fact, avoided through the proper use of prosecutorial discretion to charge for a lesser offence.
In my view, the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the Charter. To do so would be to disregard totally s. 52 of the Constitution Act, 1982 which provides that any law which is inconsistent with the Constitution is of no force and effect to the extent of the inconsistency and the courts are duty-bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter.
Therefore, to conclude, I find that the minimum term of imprisonment provided for by s. 5(2) of the Narcotic Control Act infringes the rights guaranteed by s. 12 and, as such, is a prima facie violation of the Charter. Subject to the section's being saved under s. 1, the minimum must be declared of no force or effect. [Emphasis added]

[13] Rosenberg, J.A. at paragraph 187 and 188 of **Parker** states:

187. In my view, this is a complete answer to the Crown's submission. The court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights. Section 56 fails to answer Parker's case because it puts an unfettered discretion in the hands of the Minister to determine what is in the best interests of Parker and other persons like him and leaves it to the Minister to avoid a violation of the patient's security of the person.
188. If I am wrong and, as a result, the deprivation of Parker's right to security of the person is in accord with the principles of fundamental justice because of the availability of the s.56 process, in my view, s.56 is no answer to the deprivation of Mr. Parker's right to liberty. The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the

principles of fundamental justice to subject that decision to unfettered ministerial discretion. It might well be consistent with the principles of fundamental justice to require the patient to obtain the approval of a physician, the traditional way in which such decisions are made. It might also be consistent with the principles of fundamental justice to legislate certain safeguards to ensure that the marihuana does not enter the illicit market. However I need not finally determine those issues, which, as I will explain in considering the appropriate remedy, are a matter for Parliament.

[14] Rosenberg, J.A. then rejected the trial judge's choice of remedy in reading a medical exemption into the legislation and applied the words of Lamer, C.J.C. in **Schachter v. Canada**, [1992] 2 S.C.R. 679 at paragraph 201 of **Parker**:

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. 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": **Schacter** at p. 707.

[15] The court in **Parker** agreed with the Crown submission that, should the court find a violation of s.7 because the legislation failed to provide adequate exemptions for medical use, the "only available remedy" would be 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.

[16] In the last paragraph of **Parker**, under the heading "Disposition", Rosenberg, J.A. concluded:

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 in s. 4 of the Controlled Drugs and Substances Act during the period of suspended invalidity for the possession of marihuana for his medical needs. I would set aside those parts of Sheppard J.'s judgment reading in a medical exemption into the former Narcotic Control Act and the Controlled Drugs and Substances Act and ordering the return of the plants seized in the September 1997 search. In all other respects, I would dismiss the Crown appeal.

[17] Given that the court in **Parker** applied the remedy that had been suggested by the Crown it is perhaps not surprising that the Crown did not appeal.

[18] In it's companion case of **R. v. Clay**, decided at the same time as **Parker**, the Ontario Court of Appeal dealt with the appeal of Mr. Clay, a recreational user of marihuana, from his conviction under the former Narcotic Control Act, R.S.C. 1985, c. N-1 for possession of cannabis sativa, trafficking in cannabis sativa, possession of cannabis sativa for the purposes of trafficking and the unlawful cultivation of marihuana. The court held that the marihuana prohibitions of the Narcotic Control Act were valid in all respects except that they did not include an exemption for medical use. Referring to its decision in **Parker**, Rosenberg, J.A. stated at paragraph 52:

I have found the marijuana prohibitions of the former Narcotic Control Act are valid in all respects except that they do not include an exemption for medical use. For the reasons I have given in **R.**

v. Parker, the appropriate remedy would ordinarily be a declaration of invalidity suspended for a period of time to permit Parliament to fill the void created by the declaration. The person who brought the charter challenge would normally be entitled to a constitutional exemption during that period, together with some other personal remedy to deal with the charge brought against him: see **Reference Remuneration of Judges of the Provincial Court of Prince Edward Island** [1998] 1. S.C.R. 3 at p. 20 155 D.L.R. (4^{th}) 1.

