Federal Court Cour fédérale

Date: 20160503

Docket: T-2030-13

Citation: 2016 FC 492

Ottawa, Ontario, May 3, 2016

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

NEIL ALLARD, TANYA BEEMISH, DAVID HEBERT AND SHAWN DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

ORDER AND REASONS

I. Introduction

[1] This is a motion to have this Court reconsider a part of its Order of February 24, 2016 [Allard Order], finding the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 [MMPR] unconstitutional, permitting the Government of Canada six months to enact *Charter*

compliant new medical marihuana regulations and in that interim period continue the Injunction Order of Justice Manson [the Manson Order].

II. Background

[2] The motion is brought pursuant to Rule 397(1) of the *Federal Courts Rules*, SOR/98-106, which reads:

397 (1) Within 10 days after the making of an order, or within such other time as the Court may allow, a party may serve and file a notice of motion to request that the Court, as constituted at the time the order was made, reconsider its terms on the ground that	**397 (1)** Dans les 10 jours après qu'une ordonnance a été rendue ou dans tout autre délai accordé par la Cour, une partie peut signifier et déposer un avis de requête demandant à la Cour qui a rendu l'ordonnance, telle qu'elle était constituée à ce moment, d'en examiner de nouveau les termes, mais seulement pour l'une ou l'autre des raisons suivantes :
(a) the order does not accord with any reasons given for it; or	**a)** l'ordonnance ne concorde pas avec les motifs qui, le cas échéant, ont été donnés pour la justifier;
(b) a matter that should have been dealt with has been overlooked or accidentally omitted.	**b)** une question qui aurait dû être traitée a été oubliée ou omise involontairement.
(2) [deals with clerical errors – not relevant here]	**(2)** [concerne les erreurs administratives – non pertinent en l'occurrence]

[3] The Plaintiffs assert both paragraphs (a) and (b): that the Allard Order in continuing the Manson Order does not accord with any reasons given or that by continuing the Manson Order this Court overlooked or accidentally omitted various alleged deficiencies in the Manson Order.

[4] The alleged deficiencies in the Allard Order which the Plaintiffs allege this Court should have remedied, some of which flow from continuing the Manson Order, are:

a) the size or breadth of the class of persons who should be covered during the six month period Canada has to implement a new medical marihuana regime;

b) the inability of the Manson Order to accommodate address changes;

c) the failure to issue a declaration that the limit on consumption to dried marihuana is contrary to the *Charter*;

d) the failure to quash the limit to possession to a maximum of 150 grams; and

e) the failure to immediately declare sections 4, 5 and 7 of the *Controlled Drugs and Substances Act*, SC 1996 c 19, of no force and effect.

III. Analysis

A. *Preliminary*

[5] It is noteworthy that neither the Defendant nor the Plaintiffs appealed the Allard Order. The Plaintiffs waited until after the expiry of the appeal period (and after Canada had announced that it would not appeal the Allard Order) to bring this motion for reconsideration.

[6] Rule 397 is largely a technical rule to address inadvertent errors, slips and obvious mistakes. It imposes a 10-day period in which to seek redress.

[7] The Plaintiffs' motion is out of time.

The Plaintiffs ran afoul of this technical limitation when they invoked this technical provision.

[8] The Plaintiffs do not address in any substantive manner the failure to make a timely filing. There is no explanation for the delay nor of evidence of a continuing intention to bring this motion.

[9] On this grounds alone, the motion should be struck.

[10] However, the Court is aware of some of the public's interest and the "public interest" in the whole matter of medical marihuana. For this reason, the Court will address the substance of the motion.

B. *Reconsideration*

[11] Rule 397 is an exception to the general rule and is designed to address some of the technical limitations on a judge dealing with a judgment after it has been pronounced. As a general rule a judge is "*functus officio*" (completed the official function) and has no jurisdiction to alter the terms of the order – the recourse is usually through an appeal.

[12] Justice Barnes in *Samaroo v Canada (Citizenship and Immigration)*, 2007 FC 431 at para 3, 157 ACWS (3d) 413, summarizes s 397(1)(b)'s limitations as follows:

> [3] ... What is required for such relief is evidence that the Court overlooked a matter or accidentally omitted something material from the decision. The Rule does not provide a basis for the Court to reconsider its decision on the merits or to provide an opportunity for an applicant to correct deficiencies in the evidence tendered in the earlier proceeding.

[13] I might add that it is also not a forum for the Court to provide further reasons for its decision and order and therefore a court's response to the motion is limited. The reasons and order of the judge must speak for themselves.

[14] Justice Barnes adopted the often quoted words in *Lee v Canada (Minister of Citizenship and Immigration)*, 2003 FC 867 at paras 3-4 and 7, 124 ACWS (3d) 758:

> [3] Rule 397(1)(b) is a technical rule, designed to address situations where a matter that should have been addressed was overlooked or accidentally omitted. In my opinion, that is not the situation here.
>
> [4] The Applicant is now arguing that a point raised in argument during the hearing of his application for judicial review was not addressed in the Reasons for Order filed on June 19, 2003. In *Haque v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. 1141 (T.D.), Justice Pelletier (as he then was) said as follows at paragraph 5 and 6:
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> > ...However, I disagree that Rule 397 applies to this situation. My view is that "matter", as used in Rule 397, means an element of the relief sought as opposed to an argument raised before the court. In other words, the Court has failed to deal with some part of the relief sought and an application to reconsider seeks to have the Court address the issue of the relief sought. To permit what are intended to be final orders, from which there is no appeal without the certification of a serious question of

