Conroy & company

MEDICAL MARIJUANA

File No. 98-CV-141110

SUPERIOR COURT OF JUTICE
TORONTO REGION

BETWEEN:

JAMES WAKEFORD
Applicant

-and-

HER MAJESTY THE QUEEN (IN RIGHT OF CANADA)
Respondent

A.N. Young
for the Applicant

C.A. Amerasinghe, Q.C and
K Wilson for the Respondent

Heard: May 6, 1999

REASONS FOR DECISION

LaFORME J:

[1] Mr. Wakeford brings this motion seeking to have this court re-open the hearing of the original application filed February 5, 1998 and dismissed by me on September 8, 1998. If such relief is granted by me, Mr. Wakeford then asks that this court grant him an exemption pursuant to s.24(1) of the Charter of Rights and Freedoms

(Charter). Specifically, he seeks an order of this court that he be exempt from the applicability and operation of s.4 (possession) and s.7 (production and cultivation) of the Controlled Drugs and Substances Act (CDSA).

BACKGROUND:

[2] Mr. Wakeford is a gentleman who was diagnosed as HIV positive in 1989. Since that time he has taken numerous forms of medication that leave him with debilitating side effects above and beyond the problems which are part of his serious illness. One of the many side effects of Mr. Wakeford's medication is nausea and loss of appetite. Use of specific medications that were prescribed by Mr. Wakeford's physician only made him more ill. As an aspect of Mr. Wakeford's illness continued to decline in 1996 he began using cannabis sativa (marijuana), under a physicians supervision, as an anti-nausea and as an appetite stimulant. Mr. Wakeford discovered that the use of cannabis sativa countered many of the side effects he experienced from taking the medication for his disease. Cannabis sativa is a prohibited substance contained in Schedule 11 of the CDSA, and the Act does not contain provisions allowing for exemptions for medical use of this prohibited substance.

[3] On September 8th., 1998 I released a decision in connection with the original application brought by Mr. Wakeford for Charter relief. In general terms, I found that Mr. Wakeford's Charter guarantees and protections had been infringed by the application of the CDSA. Specifically, I held that applying certain provisions of the CDSA against Mr. Wakeford violated his s.7 Charter guarantees of "liberty" and "security of the person". However, I also found that they were being denied, on its face, in accordance with the "principles of fundamental justice" and I dismissed his application. He has subsequently brought this motion to obtain leave to have the matter reheard by me pursuant to rule 59.06(2) of Rules of Civil Procedure. That is, Mr. Wakeford asserts that he is entitled to relief other than that originally awarded because of "facts arising or discovered after it was made". The facts in question are related to my findings and subsequent order in respect of the "principles of fundamental justice".

[4] On March 19, 1999 I commenced a hearing of Mr. Wakeford's motion and upon hearing initial submissions from counsel, I made the following findings and orders:

1. That I had the discretion to rehear the matter because no formal judgment had been taken out and that it is fair and just to the parties to do so. Counsel for the parties did not take issue with this court's discretion but, as I understand it, parted company as to what test is to be applied when considering such a request.

2. That the completeness and accuracy of the facts, as argued, were not evident to the court such that it was fair to determine whether or not they would have been available upon reasonable diligence by Mr. Wakeford at the time of the original application. I did not find that this is necessarily the test that Mr. Wakeford must meet, only that it is an issue I wished to examine.

[5] As a result, I concluded that the issue of jurisdiction and any subsequent rehearing were both determined by the same facts. Accordingly, in fairness to both parties, I adjourned the motion to a time to be determined by the availability of a

witness for the Respondent to attend and give evidence. That occurred on May 6, 1999.

DISCOVERED EVIDENCE:

[6] Much of the fresh evidence came from the testimony of Ms. Carole Bouchard, of the Bureau of Drug Surveillance, Therapeutic Products Directorate, Health Canada. Ms. Bouchard's evidence was presented in two ways: (i) by way of her affidavit sworn February 17, 1999; and (ii) through her viva voce testimony at this hearing. In addition there is correspondence between Mr. Wakeford and the offices of the Minister of Health since my judgment and up to this hearing. As a result of this fresh evidence, several matters are clear to me.

