

TURMEL: Crown's Supreme Court "All Sections" Memorandum

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IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

JOHN C. TURMEL
Applicant (Appellant)

-and-

HER MAJESTY THE QUEEN
Respondent (Respondent)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL RESPONDENT, HER
MAJESTY THE QUEEN

(Rules 6,27 and 49 of the Rules of the Supreme Court of Canada)

MEMORANDUM OF ARGUMENT IN RESPONSE TO THE APPLICATION FOR
LEAVE TO APPEAL

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. The Applicant was charged with possession of marihuana for the purpose of trafficking, contrary to section 5(2) of the Controlled Drugs and Substances Act1 (CDSA). Before a trial date was even scheduled, the Applicant brought an interlocutory application in the Superior Court of Ontario, seeking an order "quashing the count under s. 5 [of the CDSA] and declaring that marijuana is no longer on Schedule II of the Controlled Drugs and Substances Act".² The application was dismissed.

2. The Applicant then appealed to the Court of Appeal for Ontario, and argued that, as a result of that court's decision in *R. v. Parker*, marihuana had ceased to be listed as a controlled substance on Schedule II of the CDSA and, therefore, the offence

of possession of marihuana for the purposes of trafficking in s. 5 (2) of the CDSA was no longer in force at the time he was charged

3. The Court of Appeal, on October 7, 2003, dismissed the Applicant's appeal. Although the Court of Appeal noted that there were questions as to whether the motion was properly brought, and whether the Superior Court even had jurisdiction to hear it, the Court addressed the Applicant's argument and held that the offence of possession of marihuana for the purpose of trafficking remained in effect.³

4. The Applicant now, one year after the decision of the Court of Appeal, seeks leave to appeal to this Honourable Court to seek a declaration that the word "marijuana" was deleted from Schedule II for all offences set out in the CDSA, in reliance on the Court of Appeal's decision in *R. v. Parker*? As well, he raises a legal issue not raised in the courts below. "When legislation is struck down, is it reasonable for the government not to re-print the legislation to effect the repeal and to count on the courts to remember where the written word no longer applies?"⁰

5. The Applicant is eleven months late in seeking leave to appeal and well out of time to bring this Application. The Applicant has not brought a motion to seek an extension of time to file his leave application. Instead, he seeks an order abridging time for service, filing, or the hearing of the application.⁶ Assuming that we can treat the Applicant's application for leave to appeal as an application to extend time, he has failed to file any affidavit evidence to justify such an extraordinary delay, as required by the rules. Although self-represented, the Applicant is a very experienced litigant.

6. Even if an extension of time were to be granted, leave to appeal should be denied. No error of law arises on a question of any national or public importance. The appeal is also without merit. As the Court of Appeal properly held, the declaration of invalidity made by that court in *R. v. Parker* was only applicable to the offence of simple possession of marihuana in section 4 of the CDSA, and did not extend to any other offence provision in the CDSA. Moreover, the Applicant did not have a right of appeal to the Court of Appeal in any event, and this Honourable Court should not permit the Applicant to continue to use interlocutory proceedings to delay his criminal trial on the merits. Finally, the Applicant now seeks leave to appeal to this Honourable Court to raise a legal issue that was never argued in the courts below.

B. HISTORY OF LEGAL PROCEEDINGS

7. On July 31, 2000, the Ontario Court of Appeal, in *R. v. Parker*,¹ held that the criminal prohibition against the

possession of marihuana in section 4 of the CDSA was of no force or effect in the absence of a constitutionally acceptable medical exemption from that prohibition. The Court, however, suspended its declaration of invalidity for a period of one year to provide the Government with sufficient time to address the constitutional deficiency.⁸

8. In July 2001, prior to the expiry of the one year suspension period granted by the Court in Parker, the Government promulgated the Marihuana Medical Access Regulations⁹ which permitted, in certain circumstances, the possession and production of marihuana by individuals for medical purposes.

(1) The decision of the Superior Court of Justice (Aitken, J.)

9. On or about May 14, 2003, the Applicant was charged under the CDSA with the offence of possession of marihuana for the purposes of trafficking, in an amount not exceeding 3 kilograms, an offence within the absolute jurisdiction of a provincial court judge pursuant to s. 553 of the Criminal Code.¹¹

10. On or about May 20, 2003, the Applicant brought a motion to quash the Information in the Ontario Superior Court of Justice.

