No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

PLAINTIFF

AND:

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

DEFENDANT

PLAINTIFF'S REPLY SUBMISSION RE: The Impact of *R. v. Smith* 2015 SCC 34

Solicitor for the Plaintiffs:

John W. Conroy, Q.C.
Conroy & Company
Barristers & Solicitors
2459 Pauline Street
Abbotsford, BC V2S 3S1

Telephone: (604) 852-5110
Facsimile: (604) 859-3361

1. In *Smith*, a unanimous Supreme Court of Canada declared "ss. 4 and 5 of the *CDSA* are of no force and effect to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes."[1]

2. Just as Defendant responded to the decisions of the lower courts and the Ontario and Federal Court of Appeal in *Hitzig, Beren* and *Sfetkopolous,* the Defendant has now responded to a judicial declaration of constitutional invalidity from our highest court in the most meager way possible. This continues a long pattern of attempting to restrict, as much as possible, the impact of a *Charter* decision designed to improve access to medical cannabis. In response to *Smith,* Defendant has issued very limited section 56 exemptions (the "Limited Exemptions"). It argues these comply with *Smith* but, in substance, they do little or nothing to affirm in law the dictates of the *Charter* as interpreted by the Supreme Court of Canada nor to facilitate or ensure patient access to medical cannabis derivative products.

3. Despite this paltry minimalist response, the Defendant in this case suggests that the issue of access to medical cannabis derivatives is now "moot" and that the government has now "give[n] effect to the Court's declaration" and complied with the Court's ruling. Defendant is wrong. *MMAR* personal or designated producers covered by the injunction in this case are entitled at law to "produce" cannabis and having done so, by virtue of the *Smith* decision, are permitted to further produce or convert that into medical cannabis derivatives. The Defendant is not entitled to use the s. 56 exemption process to act as a limitation on rights found to exist by the Supreme Court of Canada.[2]

4. At least in relation to patients under the *MMAR,* such as Plaintiffs, a s.56 exemption does not limit the ambit and scope of the *Smith* decision entitling such patients to possess any "cannabis derivatives" for medical purposes, but can at most only operate concurrently with that decision.[3]

---

[1] Reasons for Judgment (RFJ) paras 31 and 33

[2] Section 56 of the *CDSA* allows the Minister to "exempt any class or person" not to re-impose unconstitutional limitations.

[3] The other Limited Exemptions have the impact of limiting a patient under the *MMPR*s or *NCR*s entitlement to possess "cannabis derivatives" and will negatively impact the Plaintiffs if their claim is denied in this case, and will no doubt result in further litigation with respect to the impact of *Smith* on the *MMPR* and *NCR*.

5. In *Parker* the Court dealt with, and rejected, the use of s. 56 to save otherwise unconstitutional legislation:

> "[187] In my view, this is a complete answer to the Crown's submission. The court cannot delegate to anyone, including the Minister, the avoidance of a violation of Parker's rights. Section 56 fails to answer Parker's case because it puts an unfettered discretion in the hands of the Minister to determine what is in the best interests of Parker and other persons like him and leaves it to the Minister to avoid a violation of the patient's security of the person.
>
> [188] If I am wrong and, as a result, the deprivation of Parker's right to security of the person is in accord with the principles of fundamental justice because of the availability of the s. 56 process, in my view, s. 56 is no answer to the deprivation of Parker's right to liberty. The right to make decisions that are of fundamental personal importance includes the choice of medication to alleviate the effects of an illness with life-threatening consequences. It does not comport with the principles of fundamental justice to subject that decision to unfettered ministerial discretion...."[4]

6. The other Limited Exemptions provide a very narrow ability for LPs to produce and sell "fresh marijuana" and exceedingly low potency cannabis oil and to allow "Health Care Practitioners" and hospitals to handle them and *MMPR* patients to possess them, subject to other various limitations, as terms and conditions of the exemption. Other forms of "derivatives of cannabis" are not referred to in the exemptions.

7. More specifically the Limited Exemptions:

a. Permit (but do not require) LPs to seek supplemental licensing allowing them, if that licensing is granted by Health Canada, to make and sell cannabis oil, as long as that oil is not made with organic solvents, does not contain more than 10mg of THC per dose and does not have a total THC potency of greater than 30ml per mg or 3%.[5]

b. Permit clients of LPs to make derivatives if, and only if, they use the low potency cannabis oil sold by LPs to make those derivatives.

---

[4] *R. v. Parker* (2000), 49 O.R. (3d) 481 and see also para 189. See also *Canada (Atty. Gen.) v. PHS Community Services Society*, 2011 SCC 44 at para 128.

[5] This is lower than the potency of virtually every strain of cannabis currently available for purchase from LPs. And, while the Limited Exemptions do not restrict the content of other cannabinoids, it is unclear how one can make a high-potency CBD oil that does not contain THC levels in excess of that permitted to LPs. Further, it appears no LP currently has such licensing and given the glacial pace of Health Canada's approvals of LP licensing, Plaintiffs have little faith that a supply of derivatives under the MMPR will be adequate or available.

c. Permit persons whose *MMAR* rights were continued via injunction to, as long as the injunction remains in place, make and possess cannabis oil and derivative medicines made from that oil as long as no organic solvents are used to make the oil (but does not extend to or cover, for example, possession of cannabis resin or derivative products made from that resin).

