

TURMEL: #3 Nielsen No-Resurrection Motion Transcripts

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JCT: Now the rest of the transcript of the July 22 2004

hearing reported at:

<http://health.groups.yahoo.com/group/medpot/message/1311>

UPON RESUMING...

THE COURT: All right. For the record then, we'll switch back to the Nielsen et. al. matter. Mr. Smith, over the luncheon, I asked you to consider three questions. One, can the Court of Appeal be seen to be changing its own decisions. What's your position on that?

SUBMISSIONS BY MR. SMITH:

I'm afraid, Your Honour, I can't answer the questions you posed to me. I don't believe I'm in a position to do that. I do, however, wish the opportunity to make submissions on the law as I know it. I don't believe it's necessary to address those questions specifically.

If I can be afforded the opportunity to discuss, from my perspective, what I believe the law to be and, and what the court should be guided by, perhaps that may be of assistance. If not, then perhaps somebody should, somebody should have been subpoenaed or served by, from the Department of Justice to come here and give evidence.

JCT: Evidence for a question of law?

I was served with the motion on, on the 12th of July, three days before it came before the court. Obviously, it wasn't complying with the criminal proceeding rules, and I'm suggesting three days clearly isn't notice.

In any event, Your Honour, they were never served.

JCT: Who was never served?

Efforts to attempt to contact them over the luncheon break were unsuccessful by me. However, if we look at exactly what is going on here, the motion is really of no consequence, quite candidly. I don't believe it should even be properly before the court.

The state of the law, as it exists today is quite simply this. First and foremost, Section 5(2) of the Controlled Drugs and Substances Act has never been deemed to be unconstitutional. So, the request by way of motion to dismiss Section 5(2) as it relates to these accused be dismissed, is inappropriate and is not properly before the court. It's never been deemed to be unconstitutional.

So, let's deal with the 4(1) charges, and I want to deal with Parker one and Parker two, and I'll deal with them as Your Honour has demarcated them, if you will.

In the first decision, in 2002, the court held that the marijuana prohibition in 4(1) of the Controlled Drugs and Substances Act was unconstitutional, and this the key point here, because it failed to permit individuals to possess marijuana for valid medical purposes. That's the key. It declared the prohibition invalid and suspended the declaration of invalidity for 12 months, so that parliament could remedy the constitutional deficiency by creating a medical use exemption.

In comes the medical, Marijuana Medical Access Regulations, otherwise known as M.M.A.R., which defined the circumstances in the manner in which access to marijuana for medical purposes was permitted. At that time, Your Honour, the trial judge initially granted the respondent's application and acquitted him. It was appealed to a summary conviction appeal court, and the trial judge's, trial judge's decision was affirmed and the appeal was dismissed.

JCT: What case is he talking about? Must be J.P. in Windsor.

There was an application for leave to appeal. He eventually became, came before the court, as Your Honour's well aware, for an appeal, and there was a bunch of people that were dealt with at the same time, Hitzig, Myrden, Chamney, Devries, etcetera, and one of which was Terrance Parker. I don't know how much clearer the court could have been. In that case, the court specifically dealt with the constitutional validity of that Act, the Medical Marijuana Access Regulation. At paragraph 166 of that decision, Your Honour...

THE COURT: This is Parker two.

JCT: This is Hitzig.

MR. SMITH: This is Parker two, from the Court of Appeal, paragraph 166, Your Honour. It says:

"As a result, the Medical Marijuana Access Regulation as modified becomes a constitutionally sound medical exemption to the prohibition in Section 4(1) of the C.D.S.A.".
Going to paragraph 170:

JCT: Remember, we're trying to get Court of Appeal Doherty to put this on the Order for Turmel-Paquette and Parker Two. Mr. Smith should explain the relevance to Vanita Goela.

"As a result, the marijuana prohibition in Section 4(1) is no longer inconsistent with the provisions of the Constitution."

JCT: Too bad he doesn't have the Order to point at like we have the Parker and Krieger Orders to point at. He has to go into a decision and urge the same conclusion since it's nowhere on any Order that the law was ordered alive. Actually, it was judged alive but the Court never ordered it alive again.

What we're talking about, again as I harken back, the marijuana prohibition in 4(1) of the C.D.S.A. was made constitutional.

JCT: Making a dead statute workable when it's too late? When the deadline for repair has been missed?

It still would permit individuals to possess marijuana for medical purposes, not recreation, not because they want to smoke a little dope. It's not that. It's for medical purposes. So, they amended, modified the M.M.A.R. and as a result of that modification, the marijuana prohibition in 4(1) was no longer inconsistent with the provisions of the Constitution.

And as far as I'm concerned, and as far as the world, the Province of Ontario, and Canada for that matter is concerned, between July 31st, 2001, and October 7th, 2003, the state of the law was in flux. That was resolved by the Hitzig decision in the Court of Appeal.