[19] However, in **Clay**, the Narcotic Control Act had already been repealed by the time of the decision and therefore no declaration was required. Moreover, the court held that, unlike Mr. Parker, Mr. Clay was not in that class of persons for whom the exemption was required. Mr. Clay's submission that legislation criminalizing personal possession of marihuana for recreational use was invalid did not succeed. Therefore, notwithstanding the declaration of invalidity in **Parker**, the corrective justice principle did not apply as it would not offend the community's sense of fair play and decency that Mr. Clay remain convicted, since the basis upon which he challenged the law had failed. The constitutional exemption that had been granted to Mr. Parker was not granted to Mr. Clay.

[20] The British Columbia Court of Appeal in **R. v. Malmo-Levine**, also held that the Narcotic Control Act's prohibitions against marihuana possession did not offend the operative principle of fundamental justice and dismissed the section 7 challenge to the legislation. However, that court did not consider the section 7 challenge on the basis of medical use of marihuana. Braidwood J.A. considered the **Parker** and **Clay** trial decisions (the appellate decisions had not yet been ruled on). Braidwood, J. stated at paragraph 160:

...The LeDain commission recommended the decriminalization of marihuana possession nearly thirty years ago based on similar arguments raised by the appellants in this case. Parliament has chosen not to act since then, although there are moves afoot to make exceptions for the medical use of marihuana in wake of recent decisions. Nevertheless, I do not feel it is the role of this Court to strike down the prohibition on the non-medical use of marihuana possession at this time.

[21] Braidwood, J.A. concluded in his decision at paragraph 163 that:

The provisions in the Narcotic Control Act prohibiting the possession of marihuana for personal use are not contrary to s.7 of the Charter of Rights and Freedoms. Accordingly, I would dismiss both appeals.

Marihuana Medical Access Regulations

[22] On July 30, 2001, one day before the suspension of the Ontario Court of Appeal's declaration of invalidity in **Parker** was to expire; the federal cabinet enacted the Marihuana Medical Access Regulations (MMAR). Orr, P.C.J in **Hadwen** provides a description and analysis of the MMAR at paragraphs 15 - 24:

15. The MMAR set out a scheme whereby persons requiring marihuana for medical purposes can 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.
16. 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.
17. 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.
18. 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.
19. 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 would outweigh the risks.
20. 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.
21. 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.
22. 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.)
23. 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 the 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.
24. 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.

[23] The Ontario Superior Court of Justice in **Hitzig** heard an application in September and October of 2002 (date of judgment January 9, 2003) for a declaration that the MMAR violated the applicants' right to liberty and security of the person guaranteed under s. 7 of the Charter and were unconstitutional. In allowing the application, Lederman, J. held that the failure to provide a legal source of marihuana did infringe the applicants' s. 7 rights in a manner inconsistent with the principles of fundamental justice. Lederman, J. declared the MMAR unconstitutional and invalid but suspended the declaration for a period of 6 months to provide time for the government to fix the MMAR or otherwise provide for legal supply of marihuana.

[24] In response to **Hitzig**, the government brought into force on July 8, 2003, the *Marijuana Exemption (Food and Drugs Act) Regulations*. S. 2 of those regulations states:

Marihuana produced under contract with Her Majesty in right of Canada is exempt from the application of the *Food and Drugs Act* and the regulations made under it, other than these Regulations.

[25] The Regulatory Impact and Analysis Statement relating to those regulations (but not part of those regulations) explicitly states that:

"The objective of this regulatory initiative is to allow the government to implement an interim response to the decision of the Ontario Superior Court of Justice in *Hitzig et al v. Her Majesty the Queen*. Although an appeal of the decision is presently before the Court of Appeal for Ontario, a request for a stay of the decision of the Superior Court pending determination of the appeal was refused. As a result, the government must, in the words of the Superior Court, "fix the *Marihuana Medical Access Regulations* (MMAR) or otherwise provide for a legal source and supply of the [marihuana]" for medical purposes before July 10, 2003.

[26] The Ontario Court of Justice in **R. v. J.P.**, in a decision dated January 2, 2003, heard an application for a declaration that the prohibition against the possession of marijuana in s.4(1) of the Controlled Drugs and Substances Act was no longer in force and that as a consequence, the counts in the information charging the accused did not disclose offences known to law. That is the same application as is now before this court. Phillips, J. allowed the application on the ground that the gap in the regulatory scheme identified in **Parker** had not been addressed by the MMAR and, the period that the declaration of invalidity was suspended now having passed, that legislation was no longer of any force and effect. Phillips, J. at paragraph 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....

