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Wakeford v. Canada

Between
James Wakeford, applicant, and
Her Majesty the Queen (in Right of Canada), respondent

[2000] O.J. No. 1479
Court File No. 00-CV-183666

Ontario Superior Court of Justice
B. Wright J.

Heard: April 12, 2000.
Judgment: May 1, 2000.
(48 paras.)

Counsel:

Alan N. Young and Louis Sokolov, for the applicant.
Eric Noble and Lara Speirs, for the respondent.

¶ 1 **B. WRIGHT J.**:— The applicant was diagnosed as HIV positive in 1989. He has discovered that the use of marijuana counters many of the side effects experienced from taking medication for this debilitating disease.

¶ 2 On June 9, 1999, Health Canada granted the applicant an exemption under s. 56 of the Control Drugs and Substances Act ("CDSA"), allowing him to possess and/or cultivate marijuana for medicinal purposes.

¶ 3 In order to secure a supply of medicine, the applicant did cultivate marijuana plants on his balcony in the summer of 1999; however, he claims he is not able to cultivate indoors due to a lack of expertise, no equipment and the lack of a suitable indoor location. He was only able to produce this one crop with the assistance of his caregivers. He also relies upon his caregivers to secure marijuana from the black market; however, he is very reluctant to continue to do so for two reasons: (1) fear that impurities in black market marijuana may be dangerous for an individual with a suppressed immune system; (2) his caregivers face the risk of prosecution for supplying him with the medicine, and, he alleges that two of his caregivers have been charged with criminal offences for assisting him.

¶ 4 Because of the problems in obtaining a supply of marijuana, even with the exemption, the applicant seeks the following relief:

(a) A declaration that the Applicant's constitutional rights under section 7 of the Charter of Rights of Freedoms have been violated.

(b) An Order under section 24(1) of the Charter of Rights and Freedoms providing the Applicant's caregivers with a constitutional exemption from the

applicability and operation of section 4 (possession), section 5 (trafficking) and section 7 (production/cultivation) of the Controlled Drugs and Substances Act ("CDSA") with respect to the provision of marijuana to the Applicant for medicinal purposes.

(c) An Order under section 24(1) of the Charter of Rights and Freedoms directing the Government of Canada, through its authorized representatives, to provide and make available to the Applicant a safe, secure and affordable supply of marijuana to be used for medicinal purposes.

History of the Proceedings

¶ 5 In Wakeford v. The Queen in right of Canada (1998), 166 D.L.R. (4th) 131, the applicant brought a previous application before LaForme J. In that application similar relief was requested. The applicant sought a constitutional exemption permitting him to lawfully possess or cultivate marijuana for medicinal purposes. In addition, he sought to compel the Government of Canada to provide him with a safe and secure supply of marijuana to be used for medicinal purposes. LaForme J. did not deal with the question of the supply of marijuana by the government.

¶ 6 LaForme J. decided that depriving Mr. Wakeford of his reasonable and fundamental choice to smoke marijuana for medicinal purposes through the CDSA constituted a deprivation of his liberty interest and his right to security of the person as provided in Charter s. 7.

¶ 7 At p. 147 of his decision Justice LaForme stated:

> . . . it would be contrary to the principles of fundamental justice to prohibit marijuana where marijuana can be shown to be a significant medicinal treatment for a debilitating and deadly disease and where there was no procedural process for obtaining an exemption from prosecution.

¶ 8 However, since it appeared that s. 56 of the CDSA provided a mechanism for an exemption, Justice LaForme was unable to hold that the denial of Mr. Wakeford's rights under Charter s. 7 was not in accordance with the principles of fundamental justice. Therefore, he dismissed the application.

¶ 9 But, at a rehearing of the application, Re Wakeford and The Queen in right of Canada (1999), 173 D.L.R. (4th) 726, Justice LaForme concluded that at the time of his original decision there was no real methodology under s. 56 of the CDSA by which an application for an exemption would be fruitful.

¶ 10 At paras. 30 and 31 of his decision he said:

> [para 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.
>
> [para 31 . . . 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 . . . .

¶ 11 As a result he made the following order on p. 738:

> 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.

¶ 12 Mr. Wakeford received his exemption on June 9, 1999, from Health Canada, allowing him to possess and/or cultivate marijuana for medicinal purposes.

Jurisdiction

¶ 13 The respondent Crown submits that this court does not have jurisdiction to consider this application by reason of s. 18(1) of the Federal Court Act which reads:

> 18.(1) Subject to section 28, the Trial Division has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

¶ 14 LaForme J. did not discuss any jurisdictional problem. However, on the rehearing of the application he made this comment at para.27:

> 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.

