

# TURMEL: Pearson Booby-traps Nielsen motion

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*From:* John Turmel (*bc726\_at\_FreeNet.Carleton.CA*)

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JCT: Well, we might as well see what Pastor Ed Pearson has added to the Nielsen file, word for word.

EP: Court File No:  
ONTARIO COURT OF JUSTICE (Region)

BETWEEN:  
HER MAJESTY THE QUEEN  
-AND-  
Accused

APPLICANT'S FACTUM IN SUPPORT OF HIS  
NOTICE OF APPLICATION AND CONSTITUTIONAL ISSUE

JCT: Moron. Now that he's raised a constitutional question, the Crown has the right to respond and make arguments. Let's get it straight. We, like the Windsor Phillips decision in J.P., have no constitutional question. Parker won our constitutional question. All we need now is a declaration that the statute is no longer known to law since Courts Only Abrogated the prohibition and Parliament Only legislates but did not here. So our case is as simple as Windsor's non-constitutional case with no constitutional question.

Ed has now complicated it by adding a constitutional question to the file which may be all it takes for the Crown to now want to study up on a response. At least, I'd ask for an adjournment to study Pastor Pearson's new Factum on the new constitutional issue if I were the Crown, wouldn't you? Does it not seem fortuitous for the Crown that the inclusion of this new reason for an adjournment pops up at this time? So, the Crown can now have the Pearson constitutional issue delayed because of the failure to file the required Notice of Constitutional Question to Canada's provincial Attorneys General too. You must inform all of them if you want to raise a constitutional issue. It hasn't been done right here where no constitutional question was expected to be raised

until Ed stuck his constitutional nose into our file.

EP: Pursuant to the provisions of Charter of Rights and Freedoms s.24 (1) (Criminal Proceedings Rules, Rule 27.01 ( c ) , Form 5 and 27.04(1) )

JCT: Our motion deals with none of this, only whether the statute is repealed or not, not a constitutional question at all. And nothing more. And now Ed's added a constitutional question that should permit the delay of the case as the Crown haven't had the chance to respond to the new constitutional arguments, only the non-constitutional "no-longer-known-to-law" arguments. Ed's given the Crown the chance to delay the case to argue against Ed's new constitutional arguments. Regardless, it just means that Sheppard's decision will make the national news first next month. Or the next person who can stay focused on the non-constitutional question.

EP: PART 1  
STATEMENT OF THE CASE:

1. The applicant , was arrested on 2004 in the town of Ontario, within the territorial jurisdiction of this Court. The charges against the applicant are:: -----  
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2. The applicant released upon his own recognizance appeared for arraignment Court at the Court House at Ontario on the day of 2004;
3. That upon arraignment on 2004 the matter was adjourned until 2004.
4. That on 2004, the matter was adjourned until 2004 for appearance with agent.
5. That on 2004 the matter was again adjourned until this day 2004.

PART 11 SUMMARY OF THE FACTS:

6. That the relevant facts in the matter at Bar at this time consist solely of the Information filed, secondly the pretended and purported charges that are alleged within the said Information # . Thirdly, the fact that the applicant was compelled to appear before the Court to respond to the said Information. Fourthly, the Information contains charges and offences unknown to law. Fifthly, the Information and charges therein infringe and deprive the applicant of his right to liberty and security and his right not to be deprived thereof except in accordance with principles of fundamental justice.

PART 111 ISSUES AND THE LAW:

7. Where a Court of Appeal by final judgment has declared a statute unconstitutional and of no force and effect but has granted temporary validity that expired without Parliamentary re-enactment does not that statute for all legal purposes cease to have effect as law? If the answer is: yes:

8. If such a statute no longer exists at law may, a Court of Appeal at a subsequent sitting approximately three years later, without statutory authority lawfully empower itself to indirectly re-enact and grant constitutional validity to such a statute?

JCT: I like it better the way judge Edward asked it: Does the court have the power to resurrect a law that's been repealed? Ed's verbose rendition can't be anyone's first choice.

EP: 9. Whether the Medical Marihuana Access Regulations [MMAR] were valid purposeful regulations having force of law when the underlying law sought to be regulated was without force and effect at the time of the promulgation, the former having been declared unconstitutional and of no force and effect?

JCT: I don't even want to read this twice. We're not here to deal with questions of constitutionality.

EP: 10. What is the effect of the expiry of a temporary Constitutional validity granted by a Court of Appeal?

JCT: We had no reason to ask this because it had already been answered. The Parker Day Declaration took effect after July 31 2001 and they've admitted it did. So the effect after expiry is what the court admitted it was, the law was repealed. Why is Ed trying to ask what's already been determined.

