IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Poelzer v. HMTQ,***
2009 BCSC 18

Date: 20090109
Docket: 24641
Registry: Vancouver

Between:

Ryan Poelzer

Appellant

And

Her Majesty the Queen

Respondent

Before: The Honourable Mr. Justice Cullen

Reasons for Judgment

Counsel for Poelzer	K. Tousaw
Counsel for the Crown	P.A. Eccles
Date and Place of Trial/Hearing:	October 29, 2008 Vancouver, B.C.

[1] This is a summary conviction appeal from a decision of the Honourable Judge Rounthwaite rendered April 16, 2008 (2008 BCPC 0102), dismissing the appellant's application for a judicial stay of proceedings of two counts, alleging that on May 18, 2007 he possessed more than 30 grams of marijuana and possessed more than 1 gram of cannabis resin, both contrary to s. 4(1) of the ***Controlled Drugs and Substances Act*** (***CDSA***).

[2] In the result, after dismissing the appellant's application for a stay of proceedings, Judge Rounthwaite found him guilty on both counts and imposed a conditional discharge with a condition to keep the peace and be of good behaviour for a period of six months.

[3] Mr. Poelzer's application for a judicial stay was premised on the contention that at the time of his possession of the marijuana and cannabis resin, s. 4(1) of the ***CDSA*** was not valid or enforceable legislation. The appellant argued in the alternative that even if the proscription under s. 4(1) could be correctly held to be valid and enforceable, a judicial stay of proceedings was justified because there was, at the material time, significant confusion as to the state of the law.

[4] The appellant's argument respecting the validity of s. 4(1) drew upon a series of decisions rendered in Ontario, determining that the validity of s. 4(1) was, in light of the provisions of the ***Charter of Rights and Freedoms***, specifically s. 7, dependant upon there being an adequate exemption from it's scope for those using marijuana for medical reasons. The cases relied on by the appellant before the learned trial judge were ***R. v. Parker***, (2000) 49 O.R. (3d) 481 (Ont. C.A.); ***Hitzig v. Canada*** (2003), 171

C.C.C. (3d) 18 (Ont. S.C.J.); ***Hitzig et al v. Canada*** (2003) 177 C.C.C. (3d) 499 (Ont. C.A.), (leave to appeal to the Supreme Court of Canada refused); ***R. v. J.P.*** (2003) 67 O.R. (3d) 321 (Ont. C.A.); and ***HMTQ v. Long*** (2007) ONCJ 340 (***Long***).

[5] In addition, the appellant relied on a federal court decision, ***Sfetkopoulos et al v. The Attorney General of Canada*** (2008) F.C. 33 (***Sfetkopoulos***). Both ***Sfetkopoulos*** and ***Long*** were appealed. The trial court decision in ***Sfetkopoulos*** was upheld following the decision of the learned trial judge in the present case, but before the appeal was argued before me. The decision in ***Long*** was overturned following the decision of the learned trial judge and after the appeal from her decision was argued before me. (See ***R. v. Long*** December 9, 2008 SCA 132/07 (Ont. SCJ))

[6] In resisting the appellant's application before the learned trial judge, the Crown primarily relied on ***Kubby v. Canada (Solicitor General)*** (2005) BCJ No. 950; 2005 BCSC 641 (BCSC) upheld in ***Canada v. Kubby*** 2005 BCCA 640; 2003 C.C.C. (3d) 292 (BCCA), (leave to appeal to the Supreme Court of Canada denied 2006 SCCA No. 29 SCC)).

[7] The application before the learned trial judge proceeded on the basis of legal arguments not evidence adduced by the appellant in support of his contention of a ***Charter*** infringement.

1. The Decision of the Learned Trial Judge

[8] The learned trial judge accepted the appellant's argument that he was not required to lead evidence to prove that his or another's ***Charter*** protected rights were

infringed, but rather, he could rely on the current state of the law as establishing a ***Charter*** infringement justifying a stay of proceedings. In other words, the learned trial judge accepted that existing legal analysis and precedent could, if accepted, justify a conclusion that s. 4(1) was invalid and unenforceable, leading to a stay of proceedings, or that the law was so uncertain that a stay of proceedings was justified notwithstanding that a declaration of invalidity was not.

