Date: 20081211

Docket: T-1430-07

Citation: 2008 FC 1367

Ottawa, Ontario, December 11, 2008

PRESENT: The Honourable Mr. Justice Hughes

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] This is a motion brought by the Plaintiffs by way of an appeal from an Order of a Prothonotary of this Court dated October 15, 2008 in which the Plaintiffs' claim was struck without leave to amend with costs to the Defendants. For the reasons that follow I will dismiss the appeal and maintain the striking of the claim.

[2] An Order of a Prothonotary striking out an action is clearly an Order vital to the final determination of the proceeding. The matter must be considered *de novo* on this appeal. A *de novo*

consideration does not require that any error be identified in the decision under appeal (*City Centre Aviation Ltd. v. Jazz Air LP*, 2007 FCA 304 at para. 13). This Court must approach the matter afresh based on the Record before the Prothonotary.

[3] This action, as pleaded in the Amended Statement of Claim dated September 6, 2007, seeks to style itself as a class action brought on behalf of the named Plaintiffs on their own behalf and "on behalf of all Ministers and practitioners of the Assembly of the Church of the Universe in Canada who have been and will be affected by actions, conduct and potential future actions and conduct of the Defendants" for damages. The damages claimed are itemized as various sums for alleged breaches of the *Charter of Rights and Freedoms*, for misfeasance of public office, punitive and exemplary damages, and special damages, together with interest, costs and further and other relief.

[4] The action does not seek to challenge the constitutional validity of the *Charter* or any *Act* or *Regulation*.

[5] The Defendants moved to have the Amended Statement of Claim struck out without leave to amend on the basis that it fails to disclose a reasonable course of action, that it is frivolous and vexatious and that the Federal Court lacked jurisdiction to entertain common-law tort claim against individuals. The motion was brought before any motion for certification of the action as a class action was taken. No such certification has yet been made. No defence has been filed by any Defendant.

[6] The Prothonotary, in a decision cited as 2008 FC 1161, concluded that the action was based on a fundamentally faulty premise, namely that section 4 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (CDSA) is of no constitutional force and effect. That premise, the Prothonotary held, was fundamentally flawed. He concluded that the claim disclosed no reasonable cause of action and was bereft of any chance of success. The Amended Statement of Claim was struck out without leave to amend. The Prothonotary wrote at paragraphs 26 to 28:

> ***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] F.C.J. No. 1177, 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.*

[7] The Plaintiffs are herein moving to set aside the Prothonotary's Order on a large number of grounds, essentially that he misunderstood or misapplied the law. The Defendants assert that the Prothonotary was correct and, in the alternative state that there are other grounds for striking out the action raised before the Prothonotary but not determined by him namely that the pleading fails to

state sufficient material facts to sustain an action in misfeasance in public office, or any other cause of action, and that the action is a blatant collateral attack on convictions entered against the Plaintiffs in the Ontario Courts, hence an abuse of process.

ISSUES

[8] I had some difficulty in discussions with Counsel for the Plaintiffs at the hearing in determining what were the real issues both before the Prothonotary and now before me.

[9] The Prothonotary at paragraph 9 of his Reasons stated that the parties were in agreement that there was a single question to be answered namely:

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

[10] Counsel for the Plaintiffs, who also argued the matter before the Prothonotary, said that there must have been a misunderstanding. Counsel says that the issues then and now are in respect of whether the Amended Statement of Claim should be struck on the basis whether:

1. During the "class period" (defined in paragraph 6 of the Amended Statement of Claim to be from on or about May 14, 1997 to the present time) there was no law prohibiting the use of cannabis;
2. The Amended Statement of Claim pleads a cause of action based on a breach of religious freedom as guaranteed by the Charter, by the Respondents?

[11] Subsequently in argument, Counsel for the Plaintiffs argued that the claim period as defined by paragraph 6 in the Statement of Claim should be amended by reducing it to a period between July 31, 2001 and October 7, 2003 having regard to decisions of the Ontario Court of Appeal in *R. v. Parker*, (2000), 146 CCC (3d) 193 and *Hitzig v. Canada*, (2003), 231 D.L.R. (4th) 104.