[27] Further at paragraph 41, Phillips, J. compares the MMAR to the exemption in s. 56 of the Act that **Parker** had already found to be inadequate:

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.

[28] Phillips, J. concludes at paragraph 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 legitimately 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.

Provincial Court Decisions Subsequent to J.P. Decision of Phillips, J.

[29] Phillips, P.C.J.'s decision in **J.P.** was considered in a number of decisions from Ontario, Prince Edward Island and Nova Scotia as well as British Columbia.

[30] In **R. v. Barnes**, a January 10, 2003 decision of the Ontario Court of Justice, Moore, J. followed the decision of Phillips, J. in **J.P.**

[31] **R. v. Stavert**, a March 14, 2003 decision of Chief Judge Thompson of the Prince Edward Island Provincial Court, held that prosecution of Mr. Stavert for possession of marihuana was an abuse of process and entered a stay of proceedings.

[32] At paragraph 47 of **Stavert**, Chief Judge Thompson explains his reasons as follows:

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.

[33] **R. v. Clarke**, a March 31, 2003 decision of Judge Buchan of the Nova Scotia Provincial Court followed the **Stavert** decision.

[34] **R. v. Nicholls**, an April 16, 2003 decision of our court by my brother Judge Stansfield, dealt with pre-trial applications to terminate proceedings on a charge of simple possession of marihuana under s.4(1) of the Controlled Drugs and Substances Act. It is not clear whether the relief sought was a judicial stay or a quashing of the information as in the case at bar. In any event the grounds for the application are set out in paragraph 6 of the decision:

Mr. Nicholls' counsel, Mr. Weststrate, argued this application on three grounds:
a) it is a breach of Mr. Nicholls' s. 15 equality rights under the Charter to be prosecuted for an offence for which he could not be prosecuted were he simply to reside in another part of Canada;
b) pursuant to the reasoning in **Stavert**, the Crown is estopped from arguing that s. 4(1) discloses an offence known to law; or
c) in reliance upon both **Stavert** and **Clarke**, it is an affront to the community sense of fair play and decency - and thus an abuse of the process of the court - to permit the federal Crown to proceed against Mr. Nicholls when more than one third of Canada's population is what he characterizes as being "immune from similar prosecution" because of **Parker**.

[35] It is instructive at this point to consider the parameters that limited the scope of Stansfield, P.C.J.'s reasons which are set out at paragraph 7:

The application was not argued on the original premise of **Parker**, namely that s.4(1) is unconstitutional for its failure to provide for the s.7 rights of medical users. Nor did Mr. Weststrate address whether the federal government's regulatory response to **Parker** was or was not sufficient to "save" the section (an issue which as I mentioned has not yet been considered by the Ontario Court of Appeal, and has not to my knowledge been argued in B.C.). At the close of his argument, I asked Mr. Weststrate whether he was inviting me to consider the constitutionality of the section. But it is clear I cannot address that issue, in part because no notice was given of that constitutional challenge, and in part because the applicant did not directly argue the substantive effect of the new regulations. So these reasons are limited to the scope of the argument as framed by Mr. Weststrate's submissions.

[36] Stansfield, P.C.J. rejected the application on the basis that he disagreed with the **Stavert** and **Clarke** decisions and declined to follow them. His reasons at paragraphs 64 -67:

64. In considering why I reach a different conclusion than did the learned judges in **Stavert** and **Clarke**, it seems that the central difference in our analysis has to do with our different perspectives as to what was decided in **Parker** - or, more significantly, what was "not appealed" by the federal Crown following **Parker**.
65. In my view, what the federal Crown did not appeal - and in that sense, therefore accepted as "final" - was Justice Rosenberg's analysis of the breach of the s. 7 rights of persons requiring marihuana for medical purposes, those persons whose rights were violated because they were forced to "choose between (their) health and imprisonment" (**Parker**, para. 10). That the Crown did not appeal that conclusion is not surprising: Justice Rosenberg's analysis is compelling; I am not aware of any decision in which any judge has articulated a contrary view regarding the s. 7 implications for persons requiring marihuana for the protection of their health.
66. But **Parker** should not be viewed in isolation. Concurrently with its decision in **Parker** the Ontario Court of Appeal in **Clay** reached the same conclusion as had the B.C. Court of Appeal in **Malmo-Levine**, upholding the constitutionality of the prohibition against marihuana possession save for the medical use issue. To the extent one talks of "winning" or "losing", the combined effect of **Parker** and **Clay** was a "win" for the federal Crown: so long as they rectified the specific deficiencies affecting medical users (which they then attempted to do with the MMAR), they succeeded in defending the legislation.
67. I have said already that I disagree with the Crown's submission that the **Parker** declaration of constitutional invalidity was somehow only a partial declaration...I don't see any ambiguity in Justice Rosenberg's statement (at para.11) that "I would declare the prohibition on the possession of marihuana in the CDSA to be of no force and effect". Mr. Justice Rosenberg analogized to the **Bilodeau** decision to make the point that he was upholding the conviction of Mr. Clay notwithstanding the general declaration of constitutional invalidity. But of course the declaration was suspended, in keeping with the broader decision in **Clay** which supported Parliament's right to prohibit possession so long as Parliament attended to the s. 7 interests of medical users. It is my view that it remains to be determined whether the MMAR does or does not "pass constitutional muster", and whether it saves s. 4(1).

[37] In **Hadwen**, Judge Orr agreed with Ontario Court of Appeal's decision in **Parker** but disagreed with the Ontario Provincial Court decisions in **J.P.** and **Barnes.** At paragraphs 74 - 77:

74. 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, 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.
75. 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 just 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.
76. 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 raised 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?

[38] Judge Orr concluded his analysis of **J.P.** and **Barnes** at paragraph 82:

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

[39] In **R. v. R. (A.C.)** a July 3, 2003 decision of my brother Judge Palmer agreed with **Nicholls, Hadwen** and **R. v. Giesbrecht**, Unreported, May 27, 2003 (Sask. P.C.) in rejecting the accused's pre-trial application to quash the information on the ground that "no one can be convicted of an offence under an unconstitutional law".

[40] Judge Palmer, P.C.J., concluded at paragraphs 34 - 36:

34. In **Nicholls**, Stansfield, P.C.J., also declined to rule on the sufficiency or validity of the MMAR, stating at paragraph [70]:
As Justice Rosenberg later said in **Wakeford** (at para. 26), "cases will arise in the future where the validity or operation of the regulations will be in issue". Those cases now have arisen, and lower courts in Ontario have expressed the view that the MMAR do not pass constitutional muster. Those decisions are under appeal, and no doubt will work their way up the jurisprudential ladder unless the issue is overtaken by new legislation.
35. I find that the reasoning and conclusions in **Nicholls** and **Hadwen et al** are logical and compelling. Carey, P.C.J. in **Giesbrecht**, stated at paragraph [5]:
Given the state of flux surrounding these matters, the court does not feel bound by the Prince Edward Island, Nova Scotia and Ontario positions but prefers to agree with the British Columbia decision in **Nichols** (sic) and the Saskatchewan decision in **Hadwen et al**.
36. I concur, and find that, for the reasons thoroughly set out in those cases, s.4(1) of the CDSA remains valid legislation in British Columbia. I am also unable, in the absence of binding authority, to conclude that the "void created by [**Parker**] declaration" has not been validly filled by the MMAR.

R. v. J.P. Appellate Decision of Ontario Superior Court of Justice

[41] On May 16, 2003, the Ontario Superior Court of Justice delivered its decision on the Crown's appeal from Phillips, J.'s ruling in **R. v J.P.** In dismissing the appeal, Rogin, J stated at paragraph 9:

I agree with the disposition of Phillips J. in his judgment of January 2/03 and would dismiss the Crown's appeal for the following reasons:
(1) On July 31, 2000, Rosenberg, J. in **R. v. Parker**, severed marihuana from s.4 of the Controlled Drugs and Substances Act and declared it invalid. Section 4 as it relates to substances other than marihuana remains in full force and effect.
(2) The declaration of invalidity was suspended for a period of 12 months from July 31, 2000. Mr. Parker was given an exemption from the marihuana provision in s.4 during the period of suspended invalidity.
(3) As of July 31/01, s.4 of the Controlled Drugs and Substances Act as it related to marihuana was invalid. Section 4 includes the penalty section. [See **Kemp v. Roth** (1996), 141 D.L.R. (4^{th}) 25 at pg. 34 and 35:
A statute which is of no force and effect confers no rights. In the absence of a direction to the contrary, a declaration that a law is of no force or effect, invalidates the law from the time when the Charter (here s. 15) came into force or the legislation was enacted, whichever is later.