[9] In finding that s. 4(1) was not invalid despite the state of the law as expressed by the decisions relied on by the appellant before her, the learned trial judge noted that in ***R. v. Parker***, the Ontario Court of Appeal held that the ministerial discretion to exempt a medical user of marijuana from prosecution as provided for in s. 56 of the ***CDSA*** was inadequate to save s. 4(1) from constitutional invalidity because it was dependent on unfettered and unstructured ministerial discretion. There must be a constitutionally acceptable exemption from prosecution for seriously ill people with legitimate medical needs for the drug. In the context of ***Parker***, which involved a person who used marijuana to control serious epileptic seizures, the court found that s. 4(1) was an unjustified infringement of rights protected by s. 7 and declared it unconstitutional. The court suspended its declaration of unconstitutionality for one year to provide Parliament with the opportunity to create the necessary exemption. The government's response was to create a medical marijuana exemption to s. 4(1) by enacting the ***Marijuana Medical Access Regulations*** (***MMAR***) S.O.R./2001-227 June 14/01 to create a scheme under which people could obtain licenses from Health Canada to possess or grow marijuana for medical use.

[10] The learned trial judge noted that following the enactment of the ***MMAR*** there were successful challenges to the sufficiency of the regulations to validate s. 4(1) by providing an effective exemption for the medical use of marijuana. The learned trial judge noted that in ***Hitzig*** (Ont. S.C.J.) the court found the ***MMAR*** were deficient in creating a constitutionally valid medical exemption and declared them invalid. On appeal to the Ontario Court of Appeal in ***Hitzig*** (Ont. C.A.), the court agreed that the ***MMAR*** were inadequate, but instead of declaring them invalid, struck down those provisions which unduly limited access to marijuana for medical purposes. In doing so, the court held the resulting access to medical marijuana met constitutional muster and thus saved s. 4(1). That decision was rendered October 7, 2003. The learned trial judge noted that in ***R. v. J.P.***, *supra*, issued on the same day as ***Hitzig*** (C.A.), the Ontario Court of Appeal concluded that s. 4(1) was of no force and effect between July 31, 2001 (one year after ***Parker***) and October 7, 2003 when it was validated by the Court's action in ***Hitzig*** (C.A.) of striking down those regulations that limited access to medical marijuana.

[11] The learned trial judge further noted that in December 2003 the federal government re-enacted two of the three supply limiting regulations struck down by the Court of Appeal in ***Hitzig*** (C.A.) reintroducing the 1:1 producer to user ratio in s. 41(b.1) and the provision that a producer could not combine production with more than two other licensed producers in s. 54.1. At the same time, the learned trial judge noted that the federal government implemented the Policy on Supply of Marijuana Seeds and Dried Marijuana for Medical Purposes (the Supply Policy) "to replace the interim policy implemented in July 2003 and to maintain a government marijuana supply that could be

provided to authorized medical users" (para. 18). The learned trial judge noted as follows:

> The government had contracted with Prairie Plant Services (PPS), the sole licensed dealer in Canada to supply medical marijuana. The supply policy eliminated several restrictive conditions from the interim policy; for example it eliminated the "one time only" provision of seeds from the government's supplier. Necessary regulations to permit the government to distribute dried marijuana and seeds produced by PPS were also implemented.

[12] In the wake of those actions taken by the federal government in respect of the accessibility of marijuana, the trial court decisions in ***R. v. Long***, *supra,* and ***Sfetkopoulos***, *supra,* were rendered. The learned trial judge in the present case noted that in ***R. v. Long*** the trial judge found that "after re-enactment of two of the provisions struck in ***Hitzig*** (C.A.), the ***MMAR*** were again rendered unconstitutional because they unduly restricted medical access to marijuana [and that] the government's reliance on a permissive supply policy was not adequate to save the Regulations …"

[13] In the result, the trial judge in ***Long*** concluded that s. 4(1) so far as it prohibited simple possession of marijuana, was of no force or effect because the amended ***MMAR*** were unconstitutional.

