Conroy & company

MEDICAL MARIJUANA

R. v. Oates, 2002 ABPC 110

Date: 20020626
Docket: 006405682P1

IN THE PROVINCIAL COURT OF ALBERTA

BETWEEN:

HER MAJESTY THE QUEEN
- and -
BRIAN EDWARD OATES

JUDGMENT OF THE HONOURABLE JUDGE P.G.C. KETCHUM

COUNSEL:

W. DeVenz for the Crown
B. McMullan for the Accused

[1] The accused is a 45-year-old male residing alone in a modest home in the City of Edmonton. He is charged with possession of marijuana and possession for the purpose of trafficking under the Controlled Drugs and Substances Act. The Crown conceded that there is insufficient evidence to convict on possession for the purpose of trafficking, but argues that there is ample evidence to convict on Count 1. The essence of the defence is that the accused is entitled to relief on Count 1 based on section 7 of the Charter of Rights and Freedoms, namely that his possession of marijuana was medically necessary to control his chronic mechanical low back pain in order for him to function as a productive member of society. Accordingly, the defence argues that the accused is entitled to a stay on Count 1 as per the cases of R. v. Parker, 146 C.C.C. (3d) 193, in the Ontario Court of Appeal, and R. v. Krieger, 2000 ABQB 1012, in the Alberta Court of Queen's Bench.

[2] The accused's grow operation was in the basement of a small bungalow-type home in the residential area of the City of Edmonton. Abnormally high electrical bills attracted attention to the accused's home. The Crown called the officers who searched and seized the equipment and plants, and also a senior police officer with expertise in the cultivation and paraphernalia relating to the production and marketing of cannabis marijuana. While the total number of plants seized was large

(71), it is abundantly clear from the evidence that the accused was the sole occupant of the residence; that his neighbours had noticed no unusual activity in and around that residence; and that no paraphernalia relating to sale or distribution of marijuana was found in his residence, i.e., weigh scales, packaging, etc.

[3] The accused completed grade 10 in Ontario and has spent the last 28 years in Alberta doing trucking, mechanical, and welding work. In the late eighties and early nineties he started developing problems with stiffness and soreness, and muscle cramping. By 1995, after an industrial accident, he started suffering unusual pain from his knees up into his low back and into the neck area. He has seen numerous medical specialists and been on Worker's Compensation and has had numerous prescriptions for pain killers, muscle relaxants, Tylenol, Robaxcin and Vioxx prescribed by medical doctors. He gave evidence that he has been told he has a disease. Periodically, he has had to take considerable time off work. Moreover, he gave evidence that the drugs prescribed to him gave him stomach problems. A friend of his who had serious back problems claimed that marijuana helped him overcome his pain. Accordingly, the accused tried smoking it but found it made him ill and had little effect on his pain. This was in the late eighties. By the mid-nineties his condition had deteriorated and he was unable at times to stand erect. Another friend suggested he try eating the marijuana. This time it had an effect. He found he could sleep at night. Some pain was still there but it was lessened to the point where it was no longer necessary for him to crawl to the bathroom, etc. During the late nineties he lost considerable work because of his medical condition. It was during this period of time that his vendor of marijuana left Edmonton. However, before doing so, he persuaded the accused to buy his equipment and showed him how to cultivate the marijuana plants and clone them, etc. In addition to all the patent medicines he has been prescribed the accused has also tried to get prescriptions filled for Marinol. Apparently Marinol contains some of the properties of raw marijuana. However, because Marinol was in short supply the accused found that it was often unavailable. His evidence is that ingesting one to two grams of his home grown raw marijuana per day not only makes him mobile, but is easy on his stomach and keeps him regular. He usually abstains for a month from time to time but when the pain and immobility symptoms worsen he resumes his dose of two grams per day. This has been his pattern for the last ten years or more.

[4] Dr. Fiorino, a specialist in family medicine with twenty years experience, testified that he has been seeing the accused since July 2000. The accused consulted him for chronic low back pain, more specifically a degenerative disc disease in the Lumbar 3, 4 and L5, S1 areas. X-rays showed arthritic disc changes. The same occurred in the neck areas, C4 to C7. Dr. Fiorino referred the accused to various specialists such as a neurologist and a physical medicine and rehabilitation specialist. The conclusion was that the accused suffered from organic soft tissue degenerative disc pain with the prognosis that it probably will not deteriorate but would not likely get any better and that he would have to live with chronic discomfort in his low back. At that point, Dr. Fiorino was prepared to support the accused's application for a Ministerial Permit based on his condition as attested to by the specialists to whom he had been referred. However, both of Dr. Fiorino's professional associations, (the Canadian Medical Association and the Alberta Medical Association) were taking the position that until a better policy is arrived at, and better studies and sources of the supply of medical marijuana are available, their recommendations were that practitioners should not support applications for the use of medical marijuana – see Exhibits 16 and 17. Dr. Fiorino had no reason to doubt the veracity of his patient. His symptoms were consistent with the letters Dr. Fiorino received from the specialists, Dr. Forester

and Dr. Sampson. Dr. Fiorino agrees that the active ingredients are more numerous in raw marijuana than in Marinol, which is the only legal drug containing any of the effective ingredients of marijuana. Accordingly, Dr. Fiorino had no reason to doubt the veracity of his patient as to the relief he obtained from orally consuming marijuana. Moreover, Dr. Fiorino pointed out that clinical trials to test the marijuana grown under the auspices of the Government of Canada were still ongoing at the time of this trial. Until these clinical trials are concluded and the Alberta Medical Association and Canadian Medical Association have withdrawn the objections stated in letters to their members, it is unlikely that this accused will be able to get the requisite support for a Ministerial Permit.

