Federal Court of Appeal

Cour d'appel fédérale

Date: 20081027

Docket: A-55-08

Toronto, Ontario, October 27, 2008

CORAM: **EVANS J.A.**
SHARLOW J.A.
RYER J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

DORA SFETKOPOULOS, DAVID MCGREGOR, PRISCILLA LAVELL, EUGENE HARACK, ROBIN TURNEY, RONALD FOLZ, MICHAEL GIBBISON, TIMOTHY DEGANS, MARK HUKULAK, LEONARD SISSON, PAUL MANNING, RON REID, RON SPECK, JOHN LOBRAICO, EDDIE WALLACE, MICHAEL DELARMEE, RONALD GEORGE WILSON, and JEFFREY LONG

Respondents

JUDGMENT

The appeal is dismissed with costs, and the cross-appeal is dismissed as abandoned with no costs.

"John M. Evans"

J.A.

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Citation: 2008 FCA 328

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Appellant

and

DORA SFETKOPOULOS, DAVID MCGREGOR, PRISCILLA LAVELL, EUGENE HARACK, ROBIN TURNEY, RONALD FOLZ, MICHAEL GIBBISON, TIMOTHY DEGANS, MARK HUKULAK, LEONARD SISSON, PAUL MANNING, RON REID, RON SPECK, JOHN LOBRAICO, EDDIE WALLACE, MICHAEL DELARMEE, RONALD GEORGE WILSON, and JEFFREY LONG

Respondents

Heard at Toronto, Ontario, on October 27, 2008.

Judgment delivered from the Bench at Toronto, Ontario, on October 27, 2008.

REASONS FOR JUDGMENT OF THE COURT BY: EVANS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on October 27, 2008)

EVANS J.A.

[1] This is an appeal by the Attorney General of Canada from a decision of the Federal Court (2008 FC 33) in which Deputy Judge Strayer declared invalid section 41(b.1) of the *Medical Marihuana Access Regulations*, SOR 2003/387 ("*MMAR*"), on the ground that it imposed an arbitrary restriction on the respondents' right of access to marihuana for medical purposes under

section 7 of the *Canadian Charter of Rights and Freedoms*. The provision of the *MMAR* in question states that a person designated by an authorized possessor to produce marihuana for the medical use of that person shall not be licensed if designated to produce for more than one person. The respondents' application for a producer to be designated had been refused pursuant to section 41(b.1).

[2] The almost identically worded predecessor of section 41(b.1) of the *MMAR* was struck down by the Court of Appeal for Ontario in *Hitzig v. The Queen* (2003), 231 D.L.R. (4th) 104, on the ground that it violated section 7. The only substantive issue in the present case is whether the Government's policy of licensing a single dealer to produce marihuana for distribution to those authorized to possess it for medical use provides an adequate licit supply of marihuana to authorized possessors in order to satisfy section 7. See Health Canada (Office of Cannabis Medical Access), *Policy on Supply of Marihuana Seeds and Dried Marihuana for Medical Purposes* (December 3, 2003).

[3] Deputy Judge Strayer found that it did not and we are not persuaded that in so concluding he committed any error warranting the intervention of this Court.

[4] In oral argument, counsel for the Crown made two principal points. First, he said that Deputy Judge Strayer erred in law by imposing on the Crown the burden of establishing that the policy was not in breach of the principles of fundamental justice because it imposed a reasonable restriction on access to medical marihuana. We do not agree. When the Judge's reasons are read as a

whole, including his statement that the Crown bears the burden of proof under section 1 and therefore has a more difficult task than under section 7, we are not persuaded that he erred as alleged. It is also important to read the Judge's reasons against the background of this litigation, namely that the predecessor to the provision of the *MMAR* impugned in this case has already been held to be invalid, and the only question in the present case is whether the Crown's policy, introduced in 2003, makes a difference.

[5] Second, counsel said that the Judge erred when he found that no more than about 20% of authorized possessors have availed themselves of the supply of dried marihuana produced by the Government's sole contractor under its policy. On the basis of the evidence before him, we are not persuaded that this finding of fact was vitiated by palpable and overriding error, or that the Judge erred in relying on this finding when demonstrating the inadequacy of the licit supply of marihuana.

[6] Finally, counsel argued that, if we were minded to dismiss this appeal, we should suspend the declaration of invalidity for one year to permit the Crown to re-design the regulatory scheme to ensure that it complies with the Charter without unduly increasing the risk that marihuana grown by designated persons for authorized medical users may find its way into the hands of the non-authorized.

[7] We do not agree. First, the Crown failed to ask Deputy Judge Strayer to suspend the declaration of invalidity. Second, suspending a declaration that legislation is unconstitutional is a somewhat exceptional remedy and we are not persuaded that it should be granted in the

circumstances of this case: the issues raised in this litigation have already had a long history in the courts; Deputy Judge Strayer's judgment was rendered in January of this year, that is, ten months ago; and the options available to the Crown to bring the regulatory scheme into compliance with the Charter, without jeopardizing competing policy objectives, are neither unclear nor particularly complicated.

[8] For these reasons, the appeal will be dismissed with costs.

"John M. Evans"

J.A.