¶ 15 In C.L.R.B. v. Paul L'Anglais Inc., [1983] 1 S.C.R. 147, Chouinard J., writing for the court, commented on the jurisdictional issue:

> On the first, I do not see any difference in this context between constitutionality and applicability: both relate to constitutional jurisdiction. In the first instance, a provision is ultra vires and must be set aside. In the second, a provision which is otherwise valid and applicable within the jurisdictional ambit of the legislature which adopted it, becomes inapplicable when it trenches on the field of jurisdiction of the other legislative power. Parliament has a perfect right to enact that the superintending and reforming power over federal agencies, acting in the administration of the laws of Canada, understood in the sense defined above, will be exercised exclusively by the Federal Court, a court created for the better administration of those laws. However, it cannot confer such an exclusive power on the Federal Court when what is involved is no longer the administration of a law of Canada, but the interpretation and application of the Constitution.

¶ 16 In Nolan v. Canada (Attorney General) (1998), 155 D.L.R. (4th) 728, Quinn J. reviews the cases which discuss jurisdiction. In particular he follows the decision of the Nova Scotia Court of Appeal in Mousseau v. Canada (Attorney General) (1993), 107 D.L.R. (4th) 727. Quinn J. at p. 735 quotes from Mousseau:

> There is, however, a distinction between jurisdiction to determine the constitutional validity or the applicability of legislation on the one hand and jurisdiction to pass upon the manner in which a board or a tribunal functions under such legislation on the other.

Caregiver Exemption

¶ 17 In correspondence during the process of applying for an exemption under s. 56 of the CDSA, reference is made to an exemption for caregivers.

¶ 18 The applicant applied to the Minister of Health for a s. 56 exemption in an application dated September 14, 1998.

¶ 19 On May 14, 1999, the applicant's counsel wrote to Health Canada saying:

> . . . we will return to court if your Department does not promptly facilitate Mr. Wakeford's application for an exemption for himself and his caregivers.

¶ 20 By letter dated June 7, 1999, the applicant wrote to the Minister of Health and stated:

> The existing court ruling did not deal with access to marijuana or protection from criminal sanction for my caregivers. Those issues will need to be resolved as part of this process.

¶ 21 After the applicant received his exemption he wrote to the Minister of Health on June 14, 1999. He said:

> The exemption falls far short of what I asked the courts to grant. You have not granted me access to marijuana and you have given no protection from criminal sanction for my caregivers.

¶ 22 It may not be clear whether or not the Minister has dealt with the request for an exemption for a caregiver of Mr. Wakeford. There is no evidence that a named person who is a caregiver to Mr. Wakeford has applied for an exemption.

¶ 23 In my view, anything to do with the Minister of Health granting or failing to grant exemptions under s. 56 of the CDSA concerns the administration of the CDSA and the manner in which the Minister functions under the provisions of the CDSA. Therefore, any problem the applicant may have in seeking a caregiver exemption falls within the exclusive jurisdiction of the Federal Court. Therefore, this part of the application requesting a constitutional exemption for caregivers is dismissed.

Government Supply

¶ 24 The specific order requested by the applicant is:

> That the Government of Canada, through its authorized representatives, take all necessary steps to secure, whether domestically or internationally, a source of research-grade marijuana to provide to the Applicant for medicinal purposes. And that the Government of Canada, through its authorized representatives, provide this Honourable Court with a report by July 1, 2000 outlining the progress which has been made in securing this source.

¶ 25 I believe the Federal Court has jurisdiction to consider this relief requested by the applicant. However, in my view that jurisdiction is not exclusive with respect to this type of relief.

¶ 26 What is different between this type of requested relief and an exemption under s. 56 of the CDSA is that the CDSA specifically provides for an exemption but the CDSA does not deal with the supply of drugs by Government. Therefore, the issue does not concern the administration of the CDSA or the manner in which the Minister of Health functions under the CDSA.

¶ 27 The applicant is challenging the applicability of the CDSA in his situation of being provided with an exemption which he says is illusory because he does not have access to a licit supply of marijuana which he says should be supplied by the Government.

¶ 28 In my view this court has jurisdiction to consider the relief requested. I admit that there is a fine distinction here between the exclusive jurisdiction of the Federal Court and the jurisdiction of this court.

¶ 29 The question to be decided: "Is the failure of the Government to supply the applicant with a safe supply of marijuana a violation of the applicant's Charter s. 7 rights?"

Charter Section 7

¶ 30 Section 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

¶ 31 In my view, now that the applicant is allowed to possess and cultivate marijuana, his rights to liberty and security of the person are not infringed.

