Federal Court of Appeal | Cour d'appel fédérale

Date: 20190918

Docket: A-258-18

Citation: 2019 FCA 232

CORAM: **WEBB J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

ALLAN J. HARRIS

Appellant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on June 27, 2019.

Judgment delivered at Ottawa, Ontario, on September 18, 2019.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: NEAR J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The issue in this appeal is whether the amended statement of claim, as filed by Mr. Harris with the Federal Court, should be struck. Mr. Harris is seeking certain declarations and unspecified damages related to the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 (ACMPR) (which were repealed on October 17, 2018 by SOR/2018-147, s. 33). The Crown had brought a motion to strike his statement of claim. The Federal Court (2018 FC 765) allowed the motion in part and struck the parts of the statement of claim related to

Mr. Harris' allegation that the ACMPR, in effect, shortchanged his right to a permit to grow cannabis but otherwise dismissed the Crown's motion.

[2] Mr. Harris filed an appeal in relation to the parts of his statement of claim that were struck. The Crown filed a cross-appeal in relation to the parts of the statement of claim that were not struck.

[3] For the reasons that follow, I would allow the Crown's cross-appeal and dismiss Mr. Harris' appeal. As a result, I would strike the amended statement of claim.

I. Background

[4] Mr. Harris filed a short amended statement of claim with the Federal Court. It appears to be based on a form that was copied from the Internet and it includes optional paragraphs that do not apply to Mr. Harris. For example, the paragraph identified as number 5 is marked as "optional for renewers". None of the blanks in this paragraph have been filled in by Mr. Harris.

[5] In paragraph 1, Mr. Harris indicates that he is seeking:

> A) a declaration that the long processing time for Access to Cannabis for Medical Purposes Regulations ("ACMPR") Production Registrations and Renewals violates the patient's S. 7 Charter Right to Life, Liberty, Security with no principle of fundamental justice such as war or emergency to necessitate and absolve such violations; and claims remedy in unspecified damages under S. 24 of the Charter in the amount of the value of the Applicant's prescription during any delay which this Court may rule inappropriate for a reasonable processing time for Registrations for medication, and

B) a declaration that back-dating the period of Registration and Renewal from the Effective Date for Registration or Expiry Date for Renewals as under the MMAR to the date the doctor signed under the ACMPR violates the patient's S. 7 Charter Rights and claims remedy for the full term of the prescription to take effect on the Effective Date of the Registration and on the Expiry Date of a Renewed Registration like the Health Card, Driver's License and MMAR.

(underlining in the original document)

[6] Mr. Harris provides very few facts as support for this claim. The only facts that are identified in his amended statement of claim and that are applicable to him are:

- he had a medical document to use cannabis for medical purposes under the ACMPR;
- he submitted an application under the ACMPR for registration to grow cannabis for medical purposes on June 11, 2017;
- his registration was received with an effective date of October 11, 2017 and an expiry date of March 23, 2018;
- ten data fields (which presumably are from the application form that he submitted under the ACMPR) are identified; and
- under the *Marihuana Medical Access Regulations* (SOR/2001-227 – repealed - SOR/2013-119, s. 267), the time to process an application was shorter and the registration began on the effective date of issuance, while under the ACMPR the time to process an application was longer and the registration was backdated to the date that the doctor signed the medical document.

[7] Mr. Harris refers to additional facts that are not applicable to him. For example, he refers to a period of 30 weeks (and over 6 months) to process an application, but his application was processed in four months.

[8] He notes that under the ACMPR any renewal was also backdated to the date that the doctor signed the medical document. Mr. Harris also alleges that having to see the doctor more often costs him more money and having to wait for the mail to find out if the registration will be renewed before the expiry date of an existing registration (when the plants would have to be destroyed) causes stress. However, his statement of claim is based on his initial application under the ACMPR for registration, not on any renewal of his registration. There are no alleged facts related to any renewal of any registration by Mr. Harris.

[9] Based on this amended statement of claim, the Federal Court judge, in paragraph 33 of his reasons, started with the proposition that Mr. Harris:

> has the right to a permit to grow marijuana for medical purposes if he satisfies the criteria of a *Charter*-compliant permit regime established under the *Controlled Drugs and Substances Act* [S.C. 1996, c. 19] and *Narcotic Control Regulations* [C.R.C., c. 1041]. This right has been confirmed by the Supreme Court of Canada, in addition to the Federal Court and various Superior Courts.
>
> [Citations added]

[10] Based on this proposition and his acceptance of the facts as pled by Mr. Harris, the Federal Court judge concluded that the motion to strike this amended statement of claim should be dismissed, except as it relates to Mr. Harris' allegation that the regime shortchanges his right to a permit to grow cannabis for the full period of time covered by his prescription.

II. Issues and Standard of Review

[11] The issues are whether the Federal Court judge erred in not striking the other parts of Mr. Harris' statement of claim and whether he erred in striking the parts of the statement of claim related to the shortchanging of the time that Mr. Harris could grow cannabis. Questions of law are reviewed on the standard of correctness. Questions of fact (including questions of mixed fact and law unless there is an extricable question of law) are reviewed on the standard of palpable and overriding error. (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

III. Analysis

[12] Although the Federal Court judge stated, in paragraph 33 of his reasons, that Mr. Harris had a right to a permit to grow cannabis for medical purposes in certain situations, there is no case authority cited to support this proposition. It appears that the Federal Court judge is relying on the decision of the Federal Court in *Allard v. Canada*, 2016 FC 236, [2016] 3 F.C.R. 303, to which he referred in paragraph 11 of his reasons. In *Allard*, the Federal Court cited the decision of the Supreme Court of Canada in *R. v. Smith*, 2015 SCC 34, [2015] 2 S.C.R. 602. I do not, however, read either *Allard* or *Smith* as support for the proposition as stated by the Federal Court judge.