JCT: The law was dead he calls "in flux." Flux implies movement, the law wasn't moving towards death, it was dead. Way past being in flux.

THE COURT: And the reason is that the federal government, I gather, dropped the ball in the sense that they didn't bring in the regulations.

JCT: Sure they brought in the regulations. Except the regulations didn't work.

In other words, what happened was that Parker one said, you know what? You've got a problem here. You make it an offence for people with a medical purpose to possess marijuana. You've got to change it, and they give them a window of opportunity of 12 months. They didn't change it, and hence, the situation with the learned justice from Windsor tossing the case and eventually a number of cases tossed until the Court of Appeal came along with Parker two.

JCT: Can the court come along and change things?

MR. SMITH: What actually happened, Your Honour, I think you're, you're accurate to some extent. What actually happened in that case was that they were to respond within a year to bring in this regulation, and they did that within the year period of time. Unfortunately, that regulation, I, I don't believe adequately addressed possession for medical purposes, and that's where the the difficulty lies.

JCT: And if it didn't adequately address the violation of rights, the law's death is the difficulty.

That was, subsequently, in the October 7th, 2003, judgment, rectified, and from that point forward, Section 4(1) of the C.D.S.A. has been a valid law in the Province of Ontario and in Canada.

JCT: Here he argues that the Ontario Court of Appeal can impose criminal sanctions on citizens of other provinces.

So, to possess marijuana is an offence. It has been an offence. Any defence counsel, in this jurisdiction or Hamilton, or any of the jurisdictions around here will tell the court that routinely, I deal with matters with other defence counsel and routinely, there is, for the record, cases dealing with Section 4(1) of the C.D.S.A. charges. If there...

THE COURT: Charges post–October 7th?

MR. SMITH: Post–October 7th charges.

THE COURT: Those would be charges that were laid after October 7th when the Court of Appeal clarified the law.

MR. SMITH: And these charges here before the court are from June of this year.

THE COURT: All right.

MR. SMITH: I don't see what, what the argument is. In any event, Your Honour, briefly, that's, those are my points as, as relating to that matter.

And again, Mr. Turmel's case deals with whether the declaration in Parker could be extended to include the prohibition in Section 5(2) of the Controlled Drugs and Substances Act, and I think you've already referred to that, Your Honour.

It's never been, deemed to be unconstitutional and that's never been a problem, quite candidly, before the court. Section 5(2) has always been an offence, and it continues to be an offence. So, I believe that to be a non–issue.

With respect to the Court of Appeal decisions in Clay and Malmo–Levine, we have to be careful, because what we're looking at in those cases is a Section 7 argument, fundamental justice and basically whether or not the criminal prohibition on possession of marijuana infringes that section. So, it's a different issue, quite candidly.

THE COURT: Yes, I don't think that was raised in the application before the court.

MR. SMITH: I won't deal with it then, Your Honour, because I really believe it's a separate and distinct issue, and it's not something that we should deal with at this point in time.

With respect, Your Honour – so that's, that's essentially, I don't believe the court overruled anything. Maybe what the court does, what the Court of Appeal is enlisted to do, is deal with issues of law and interpret law and statutes and apply common law principles thereto. Again, I, I indicated what the law was in Hitzig and what was exactly taking place and the clarifications that took place, and it's not overruling any decisions. It's clarifying a decision, which is what they're enlisted to do. They're the law of the land, subject to any change by the legislature, which hasn't happened, and as far as I'm concerned, the law as it exists is a valid law.

I don't believe I can offer an opinion or a comment, Your Honour, with respect to the second point as the federal prosecutor. I believe that the current law under Section 4(1) of the Controlled Drugs and Substances Act to be confusing.

THE COURT: You're saying it's not now, since October 7th?

MR. SMITH: Right.

THE COURT: All right.

MR. SMITH: And I, I'm saying that from my perspective. I'm not speaking, necessarily for the Department of Justice. I anticipate that they would take the same view, but I can't say that, Your Honour, because I haven't had a chance to speak to anybody from there.

I think the third point that you've asked me to canvass or

address, can the Court of Appeal resurrect a legislative provision, that otherwise it struck down? Well, they weren't struck down.

JCT: Har har har har. Incredible.

They were never struck down. They were clarified, and they were given an opportunity to, the, the government was given an opportunity to do that. They did it and as of October 7th, 2003, that's been valid law in this country.

THE COURT: All right. Thank you, Mr. Smith. Any reply from any of the applicants?

REPLY BY MR. NIELSEN:

Yes. Somewhere I read in here where the M.M.A.R. did not state that the, they had...

MRS. NIELSEN: I think it was Lederman...

MR. NIELSEN: I believe it was in...