8. It is a real possibility that, if the relief sought in the case at bar is refused, patients will be left without any lawful access to any derivative products unless and until LPs succeed in obtaining secondary licensing to make and sell this low potency oil and, even then, will be left with arbitrarily restricted access to a small subset of derivative medicine.

9. Defendant's submission on the impact of *Smith* and the Limited Exemptions is wrong in the following ways:

a. The Plaintiffs' challenge on derivatives is not moot[6];

b. The Limited Exemptions do not ensure that patients have any access, much less reasonable access, to derivative products;

c. *Smith* was not a challenge to the *MMAR* but, rather, was a successful challenge to the *CDSA* as modified by the *MMAR* resulting in a declaration about the *CDSA* that cannot be undone merely by the Minister issuing Limited Exemptions;

d. *Smith* stands for the proposition that patient's *Charter* rights are violated when they are prohibited from possessing any medical cannabis derivatives, the use of which is a reasonable choice, not that the government is entitled to prohibit virtually all derivatives if it provides limited and ineffective access to nearly inert cannabis oil;

e. *Smith* confirms that the objective of the *CDSA* is protection of health and safety, full stop, and that importing the means used (the *MMPR* in this case) into the description of the objective is inappropriate.[7];

f. Plaintiffs do not argue that the Supreme Court lowered the balance-of-probabilities evidentiary burden in s. 7 cases, rather, that the Court made clear that burden could be satisfied by evidence establishing, in the

[6] If the Court determines the issue is moot then Plaintiffs' are entitled to costs as they attempted to adjourn the trial, and Defendant opposed, in order to avoid dealing with the derivatives issue until the Supreme Court issued its ruling in *Smith*

[7] RFJ para 24

context of medical decision making, that patient's autonomous choices were reasonable.[8]

g. *Smith* supports the Plaintiffs' request for immediate relief and the government's swift though insufficient response to *Smith* establishes that, when it wishes to do so, the government can quickly fill any regulatory void left by an immediately effective declaration.

10. The *Smith* Court did not confine its declaration to the *MMAR* nor the *MMPR*. Nor was the class of persons covered by the declaration limited to "clients" of LPs under the *MMPR* or persons holding ATPs under the *MMAR* but, instead, applies to 'a person with a medical authorization'.[9]

11. Nor was the Court's declaration confined to any particular class of derivatives, such as the 3% THC cannabis oil permitted to LPs and their clients under the s. 56 exemptions.

12. The Court's ruling, therefore, remains effective despite the government's issuance of the Limited Exemptions. Patients are not re-criminalized, as the government implicitly suggests, by, for example, possessing cannabis resin or cooking oil more potent than the 3% permitted to clients of LPs under the exemptions.

Mootness

13. The challenge is not moot. The Limited Exemptions do not comport with the Court's ruling. The government's interpretation of the decision coupled with the Limited Exemptions means that, at least in the Defendant government's view, patients continue to be criminally prohibited from possessing all but a very limited category of derivatives.

14. Moreover, Plaintiffs' claim sought a declaration permitting access to cannabis in "any form" not simply low potency cannabis cooking oil.[10]

Reasonable Access

---

[8] RFJ para 19-20
[9] RFJ para 31 and 33
[10] The issue also remains live in respect of the 150gram possession limit because the Limited Exemptions attempt to tie the permissible amount of cannabis oil or fresh cannabis to the (theoretically) equivalent weight of dried marijuana.

15. Absent relief from this Court, the *MMPR* coupled with the Limited Exemptions means only that if LPs choose to seek supplemental licensing, and if Health Canada approves that licensing at some indeterminate point in the future (likely to be the far future given the glacial pace of Health Canada licensing approvals in this area), then patients who can afford to purchase low-THC cannabis oil from LPs can make edible products from that weak oil.

16. For someone like Mr. Davey, who makes cannabis cookies containing very significant quantities of THC, the Limited Exemption is essentially worthless. Even if an LP seeks and succeeds in obtaining licensing at some point in the future, and even if Mr. Davey can afford to purchase that oil (at unknown cost), he will be confined to making very weak cookies from very weak oil or ingesting dozens or hundreds of weak oil capsules to meet his medical needs.

Conclusion

17. Paraphrasing this Court's comments in *Sfetkopolous* at paragraph 19, it is not tenable for the government, consistently with the rights established by the Supreme Court of Canada in *Smith,* to force medically authorized patients to only buy low potency cannabis oil from the unnecessarily restrictive system of LPs or to force them to acquire or make other derivative medicines illicitly and in violation of the criminal law. This is not reasonable access and does not give effect to the Supreme Court of Canada's determination that s. 7 of the *Charter* is violated when the government criminalizes the reasonable medical choices of authorized patients.

All of which is respectfully submitted.

DATED: July 23, 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