[7] At the time Mr. Wakeford filed his original application in this matter, namely, February 1998, there was no process whereby the Minister of Health could have granted him an exemption. This continued to be the case on September 1998 when I released my judgment. That fact is not in dispute and is, in my opinion, confirmed in the affidavit of Ms. Bouchard filed in these proceedings. And, although the evidence is not entirely clear on this point, I am satisfied that a fair and correct inference is that the exemption Mr. Wakeford seeks was not a real or intended original objective of s.56 of the CDSA. For ease of reference, s.56 provides:

The Minister [of Health] may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of the Act or the regulations if; in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

[8] Indeed, counsel for the Respondent readily admits that action by the federal government on this issue began, in part, as a result of the findings in Mr. Wakeford's original application. In that regard, counsel for the Respondent submits that had Mr. Wakeford applied for an exemption prior to his bringing the application, the process to allow the Minister of Health to consider exemptions would have commenced that much sooner. While there is little to no evidence to support this submission, what is clear is that: (i) no process existed within the Ministry of Health such that an application for exemption by someone in the circumstances of Mr. Wakeford could have been considered at the time of the original hearing in this matter; and (ii) had Mr. Wakeford formally applied for an exemption, the Minister of Health had no real and meaningful way of considering his application. Some of the evidence in support of this submission comes again from the affidavit and testimony of Ms. Bouchard.

[9] It is evident that the Ministry of Health officials and the Minister of Health, upon receiving the application for exemption from Mr. Wakeford in September 1998 (after my judgment) viewed his request as "extraordinary" and one that required a "reasonable turn around time" given his medical condition. Thereafter, Ministry of Health officials, including Ms. Bouchard, commenced to investigate and formulate a process by which persons such as Mr. Wakeford could receive Ministerial consideration for an exemption under s.56. Indeed, it was the intention of the Ministry of Health to "fast track" the development of a process whereby applications from persons such as Mr. Wakeford could be considered. An example of the sincerity of the Minister's concern for this issue is found in the official proceedings of

Parliament during "Question Period" on March 3, 1999. In response to a question from a member, the Minister of Health, the Honourable Allan Rock responded that:

...[T]his government is aware there are Canadians suffering, who have terminal illnesses, who believe that using medical marijuana can help ease their symptoms. We want to help.

As a result. I have asked my officials to develop a plan that will include clinical trials for medical marijuana, appropriate guidelines for its medical use and access to a safe supply of this drug.

[10] After a further question by a member of the opposition Reform Party about whether or not such a concern by the Minister was "the first step in... decriminalizing marijuana for other purposes", the Minister answered:

"There are people who are dying. They want access to something they believe will help with their symptoms. We want to help. Clinical trials would allow us to get research to know more about how we can help."

[11] Thus, while an exemption process for persons like Mr. Wakeford may have been reasonably viewed as a possibility at the original hearing, it was, as was suggested at that time, in fact illusory. Notwithstanding that now known fact, the position of the Crown at the original hearing was that Mr. Wakeford ought to have first availed himself of the exemption process, such as it was, before seeking a constitutional remedy in this court. And, as the CDSA specifically, and in my mind clearly, vested the Minister of Health with related exemption discretion and responsibility, I agreed and dismissed Mr. Wakeford's application since I found he had not done so. At the same time I said:

"[I]f there is no real process or procedure whereby an individual in the situation of Mr. Wakeford could seek to be. exempt from the application of the CDSA, that would be contrary to the principles of fundamental justice. if that were the case I would have no hesitation in granting, perhaps even all, the relief Mr. Wakeford seeks."

[12] Counsel for the Respondent submits that I was aware at the hearing of the original application that no real process to grant Ministerial exemptions existed; and that the evidence, such as it was, that I relied upon then was all the evidence that was available. He concludes that had Mr. Wakeford applied for an exemption then, his evidence to put before this court would merely have confirmed my view.

[13] Since August 1998 Ms. Bouchard and other government officials have visited other foreign jurisdictions and otherwise set about the task of developing a protocol or process to allow the Minister to consider applications under s.56 of the CDSA. Both Mr. Wakeford and Professor Young continued to write to the Minister of Health after his letter of November 18, 1998. On May 5, 1999, Professor Young finally received a letter from Mr. Dann M. Michols, Director General, Health Canada. The letter was specific to Mr. Wakeford and indicated an in depth awareness of Mr. Wakeford's medical condition and concern. Further, the letter included an attachment that was described as:

a copy of the Interim Guidance Document on applying for an exemption under Section 56 for medical purposes. This document aims to assist those who apply for an exemption under Section 56 of the Controlled Drugs and Substances Act for a medical purpose, to submit a complete application.

[14] Finally, the letter outlined three pages of further questions Mr. Wakeford was required to answer. One of the questions was: "An identification of the source of marijuana that Mr. Wakeford will be using, as per Section 5.l.l.C of the Interim Document". On this point, and given that there are no legal sources of marijuana in Canada, I would hope that Mr. Wakeford would not be jeopardizing his application by exercising his legal right not to answer what I view as an unfair question; at least as it is currently phrased.