¶ 32 The applicant began smoking marijuana in 1996 to alleviate the side-effects of his other medications.

¶ 33 In cross-examination the applicant provided the following:

> Q. Is it almost always possible for you to find marijuana, from one source or another, should you require it?
>
> A. I have made it my business to make that possible, just as I have made it my business to be on top of my illness since June 1989.

¶ 34 The applicant has successfully cultivated marijuana on his balcony and has not attempted to grow it inside his apartment.

¶ 35 In a letter dated June 7, 1999, to the Minister of Health the applicant said, "I would like to apply

for a grower's licence or permit so I can supply not only my needs but those of others as well."

¶ 36 I find that Mr. Wakeford has no real difficulty in obtaining marijuana for medicinal purposes and is not dependent on Government to supply him with marijuana.

Principles of Fundamental Justice

¶ 37 If there is a deprivation of the applicant's rights to liberty and security of the person, is the deprivation in accordance with the principles of fundamental justice?

¶ 38 The Government of Canada does not have a licit supply of marijuana. The United States and the United Kingdom are the only two countries which currently have a licit source of marijuana capable of being exported to Canada. In accordance with the constraints imposed by the international conventions, the United States and the United Kingdom will only agree to permit marijuana to be exported to Canada if Canada undertakes to ensure that any use thereof takes place within the context of legitimate research projects.

¶ 39 In Re Wakeford and The Queen in right of Canada, supra, Justice LaForme comments on the steps taken by the Government to assist Mr. Wakeford and other persons in similar need. Justice LaForme stated at p. 737:

> [para 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.

¶ 40 On June 9, 1999, the Minister tabled in the House of Commons a status report entitled "Health Canada's Research Plan for the Use of Marijuana for Medicinal Purposes". In this report, the Minister reported on the progress that had been made in moving forward with the commitment that had been made in the House of Commons on March 3, 1999. Among other items, the report noted:

(a) that funds had been committed to the community Research Initiative of Toronto ("CRIT") in association with the Canadian HIV Trials Network ("CTN") to assist in the commencement of clinical trials;

(b) that the Medical Research Council of Canada will receive funds with which to sponsor a variety of research activities relating to the medicinal use of marijuana; and

(c) that Health Canada was negotiating with a UK firm to develop clinical trials using a non-smoked form of marijuana.

¶ 41 Discussions between Health Canada and CRIT with a view to the establishment of clinical trials had already begun prior to the tabling of the Minister's Research Plan in the House of Commons on June

9, 1999. Since that time, Health Canada has committed funding to CRIT/CTN for the purpose of enabling CRIT/CTN to conduct clinical trials in which members of the HIV/AIDS community will be able to participate. A letter of intent between Health Canada and CRIT was signed on January 28, 2000.

¶ 42 In my view the Government is acting reasonably in planning to have Mr. Wakeford and others participate in clinical trials with marijuana rather than to supply marijuana directly to exemptees. Because we are all individuals the benefits of a particular medication for one person may be of no benefit to another and may even be harmful. There are risks to using marijuana.

¶ 43 The applicant acknowledges:

(a) that there is not uniformity in effect among the different strains of marijuana in alleviating the symptoms of a particular ailment;
(b) that much of the evidence concerning the effectiveness of marijuana in treating illness is anecdotal; and,
(c) that there is a need for a great deal more proper research to be done.

¶ 44 Although Mr. Wakeford has experienced that the use of marijuana improved his quality of life, he has not exhausted other possibilities which may be equally as effective. As Justice LaForme noted in his decision Wakeford v. The Queen in right of Canada, supra, at p. 156:

> . . . Mr. Wakeford has not established that he has no other effective legal way to treat his nausea and loss of appetite. Indeed, the evidence is there are other options that are available to him, some of which he has, for his own reasons, chosen not to avail himself of.

¶ 45 In view of the fact that the Government does not have, within Canada, a source of licit marijuana, and that the Government is moving at a reasonable pace to provide clinical trials of marijuana, and that Mr. Wakeford has no real difficulty in obtaining marijuana, and that marijuana is not the only avenue by which Mr. Wakeford may improve his quality of life, the principles of fundamental justice are not infringed by the failure of the Government to supply marijuana directly to Mr. Wakeford.

¶ 46 To be in accordance with the principles of fundamental justice does not mandate a perfect system of government which is required to meet the desires and demands of its citizens even in the area of personal health.

¶ 47 This is not the type of case in which the court should take the extraordinary step of requiring the Government to do anything, especially to require the Government to supply marijuana directly to the applicant.

¶ 48 The applicant's constitutional rights under Charter s. 7 have not been violated. The application is dismissed.

B. WRIGHT J.

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