Professor Hogg in *Constitutional Law of Canada*, 3rd. ed. (Toronto: Carswell, 1992) states at pp. 1241-1242 (emphasis added):

A judicial decision that a law is unconstitutional is retroactive in the sense that it involves the nullification of the law from the outset. Indeed, any judicial decision must be retroactive in order to apply to the facts before the court, since those facts must have already occurred. That a court makes new law when it overrules prior doctrine or even when it decides an unprecedented case is not open to doubt; but a court does not make new law in the same way as a legislative body, that is, for the future only.

(4) Parliament's response to the Ontario Court of Appeal decision in **Parker** was to enact the Medical Marihuana Access Regulations, published in the Canada Gazette on June 14/01, to come into force on July 30/01. Justice Phillips recognized at para. 39 of his judgment, that the regulations have the force of law, which was conceded by the respondent both in this court and before Justice Phillips.

(5) However, Parliament at no time re-enacted s.4 of the Controlled Drugs and Substances Act, as it relates to marihuana. Accordingly, notwithstanding the enactment of the Medical Marihuana Access Regulations which allow possession of marihuana under certain circumstances, in no place in those regulations is there a prohibition against simple possession of marihuana.

[42] Rogin, J. summarized at paragraph 10:

In addition, since s.4 of the Controlled Drugs and Substances Act has not been re-enacted, as it relates to marihuana, there is no penalty in the Act for simple possession of marihuana even if it had been prohibited by the Medical Marihuana Access Regulations. It is to be noted, that there are no penalty sections set out in the Medical Marihuana Access Regulations.

[43] Rogin, J. then considers whether 's analysis of the MMAR could, by implication, prohibit possession of marihuana except as provided therein, effect of the **Parker** declaration on s.4 of the Controlled Drugs and Substances Act is at paragraph 14:

In **R. v. MacIntosh** [1995] 1 S.C.R. 686 Lamer C.J. as he then was, said the following, which is reproduced from Para. 38 of the Quicklaw Edition:

"As stated above, the overriding principle governing the interpretation of penal provisions is that ambiguity should be resolved in a manner most favourable to accused persons. Moreover, in choosing between two possible interpretations, a compelling consideration must be to give effect to the interpretation most consistent with the terms of the provision. As Dickson J. noted in **Marcotte**, [1976] 1 S.C.R. 108, supra, when freedom is at stake, clarity and certainty are of fundamental importance. He continued at p. 115:

If one is to be incarcerated, one should at least know that some Act of Parliament requires it in express terms, and not, at most, by implication.

Under s. 19 of the Criminal Code, ignorance of the law is no excuse to criminal liability. Our criminal justice system presumes that everyone knows the law. Yet we can hardly sustain such a presumption if courts adopt interpretations of penal provisions which rely on the reading-in of words which do not appear on the face of the provisions. How can a citizen possibly know the law in such a circumstance?

The Criminal Code is not a contract or a labour agreement. For that matter, it is qualitatively different from most other legislative enactments because of its direct and potentially profound impact on the personal liberty of citizens. The special nature of the Criminal Code requires an interpretive approach which is sensitive to liberty interests.

Therefore, an ambiguous penal provision must be interpreted in the manner most favourable to accused persons, and in the manner most likely to provide clarity and certainty in the criminal law."