[15] Ms. Bouchard was clear that the Interim Guidance Document was merely the beginning of the development of the process to consider s.56 applications. She added that, while it may be modified and improved upon in the future, it is the protocol that applicants like Mr. Wakeford will presently proceed under. As well, Ms. Bouchard agrees that the structure and personnel to review applications is not complete, and she cannot say how long it will take to consider and decide upon Mr. Wakeford's application.

[16] It is on the above facts that I intend to consider both my jurisdiction to re-open this application and thereafter, if necessary, consider Mr. Wakeford's request for further relief.

JURISDICTION:

[17] As stated at the outset, Mr. Wakeford brings this motion under R. 59.06(2)(a) which provides that:

A Party who seeks to, ... have an order set aside or varied on the ground of... arising or discovered after it was made ... may make a motion in the proceeding for the relief claimed.

[18] The Respondent submits that the sole test for this court to be applied when deciding whether or not to re-open a judgment is found in the Ontario Court of Appeal decision in Becker Milk Co. Ltd v. Consumers' Gas Co. In Becker Milk the court held that until judgment was issued, it is within a trial judge's discretion to admit further evidence:

... if he were satisfied that the matters in question had come to the knowledge of a party after the trial, could not with reasonable diligence have been discovered sooner, and, if the evidence, as is the case here, were of such a character that it might probably have altered the judgment about to be given.

[19] In employment of the Becker Milk test I must answer several questions, namely: (i) did the evidence come to the attention of Mr. Wakeford after the hearing; (ii) could Mr. Wakeford have discovered the evidence sooner with reasonable diligence; and (iii) would the evidence have altered my original judgment? Thus, accepting for the moment that this is the appropriate test, in the specific circumstances of this case, I will examine each element of it.

(I) WHEN WAS THE EVIDENCE DISCOVERED?

[20] Clearly, the evidence was discovered in its meaningful totality on May 4, 1999. That was the date of the letter from the Director General, Health Canada in response to Mr. Wakeford's formal application of September 14, 1998. The original hearing of this matter was concluded on August 5, 1998 and my judgment was released on September 8th.

(II) COULD THE EVIDENCE HAVE BEEN DISCOVERED SOONER?

[21] Being somewhat intimately aware of the sequence of events and facts in the within action, it is difficult to say what Mr. Wakeford may have discovered had he applied to the Minister of Health prior to bringing his application. The Respondent says that had Mr. Wakeford applied Sooner, what he has since received can be inferred as representing that which he would have received. With respect, I totally disagree. In my opinion no such reasonable inference can be made.

[22] Firstly, I found at the original hearing that Mr. Wakeford's letters to the Prime Minister, the Minister of Justice, and the Minister of Health did not amount to an application under s.56 of the CDSA. And, while that is still my opinion, there can be no doubt as to what Mr. Wakeford was requesting, namely, access to marijuana for "personal medical use" What Mr. Wakeford received was a letter from the Minister of Health dated November 11, 1997 expressing "regret" in his inability to provide "a more positive response". The letter concluded, with what I perceive as; leaving the resolution of Mr. Wakeford's "problem" to him. There was nothing mentioned to Mr. Wakeford of any notion of developing a protocol under s.56 or that any s.56 option even existed.

[23] Although it is no doubt true that Professor Young was, or ought to have been, aware of s.56, it is equally Clear to me that the Minister of Health and his officials did not view this section as applying to persons in the situation of Mr. Wakeford. I am quite certain that had Mr. Wakeford's original letter been in the form of a formal application, the response by the Minister would not have been meaningfully different. Subsequent events, including the original hearing and the judgment of this court, together with Mr. Wakeford's formal application are what prompted the government's recent initiatives. That foundation was not present when Mr. Wakeford could have originally applied and therefore the action, particularly that of the creation of the interim Guidance Document, would not have been discovered because it simply cannot be said that it would have been created.

[24] It is indeed true that in my original judgment I was of the view that no real process existed to consider an application by Mr. Wakeford. However, my conclusion then should not be interpreted as being an acceptance of that fact at that point in time. On the contrary, my words were specific in that, it was not my opinion as to what might or might not be that was of import; it was my desire to fairly allow the Minister to first be given the benefit of specifically exercising the discretion and authority that Parliament saw fit to vest him with. No one, including counsel for the Respondent, was able to say with any degree of certainty whether or not any process then existed. We now know the answer that we didn't know at the time but only believed to be the case; that there was no process.