His Notice of Motion requested the following relief:

- "1. an Order pursuant to Rule 601 (1) to quash the indictment for the defect apparent on the face thereof that discloses no offence known to law;
2. an Order of mandamus that the Attorney General cease all further prosecution of charges no longer known to law and commence expunging all convictions under said statute which is unknown to law;
3. an Order of prohibition that the Attorney General from [sic] laying all further new charges under said statute no longer known to law;
4. an Order striking condition (3) of the release in the undertaking given to a Justice of the Peace dated May 15 2003."¹²

11. The Applicant argued that the Court of Appeal for Ontario, in *R. v. Parker*,¹³ had "invalidated the prohibition on marihuana" in the CDSA and the court's Order had the effect of "deleting" marihuana as a controlled substance from Schedule II of the CDSA.¹⁴

12. On May 26, 2003, Aitken, J. dismissed the Applicant's application to quash the Information. Aitken, J. found that,

"The Applicant's motion is dismissed. The Applicant has been charged under s. 5 (2) of the CDSA. The declaration of the Court of Appeal in the case of *R. v. Parker* (2000), 49 O.K. (3d) 481 relates to s. 4 (1) of

the CDSA, namely simple possession of marijuana. It does not apply to s. 5 (2), possession for the purpose of trafficking."15

(2) The decision of the Court of Appeal for Ontario (Doherty, Goudge, and Simmons, JJA)

13. The Applicant appealed the decision of Aitken, J., repeating his argument that marihuana was no longer listed on Schedule II of the CDSA.

14. The Court of Appeal for Ontario dismissed the Applicant's appeal. The Court found that marihuana continued to be a controlled substance listed on Schedule II of the CDSA, and thus the offence of possession of marihuana for the purposes of trafficking continued to exist on May 26, 2003. The Court stated:

[4] While there are questions about whether this motion was properly brought, and whether the Superior Court had jurisdiction to hear it, we prefer to deal with this appeal by addressing directly the argument made by Mr. Turmel.

[5] It is based on a fundamental misconception. A declaration does not delete a provision from a statute. Pursuant to s. 52(1) of the Constitution Act, 1982 its effect is to render the provision of no force or effect to the extent of its inconsistency with the provisions of the Constitution.

[6] The declaration of invalidity made by this court in Parker, supra, does not delete marihuana from Schedule II of the CDSA. It simply declares that the reference to marihuana in Schedule II is of no force or effect for the purposes of the possession charge in s. 4 of the CDSA. The declaration does not extend to any other section of the CDSA. In particular, it does not diminish the effect of the listing of marihuana in Schedule II for the purposes of s. 5(2) of the CDSA. As a result, the charge of possession of marihuana for the purposes of trafficking existed on May 26, 2003.

[7] Thus Aitken J. was correct to dismiss the appellant's argument and we would dismiss his appeal.

C. THE PRESENT LEAVE APPLICATION

15. The time period within which to seek leave to appeal from this decision expired on December 8, 2003.

16. On October 7, 2004, one year after the Court of Appeal released its decision, the Applicant served and filed the within application for leave to appeal to this Honourable Court.

PART II – QUESTIONS IN ISSUE

17. The Respondent submits that the simple issue that arises on this Application for Leave to Appeal is whether a question of law of national or public importance arises in the circumstances of the case.

18. There is no question of law of national or public importance that arises on the facts of this case. The decision of the Court of Appeal for Ontario was manifestly correct, and there is no right of appeal from an interlocutory proceeding in criminal matters in any event.

PART III – ARGUMENT

A. THERE IS NO QUESTION OF NATIONAL OR PUBLIC IMPORTANCE

19. The leave application, which is now brought one year after the decision of the appellate court below, does not give rise to a question of national or public importance.

20. The Applicant has raised one legal issue in his Application for Leave to Appeal: Whether the government is required to re-enact legislation if it wishes to restore legislation that has been "repealed".¹⁸ The Applicant argues that when the Ontario Court of Appeal in *Parker* declared to be invalid the reference to marihuana in Schedule II for the purposes of the offence of possession of marihuana in section 4 of the CDSA, that Order effectively deleted marihuana from Schedule II to the CDSA, thereby removing marihuana from the list of controlled substances under the CDSA.¹⁹ The Applicant argues that as a result the offence of trafficking in marihuana had been "repealed".

