No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

DEFENDANT

PLAINTIFFS' SUBMISSIONS RE: The Impact of *R. v. Smith* 2015 SCC 34

Introduction and Overview

1. On June 11, 2015 the Supreme Court of Canada unanimously determined that ss. 4 and 5 of the *CDSA* are of no force and effect to the extent that they prohibit medically qualified patients from possessing cannabis derivatives for medical purposes because such limitations arbitrarily violate their s. 7 *Charter* rights to liberty and security of the person in a manner that could not be justified under s.1 as not rationally connected to the objective of the *CDSA*.[1]

2. The Court held that the restriction arbitrarily infringed medically qualified patients' narrow liberty interest (by the threat of incarceration), broader decisional liberty interest (by foreclosing reasonable medical choices under threat of criminal prosecution) and the security of their persons (by forcing patients to choose between a legal but inadequate treatment and an illegal but more effective one) because the restriction could cause harm to those patients' health and safety.[2]

3. The Supreme Court of Canada's decision in *Smith* supports the Plaintiffs'

---

[1] Reasons for Judgment (RFJ) paras. 28-29
[2] RFJ paras.17-18

position in this litigation in the following ways:

a. Directly linking the *CDSA* to the rights violation at issue, irrespective of the government's choice of regulatory exemption regime, confirming that the constitutionality of the *CDSA* provisions are dependent on the constitutionality of any exemption regime thereunder, and confirming that patients are not permitted to lawfully consume cannabis in any form they choose (as suggested by the Defendant herein)[3];

b. Confirming that all "medically qualified" patients qualify for s.7 *Charter* protection in relation to their individual rights and because the objective of the prohibition (protection of health and safety) is the same in both analyses under s.7 and s.1, that any limitations on the patients' rights suffer from the same disconnect between the prohibition and its object rendering it arbitrary and thereby frustrating the s.1 requirement that the limit on the right be rationally connected to a pressing objective and it is not therefore in furtherance of the public interest[4];

c. Holding that evidence sufficient to establish a *Charter* violation need only be reasonable and can consist of a combination of anecdotal evidence from patients and expert evidence[5];

d. Holding that "...criminalization of access to the treatment in question infringes liberty and security of the person"[6] because restrictions on access to medical cannabis violate the narrow liberty interest (triggered by the threat of incarceration), the broader liberty interest (by foreclosing "reasonable" medical choices) and the security of the person interest (by forcing patients to choose between "legal but inadequate" treatments and illegal ones)[7];

---

[3] RFJ paras.17, 31-33
[4] RFJ paras.28-29
[5] RFJ paras.19-20
[6] RFJ para. 20
[7] RFJ paras.17-18

e. Reiterating that the object of the *CDSA* is protection of health and safety generally and that objective should not be qualified or limited by reference to other Acts or regulations (such as specifically the *Food and Drugs Act* (*FDA*) requirements) that are better described as means to achieve the goals, not goals themselves[8];

f. Holding that a restriction on access to medical cannabis which causes harm to health is arbitrary[9]

g. In doing so, explicitly rejecting the government's argument that there is a rational connection between the *CDSA* goal of protecting health and safety and a regulatory scheme that only allows access to drugs that are shown by scientific study to be safe and therapeutically effective and, therefore, that the restrictions are not arbitrary[10]; and

h. Determining that a suspension of a declaration of invalidity is inappropriate when it would leave patients without lawful medical treatment and the law in limbo[11].

Sufficiency of Evidence

4. *Smith* conclusively disposes of Defendant's arguments relating to the nature and sufficiency of evidence demonstrating a threshold infringement of s. 7. In *Smith*, as in the case at bar, the government argued that evidence from the patients amounted to merely a subjective preference for an illegal treatment over a legal one and, therefore, only the narrow liberty interest could be implicated.[12]

5. This argument was rejected and is a full answer on the infringement issue as it relates to Plaintiffs' use of derivative medicines.[13] It is also, Plaintiff submits, conclusive

[8] RFJ paras.24 and 26
[9] RFJ para. 25
[10] RFJ paras. 24 and 26
[11] RFJ paras.30-33
[12] RFJ paras.17-19
[13] See *Smith*, paragraph 20, holding that lay witnesses did not need to provide medical reports to conclusively demonstrate medical need for derivative medicines and that the evidence need only show that the decision to use those medicines be "medically reasonable".

on the issue of the sufficiency of Plaintiffs' evidence regarding consumption patterns and the corresponding access issues created by being forced to purchase from the small number of LPs.