EP: 11. May a Court of Appeal directly or indirectly in respect of a statute that in law no longer exists read in or read down that statute so as to constitutionally validate such a non-existent law?

JCT: Judge Edward's question was shorter. Perhaps he'll appreciate Ed helping him make it longer.

EP: Where a Court of Appeal by final judgment has declared a statute unconstitutional and of no force and effect but has granted temporary validity that expired without Parliamentary re-enactment does not that statute for all legal purposes cease to have effect as law?

JCT: Everyone's admitted so. Why ask what's already been accepted? The law died on Terry Parker Day. Everyone knows it, except Ed who has to ask. Though it gives the Crown the chance to engage the constitutional debate once again.

EP: 12. It is clear from the judgment of the Supreme Court of Canada in *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 that no person may be charged or convicted under an unconstitutional law and that any person may defend against the charge by arguing the constitutional validity of the charge. Inclusive is that any person may defend against a charge that is founded upon a statute that has been declared unconstitutional and of no force and effect, has ceased to exist, and which has not subsequently been re-enacted by Parliament.

If such a statute no longer exists at law may, a Court of Appeal at a subsequent sitting approximately three years later, without statutory authority lawfully empower itself to indirectly re-enact and grant constitutional validity to such a statute?

JCT: Edwards asked it better.

EP: What is the effect of the expiry of a temporary Constitutional validity granted by a Court of Appeal?

JCT: It's been admitted that the effect was the invalidity.

EP: May a Court of Appeal directly or indirectly in respect of a statute that in law no longer exists read in or read down that statute so as to constitutionally validate such a non-existent law?

JCT: Still like Edward's wording better no matter how many times Ed repeats the same thing.

EP: In *Re Manitoba* [1985] 1 S.C.R. 721 the Supreme Court of Canada determined that if before the expiry of the temporary validity a statute is not re-enacted it ceases to have any legal force and effect no law existing.. In respect of the instant matter the Ontario Court of appeal in *Parker v Q*, [2000] 49 O.R. (3d) 481 (C.A.) declared at paragraphs 10–12 and 210 that the prohibition against cultivation and possession of Marihuana was unconstitutional CDSA s.7 and 4 being integral one to the other and inseparable the Court rightly declared both to be in violation of Charter s.7 rights.. The Ontario Court of Appeal suspended for one year the effect of the declaration of unconstitutionality by granting temporary validity to those statutes during that period of time. Is not such a suspension constitutionally impermissible given Charter s 1, 7, and s. 52 of the

Constitution Act, 1982.

JCT: Ed's supposed to be telling them the answer to the question, not asking it.

EP: That issue is in question at this time and cannot be left for another day. It is submitted that what is clear is that the applicant as an accused has standing to attack these present charges as being for offences unknown to law and as charged offences that infringe and deny his s. 7 Charter rights.

JCT: No one needs part II about his constitutional rights, we only need part about unknown to law which calls for no further delays.

EP: It is a fundamental principle that orders issued without jurisdiction or on some fundamentally flawed basis are nullities \*\*\*\*\* Persons materially affected by such matters are entitled as of right to have them put to rest and some Court is correspondingly obliged to do so.\*\*\*\*\* It is part of the overarching doctrine of ex debito justitiae : R v Sterling (1993) 84 C.C.C. (3d) 65 (Sask. C.A.).

14. In Schachter, [1992] 2 S.C.R. 679 and the more recent case of Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General) Neutral citation: 2004 SCC 4. File No.: 29113, 2003: June 6; 2004: January 30, the issue before the Supreme Court of Canada was the question of when it is permissible to read in and/or read down an "existing law" so as to bring it within constitutional requirements. It is no longer questionable that the common law power to read in and/or read down conflicts with the mandatory terms of s.52 of the Constitution Act, 1982. The applicant at this time raises that issue. However, it is of note that both of the above cited cases have application only where and when the reading in or reading down is in respect of an existing, enforceable having effect statute. Thus there exists that additional issue. (underline emphasis added by applicant) No judgment on all fours with the applicant's present submissions can be found by this applicant, thus viable constitutional issues are raised. In the case at bar it is established that in respect of the involved statutes and regulations neither had force and effect nor existed as valid law.

15. Section 4(1) ceasing to have force and effect on July 31 2001,

JCT: Actually, July 31 2001 was its last day of force and effect. It ceased to have force and effect at 12:00:01 on

Aug 1 2001.