[12] Counsel for the Defendants argued that the Prothonotary got it right. Counsel also said that the Defendants argued a second and overarching ground for dismissal namely abuse of process, which ground was not dealt with by the Prothonotary.

[13] A further issue was raised by Counsel for the Plaintiffs, namely even if the Amended Statement of Claim as it currently stands in is struck out, the Prothonotary ought to have given leave to amend.

[14] The Plaintiffs, in their written Memorandum, but not in oral argument, raised the issue as to whether the Prothonotary had jurisdiction to determine the matter at all. In their written Memorandum paragraph 26 the Plaintiffs state that they will not dwell on this point. I take it therefore that this is not an issue that requires determination here since I am considering the matter *de novo*.

[15] Given the somewhat shifting ground upon which Plaintiffs Counsel has endeavoured to establish the issues for determination, I formulate the issues now before this Court, on a *de novo* basis to be the following:

1. Should the claim as pleaded in the Amended Statement of Claim be struck out as an abuse of process?
2. Should the claim as pleaded in the Amended Statement of Claim be struck out for failure to disclose a reasonable cause of action?
3. In the event that the claim as pleaded is struck out, should the Plaintiffs be given leave to amend?

Issue 1 – Abuse of Process

[16] Rules 221 (1)(c) and (f) of this Court provide that the Court may at time strike out an action on the ground that it is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the Court.

[17] The Supreme Court of Canada in *Toronto (City) v. C.U.P.E. Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 has stated that the doctrine of abuse of process engages the inherent power of the court to prevent misuse of its procedure in a way that would bring the administration of justice into disrepute even where the strict requirements of issue estoppel are not met. Arbour J. for the majority wrote at paragraph 37:

> ***37*** *In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:*

> *The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).*
>
> *One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]*

> *As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, Franco v. White (2001), 53 O.R. (3d) 391 (C.A.); Bomac Construction Ltd. v. Stevenson, [1986] 5 W.W.R. 21 (Sask. C.A.); and Bjarnarson v. Government of Manitoba (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, supra, at pp. 624-25).*

[18] As a companion principle to abuse of process is that of preclusion of a collateral attack on another judgment of a court of competent jurisdiction. Binnie J. for the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 wrote at paragraph 20:

> ***20*** *The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law,*

> *the idea that a dispute once judged with finality is not subject to relitigation: Farwell v. The Queen (1894), 22 S.C.R. 553, at p. 558; Angle v. Minister of National Revenue, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): G. S. Holmested and G. D. Watson, Ontario Civil Procedure (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: Wilson v. The Queen, [1983] 2 S.C.R. 594; R. v. Litchfield, [1993] 4 S.C.R. 333; R. v. Sarson, [1996] 2 S.C.R. 223.*

[19] Turning to the Amended Statement of Claim, it is styled as a proposed class action; it has not yet been certified as such. The motion to strike was brought before a certification motion has been heard. The claim is for damages, no attack on constitutionality has been made. The Plaintiffs style themselves as members of a church, Ethier and Pearson claim to be ordained ministers, Hoad claims to be a parishioner (paragraph 2). The class which the Plaintiffs claim to represent as defined (paragraphs 19 to 22) is said to be all Ministers, parishioners and adherents of the Church who hold cannabis as a sacrament, the size of the class is undetermined. Paragraph 6 defines a "class period" said to be from on or about May 14, 1997 to the present time. The common issue of law (paragraphs 23 to 23.4) is said to be entitlement to equal treatment and benefit of the law in the use of cannabis for sacramental purposes. The common issues of fact (paragraphs 24 to 26) are set out in paragraph 24.4 as whether each class member has been subjected to rights guaranteed by the *Charter* and whether the rights have been violated. No time period whether "class period" or otherwise is specified. No particular rights or violations are identified. Paragraphs 30 and 31 state

generally that some members of the proposed class have been arrested, prosecuted and detained for possession of cannabis and promise that particulars of loss and damage will be provided before trial.

[20] Paragraphs 32 to 45 of the Amended Statement of Claim allege broadly that the Defendants have engaged in deliberate acts and conduct. Those acts are generally stated to be the arrest and laying of charges pertaining to cannabis.

[21] Paragraph 43 alleges a conspiracy between the Defendants after July 31, 2001 and continuing. Paragraphs 46 sets out a general listing of provisions of the *Charter*, *Federal Court Act* and *Rules*, *Crown Liability Act*, and CDSA.