6. The evidence at trial, included, as in *Smith*, "extensive expert and personal evidence"[14] and is such that Plaintiffs (and similarly situated persons, including reasonable hypotheticals) demonstrated that they will be forced "to choose between a legal but inadequate treatment") (e.g., buying insufficient quantities of medicine in dried form only from LPs) and "an illegal but more effective choice" (e.g., continuing to produce for themselves and making their own derivative medicines).[15]

7. In its discussion of the evidentiary burden, the Court in *Smith* did not establish a precise threshold but agreed with the trial judge and BC Court of Appeal that the expert evidence coupled with "the anecdotal evidence from the medical marihuana patient who testified, did more than establish a subjective preference." Instead, it was sufficient that the evidence "demonstrated that the decision to use non-dried forms of marihuana for treatment of some serious health conditions is medically reasonable."[16]

8. This reasonableness threshold for demonstrating a threshold infringement of s. 7 is more than met on the facts established by the Plaintiffs and experts in the case at bar.

Violation of Liberty and Security of the Person

9. According to the Supreme Court of Canada, forcing patients under threat of criminal sanction to "choose between a legal but inadequate treatment, and an illegal but more effective one" infringes security of the person.[17] That analysis holds true in the case at bar. Patients unable to produce for themselves are forced to choose between the legal but inadequate option of the *MMPR* and the illegal but more effective option of producing for themselves. This violates their security of the person.

---

[14] RFJ para. 19
[15] RFJ para. 18
[16] RFJ para 20.
[17] RFJ paras.18-19

10. The *Smith* decision also confirms that the removal of personal production as a reasonable choice through the threat of criminal prosecution violates the broader liberty interest. In describing the way that the dried-only restriction infringes liberty, the Supreme Court of Canada held that it did so because it "foreclose[ed] reasonable medical choices through the threat of criminal prosecution."[18] This denial of choice is "non-trivial" in the sense that it subjects the medically approved person to the risk of being without a reasonable supply of their medicine at any given time and therefore suffering serious physical and mental harms inconsistently with the purposes of the *CDSA*.

11. Moreover, the Court in *Smith* found a violation of the broader decisional liberty interest in the "state prevent[ing] people who have already established a legitimate need for the drug – a need the legislative scheme purports to accommodate – from choosing the method of administration of the drug."[19] In the case at bar, the CDSA prevents patients such as Plaintiffs, who have established legitimate need for cannabis, from having access to an adequate supply of cannabis by criminalizing the decision to produce it and by imposing unduly restrictive limits on possessing it.

Objective and Arbitrariness

12. *Smith* also provides guidance on the second stage of the s. 7 inquiry by confirming the object of the *CDSA* must not be conflated with the means chosen by the government to achieve it and in holding that restrictions in the *CDSA* are arbitrary when they cause harm to health rather than preventing it.

13. In the second stage of the s. 7 analyses, the Defendant herein argued, as it did in *Smith*, that the object of the restriction should be broadened to essentially include the means (the *MMPR* and/or the *FDA/FDR*) as part of the objective. The *Smith* decision confirms that this conflation of means and ends is inappropriate. In *Smith* the government argued that the protection of health and safety under the *MMAR* is accomplished by ensuring that as far as therapeutic drugs go they "comply with the

[18] RFJ para 18, *citing Parker* at para 92 (holding that the choice to use cannabis is of fundamental personal importance).
[19] RFJ para 18.

safety, quality and efficacy requirements" set out in the *FDA* and its regulations. Here, the government argues that the *MMPR* accomplishes the objective of protecting health and safety by "entrusting the responsibility for cultivating safe, good quality marijuana destined for patients to a new licensed producer industry subject to stringent standards and government oversight." [20]

14. Just as the *FDA* does not alter the object of the *CDSA* prohibition in the case of derivative medicines, so too the *MMPR* does not alter the objective of the *CDSA* prohibition in the case of personal/caregiver production of cannabis. The evidence at trial demonstrated that Plaintiffs could and did safely and effectively produce their own cannabis. Indeed, Defendant conceded that the risks it claims are associated with personal production could be minimized if patients simply construct and operate their gardens properly.[21] The evidence is that safe and proper operation of personal gardens occurred under the *MMAR* but is largely absent from unlawful production. In other words, removing personal production will cause an increase in precisely the harms that the government says it wishes to avoid. This runs contrary to and is inconsistent with the goals of protecting health and safety and is, therefore, arbitrary.

15. In addition, patient inability to access sufficient quantities of cannabis, including the inability to lawfully access any forms of derivative medicines from LPs, means that patients will suffer harm to health and safety, either by being forced to choose between insufficient quantities of medicine and other needs or by going to the black market to obtain medicine at cheaper prices than LPs. This situation "undermines the health and safety of medical marihuana users by diminishing the quality of their medical care." In other words, the "effects of the prohibition contradict its objective, rendering it arbitrary."[22]

16. Finally, the decision in *Smith* directly refutes a central premise of Defendant's argument; that the *MMPR* restrictions are not arbitrary because they are rationally connected to the goal of ensuring that patients only obtain cannabis that has been

---

[20] Defendant's Memorandum, para. 1
[21] Defendant's Memorandum, para. 254
[22] RFJ para. 25 (citing *Bedford* paras.98-100)

produced in accordance with the quality control criteria set out in the *MMPR*. The same argument was made in relation to derivative medicines and was soundly rejected:

> The Crown says there are health risks associated with extracting the active compounds in marihuana for administration via oral or topical products. It argues that there is a rational connection between the state objective of protecting health and safety and a regulatory scheme that only allows access to drugs that are shown by scientific study to be safe and therapeutically effective. We disagree.[23]

17. Put another way, in the case at bar the Defendant argues that there are health risks associated with consuming cannabis that has not gone through the *MMPR* quality control processes, and that there is a rational connection between the state objective and its regulatory scheme that only allows access to cannabis that has been grown in accordance with the *MMPR*. With respect, and as established by the evidence, this Court should disagree.