[14] The learned trial judge in the present case noted that ***Long*** was under appeal, was not strong authority and she "was not persuaded by its reasoning". The learned trial judge accepted the Crown's submission that "respect for ***Charter*** rights can be accomplished via policy directive, rather than by legislation".

[15] The learned trial judge in the present case then turned to the trial court decision in ***Sfetkopoulos*** in which the court held that s. 41(b.1) (the re-enacted 1:1 producer to

user ratio) to be unconstitutional and invalid, considering it an undue restraint on access to medical marijuana that was not in accordance with the principles of fundamental justice. The learned trial judge noted that the trial court judge in ***Sfetkopoulos*** found the supply policy did not save the re-enacted Regulations for two reasons:

- He found that many qualified medical users were forced to grow their own marijuana, buy from the sole government contractor or acquire it illicitly.
- He found the effect of current law and policy was arbitrary and caused major access difficulties with no commensurate furtherance of state interests.

[16] The learned trial judge went on to hold as follows:

> 37. I reject the Applicant's submission for these reasons. The *Sfetkopoulos* decision is based on a factual finding that the current system under the MMA Regs and the Supply Policy does not adequately meet the needs of medical marijuana users, but the judgment does not explain the evidence supporting this finding. The judgment mentions that 20% of ATP holders were obtaining marihuana from the government supplier in July 2007, but does not explain the inference drawn from this fact, and provides no other facts to support the finding that many medical marihuana users were forced to obtain the drug illegally.
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> 38. Conversely, the judgments in the *Long* case, heard in the same city (Toronto) seven months earlier, hold that the system established by the government has resulted in medical users being able to access marijuana as needed. There is therefore a conflict on the facts in the case law cited by the Applicant. I consider that the branch of the Applicant's argument based on the reasoning in *Sfetkopoulos* requires proof that there is a current supply problem, with medical users being forced to buy marihuana illegally. Given the conflict in the facts in the cases cited, I find that the Applicant cannot rely on the reasoning in *Sfetkopoulos* without establishing the underlying facts on which the analysis is based.
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> 39. There is no evidence before me of access problems for medical marihuana users. In fact, the affidavit of Carole Bouchard filed by the Crown on this application, establishes that as of February 1, 2008 significantly more ATP holders were receiving marihuana from the government than in July 2007, the period considered in *Sfetkopoulos*. There would have to be an evidentiary basis from which I could conclude

> that the existing system deprives licensed medical marihuana users of an adequate supply before I could consider an application based on the reasoning in *Sfetkopoulos.*
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> 40. However, whether or not *Sfetkopoulos* is wrongly decided, as the Crown submits, it did not conclude that s. 4(1) of the CDSA is invalid. A judge of the Federal Court has the power to make declarations, and the Deputy Judge declared s. 41(b.1) of the MMA Regs to be of no force and effect. The case involved administrative review of a decision of the Minister of Health in which the minister applied the 1:1 ratio and refused to issue additional licences to a licensed producer. The Court simply referred the application back to the Minister for reconsideration.
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> 41. Even if I felt able to apply *Sfetkopoulos* without a factual context, and agreed with its conclusions, the result would not be a finding that s. 4(1) is invalid. I would follow the approach taken in *Hitzig*, one of minimal intrusion, and find that the result of the declaration in *Sfetkopoulos* was to render the MMA Regs constitutional once the offending provision was struck.

[17] The learned trial judge relied on the principal case advanced by the Crown, ***Kubby v. Canada*** (BCSC) and ***Canada v. Kubby*** (BCCA), noting that both in the Supreme Court and in the Court of Appeal, the ***MMAR*** were found to meet constitutional standards, based on the jurisprudence. The learned trial judge responded to the appellant's contention that the Court of Appeal's finding of constitutionality was obiter as it ruled that the petitioner did not adduce the necessary factual grounding for her challenge, or alternatively because the court did not refer specifically to the post ***Hitzig*** amendments, including the re-enactment of provisions deemed unconstitutional in ***Hitzig*** in coming to its conclusion. The learned trial judge held that the Court of Appeal "did conduct a separate analysis to assess the constitutionality of the Regulations in light of the existing jurisprudence" and that the Court of Appeal expressly approved the judgment of Rice J. in ***Kubby*** (BCSC) and he did consider the post ***Hitzig*** changes to the ***MMA*** Regulations, finding them to be valid. In the circumstances, the learned trial

judge concluded that she was bound by the Court of Appeal decision in ***Kubby*** to find the impugned legislation valid.

