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IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA
v.
CURTIS BRUCE NICHOLLS

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE H.C. STANSFIELD

Counsel for the Crown:	Roy Sommerey
Counsel for the Defendant:	Blaine Weststrate
Place of Hearing:	Kelowna, B.C.
Date of Hearing:	April 7, 2003
Date of Judgment:	April 16, 2003

[1] The defendant, Mr. Nicholls, asserts in this pre-trial application on a charge of "simple possession of marihuana" under s.4(1) of the *Controlled Drugs and Substances Act*, that it is not "fair" that this British Columbia prosecution continue because citizens in the provinces of Ontario, Prince Edward Island and Nova Scotia - given the state of the law in those provinces - are "immune from prosecution" for the same offence. Thus he says I should make one of a number of proposed orders which would have the effect of ending the proceeding, and the associated unfairness.

[2] That his application is brought is not surprising. The law relating to possession of marihuana in Canada at the moment is in fact - to speak colloquially - a mess. No doubt it would be of assistance were Parliament to intervene legislatively, sooner rather than later, to address evolving public opinion and evolving jurisprudence. But my task on this application is to discern and apply the law as it currently stands in British Columbia.

[3] The application has its genesis in a July 31, 2000 decision of the Ontario Court of Appeal, *R. v. Parker* [2000] O.J. No. 2787 (about which I'll say more in due course), where it was held that s.4(1) is unconstitutional as it relates to marihuana because the legislation fails to protect the *Charter* s.7 rights of persons who require marihuana for medical purposes. The court's declaration was suspended for a year in order to permit Parliament to rectify the situation. Subsequent Ontario lower court decisions have held that Government's regulatory response to *Parker* was conceptually flawed or itself unconstitutional and so the lower courts have determined that with the one year suspension of the declaration of constitutional invalidity having expired, s.4 (1) is now of no force and effect. Notably, while the lower court decisions are under appeal, the Ontario Court of Appeal has not yet been called upon to opine on the issue.

[4] There have now been two cases in other provinces, *R. v. Stavert* [2003] P.E.I. No. 28, and *R. V. Clarke*, unreported, March 31, 2003, Dartmouth Nova Scotia, in which Provincial Court judges have stayed proceedings under s.4(1) because it was determined the prosecutions constituted an abuse of process because "all residents of Canada are entitled, in fairness, to expect a uniformity of... federal Crown... prosecutorial function" (*Stavert* at para 51), and because it would be "oppressive and vexatious to allow the prosecution... to continue, given the state of this law in the Provinces of Ontario and Prince Edward Island" (*Clarke*, pp.6,7).

[5] I learned some 45 minutes before being scheduled to deliver these reasons that just yesterday, April 15, 2003, yet another case in this line of authority was decided by the Honourable Judge Orr of the Saskatchewan Provincial Court in *R. v. Hadwen, Boser,* and *Langlois*, unreported, April 15, 2003. In an addendum at the conclusion of these reasons I explain why I have decided not to adjourn to permit further submissions regarding that case, and why I have not included reference to Judge Orr's reasoning in this decision.

[6] 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*.

[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.

[8] Mr. Sommerey, on behalf of the federal Crown argues that the defendant's characterization of the state of the law in Ontario, Prince Edward Island and Nova Scotia misapprehends the jurisprudential realities and, in any event, that proceedings in British Columbia should continue unless and until a British Columbia court articulates a reason why they should not, or the Supreme Court of Canada does so in relation to the whole nation. Additionally, in terms of the law of British Columbia, he argues that the B.C. Court of Appeal has already determined that "simple possession" prosecutions do not contravene s.7 of the *Charter*, and I am bound by their reasoning.

[9] One of the interesting aspects of this hearing is the extent to which counsel disagree as to what has or has not been decided in the various Ontario, Prince Edward Island and Nova Scotia decisions to which they have referred. The extent of their disagreement becomes less surprising when one reviews the more recent decisions in Ontario, and encounters the differences of opinion that seem to have arisen among judges as to the proper interpretation of *Parker*, and its "companion" case issued the same day by the same panel, *R. v. Clay* [2000] O.J. No. 2788.

[10] Having now had the opportunity to reflect upon the authorities from other provinces, I have determined that I respectfully disagree with, and therefore cannot follow, the *Stavert* and *Clarke* decisions. It follows that I must reject the defendant's application which relies upon those cases.

[11] To explain that conclusion, my starting point needs to be a review of the jurisprudence emanating from the other provinces. Because there seems to be such disagreement as to what originally was said by the Ontario Court of Appeal in *Parker* and *Clay*, I will begin my discussion of those two cases by noting their own internal references to each other; those references should be instructive as to the Court's intention when issuing the two decisions. I will then discuss the two decisions themselves. Because of the differences of interpretation to which I referred, I will quote from the other judgments at greater length than what I generally believe to be good practice in order to let those judgments speak for themselves.

Parker and _Clay_ - two decisions, same day - inconsistent or not?

[12] *Parker* and *Clay* were decided by the same panel of Justices Catzman, Charron and Rosenberg. In each

case a single decision was written by Justice Rosenberg, speaking for the Court. They were issued the same day. It seems beyond doubt that the decisions were intended to be complementary.

[13] In *Parker*, Justice Rosenberg referred to the decision in *Clay* as follows:

> [75]... These headings (under which the *Parker* decision is organized) should be understood as dealing with the therapeutic use of marihuana, not the broader claims dealt with in the *Clay* case.
>
> [77] In the companion case of *R. v. Clay*, I have already dealt with the submission that, broadly speaking, the marihuana prohibition violates s.7 because it criminalizes people who have done nothing wrong. This case (that is, *Parker*) raises the narrower issue of the impact upon individuals claiming a need for marihuana as a matter of medical necessity, not recreational use.
>
> [83] ... The dominant aspect of the context in this case is the claim by Parker and other patients that they require access to marihuana for medical reasons. They do not, like the appellant in the *Clay* case, assert a desire for marihuana for recreational use.

[14] In *Clay*, Justice Rosenberg refers to *Parker* as follows:

> [1] ...the Crown appeal in *R. v. Parker* ... concerns the medical use of marihuana. This appeal centers primarily on the use of the criminal law power to penalize the possession of marihuana.
>
> [38] ... for my reasons in *R. v. Parker*, I agree with the appellant's submission that the prohibition (against marihuana possession) is overly broad in that it fails to include an exemption for medical use.
>
> [52] I have found that the marihuana 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.
>
> [53] ... Unlike Mr. Parker, (Mr. Clay) is not within the class of persons for whom the exemption (for medical use) is required.