(III) WOULD THE EVIDENCE HAVE MATTERED?

[25] The first response to this question might well be that the evidence would have mattered because it may well have satisfied Mr. Wakeford's concerns and he would not have any cause to bring his original application. On the other hand, had Mr. Wakeford nonetheless brought his application in the face of this evidence I probably would have again dismissed it However, I am unable to decide at this point whether or not it would have mattered since the evidence is still not complete.

[26] What I am able to say at this point is that the evidence that was recently discovered or received would have mattered. What I am not able to say at this point is how or to what extent.

[27] I am satisfied, for the foregoing reasons, that I have the jurisdiction to consider Mr. Wakeford's motion to re-open my judgment It may be that Mr. Wakeford's more appropriate course of action should be to the Federal Court for judicial review, however, this is not fatal to me hearing this matter. I am satisfied as well that Mr. Wakeford has satisfied the test set out in Becker Milk and I can re-open the judgment. In addition I am of the opinion that this is a proper case wherein legislative provisions such as the Rules of Civil Procedure ought not to operate so as to prevent the litigation of Charter claims. I adopt the language of Justice Lamer (as he then was) in his decision in Nelles V. Ontario:

The rules of civil procedure should not act as obstacles to a just and expeditious resolution of a case. Rule 1.04(1) of the Rules of Civil Procedure in Ontario confirms this principle in stating that "[T]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits".

[28] This principle must apply with no less force where, as here, the issues are Charter based.

CONCLUSION:

[29] I am personally impressed and comforted by the action of the government on the issue of medical marijuana. The speed with which it has responded to the genuine concerns of persons suffering from debilitating and deadly illnesses since deciding to pursue this issue is also noteworthy. I appreciate that it is doing so at an accelerated speed which is relative to the usual requirements of the workings of government. I know as well that the relative speed or "fast tracking" gives little comfort to those persons, like Mr. Wakeford, with a legitimate and timely need for consideration of their medical requirements. So, while it is clear, in my opinion, that the government has some ways to go before it is able to accommodate applications of persons like Mr. Wakeford, it is equally clear there is a genuine effort being made by the Ministry of Health to get there, and as quickly as possible.

[30] Ms. Bouchard in her evidence was very clear and candid: she does not, at this time, know how the proposed process will actually work; she does not know when it will be fully staffed with appropriate personnel to consider applications; and she does not know how long it will take or when Mr. Wakeford's application will be concluded. In other words, I continue to be unable to decide whether the process is real in the sense that it complies with principles of fundamental justice.

[31] In all the circumstances, I am allowing the fresh evidence and conclude that it would have impacted on my original judgment. However, I find that the significance of the evidence is not what it demonstrates, but rather, what it fails to demonstrate. That is, it is now clear that where there was no process to consider any s.56 CDSA applications, there now is. Regrettably the evidence is clear that it is unknown whether or not the process can work or even if it is capable of doing so, and if so, can it do so in a meaningful and timely fashion. Accordingly, had I considered this evidence at the time of my judgment I would have granted Mr. Wakeford some relief. It is that relief that I will now order.

[32] It is evident that the Minister is now able, or soon will be, to consider Mr. Wakeford's application for an exemption under s.56 of the CDSA. The evidence, although not entirely clear on this point, means that the Minister may very well grant the exemption Mr. Wakeford seeks and will do so if appropriate. That, of course, remains an unknown since that is a power vested with the Minister to be exercised solely in his discretion. However, I am in a position to know intimately the details of most of the evidence that the Minister will consider when he comes to exercise his discretion in the case of James Wakeford. I know, for example, that Mr. Wakeford's application is bona fide, for a legitimate medical purpose, and one which merits genuine consideration. My views aside however, the ultimate decision will be, as Parliament has dictated, that of the Minister and that must be honoured. Consequently, I believe my decision must reflect that and I am therefore ordering that my judgment of September 8, 1998 be amended, but only as follows:

Pursuant to S. 24(1) of the Charter of Rights and Freedoms, Mr. Wakeford is hereby granted an interim constitutional exemption from the applicability and operation of sections 4 (possession) and 7 (production and cultivation) of the Controlled Drugs and Substances Act. This interim exemption shall remain in force until such time as the Minister of Health decides upon the application for exemption by Mr. Wakeford presently before the Minister, and made pursuant to s.56 of the Controlled Drugs and Substances Act.

Order accordingly

RELEASED: this 10th day of May 1999.

(signed)

H.S. LaForme J.