[22] With respect to the Plaintiff Pearson, paragraphs 48 to 52 make allegations without giving particulars. Pearson claims a sincere belief in the use of cannabis as a sacrament and alleges that during the "class period" police officers subjected "his congregation" sometimes called "parishioners" to search and seizure and that he was required to attend criminal courts to "assist parishioners".

[23] Paragraphs 53 to 63 purport to identify facts pertaining to the Plaintiff Ethier. It is said that since 1998, the Defendants or their agents have arrested Ethier and detained him on eight separate occasions in respect of cannabis related matters. He claims that, as a result, he is apprehensive of assembling with other Church members for religious purposes including the possession of cannabis.

[24] Paragraphs 64 to 75 address the circumstances of the Plaintiff Hoad. He claims that since 1998 he has been arrested four times on cannabis related charges as a result of which he fears assembling with other members of the Church for religious purposes.

[25] This is a brief summary of the Amended Statement of Claim. I have not intended to refer to every part of it, rather, I have endeavoured to set out a broad outline for the purposes of these Reasons.

[26] The individual Plaintiffs are no strangers to the Court system. Each of Ethier and Hoad admit in the Amended Statement of Claim to have been arrested on several occasions on cannabis related charges. The evidence before this Court on this motion demonstrates the numerous occasions that Ethier alone or Ethier together with Hoad have been before the Courts on cannabis related criminal charges and that a number of proceedings and appeals have been taken in such proceedings. Ethier raised issues in the Ontario Court such as violation of "fundamental principles of justice" and that the "essential elements" referring to the CDSA were "unconstitutional and of no force and effect". He lost at the trial level. The Ontario Court of Appeal by Order dated November 18, 2003 dismissed his appeal. The Plaintiff Hoad was also charged in the matter but does not appear to have taken part in the appeal since the Trial Judge stayed his matter until the disposition of Ethier's appeal (Karom J. May 22, 2003, Court File 030313, transcript page 16).

[27] The Plaintiff Pearson has been active in the Quebec Courts and the Federal Courts as well as the Supreme Court of Canada. The Supreme Court of Canada dismissed his appeal from a

conviction in the Quebec Courts of trafficking in narcotics ([1998] 3 S.C.R. 320). In the Federal Court, Pearson brought an action for wilful abuse of process and malicious violation of his rights under the *Charter*. Richard A.C.J. of this Court, as he then was, stayed that action pending final determination of proceedings in the Quebec Courts ([1999] F.C.J. No. 1298). When such proceedings ended the stay was lifted by Teitlebaum J. ([1994] F.C.J. No. 1991). The matter ultimately went to trial before de Montigny J. of this Court who dismissed the action with written reasons cited as 2006 FC 931. That decision was affirmed by a unanimous decision of the Federal Court of Appeal, 2007 FCA 380.

[28] Justice de Montigny began his Reasons by setting out the nature of Pearson's claim, which was for various kinds of damages for "known and wilful abuse of process and malicious violation of (Pearson's) *Charter* rights by the Crown and her officers". That Judge spoke of the complex, extraordinary and chequered history of Court proceeding that were involved. He wrote at paragraphs 1, 2 and 3:

> ***1*** *On February 24, 1999, the plaintiff commenced an action in this Court against the defendant, based on the actions of her servants. Mr. Pearson is seeking compensatory damages, general damages, exemplary damages and punitive damages for a total of $13 000 000.00. His claim rests on the alleged known and willful abuse of process and malicious violations of the plaintiff's Charter rights by the Crown and her officers, servants and agents in his criminal prosecution in the Quebec courts.*
>
> ***2*** *This case has had a very complex history, both in the courts of criminal jurisdiction and in this Court. A number of my colleagues, both judges and prothonotaries, have been called upon to adjudicate on various motions filed by the plaintiff and the defendant at various stages of this proceeding. Indeed, Justice Hansen commented in her reasons for an order dismissing a motion by the plaintiff that the case had become procedurally*

