Date: 20081015

Docket: T-1430-07

Citation: 2008 FC 1161

Toronto, Ontario, October 15, 2008

PRESENT: Kevin R. Aalto, Esquire, Prothonotary

BETWEEN:

REVEREND EDWIN PEARSON, REVEREND MICHEL ETHIER and JAMES ROSCOE HOAD

Plaintiffs

and

HER MAJESTY THE QUEEN as represented by THE MINISTER OF JUSTICE OF CANADA, THE ATTORNEY GENERAL OF CANADA and THE SOLICITOR GENERAL OF CANADA

Defendants

REASONS FOR ORDER AND ORDER

[1] For the individual Plaintiffs and the members of the Assembly of the Church of the Universe (the "Assembly") the use of cannabis is an essential element of their religious services. For years now, many members of the Assembly have struggled mightily to rid Canada of its criminal prohibitions on the personal possession and consumption of marijuana. The Assembly alleges that

their hopes and dreams have been realized, and seek damages for what they claim is the unlawful enforcement of section 4(1) of *Controlled Drugs and Substances Act* ("CDSA").

[2] The Plaintiffs' declaration of victory is, however, premature. For the reasons that follow, I find that Plaintiffs' claim must be struck.

I. Background and Procedural History

[3] The Assembly, and the class on whose behalf they have brought suit, are all members of the Assembly. The members of the Assembly are said to be devout adherents to the belief that cannabis, the "tree of life," is a sacrament.

[4] The Plaintiffs have been engaged in sacramental cannabis use for some period of time. By their own admission, Revs. Pearson and Ethier have had multiple encounters with Canada's criminal justice system in relation to their drug-related religious observances.

[5] The Plaintiffs commenced this action and brought a motion pursuant to former Rule 299.17, now Rule 334.15, of the *Federal Courts Rules* for certification as a class proceeding on behalf of all members of the Assembly. The Plaintiffs claim damages for violation of class members' rights under the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The Plaintiffs allege that since July 31, 2001, the Defendants have been unlawfully enforcing the CDSA to the manifest injury of the members of the Assembly.

[6] On December 7, 2007, the Defendants filed a motion to strike the amended statement of claim pursuant to Rule 221(1)(a) of the *Federal Court Rules*. The motion advances a number of arguments:

1. The action is an abuse of process because the alleged improper actions of the Defendants were the subject of judicial determinations by the Ontario Court of Justice, the Ontario Superior Court of Justice and the Court of Appeal for Ontario. The Defendants argue that the Ontario Courts made judicial determinations, either implicitly or explicitly, that the underlying offence provisions were constitutionally valid and thus, as the Plaintiffs are seeking to revisit those decisions, this Court is being asked to sit in appeal of the Ontario Courts. The Defendants argue that the action therefore constitutes an abuse of process and should be dismissed.

2. Alternatively, the Defendants say that the action is fatally flawed as it is entirely dependent on an incorrect conclusion of law, *viz.*, that there is no valid prohibition against the possession of marijuana. Thus, they argue, the action is doomed to failure and should be struck as disclosing no reasonable cause of action.

3. In the further alternative, the Defendants say that the Plaintiffs have failed to plead sufficient material facts to sustain an action in misfeasance in public office or any other cause of action and for that reason must be struck.

[7] In responding to the Defendants' motion to strike, the Plaintiffs raised a number of preliminary jurisdictional objections with respect to the powers of Prothonotaries vis-à-vis class proceedings, and in respect of the value of the damages sought by the Plaintiffs. On January 17, 2008, I issued reasons rejecting the Plaintiffs jurisdictional objections, finding that Prothonotaries may dispose of motions to strike in relation to proposed class proceedings, and motions to strike in actions where the claimed damages are in excess of $50,000 (see *Pearson v. Canada*, 2008 FC 62).