British Columbia Decisions Since Nicholls

[44] There have been a number of British Columbia Provincial Court decisions agreeing with Stansfield, P.C.J.'s decision in **Nicholls** including **R. (A.C.)** and **R. v. Ryan Therrien**. Neither **Nicholls** nor **R. v. R. (A.C.)** considered the appellate decision in **J.P. Nicholls** predated the **J.P.** appellate decision. **R. (A.C.)** was filed on July 3, 2003 but argument was heard on March 27, 2003 and the appellate decision in **J.P.** does not appear to have been provided to the court or argued. In any event the appellate decision in **J.P.** is not referred to in Judge Palmer's reasons. The appellate decision in **J.P.** was presented to my brother Judge Milne in **Therrien** but there is no discussion of it in the reasons for judgment. Essentially, the court in **Therrien** adopted the reasons of Judge Stansfield in **Nicholls**, concluding at paragraph 18:

In this case I feel bound by the principle of judicial comity in relation to the judgment in **Nicholls**. The issues argued there are essentially the issues argued here, and I agree with the results therein, that is, s.4(1) of CDSA is valid legislation relating to non-medical use of marihuana and a prosecution thereunder is not an abuse of process of the court.

Argument

[45] Counsel for Mr. Masse submits that this court should apply the reasoning in reasons for judgment in **Parker** and **Clay** to find s.4(1) of the Controlled Drugs and Substances Act to be of no force and effect with respect to marihuana since July 31, 2001 and apply the reasoning in reasons for judgment in **J.P.** to find that the invalidity cannot be cured by the Medical Marihuana Access Regulations. Counsel for Mr. Masse submits in the alternative, that this court should apply the reasons for judgment in **Hitzig** to find that the Medical Marihuana Access Regulations are themselves unconstitutional and inadequate to cure the invalidity of s. 4(1).

[46] Crown Counsel submits that **Parker** and **Clay** read together show the opinion of the Ontario Court of Appeal that the prohibition against possession of marihuana for non-medicinal, recreational, users is not contrary to s.7 of the Charter and that the law in British Columbia is that s.4(1) of the Controlled Drugs and Substances Act remains valid. Crown has conceded that **Parker** is good law but argues that the Medical Marijuana Access Regulations were effective to "save" the legislation declared invalid. Crown submits further that this court should follow the principle of judicial comity and stare decisis and follow the decisions of **Nicholls** and **R. (A.C.)**.

Analysis

[47] I also find Rosenberg, J.'s reasons for judgment in **Parker** compelling. None of the cases presented to me that have considered **Parker** has disagreed with those reasons. The divergence in decisions since then has resulted from:

1. different interpretations by different courts in this country of the combined effect of the decisions in **Parker** and **Clay**; and
2. different interpretations by different courts in this country of the effect of the MMAR on Rosenberg, J.'s declaration, in **Parker,** of the invalidity of the s.4 marihuana prohibitions.

[48] In my view there was nothing ambiguous about the decision of Rosenberg, J. in **Parker**. Having found the marihuana prohibition in s.4 an unjustifiable infringement on the s.7 Charter rights of Mr. Parker and other persons requiring marihuana for medical reasons, Rosenberg, J. declared it unconstitutional and suspended the declaration of invalidity for a period of one year.

[49] While I agree that I am not bound by **Parker**, in my view it should be followed unless there is a good reason not to do so. It is, after all, a decision of the Ontario Court of Appeal and no decision of this province's Court of Appeal has addressed the issue of the constitutionality of s.4's prohibition against marihuana on the basis of medical use. In any event, I find the decision of

Rosenberg, J. to be well-considered, his reasons compelling. I agree with his analysis, his decision on the infringement of s. 7 Charter rights and the remedy that he applied.

[50] In my view, the decision of Rosenberg, J. in the companion case of **Clay** does nothing to detract from the declaration of invalidity in **Parker**. In **Clay**, a recreational user of marihuana was not successful in his challenge to the constitutionality of s.4 of the Controlled Drugs and Substances Act. Rosenberg, J. in **Clay** basically applied the same reasoning as did Braidwood, J. of our Court of Appeal in **Malmo-Levine**. But Mr. Clay's failed challenge does not change the fact that Mr. Parker's challenge was successful and resulted in the Ontario Court of Appeal's declaration of s.4's invalidity. Rosenberg, J.'s explanation of why he was not extending a constitutional exemption to Mr. Clay notwithstanding that the legislation had been found unconstitutional and therefore invalid makes this abundantly clear.