[15] With the Court's own comments in mind as to the distinctions between the two cases, I move on to consider them separately.

***Regina v. Parker* [2000] O.J. No. 2787 (C.A.)**

[16] Mr. Parker was charged under the *Narcotic Control Act* with cultivating marihuana, and under the *Controlled Drugs and Substances Act* with possession of marihuana.

[17] Mr. Parker suffered from a severe form of epilepsy. The Court of Appeal was satisfied "that the trial judge was right in finding that Parker needs marihuana to control the symptoms of his epilepsy" (para. 10).

[18] Mr. Parker challenged the constitutionality of the marihuana prohibition in the predecessor *Narcotic Control Act* and the current *Controlled Drugs and Substances Act*, claiming that it infringed his rights under s.7 of the *Charter*, which guarantees every one the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice.

[19] The trial judge determined the *Charter* issue in favour of Mr. Parker. By way of remedy, he "read into" the legislation an exemption for persons possessing or cultivating marihuana for their personal medically approved use.

[20] Near the outset of his reasons, Mr. Justice Rosenberg summarized his conclusions as follows:

> [10] I have also concluded that the prohibition on the cultivation and possession of marihuana is unconstitutional... forcing Parker to choose between his health and imprisonment violates his right to liberty and security of the person... these violations of Parker's rights do not accord with the principles of fundamental justice... the possibility of an exemption under s. 56 dependent upon the unfettered and unstructured discretion of the Minister of Health is not consistent with the principles of fundamental justice ...
>
> [11] Accordingly, I would uphold the trial judge's decision to stay the charges against Parker ... However I disagree with (the trial judge's) remedy of reading in a medical use exemption into the legislation... this is a matter for parliament. Accordingly, I would declare the prohibition on the possession of marihuana in the *Controlled Drugs and Substances Act* to be of no force and effect. However, since this would leave a gap in the regulatory scheme until parliament could amend the legislation to comply with the Charter, I would suspend the declaration of invalidity for a year. During this period, the marihuana law remains in full force and effect. Parker, however, ... is entitled to a personal exemption from the possession offence... if necessary, I would have found that Parker was entitled to a personal exemption from the cultivation offence for his medical needs.

[21] Relevant extracts from the balance of his decision include:

> [78] The case raises an issue akin to the standing issue that I have touched upon in the *Clay* case... it is also open to Parker to challenge the validity of the legislation on the basis that it was over broad or unconstitutional in some other way in its application to other persons... That conclusion follows from the decisions of the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 and *R. v. Morgentaler*. In both cases, the accused were held to have standing to challenge the law under which they were charged although the alleged infringement of the *Charter* concerned the rights of some other person.
>
> [79] (In finding in *Morgentaler* that accused physicians had standing to argue *Charter* breaches relating to pregnant women seeking abortions, Dickson CJC said at page 63):
>
> > ... the appellants have standing to challenge an unconstitutional law if they are liable to conviction for an offence under that law even though the unconstitutional effects are not directed at the appellants per se: *R. v. Big M Drug Mart Ltd.* at p. 313.
>
> [80] Therefore, it is open to Parker to challenge the validity of the marihuana prohibition not only on the basis that it infringes his s.7 rights because of his particular illness, but that it also infringes the rights of others suffering other illnesses.
>
> [83] The dominant aspect of the context in this case is the claim by Parker and other patients that they require access to marihuana for medical reasons. They do not, like the appellant in the *Clay* case, assert a desire for marihuana for recreational use.
>
> [92] I believe that I am justified in considering Parker's liberty interest in at least two ways. First, the threat of criminal prosecution and possible imprisonment itself amounts to a risk of deprivation of liberty ... Second... liberty includes the right to make decisions of fundamental personal importance. Deprivation of (both) must accord with the principles of fundamental justice.
>
> [143] ... The state has an interest in protecting against the harmful effects of use of (marihuana)... the other objectives (of legislation prohibiting possession of marihuana) are to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs.

[161] ... The evidence establishes that the danger from the use of the drug by a person such as Parker for medical purposes is minimal compared to the benefit to Parker and the danger to Parker's life and health without it.

[178] S.56 (of the *CDSA*, permitting ministerial exemptions) reposes in the Minister an absolute discretion based on the Minister's opinion whether an exception is "necessary for a medical ... purpose", a phrase that is not defined in the Act.

[179] Even if the Minister were of the opinion that the applicant had met the medical necessity requirement, the legislation does not require the Minister to give an exemption. The section only states that the Minister "may" give an exemption.

[184] In view of the lack of an adequate legislated standard for medical necessity and the vesting of an unfettered discretion in the Minister, the deprivation of Parker's right to security of the person does not accord with the principles of fundamental justice.

[187]... The Court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights.

[188] ... 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.

[191] ... The Crown did not suggest that the violations could be saved by s.1 (of the *Charter*).

[193] The only possible basis for holding that the provision of the *CDSA* constituted a reasonable limit is that s.56 tempers the facial over breadth of the prohibition. However ... the plenary discretion vested in the Minister precludes a finding that this is a reasonable limit.

[194] Finally, the broad prohibition means that the section fails the minimal impairment test ... there is no need to prosecute people like Parker who require marihuana for medical purposes to achieve any of the three objectives identified by the Crown.

[198] I also do not agree with the trial judge that it was appropriate to read a medical exemption into the legislation... 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.

[200] The purpose of reading in "is to be as faithful as possible within the requirements of the constitution to the scheme enacted by the legislature".

[201] To read in an exemption (where 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) 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".

[203] ... For these reasons ... the prohibition on simple possession of marihuana in s.4 of the *CDSA* must be struck down.

[206] ... I believe it is appropriate to sever the marihuana possession prohibition from the other parts of s.4.

> [207] The declaration of invalidity should be suspended to provide Parliament with the opportunity to fill the void... I would suspend the declaration of invalidity for 12 months.

***Regina v. Clay* [2000] O.J. No. 2788**

[22] Mr. Clay owned a store which sold hemp products and marihuana plant seedlings. He was an active advocate for the decriminalization of marihuana. He did not require marihuana for any medical reason.

[23] Mr. Clay argued that the inclusion of marihuana in the *Narcotic Control Act* violated s.7 of the *Charter* because his right to use intoxicants in the privacy of his home is a fundamental aspect of personal autonomy and human dignity and is thus guaranteed by s.7 of the *Charter*. He argued it is a principle of fundamental justice that the criminal law be used with restraint and not be employed unless there is a reasonable basis for finding that the prohibition is directed to harmful conduct. Finally he asserted that the marihuana prohibition is overly broad as it does not include an exemption for the medical use of marihuana and it prohibits forms of cannabis that are not harmful or intoxicating.

