Federal Court of Appeal | Cour d'appel fédérale

Date: 20141215

Docket: A-174-14

Citation: 2014 FCA 298

CORAM: **NADON J.A.**
WEBB J.A.
BOIVIN J.A.

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

NEIL ALLARD, TANYA BEEMISH, DAVID HEBERT and SHAWN DAVEY

Respondents

Heard at Vancouver, British Columbia, on November 24, 2014.

Judgment delivered at Ottawa, Ontario, on December 15, 2014.

REASONS FOR JUDGMENT BY: BOIVIN J.A.

CONCURRED IN BY: NADON J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

BOIVIN J.A.

[1] This appeal is from a decision of Mr. Justice Manson of the Federal Court (the judge) dated March 21, 2014.

[2] The judge exercised his discretion to grant an interlocutory injunction to the respondents under s. 24(1) of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (Charter), as well as under Rule 373(1) of the *Federal Courts Rules*, SOR/98-106.

[3] The judge's decision preserves certain rights that were available under the *Marihuana Medical Access Regulations*, SOR/2001-227 (the MMAR) thus staying the full coming into force of the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 (the MMPR) for the persons and classes of persons covered by the order, pending determination of the trial on the merits. The trial is currently scheduled to commence on February 23, 2015.

[4] The underlying action is a claim that the MMPR violates the respondents' section 7 Charter rights to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice. In particular, the respondents challenge the MMPR's prohibition of the personal production of marihuana for medical purposes and the possession limit of 150 grams of dried marihuana.

[5] Prior to the coming into force of the MMPR, the MMAR provided for a licence scheme whereby eligible persons who have a declaration signed by a medical practitioner are issued an Authorization to Possess (ATP) marihuana. Individuals who had an ATP could lawfully obtain access to marihuana (i) through a Personal Production Licence pursuant to which the individual was allowed to produce a determined quantity of marihuana for his own use; (ii) through a Designated Person Licence pursuant to which the individual was able to designate another person to produce his or her marihuana; (iii) by purchasing dried marihuana directly from Health Canada which contracted with a private company to produce and distribute marihuana.

[6] The Crown (appellant) appeals the interlocutory order on the ground that the respondents failed to conclusively establish irreparable harm. It submits that the evidence on this point was at

best speculative and the judge therefore erred when he found the evidence sufficient to establish the said harm. The appellant also contends that the judge erred in finding that this was a "clear case" in which the interests of the respondents outweighed the public interest and thus holding that the balance of convenience lay in favour of the respondents.

[7] The respondents cross-appeal on the remedy and argue that the judge erred in that he limited the remedy to too narrow a group of medical marihuana users. The respondents also submit that the judge ought to have recognized that the 150-gram limit on possession under the MMPR does constitute irreparable harm as it affected the respondents. They further argued at hearing before this Court that it impacted on the respondents' mobility. Accordingly, the respondents submit that the judge's order is too narrow in scope and ought to be broadened.

I. The Appeal

[8] For the following reasons, I am of the view that the judge did not misapprehend the facts, proceed on an erroneous principle of law or insufficiently weigh a relevant factor which would allow our Court to intervene on a discretionary interlocutory order (*Canada (Attorney General) v. Simon*, 2012 FCA 312, [2012] F.C.J. No. 1538 [*Elsipogtog FCA*] at para. 22 citing *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at pp. 154-156.).

[9] The judge reviewed the legislative schemes at issue, as well as the jurisprudence that gave rise to the requirement that the government provide a legal source of marihuana for persons with a medical need for the drug. He also referred to the three sets of regulations governing access to medical marihuana in Canada, and described the individual applicants. He then

summarized the affidavit evidence for both sides, the relief sought at trial, the interlocutory order sought, and outlined the issues before him.

[10] In the analysis portion of his reasons, the judge agreed with the parties that the applicable test for obtaining an injunctive relief is the tri-partite test established by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 and affirmed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311:

1. Is there a serious issue to be tried?
2. Will the applicants suffer irreparable harm if the interlocutory relief does not issue?
3. Does the balance of convenience favour the issuance of the interlocutory relief requested?

[11] Before the judge, the parties did not dispute that there was a serious issue to be tried. The bulk of the judge's analysis, accordingly, relates to the irreparable harm and balance of convenience branches of the test.