21. The Applicant's argument, however, is grounded on a fundamental misunderstanding of the effect of the Court of Appeal's order in *Parker*.²⁰ In *Parker*, the Court of Appeal determined that the prohibition against simple possession of marihuana in the CDSA was overly broad, as the legislative scheme failed to provide an exemption for medical use. The constitutional validity of the offence of possession of marihuana for the purpose of trafficking, in s. 5(2) of the CDSA, was not before the Court of Appeal in *Parker*.²¹

22. The Court of Appeal found that the Applicant's arguments were misconceived and explained that its declaration of invalidity did not delete marihuana as a controlled substance in Schedule II. The Court of Appeal was correct in reaching this conclusion. As the Court aptly noted, pursuant to s.52(1) of the Constitution Act, the court only had jurisdiction to declare the prohibition against marihuana unconstitutional to the extent of its inconsistency with the Constitution. Since the constitutional

issue in Parker was restricted to possession of marihuana for medical purposes, and not for the purposes of trafficking, the declaration of invalidity was restricted to the prohibition against marihuana only in relation to the offence of simple possession under the CDSA. All other offence provisions in respect of marihuana, such as production of marihuana, trafficking in marihuana, possession of marihuana for the purpose of trafficking, and importing of marihuana, remained in full force and effect.

23. Since there was no declaration of invalidity in respect of the offence of possession for the purpose of trafficking, that offence existed at the time the Applicant was alleged to have committed the crime.

24. Finally, the Applicant has failed to explain the significant delay in bringing this application for leave to appeal. Although the Applicant is a self-represented litigant, he is not inexperienced in litigation matters. In addition to the various proceedings advanced by the Applicant in the courts below as a self-represented litigant, the Applicant has acted on his own behalf in numerous other proceedings in the past: see R. v. Turmel, [1996] O.J. No. 2835 (Ont. C.A.); R. v. Turmel, [1995] O.J. No. 2683 (Ont. C.A.); R. v. Turmel, [1995] O.J. No. 4308 (Ont. Ct. Prov. Div.); R. v. Turmel, [1995] O.J. No. 1302 (Ont. Ct. Prov. Div.); R. v. Turmel, [1995] O.J. No. 629 (Ont. C.A.); R. v. Turmel, [1994] O.J. No. 2406 (Ont. Ct. Prov. Div.); Turmel v. CBC, [1990] O.J. No. 1640 (Ont. H.C.); R. v. Turmel, [1984] O.J. No. 1989 (Ont. C.A.).

B. THE APPLICANT HAD NO RIGHT OF APPEAL TO THE COURT OF APPEAL FOR ONTARIO

25. In addition, the Applicant did not have a right of appeal to the Court of Appeal.

26. It is settled law that there are no interlocutory appeals in criminal matters. All criminal appeals are statutory.²² Pursuant to s. 674 of the Criminal Code, "No proceedings other than those authorized by this Part and Part XXVI shall be taken by way of appeal in proceedings in respect of indictable offences".²³

27. As La Forest, J. stated in *Kourtessis v. M.N.R.*:

"Appeals are solely creatures of statute: see R. v. Meltzer (1989), 49 C.C.C. (3d) 453 at p. 460, [1989] 1 S.C.R. 1764, 70 C.R. (3d) 383. There is no inherent jurisdiction in any appeal court. Nowadays, however, this basic proposition tends at times to be forgotten. Appeals to appellate courts and to the Supreme Court of

Canada have become so established and routine that there is a widespread expectation that there must be some way to appeal the decision of a court of first instance. But it remains true that there is no right of appeal on any matter unless provided for by the relevant legislature.

There are various policy reasons for enacting a procedure that limits rights of appeal. Sometimes the opportunity for more opinions does not serve the ends of justice. A trial court, for example, is in a better position to assess the factual record. Thus, most criminal appeals are restricted to questions of law or mixed questions of law and fact.