[5] During the last few months the national press has carried numerous articles on the problems surrounding medical marijuana certificates. There has been a debate in Parliament relating to Dr. Keith Martin, MP, and his private member's bill. There is currently an ongoing Senate committee investigating the availability and policies relating to the medical use of marijuana. That committee is expected to table its final report in August of this year. I accept that Canada has a vital interest in protecting its citizens against the known harmful effects of marijuana, as well as a vital interest in fulfilling its International treaty obligations and that these factors have to be balanced against the formulation of a policy providing for medical exemptions that can be supported by the various Medical Associations across Canada. I understand that clinical trials to test the marijuana being grown by the Government of Canada are still ongoing. I also note that some Ministerial Permits for the medical use of marijuana have been issued.

[6] I accept the evidence that the accused's family doctor prescribed legally available medications for his serious arthritic problems. I also accept the accused's evidence that he found those prescriptions ineffective compared to the results he obtains from orally ingesting his home grown marijuana.

[7] Over the course of the last two years the accused has become knowledgeable in the cultivation and cloning of marijuana plants to the point where his grow operation in his basement has become his hobby. I find he takes cuttings to produce the best female buds for his personal use only. There is no evidence before me that he uses marijuana for anything other than an analgesic for himself only.

[8] To sum up, he is a single middle-aged man living alone and supporting a son who lives with his mother. He finds that without ingesting small quantities of marijuana on a daily basis he is unable to return to his physically demanding work and unable to support himself and his son. There is no evidence from his estranged wife or from his neighbours that he promoted or in any way has encouraged the use of this drug as a mind or mood altering substance. While the number of plants seized in his residence (71) was significant, I accept the accused's explanation that only a portion of these were female plants providing the active THC ingredient. I find that the grafting and horticulture hobby he pursued accounts for the large number of plants seized by the police. I find he was doing selective grafting and breeding to obtain the best quality for his personal consumption. In short, I find the accused's evidence as to his self medication and to his cultivation of the marijuana plants to be credible. He admits that there are negative side effects in relation to the condition of his teeth, and to skin rashes and depression. However, having tried all other legally available pain killers he finds that the ingestion of marijuana enables him to walk with minimal pain, and without his mobility he is unable to earn a living. In short, I find that this accused grew and used marijuana orally for medicinal purposes only. There was no

evidence or indicia of any commerciality associated with the accused's grow operation. There were no score sheets found, no packaging, no weigh scales, and no evidence of buyers coming to his residence.

[9] Under these conditions the accused applies for Charter relief under section 7. The legal issues raised by that application are thoroughly canvassed by the judgment of the Ontario Court of Appeal in R. v. Parker, 146 C.C.C. (3d) 193, a case in which the Court stayed similar charges against an accused.

[10] Possession of marijuana is still a crime. However, possession for medicinal use only is available through the Ministerial Permit procedure. In this case that procedure was frustrated by the differences between his doctors and the granting authorities over the lack of a source which had undergone clinical trials and could be approved by the medical profession. While the accused took risks in using unclinically tested marijuana, I find that in this case those risks were acceptable to him and no one but himself was affected. Health is fundamental to life and security of the person. This accused discovered that he could manage his severe back pain and live a comparatively normal life by ingesting raw marijuana, after he found he could not have that quality of life by using drugs that were legally available to him. I found the accused's evidence as to his self medication and his cultivation of marijuana to be credible.

[11] In my judgment, it is not in accordance with the principles of fundamental justice to criminalize this accused while he waits for a medically approved source of raw marijuana to be made legally available to him. I agree with the judgment of the Ontario Court of Appeal in R. v. Parker, supra. I find that forcing the accused to choose between his health and imprisonment violates his right to liberty and security of the person under section 7 of the Canadian Charter of Rights and Freedoms. The Charter relief I am granting the accused is under section 24(1). As Chief Justice Lamer noted in R. v. Mills (1986) 26 C.C.C. (3d) 481:

> "As a general rule it is the trial court that is not only competent, but to be preferred in matters arising under the Charter".

[12] This position has been re-enforced recently in The Queen in Right of Ontario v. 974649 Ontario Inc., 159 C.C.C. (3d) 2002 at p. 321 where Chief Justice McLachlin speaking for the full court observed that:

> "In criminal proceedings incidental Charter issues are routinely resolved at the trial stage without recourse to other proceedings, a procedure repeatedly endorsed by this Court as desirable."

[13] In my judgment, the appropriate remedy for this violation of the accused's right to security of his person, is to direct a stay on Count 1 until such time as there is a government approved source of supply that has been clinically tested and has the approval of the Canadian Medical Association and the Alberta Medical Association, and this accused has had an opportunity to apply for an exemption.

Dated at the City of Edmonton, in the Province of Alberta this 26th day of June, 2002.

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Judge P.G.C. Ketchum