[18] In coming to her conclusion, the learned trial judge held as follows:

> - I am bound by the decision of the B.C. Court of Appeal in *Canada v. Kubby,* which held s.4(1) to be constitutionally valid.
> - I am not bound by the Ontario Court of Justice decision in *R. v. Long*, which is under appeal, and has not been followed by another judge of that court. I decline to follow it because I am not persuaded by its reasoning.
> - I am also not bound by the judgment of the Federal Court Trial Division in *Sfetkopoulos et al v. Attorney-General of Canada*, which is also under appeal and has been stayed pending appeal. The facts necessary for me to apply its reasoning have not been proven in this application. Moreover, it does not conclude that s. 4(1) is invalid.
> - B.C. Provincial Court cases decided in 2003 are generally not helpful because they have been affected by subsequent decisions, amendments to the MMA Regs, and adoption of the Supply Policy.

[19] The learned trial judge then went on to consider the appellant's alternative argument that the state of the law was sufficiently confused at the material time to justify staying proceedings against him. She concluded that in British Columbia, the only relevant authority since the post ***Hitzig*** amendments were the decisions of the Supreme Court and the Court of Appeal in ***Kubby*** which confirm the validity of the ***MMAR*** and s. 4(1) of the ***CDSA***. The only cases casting any doubt on the validity of s. 4(1) were Provincial Court decisions in British Columbia decided in 2003 before "the Ontario Court of Appeal's decisions in ***J.P.*** and ***Hitzig*** put an end to that confusion." The learned trial judge also noted that in December 2003 the Supreme Court of Canada upheld the validity of the s. 4(1) prohibition against possession of marijuana in ***R. v. Malmo-***

Levine, [2003] 3 S.C.R. 571, 179 C.C.C. (3d) 417 (S.C.C.); and ***R. v. Clay***, [2003] 3 S.C.R. 735, 179 C.C.C. (3d) 540 (S.C.C.).

[20] In the result, the learned trial judge held that at the time of the appellant's possession of the marijuana, there was no confusion as to the state of the law in British Columbia or elsewhere and she declined to give effect to his application for a stay of proceedings on that ultimate ground.

2. The Appellant's Argument

[21] It is the appellant's argument on the issue of the validity of s. 4(1) that neither the trial court decision nor the Court of Appeal decision in ***Kubby*** is determinative of the issue of whether s. 4(1) is too broad to pass constitutional muster. The appellant accepts the contention that in the wake of ***Hitzig*** (C.A.) there was a constitutionally acceptable regime in place to accommodate those who require marijuana for medical uses and that accordingly, s. 4(1) validly proscribed possession of marijuana following ***Hitzig*** (C.A.). It is the appellant's contention, however, that neither the trial court nor the Court of appeal in ***Kubby*** considered whether the federal government in re-enacting "nearly verbatim" the ***MMAR*** provisions which ***Hitzig*** (C.A.) found in violation of the ***Charter*** "while attempting to remedy the supply side deficiencies identified in that decision by implementing the supply policy", acted in violation of the ***Charter*** as was found in ***Long***, *supra,* at the trial court level, and ***Sfetkopoulos*** at the federal trial court and Court of Appeal level.

[22] The appellant contends that although the impugned amendments and the supply policy were in place in 2005 when both ***Kubby*** decisions were rendered, those courts

did not have the benefit of the arguments inspiring the reasoning in ***Long*** or ***Sfetkopoulos***.

