Court File No.: T-2030-13

FEDERAL COURT

BETWEEN:

Neil ALLARD, Tanya BEEMISH, David HEBERT and Shawn DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

DEFENDANT'S SUR-REPLY SUBMISSIONS ON *R. v. SMITH*

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1. The plaintiffs' understanding of the scope of the s. 56 class exemptions issued by the Minister of Health is incorrect. These exemptions do not force medically authorized individuals to "buy only low potency cannabis oil" or "acquire or make other derivative medicines illicitly and in violation of the criminal law."[1] The s. 56 class exemptions expressly permit clients of Licensed Producers and individuals who are subject to the *Allard* injunction order to possess and produce all manner of cannabis derivatives.

2. The s. 56 class exemption for clients and responsible persons under the *Marihuana for Medical Purposes Regulations* (MMPR) permits these individuals to possess cannabis oil, fresh marijuana and to "alter the chemical or physical properties" of cannabis oil, fresh marijuana or dried marijuana obtained from licensed producers.[2] They may possess products that are the result of this alteration as well as derivatives of those products. In other words, these individuals may make their own butters, oils, cookies and any other number of cannabis products from the dried marijuana, cannabis oil or fresh marijuana purchased from licensed producers.

3. Similarly, injunction holders with personal or designated-person production licenses are permitted to make cannabis products from the marijuana that they cultivate for medical purposes.[3] There are no restrictions in the s. 56 class exemption on the types of cannabis products that may be produced and possessed by these individuals.

4. There are also no restrictions on the "potency" or level of THC concentration in cannabis oil or resin that medically authorized individuals may produce for their own personal use from dried or fresh marijuana as either clients of Licensed Producers or as individuals covered by the injunction order. The plaintiffs' assertion that the s. 56 class exemptions "re-criminalize"[4] the possession of cannabis resin or cooking oil that is more potent than 3% is simply factually inaccurate.

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[1] Plaintiffs' Reply, para. 17
[2] See Respondent's Response, Tab 2
[3] See Respondent's Response, Tab 1
[4] Plaintiffs' Reply, para. 12

5. The only restriction on the form of cannabis products that clients of Licensed Producers or injunction holders may produce is that they may not use dangerous organic solvent methods of extraction. This furthers the objective of the *Controlled Drugs and Substances Act* (CDSA) of protecting public health and safety because, as Canada's evidence at trial demonstrated, these methods produce toxic vapours that may cause fires and explosions. There is no restriction on using safer methods of extraction.

6. The Supreme Court in *Smith* held that a complete prohibition on access to non-dried forms of marijuana was unconstitutional. The Court did not, however, determine that a specific form of access or access to specific products was required.[5] The s. 56 class exemptions have been carefully crafted to balance reasonable access to a wide range of cannabis derivatives with the CDSA's mandate of protecting public health and public safety.

7. The plaintiffs erroneously label the s. 56 class exemptions as "limited"[6] when, in fact, they give full effect to the Court's reasons in *Smith*. While the Court's reasons imply that medically authorized individuals ought to be able to produce cannabis derivatives for their own use, the Court's declaration of invalidity concerns only ss. 4 (possession) and 5 (trafficking) of the CDSA. Strictly speaking, this declaration permits these individuals to possess and obtain but not produce cannabis derivatives. The s. 56 class exemptions rectify the gap between the Court's reasons and its declaration by permitting the production of cannabis derivatives. The s. 56 class exemptions were necessary in order to ensure that medically approved individuals would not face criminal sanctions for producing cannabis derivatives. The exemptions also provide certainty to Licensed Producers with respect to their production of cannabis oil and thereby attempt to ensure the development of a reasonable supply for purchase.

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[5] See *R. v. Mills*, [1999] 3 S.C.R. 668, para. 55: "it does not follow from the fact that a law passed by Parliament differs from a regime envisaged by the Court in the absence of a statutory scheme, that Parliament's law is unconstitutional. Parliament may build on the Court's decision, and develop a different scheme as long as it remains constitutional. Just as Parliament must respect the Court's rulings, so the Court must respect Parliament's determination that the judicial scheme can be improved. To insist on slavish conformity would belie the mutual respect that underpins the relationship between the courts and legislature that is so essential to our constitutional democracy."

[6] Plaintiffs' Reply, see for example, footnote 10, paras. 6, 7, 9

8. It is also inaccurate to imply that *Smith* created a new class of individuals who may use marijuana for medical purposes outside of Canada's regulatory regime.[7] The Court refers to individuals with "a medical authorization" in the context of assessing the constitutionality of the dried marijuana limitation in the MMAR. *Smith* does not stand for the proposition that individuals who wish to use marijuana for medical purposes may obtain an authorization to do so outside of Canada's regulatory regime.

9. The plaintiffs' misunderstanding of the s. 56 class exemptions is also apparent in their reliance on *Parker* for the proposition that s. 56 exemptions cannot be used to save otherwise unconstitutional legislation.[8] First, this aspect of *Parker* has been superseded by the Supreme Court's holding in *PHS* that s. 56 acts as a "safety valve that prevents the CDSA from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects."[9] Second, *Parker* was decided prior to the implementation of the MMAR and, as such, the comments on s. 56 were made in the absence of a regulatory regime. Third, unlike the s. 56 exemption at issue in *Parker*, the present s. 56 exemptions are "class exemptions" that apply to all medically authorized individuals under the MMPR and all injunction holders. These five class exemptions supplement the existing regulatory regime to provide for reasonable access to cannabis derivatives.

10. The plaintiffs assert that their constitutional challenge to the dried marijuana only limitation in the MMPR is not moot because "patients continue to be criminally prohibited from possessing all but a very limited category of derivatives."[10] This is blatantly wrong. The s. 56 class exemptions for clients of licensed producers as well as for the current injunction holders clearly and unequivocally permit all manner of cannabis derivatives to be possessed and produced. Canada has expressly provided for reasonable access to precisely the relief the plaintiffs are seeking in the present case with respect to cannabis derivatives. Accordingly, this aspect of their constitutional challenge is moot.

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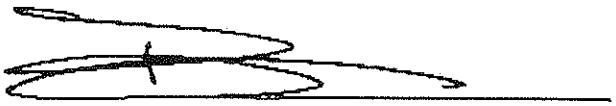
[7] Plaintiffs' Reply, para. 10
[8] Plaintiffs' Reply, para. 5
[9] *Canada v. PHS Community Services Society*, 2011 SCC 44, para. 113
[10] Plaintiffs' Reply, para. 13

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 28th day of July, 2015.



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