[51] I agree with the argument of defence counsel that the combined effect of **Parker**, **Clay** and **Malmo-Levine** is a dialogue between the courts and the legislature in which the Ontario Court of Appeal is communicating to Parliament that legislation prohibiting possession of marihuana for recreational, non-medical, use would not be an infringement of s.7 Charter rights and that such legislation, as long as it allowed persons requiring marihuana for medical purposes to legally access it, could be validly enacted. However, it is my view that, having communicated that message to Parliament, the Ontario Court of Appeal, nevertheless, declared s.4 invalid and suspended the operation of that declaration for a period of one year.

[52] Rosenberg, J., in **Parker**, explored remedies that would have restricted relief from the sanctions against marihuana in s.4 to medical users but found them wanting and rejected them. At paragraph 208, he rejected the submission of an intervenor that the appropriate remedy was a constitutional exemption for all those persons requiring marihuana for medical purposes and chose instead to extend that exemption only to Mr. Parker personally. Rosenberg, J. specifically rejected the lower court's remedy of reading in an exemption for persons requiring marihuana for medical use on the ground that that would intrude on what should be the role of the legislature, not the courts.

[53] Rosenberg, J. did not say that s.4 was unconstitutional unless some event occurred. He did not say it was unconstitutional only for medical users of marihuana. In my view, Rosenberg, J.'s declaration of s.4's invalidity in **Parker** was clear, unequivocal, unqualified, unconditional and unrestricted in its application to all citizens, subject only to the proviso that its operation was to be suspended until July 31, 2001. In my view, had the government done nothing by July 31, 2001, the prohibitions against marihuana found in s.4 of the Controlled Drugs and Substances Act would be invalid.

[54] The only issue that remains is the effect of the Medical Marijuana Access Regulations (MMAR) that came into force on July 30, 2001. Did the MMAR avoid the declaration of invalidity coming into effect on July 31, 2001?

[55] In **Nicholls** the court was of the view that "it remains to be determined whether the MMAR does or does not 'pass constitutional muster', and whether it saves s. 4(1)" (at paragraph 67) and that until a court in British Columbia decided that the MMAR does not "save" s.4(1), it remained valid legislation.

[56] In my view, implicit in the question of whether the MMAR could "save" s. 4 of the Controlled Drugs and Substances Act is the fact that, if s.4 is not "saved", then by operation of the Ontario Court of Appeal's ruling in **Parker**, the legislation was a nullity as of July 31, 2001. I am unable to agree with the conclusion of Stansfield, P.C.J. that s. 4(1) remains valid legislation until a court decides that the MMAR does *not* save it. I adopt the reasons in Parker. S. 4 was declared invalid as it relates to marihuana. That legislation therefore *is* invalid unless either s. 4 is re-enacted, or

the MMAR can operate to halt Rosenberg, J.'s declaration of invalidity. The legislation was not re-enacted. The onus on this application should not be on the applicant to show that the MMAR do not "save" s.4, it should be on the Crown to show that they do "save" s.4 because otherwise the plain reading of Rosenberg, J.'s decision in **Parker** is that s.4 of the Controlled Drugs and Substances Act, as it relates to marihuana, became invalid as of July 31, 2001.

[57] To be fair, the federal government's regulatory response to the declaration of invalidity in **Parker** was never addressed in **Nicholls.** Stansfield, P.C.J. at paragraph 7 of that decision acknowledges that his reasons were limited to the scope of the argument framed by the applicant. **Nicholls** focussed on the issues of abuse of process and estoppel that had been argued previously in **Stavert** and **Clarke**. Stansfield, P.C.J. did not address the constitutionality of S. 4 even though he found the analysis of Rosenberg, J. in **Parker** to be compelling. In my view the unconstitutionality of the s.4 prohibitions against marihuana are precisely what was decided in **Parker**. In the case at bar the issue before me is whether the information charging Mr. Masse discloses an offence known to law.

[58] As noted in **R. (A.C.),** Stansfield, P.C.J. declined to rule on the sufficiency or validity of the MMAR. At paragraphs 67 and 68 of **Nicholls**:

67. ...It is my view that it remains to be determined whether the MMAR does or does not "pass constitutional muster", and whether it saves s.4(1).
68. But to extrapolate from the lower court decision in **J.P.** and **Hitzig** that the Ontario Court of Appeal will inevitably decide that Parliament has failed to do that which was required of it in the **Parker** decision is in my respectful view to jump the gun....

