

Citation:

Date:

File No:  
Registry:

118904  
Victoria

**IN THE PROVINCIAL COURT OF BRITISH COLUMBIA  
CRIMINAL COURT**

**REGINA**

**v.**

**LEON EDWARD SMITH  
AND  
COLBY BUDDA**

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE JUDGE L.F. CHAPERON**

Counsel for the Crown:

Counsel for the Accused:

Place of Hearing:

Date of Hearing:

Date of Judgment:

Michael J. Lawless

Robert Moore-Stewart

Victoria, B.C.

May 26, June 11, July 15, 2004

September 7, 2004

- [1] The accused are charged with the possession of less than 3 kilograms of cannabis (marihuana) for the purpose of trafficking contrary to Section 5(2) of *The Controlled Drugs and Substances Act*. The date of the alleged offence is January 3, 2002.
- [2] Mr. Smith was the operator of an enterprise known as Ted's Bookstore. Its purpose was to provide a source of marihuana to persons with a medical need for it. At the time, January 3, 2002, while the Marihuana Medical Access Regulations provided for a medical exemption to the prohibition against possession of marihuana, it did not provide any way for those with the exemption to acquire marihuana legally.
- [3] Mr. Smith's "compassion club" which he called the Vancouver Island Cannabis Buyers' Club operated out of the Ted's Bookstore storefront on Johnson Street in Victoria.
- [4] On January 3, 2002 police were informed about the operation of the Club. The informant was an angry and disgruntled former member of the Club whose right to buy marihuana had been terminated because he was reselling it to others in contravention of the Club's policy.
- [5] The evidence disclosed that the operators of the Club required some evidence of a medical condition which marihuana could help and also required that the club members buy only for themselves and not resell it to others. There was a limit on the amount which could be purchased at one time.

[6] Mr. Smith has admitted in his evidence that he was the operator of the enterprise. The evidence against Mr. Budda is that he was found in the store near a computer monitor with a membership list on it and at a desk with money and marihuana and on it and scales nearby. On the back of the chair he was sitting on was a price list. The money was arranged so as to enable a person to make change for customers.

[7] Mr. Smith was very forthcoming with Constable O'Neal admitting he was the store owner and that he sold medicinal marihuana to members.

[8] The premises contained loose marihuana as well as marihuana seeds and marihuana cookies.

[9] Ironically, Mr. Smith had himself called police that day after the informant had started an altercation in the store when he was told his membership was terminated.

[10] Among the various items seized was a new membership sign up procedure card which indicated that proof of a medical condition was required for membership plus a membership list numbering some 800 persons with the names and medical conditions listed. The members were issued membership cards which allowed them to buy the marihuana.

[11] The evidence was that the club had applied for a government authorization for the sale of marihuana but had not as yet received it.

[12] A second officer, Constable Cronk, gave expert evidence that the business was run like a pharmacy with different strains of marihuana with different levels of T.H.C. There was 646 grams of marihuana with a street value of \$6,410.00 as well as two

varieties of marihuana cookies. The marihuana was not, he said, packaged in common street level weights but rather was weighed out specifically for each customer.

[13] In Cronk's opinion the marihuana on the premises was held for the purpose of trafficking.

[14] Mr. Smith gave evidence in his own behalf. Mr. Budda did not.

[15] Mr. Smith is candid in admitting he is a crusader for the legalization of marihuana for medical purposes and otherwise. He testified he had been running the Club for about 7 years out of an apartment. When this created problems, he says he was told by police to get a storefront which he did in 2001. In fact, he gave in evidence the name of the officer who told him this. Mr. Smith was very knowledgeable about the various diseases and conditions for which marihuana use could provide relief. He testified that he had decided as far back as November, 1995 to provide this service to sick people.

[16] Mr. Smith's evidence, which I found completely credible, was that the police were well aware of what he was about but didn't interfere because he was selling marihuana for medical purposes only. He said on numerous occasions undercover officers had come in and tried to buy drugs but were refused. He described the procedure used to qualify members. They had to produce photo identification, proof of a disability or disease for which marihuana could provide relief and in some cases a recommendation from doctor. For physical diseases proof of the condition or disease was sufficient but for mental health problems a doctor's note was needed.

[17] Mr. Smith's evidence was that he and the other persons working at the Club were paid \$10.00 an hour and operated 365 days a year because of the perceived need.

[18] At the time of the alleged offence the Government of Canada had responded to the Ontario Court of Appeal decision in *Regina v. Parker* (2000) 146 C.C.C. (3d) 193 which had held the prohibition against marihuana possession was unconstitutional absent a constitutionally acceptable medical exemption to that prohibition, by introducing the Marihuana Medical Access Regulations (MMAR). This set up a scheme whereby persons with a condition or disease for which marihuana could be an effective treatment could obtain an authorization to possess. What the MMAR did not however provide in January of 2002 was a reliable means by which persons in need could legally acquire their marihuana.

[19] Such people were thus forced to acquire their marihuana on the black market. It is unsettling to contemplate persons with AIDS or who are undergoing cancer treatment being forced to go down to the illegal drug emporium which operates in the downtown core of Victoria to acquire their marihuana from persons who are interested only in selling them drugs of unknown quality for a profit. But on January 3, 2002, but for compassion clubs such as Mr. Smith's, that was their only alternative.