THE COURT: Hold on, folks. I can only listen to one of you at a time. Okay? So, why don't you conference, figure out what you're going to say and then one of you say it.

MR. NIELSEN: Oh, yeah. Where it was struck down and where it was just...

MRS. NIELSEN: It was already dead at that time.

MR. NIELSEN: That's micro management of, of the law, and I, I wasn't aware that a judge was allowed to micro manage...

MRS. NIELSEN: The courts.

MR. NIELSEN: ...parliament's decision.

THE COURT: Any other concerns you have to voice to the court by way of reply?

MRS. NIELSEN: I have, I have one comment, Your Honour. My, my idea is, if you were a judge out in B.C. in a court, that you would want to withhold the, the decision made from that court, because it just makes sense, that if they'd made sticking with the decision that was made in in ..., in B.C.'s court, you're saying that what they say out there really doesn't matter. I'm quite sure Mr. Lederman would want his decision upheld.

MR. NIELSEN: What she's trying to say is that...

MRS. NIELSEN: In other words, he struck the law down, and now they're trying to rebuild it, so...

MR. NIELSEN: It's...

MRS. NIELSEN: ...that makes his decision null and void, basically. It changed.

THE COURT: Okay. But you have to all appreciate that lower courts are subject to the scrutiny of appellate courts, and if I, of the lower court, screw it up, then it's your right to say, you know what? Edward got it wrong and it should go in front of a higher court for their consideration and review.

JCT: That's a gimme. Hope we don't have to. Hope the Crown has to do the dancing.

And what you see in these cases are a series of decisions that have been reconsidered by a higher court, an appellate court, and the appellate court is charged with the responsibility of considering the appropriateness of a lower court decision, and saying, you know what? They got it right or they didn't get it right, and these are the reasons. And it's a fundamental part of our system of justice...

JCT: But not resurrect repealed statutes. POLCOA.

MRS. NIELSEN: Even though the law...

THE COURT: that...

MRS. NIELSEN: ...has been dead for two years?

THE COURT: that, let me finish. That both defendants and the Crown have the opportunity to ask a higher court for a review or a consideration.

MRS. NIELSEN: At this point, though, the law was dead already for two years, and then they say they resurrected it again, they repealed it and made it better. I was under the understanding once a law's been struck down, it must go back to parliament.

THE COURT: Okay.

MR. NIELSEN: Be legislated.

MRS. NIELSEN: In order to be put back in and become constitutional for all of us. I mean, once it's been deemed unconstitutional, it needs to be fixed, by the right people, not by the courts. That's my...

THE COURT: All right.

JCT: All right. It wasn't fixed by the right people. Well said. POLCOA.

MRS. NIELSEN: ...my main argument.

THE COURT: And that may be just as a result of you having this concern that, you know what? What happened in this period of time between 2001 and October...

MRS. NIELSEN: Mm-hmm.

THE COURT: ...7th, 2003? This situation is not unique. There have been other instances ..

MRS. NIELSEN: I know.

THE COURT: ...where courts have determined that pieces of legislation don't stand Charter scrutiny, and they have said, we're going to make a finding today, but we're going to withhold the imposition of our finding for a period of time to allow certain changes to be made which would bring it in line with the Charter. The fact that a court does that, doesn't make the legislation less applicable once that period of time passes and the necessary changes have been

made. So, you have to bear that in mind. Justice is not a perfect instrument, and I think that's what can be frustrating for people. They wonder, well, why are things changed and then changed back. Well, that's all part and parcel of how the law works. Anything else...

MR. NIELSEN: So, you're ..

THE COURT: ...anyone wishes to say?

MR. NIELSEN: So, what you're saying is if an entire, Ontario judge amends a law that exists...

MRS. NIELSEN: Strikes down.

MR. NIELSEN: ...and a judge out in British Columbia doesn't agree that the Ontario judge was right, then wouldn't they just fight back and forth over something that was supposed to be provincial?

THE COURT: Well, I think what you have to...

MR. NIELSEN: Or like...

THE COURT: ...yeah, what you have...

MR. NIELSEN: ...parliamentary?

THE COURT: ...to appreciate is the principle of stare decisis(ph), the principle of precedent. What you need to understand is that I'm bound by my higher court in this province. So, I'm bound by the decision of the Ontario Court of Appeal.

MR. NIELSEN: But you're not bound by a law that may not exist.

JCT: Bingo. Boy is Doug ever quick on the draw with always the right arrow.

THE COURT: I'm not bound, necessarily, by a decision that's made in British Columbia. That decision in British Columbia may have some persuasive authority over me simply because of how the logic of the decision runs, but in this case, the Ontario Court of Appeal in the case that has been referred to earlier makes it very clear that 4(1) now stands and 5(2) always stood.