[23] As ***Long*** has been overturned, the appellant's argument rests on ***Sfetkopoulos***, as authority for the proposition that because the state of the ***MMAR*** from December 2003 when the amendments and the supply policy were introduced was deficient in meeting the constitutional requirement of providing access to marijuana for those requiring it for medical purposes, s. 4(1) was invalid legislation from that date, given the declaration in ***Parker*** and the reasoning in ***R. v. J.P.***

[24] In ***Sfetkopoulos***, 27 medical users of marijuana applied to Health Canada for authorization to designate Carasel Harvest Supply Corporation as their marijuana producer under the ***MMAR***. Health Canada refused the applications on the basis that they were contrary to s. 41 (b.1) of the ***MMAR*** which provides that a marijuana producer for medical users can only obtain a licence to produce for one user. The issue before the court in ***Sfetkopoulos*** was whether the restriction in s. 41(b.1) permitted reasonable access to a supply of dried marijuana or seeds for those who already possessed an authorization to possess marijuana.

[25] Following his analysis of the issues before him in light of s. 41(b.1) and the government's supply policy which was designed to give authorized persons reasonable access to a legal source of supply, Strayer J. concluded that s. 41(b.1) was not in accordance with the principles of fundamental justice.

[26] He found that the limitations on access to marijuana users "pressured a citizen to break the law in order to have something he medically requires". He also found the

restriction to be arbitrary "in the sense that it causes individuals a major difficulty with access, while providing no commensurate furtherance of the interests of the state."

[27] In the result, Strayer J. declared s. 41(b.1) to be of no force and effect and he ordered that the applicant's application to Health Canada for the designation of Carasel as their producer be remitted to the Minister for reconsideration.

[28] In the federal Court of Appeal, 2008 FCA 328, the court upheld Strayer J. in brief reasons as follows in paras. 2 and 3:

> [2] The almost identically worded predecessor of section 41(b.1) of the *MMAR* was struck down by the Court of Appeal for Ontario in *Hitzig v. The Queen* (2003), 231 D.L.R. (4th) 104, on the ground that it violated section 7. the only substantive issue in the present case is whether the Government's policy of licensing a single dealer to produce marihuana for distribution to those authorized to possess it for medical use provides an adequate licit supply of marihuana to authorized possessors in order to satisfy section 7. See Health Canada (Office of Cannabis Medical Access), *Policy on Supply of Marihuana Seeds and Dried Marihuana for Medical Purposes* (December 3, 2003).
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> [3] Deputy Judge Strayer found that it did not and we are not persuaded that in so concluding he committed any error warranting the intervention of this Court.

3. Analysis and Conclusions

[29] I conclude that on this issue, the appellant's argument must fail. Even accepting for the sake of argument that notwithstanding ***Kubby***, the decision in ***Sfetkopoulos*** is correct and s. 41(b.1) of the ***MMAR*** is of no force and effect on the basis that it violates the s. 7 ***Charter*** rights of those requiring marihuana for medical purposes by unduly limiting access, it does not follow that the s. 4(1) prohibition on possession of marijuana is of no force and effect.

[30] In ***R. v. J.P.****, supra,* the Ontario Court of Appeal noted that the order in ***Parker*** was directed at the marijuana prohibition in s. 4(1) as it existed when ***Parker*** was decided and that the power to make the declaration of invalidity of that section derived from s. 52 of the ***Constitution Act***, ***1982*** which provides that:

> Any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.

[31] In ***Hitzig***, (C.A.) which was issued on the same day as ***J.P.*** the court held after determining that the provisions of the ***MMAR*** enacted by the government in response to ***Parker*** were not adequate as follows:

> [153] Having found that the *MMAR* do not create a constitutionally valid medical exemption to the criminal prohibition in s. 4 of the *CDSA*, we must now shape a declaration under s. 52 of the *Charter* which responds to the constitutional shortcomings of the *MMAR.* We must then determine whether that order should be suspended. As we shall explain, we have concluded that a precisely targeted declaration is appropriate and that it should not be suspended. In this case, the same considerations which dictate the relatively narrow focus of our declaration of invalidity militate against any suspension of that order. We will identify and address those factors subsequently, as they apply to both the scope and timing of the remedy we would grant. First, however, we must turn to the order proposed b y the Hitzig applicants.
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> [154] The Hitzig applicants argue that the appropriate remedy for the constitutional deficiency in the scheme of medical exemption crafted by the Government is the declaration granted by Lederman J., namely that the *MMAR* in their entirety are constitutionally invalid and of no force or effect. In their cross-appeal they also seek a declaration that the criminal prohibition against possession in s. 4 of the *CDSA* is of no force or effect in relation to marihuana. Of course, without the invalidity of the marihuana prohibition in s. 4, an order declaring the *MMAR* to be of no force or effect would leave those in medical need of marihuana with no way to possess it without criminal sanction.
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> [155] We find the remedy contended for by the Hitzig applicants to be overly broad and inadequately tailored to the constitutional deficiencies in the MMAR. Section 52(1) of the *Constitution Act, 1982* requires the court to strike down any law that is inconsistent with the Constitution, but only

> "to the extent of the inconsistency". This invites some precision in selecting a remedy.
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> [156] Dealing first with the eligibility deficiencies in the *MMAR,* it is true that the declarations sought by these applicants have the effect of removing the barrier of criminal sanction for possession of marihuana by those in medical need of it. However, the remedy proposed by the respondents achieves this result only by striking down the *MMAR* in their entirety and by coupling this with the invalidation of the marihuana prohibition in s. 4 of the *CDSA*. The latter declaration would exempt from criminal sanction all those who possess marihuana, not just those who must do so out of medical necessity. Thus, the remedy sought goes well beyond the eligibility deficiencies in the medical exemption crafted by the appellant. In that sense the remedy sought by these respondents is simply too broad.

[32] Thus in ***Hitzig*** (C.A.), the Court of Appeal eschewed the need to declare the prohibition in s. 4(1) of the ***CDSA*** of nor force or effect despite the inadequacies of the ***MMAR*** because it was possible for the court to rectify the inconsistency thus created through a remedy "more specifically targeted to the constitutional shortcomings that [it had] identified in the ***MMAR***."

[33] In ***R. v. J.P.*** the court dismissed a Crown appeal from the respondent's acquittal of two marijuana related charges which arose on April 12, 2002 after the government responded to ***Parker*** by bringing into force the original ***MMAR*** on July 30, 2001 which the court concluded were deficient in ***Hitzig*** (C.A.).

[34] In ***R. v. J.P.*** the court concluded that "as of April 12, 2002 when the respondent was charged by the prohibition against possession of marijuana, s. 4 of the ***CDSA*** was subject to the exception created by the ***MMAR***".

[35] The court went on to hold that because the ***MMAR*** brought into force on July 30, 2001 did not create a constitutionally acceptable medical exemption, the declaration in

Parker that s. 4(1) was of no force and effect, in the absence of such an exception was operative, and as of April 12, 2002 the respondent could not be prosecuted.

[36] The court rejected the Crown's argument that once the government moved to cure the constitutional defect by enacting the ***MMAR***, s. 4(1) was in full force and effect until and unless a court determined the government's attempts to create an effective exemption was inadequate. The court held as follows:

> The *Parker* order, by its terms, took effect one year after its pronouncement. That order was never varied. After the *MMAR* came into effect, the question was not whether the enactment of the *MMAR* had any effect on the *Parker* order, but rather whether the prohibition against possession of marijuana in s. 4 of the *CDSA* as modified by the *MMAR* was constitutional. If it was, the offense of possession was in force. Paired with the suspension of the declaration in *Parker,* this would have the effect of keeping possession prohibition in s. 4 in force continually. If the *MMAR* did not create a constitutionally valid exception as we have held, then according to the ratio in *Parker,* the possession prohibition in s. 4 was unconstitutional and of no force and effect. The determination whether there was an offense of possession of marijuana in force as of April 2002 depended not on the terms of the *Parker* order, but on whether the government had cured the constitutional defect identified in *Parker.* It had not.

[37] Although the reasoning of the court in ***J.P.*** appears to suggest that the prospective validity of the prohibition in s. 4(1) is tied to the existence of an effective exemption for medical users from its scope, I read ***Hitzig*** (C.A.) as basing the prospective validity of s. 4(1) on whether there is another remedy that more specifically targets the deficiencies in the exemption in keeping with the provisions of s. 52 of the ***Constitution Act***, ***1982***, rather than one which targets a prohibition that has been held to be constitutionally valid by the Supreme Court of Canada.