> *complex, "a fact to which the file's fifty six pages of recorded entries attests"; that was on June 21, 2001.*
>
> ***3*** *Not only is this file complex and extraordinary by reason of its procedurally chequered history, but it also raises substantive issues that are still somewhat uncharted and contentious, from a strictly legal point of view. They have to do with the tangled web of civil and criminal law, with the elusive concepts of civil remedies and time limitations for Charter violations, and to a certain extent with the very jurisdiction of this Court.*

[29] In concluding his Reasons for dismissal of the action, de Montigny J. wrote at paragraph 88:

> ***88*** *I am therefore bound to reject Mr. Pearson's claim, even if I were to assume that it is not prescribed and that I am not precluded to look into it as a result of the various decisions made by the courts of criminal jurisdiction. As forceful and persuasive as he was in his honestly held belief that he has been wronged by the Crown in the conduct of his criminal trial, Mr. Pearson has failed to establish that he is entitled to an award of damages. I am unable to conclude that his constitutional rights have been infringed, and that the behaviour of the Crown agents involved in the investigation or in the conduct of his trial was in any way reprehensible, at least to the extent required to call for damages. If, through no fault of the Crown, Mr. Pearson was impaired in his ability to make full answer and defence, he was granted an appropriate and just remedy in obtaining a new trial limited to the issue of entrapment. The Court of Appeal of Quebec did not see fit to award damages to Mr. Pearson, and he cannot now come to this court and ask for what he was denied in the courts of competent jurisdiction. If the plaintiff feels strongly that his defence was jeopardized as a consequence of his ignorance of key documentary evidence, the proper recourse is to try and obtain a reopening of his trial, not to challenge (albeit obliquely) the decisions of the Quebec Superior Court and Court of Appeal in this Court.*

[30] The Federal Court of Appeal per Linden JA. unanimously dismissed the appeal. He wrote at paragraph 6:

> ***6*** *While it is clear that a violation of the Charter may sometimes ground an award of civil damages pursuant to section 24, this is*

> *not automatic. The jurisprudence is clear that to recover damages something more than a technical violation of the Charter is required. It is necessary to demonstrate that there has been conduct that was done in bad faith, clearly wrong or which amounted to an abuse of power. Merely acting in an unconstitutional way, if it is done in good faith and without abuse of power, does not lead to civil liability, (See Mackin v. New Brunswick; Rice v. New Brunswick, [2002] 1 S.C.R. 405, per Gonthier J. at paras. 78 and 79) even though there may be other legal consequences. ((R v. Carosella), [1997] 1 S.C.R. 80.)*

[31] With this history, the present action taken by the Plaintiffs Pearson, Ethier and Hoad can be seen as yet another endeavour to do what they have failed to do in earlier criminal and civil proceedings namely to persuade a Court that the possession and use, by them and their colleagues of cannabis for what they characterise as "sacramental purposes" is lawful and protected by the *Charter*. To cast the present action as a proposed class action and to plead that there are others, "parishioners" who have suffered like abuses is simply an endeavour by them to relitigate what has been lost by them many times or, put another way, to attack collaterally decisions of this and other superior courts and appellate courts of this country. These are the same issues simply packaged differently. To allow such a claim to be made would bring the administration of justice into disrepute. The claim will be struck out as an abuse of court.

Issue 2 – Disclosure of a Reasonable Course of Action

[32] Prothonotary Aalto dismissed the action on the basis that the premise of the action was based on an incorrect premise namely whether 4(1) of the *CDSA* remains an enforceable law of Canada. I agree with his decision on this issue and for the Reasons that he gave. From discussions

with each Counsel for the parties at the hearing, I understand that they accept this decision as well subject to the submissions of Plaintiffs' Counsel as set out next.

[33] Counsel for the Plaintiffs at the hearing sought leave to amend the claim so as to be restricted to a time period in respect of which wrongful actions are said to have been committed by the Defendants, defined as the claim period, to that from July 31, 2001 to October 7, 2003. This period is established by Plaintiffs' Counsel through a reading of the decisions of the Ontario Court of Appeal in *Parker*, *supra* and *Hitzig*, *supra* and the decision of Lederman J. of the Ontario Superior Court in *Hitzig* (2003), 171 CCC (3d) 18 that preceded the Court of Appeal decision.