MR. NIELSEN: Also, on page three here, Your Honour, of Malmo–Levine case, one, two, three, four, fifth paragraph down:

"The relevant principle of fundamental justice is that the parliamentary response must go, must not be grossly disproportionate to the state interests sought to be protected. A criminal law that is arbitrary or irrational will infringe Section 7 of the Charter."

THE COURT: Okay. And you have to be careful, though, that the application that you're bringing is different than the application that was brought on Malmo–Levine. And so, the court's concern is that you may now be, sort of, stretching and saying okay, well, that case sort of stands for something I'm interested in putting before this court. That

case stood for the whole proposition of the constitutionality of the possession of marijuana. It was a situation not like this situation. Anything else?

MRS. NIELSEN: The only other thing I'd like to add is that Health Canada, Health Canada supposedly resurrected the law again by, by changing it on December 3rd, 2003, which again made it unconstitutional at that point on. THE COURT: Yes.

MR. NIELSEN: They put the poisonous part back...

MRS. NIELSEN: Put it right back in.

MR. NIELSEN: ...into the law that...

MRS. NIELSEN: Which took out.

MR. NIELSEN: ...they took out to make it...

MRS. NIELSEN: And they've put it back...

MR. NIELSEN: ...unconstitutional.

MRS. NIELSEN: ...in.

MR. NIELSEN: On December of 2003, they put that piece back in...

MRS. NIELSEN: Which...

MR. NIELSEN: ...that in the Parker decision...

MRS. NIELSEN: ...to begin with.

MR. NIELSEN: ...they dropped because of that case.

THE COURT: Hold on. One at a time.

MR. NIELSEN: So, the poisonous part of the law that they took out to strike the law down in the Parker decision, was put back in last December of 2003, which means that when the, if the law exists today with that poisonous part that struck it down in the first place, is it not struck down also again?

THE COURT: But I don't take my marching orders from Health Canada. I take mine from the Ontario Court of Appeal.

MR. NIELSEN: So, I guess...

THE COURT: All right.

MR. NIELSEN: ...my basic closing argument is, if, if the Crown Attorney's office can't present me evidence that there was a law legislated by parliament since it was dropped in the Parker case, how am I to fight my innocence considering he can't prove that there is even a law against what I'm doing here.

JCT: Great shot.

THE COURT: But I think you may have missed his point. You were charged in June of this year.

MR. NIELSEN: Mm-hmm.

THE COURT: The Court of Appeal clarified its position and the position of the law in Ontario on October 7th of 2003. That's the federal prosecutor's position.

MR. NIELSEN: By putting...

THE COURT: So, that...

MR. NIELSEN: ...in a law...

THE COURT: ...when you committed...

MR. NIELSEN: ...that was...

THE COURT: Let me finish. When you committed the offence in June of 2004, the law in the Province of Ontario as stated by that Ontario Court of Appeal in Parker was clear, that both 4(1) and 5(2) are constitutional.

JCT: Of course, Judge Sheppard basically said the same thing except that he was waiting to be shown otherwise. Hope the Timeline convinces both of them. Actually, they have no excuse, certainly not the Nuremberg excuse, to continue an unlawful prosecution. Tough decision to be making. If he just follows orders, he has to send his judicial wards off to trial.

All right. Thank you for your submissions, and there are a couple of issues that I need to consider. I'm going to put this case over for, not a long period of time, and I'll then provide you with my decision. Just give me a second to look at my diary.

MR. SMITH: Your Honour, could I ask that you not schedule it during the week of the 26th of July, please?

THE COURT: Yeah. It won't be. All right. I'm looking at September 14th.

MR. SMITH: I'm in your court in any event, Your Honour.

THE COURT: All right. That's convenient. All right. Would all of you please stand, please? All right. I want to thank you for your submissions today. I'm going to adjourn your case to September 14th at ten a.m., at which time I'll give you my decision. In the event that I dismiss all of your applications, I'm going to also then on the 14th, conduct a judicial pretrial with a view to attempting to resolve this case in some fashion. For example, you were here earlier today, saw another case where multiple defendants were charged and one defendant pled out, another defendant had charged stayed. I'm not saying that's the situation in this case, but those are the types of things a court may canvass at a judicial pretrial. So, I'd like you all to be back here on September 14th, at ten a.m., and it will be number two court, which is the court next to me. Thank you.

MR. SMITH: Thank you, Your Honour.

JCT: So judge now has the <http://www.cyberclass.net/turmel/timeline.htm> of cases so he has no excuse to get it wrong. POLCOA.

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Abolitionist Slave Leader John C. "The Banking Systems Engineer" Turmel for UNILETS interest-free time-based currency in U.N. resolution C6 to Governments in the <http://www.un.org/millennium/declaration.htm> <http://www.cyberclass.net/turmel> 519-753-0645 USENET: can.politics