[13] In *Smith*, the issue before the Supreme Court of Canada was whether the regulations under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 unjustifiably violated the guarantee of life, liberty and security of the person contrary to section 7 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. The Supreme Court noted that the regulations in issue only permitted the use of dried marihuana for medical treatment. The possession of cannabis products extracted from the active medicinal compounds in the cannabis plant was still prohibited.

[14] The Supreme Court of Canada found that "a medical access regime that only permits access to dried marihuana unjustifiably violates the guarantee of life, liberty and security of the person contrary to s. 7 of the *Charter*". However, in this case, the issues are related to the regulations that would allow Mr. Harris to grow his own marihuana. There is nothing in his statement of claim to indicate that there would be any difference between the marihuana that he would grow and the marihuana that he could have purchased from a person authorized to sell marihuana under the ACMPR.

[15] The *Allard* case addressed concerns related to the *Marihuana for Medical Purposes Regulations* (SOR/2013-119 – repealed by SOR/2016-230, s. 281) (MMPR) which are not the same regulations that are the subject of Mr. Harris' amended statement of claim. The ACMPR replaced the MMPR following *Allard.* In *Allard,* Phelan, J. noted, in paragraph 14 of his reasons, that "this case does not turn on a right to 'cheap drugs', nor a right 'to grow one's own', nor do the Plaintiffs seek to establish such a positive right from government".

[16] Neither party provided any authority that would support the proposition that Mr. Harris has a constitutional right to grow his own cannabis.

[17] The amended statement of claim filed by Mr. Harris seeks remedies related to two situations – the initial application for registration under the ACMPR (which would allow him to grow his own marihuana) and the renewal of such registration.

A. *Initial Application*

[18] The facts, as alleged by Mr. Harris in relation to his application for registration under the ACMPR, are simply that he was in possession of a medical document allowing him to use cannabis for medical purposes; it took approximately four months for him to receive his registration; under the previous regulations the processing time was shorter; and the effective date of his registration is different than it was under the previous regulations.

[19] However, these facts do not provide any indication of how his "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", as provided in section 7 of the *Charter*, was engaged. When a person grows his or her own marihuana there will necessarily be a delay for the time that it takes the marihuana plant to mature and produce a useable product. Mr. Harris does not provide any facts as support for his allegation that the additional waiting time of four months for his registration (which would then allow him to grow his own plants) deprived him of his right to "life, liberty and security of the person". There is nothing to indicate that Mr. Harris would not have been otherwise able to obtain marihuana during this waiting period from a person authorized to sell marihuana under the ACMPR.

[20] The facts, as alleged by Mr. Harris, are insufficient to support a claim based on section 7 of the *Charter* in relation to his initial application for registration under the ACMPR.

[21] In this case, there is also an additional basis for striking that part of Mr. Harris' amended statement of claim related to his requested declarations with respect to the ACMPR. Since these regulations have been repealed, any declaration with respect to these regulations would be meaningless. The Crown, however, did not raise this issue.

B. *Renewal of a Registration*

[22] Mr. Harris did not complete the process for a renewal of his registration prior to submitting his amended statement of claim. Therefore, any alleged facts in his amended statement of claim related to the renewal of a registration (which are summarized in paragraph 8 above), are not facts that are applicable to him. These alleged facts related to the renewal process are only speculation for what experience Mr. Harris may encounter when he applies for a renewal of his registration. Facts that are applicable to another individual (that Mr. Harris is using to speculate about what will happen when he applies for a renewal of his registration) cannot be used to support his claim, as set out in his amended statement of claim, that his rights under section 7 of the *Charter* have been infringed.

C. *Conclusion*

[23] As a result, Mr. Harris has not pled sufficient facts to support his claims for the declarations (which, as noted above, are also in relation to regulations that have been repealed) and the damages that he is seeking.

[24] I would, therefore, allow the Crown's cross-appeal and dismiss Mr. Harris' appeal. Setting aside the Order issued by the Federal Court in this matter and rendering the decision that the Federal Court should have made, I would allow the Crown's motion to strike Mr. Harris' amended statement of claim and I would strike his amended statement of claim without leave to amend. I would not award costs in relation to the motion before the Federal Court but I would award costs to the Crown for the cross-appeal.

"Wyman W. Webb"
J.A.

"I agree
D. G. Near J.A."

"I agree
Yves de Montigny J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED JULY 20, 2018, CITATION NUMBER 2018 FC 765 (DOCKET NUMBER T-1379-17)

DOCKET:	A-258-18
STYLE OF CAUSE:	ALLAN J. HARRIS v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JUNE 27, 2019
REASONS FOR JUDGMENT BY:	WEBB J.A.
CONCURRED IN BY:	NEAR J.A. DE MONTIGNY J.A.
DATED:	SEPTEMBER 18, 2019

APPEARANCES:

Allan J. Harris	ON HIS OWN BEHALF
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SOLICITORS OF RECORD:

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