**DATE: 20031007**
**DOCKET:C40127**

# COURT OF APPEAL FOR ONTARIO

## DOHERTY, GOUDGE AND SIMMONS JJ.A.

| | | |
|---|---|---|
| **B E T W E E N:** | ) | |
| | ) | |
| **HER MAJESTY THE QUEEN** | ) | **John C. Turmel** |
| | ) | **In person** |
| | ) | |
| | ) | |
| **Respondent** | ) | |
| | ) | |
| **- and -** | ) | |
| | ) | **Croft Michaelson** |
| **JOHN C. TURMEL** | ) | **Christopher Leafloor** |
| | ) | **Vanita Goela** |
| **Appellant** | ) | **for the respondent** |
| | ) | |
| | ) | |
| | ) | **Heard: July 29 and 30, 2003** |

**On appeal from the decision of Justice Catherine Aitken of the Superior Court of Justice dated May 26, 2003.**

**BY THE COURT:**

[1] On May 14, 2003 Mr. Turmel was charged with possession of marihuana for the purposes of trafficking pursuant to s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c.19 (the *CDSA*).

[2] On May 26, 2003 Mr. Turmel brought a motion in the Superior Court of Justice seeking in effect to have this charge stayed. Aitken J. dismissed the motion and Mr. Turmel now appeals from her order.

[3] He makes only one argument. It is founded on the order made by this court in *R. v. Parker* (2000), 146 C.C.C. (3d) 193 declaring the marihuana prohibition in s. 4 of the *CDSA* to be invalid and suspending the declaration for 12 months. Mr. Turmel says that

since s. 4 prohibits possession of any substance included in, *inter alia* Schedule II (which lists marihuana) this court's declaration can only be effected (now that the 12 months has passed) by deleting marihuana from Schedule II. He argues that this must remove marihuana from Schedule II for all purposes. Section 5(2), like s. 4, relies on the listing of marihuana in Schedule II to create the charge of possession of marihuana for the purposes of trafficking. Mr. Turmel says that the *Parker* declaration means that there was no such charge on May 26, 2003, since it deletes marihuana from Schedule II.

[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.

**Released:** October 7, 2003 "DD"

"Doherty J.A."

"S.T. Goudge J.A."

"Simmons J.A."