[24] In concluding that prohibiting the recreational use of marihuana does not violate liberty and security interests of s.7 of the *Charter*, Mr. Justice Rosenberg said in part:

> [15] ... the decision to use marihuana for recreational purposes ... does not fall within (the aspect of security of the person which was engaged in such cases as *Rodriguez* [1993] 3 S.C.R. 519 @ 588 where the court was dealing with the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity).
>
> [16] The affront to autonomy and human dignity in (cases like *Rodriguez*) is far removed from the claim made by (Mr. Clay).
>
> [23] ... (Mr. Clay) rightly points out that his liberty interest is engaged since imprisonment was available for the marihuana offences... accordingly, he can only be deprived of his liberty in accordance with the principles of fundamental justice.
>
> [26] In *R. v. Malmo-Levine* [2000] B.C.J. No. 1095, the British Columbia Court of Appeal was presented with virtually the same arguments made in this case. ... Braidwood J.A., speaking for himself and Rowles J.A., concluded that the harm principle is a principle of fundamental justice within the meaning of s.7. He concluded, however, that the marihuana prohibition in the former *Narcotic Control Act* is consistent with the principles of fundamental justice.
>
> [29] McLachlin J. in *Cunningham v. Canada* [1993] 2 S.C.R. 143 @ 151 (said):
>
> > The principles of fundamental justice are concerned not only with the interests of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally ...
>
> [33] As Braidwood J.A. noted at paragraphs 146-47 in *Malmo-Levine*, the continued criminalization of marihuana has led to a "palpable disrespect for the law among the million or so Canadians who continue to use the substance despite the risk of imprisonment".
>
> [52] I have found that the marihuana 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.
>
> [53]... (Mr. Clay) would not be entitled to a constitutional exemption since ... he is

not within the class of persons for whom the exemption is required. The only issue, then, is whether (Mr. Clay) is entitled to a personal remedy under s.24(1) of the *Charter* in the form of a stay of proceedings. In my view, this is not an appropriate case for a stay of proceedings. The appellant appears to have conceded at trial that he had no standing to challenge the law on the basis of a medical need for marihuana. That concession was wrong. However, it was consistent with the appellant's position throughout the case that the real problem with the legislation was the criminalization of personal possession for recreational use. The appellant did not succeed on that part of the case.

[56] (After analogizing to the Supreme Court of Canada's decision in *Bilodeau* [1986] 1 S.C.R. 449 where a section of the *Highway Traffic Act* had been found to be ultra vires the legislature but the declaration was suspended for a period of time to permit rectification, and the conviction of the appellant under the "invalid" legislation during the period of suspension was found to be enforceable) ... this doctrine appears to stand as an exception to the broad proposition stated by Dickson J. in *Big M Drug Mart Ltd.*, at page 313 that "no one can be convicted of an offence under an unconstitutional law".

[58] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 S.C.R. 203) band members succeeded in securing a declaration that certain words in the subject statute were invalid, but the Court suspended the declaration of invalidity to permit Parliament to amend the legislation. The Court, however, refused to grant the band an exemption from the declaration of invalidity...

[60]... The corrective justice rationale (under which, in general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of that ruling, even if the effect of the declaration is suspended) has no application since (Mr. Clay) did not obtain the remedy he was seeking, decriminalization of marihuana for recreational use ... the only question is whether (Mr. Clay) should be granted a stay of proceedings on the more general basis, that to permit the conviction to stand in the circumstances would constitute an abuse of process. In my view, it would not. It does not offend the community's sense of fair play and decency that (Mr. Clay), who openly defied the law, should remain convicted when the basis upon which he challenged the law failed.

Summary of the conclusions and implications of *Parker* and *Clay*

[25] From the foregoing, I discern that as the highest Court in the province of Ontario, the Court of Appeal determined in *Parker* and *Clay*, for the province of Ontario, that:

(1) s.4(1) of the *CDSA*, only as it bears upon the possession of marihuana as distinct from other controlled drugs and substances, is unconstitutional through its failure to protect the s.7 rights of persons who require marihuana for medical purposes;

(2) the declaration of constitutional invalidity is general, in the sense that it declares that the prohibition against possession of marihuana is unconstitutional for all persons, not just persons who can prove a personal medical need;

(3) as a corollary to the immediately preceding point, any person who is charged with an offence has standing to challenge the constitutional invalidity of that offence, regardless whether the factual underpinning of the constitutional invalidity relates to the person charged, or to other citizens;

(4) save for the failure to protect the s.7 rights of persons medically requiring marihuana, the prohibition against possession of marihuana is valid federal legislation and withstands constitutional scrutiny;

(5) the concurrent conviction of Mr. Clay makes it clear it was not the Court's intention through its declaration of constitutional invalidity to relieve persons other than those requiring marihuana for medical purposes from criminal culpability for

> unlawful possession;
>
> (6) the suspension of the declaration of invalidity was made for the express purpose of providing to Parliament a reasonable period of time within which it could take appropriate steps to protect the s.7 rights of persons with medical need for marihuana, while respecting Parliament's obvious intent of prohibiting possession of marihuana by other persons;
>
> (7) though Justice Rosenberg does not address the issue expressly, it reasonably must follow from his decision that if within twelve months Parliament took no steps to protect the s.7 rights of persons requiring medical use of marihuana, that s.4(1) of the *CDSA* would be of no force and effect in the province of Ontario.

Recent decisions in Ontario applying or interpreting *Parker* and *Clay*

[26] There are three recent decisions in Ontario which are directly relevant to the defendant's application in this proceeding: *R. v. J.P.* [2003] O.J. No. 1 (Ont. Ct. Justice, January 2, 2003); *Hitzig v. Canada* [2003] O.J. No. 12 (Ont. Sup. Ct. Justice, January 9, 2003); and *R. v. Barnes* [2003] O.J. No. 261 (Ont. Ct. Justice, January 10, 2003). Less directly relevant, but also significant is the slightly earlier decision of the Ontario Court of Appeal in *Wakeford v. Canada* [2002] O.J. No. 85.

a) R. v. J.P. [2003] O.J. No. 1 (Ont. Ct. Justice, January 2, 2003)

[27] In *J.P.*, a young person was charged with possession contrary to s.4(1).