EP: the objective purpose of the MMAR had ceased to exist. The CDSA, Schedule substance sought to be regulated, was and is marihuana, the possession and cultivation of which was no longer prohibited. Marihuana was no longer a substance within the very intent, purpose and objective of the regulations. The MMAR were not stand alone provisions they provided no prohibitions the validity of those regulations required an underlying source, which was the prohibitions found in CDSA s. 4 (1), 5 (1) ,7 (1) the Schedule substance 'marihuana' without which they had neither force nor effect. The MMAR were ab-initio nullities.

16. It is the applicant's submission that as CDSA s. 4 and 7, were offences unknown to law and of no force and effect on October 7, 2003. The Ontario Court of Appeal could neither directly nor indirectly by any act of the Court give breadth of life to either. Common reason and logic dictates that non-existent no force and effect statutes and regulations are not capable of correction or resurrection except by Parliament and in respect of the latter by Governor in Council.

JCT: So he argues POLCOA too.

EP: 17. In Parker (supra) The Court of appeal declared sections 4 (1) as it relates to the substance Marihuana in the Schedule and s. 7(1) as it relates to the substance marihuana in the Schedules of the CDSA, unconstitutional and of no force and effect but suspended the effect of the declarations for one year, that is to say until (July 31 2001). Sections 4 (1), 5 (1) and 7 (1) in and of themselves remained in full force and effect and constitutionally valid excepting when relative to the substance marihuana prescribed in the schedules. No application by the Crown for leave to appeal to the Supreme Court of Canada was sought. On July 31 2001 and thereafter, actually since the CDSA enactment in 1995, relative to the substance marihuana had no legal existence. In Hitzig et al v Q, (2003) October 7 2003, DOCKET: C39532; C39738; C39740, on appeal from (2003) 171 C.C.C. (3d) 18, the Ontario Court of Appeal affirmed R. v. Parker, supra, Our decision in this case confirms that it did not do so. Hence the marihuana prohibition in s. 4 has been of no force or effect since July 31, 2001 [sic]. The Section 4, declared unconstitutionality related to the substance prohibited, 'marihuana' as set forth in the schedule. Absent the inclusion of a substance the section 4 (1) prohibition is meaningless.

18. Without consideration by the Court of the issue set forth in paragraph 9, (*supra*), it must be noted that on January 9th 2003, the Ontario Superior Court of Justice, in *Hitzig et al v Her Majesty the Queen, Lederman (J)* rendered a decision declaring the Marihuana Medical Access Regulations (MMAR) unconstitutional being in violation of Charter s. 7 though suspending the effect of the said declaration for a period of six months. Thus on July 10th 2003 the MMAR, if not corrected by that date, as has been conceded by the Crown became invalid.

19. The Crown appealed the judgment in *Hitzig et al*, and sought before Carthy J.C.A., a stay of the Lederman (J.) decision on the grounds that Failure to sufficiently address the issues raised by the Court by July 10, 2003 would result in the MMAR becoming invalid in Ontario. A stay of the decision was requested by the Crown pending the appeal, but refused. The consequence of the denial of the stay coupled with the Crown failure to address the issues raised by Lederman (J) prior to July 10, 2003 resulted in the MMAR becoming constitutionally invalid and of no force and effect in Ontario. Thus the MMAR was without force and effect for any purpose in Ontario. As a matter of law, for purposes of enforcement or compliance therewith, the regulations no longer existed, s. 52 Constitution Act 1982. Clearly this situation was subject to the reasoning and judgment of the Supreme Court of Canada in *Re Manitoba* (*supra*) as regards the consequences of an expiration of a temporary validity. The question then is what are the legal consequences and sanctions relative to the appeal taken in *Hitzig et al* and whether a Court of Appeal in such circumstances has the constitutional or statutory power to re-enact the specific provision or whether the regulating body must promulgate new regulations or must Parliament intervene in the enactment. It is the submission of the applicant that the appeal relative to the MMAR at the point of denial of the stay became academic and un-remedial. It became an appeal wholly devoid of underpinning and one not subject to adjudication, one which no judgment could cure.

20. Even if it were acceptable as being within jurisdiction and the *Hitzig et al* Court of Appeal could strike or read down five parts of a regulative scheme that expired (MMAR), its power to do so was limited and curtailed by both *Re Manitoba* and *Schachter v Canada*, which together impose a burden that is incapable of being met within the confines of the Courts jurisdiction, statutory and constitutional. The striking of five parts of the MMAR in all of the circumstances was void.