> general importance, to be opened up because an argument has not been dealt with undermines the finality of the decision. Furthermore, I would not wish to impose on the Court the obligation of dealing with every argument made without regard for its significance or its merit.
>
> In saying this, I am referring to the legal obligation upon a judge preparing reasons. I am not speaking of good practice. Good practice generally includes acknowledging the arguments made by the parties so that they know they have been heard. The wisdom of such a course of action is proved by this application. But there are many reasons why a judge might not deal with all arguments made to the Court. Relevance, significance, lack of merit are among them. Oversight is another. To hold that some of those reasons are sufficient to justify reconsideration while others are not is to invite inquiries into all instances of failure to refer to arguments made. This undermines the finality of decisions made. For that reason, the application for reconsideration is dismissed.
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> ...
>
> [7] In my opinion, he is now trying to re-argue an issue that was clearly dealt with in the Reasons for Order filed in this matter. He is improperly using Rule 397 as a disguised method of appeal and the jurisprudence is clear that the reconsideration rule cannot be used in that way: see *Kibale v. Canada (Transport Canada)* (1989), 103 N.R. 387 (F.C.A.).

[15] The Federal Court of Appeal in *Bell Helicopters Textron Canada Limitée v Eurocopter*, 2013 FCA 261 at para 15, 235 ACWS (3d) 214, summarized the situation in many ways analogous to the present circumstances:

> [15] First, Eurocopter's motion is a rather crude attempt to argue anew a ground of appeal which it had been originally raised in its Memorandum of fact and law with respect to its cross-appeal. As aptly noted by Hugessen J.A. in *Kibale v. Canada (Transport Canada)* (F.C.A.) (1988), 103 N.R. 387, the rule allowing for reconsideration "is not a means whereby the losing party may validate or complete his plea." Likewise, that rule is not a means by which a litigant may argue an issue a second time in the hope that the Court will change its mind.

C. *Rule 397(1)(a)*

[16] These cases cited above and those referred to by the parties dealt with Rule 397(1)(b). No cases related to Rule 397(1)(a) were cited to the Court. However, the essence of the Plaintiffs' complaint is that there is a discordance between the Allard Order and the Reasons because the Court found a *Charter* violation and yet continued the Manson Order. The case law is rather limited and not very illuminating with respect to the subsection.

[17] The discordance usually addressed in Rule 397(1)(a) is of the type where the reasons favour one party and yet through a clear error the order does not. The error is plain and obvious.

[18] As a general comment, with respect, I do not see a discordance between the Reasons which hold that there is a *Charter* violation, that the declaration of such invalidity should be suspended to permit remediation in a short period of time and the Order which does that and maintains the status quo (the Manson Order) until that period expires.

[19] The remedy was a judicial choice with which the Plaintiffs disagree in part. However, it was not an unintended result.

D. *Rule 397(1)(b)*

[20] Most of the Plaintiffs' specific complaints fall under this provision alone or in conjunction with Rule 397(1)(a) but I will address them all here.

[21] The Plaintiffs have the difficult burden of convincing me that I overlooked or accidentally omitted something. It no doubt is of cold comfort to hear the judge say that the matters were not missed, that the matters were thought about, but the Court was not convinced that they needed to be addressed as the Plaintiffs propose.

[22] With respect to "class size" issue, that had been a live issue throughout the litigation. It had been raised with the Court of Appeal (and not altered), it was contained in final submissions at trial, it was raised in the R 399 motion to vary and dismissed. The Court was well aware of the alleged deficiencies of the Manson Order.

[23] It is evident that this Court made a choice not to alter the Manson Order and that should end the matter. It was obvious, even on this motion, that tampering with the Manson Order raises a number of related issues including who is in, who is out, why, and what are the impacts of such amendment on all parties and affected persons.

[24] Regarding the "change of address" issue, the problem was specifically recognized at paragraph 142 of the Reasons. It was an issue that had been consistently addressed. Canada had specific problems with the issue.

In issuing its Allard Order, the Court chose a different method to address the various issues. There was no oversight or accidental omission in its Order.

[25] With respect to the failure to make a declaration that the limitation on consumption to dried marihuana was an omission or oversight, the Court specifically referred to the issue and the

Supreme Court's decision in *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602 [*Smith*], at paragraph 59 *et seq* and at paragraph 196 of the Reasons.

[26] That limitation has been struck as a result of *Smith*. As confirmed in *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12, the Court is not to issue declaration of rights where those rights have already been established.

[27] The Plaintiffs alleged in argument, but without proof, that some police officers are ignoring the Supreme Court's ruling. This would be a matter of grave concern, if true, but it must be established in the proper forum with a proper evidentiary basis.

[28] The limitation of 150 grams was likewise not accidentally omitted or overlooked. It is referred to in the Reasons at paragraphs 287-288 and not considered to be constitutionally infirmed.

[29] The Plaintiffs' request for the suspension of sections 4, 5 and 7 of the *Controlled Drugs and Substances Act* was asked for and denied (for the time being). As stated at paragraph 295 of the Reasons, it would be a "blunt instrument". Although in *R v Parker*, (2000) 49 OR (3d) 481, 188 DLR (4th) 385 (ONCA), the Ontario Court of Appeal granted the remedy immediately, it faced a different fact situation to that facing this Court.

[30] The Court has neither precluded that remedy nor somehow inadvertently missed it. It chose to put in place a different remedial structure.

IV. Conclusion

[31] This is the Plaintiffs' fourth attempt to alter the Manson Order. Its attempt this time is an impermissible attempt at an appeal. It will not be allowed.

[32] For all these reasons, the motion is dismissed with costs.

ORDER

THIS COURT ORDERS that the motion is dismissed with costs.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-2030-13
STYLE OF CAUSE:	NEIL ALLARD, TANYA BEEMISH, DAVID HEBERT AND SHAWN DAVEY v HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	APRIL 22, 2016
ORDER AND REASONS:	PHELAN J.
DATED:	MAY 3, 2016

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