[28] The youth did not assert any medical basis for the alleged possession; rather, he argued that because Parliament had not amended s.4(1) nor re-enacted a new section, that by operation of the *Parker* decision, twelve months having passed, s.4(1) was "deemed repealed" or otherwise was of no force and effect.

[29] The issue was framed as being whether Parliament had taken steps during the period of suspension following *Parker* and before the effective date of the declaration of invalidity to "save" s.4(1).

[30] Justice Phillips decided the youth had standing to bring the application notwithstanding that he was not advancing a medical need for marihuana.

[31] The Court then went on to consider whether the Marihuana Medical Access Regulations ("MMAR") SOR/2001-227, which were promulgated by the Governor in Council the day prior to expiration of the *Parker* suspension, operated to "save" s.4(1) by addressing the constitutional shortcomings identified in *Parker*. Justice Phillips restated that question in the following terms:

> [41] ... 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 stipulate an exemption 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 would entail.

[32] After quoting from Justice Rosenberg in *Parker*, specifically in relation to the shortcomings of the s.56 process relating to the ministerial discretion inherent in that process, Justice Phillips went on to decide the matter in the following terms:

> [45] Based on the opinion in *Parker*, it is the absence of suitable guidelines and structure in the legislation that leads to the *Charter* violation.
>
> [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 the administrative discretion was requisite, but lacking ...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.

Accordingly, the information was quashed as disclosing no offence known to law.

b) Hitzig v. Canada [2003] O.J. No. 12 (Ont. Sup. Ct. Justice, January 9, 2003)

[33] In *Hitzig*, the applicants sought a declaration that the MMAR violated their s.7 rights and were unconstitutional. The application was predicated on their assertion that the regulations contained so many barriers to gaining access to marihuana for medical use that the drug effectively remained unavailable to many seriously ill people. That assertion in turn relied in part on the fact that the regulations did not provide those who obtained exemptions with access to a legal supply.

[34] Justice Lederman observed that it was held in *Parker* that the s.56 exemption lacked an adequate legislated standard for medical necessity (i.e. it was too vague) and relied on unfettered ministerial discretion, thus compromising Mr. Parker's security of the person in a manner inconsistent with the principles of fundamental justice. He interpreted *Parker* as having provided to Parliament one year "to craft a medical exemption with adequate guidelines that would pass constitutional muster".

[35] Justice Lederman concluded that the MMAR violated the applicants' s.7 rights to liberty and security of the person in a manner inconsistent with the principles of fundamental justice because the regulations failed to provide individuals who have a serious medical need to use marihuana with a legal source and safe supply of their medicine. He found the violation was not saved by s.1 of the *Charter*. Thus he declared the MMAR to be of no force and effect, though he ordered that his declaration of unconstitutionality be suspended for six months, saying:

> [168] To sum up, regulations which allow for the possession of marihuana without providing for any legal means to obtain this drug, to say nothing of maintaining access to a reliable supply of it on an ongoing basis, violate the applicants' s.7 rights in a manner inconsistent with the principles of fundamental justice... marihuana possession and production rights offer little relief to seriously ill individuals when there is no legal and safe way to take advantage of them.
>
> [190] ... The government must be granted time to fix the MMAR or otherwise provide for a legal source and supply of the drug the MMAR authorizes seriously ill individuals to possess and produce, consistent with their s.7 rights.

[36] Justice Lederman did not address what, if any, impact his decision had upon the earlier *Parker* declaration relating to s.4(1). Additionally, while he referred to Justice Phillips' decision in *J.P.*, he made no comment upon its merits, saying *J.P.* "is currently under appeal, and is not considered in this decision".

c) R. v. Barnes [2003] O.J. No. 261 (Ont. Ct. Justice, January 10, 2003)

[37] In *Barnes* the accused was charged with possession of marihuana contrary to s.4(1). Like *J.P.*, he did not assert any medical basis for his alleged possession.

[38] Justice Moore essentially applied the principle of judicial comity in holding that there was "no compelling reason not to follow the decision of Mr. Justice Phillips in *J.P.*", and finding "that as the law presently stands in Ontario, s.4(1) of the *Controlled Drugs and Substances Act* no longer exists as per *Parker*". Accordingly he found the defendant was charged with an offence not known to law and quashed the charge.

d) Wakeford v. Canada [2002] O.J. No. 85 (CA)

[39] Mr. Wakeford sought a declaration that his *Charter* s.7 rights had been infringed through an inadequate *CDSA* s.56 exemption, seeking an order that any individual serving as one of his caregivers was exempt from operation of the *CDSA* while assisting his medical needs.

[40] For the most part *Wakeford* turns on jurisdictional and other issues which are not relevant to the s.4 (1)/*Parker* debate. But because Justice Rosenberg (with Justice McPherson) was speaking for the Ontario Court of Appeal on issues relating to medical use of marihuana, certain of his dicta may be informative, most particularly comments regarding the parties' application to adduce evidence of the proclamation of the MMAR:

> [26] The Marihuana Medical Access Regulations, SOR/2001-227 came into force on July 30, 2001. The regulations define the circumstances in which patients and

> caregivers will be authorized by the Minister to possess and cultivate marihuana. We do not propose to summarize the effect of the regulations or their apparent operation. *It is possible that cases will arise in the future where the validity or operation of the regulations will be in issue...* (emphasis added)

Summary of the apparent state of the law in Ontario today

[41] The Court of Appeal of Ontario has not yet been called upon to determine whether the MMAR "saves" s.4 (1) of the CDSA on the basis that the regulations are an adequate response to Justice Rosenberg's decision in *Parker*. To use Justice Rosenberg's own language, the question will be whether the MMAR "fills the void" (see para. 207 of *Parker*). As he foresaw in *Wakeford*, cases are now arising in which the validity or operation of the regulations will eventually be determined.

[42] A provincial court decision (*J.P.*) has decided that parliament has failed to do that which was required of it in *Parker* and, accordingly, s.4(1) is of no force and effect. That decision is under appeal (to the Ontario Sup. Ct. of Justice); the appeal is not resolved.

[43] The superior trial court has held that the MMAR are themselves unconstitutional, but has suspended the effect of that declaration (which suspension continues until June 2003) to provide to Parliament an opportunity to address the implications of that decision. The court did not opine as to the impact of its decision upon the declaration of invalidity in *Parker*, but one reasonably might ask why Justice Lederman would have suspended his declaration of constitutional invalidity if it was clear to him that s.4(1) was now of no force and effect as posited by Justice Phillips in *J.P.*.

[44] While defence counsel argued before me that persons in Ontario "cannot be prosecuted" (that assertion being consistent with the decisions in *J.P.* and *Barnes*), it also appears from references in the cases that other proceedings are simply being adjourned pending appellate clarification.