21. The Hitzig et al, Court concluded without a proper analysis of its power to do so, that by striking or reading down the offending five parts of the MMAR they could give life to the expired MMAR, and secondly, having recreated same the end result would automatically be that the prohibition of possession of marihuana Parker v Q, declared to be unconstitutional would ipso facto become constitutional and the CDSA s. 4(1) prohibition against marihuana would once again be enforceable. On the basis of this constitutionally infirm assumption that defies all rules of statutory construction the present applicant stands charged, with a Court created offence that infringes and deprives him of his right to liberty and security and the right not to be deprived thereof except in accordance with fundamental principles of justice. The position of the Crown in Parker v Q (supra) was:

In this respect, I agree with the submissions of the Crown. In light of the leading decisions on remedy in Schachter v. Canada, [1992] 2 S.C.R. 679, Corbiere v. Canada (Minister of Indian and Northern Affairs), [1999] 2 S.C.R. 203 and Rodriguez, the Crown submits that, should this court find a violation of s. 7 because the legislation fails to provide adequate exemptions for medical use, the only available remedy is to strike down those provisions and suspend the finding of invalidity for a sufficient period of time to allow Parliament to craft satisfactory medical exemptions. [199] Since the federal Crown takes this position in defending its own legislation, it is only necessary for me to briefly indicate my reasons for reaching the same conclusion with respect to the Controlled Drugs and Substances Act

22. Assuming arguendo that the Hitzig et al judgment conforms with statutory and constitutional dictates and that the five stricken parts served to give life to the expired MMAR, there remains glaring infirmities going to establish invalidity. The Court failed to constitutionally situate itself in a position that would permit or vest it with the power exercised. In fact, the Court concluded that there indeed was no permanence in the power exercised and that the striking of those five parts would in all probability give life to further constitutional attacks. The Court stated at paragraph [172]

Third, we acknowledge that the Government could choose to address the constitutional difficulty by adopting an approach fundamentally different from that contemplated in the MMAR. The alternatives range from the Government acting as the sole provider, to the decriminalization of all transactions that provide marihuana to an ATP holder. Indeed, even if the Government is content with the solution

contained in the MMAR as modified by our order, it may seek to impose reasonable limits, provided they do not impede an effective licit supply, for example on the amount of compensation that a DPL holder can claim or on the size of the operation that a DPL holder can undertake.

23. The Court then went much further acknowledging that their decision, [166] While the record before us sustains this conclusion, it is conceivable that, as events unfold, further serious barriers could emerge either to eligibility or to reasonable access to a licit source of supply. Should that happen, the issue of the appropriate remedy might have to be revisited in a future case (underline emphasis added by the applicant)

24. These above paragraphs 19–20 make it patently clear that the Hitzig et al Court exceeded the jurisdictional powers imposed by *Schachter v Canada* (supra) and *Re Manitoba* (supra). The Crown in *Hitzig et al*, (supra) submitted as follows:

JCT: How many ways are there to say they exceeded their power?

EP: 76. With respect to 'reading in' the Supreme Court in *Schacter* noted as follows:

The Court should not read in in cases where there is no manner of extension which flows with sufficient precision from the requirements of the constitution. 'In such cases, to read in would amount to making ad hoc choices from a variety of options, none of which was pointed to with sufficient precision by the interaction between the statute in question and the requirements of the Constitution. 'This is a task of the legislature, not the courts.' (emphasis added) *Schacter v. Canada*, supra at 19

77. The Court in *Schacter* also reiterated the following observation of Dickson, C.J.C. in *Morgentaler* who, having found that the detailed scheme embodied in the abortion law was constitutionally deficient, went on to say: Having found that this "comprehensive code" infringes the Charter, 'it is not the role of the court to pick and choose among the various aspects of s.251 so as to effectively redraft the section.' (emphasis added)

25. It can be also be properly advanced and it is submitted that the failure of the Crown to comply fully with the Order of the *Hitzig et al*, Court as regards removing the limitation of the amount of compensation a DPL holder can command as well as the size of the operation that a DPL

holder can undertake and for how many is fatal. The Crown's failure to comply and to adhere to the Courts Order in respect of the very constitutional infirmities found, two of the five, resituates the MMAR as declared by Lederman (J), unconstitutional and unknown to law as of July 10th 2003, the whole being violation of Charter section 7, Justice Carthy, of the Ontario Court of Appeal on June 25, 2003 having refused to grant the Crown application for a stay of the decision of Lederman, (J).

26. As concerns CDSA s. 4, ( the prohibition against possession of marihuana), the question is whether a law that has by final judgment been declared unconstitutional and of no force and effect as of July 31 2001 can, on October 7th, 2003 without any act of the Parliament, be re-constituted as an offence known to law notwithstanding that that provision for all purposes ceased to exist on July 31st 2001, Charter section 1 and section 52 of the Constitution Act 1982, Re Manitoba, and Schacter (supra). The applicant submits that the CDSA s.4 (1) prohibition against marihuana the substance, remained and is as previously declared unconstitutional and of no force and effect.