[20] Because of the failure of the Government to provide a legal way for persons in need to acquire medical marihuana, there is implicit in the MMAR at the time in question a reliance on the black market to supply the requirements of those persons with a need for medical marihuana.

[21] This was considered at length again by the Ontario Court of Appeal in the case of *Hitzig et al v. Canada* (2003-10-07) ONCA 39 532, C39738, C39740.

[22] The Court in *Hitzig* was considering a civil application by three persons in need of medical marihuana who had no licit way of acquiring the drug. The MMAR had put in place a scheme by which such persons in need could become authorized to possess medical marihuana but provided no legal method by which they could obtain that marihuana. Their recourse was either the black market or compassion clubs such as Mr. Smith's.

[23] In Paragraph 20, the Court commented on the risks that those who operated such compassion clubs must live with, including raiding by police and being abused by criminals. Mr. Smith's operation in this case was raided because he had terminated a member's right to buy marihuana because he had resold it. Ironically, when this person became abusive Mr. Smith called the police but Constable O'Neal arrived first after that angry former member had informed him about the sale of marihuana at Ted's Bookstore.

[24] The Court in *Hitzig* in Paragraph 22 also commented on the obvious problems associated with the purchase of marihuana on the black market, namely high price, uncertain quality and availability and the risks associated with forcing vulnerable people to consort with criminals to obtain the marihuana.

[25] The Court at Paragraph 23 concluded that the Government was itself relying on what it called "unlicensed reliable suppliers" to provide those in need with medical marihuana.

~~"It is ironic, given the Government's reliance on this part of the black market to supply those whom the Government has determined should be allowed to use marihuana, that the police, another arm of the State, shut down these operations from time to time because they contravene the law."~~

[26] The Court at Paragraph 161 also found that the provisions of the MMAR effectively prevented the emergence of lawfully sanctioned "compassion clubs" to supply those who were authorized to possess medical marihuana.

[27] ~~On the one hand, the Government was relying on these clubs to be the "unlicensed, reliable supplier" of medical marihuana to those in need, while on the other hand it was criminalizing their actions and continuing to prosecute them. In so doing it was engendering a disrespect for the law and the administration of justice because of the fundamental unfairness of such a position. It has created an alliance between itself and these "unlicensed, reliable suppliers", whom it now seeks to prosecute. The Court in *Hitzig* found that the MMAR was not constitutionally acceptable because of their failure to provide those with a right to possess marihuana for medical reasons with a method of legally acquiring a reliable supply of the drug.~~

[28] Subsequent to that decision, the Government responded by amending the MMAR to provide for such a licit supply but at the time these accused were charged in January of 2002, those with a medical need for marihuana had no legal, reliable source of supply.

[29] Mr. Smith's operation in my view was clearly a "compassion club". While he and the other workers were paid it was at a very modest level of \$10.00 per hour. They were open every day of the year. Care was taken to ensure that persons who became

members of the Club were suffering from a medical condition which marihuana use could help. A limit was placed on the amount which could be purchased and the terms of membership prohibited members from reselling the marihuana. Although the scrutiny of potential members was not as stringent as the Government might have wished, they were doing the job the Government itself was not doing, namely, providing a reliable supply of marihuana to those in need of it.

[30] In the case of *R. v. St. Maurice* [2003] J.Q. No. 5670 (C.Q.) Mr. St. Maurice operated a compassion club and was charged with possession of marihuana for the purpose of trafficking and trafficking. There are some differences in the operation of the two clubs. Mr. St. Maurice was an unpaid volunteer. Mr. Smith and his other workers were paid a modest wage. His club required a medical doctor's statement in every case. Mr. Smith's did not always require a medical certificate but would look at other ways of determining if a medical condition existed for which marihuana use could provide relief.


[31] In *R. v. St. Maurice* the Court found that the accused had sufficient interest to challenge the constitutional validity of Section 5 of *The Controlled Drugs and Substances Act* as there was a risk they could be convicted pursuant to it. The Court found that Section 5 violated the accuseds' rights guaranteed by Section 7 of *The Charter* since persons who were ill and could benefit from the use of medical marihuana could not obtain the drug by any legal source.



[32] The Court in that case considered various remedies available to the accused who were in essentially the same position as the accused in this case. The Court settled on the judicial stay of proceedings as being the only appropriate remedy.

[33] In this case I am satisfied that the accused Smith and Budda operated a compassion club to provide persons with a medical need with a safe, reliable, supply of marijuana and as did the Court in *R. v. St. Maurice*. I am ordering a stay of these proceedings.

[34] I note that with respect to Budda the evidence of possession for the purpose of trafficking is circumstantial since he made no admissions to police nor did he testify at trial as Mr. Smith did. However the circumstances in which he was found by police satisfy me that he was very much a part of the operation of this club and but for the stay of proceedings I would have convicted him as well as Mr. Smith for possession for the purpose of trafficking.

  
Judge of the Provincial Court