The Ontario decisions in other provinces - PEI and Nova Scotia decisions

[45] The defence application in this case rests primarily upon the reasoning of the Honourable Chief Judge Thompson of the Prince Edward Island Provincial Court in *R. v. Stavert* [2003] P.E.I. J. No. 28, a very recent decision (issued March 14, 2003).

[46] During oral submissions I was told there had been another recent decision with the same result as *Stavert* in the Nova Scotia Provincial Court, that being *R. v. Clarke*, a decision of the Honourable Judge Buchan. But when this application was argued, Judge Buchan's oral decision of March 31, 2003 had not yet been transcribed. Through my own inquiries I secured a copy of her reasons on April 11, 2003, and forwarded them to counsel, advising that I would consider any further submissions regarding *Clarke* if received by April 14, 2003. I received a further submission from Mr. Sommerey, though not from Mr. Westrate, no doubt because for the most part Judge Buchan simply adopts Chief Judge Thomson's reasoning in *Stavert*.

a) Regina v. Stavert [2003] P.E.I. J. No. 28

[47] Mr. Stavert was charged with possession of marihuana contrary to s.4(1). He applied to quash the information arguing, based on *Parker*, that it did not disclose an offence known to law.

[48] Mr. Stavert based his argument on two grounds:

> a) that the federal Crown is estopped (by operation of the principle of issue estoppel) 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; and
>
> b) that it would be an abuse of the process of the Court within the meaning given to that term by the Supreme Court of Canada in *R. v. Jewitt* (1985) 21 C.C.C. (3d) 7 at 14 to permit the Crown to prosecute persons in other provinces when more than one third of the population of Canada (that is, all persons in Ontario) are "now apparently immune from similar prosecution".

[49] The Honourable Chief Judge Thompson declined to apply the estoppel principle because he found as a matter of law that issue estoppel could not be raised prior to a plea being entered, but he entered a stay of

proceedings on the basis that the prosecution constituted an abuse of process. In reaching that decision he said in part:

> [14] What the Ontario Court of Appeal clearly did in *Parker* was declare the marihuana possession prohibition in s.4 of the CDSA to be invalid without exception. It also suspended the declaration of invalidity for a period of 12 months ... "to provide Parliament with the opportunity to fill the void"
>
> [17] This Court is not bound by either level of the Ontario Courts (whether the Court of Justice in J.P., or the Court of Appeal in Parker) although in my view a decision of the Court of Appeal of a province, being at a level directly before 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?
>
> [19] In the case of Danyluk v. Ainsworth Technologies Inc. [2001] 2 S.C.R. 460... the pre-conditions 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.
>
> [22] The only contentious aspect of the question as to whether issue estoppel is applicable arises out of the third pre-condition. Is there sufficient privity of the parties in order to justify a finding that issue estoppel is available to the applicant?
>
> [24] ... Since the Crown is bound in relation to all simple possession of marihuana 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 marihuana 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.
>
> [33] (After citing cases in the Federal Court in which the Crown has been constrained by earlier decisions involving other citizens, but going on to quote from Sopinka and Lederman's Law of Evidence in Canada, (2nd Ed.) at p. 1107 where they say "there is no plea to raise an issue estoppel; the accused must plead not guilty")... issue estoppel therefore cannot be raised at this time in these proceedings since no plea has yet been entered.
>
> [34] In *Conway* (1989) 49 C.C.C. (3d) 289, L'Heureux-Dube J. at pp. 301-302 restated *Jewitt* (1985) 21 C.C.C. (3d) 7 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 sense of fair play and decency and to prevent the abuse of a court's process through oppressive or vexatious proceedings". ... the judge's power may be exercised only in the "clearest of cases".

> 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 fulfill its function. Consequently, where the affront to fair play and decency is disproportionate to the societal interests in the effect of prosecution of criminal cases, then the administration of justice is best served by staying the proceedings.

[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.

[44] The inadequacy of (the MMAR) 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*.

[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 re-litigate 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.

[50] There are societal interests to be protected here. ... What is more important is that the law have a national application where the federal Crown has jurisdiction.

[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 a simple possession of marihuana will not proceed in this Court.

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

b) R. v. Clarke, unreported, Mar 31, 2003, Dartmouth, Nova Scotia (Prov. Ct.)

[50] Ms. Clarke was charged with possession of marihuana contrary to s.4(1).

[51] She applied for an order that the charge be "dismissed, stayed, or held in abeyance, pending the final determination of the cases of *Hitzig,* (and) *J.P.* from the Ontario courts and now, most recently, *Stavert*, a decision of the Provincial Court of Prince Edward Island, all presently on appeal" (the decision's paragraphs are not numbered, so I can refer only to page numbers; see p.1).

[52] Judge Buchan notes (p.2) that the defence also argued that permitting the prosecution to proceed would be an abuse of process:

> "first, because of the state of flux of the law as the *Parker* decision was not appealed by the Crown; secondly, that simple possession of marihuana may soon be decriminalized, as noted in *Stavert* by Chief Judge Thomson where he

> acknowledged the September 2002 report of the Senate Special Committee on Illegal Drugs has recommended that the Government of Canada amend the *C.D.S.A.* to create a legislated criminal exemption scheme for the production and sale of cannabis; and thirdly, that should this prosecution proceed, that it would be the federal Crown's fourth attempt to re-litigate the same issue".

[53] The Crown argued (pp 2,3):

> "The Ontario Court of Appeal's declaration of invalidity has effect in Ontario only; and that *J.P.* and *Stavert* were ill-considered and wrongly decided.
>
> ... that should this court follow the rulings of the Ontario and Prince Edward Island Provincial Courts without waiting for the appeal process to conclude, regardless of how long this may take, that legal chaos would ensue"

[54] After referring to the substance of the decisions in *Parker* and *Stavert* Judge Buchan said (pp 4,5,6):

