

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Elliott*,  
2016 BCSC 1200

Date: 20160504  
Docket: 78741-2  
Registry: Kelowna

2016 BCSC 1200 (CanLII)

**Regina**

v.

**Keith Steven Elliott and Anthony Edward Rico**

Before: The Honourable Madam Justice Fenlon

**Oral Ruling re: s. 1 *Charter* Application  
Re: Accused Elliott**

Counsel for the Crown:

A. Chan

Counsel for the Accused:

J.W. Conroy, Q.C.

Place and Date of Hearing:

Vancouver, B.C.  
May 4, 2016

Place and Date of Judgment:

Vancouver, B.C.  
May 4, 2016

[1] **THE COURT:** In reasons delivered on February 16, 2016, I found that s. 7(2)(b)(i) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, is inconsistent with s. 12 of the *Charter*. That section requires the imposition of a minimum sentence of six months' jail if the production involves more than five and fewer than 201 marihuana plants and the production is for the purpose of trafficking.

[2] At the request of the parties, I deferred the hearing on whether the provision could be saved by s. 1 of the *Charter*. That is the issue before me today.

[3] The Crown says the infringement can be justified as a reasonable limit under s. 1 of the *Charter* for three reasons. First, because the objective of protecting the community from exposure to the physical and social harms associated with the commercial production of marihuana is pressing and substantial. Second, because s. 7(2)(b)(i) is carefully tailored to apply to a relatively narrow set of circumstances; it is therefore rationally connected to its objective and minimally impairs s. 12 *Charter* rights. Third, the section is not disproportionate in its effects on *Charter* protected interests.

[4] The *Oakes* test (*R. v. Oakes*, [1986] 1 S.C.R. 103), governs the application of s. 1 of the *Charter*. It involves a two-step analysis. First, the court must be satisfied that the objective of the law is of sufficient importance to warrant the overriding of the constitutionally protected right in issue, here s. 12. The objective must be pressing and substantial.

[5] I am satisfied that Parliament's objective of combating the commercial production and distribution of illicit drugs is an important objective.

[6] Second, the court must be satisfied that the means chosen are reasonably and demonstrably justified. This involves a form of proportionality test with the following three components. First, there must be a rational connection between means chosen by the legislature and the legislative objective.

[7] I am satisfied the objective is rationally connected to the imposition of the mandatory six-month sentence. However, the means chosen do not impair the right

as little as possible in order to achieve the legislative objective. Parliament has attempted to minimally impair the *Charter* right by making the mandatory minimum applicable only where more than five plants are grown, and where it is established that the growing is for the purpose of trafficking. But since I have found this results in a grossly disproportionate sentence in some cases, the proportionality and minimal impairment aspects of the *Oakes* test are not met.

[8] The recent decisions in *R. v. Dickey*, 2016 BCCA 177 and *R. v. Lloyd*, 2016 SCC 13, are to the same effect.

[9] In summary, the Crown has not established that less harmful means of achieving Parliament's objective were not available. I conclude that the violation of the s. 12 right is not justified under s. 1 of the *Charter*.

The Honourable Madam Justice L.A. Fenlon