18. A further breach of the principles of fundamental justice is created by the intersection of *Smith,* confirming the patient's right to lawfully access derivative medicines, and the *MMPR*'s refusal to permit LPs (or patients) to make or sell derivative medicines. The Defendant Minister of Health's public response to the *Smith* decision – attacking the Supreme Court and vowing to fight its decision, rather than addressing the constitutional deficiencies identified by the Court – provides little hope that it will act to remedy the defects and therefore it leaves Plaintiffs in a position of having a legal right to possess, produce and consume derivative medicines but no lawful supply options; precisely the type of rule of law problem identified by the *Hitzig* Court, and accepted by this Court, as violating the principles of fundamental justice.[24]

Immediately Effective Remedy

19. Finally, the decision in *Smith* supports the remedies sought by the Plaintiffs herein and supports making those remedies immediately effective.

20. The Court in *Smith* rejected the Defendant Canada's argument for suspending

---

[23] RFJ par 26.

[24] ***Hitzig v. Canada*** (2003) 231 D.L.R. (4th) 104, paras 110 – 116; *Sfetkopolous v. Canada,* 2008 FC 33, para. 19.

any declaration of invalidity because doing so "would leave patients without lawful medical treatment and leave the law and law enforcement in limbo."[25]

21. Similarly, suspending any declaration in the case at bar – unless the existing injunction is continued and expanded at least to the extent sought in the motion to vary – will leave some medically approved patients without access to lawful medical treatment while the government decides how to respond.

22. In coming to its decision on remedy, the Supreme Court of Canada held that it was not the exemption standing alone that was necessarily problematic; it was the under-inclusiveness of that exemption coupled with the *CDSA* prohibition that presented the constitutional problem.[26] Similarly, as Plaintiffs in the case at bar argued, it is not the existence of the *MMPR* exemption that is the problem; it is that the *MMPR* is under-inclusive in that it does not extend an exemption for production to patients and imposes arbitrary limits on possession and modes of administration by patients.

23. The Supreme Court of Canada's solution was to make an immediately effective declaration that sections 4 and 5 of the *CDSA* are of no force and effect to the extent that they prohibits a person with a medical authorization from possessing cannabis derivatives for medical purposes[27].

24. Similarly, in the case at bar, this Court should declare that s. 7 of the *CDSA* is of no force and effect to the extent that it prohibits medically qualified patients or their caregivers (e.g., all *MMAR* licensees, all persons holding medical declarations under the *MMPR* and all persons having physician prescriptions or authorizations under the *NCR*) from producing cannabis for the personal medical consumption of the patient.

25. Further, the remedies sought by the Plaintiffs with respect to the limitation to "dried marihuana" in the *MMAR*, *MMPR* and *NCR* are essentially on all fours with the decision in *Smith* and the same remedy should be granted.

26. Similarly, the 150 gram possession limit in the *MMPR* (and imposed by Manson

[25] RFJ para. 32
[26] RFJ para 31.
[27] RFJ paras. 31 and 33

J. on *MMAR* patients) combined with the impact of *CDSA* ss. 4(8) (deeming, for purposes of determining quantities of cannabis possessed by a person, the weight of any substance containing cannabis as being cannabis) means that a patient could be at his or her maximum possession limit simply by possessing a few cannabis cookies, or a jug of cooking oil. This is arbitrary, prevents patients from reasonable travel and possession of their lawful medicine, and should be declared invalid.

27. The remedies sought by Plaintiffs in their Statement of Claim are all supported by the decision of the Supreme Court of Canada in *Smith* and should all be granted.

28. It is respectfully submitted that the Supreme Court of Canada in *Smith* has laid out a roadmap showing (a) that Plaintiffs' evidence is sufficient to find a threshold engagement of and violation of s.7 of the *Charter*; (b) that restricting medically qualified patients' reasonable medical choices and access to cannabis infringes the narrow and broader decisional liberty interest, and the security of the person interest; (c) that such restrictions when they cause harm to patient health are arbitrary; and (d) that an immediately effective remedy ought to be granted to Plaintiffs.

All of which is respectfully submitted.

DATED: June 25, 2015

John W. Conroy, QC
Kirk Tousaw
Counsel for the Plaintiffs
Tel: (604) 852-5110
Fax: (604) 859-3361

To: Jan Brongers
Senior General Counsel
BC Regional Office
900- 840 Howe St.
Vancouver, BC V6Z 2S9