> The decisions from the Courts in *Barnes*, *Stavert*, and *J.P.* all courts of co-ordinate jurisdiction, lend support to the issue of *stare decisis* raised by (the defence), in the absence of strong reason to the contrary, as does the principle of Judicial Comity.
>
> ... in my view the real issue is whether it is an abuse of the Court's process to permit the Federal Crown to litigate an issue already finally determined in *Parker* and now interpreted and followed by several lower courts in both Ontario and Prince Edward Island.
>
> During oral arguments I raised the concern that as things now stand, a Canadian citizen living in Ontario, and now since March the 21st, 2003 in Prince Edward Island, are presently and possible permanently, immune from prosecution for marihuana possession.
>
> To support the Federal Crown's contention that it is restricted by the *Parker* decision only within Ontario, would allow, in my view, a re-litigation of the same issue in every province and territory. This would have the potential of creating the legal chaos that the Crown suggests would occur if this prosecution were not permitted to continue.
>
> ... Surely, all Canadian residents are entitled in fairness to expect a uniformity of approach from the Federal Crown. Most importantly, where the Federal Crown has jurisdiction, the law must be applied consistently on a national level.
>
> ... I would agree with Chief Judge Thomson in *Stavert* where he states that he fails to see how the Crown is not bound by *Parker* when we are dealing with a single, indivisible entity with jurisdiction throughout Canada.
>
> Certainly the Crown should vigorously defend the constitutionality of duly enacted legislation within the bounds of the law; but when a law has been found to be invalid by several courts in separate jurisdictions in Canada, for the Crown to continue to prosecute that law in certain provinces and not in others, is an abuse of process. Until a decision on appeal to a higher court is made, the decisions of the lower courts stand.
>
> ... I am satisfied that the high test has been met in deciding whether this case rises to the level of an abuse of process. I find that it would be oppressive and vexatious to allow the prosecution of Ms. Clarke on the charge of marihuana possession to continue, given the state of the law in the Provinces of Ontario and Prince Edward Island. To do otherwise would undermine the fundamental justice of the system.
>
> ... A stay of proceedings is, therefore, entered in this matter.

Pre-*Parker* B.C. decisions regarding the *Charter* s.7 constitutionality of s.4(1)

[55] It will have been seen when I set out excerpts of Justice Rosenberg's reasoning in *Clay* that he based his decision in part in reliance on the reasoning of Mr. Justice Braidwood of the B.C. Court of Appeal in *R. v. Malmo-Levine* [2000] B.C.J. No. 1095, saying that the B.C. Court of Appeal had been "presented with virtually the same arguments" as were before the Ontario court in *Clay*.

[56] The *Malmo-Levine* appeal decision referred to above ([2000] BCJ No. 1095]) dealt with both Mr. Malmo-Levine (on appeal from [1998] BCJ No. 1025), and a second appellant, Mr. Caine, on appeal from *R. v. Caine* [1998] BCJ No. 985, a decision of my sister Judge Howard, in which she had held that the prohibition against possession of cannabis was intra vires the federal Parliament, and that the prohibition did not offend against the defendant's s.7 *Charter* rights (medical use was not an issue for either of Messrs. Malmo-Levine or Caine).

[57] On appeal, Mr. Justice Braidwood, speaking for himself and Madam Justice Rowles, referred (at para 18) to the trial decisions in *Parker* and *Clay*, but on the facts before him, did not explore any medical use implications of his *Charter* s.7 analysis. He considered the matter by reference to the "three stage" analysis of s.7 inquiries recommended by Justice Iacobucci in *R. v. White* [1999] 2 SCR 417 at 436. He agreed with Judge Howard that the penal consequences of the *Narcotic Control Act* "automatically engaged" the liberty interest of s.7 of the *Charter*, so moved on to consider the principles of fundamental justice. He concluded that marihuana poses a risk of harm to others that is not insignificant or trivial. He decided that the deprivation of the appellants' liberty interests was in accordance with the harm principle and did not offend the operative principle of fundamental justice.

[58] While there is, therefore, B.C. authority consistent with the Ontario decision in *Clay* - and thus general support for the constitutionality of a prohibition against marihuana possession - I respectfully disagree with Mr. Sommerey that *Malmo-Levine/Caine* can be held out as having determined the issue decided by the Ontario Court of Appeal in *Parker*. To date no court in B.C of which I am aware has been asked to rule on the constitutionality of s.4(1) by reference to an alleged failure of Parliament to protect the s.7 liberty interests of persons who require marihuana for the protection of their health.

British Columbia decisions commenting upon *Parker*

[59] While as I just suggested, counsel did not refer me to, nor did my own noting up of *Parker* identify, any British Columbia decisions expressly considering the constitutionality of s.4(1) within the context of the decision in *Parker*, nor otherwise expressly determining *Parker*'s application in this province, there have been at least a few decisions mentioning the *Parker* decision.

[60] The most directly on point is the decision of my brother Judge Saunderson in *R. v. Reyklin* [2001] B.C.J. No. 1944. Judge Saunderson entered a judicial stay of proceedings on a charge of possession of marihuana where he found as a fact that marihuana was of therapeutic medical value in treating the defendant's condition. So he found a breach of Mr. Reyklin's s.7 rights on a *Parker* analysis, but was not asked to opine on the constitutionality of the legislation as a whole. The remedy was personal to Mr. Reyklin under s. 24 of the *Charter*. The Crown did not argue that the defendant ought to have applied for a medical exemption under s.56.

[61] In *R. v. Lucas* [2002] B.C.J. No. 1631, the Honourable Judge Higinbotham granted an absolute discharge on a guilty plea to trafficking marihuana where the defendant was president of an organization that provided marihuana to its members for medical purposes. Although he noted the case did not directly engage s.7 of the *Charter* because Mr. Lucas entered a guilty plea, he nonetheless applied the principles articulated by Justice Rosenberg in *Parker* in deciding the absolute discharge was appropriate.

[62] In *R. v. Small* [2001] B.C.J. No. 248, the Court of Appeal of British Columbia, dealing with a defence sentence appeal where a fine had been imposed following a guilty plea to a charge of production of marihuana, granted the appeal and imposed a conditional discharge, notwithstanding that the defendant previously had realized the benefit of an absolute discharge in a related proceeding. In reaching that result, the Court of Appeal observed in passing (para. 13) that "the decision in *Parker* ... affects the question of appropriate sentence".

Supreme Court of Canada's approach to *Clay*, and *Malmo-Levine/Caine*

[63] The Supreme Court of Canada granted leave to appeal *Malmo-Levine* and *Caine* (without reasons) March 15, 2001 (see [2000] SCCA No. 490). On December 13, 2002, the Chief Justice speaking for the whole Court gave the following interim judgment regarding the *Malmo-Levine* and *Caine* appeals, together with the

defence appeal from Justice Rosenberg's decision in *Clay*:

> In these appeals the Court is being asked to determine the constitutionality of provisions of the *Narcotic Control Act* prohibiting possession of marijuana.
>
> According to the written submissions to the Court, a central question is whether harm to society or to any person by the use of marijuana is sufficient to permit criminalization. The Minister of Justice and Attorney General of Canada, who is the respondent in the three appeals before us, has announced his intention to introduce legislation in Parliament that would decriminalize in some way the present marijuana offences, and has made comments upon the gravity of the existing offences. The process announced by the Minister will inevitably involve a discussion of what harm comes from the conduct covered by these offences, and its proportionality to conviction and to its consequences. We may therefore expect that the underlying basis for the criminalization of marijuana possession and use wil be taken up in Parliament and widely discussed in the months to come.
>
> That examination and discussion may well prove to be of relevance to the case and of interest to the parties, and may provide guidance to the Court in deciding the present appeals. Accordingly, considering all these circumstances, particularly the interest in a full and fair hearing in these issues, the Court will adjourn these appeals to the Spring term. In adjourning these appeals, the Court expresses no views on the issues before us.