II. Issues to be Determined

[8] In my reasons on the preliminary jurisdictional matters, I noted that addressing the merits of the present motion requires determining three issues:

1. Does the action constitute an abuse of process because it requires this Court to sit in appeal of prior determinations made in the Ontario Courts with respect to the constitutional validity of the provisions of the CDSA?

2. Should the claim be struck in its entirety under Rule 221(1)(a) of the Rules without leave to amend and the action be dismissed because it fails to disclose a reasonable cause of action?

3. Should the claim be struck in its entirety under Rule 221(1)(c) and (f) of the Rules without leave to amend and the action be dismissed because it is frivolous and vexatious?

[9] At the hearing on the merits of the present motion, the parties were in agreement that adjudicating the present motion requires answering a single question:

> In light of the existing jurisprudence, does section 4(1) of the CDSA remain an enforceable law in Canada?

The parties conceded that if the answer to this question was yes then this class action had no chance of success and should be dismissed. For the reasons that follow I conclude that section 4(1) of the CDSA remains an enforceable law in Canada.

III. Section 4(1) of the CDSA: The Battles Won and Lost

[10] From the outset it must be noted that the Plaintiffs are not challenging the constitutionality of section 4 of the CDSA. Rather, the core of the position advanced by the Plaintiffs is that the decisions of other courts have rendered section 4(1) of the CDSA of no force and effect within the meaning of section 52 of the *Constitution Act, 1982*. For their part, the Defendants argue that section 4 of the CDSA has been adjudged as constitutional.

[11] Attacks on the constitutionality of the marijuana possession law as codified in section 4(1) of the CDSA have, to date, proceeded on two primary grounds. The first has been that section 4(1) unconstitutionally denies marijuana to those who require it for medical reasons. The second is that prohibiting the personal possession and use of marijuana offends broader societal norms, such as respect for personal autonomy. In this respect, it is argued that the absence of any harm in the possession and consumption of marijuana offends the principles of fundamental justice under section 7 of the *Charter*.

IV. The Medical Marijuana Cases

[12] In *R. v. Parker* (2000), 49 O.R. (3d) 481, the Ontario Court of Appeal held that section 4(1) of the CDSA offended section 7 of the *Charter* to the degree that it prevented personal possession and use of marijuana by those who have a medical condition that necessitates the use of marijuana. The court in *Parker* suspended its declaration of invalidity of section 4 of the CDSA for a one year period expiring on July 31, 2001, in order to give the government time to put into place measures to ensure access to marijuana by those with a medically established need.

[13] On July 30, 2001, the Governor-in-Council promulgated the *Marihuana Medical Access Regulations*, SOR/2001-227 (MMAR). The MMAR sought to address the deficiencies in the CDSA by the court in *Parker* by creating a framework to ensure that marijuana is available in instances of medical need.

[14] The MMAR has been and continues to be the subject of judicial scrutiny. In *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104, the Court of Appeal for Ontario was asked to evaluate the constitutionality of the MMAR regime. It found certain sections of the MMAR constitutionally deficient. However, the court in *Hitzig* rejected calls for a declaration that section 4 of the CSDA be deemed of no force and effect:

> The Hitzig applicants argue that the appropriate remedy for the constitutional deficiency in the scheme of medical exemption crafted by the Government is the declaration granted by Lederman J., namely that the MMAR in their entirety are constitutionally invalid and of no force or effect. In their cross-appeal they also seek a declaration that the criminal prohibition against possession in s. 4 of the CDSA is of no force or effect in relation to marihuana. Of course,

> without the invalidity of the marihuana prohibition in s. 4, an order declaring the MMAR to be of no force or effect would leave those in medical need of marihuana with no way to possess it without criminal sanction.
>
> We find the remedy contended for by the Hitzig applicants to be overly broad and inadequately tailored to the constitutional deficiencies in the MMAR. Section 52(1) of the Constitution Act, 1982 requires the court to strike down any law that is inconsistent with the Constitution, but only "to the extent of the inconsistency". This invites some precision in selecting a remedy (paras. 154-55).