JCT: I like Edward's short question better.

27. The sole distinction between the judgment in Parker (supra) CDSA s. 4 and that of Hitzig et al (supra) MMAR,, is that the latter because of the pending appeal might appear to have an air of legality which the applicant does not admit, whilst Parker (supra) on the finality of judgment principle was not subject to collateral, direct or in this case indirect intrusion and interference with by the Court of Appeal of Ontario through the bias of another independent matter then before the Court. It can be said that in respect to CDSA s.4 the Court put the wagon before the horse, their act was premature in the sense that prior to speaking to that section it was required that that section exist in law and fact. A surgical intervention to remove the shoes from a dead horse cannot give life to that animal or an adjacent. The Hitziget al Court failed to adhere to the Parker judgment which unequivocally directed that only Parliament could enact a statute that could correct the constitutional infirmities that resulted in the declaration of unconstitutionality. Parliament failed to do so within the temporary period of validity and the declared inoperable part at that point ceased to exist. It is submitted that the Ontario Court of Appeal in Hitzig et al, (supra) usurped the exclusive domain of Parliament and acted ultra vires its statutory authority and prescribed powers its judgment was in excess of jurisdiction and was a nullity and void. The charge in the instant matter is an unconstitutional

infringement of the applicants rights and in conflict with Charter s. 7.

JCT: Parliament Only Legislates, Court Only Abrogates" is shorter.

EP: 28. Even under the common law and common law principles the power to read in, read down or suspend declarations of ultra vires was circumscribed by the necessity that there exist exceptional circumstances. However, with the advent of the Charter and Constitution Act, 1982 s. 52 it is abundantly clear, that Court suspensions of declared unconstitutional statutes and regulations found to be so because they violate charter s. 7 run afoul of s. 52. This is so by reason that such suspensions would condone continued violations and infringements of the Charter s. 7 Charter rights of individuals contrary to the mandatory provisions of s.52 and remove or nullify the remedial provisions of Charter s.24 (1). It is trite law to state that common law and principles thereof that conflict with the Charter must be resolved in conformity with the Charter and the clear mandate of s.52 of the Constitution Act, 1982.

29. The applicant submits that in all of the circumstances and in law, both statutory and constitutional the instant charge is an unconstitutional infringement and denial of his Charter section 7, rights.

JCT: This gives the chance to the Crown to have an adjournment to argue whether it's unconstitutional or not, once the Nielsens have served the other 14 provincial Attorneys General first. Maybe I'll get the Nielsens to drop their constitutional request which the Crown can use to adjourn their case.

EP: PART 1V ORDER REQUESTED

30. An Order issue on the grounds that no valid law prohibiting possession of the schedule 11 substance marihuana exists and that the present and any subsequent proceedings relative to that substance must be dismissed as an abuse of process.

JCT: How many ways to ask if no law exists? Ed's thinks his way is better than mine.

EP: 31. That the applicant be granted his costs.  
Dated this day of July 2004 At Burlington, Ontario,

AUTHORITIES TO BE CITED Paragraphs Page (First appearance)

Big M Drug Mart Ltd [1985] 1 S.C.R. 295 11 4  
Re Manitoba [1985] 1 S.C.R. 721 12,16,20,22 5  
Parker v Q [2000] 49 O.R. (3d) 481 (C.A.) 12,14,17,21,23 5  
Schachter v Canada [1992] 2 S.C.R. 679 12,20,22 5  
Canadian Foundation Youth v Canada, (attorney General)  
Neutral Citation 2004 S.C.C. 4 13, 6  
Hitzig et al v Q [2004] October 7, 3003 (OCA)  
14,15,16,17,20,21,23 6  
it this factum in writing, without oral argument.  
Edited by MedPotMarc (Sun Sep 05 2004 09:58 AM)

JCT: Imagine missing the Krieger decision which invalidates both cultivation and possession at the same time.

Anyway, he's asking for the same relief I'm asking for except his Factum has the constitutional booby-trap that should derail their case for the next few months. It's an out for the Crown they'd be stupid to miss. Remember how Bruce Ryan had the 200 page document to hand in that would have delayed his case? Same kind of possible stall here. What other choice does the Crown have? They're in no rush to judgment and Ed's given them the opportunity to put everything off. It's basically a more verbose version of Turmel's POLCOA except that Pearson Booby-traps Nielsen motion with constitutional question.

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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