Why I respectfully disagree with the *Stavert* and *Clarke* reasoning

[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).

[68] But to extrapolate from the lower court decisions 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. That is a question which remains to be considered by the Court of Appeal, whether on an eventual appeal from *J.P.*, or on an appeal in the first instance from *Hitzig*. In that regard, I agree with Mr. Sommerey's supplementary submission that "the lower courts in *J.P., Stavert,* and *Clarke* are taking the Ontario Court of Appeal to places where the Ontario Court of Appeal itself has not gone". Even were it to be determined by the Ontario Court of Appeal or another court that the MMAR does not "save" s.4

(1) in terms of the constitutional shortcomings identified in *Parker*, it would also remain to be considered whether any further suspension would be granted (as Justice Lederman did in *Hitzig*), and it would be open to the federal Crown to appeal.

[69] Additionally, it is not apparent to me why it is not presently open to any person in any province to argue before the courts of that province that the MMAR does or does not "save" s.4(1). If that issue is decided against the federal Crown, it will be open to the Crown (subject to leave, of course) to appeal that issue all the way to the Supreme Court of Canada. If and when that argument is made in B.C. (given that it was not expressly argued in this case), it will be the B.C. Court of Appeal, not the Ontario Court of Appeal, who will determine any appeals of B.C. lower court decisions.

[70] As to the declaration initially made in *Parker*, and the suspension of that declaration, and the Crown not having appealed that remedy, it must be remembered that the federal Crown *invited* Justice Rosenberg to make the declaration of constitutional invalidity rather than reading in an exemption for medical purposes as the trial judge had done. So one would have been surprised to see the Crown appeal the remedy. Rather, the Crown accepted the decision, and proceeded to draft the voluminous and comprehensive MMAR "to fill the void created by the declaration". 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.

[71] It also appears that I differ from the learned judges in *Stavert* and *Clarke* in our perception of the capacity for Canadian courts to differ. This has to do with what I would refer to as the "jurisprudential construct" of the constitution of Canada. It is my understanding of our federal structure that there are 13 "streams" of partially autonomous provincial and territorial court systems, all flowing toward, and ultimately subject to, the definitive "pool" of oversight of the Supreme Court of Canada. While I certainly agree that decisions from other provinces - especially decisions from Courts of Appeal in other provinces - must be given serious consideration and should be followed where possible, it is also to be expected that different lines of authority will develop in various provinces and territories from time to time. Conflicting decisions from different Courts of Appeal often serve to inform, and I expect even foster, the decision-making process within the Supreme Court of Canada.

[72] As just one example of such disagreement between Courts of Appeal, Mr. Sommerey referred to *R. v. Van Vliet* [1988] B.C.J. No. 2480, where the B.C. Court of Appeal expressly disagreed with prior decisions of the Ontario Court of Appeal regarding the criminal law implications of failure by a province to implement the "curative treatment discharge" provisions of the *Criminal Code*.

[73] It follows that I do not find Chief Judge Thompson's reasoning regarding issue estoppel persuasive. Assuming - without having to decide in this case - that the doctrine of issue estoppel can be applied to limit criminal proceedings in one province by reference to proceedings in another province, I would have thought that on the facts of this case the issue of privity was less problematic than the aspect of finality which I canvassed above.

[74] It seems to me that the reasoning in *Stavert* and *Clarke*, taken to its logical extension, would have the result of any judgment against the federal Crown in any court in Canada becoming binding on all courts of other provinces. That result would amount to a dismantling of the federal jurisprudential system to which I have already referred.

[75] To similar effect, I am not persuaded by the reasoning in *Stavert* and *Clarke* regarding abuse of process. For the reasons I have already identified, I do not accept that the citizens of Ontario are "immune from prosecution". It appears *J.P.* and *Hitzig* and *Barnes* are operating to cause some cases to be judicially stayed. Those decisions are under appeal. It appears other cases are being adjourned. Whatever may be the disposition of those Ontario cases, they are all subject to appellate review in Ontario. I agree that citizens of Canada are entitled to a certain uniformity of approach by the federal Crown, but that general proposition is subject to the reality of our federal court system.

[76] There is an unfortunate degree of uncertainty at the moment regarding the status of the *CDSA* legislation. I said at the outset of these reasons that it would be of assistance were Parliament to intervene legislatively, sooner rather than later, to address evolving public opinion and evolving jurisprudence. But for courts to interpret the law differently in different provinces does not by definition give rise to an abuse of the process of the court.

Analysis of this application (Charter s.15; issue estoppel; abuse of process)

[77] As mentioned at the outset, Mr. Weststrate suggested that all three defence arguments could be re-stated as simply being that the prosecution is not "fair" given the state of the law in other parts of Canada.

[78] Mr. Weststrate stressed that his position rests upon the belief that the MMAR are not materially different than a *C.D.S.A.* s.56 exemption and, for that reason, the "evil" that underlay the decision in *Parker* has not been remedied.

[79] Yet in his submissions Mr. Weststrate made no specific reference whatsoever to the actual contents of the MMAR; he did not present any specific or substantive argument as to why the regulations may or may not "pass constitutional muster" in terms of protecting the s.7 rights of persons requiring marihuana for medical purposes. The issue is of course crucial, as it will in due course inform any determination as to whether the constitutional inadequacies identified by Justice Rosenberg in *Parker* have or have not been remedied. Given that this crucial point was not argued at all, and that in any event no proper notice of constitutional question in this regard was given, the issue will remain to be considered in British Columbia, and I will restrict my analysis to the issues as framed by counsel.

a) is this prosecution a breach of Mr. Nicholls' Charter s.15 rights?

[80] Mr. Weststrate, on behalf of the defendant, argued that 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.

[81] Section 15 of the Charter states:

> 15 (1) Every individual is equal before and under the law and has the right to the equal protection and the equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.