[15] Rather than striking down section 4 of the CDSA, the court in *Hitzig* declared certain provisions of the MMAR to be of no force an effect (at para. 176). The general prohibition on personal possession and use was, therefore, undisturbed by the ruling in *Hitzig*.

[16] In the wake of *Hitzig*, amendments to the MMAR were issued by the Governor-in-Council (see SOR/2003-387). These amendments are the subject of ongoing litigation before the Federal Court. On January 10, 2008, Deputy Judge Strayer held that certain post-*Hitzig* amendments to the MMAR to be unconstitutional (*Stefkopoulos v. Canada (Attorney General)*, 2008 FC 33). However, the remedy granted by Deputy Judge Strayer was to find section 41(b.1) of the MMAR of no force and effect (at para. 25). Deputy Judge Strayer's decision was stayed by Chief Justice Richard pending the full hearing of the appeal before the Federal Court of Appeal (see *Canada (Attorney General) v. Stefkopoulos*, 2008 FCA 106). However, nothing in the *Stefkopoulos* decision suggests that section 4 of the CDSA is of no force and effect.

[17] In sum, while the earlier medical marijuana jurisprudence (*Parker*, *supra*) did challenge the constitutional validity of section 4 of the CDSA, the cases have shifted in their focus to the

operation of the medical marijuana supply regime codified under the MMAR. And while the skirmishes concerning the MMAR are ongoing, none of the jurisprudence concerning the MMAR has attacked the underlying validity of section 4 of the CDSA.

V. Marijuana and the Societal Principles

[18] The second ground of attack against section 4 of the CDSA has been that it offends certain societal norms that are said to reside within principles of fundamental justice under section 7 of the *Charter*. In *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, the Supreme Court upheld the constitutionality of section 4 of the CDSA. In so doing, the Court rejected the harm principle as an element of fundamental justice:

> Contrary to the appellants' assertion, we do not think there is a consensus that the harm principle is the sole justification for criminal prohibition. There is no doubt that our case law and academic commentary are full of statements about the criminal law being aimed at conduct that "affects the public", or that constitutes "a wrong against the public welfare", or is "injurious to the public", or that "affects the community". No doubt, as stated, the presence of harm to others may justify legislative action under the criminal law power. However, we do not think that the absence of proven harm creates the unqualified barrier to legislative action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused (at para. 115).

[19] Furthermore, the Court in *Malmo-Levine* declined to find that criminalizing the personal possession or use of marijuana is arbitrary or disproportionate (at paras. 135 – 183). In a companion

case, *R. v. Clay*, 2003 SCC 75, [2003] 3 S.C.R. 735, the Court also rejected arguments that the CDSA is overbroad or violates a right to privacy vis-à-vis the personal use of marijuana.

VI. The Marijuana Jurisprudence and the Plaintiffs Claim

[20] Where do these cases leave the Plaintiffs' claim? The Plaintiffs amended statement of claim is premised on the notion that the Defendants have obtained "convictions, the imposition of fines, or both fines and imprisonment against the Plaintiffs though the prosecution of offences under the *CDSA*." (at para. 11) The Defendants have done so, however, in accordance with a law that has been upheld by both the Court of Appeal for Ontario and the Supreme Court of Canada. Therefore, it cannot be said the Defendants have acted unlawfully.

[21] The Plaintiffs point to two other cases, *R. v. Long*, 2007 ONCJ 340, (2007), 88 O.R. (3d) 146, supplemental reasons 2007 ONCJ 341, (2007), 88 O.R. (3d) 143, and *R. v. Bodnar*, [2007] O.J. No. 5215, in support of their argument that the CDSA is of no force and effect. Neither of these cases supports the position of the Plaintiffs nor do they support allowing the Plaintiffs' claim to proceed.