A further policy rationale, and one that is important to the case before this court, is that there should not be unnecessary delay in the final disposition of proceedings, particularly proceedings of a criminal character. This is especially applicable to interlocutory matters which can ultimately be decided at trial: see *R. v. Mills* (1986), 26 C.C.C. (3d) 481, 29 D.L.R. (4th) 161, [1986] 1 S.C.R. 863. On this point, McLachlin J., speaking for the majority in *R. v. Seaboyer* (1991), 66 C.C.C. (3d) 321 at p. 414, 83 D.L.R. (4th) 193, [1991] 2 S.C.R. 577, noted that there was a valid policy concern to control the "plethora of interlocutory appeals and the delays which inevitably flow from them". Such review should, in the court's view, normally take place at trial."²⁴ [emphasis added]

28. Pursuant to s. 553 (c) (xi) of the Criminal Code, the offence in respect of which the Applicant was charged fell within the absolute jurisdiction of a provincial court judge.²³

29. Pursuant to section 601 of the Criminal Code, the court having jurisdiction over the proceedings has the exclusive jurisdiction to determine the validity of an information or an indictment. The Applicant's motion to quash the information charging him with the offence of possession of cannabis (marihuana) for the purpose of trafficking was brought in the Superior Court rather than the Ontario Court of Justice. The Applicant's motion to quash the information was thus brought in the wrong forum, and Aitken, J. had no jurisdiction to grant the Applicant the relief he sought.²⁵

PART IV – SUBMISSIONS ON COSTS

The Respondent makes no submissions as to costs in respect of this matter.

PART V – ORDER SOUGHT

31. The Respondent respectfully requests that the within application for leave to appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 4th day of November, 2004.

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Of Counsel for the Respondent

Notes:

- 1- Controlled Drugs and Substances Act, S.C. 1996, c. 19. 2- Applicant's Notice of Appeal, dated June 9, 2003.
- 3- Hitzig v. Canada (2003), 231 D.L.R. (4th) 190 (Ont. C.A.) [R. v. Turmel].
- 4- Applicant's Notice of Application for Leave to Appeal, Application for Leave to Appeal, pp.1-3.
- 5- Applicant's Memorandum of Argument, Application for Leave to Appeal, pp. 9-13, para. 3.
- 6- Applicant's Notice of Application for Leave to Appeal, Application for Leave to Appeal, pp.1-3.
- 7- R. v. Parker (2000), 49 O.R. (3d) 481 (C.A.) [Parker].
- 8- Parker, supra at para. 1.
- 9- Marihuana Medical Access Regulations, SOR/DORS 2001-227.
- 10- Hitzig (Ont. C.A.), supra, note 3 at paras. 1 and 39. This Honourable Court denied a number of the appellants in Hitzig leave to appeal: Hitzig v. Canada, [2004] S.C.C.A. No. 5 (QL).
- 11- Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 553.
- 12- Notice of Motion, dated May 20 2003, returnable May 26 2003.
- 13- Parker, supra note 7.
- 14- Affidavit of John C. Turmel, dated May 20, 2003.
- 15- Endorsement of Aitken, J., dated May 26, 2003, Application for Leave to Appeal, pp. 5.
- 16- Applicant's Notice of Appeal, dated June 9, 2003.
- 17- Hitzig, supra note 3 (R. v. Turmel).
- 18- Applicant's Memorandum of Law, Application for Leave to Appeal, pp. 9-13 at para. 3.
- 19- Applicant's Memorandum of Law, Application for Leave to Appeal, pp. 9-13 at paras. 1 and 4.
- 20- Parker, supra note 7 at para. 210.
- 21- See also: R. v. Krieger (2000), 225 D.L.R. (4th) 164 (Alta. Q.B.) aff d (2002), 225 D.L.R. (4th) 183 (Alta C.A.); leave to appeal to this Honourable Court denied, [2003] S.C.C.A. No.114.

In this case the court upheld the constitutional validity of the offence of possession of cannabis marihuana for the purpose of trafficking. (The Alberta Court of Appeal ordered a new trial on the trafficking charge, but only with respect to the trial judge's charge to the jury regarding the defence of necessity. The validity of the trafficking offence was not overturned.)

22– R. v. Meltzer, [1989] 1 S.C.R. 1764.

23– Criminal Code of Canada, R.S.C. 1985, c. C–46, s. 674.