[82] Mr. Weststrate relied on the decision of the Supreme Court of Canada in *Turpin and Syddiqui v. The Queen* (1989) 48 C.C.C. (3d) 8 where, at page 36, Madam Justice Wilson, speaking for the Court, said:

> I would not wish to suggest that a person's province of residence or place of trial could not in some circumstances be a personal characteristic of the individual or group capable of constituting a ground of discrimination...
>
> In concluding that s.15 is not violated in this case, I realize that I am rejecting the proposition accepted by several Courts of Appeal in Canada that it is a fundamental principle under s.15 of the *Charter* that the criminal law apply equally throughout the country.
>
> ... In my view, s.15 mandates a case-by-case analysis as was undertaken by this Court in *Andrews* to determine (1) whether the distinction created by the impugned legislation results in a violation of one of the equality rights and, if so, (2) whether that distinction is discriminatory in its purpose or effect.
>
> ... This does not, in my view, preclude the possibility that some variations in criminal law and procedure among the different provinces could give rise to discrimination in the sense defined by a majority of this Court in *Andrews*.

[83] He referred as well to the decision of the Saskatchewan Court of Appeal in *R. v. Schell* (1990) 57 C.C.C. (3d) 227 where, at page 245, Justice Wakeling, speaking only for himself, stated (at paragraph d) ... "I see nothing in the judgments I have reviewed which indicates to me that geographic disparity should not be considered a personal characteristic of an individual or group".

[84] More generally regarding s.15, Mr. Weststrate appropriately referred to the decision of the Supreme Court of Canada in *Andrews v. The Law Society* (1989) 34 B.C.L.R. (2d) 273. Although Mr. Justice McIntyre was dissenting in the result, Madam Justice Wilson, for the majority, was "in complete agreement with him as to the way in which s.15(1) ... should be interpreted and applied" (see p. 305). In that regard, Justice McIntyre

said (at page 283):

> S. 15(1) of the Charter provides for every individual a guarantee of equality before and under the law, as well as the equal protection and equal benefit of the law without discrimination. This is not a general guarantee of equality; it does not provide for equality between individuals or groups within society and a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment to others. It is concerned with the application of the law.
>
> ... It must be recognized at once, however, that every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality.
>
> (at page 287, 288) s.15(1) of the *Charter* provides a much broader protection (than the Canadian Bill of Rights). S.15 spells out four basic rights: (1) the right to equality before the law; (2) the right to equality under the law; (3) the right to equal protection of the law; and (4) the right to equal benefit of the law.
>
> It is clear that the purpose of s.15 is to ensure equality in the formulation and application of the law.
>
> ... (at page 292) Both the enumerated grounds themselves and other possible grounds of discrimination recognized under s.15(1) must be interpreted in a broad and generous manner, reflecting the fact that they are constitutional provisions not easily repealed or amended but intended to provide a "continuing framework for the legitimate exercise of governmental power" and, at the same time, for "the unremitting protection" of equality rights.

[85] While I accept Mr. Weststrate's submission that in general it is a fundamental principle under s.15 that the criminal law apply equally throughout the country, and that in appropriate circumstances, geographic disparity could be considered a personal characteristic of an individual or group for the purposes of a s.15 argument, in my view s.15 has no application to this case. It is, at best, a circular argument, or one which simply begs the question which is being asked more generally, namely, whether the Ontario (and now P.E.I. and Nova Scotia) decisions operate to bind the British Columbia Court to their result. If they do not, then it is not the "law" of British Columbia that s.4(1) is of no force and effect, and Mr. Nicholls is subject to the same "law" in British Columbia as every other resident of British Columbia.

[86] I agree with Mr. Sommerey that *Van Vliet* (supra) stands as an example of the tolerance for varied geographic application of the criminal law where such differences occur as a function of the law.

b) is the Crown estopped from arguing s. 4(1) discloses an offence known to law?

[87] As canvassed earlier in my comments as to why I respectfully disagree with the reasoning in *Stavert* and *Clarke*, in my view the difficulty Mr. Nicholls faces with the argument in this case is not regarding privity as discussed by Chief Judge Thomson in *Stavert*, but rather that the Crown is not seeking to re-litigate any "final" decision. The matter really turns on what constitutes the *ratio decidendi* of *Parker*, again a point which I discussed above. In my view, therefore, issue estoppel does not apply.

c) *is it an abuse of the process of the court to permit this prosecution to proceed?*

[88] Mr. Weststrate adopts the analysis of Chief Judge Thomson and Judge Buchan in arguing it is an affront to the community sense of fair play and decency to permit the federal Crown to proceed against Mr. Nicholls notwithstanding that greater than one third of the population of Canada is what they characterize as being "immune from similar prosecution" by operation of *Parker*.

[89] I have already explained why, in my view, Ontario citizens have not yet been determined to be "immune from prosecution", and why it remains open to persons in any province (including the federal Crown) to argue that he MMAR "saves" the constitutional frailties identified by Justice Rosenberg in *Parker*.

[90] For the reasons I have given, I have concluded that pending any decision by British Columbia courts that s.4(1) of the *CDSA* is of no force and effect, it remains valid legislation, and a prosecution under valid

legislation is not, without more, an abuse of the process of the court.

Conclusion

[91] I am not satisfied that the unsettled state of the law regarding s.4(1) of the *CDSA* in the provinces of Ontario, Prince Edward Island and Nova Scotia causes this prosecution to be "unfair" as alleged by the defendant, whether by operation of s.15 of the *Charter*, the doctrine of issue estoppel, or abuse of process. Accordingly, the defendant's pre-trial applications are dismissed.

Addendum

[92] Approximately 45 minutes before I was scheduled to deliver my reasons in this matter, I received correspondence from Mr. Sommerey on behalf of the federal Crown, attaching a decision delivered yesterday by the Honourable Judge Orr of the Saskatchewan Provincial Court in *R. v. Hadwen, Boser,* and *Langlois*, unreported, April 15, 2003. It is yet another decision addressing the impact of *Parker, Hitzig, J.P.,* and *Barnes.*

[93] Because defence counsel may not even yet have seen the decision, and because it has not been argued before me, I do not intend to include in these reasons any further reference to the decision. One imagines with the flurry of cases addressing these issues in various provinces, that if I adjourn to invite additional submissions on *Hadwen et al*, that the process may never end. Thus I will proceed to deliver these reasons for judgment, leaving others to reap the benefit that no doubt will be derived from Judge Orr's additional reasoning.

The Honourable Judge H.C. Stansfield