[22] Both *Long* and *Bodnar* are decisions of the Ontario Court of Justice. It is well settled law that the inferior courts of the provinces generally lack the authority to declare legislation of no general force or effect under section 52 of the *Constitution Act, 1982* (see *Shewchuck v. Richard* (1986), 28 D.L.R. (4th) 429, 2 B.C.L.R. (2d) 324 (C.A.) cited with approval in *Douglas/Kwantlen Faculty Association v. Douglas College* (1990), 77 D.L.R. (4th) 94 at 122, [1990] 3 S.C.R. 570). As then Chief Justice Nemetz wrote in *Shechuck*:

> **It is clear that the power to make general declarations that enactments of Parliament or of the legislature are invalid is a high constitutional power which flows from the inherent jurisdiction of the superior courts**.
>
> But it is equally clear that if a person is before a Court upon a charge, complaint, or other proceeding properly within the jurisdiction of that Court then the Court is competent to decide that the law upon which the charge, complaint or proceeding is based is of no force and effect by reason of the provisions of the Canadian Charter of Rights and Freedoms, and to dismiss the charge, complaint or proceeding. The making of a declaration that the law in question is of no force and effect, in that context, is nothing more than a decision of a legal question properly before the Court. It does not trench upon the exclusive right of the superior courts to grant prerogative relief, including general declarations. (at pp. 439-40) (emphasis mine)

[23] Indeed, even Judge Borenstein in *Long* appreciated his limited power to "declare" section 4 of the CDSA unconstitutional:

> The Crown submits that I have no jurisdiction to declare s. 4(1) of the C.D.S.A. unconstitutional. I can find it to be unconstitutional but I cannot declare it to be unconstitutional. My jurisdiction is to deal with the issues presented in the case before me. General declaratory powers are the exclusive jurisdiction of the Superior Courts. (2007 ONCJ 341 at para. 8)

[24] As a result, neither *Long* nor *Bodnar* are controlling in terms of a general declaration of invalidity of section 4 of the CDSA under section 52 of the *Constitution Act, 1982*.

[25] The Plaintiffs in their amended statement of claim, and in their written representations allege they are seeking to protect their right to exercise their religion freely. However, they have not, in the context of this proceeding, challenged the constitutional validity of section 4 of the CDSA. I

note that in another proceeding, the Plaintiffs have made such a claim, but to no avail (see *Tucker v. Canada*, 2004 FC 1729).

[26] In this case, the Plaintiffs' amended statement of claim is based upon a fundamentally faulty premise: that section 4 of the CDSA is of no constitutional force and effect. However, none of the cases cited by the Plaintiffs support their idyllic view of the laws governing the personal possession and use of marijuana in Canada. It may very well be that, on the ethereal plane, the possession and consumption of marijuana is a divine experience. However, at the present moment, the laws promulgated by the Parliament of Canada deny the Plaintiffs the sacramental satisfaction they seek.

[27] Given this fundamental flaw, it must be concluded that the Plaintiffs claim discloses no reasonable cause of action (see generally *Canada v. Roitman*, 2006 FCA 266) and is bereft of any chance of success.

[28] In coming to the conclusion that this claim should be struck, I have considered all of the allegations in the amended statement of claim in light of the teachings of the Supreme Court of Canada in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959. Applying the test in *Hunt v. Carey* it is plain and obvious that this claim cannot succeed. The claim must therefore be struck.

ORDER

THIS COURT ORDERS that:

1. The amended statement of claim herein be struck out without leave to amend.

2. As the Defendants were completely successful, they are entitled to costs to be assessed in accordance with the middle column of Tariff B.

"Kevin R. Aalto"
Prothonotary

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	REVEREND EDWIN PEARSON, REVEREND MICHEL ETHIER and JAMES ROSCOE HOAD v. HER MAJESTY THE QUEEN as represented by THE MINISTER OF JUSTICE OF CANADA, THE ATTORNEY GENERAL OF CANADA, and THE SOLICITOR GENERAL OF CANADA
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