[12] On the issue of irreparable harm, the judge accepted the principle that economic hardship could contribute to a finding of irreparable harm in combination with other factors and on the basis of jurisprudence of our Court accepting serious economic hardship on individuals as a relevant factor to consider in the context of interlocutory relief. The judge was convinced on the evidence before him, that the price increase from the personal production under the MMAR to the cost of purchase under the MMPR would severely impoverish the applicants. This was an inference that was open for him to make and was supported by the jurisprudence (see *Elsipogtog FCA* at paras. 37-38).

[13] The judge therefore found that the evidence demonstrated that the applicants' inability to afford marihuana would likely affect their health, endanger their liberty or severely impoverish them. As such, a failure to grant the interlocutory relief sought would result in irreparable harm (judge's reasons at paras. 92 and 96).

[14] I cannot see a reviewable error of law or misapprehension of the facts or inappropriate weighing of a factor by the judge, nor that his order creates an obvious injustice.

[15] Moving to the balance of convenience prong of the test, the appellant submits that the judge was under a fundamental misapprehension of the facts in how he addressed the "public interest" benefits of the MMPR. Considering without deciding whether this is a "clear case" which outweighs the public interest (judge's reasons at para. 119), I am of the view that the judge correctly applied the legal principles flowing from *Elsipogtog FCA* to the facts of this case and there is no reason to disturb his finding on balance of convenience. The judge weighed and considered the evidence both parties placed before him and I cannot detect a reviewable error in the judge's legal analysis. In essence, the appellant is asking this Court to reweigh the evidence. This is not the role of this Court.

II. The Cross-Appeal

[16] On the matter of the cross-appeal, the respondents argue that although the order of the judge provides a remedy to the respondents Mr. Neil Allard and Mr. Shawn Davey, it fails to provide relief to the other two (2) respondents, Ms. Tanya Beemish and Mr. David Hebert. Accordingly, they ask this Court to broaden the scope of the order to include Ms. Beemish and Mr. Hebert.

[17] Throughout his analysis, the judge does not distinguish between the four (4) respondents to whom he refers as the "applicants". On the irreparable harm portion of his reasons, the judge uses the word "applicants" (judge's reasons at paras. 77 and 96) without distinction. In addressing the balance of convenience, he again refers to the "applicants" as "representatives of an identifiable group" and finds that the balance of convenience lies with the "applicants" (judge's reasons at paras. 117 and 120).

[18] While the judge carefully crafted and tailored his order in a way that he considered minimally intrusive into the legislative sphere (judge's reasons at para. 121), it does not provide remedy to patients who held valid production licences on September 30, 2013 but whose authorizations to possess expired between September 30, 2013 and March 21, 2014 (the date of his order). The judge's choice of March 21, 2014 as the "cut-off" date has the effect of excluding Ms. Beemish and Mr. Hebert from his order.

[19] With respect, the difficulty with the judge's finding is that although he provides a right (the interlocutory injunction) to the four (4) respondents – Mr. Allard, Mr. Davey, Ms. Beemish and Mr. Hebert – he does not, in contrast, explain why he deprives two (2) respondents – Ms. Beemish and Mr. Hebert - of a remedy. After careful reading of the judge's reasons, I am left to speculate as to his intention.

[20] In these circumstances, I cannot address properly the determination the respondents are seeking as I am unable to understand whether the judge intended to exclude Ms. Beemish and Mr Hebert or simply forgot to deal with their situation. In other words, the judge's reasons do not allow this Court to perform its appellate function.

[21] After considering making an assessment of the evidence, I believe that the wiser course is to return the matter to the judge with a direction that he specifically addresses the situation of Ms. Beemish and Mr Hebert.

[22] Finally, I do not agree with the respondents' contention that the judge erred in his determination that they failed to show irreparable harm based on the 150-gram possession limit. He exercised his discretion and considered both parties' interest, arguments and evidence. There is no basis for our Court's intervention on this issue and I therefore decline to expand the scope of the judge's order.

[23] I would consequently dismiss the appeal with costs and I would allow the cross-appeal without costs. I would remit the matter back to the judge for determination solely on the issue of

the scope of the remedy, more particularly with respect to Ms. Beemish and Mr. Hebert, in accordance with these reasons.

"Richard Boivin"

J.A.

"I agree
M. Nadon J.A."

"I agree
Wyman W. Webb J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-174-14
STYLE OF CAUSE:	HER MAJESTY THE QUEEN IN RIGHT OF CANADA v. NEIL ALLARD, TANYA BEEMISH, DAVID HEBERT AND SHAWN DAVEY
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
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REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	NADON J.A. WEBB J.A.
DATED:	DECEMBER 15, 2014

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