[38] It is of significance that the remedy sought by and granted to the medical marijuana users/applicants in ***Sfetkopoulos*** was a declaration of invalidity of s. 41(b.1) of the ***MMAR*** and that their applications for the designation of Carasel as their producer be remitted to the Minister for reconsideration. The applicants in ***Sfetkopoulos*** did not seek and were not granted a declaration that s. 4(1) was of no force and effect. That, it seems to me, is entirely in keeping with the rationale in ***Hitzig*** (C.A.) – that s. 52 mandates a remedy that addresses the extent of the inconsistency of the legislative scheme with the provisions of the Constitution, not one that extends beyond the inconsistency and affects, as well, aspects of the scheme that are consistent with the constitution, as determined by the Supreme Court of Canada in ***R. v. Malvo-Levine***, *supra,* and ***R. v. Clay***, *supra.*

[39] If I am wrong in my reading of the effect of the reasoning in ***Hitzig*** (C.A.) on the prospective validity of s. 4(1) in Ontario, given the declaration in ***Parker***, I would nonetheless not find merit in the appellant's position. In British Columbia, there is no binding authority that s. 4(1) is of no force and effect in the absence of a constitutionally acceptable exemption for medical marijuana users. As noted by the learned trial judge, there are divergent cases in the Provincial Court on the issue but they were decided before the Ontario Court of Appeal judgments in ***R. v. J.P.*** and ***Hitzig*** (C.A.), before the amendments to the ***MMAR*** and before the adoption of the supply policy. The federal court in ***Sfetkopoulos*** dealt discretely with the ***MMAR*** and did not declare s. 4(1) of no force and effect despite finding deficiencies in the ***MMAR***. Thus, what confronts the courts in British Columbia is a prohibition in s. 4(1) against possession of marijuana which has been held to be constitutionally sound by the Supreme Court of Canada and

a declaration and order in ***Sfetkopoulos*** which is tailored to rectify that part of the legislative regime respecting the exemption from the prohibition against marijuana possession for medical users which was found to be flawed. Those are not conditions which would justify a British Columbia court in declaring s. 4(1) to be of no force and effect, or in treating it as such. To do so would be to fashion or provide a remedy that in the words of the Ontario Court of Appeal in ***Hitzig*** (C.A.) would be "overly broad and inadequately tailored to the constitutional deficiencies in the ***MMAR***".

[40] This is not a case in which the learned trial judge was confronted with any evidence of conditions that would have justified her in making the sort of declaration made in ***Parker***. On the contrary, she was being asked in the face of quite different circumstances to give effect to the ***Parker*** declaration in British Columbia. In my view, she was entirely correct in declining to do so.

[41] In respect of the appellant's alternate argument, I am similarly unable to conclude that the learned trial judge erred in declining to stay proceedings against him on the footing that the state of the law is so confused that it would be manifestly unfair to prosecute him.

[42] In the first place, there was no evidence called before the learned trial judge to establish that the appellant himself was in any state of confusion as to the law on May 18, 2007. Secondly, none of the cases cited by the appellant as giving rise to confusion as to the state of the law were current at the time of the offence. ***R. v. Long*** was decided in July 2007, several months post-offence and ***Sfetkopoulos*** was decided by the trial court in January 2008, some ten months later. The only cogent case in British

Columbia at the time of the offence was ***Kubby***, decided in 2005 at the Supreme Court and Court of Appeal level, both of which held s. 4(1) to be of full force and effect. Prior to that, in October 2003, ***R. v. J.P.*** was a decision that dealt retroactively with an offence that occurred in 2002 and ***Hitzig*** (C.A.) made no prospective determinations as to the validity of s. 4(1). In my view, there is no reasonable basis to conclude that the state of the law was confused or that it would as a consequence be unfair to prosecute the appellant, as was done in this case. I accordingly decline to give effect to his alternative argument. In the result, I dismiss the appeal.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen