Citation:

Date: NOV - 6 2002
File No: 120651
Registry: Surrey

# IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

**REGINA**

v.

**DANIEL MARK OLSON**
**AND**
**WILLIAM DAVID THOMPSON**

**REASONS FOR JUDGMENT**
**OF THE**
**HONOURABLE JUDGE J.R. LYTWYN**

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| Counsel for the Crown: | A. Read |
| Counsel for the Defendants: | J. Conroy, Q.C. |
| Place of Hearing: | Surrey, B.C. |
| Date of Hearing: | July 29 & October 18, 2002 |
| Date of Judgment: | November 6, 2002 |

[1] Daniel Mark Olson and William David Thompson are charged with possession of cannabis (marihuana) contrary to Section 4(1) of the *Controlled Drugs and Substances Act*. Olson and Thompson seek relief, on two different grounds, pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms* including a declaration of constitutional invalidity under section 52(1) of the *Charter*.

[2] The first ground challenges the constitutionality of the prohibition of the personal use and simple possession of marihuana contrary to sec. 4 and Schedules II, VII and VIII of the *Controlled Drugs and Substances Act, S.C. 1996, c. 19*. Olson and Thompson state the prohibition violates their constitutional right not to be deprived of liberty and the security of person except in accordance with principles of fundamental justice as set out in s. 7 of the *Charter*. It is conceded, however, that this ground must fail as this Court is bound by the decisions in ***Regina v. Malmo-Levine; Regina v. Caine [2001] 145 C.C.C. (3d) 225 (B.C.C.A.)***

[3] In ***Regina v. Malmo-Levine and Caine, supra***, the majority of the B.C. Court of Appeal held the penal provisions for simple possession of marihuana under the *Narcotic Control Act S.C. 1960-1, c. 35* did not offend Section 7 of the *Charter*. The majority held that in cases involving simple possession of marihuana the liberty interests of section 7 of the *Charter* were engaged, that the state has no right to interfere with the liberty of an individual in the absence of harm to other persons or to society in general, but that the findings of fact made by the trial judge showed that marihuana did pose a risk of harm to others and society that was not insignificant or trivial.

[4] Finally, the majority considered whether the *Narcotic Control Act* struck the right balance between the rights of individuals and the interests of the state. They found the result of the balancing test was quite close, but that a degree of judicial deference is owed to Parliament in matters of public policy. The deprivation of the accused's liberty caused by the presence of penal provisions in the *Narcotic Control Act* did not offend section 7 of the *Charter*. Prowse, J.A. dissented as she believed a reasoned apprehension of harm that is not insignificant or trivial is not the appropriate formulation of the test. She believed there should be a reasonable apprehension of harm of a serious, substantial or significant nature, whether or not actual harm can be established. The matter is presently on appeal to the Supreme Court of Canada.

[5] The second ground challenges the constitutionality of Section 60 of the *Controlled Drugs and Substances Act* and the statutory criterion for adding an item or portion of an item to the Schedules pursuant to Section 60 of the *Act*. Section 60 provides that:

> The Governor in Council may, by order, amend any of the Schedules I to VIII by adding to them or deleting from them any item or portion of an item, where the Governor in Council deems the amendment to be necessary in the public interest.

[6] Olson and Thompson state that Section 60 of the *Controlled Drugs and Substances Act* is unconstitutional because it violates s. 7 of the *Charter* in that it is unconstitutionally vague in its use of the term ". . . to be necessary in the public interest", relying on ***Regina v. Morales, (1992) 77 C.C.C. (3d) 91 (S.C.C.) Regina v. Parker, July 31, 2002 (Ont. C.A.)*** They assert the section is constitutionally vague and

imprecise, permitting a 'standardless sweep' that allows the Governor in Council to pursue personal predilections in directing the inclusion of any item.

[7] This ground is premised on the assertion that the inclusion of marihuana as set out in Schedules II, VII and VIII of the *Controlled Drugs and Substances Act* occurred as a result of the Governor in Council by Order pursuant to Section 60.

[8] The legislative history of the addition of marihuana to the list of prohibited substances is set out in ***Regina v. Malmo-Levine, supra***. Marihuana first became a prohibited substance in 1923 and has remained a prohibited substance since then but under different legislative enactments.

[9] Parliament passed its first piece of legislation directed to the use of narcotics for non-medicinal purposes in 1908 with the *Opium Act, S.C. 1908, c. 50*. This statute was replaced in 1911 by the *Opium and Drug Act, S.C. 1911, c. 17*, which prohibited cocaine, morphine, and eucaine in addition to opium. The *Opium and Drug Act* contained a provision allowing Cabinet to add new substances to the schedule of prohibited drugs from time to time in the public interest. In 1923, Parliament enacted a consolidated *Opium and Narcotic Act, S.C. 1923 c. 22*, containing "Cannabis Indica (Indian Hemp) or Hasheesh" in the Schedule of prohibited drugs.

[10] Cannabis Indica or marihuana remained a prohibited substances through various changes to the *Act*. In 1929, the *Opium and Narcotic Drug Act* was amended so the penalty for possession included a minimum six-month sentence and a $200 fine. *S.C. 1929, c. 49. s. 4.* In 1954, Parliament amended the *Opium and Narcotic Drug Act,*

*R.S.C. 1952 c. 201* to include the new offence of possession for the purpose of tracking and increasing the penalties for trafficking.

[11] In 1961, Parliament enacted the *Narcotic Control Act* to replace the *Opium and Narcotic Drug Act*. Marihuana cannabis remained a prohibited substance under the Schedules of the *Narcotic Control Act*. In 1969, amendments to the *Narcotic Control Act* allowed offenders to be prosecuted by way of summary conviction instead of indictment.

[12] In 1996, the *Narcotic Control Act* was merged with *the Food and Drugs Act, R.S.c. 1985, c. F-27* to create the *Controlled Drugs and Substances Act*. Marihuana remained a prohibited substance in Schedules II, VI and VII of the *Act*.

[13] The Crown states that the Schedules II, VI and VII of the *Controlled Drugs and Substances Act* were not added to or deleted through order of the Governor in Council and Section 60 of the *Act* but rather were enacted by Parliament when the *Act* was passed by Parliament. The Crown states that the constitutionality of Section 60 does not arise in the present case because marihuana was included in the schedule to the statute at the time that the statute was adopted relying on ***Regina v. Harmon, (1994) 85 C.C.C. (3d) 490 leave to appeal to S.C.C. refused 85 C.C.C. (3d) vi.***

[14] I agree with the Crown. It is not necessary to determine whether Section 60 of the *Controlled Drugs and Substances Act* contravenes the *Charter of Rights and Freedoms* as marihuana was included in the Schedules to the statute at the time the statute was adopted rather than being added by an Order in Council pursuant to Section 60.

[15] For these reasons, the application of Olson and Thompson is not granted.

Lytwyn, J.
Surrey
November 6, 2002