[34] Essentially, the time period is established by Plaintiffs' Counsel on the basis that in *Parker* the Ontario Court of Appeal declared that the prohibition on the possession of marihuana in the CDSA was of no force and effect however the declaration of invalidity would be suspended for one year, and during that period the law remained in full force and effect. Rosenberg JA. for the Court said at paragraph 11:

> *[11] Accordingly, I would uphold the trial judge's decision to stay the charges against Parker and I would dismiss that part of the Crown's appeal. However, I disagree with Sheppard J.'s remedy of reading in a medical use exemption into the legislation. I agree with the Crown that this is a matter for Parliament. Accordingly, I would declare the prohibition on the possession of marijuana in the Controlled Drugs and Substances Act to be of no force and effect. However, since this would leave a gap in the regulatory scheme until Parliament could amend the legislation to comply with the Charter, I would suspend the declaration of invalidity for a year. During this period, the marijuana law remains in full force and effect. Parker, however, cannot be deprived of his rights during this year and therefore he is entitled to a personal exemption from the possession offence under the Controlled Drugs*

> *and Substances Act for possessing marijuana for his medical needs. Since the Narcotic Control Act has already been repealed by Parliament, there is no need to hold it unconstitutional. If necessary, I would have found that Parker was entitled to a personal exemption from the cultivation offence for his medical needs.*

[35] That decision was dated July 31, 2001.

[36] One day before the expiry of the one year period, the federal government enacted provisions of the *Marihuana Medical Access Regulations* SOR/2001-227 (MMAR) which were allegedly curative of the deficiencies found by the Ontario Court of Appeal in *Parker*.

[37] A new challenged to the CDSA and the new MMRA provisions were launched in *Hitzig*. Justice Lederman of the Ontario Superior Court in his decision dated January 9, 2003, declared that the relevant portions of the CDSA and MMAR were unconstitutional but suspended the application of his ruling for a period of six months. That decision was appealed; however the six month period came and went with no amendments to the MMAR. The Crown sought an extension of that six months period but that request was denied. After the expiration of the six month period, on October 7, 2003, the Ontario Court of appeal in *Hitzig* upheld Lederman J.'s decision however a remedy was provided in that Court's decision that would maintain the constitutionality of section 4 of the CDSA. At paragraph 2 of its unanimous decision the Court wrote:

> ***2*** *These applications concern the constitutionality of the Marihuana Medical Access Regulations, S.O.R./2001-227, made by the Governor in Council on 14 June 2001 pursuant to subsection 55(1) of Controlled Drugs and Substances Act, S.C. 1996, c. 19. More particularly, at issue is whether these regulations, in conjunction with prohibitions specified in the*

> *Controlled Drugs and Substances Act [CDSA], violate some or all of the applicants' rights to liberty and security of the person as guaranteed by s. 7 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]. These applications follow very much in the footsteps of the Ontario Court of Appeal's 31 July 2000 decision in R. v. Parker (2000), 49 O.R. (3d) 481 [Parker]. Indeed, the accused in the Parker case is one of the applicants presently before this court.*

[38] At paragraph 170 of *Hitzig*, the Ontario Court of Appeal affirmed the validity of section 4 of the CDSA:

> ***170*** *This section permits legislative provisions which would otherwise breach Charter rights to be found constitutional. As when considering the principles of fundamental justice, the inquiry at this stage involves some consideration of whether the "law strikes the right balance between the accused's interests and the interests of society." (Cunningham v. Canada, [1993] 2 S.C.R. 143 at 152). But the justification analysis under s. 1, as noted above, goes beyond the internal limitations proscribed by the principles of fundamental justice and incorporates broader values, namely those of a free and democratic society. (See Mills, supra). Section 1 analysis thus involves two parts.*

[39] In a companion case proceeding at the same time as *Hitzig, R. v. J.P.* (2003), 67 O.R. (3d) 321 the Ontario Court of Appeal in a unanimous decision confirmed that section 4 was in force and effect. It wrote at paragraphs 31 to 33:

> *[31] The court in Parker, supra, declared that the marihuana prohibition in s. 4 was inconsistent with the Charter and consequently of no force or effect absent an adequate medical exemption. In making the declaration, the court did not and could not repeal or otherwise alter the terms of the statute. The court could only declare the constitutionally offensive part of the legislation to be of no force or effect.*
>
> *[32] By bringing forward the MMAR, the Government altered the scope of the possession prohibition in s. 4 of the CDSA. After the*