24– Kourtessis v. M.N.R., [1993] 2 S.C.R. 53 at 294–95; R. v. Multitech Warehouse Direct (Ontario) Inc. (1989), 52 C.C.C. (3d) 175 (Ont. C.A.).

25– Criminal Code of Canada, R.S.C. 1985, c. C–46, ss. 601(1), 601(10).

PART VI – TABLE OF AUTHORITIES PARAGRAPH NUMBER

Hitzig v. Canada (2003), 231 D.L.R. (4th) 190 (Ont. C.A.) 3, 8,14

Hitzig v. Canada, [2004] S.C.C.A. No. 5 8

Kourtessis v. M.N.R., [1993] 2 S.C.R. 53 27

R. v. Krieger (2000), 225 D.L.R. (4th) f4 (Alba. Q.B), affmd (2002), 225 D.L.R. (4th) 183 (Alba C.A.); Application for Leave to Appeal denied [2003] S.C.C.A. No. 114. 21

R. v. Meltzer [1989], 1 S. C.R. 1764 26

R. v. Multitech Warehouse Direct (Ontario) Inc. (1989), 52 27 C.C.C. (3d) 175 (Ont. C.A.)

R. v. Parker (2000), 49 O.R. (3d) 481 (C.A.) 4, 7,11, 21

R. v. Seaboyer, [1991] 2 S.C.R. 577

PART VII – STATUTES, REGULATIONS, RULES RELIED ON

1. Controlled Drugs and Substances Act, S.C. 1996, c. 19, s.4, 5(2)

2. Criminal Code of Canada, R.S.C. 1985, c. C–46, ss. 601(1), 601(10), 553 ; 647

3. Marihuana Medical Access Regulations, SOR/2001 –227

4. Marihuana Exemption (Food and Drugs Act) Regulations, SOR/2003–261

5. Regulations Amending the Marihuana Medical Access Regulations, SOR/20 387

PART I

OFFENCES AND PUNISHMENT

Particular Offences 4(1) Possession of substance

4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

4(2) Obtaining substance

(2) No person shall seek or obtain

(a) a substance included in Schedule I, II, III or IV, or

(b) an authorization to obtain a substance included in Schedule I, II, III or IV

from a practitioner, unless the person discloses to the practitioner particulars relating the acquisition by the person

of every substance in those Schedules, and of every authorization to obtain such substances, from any other practitioner within the preceding thirty days.

4(3) Punishment

(3) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule I

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding seven years; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

4(4) Punishment

(4) Subject to subsection (5), every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

4(5) Punishment

(5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.

4(6) Punishment

(6) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule III

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two

thousand dollars or to imprisonment for a term not exceeding one year, or to both.

4(7) Punishment

(7) Every person who contravenes subsection (2)

(a) is guilty of an indictable offence and liable

(i) to imprisonment for a term not exceeding seven years, where the subject-matter of the offence is a substance included in Schedule I,

(ii) to imprisonment for a term not exceeding five years less a day, where the subject-matter of the offence is a substance included in Schedule 11,

(Hi) to imprisonment for a term not exceeding three years, where the subject-matter of the offence is a substance included in Schedule III, or

(iv) to imprisonment for a term not exceeding eighteen months, where the subject-matter of the offence is a substance included in Schedule IV; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

4(8) Determination of amount

(8) For the purposes of subsection (5) and Schedule VIII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

Trafficking in substance

5. (1) No person shall traffic in a substance included in Schedule I, II, III or IV or in any substance represented or held out by that person to be such a substance.

5(2) Possession for purpose of trafficking

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.

5(3) Punishment

(3) Every person who contravenes subsection (1) or (2)

(a) subject to subsection (4), where the subject-matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

(b) where the subject-matter of the offence is a substance included in Schedule III,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and

(c) where the subject-matter of the offence is a substance included in Schedule IV,

- (i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or
- (ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

5(4) Punishment in respect of specified substance

(4) Every person who contravenes subsection (1) or (2), where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VII, is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day.

5(5) Interpretation

(5) For the purposes of applying subsection (3) or (4) in respect of an offence under subsection (1), a reference to a substance included in Schedule I, II, III or IV includes << reference to any substance represented or held out to be a substance included in that Schedule.

5(6) Interpretation

(6) For the purposes of subsection (4) and Schedule VII, the amount of the substance means the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance.

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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