Federal Court  Cour fédérale

Date: 20150715

Docket: T-2030-13

Citation: 2015 FC 866

Ottawa, Ontario, July 15, 2015

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

NEIL ALLARD, TANYA BEEMISH,
DAVID HEBERT AND SHAWN DAVEY

Plaintiffs (Moving Party)

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant (Respondent on the Motion)

ORDER AND REASONS

I. Nature of the Matter

[1] This is a motion to vary, pursuant to Rule 399(2), the Injunction Order of Justice Manson issued March 21, 2014, prior to the trial of this matter challenging the constitutionality of the current *Marihuana for Medical Purposes Regulations*, SOR/2013-119 [MMPR].

[2] The trial has been completed and the parties are in the process of final submissions – a process which the Court permitted in light of the Supreme Court of Canada's decision in *R v Smith*, 2015 SCC 34.

[3] The terms of the variation requested involve the expansion of the Injunction Order including but not limited to: including all previous patients under the prior regime and some others requiring Health Canada to maintain its own database; and, ancillary relief for these individuals.

[4] The basic grounds of the motion are "new matters arisen/discovered", some of which are matters heard at trial. A particular focus is on patients whom the Plaintiffs say "fell between the cracks" under the Injunction Order. Some of the relief is intended to extend beyond the Court's decision on the *Charter* challenge.

II. Background

[5] In the course of the Plaintiffs' *Charter* challenge, they secured an interlocutory injunction from Justice Manson. It was a carefully crafted order with very specific terms designed to balance a number of competing interests. It has been upheld in all its material parts by the Federal Court of Appeal.

[6] During the appeal process, the Plaintiffs sought to adduce "new" evidence – evidence which is the same or similar to the evidence now relied on. That motion to adduce new evidence was dismissed.

[7] In the Court of Appeal's referral back to Justice Manson for purposes of clarification as to whether Mr. Hebert and Ms. Beemish were deliberately excluded from the Injunction Order, Justice Manson reaffirmed that his Order was crafted to avoid unduly impacting the validity of the new medical marihuana regime and to take into account the practical implications of the previous administrative licensing regime [MMAR – *Medical Marihuana Access Regulations*, SOR/2001-227] no longer in place.

[8] The Plaintiffs then appealed Justice Manson's Clarification Order. The net effect of the procedural skirmishes at the Court of Appeal is that the Plaintiffs discontinued that appeal and brought this motion to vary.

[9] In summary, the motion seeks to change dates set out in the Injunction Order as well as to change the class of persons covered by that Order and to extend that Order to a wider group of former MMAR licence holders.

III. Analysis

[10] I have concluded that the motion should be dismissed because:

- the evidence is not a new matter;
- the motion is premature;
- the Court should not alter a carefully crafted Interlocutory Injunction by expanding its terms; and
- the relief extends far beyond Rule 399 relief.

A. *New Matter*

[11] As held in *Janssen Inc v Abbvie Corporation*, 2014 FCA 176 at paragraphs 40-42, 242 ACWS (3d) 11, not every change of facts is grounds for a variance. The Court must determine whether the evidence offered in support of the variance establishes that the matters are truly unforeseen. As a general rule, only concrete matters of significance will warrant a change to the terms of an injunction as the threshold of proof is high.

[12] The matters raised on this motion are not truly new. The evidence before Justice Manson related specifically to the supposed new matters:

a) the impact that the inability to renew personal production licences or designated-person production licences after September 30, 2013, had on some users. Specifically, the Plaintiffs, Mr. Hebert and Ms. Beemish, gave evidence before Justice Manson on the difficulties of renewing licences and amending the address on licences;

b) the impact of the 150 gram personal possession limit was specifically before Justice Manson in evidence from Mr. Allard and Ms. Lukiv. Justice Manson made a clear finding that on this issue the Plaintiffs had not established irreparable harm;

c) the matter of the prices and strains offered by licensed producers under the MMPR was directly before Justice Manson. The Plaintiffs' "new" evidence is an updating of current circumstances, as was heard at trial. Justice Manson anticipated that there would be developments in this area. To the extent that

anything new or of significance has arisen, it was heard by this Court at trial. For reasons given, it is premature to reach a conclusion on this aspect of the case; and,

d) as to the status of the MMAR administrative regime, there was evidence before Justice Manson as to the closing out of the MMAR system. The transition to a new system was an important aspect of Justice Manson's balance of convenience considerations.

B. *Prematurity*

[13] This motion is premature in the sense that some of the "new" evidence is old subject matter but expanded upon at trial. To accept the Plaintiffs' characterization of the evidence, its weight and significance would require this Court to make critical determinations in advance of its decision on the underlying *Charter* challenge.

[14] It is inappropriate for a Court to engage in this piecemeal and premature consideration of aspects of its final judgment. It would also lead to speculation as to the final result or worse, foreclose a proper consideration of all the evidence as a whole.

C. *Expansion of Injunction Order*

[15] The Plaintiffs seek to expand the scope of the Injunction Order. By doing so, it would disrupt the balance of convenience analysis and throw open the whole of the Injunction, leading potentially to its unravelling.

[16] Justice Manson carefully crafted his Order. As he himself notes:

> … in crafting the terms of this Order, I have considered the least drastic means available to protect the rights of the Applicants while preserving the will of Parliament.

[17] It is clear that in considering this balance in the Applicants' (Plaintiffs') favour, the Injunction Order did not embrace all medically approved users of marihuana or that the previous MMAR structure was to be maintained.

[18] It is also evident that some people and some circumstances would not enjoy the benefits of the Injunction Order. It is erroneous to describe this as an inadvertent omission or a "falling between the cracks".

[19] The Plaintiffs not only seek to expand the class of users covered by the Injunction Order but also to recreate in part the MMAR with new staff and resources. That aspect is an important part of the balance of convenience analysis which could undermine the existing Injunction Order. The Plaintiffs are engaging in an exercise equivalent to pulling a thread on a sweater – sometimes the whole unravels.

[20] There was concern expressed that the MMAR database not be dismantled or destroyed. This could be important if the Plaintiffs are successful in their action. However, the Court has Crown counsel's assurance that the database is being kept properly and will not be destroyed or dismantled. The Court takes those assurances from officers of the Court as sufficient guarantee of database integrity.

D. *Extension of Injunction Order*

[21] The Plaintiffs also seek to have the Injunction Order and its operation extend past the decision date of the *Charter* challenge.

[22] Quite apart from such practical aspects related to average grow crop period of three-four months and time needed to create some MMAR-like administrative regime to deal with an expanded Injunction Order, any extension beyond the decision date is inappropriate.

[23] The Court is not prepared to tie its hands on the questions of a *Charter* remedy (if any). Interlocutory orders are, by their nature, designed to expire when the final decision in the litigation is made. This case is no exception.

[24] It may well be that a remedies hearing or submissions are necessary after the decision, whether the Plaintiffs are successful or not.

[25] It is at that time that any issues related to the Injunction Order and its operation should be addressed.

IV. Conclusion

[26] For these reasons, the motion to vary is denied with costs in any event of the cause.

ORDER

THIS COURT ORDERS that the motion to vary is denied with costs in any event of the cause.

"Michael L. Phelan"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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