> *MMAR came into force, the question therefore became whether the prohibition against possession of marihuana as modified by the MMAR was constitutional. If it was, then the possession prohibition was in force. If the MMAR did not solve the constitutional problem, then the possession prohibition, even as modified by the MMAR, was of no force or effect.*
>
> *[33] There was no need to amend or re-enact s. 4 of the CDSA to address the constitutional problem in Parker. That problem arose from the absence of a constitutionally adequate medical exemption. As our order in Hitzig demonstrates, the prohibition against possession of marihuana in s. 4 is in force when there is a constitutionally acceptable medical exemption in force.*

[40] Applying this legal history to the circumstances of this case, the Plaintiffs argue that an amendment could be made to the present Amended Statement of Claim to restrict the "claim date" to the period between the Ontario Court of Appeal decision in *Parker* and *Hitzig*, July 31, 2001 to October 7, 2003. They argue that during that period the status of the relevant provisions of the CDSA were in doubt. That period could even be reduced further to the end of the six month delay provided for by Lederman J. to October 7, 2003, that is, from July 9, 2003 to October 7, 2003.

[41] The Defendants' Counsel argues that simply to limit the time period in this way is insufficient. Counsel argues that a law is presumed to be valid and ultimately the Ontario Court of Appeal in *Hitzig* and *J.P.* held that it was. Government actions taken pursuant to legislation, Counsel argued, even legislation subsequently held to be unconstitutional, cannot sustain an action for damages citing *Guimond v. Quebec (Attorney General)* [1996] 3 S.C.R. 347.

[42] Further, Defendants' Counsel argues that a claim for misfeasance in a public office must be based on pleading and subsequently proof of two elements, first deliberate and unlawful conduct and, second, awareness that the conduct is unlawful and likely to injure. Iacobucci J. for the

Supreme Court of Canada in *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263 wrote at paragraph 32:

> ***32*** *To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, [page287] the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.*

[43] Rule 181(1)(b) of this Court requires that where a plea such as that of malice is made, that plea must be particularized.

[44] There is no plea let alone a particularized plea, that would satisfy the criteria established in *Odhavji Estate supra*.

[45] I find therefore, that the Amended Statement of Claim as it stands, fails to set out a reasonable cause of action and must be struck out.

Issue 3 – Leave to Amend

[46] Rule 221 of this Court states that the Court may strike out a pleading "with or without leave to amend". The Prothonotary denied leave to amend.

[47] Generally speaking, if an amendment can cure a defect in a pleading the Court is willing to allow such an amendment, subject to consideration of matters such as prejudice and costs. If the striking out of the claim was based on Issue 2 above, pleading a reasonable cause of action, I would allow amendments directed to a more limited time period and setting out, if there is a proper basis for it that the Defendants conduct fell within the *Odhavji Estate* criteria, with full particulars.

[48] However, I have already struck out the claim on the first ground, abuse of process. This is not a matter that can be cured by amendment.

[49] Therefore, I will not grant leave to amend.

COSTS

[50] Ordinarily costs would follow the event, that is, the Defendants, being successful, would be awarded costs. This is what the Prothonotary did.

[51] The Plaintiffs argue, however, that this proceeding is to be considered as a class action and, as such, no costs should be awarded against the Plaintiffs. A one-way rule applies, Plaintiffs' Counsel argues, such that the Plaintiffs may be awarded costs, but not costs against them. I do not agree.

[52] This is a motion brought before the action has been certified as a class action and is dispositive of the action. The class action rules and concepts such as one-way costs, even if applicable at a later stage, are not yet engaged.

[53] The Defendants are entitled to their costs of the motion.

ORDER

For the Reasons given:

THIS COURT ORDERS that:

1. The motion by way of an appeal from the Order of the Prothonotary dated October 15, 2008, is dismissed;
2. The Amended Statement of Claim dated September 6, 2007 herein is struck out without leave to amend;
3. Costs are awarded to the Defendants.

"Roger T. Hughes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1430-07
STYLE OF CAUSE:	**REVEREND EDWIN PEARSON et al. v. HER MAJESTY THE QUEEN et al.**
PLACE OF HEARING:	Toronto, Ontario
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