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COURT OF APPEAL FOR ONTARIO

CATZMAN, CHARRON and ROSENBERG JJ.A.

B E T W E E N :	)	
	)	**Alan Young and**
HER MAJESTY THE QUEEN	)	**Paul Burstein,**
	)	**for the appellant**
Respondent	)	
	)	
- and -	)	**Morris Pistyner and**
	)	**Kevin Wilson,**
CHRISTOPHER CLAY	)	**for the respondent**
	)	
Applicant/	)	
Appellant	)	
	)	**Heard: October 6, 7 and 8, 1999**
	)	

On appeal from his conviction by Mr. Justice J. F. McCart, sitting without a jury, on August 14, 1997

ROSENBERG J.A.:

[1] This is one of two appeals heard by this court concerning the constitutionality of the marihuana prohibition in the former *Narcotic Control Act*, R.S.C. 1985, c. N-1 and the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.[1] The Crown appeal in *R. v. Parker* concerns the medical use of marihuana. This appeal centres primarily on the use of the criminal law power to penalize the possession of marihuana.

[2] The appellant owned a store called "The Great Canadian Hemporium". In addition to selling items such as hemp products, marihuana logos and pipes, the appellant sold small marihuana plant seedlings from his store. The appellant is an active advocate for the decriminalization of marihuana. The appellant does not require marihuana for any

[1] In 1997, the *Narcotic Control Act* was repealed by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

personal medical reason although he did sell marihuana cuttings from his store to persons who did.

[3] An undercover police officer bought a small marihuana cutting at the store. The police also seized marihuana cuttings and a small amount of marihuana when they executed search warrants at the appellant's store and home. As a result, the police charged the appellant under the former *Narcotic Control Act* with possession of *cannabis sativa*, trafficking in *cannabis sativa*, possession of *cannabis sativa* for the purpose of trafficking and the unlawful cultivation of marihuana.[2]

[4] At trial, the appellant challenged the constitutionality of the cannabis prohibitions in the former *Narcotic Control Act* on the basis that: (a) these prohibitions violate his rights under s. 7 of the *Canadian Charter of Rights and Freedoms;* and (b) the regulation of marihuana is not within federal jurisdiction. He also argued that the Crown failed to prove that the substances seized from him were prohibited narcotics as defined by the Act.

[5] McCart J. dismissed the appellant's constitutional challenge and found that the Crown had proven the offences against him. In reasons reported at (1997), 9 C.R. (5^{th}) 349, McCart J. fully reviewed the evidence at trial and made findings of fact and law with which I essentially agree.

[6] For the reasons that follow, I would dismiss the appellant's appeal. I will deal with the appellant's constitutional arguments first and then with whether the Crown proved that the seized substances were narcotics as defined by the Act.

THE CONSTITUTIONALITY OF THE PROHIBITION AGAINST THE POSSESSION AND TRAFFICKING OF MARIHUANA

1. The Appellant's Position

[7] The focus of the appellant's attack on the marihuana prohibitions is on the alleged deleterious health effects of marihuana use and the alleged danger to the public. Briefly, he argues that the evidence shows that marihuana use is not associated with any significant harmful health effects[3] and that it is the criminalization of marihuana, rather than its use, that poses the greater danger to the public. He argues that inclusion of

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[2] The appellant was convicted of possession of *cannabis sativa*, two counts of possession of *cannabis sativa* for the purposes of trafficking and one count of trafficking in *cannabis sativa.* He was acquitted on the charge of unlawfully cultivating marihuana.

[3] Indeed, he argues that marihuana has therapeutic uses.

marihuana in the Act violates s. 7 of the *Canadian Charter of Rights and Freedoms* because:

> (i) It is a principle of fundamental justice that the criminal law be used with restraint and not employed unless there is a reasonable basis for finding that the prohibition is directed to harmful conduct;
>
> (ii) 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.
>
> (iii) The right to use intoxicants in the privacy of one's home is a fundamental aspect of personal autonomy and human dignity and is thus guaranteed by s. 7.

[8] The appellant argues, alternatively, that the regulation of *cannabis sativa* is not within federal jurisdiction under s. 91 of the *Constitution Act, 1867*, being neither criminal law nor a matter of peace, order and good government.

[9] A note on terminology: Under the former *Narcotic Control Act*, it was an offence to possess a narcotic (s. 3), to traffic in a narcotic (s. 4(1)), and to possess a narcotic for the purpose of trafficking (s. 4(2)). The term "narcotic" is defined in s. 2 to include any substance in the schedule. The schedule lists "*Cannabis sativa*, its preparations, derivatives and similar synthetic preparations". Among the listed derivatives is "Cannabis (marihuana)". For this part of the analysis, I will, for simplicity, generally use the term "marihuana" as the part of the plant that users smoke. On occasion, it may be necessary to refer to the plant itself, in which case, I will use the term "cannabis" or "*cannabis sativa*".

2. The Trial Decision

[10] The trial judge heard two weeks of evidence, including evidence from some of the leading experts on marihuana. He was also referred to government and scientific studies and the reports of various law reform bodies. On the basis of this evidence, the trial judge concluded that previous concerns about marihuana use are exaggerated, but that there are certain health and public dangers associated with its use. In my view, these findings are founded in the evidence. They are set out in full below from pp. 360-62:

From an analysis of their evidence I am able to reach the following conclusions:

1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;

2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;

3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;

4. There is no hard evidence that cannabis consumption induces psychoses;

5. Cannabis is not an addictive substance;

6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;

7. That the consumption of marijuana probably does not lead to "hard drug" use for the vast majority of marijuana consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;

8. Marijuana does not make people more aggressive or violent;

9. There have been no recorded deaths from the consumption of marijuana;

10. There is no evidence that marijuana causes amotivational syndrome;

11. Less than 1% of marijuana consumers are daily users;

12. Consumption in so-called "decriminalized states" does not increase out of proportion to states where there is no decriminalization;

13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

Harmful Effects of Marijuana and the Need for More Research

Having said all of this, there was also general consensus among the experts who testified that the consumption of marijuana is not completely harmless. While marijuana may not cause schizophrenia, it may trigger it. Bronchial pulmonary damage is at risk of occurring with heavy use. However, to be fair, there is also general agreement among the experts who testified that moderate use of marijuana causes no physical or psychological harm. Field studies in Greece, Costa Rica and Jamaica generally supported the idea that marijuana was a relatively safe drug - not totally free from potential harm, but unlikely to create serious harm for most individual users or society.

The LeDain Commission found at least four major grounds for social concern: the probably harmful effect of cannabis on the maturing process in adolescence; the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities, from the additive interaction of cannabis and alcohol and from the difficulties of recognizing or detecting cannabis intoxication; the possibility, suggested by reports in other countries and clinical observations on this continent, that the long-term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder; and the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug

experience and lowering inhibitions about drug experimentation. This report went on to state that it did not yet know enough about cannabis to speak with assurance as to what constitutes moderate as opposed to excessive use.

The Report of the National Task Force on Cannabis, Canberra, Australia, was delivered on September 30, 1994. This Task Force concluded, in general, that the findings on the health and psychological effects of cannabis suggest that cannabis use is not as dangerous as its opponents might believe, but that its use is not completely without risk, as some of its proponents would argue. As it is most commonly used, occasionally, cannabis presents only minor or subtle risks to the health of the individual. The potential for problems increases with regular heavy use. While the research findings on some potential risks remain equivocal, there is clearly sufficient evidence to conclude that cannabis use should be discouraged, particularly among youth.

Sometime prior to the Canberra Report, the Royal Commission into the non-medical use of drugs in South Australia was released. This Commission concluded that marijuana is not an addictive drug and "is comparatively harmless in moderate doses, although there are effects on skills such as those required for driving, and its effects may be greater if it is taken in combination with other drugs. It is almost certainly harmful to some extent in high doses. The summary of the scientific and medical evidence does not entirely resolve the policy questions, since further value judgments have to be made."

Finally, I would refer to a commentary by Dr. Harold Kalant [the Crown's expert witness] on three reports which appeared in 1982 respecting the potential health damaging consequences of chronic cannabis use. The one report is that of an expert group appointed by the Advisory Council on the misuse of drugs in the United Kingdom. The second is that resulting from a scientific meeting sponsored jointly by the Addiction Research Foundation of Ontario and the World Health Organization. The third is that of a committee set up

> by the Institute of Medicine, National Academy of Sciences, of the United States of America. There was general agreement by the three groups after a review of essentially the same body of evidence. In brief, the verdict in each case has been that the available evidence is not nearly complete enough to permit an identification of the full range and frequency of occurrence of adverse effects from cannabis use, but that the practice can certainly not be considered harmless and innocent.
>
> I can only conclude from a review of these reports and the other *viva voce* evidence which I heard that the jury is still out respecting the actual and potential harm from the consumption of marijuana. It is clear that further research should be carried out. While it is generally agreed that marijuana used in moderation is not a stepping stone to hard drugs, in that it does not usually lead to consumption of the so-called hard drugs, nevertheless approximately 1 in 7 or 8 marijuana users do graduate to cocaine and/or heroin.

[11] The trial judge noted that studies have shown that marihuana has a therapeutic value for the relief of symptoms of certain diseases and illnesses. However, he concluded that this was irrelevant to the appellant's case since he did not claim to require marihuana for medical use. I address the issue of the medical use of marihuana in the companion appeal in *R. v. Parker*. I will consider the impact of my findings in that case to this appellant's case at the conclusion of these reasons.

THE CONSTITUTIONAL ARGUMENT

1. Section 7 of the *Charter of Rights and Freedoms*

(i) Personal autonomy

[12] The appellant's principal argument was based on the "harm principle" as a principle of fundamental justice. However, I find it convenient to first deal briefly with an alternative argument raised by the appellant. He argues that the right to use intoxicants, including marihuana, in the privacy of one's home is a fundamental aspect of

personal autonomy and human dignity. In my reasons in *R. v. Parker*, I have dealt at some length with the extent to which s. 7 of the *Charter* protects aspects of personal autonomy and I need not repeat that discussion here. For the purposes of this appeal, it is sufficient to refer to the reasons of La Forest J. in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315. This represents the widest view of liberty that has attracted the support of some of the judges of the Supreme Court of Canada. La Forest J., writing for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ. on this issue, held as follows at p. 368:

> Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. [Emphasis added.]

[13] This and other cases, such as the recent decision in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1999), 177 D.L.R. (4th) 124 (S.C.C.), concern decisions over medical care and by parents concerning the health of, and access to, their children. They are of an entirely different order from the right to intoxicate oneself in the privacy of one's home. The marihuana prohibition does not infringe this wider aspect of liberty in s. 7 of the *Charter*.

[14] The Supreme Court of Canada has also confirmed that s. 7 protects a right to personal autonomy as an aspect of security of the person. As Sopinka J. wrote in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at p. 588:

> There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these. [Emphasis added.]

[15] In my view, the decision to use marihuana for recreational purposes similarly does not fall within this aspect of security of the person. I do not agree that such a decision is basic to human dignity. This case is not at all like *Rodriguez* where, at p. 588, Sopinka J. described the impact of the *Criminal Code* prohibition on assisted suicide on the appellant's ability to make personal decisions in these terms:

> The effect of the prohibition in s. 241(b) is to prevent the appellant from having assistance to commit suicide when she is no longer able to do so on her own. She fears that she will be required to live until the deterioration from her disease is such that she will die as a result of choking, suffocation or pneumonia caused by aspiration of food or secretions. She will be totally dependent upon machines to perform her bodily functions and completely dependent upon others. Throughout this time, she will remain mentally competent and able to appreciate all that is happening to her. Although palliative care may be available to ease the pain and other physical discomfort which she will experience, the appellant fears the sedating effects of such drugs and argues, in any event, that they will not prevent the psychological and emotional distress which will result from being in a situation of utter dependence and loss of dignity.

[16] Other cases engaging this aspect of security of the person have included *R. v. Morgentaler*, [1988] 1 S.C.R. 30, where delays in the therapeutic abortion procedure put the pregnant woman's life and health at risk, and *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (C.A.), where a psychiatric patient was medicated contrary to instructions he had given when he was still competent. I have also held in *R. v. Parker* that the accused's right was infringed where he was denied access to marihuana that he required to control epileptic seizures that threatened his life and health. Again, the affront to autonomy and human dignity in these cases is far removed from the claim made by the appellant in this case.

[17] At this stage in the development of the *Charter*, it is not possible to delineate the aspects of personal autonomy that will receive protection under s. 7. The result for any given fact situation must be informed by the situations where a deprivation of liberty or security of the person has been found in the past.

[18] I agree with the trial judge that the recreational use of marihuana, even in the privacy of one's home, does not qualify as a matter of fundamental personal importance so as to engage the liberty and security interests under s. 7 of the *Charter*.

(ii) The "harm" principle

[19] This part of the appellant's s. 7 argument rests upon the risk of deprivation of liberty through the possibility of imprisonment upon conviction for the marihuana offences under the *Narcotic Control Act*. Drawing together a number of themes from various authorities, not all of them dealing with s. 7, Mr. Young, on behalf of the appellant, argues that s. 7 of the *Charter* precludes Parliament from interfering with the liberty of Canadians through a penal sanction unless there is a reasonable basis for finding that the conduct to which the prohibition is directed is harmful.

[20] In this aspect of the case, the appellant particularly relies upon the well-known principle expressed by Lamer J. at the opening of his reasons in *Reference re s. 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 492:

> A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter of Rights and Freedoms* (*Constitution Act, 1982*, as enacted by the *Canada Act, 1982*. 1982 (U.K.), c. 11). [Emphasis added.]

[21] This principle has been employed to measure the constitutionality of the *mens rea* or fault requirements of criminal and quasi-criminal provisions. It has not previously been used by the courts to evaluate the wisdom of penalizing the underlying prohibited conduct.

[22] The appellant also relies upon statements from the Law Reform Commission of Canada, the Report of the Canadian Committee on Corrections (Ouimet Report) and the Government of Canada itself in *The Criminal Law in Canadian Society*, which have all affirmed the principle of restraint as a fundamental basis for use of the criminal law and especially the use of the sanction of imprisonment.

[23] In summary, the appellant seeks to derive a "harm principle" from these and other statements as a principle of fundamental justice. He rightly points out that his liberty

interest is engaged since imprisonment was available for the marihuana offences under the *Narcotic Control Act* (as it still is under the *Controlled Drugs and Substances Act*). Accordingly, he can only be deprived of his liberty in accordance with the principles of fundamental justice. He argues that penal legislation that does not comply with the harm principle is not consistent with the principles of fundamental justice and therefore violates s. 7 of the *Charter.*

[24] In *Rodriguez v. British Columbia (Attorney General)* at p. 590, Sopinka J. cautioned that the court must be careful that the principles of fundamental justice do not become principles in "eye of the beholder *only*". As he said at pp. 590-91:

> Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result.

[25] The harm principle as a principle of fundamental justice evokes many of these concerns when it is taken out of the context from which it is derived. While it is a good basis for legislative policy, a helpful guide for the exercise of discretion by prosecutions and an important principle for judges in exercising discretion in sentencing, it is a difficult principle to translate into a means of measuring the constitutionality of legislation. For example, how much harm is sufficient to warrant legislative action? And, can the harm principle be applied outside the *mens rea* area in a manner that yields an understandable result?

[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. In a thoughtful treatment of this difficult question, 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.

[27] Braidwood J.A. described the harm principle at para. 138 as "whether the prohibited activities hold a 'reasoned apprehension of harm' to other individuals or society". He also held that the degree of harm must be neither insignificant nor trivial. He rejected a higher test suggested by Prowse J.A. in her dissenting reasons. She held at para. 177 that the harm must be of a serious, significant or substantial nature.

[28] I am prepared to accept for the purpose of this appeal that a harm principle is a principle of fundamental justice in the terms suggested by Braidwood J.A. I do not agree

with the higher test propounded by Prowse J.A. which, in my view, could lead to an unjustifiable intrusion into the legislative sphere. Moreover, the principle, as derived by Braidwood J.A., appears to be consistent with the argument made by the appellant in this court, which in turn was based on some of the language from *R. v. Butler*, [1992] 1 S.C.R. 452. In that case, Sopinka J., in applying s. 1 to the alleged violation of freedom of expression from the obscenity prohibition in the *Criminal Code,* held at p. 504 that a rational connection between the impugned measure and the objective of the legislation was made out if Parliament had a "reasoned apprehension of harm". Later he held at p. 505, in applying the minimal impairment test, that it was sufficient that the prohibited material "creates a risk of harm to society" and "that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm".

[29] Finally, it seems to me that the test, as articulated by Braidwood J.A., is consistent with Sopinka J.'s discussion in *Rodriguez* about the principles of fundamental justice. Sopinka J. held that in determining whether the legislation was consistent with the principles of fundamental justice, it was necessary to consider the state interest and at pp. 593-94 he referred to the reasons of McLachlin J. in *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at 151-52:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a <u>fair balance</u> be struck between these interests, both substantively and procedurally… [Emphasis added.]

[30] In *Cunningham* at p. 151, McLachlin J. had also held that the "*Charter* does not protect against insignificant or 'trivial' limitations of rights".

[31] Finally, the harm principle as articulated by Braidwood J.A. is not unlike a principle of fundamental justice described by Sopinka J. at pp. 594-95 of *Rodriguez*. He held that where the "deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose". Similarly, if the marihuana prohibition, which risks depriving the appellant of his liberty, does little or nothing to enhance the state's interests because there is no rational basis for finding that marihuana use is harmful, there is a breach of fundamental justice.

[32] As Sopinka J. said at p. 596 of *Rodriguez*, the determination whether substantive legislation is consistent with the principles of fundamental justice requires "an analysis of our legislative and social policy … to determine whether fundamental principles have evolved such that they conflict with the validity of the balancing of interests undertaken by Parliament." I need not engage in an extended discussion of this issue since I agree with the findings of McCart J. at trial and much of the analysis of Braidwood J.A. in *Malmo-Levine*.

[33] In considering whether Parliament has struck a fair balance, the deleterious effects of the marihuana prohibition should not be underestimated. In addition to the possibility of imprisonment, the evidence at trial also demonstrated the broader adverse impact. 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". The marihuana law has fostered disrespect and distrust for narcotic laws generally. The marihuana prohibition has also resulted in the stigmatization of many thousands of Canadians who have been given a criminal record or a record of a finding of guilt by reason of their being charged with possession of marihuana. That charge and the resultant court proceedings are often their only interaction with the criminal justice system.

[34] In considering the other side of the issue, the interests of the state, it has to be conceded that origins of the marihuana prohibition in Canada are not based in good public policy. While the objective was to protect Canadians from harm caused by marihuana use, the supposed evidence of that harm was based on racism and irrational, unproven and unfounded fears. The Crown does not suggest that the harms identified in the early part of the last century can justify the legislation. It does, however, identify a number of other harms that can justify a continuing state interest in the prohibition. As discussed earlier, I accept McCart J.'s findings that there is some harm associated with marihuana use. In my view, the evidence established that there is a reasoned apprehension of harm that is neither insignificant nor trivial. I do not see this as the "shifting purpose" argument, condemned by the Supreme Court of Canada in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. The purpose of the legislation has remained the same; the evidence to support the purpose has shifted. In any event, in considering the purpose, it is necessary to consider the particular legislation at stake. While the impugned provisions have their origin in the *Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22, the legislation involved in this challenge is the *Narcotic Control Act*, which was enacted in 1961 after Canada became a party to the United Nations *Single Convention on Narcotic Control 1961*. Under that Convention and those that have followed, Canada was obligated to prohibit the scheduled drugs, including marihuana, except in narrow circumstances, such as for medical use.

[35] The legislative situation in other western democracies, in general, reflects a similar approach to that currently existing in Canada. I canvass this issue more fully in *R. v. Parker*. It is sufficient for this appeal to note that, except for the medical use of marihuana, there is nothing approaching an international consensus that even the simple possession of marihuana should be legalized.

[36] Mr. Young also pointed to studies showing that cigarette smoking is more dangerous to the smoker's health than marihuana smoking and that alcohol abuse is associated with violent crime whereas marihuana use is not. In my view, this is not an apt comparison. The fact that Parliament has been unable or unwilling to prohibit the use of other more dangerous substances does not preclude its intervention with respect to marihuana, provided Parliament had a rational basis for doing so.

[37] To conclude, given the harms identified by the trial judge and the other objectives of the legislation, I do not agree that there is no rational basis for the marihuana prohibitions. In terms expressed by Sopinka J. in *Rodriguez*, the legislation is not arbitrary or unfair in that it is unrelated to the state's objectives and lacks a foundation in the legal traditions and societal beliefs that are said to be represented by the prohibitions.

(iii) Overbreadth

(a) Medical use

[38] The appellant submits that the marihuana prohibitions are overly broad in two respects and therefore the infringement of liberty does not accord with the principles of fundamental justice. For my reasons in *R. v. Parker*, I agree with the appellant's submission that the prohibition is overly broad in that it fails to include an exemption for medical use. I need not expand on that issue in these reasons. I will consider the impact of that holding for this appellant when I deal with remedy at the end of these reasons.

(b) Inclusion of non-intoxicating cannabis

[39] The appellant also submits that the prohibition is over broad because it applies to all forms of cannabis, not merely those with a sufficient level of Tetrahydrocannabinol (THC) to produce the psychoactive effect. It does not appear that this issue was raised before the trial judge as a constitutional matter. In any event, there is a rational basis for Parliament prohibiting all cannabis in order to effectively control the harm from psychoactive cannabis. This is because there is not a clear distinction between "narcotic"

and “non-narcotic” cannabis and, therefore, it is difficult to distinguish between the two. For example, while some scientists consider cannabis with 0.3% THC “narcotic”, there is evidence that even cannabis with less than this amount of THC is psychoactive.

2. Federal Jurisdiction to Regulate Marihuana

[40] The resolution of this issue depends primarily on the effect to be given to the decision of the Supreme Court of Canada in *R. v. Hauser* (1979), 46 C.C.C. (2d) 481. While the constitutionality of the *Narcotic Control Act* was not in issue in *Hauser*, in my view, this case is an authoritative statement from the Supreme Court of Canada (in a case involving cannabis) that the *Narcotic Control Act* was valid federal legislation and this court should follow it: *R. v. Sellars* (1980), 52 C.C.C. (2d) 345 (S.C.C.) at 348.

[41] In considering the application of *Criminal Code* provisions for the prosecution of offences under the *Narcotic Control Act*, Pigeon J., speaking for the majority, held that the Act did not depend for its validity on the criminal law power in s. 91(27) of the *Constitution Act, 1867*. After tracing the history of narcotic regulation in this country, he concluded that the legislation was enacted under the general federal residual power to make laws for the “peace, order and good government of Canada”. His reasoning is summarized in the following passage at p. 498:

> In my view, the most important consideration for classifying the *Narcotic Control Act* as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of "Matters of a merely local or private nature". The subject-matter of this legislation is thus properly to be dealt with on the same footing as such other new developments as aviation: see *Re Aerial Navigation*, [1932] 1 D.L.R. 58, [1931] 3 W.W.R. 625, [1932] A.C. 54, and radio communications *Re Regulation & Control of Radio Communication*, [1932] 2 D.L.R. 81, [1932] 1 W.W.R. 563, [1932] A.C. 304.

[42] The appellant seeks to avoid the effect of *Hauser* on three bases. The appellant’s first argument is that on this issue *Hauser* was simply wrongly decided, that Pigeon J.

was in error in holding that the regulation of *cannabis sativa* does not infringe upon matters of a merely local or private nature, namely health concerns. It may be that the record in this case is more extensive than the record placed before the Supreme Court of Canada in *Hauser*. However, in my view, it is not for this court to reconsider the issue.

[43] The appellant's second argument is similar to the first. He argues that recent pronouncements of the Supreme Court of Canada have called into question reliance upon the residual power as the foundation for the *Narcotic Control Act.* Once again, in my view, it is not open to this court to revisit the matter. In any event, I do not agree with the appellant that Estey J.'s statements in *Labatt Breweries of Canada Ltd. v. Canada (Attorney General)* (1979), 52 C.C.C. (2d) 433 (S.C.C.) are inconsistent with the holding by Pigeon J. in *Hauser*. I also note that the view expressed by Laskin C.J.C. in *Schneider v. The Queen* (1982), 68 C.C.C. (2d) 449 (i.e. that had he been sitting, he would have viewed the *Narcotic Control Act* as an exercise of the federal criminal law power) was not adopted by the other members of the court. Dickson J., speaking for the other members at pp. 465-66, accepted the majority holding in *Hauser* that Parliament is competent to make laws for the control of narcotics pursuant to its power to make laws in relation to peace, order and good government.

[44] The appellant's third argument depended upon his success in convincing the court that the legislation could not be supported by the federal residual power. He then sought to argue that the only other suggested head of power, criminal law, would not support the legislation for many of the same reasons that he advanced in support of his arguments under s. 7 of the *Charter*. Mr. Young referred to the well-known passages from *Reference as to the Validity of Section 5(a) of the Dairy Industry Act* [*The Margarine Reference*], [1949] S.C.R. 1 at 49 and 50 to support his argument that, because marihuana possession no longer represents a substantial harm to the public, it no longer falls within the realm of criminal law:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.
>
> …
>
> Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal

> law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law, but they do not appear to be the object of the parliamentary action here. That object, as I must find it, is economic and the legislative purpose, to give trade protection to the dairy industry in the production and sale of butter; to benefit one group of persons as against competitors in business in which, in the absence of the legislation, the latter would be free to engage in the provinces. To forbid manufacture and sale for such an end is prima facie to deal directly with the civil rights of individuals in relation to particular trade within the provinces … [Emphasis added.]

[45] In my view, the findings by the trial judge concerning the harm from marihuana use and the other objectives of the *Narcotic Control Act*, including Canada's international obligations and controlling the domestic and international trade in illicit drugs, are sufficient to dispose of this argument. Moreover, in view of the binding effect of the decision in *Hauser*, this argument is not available to the appellant. Finally, acceptance of the reservations expressed by Dickson J. in *Hauser* and Laskin C.J.C. in *Schneider* about the use of the federal residual power would merely result in the Act being justified as an exercise of the federal criminal law power.

PROOF OF THE OFFENCE

[46] The appellant's final argument is simply that the Crown failed to prove that the substances seized from his home and store were illegal substances under the Act. The certificates of analysis tendered at trial identified the substance as cannabis (marihuana). The analyst who signed the certificates testified that the procedures in his laboratory provide that a substance certified as cannabis (marihuana) must contain two of four target cannabinoids. It is not necessary that one of the cannabinoids be THC, the psychoactive ingredient in marihuana. The analyst could not say that the seized substances contained any THC. Based on this evidence, the appellant argues that the seized substances do not fall within the *Narcotic Control Act* prohibitions. To understand this argument, it is necessary to set out the relevant statutory provisions.

[47] Section 3 of the Act provides that except as authorized by the Act or regulations, no person shall have a "narcotic" in his possession. Section 2 defines "narcotic" as "any

substance included in the schedule or anything that contains any substance included in the schedule". Item 3 to the schedule is as follows:

> *Cannabis sativa*, its preparations, derivatives and similar synthetic preparations, including:
>
> (1) Cannabis resin,
>
> (2) Cannabis (marihuana),
>
> (3) Cannabidiol,
>
> (4) Cannabinol (3-n-amyl-6,6,9-trimethyl-6-dibenzopyran-1-ol),
>
> (4.1) Nabilone ((±)-trans - 3 (1,1 – dimethylheptyl) – 6, 6a, 7, 8, 10, 10a-hexahydro-1-hydroxy-6,6-dimethyl-9h-dibenzo[b,d] pyran-9-one),
>
> (5) Pyrahexyl (3-n-hexyl-6,6,9-trimethyl-7,8,9,10-tetrahydro-6dibenzopyran-1-ol), and
>
> (6) Tetrahydrocannabinol.
>
> but not including:
>
> (7) non-viable *Cannabis* seed.

[48] The appellant argues that, properly construed, the Act was not intended to apply to non-intoxicating substances. The appellant submits that the evidence showed that there are two strains of *cannabis sativa* – a fibre strain (hemp) and an intoxicating strain (marihuana) - and only the intoxicating strain, *cannabis sativa* with an excess of 0.3% THC could be considered a narcotic. I would not give effect to this argument.

[49] The appellant's submission is dependent upon there being an ambiguity in the wording of the statute because of the use of the term "narcotic" and the term "marihuana", both of which in their ordinary and dictionary meanings imply an

intoxicating or hallucinogenic substance. In my view, however, there is no ambiguity. It is open to Parliament to deem a particular term to have a meaning that it would not otherwise bear if it does so with sufficient clarity.

[50] Moreover, the decision of the Supreme Court of Canada in *R. v. Perka*, [1984] 2 S.C.R. 232 determines this issue against the appellant. In *Perka*, the accused advanced a similar argument. They adduced evidence that botanists considered that there were three species of cannabis—*Cannabis sativa L., Cannabis indica Lam.,* and *Cannabis ruderalis Jan.* They argued that only *Cannabis sativa L.* was covered by the *Narcotic Control Act* and the analyst had not tested the material to prove that it was *Cannabis sativa L.* The court rejected this argument. Dickson J. wrote as follows at pp. 265-66:

> But where, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted. It is clear that Parliament intended in 1961, by the phrase "*Cannabis sativa* L.", to prohibit all cannabis. The fact that some, possibly a majority, of botanists would now give that phrase a less expansive reading in the light of studies not undertaken until the early 1970's, does not alter that intention. The interpretation given to the *Narcotic Control Act* by the trial judge was consistent with Parliament's apparent intent in enacting the legislation, and was, in my opinion, correct.
>
> There is no question in my mind that the appellants were given "fair warning" by the *Narcotic Control Act* that their conduct was illegal. It is common knowledge in our society that marihuana is an illegal drug. It is not common knowledge that some botanists have recently concluded that there are three separate species of the mother plant, based on morphological considerations. Against this background, it seems highly unlikely that the citizen seeking guidance from his country's laws as to what he may or may not do, would see in the language "*Cannabis sativa* L." a basis for the three species botanical argument relied upon by the appellants in the case at bar. It would simply be unreasonable to assume that by using the phrase "*Cannabis sativa* L." Parliament

> meant to prohibit only some intoxicating marihuana and exempt the rest. Such an interpretation would be at odds with the general scheme of the *Narcotic Control Act* as well as the common understanding of society at large. Under the circumstances, it seems clear that the statute gives ample warning as written. Fairness does not demand that it be more narrowly construed. [Emphasis added.]

[51] Accordingly, the Crown proved that the substance found in the appellant's possession was marihuana as listed in the schedule and a narcotic within the meaning of s. 3 of the *Narcotic Control Act.*

DISPOSITION

[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. The person who brought the *Charter* challenge would usually be entitled to a constitutional exemption during that period, together with some other personal remedy to deal with the charge brought against him. See *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1998] 1 S.C.R. 3 at 20.

[53] However, the *Narcotic Control Act* has been repealed and therefore no declaration of invalidity is required. Further, the appellant, in my view, would not be entitled to a constitutional exemption since, unlike Mr. Parker, he is not within the class of persons for whom the exemption is required. The only issue, then, is whether the appellant is entitled to a personal remedy under s. 24(1) of the *Charter* in the form of a stay of proceedings.

[54] 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.

[55] The question of remedy raised by this case is similar to the issue dealt with by the Supreme Court of Canada in *Bilodeau v. Manitoba (Attorney General)*, [1986] 1 S.C.R. 449. Although not a *Charter* case, some of the same principles apply. The appellant in *Bilodeau* had been charged with speeding contrary to the *Highway Traffic Act*, R.S.M. 1970, c. H60 and received a summons for the offence issued under the *Summary Convictions Act*, R.S.M. 1970, c. S230. At trial, he applied for dismissal of the charge because both enactments were *ultra vires* the Manitoba legislature since they were printed and published only in English, contrary to s. 23 of the *Manitoba Act, 1870*, R.S.C. 1970, App. II, No.8. The trial judge held that the enactments were valid and convicted the appellant. His appeal to the Manitoba Court of Appeal was dismissed. The appellant appealed to the Supreme Court of Canada. By that time, the Supreme Court had held in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 that s. 23 of the *Manitoba Act* was mandatory and that laws not conforming with the bilingual requirement were, and always had been, invalid. However, the court had then applied the constitutional principle of rule of law to ensure that legal chaos did not ensue in Manitoba for the period required to translate, re-enact, print and publish the statutes in conformity with s. 23. With respect to the appellant's conviction under the invalid *Highway Traffic Act*, the court held as follows at pp. 456-57:

> The conviction is, however, saved by the principle of rule of law. One of the manifestations of this principle with respect to the legal situation in Manitoba is stated in the *Reference re Manitoba Language Rights*, at p. 768:
>
> > All rights, obligations and any other effects which have arisen under Acts of the Manitoba Legislature which are purportedly repealed, spent, or would currently be in force were it not for their constitutional defect, and which are *not* saved by the *de facto* doctrine, or doctrines such as *res judicata* and mistake of law, are deemed temporarily to have been, and to continue to be, enforceable and beyond challenge from the date of their creation to the expiry of the minimum period of time necessary for translation, re-enactment, printing and publishing of these laws.
>
> Thus, the conviction of the appellant under the invalid *Highway Traffic Act* is enforceable pursuant to this Court's

> decision and order in the *Reference re Manitoba Language Rights*.

[56] This doctrine appears to stand as an exception to the broad proposition stated by Dickson J. in *Big M Drug Mart Ltd.*, at p. 313 that "no one can be convicted of an offence under an unconstitutional law". That statement was made in the context of the court striking down the legislation under s. 52 of the *Constitutional Act, 1982*.

[57] I have held in the *Parker* case that the marihuana prohibitions under the *Narcotic Control Act* should not be struck down since the legislation has been repealed. Therefore, s. 52 is not engaged. Section 43(d) of the *Interpretation Act*, R.S.C. 1985 c. I-21 nevertheless authorizes the prosecution under the former enactment. The question is then whether the appellant's convictions should stand or whether the appellant is entitled to a personal remedy under s. 24(1) of the *Charter*. While the result in *Bilodeau* depended upon the rule of law doctrine as applied to s. 23 of the *Manitoba Act*, it seems to me that the same result is achieved under s. 24(1) of the *Charter*.

[58] Moreover, it is not unheard of for the successful *Charter* claimant to receive no immediate benefit from the result. In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the respondents, non-resident members of the Batchewana Indian Band, sought a declaration that s. 77(1) of the *Indian Act*, which requires that band members be "ordinarily resident" on the reserve in order to vote in band elections, violates s. 15(1) of the *Charter*. They were successful and the court declared that the words "and is ordinarily resident on the reserve" in s. 77(1) were invalid but 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 in the expectation that the parties could develop an electoral process that balanced the rights of off-reserve and on-reserve members in future elections.

[59] In her concurring reasons, L'Heureux-Dubé J. considered the basis for granting an exemption. Some of the considerations that underlie the exemption remedy may apply to the personal remedy of a stay of proceedings sought by this appellant. L'Heureux-Dubé J. pointed out that, in general, litigants who have brought forward a *Charter* challenge should receive the immediate benefits of the ruling, even if the effect of the declaration is suspended. She referred at pp. 286-87 to an excerpt from Roach, *Constitutional Remedies in Canada* (loose-leaf), (1999) at para. 14.1856 as to why the successful litigant should be granted an exemption from the suspension of the effect of a declaration of invalidity and, therefore, an immediate remedy:

> Corrective justice would suggest that the successful applicant has a right to a remedy while regulatory or public law approaches would only be concerned with giving the applicants enough incentive to bring their case to court.

[60] In *Corbiere*, L'Heureux-Dubé J. held that neither consideration applied. In my view, similarly, neither consideration applies here. The corrective justice rationale has no application since the appellant did not obtain the remedy he was seeking, decriminalization of marihuana for recreational use. The public law rationale has no application, for the same reasons. The only question is whether the appellant 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 this appellant, who openly defied the law, should remain convicted when the basis upon which he challenged the law failed.

[61] Accordingly, I would dismiss the appeal.

Signed: "M. Rosenberg J.A."
"I agree: M.A. Catzman J.A."
"I agree. Louise Charron J.A."

RELEASED: 31 JUL 2000

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