[59] Now there has been an appellate decision in **J.P.** whose further appeal to the Ontario Court of Appeal has yet to be heard but which was never put before Stansfield, P.C.J. in **Nicholls** and not considered in any of the other cases following **Nicholls**.

[60] The Ontario Superior Court of Justice, in my view, came to its conclusion on the invalidity of s.4 for a different reason than did Phillips, J. in the court below. Rogin J. did not rule on the right of Parliament to delegate the issue of the gap in the regulatory scheme to cabinet as had Phillips, J. Also, Rogin, J. did not consider whether the MMAR suffered from the same defects, identified by the court in **Parker,** as the s.56 exemption, as had Phillips, J.

[61] **Nicholls** and the cases that have followed it are distinguishable from the case at bar for that reason. If I am incorrect in my view that **Nicholls** and the cases following it are distinguishable from the case at bar, then I am still prepared to come to a different result on the basis of the principles set out in **Re Hansard Spruce Mills Ltd.** where Wilson J. sets out the situations in which it is permissible to depart from the requirements of judicial comity. Those situations are described there as follows:

a. Subsequent decisions have affected the validity of the impugned judgment;
b. It is demonstrated that some binding authority in case law or some relevant statute was not considered;
c. The judgment was unconsidered, a nisi prius judgment given in circumstances familiar to all trial judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

[62] The appellate decision in **J.P.** was not considered in **Nicholls** or in the cases of our court that followed it. In my view, that creates one of the situations described in **Re Hansard Spruce Mills Ltd.** where a court may depart from the principle of judicial comity.

[63] I agree with the reasons of Rogin, J. in the appellate decision of **J.P.** The MMAR cannot "save" s.4 and cannot halt the operation of a declaration made one year less a day prior to their enactment. The suspension of Rosenberg J.'s declaration of the invalidity of the marihuana prohibition in s.4 of the Controlled Drugs and Substances Act in **Parker** expired on July 31, 2001. There is nothing in that decision to indicate that the declaration would be rendered ineffective if regulations were passed before July 31, 2001 allowing medical users of marihuana access to the drug. The court's declaration of invalidity was unconditional, subject only to the proviso that its operation was suspended for one year.

[64] Rogin's reasoning in the **J.P.** appellate decision was simply this: sS.4 of the Controlled Drugs and Substances Act has not been re-enacted as it relates to marihuana. Once the declaration of invalidity took effect, s.4 as it related to marihuana became a nullity. It ceased to exist and could not exist again unless re-enacted. As a result, there was no longer any prohibition or penalty in the Act for simple possession of marihuana. The MMAR themselves do not contain any prohibition or penalty for simple possession of marihuana.

[65] It may be that, had the MMAR been in existence at the time of the **Parker** decision, the Ontario Court of Appeal may have come to a different conclusion with respect to the issue of whether the marihuana prohibition in s.4 infringed on Mr. Parker's s.7 Charter rights. It is also possible the court may still have come to the same conclusion on the basis of the lack of any legal supply of marihuana, as was found by Lederman, J. in **Hitzig.** However, that is all immaterial to the application before me. In my view, s.4 of the Controlled Drugs and Substances Act, as it applies to marihuana, ceased to be valid legislation after July 31, 2001.

[66] If I am wrong in this, and it is possible for regulations addressing the concerns raised in **Parker** to halt the operation of the declaration of s.4's invalidity, then I agree with the decision in **Hitzig** that the MMAR were inadequate for this purpose because, as long as there is no legal supply of marihuana for persons requiring it for medical use, the infringement on s. 7 Charter rights identified in **Parker** has not been cured. The enactment of the *Marijuana Exemption (Food and Drugs Act) Regulations* on July 8, 2003 may or may not address the concerns raised in **Hitzig** but came too late to have any effect on the declaration of invalidity in **Parker**. July 31, 2001 had, by that time, already come and gone, and the legislation had already been rendered invalid. Once invalid, it became a nullity and could not be resuscitated; it could only be re-enacted.

Disposition

[67] It follows therefore, that there is no offence known to law at this time for simple possession of marihuana. The application is allowed.

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P. Chen, P.C.J.