Federal Court  Cour fédérale

Date: 20130621

Dockets: T-821-12
T-894-12

Citation: 2013 FC 700

Ottawa, Ontario, June 21, 2013

PRESENT: The Honourable Mr. Justice Annis

Docket: T-821-12

BETWEEN:

THE NORTHERN ONTARIO COMPASSION CLUB, RYAN MCILVENNA

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

Docket: T-894-12

AND BETWEEN:

DEREK FRANCISCO and CENTRAL ONTARIO MOBILE MARIJUANA PATIENT ALLIANCE CO-OPERATOR (COMMPAC)

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] These are applications, pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, for review of the denial of a request to Health Canada for an exemption from section 56 of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA].

[2] The applicants argue that they had requested, in writing, a section 56 exemption from criminal sanctions and from the provisions of the *Marihuana Medical Access Regulations*, SOR/2001-227 [MMAR] in order to implement a proposed scheme to grow medical marihuana, licence medical marihuana possessors, and distribute medical marihuana to the licensed possessors from clubs.

[3] The respondent argued that no application for exemption under s. 56 had been made and that the applicants had merely requested that they be allowed to operate a scheme not foreseen by the MMAR. In the alternative, the respondent argued that the Minister of Health acted reasonably in deciding not to grant an exemption.

[4] For the reasons which follow, I find that, with a generous reading of the materials, they can be interpreted as the applicants' seeking a s. 56 exemption. However, even accepting that it was such a request, it was reasonable under the circumstances for the Minister to deny it. Granting the request would have authorized a wholesale modification at a very major level of the MMAR, and

the applicants did not provide adequate substantiation pursuant to one of the three s. 56 grounds. I therefore dismiss the applications.

Background

[5] The record in these applications consists of a series of e-mails and a short affidavit from the applicant Mr. McIlvenna and one e-mail from the applicant Mr. Francisco.

[6] Mr. McIlvenna is the owner of the Northern Ontario Compassion Club [NOCC]. The NOCC was established in 2009 to provide public information about medical marihuana and to encourage networking and lobbying for medical marihuana access. Mr. McIlvenna states that through years of genetic research, the NOCC has developed and acquired a selection of strains regarded by many as some of the best medical marihuana in the world. It has land and financing available to build a licensing centre, growing facilities, and distribution centres for medical marijuana. Mr. Francisco runs a similar organization, the Central Ontario Mobile Marijuana Patient Alliance Co-operator [COMMPAC].

[7] Mr. McIlvenna initially wrote to the Minister of Health on March 8, 2012, by filling out an Internet feedback form in which he sought changes to the regulations to allow for the production and supply of marihuana to others. His message ran as follows:

> This a Formal Request to The Minister of Health Leona Aglukkaq from Ryan McIlvenna and The Northern Ontario Compassion Club in regards to changes in the MMAR, and community access to medical grade marijuana.
> 1. the Northern Ontario Compassion Club or NOCC was created to help individuals with a medical condition to receive all the proper information in regards to access of the MMAR, so as to provide relief of pain and suffering.

> 2. The NOCC has over 150 members and does not currently provide anything else but information.
> 3. The NOCC is making a formal request to be able to provide the production and supply of Marijuana or any of its other forms to sick or disabled persons or individuals who by way of contract have signed all the appropriate forms or affidavits with regards to their specific illness and choice of medication, by way of one or various locations or wherever the NOCC deems fit providing they meet all community guidelines as set forth by Health Canada.
> 4. It is also requested that all members who have provided information in the form of prescription for medication, Dr. reports, or specialist reports and who have claimed by write that they use marijuana to treat their illness that they receive immediate protection from the law in regards to the Controlled Drugs and Substances Act in regards to Marijuana.
> Dated March 8, 2012 in the city of Sudbury, Ontario, Canada
> [Emphasis added]

[8] The Director of the Bureau of Medical Cannabis replied on March 20th outlining the regulatory restrictions on the supply of marijuana for medical purposes, while also pointing out the risks associated with the uncontrolled use of marijuana.

> Dear Mr. McIlvenna,
> Thank you for your email of March 8, 2012, to the Minister of Health, the Honourable Leona Aglukkaq, regarding the Northern Ontario Compassion Club. Your email was forwarded to me so that I may respond to you directly.
>
> The *Marihuana Medical Access Regulations* (MMAR) provide a means through which seriously ill Canadians can obtain access to marihuana for medical purposes. An authorization to possess and/or a licence to produce marihuana for medical purposes may only be granted when all criteria have been met, as stated in the MMAR, including the requirement for a medical practitioner's signature.
>
> Once approved under the MMAR, individuals have three options for obtaining a legal supply of dried marihuana: 1) they can apply under the MMAR to access Health Canada's supply of dried marihuana; 2) they can apply for a personal-use production licence; or 3) they can designate someone to cultivate on their behalf with a designated-person production licence.
>
> The use of marihuana for medical purposes is intended for those patients for whom all other conventional treatments have been tried

or considered, or that have been found to be ineffective or medically inappropriate for the treatment of their medical condition.

Furthermore, it is important to highlight that marihuana is not approved as a therapeutic drug in any country in the world. At present, while pointing to some potential benefits, current scientific evidence does not establish the safety and efficacy of cannabis to the extent required by the *Food and Drug Regulations* for marketed drugs in Canada. As such, cannabis remains a controlled substance that is only legally accessible by applying to Health Canada's Marihuana Medical Access Program (MMAP).

Furthermore, individuals who are authorized to possess and/or licenced to produce marihuana for medical purposes under the MMAR are reminded to abide by all other applicable federal, provincial, territorial or municipal legislation. Any activities undertaken by authorized and/or licenced individuals who disregard their authorization and/or licence requirements, or any other related legislation, are subject to law enforcement measures under the applicable legislation.

Health Canada does not licence organizations such as compassion clubs or dispensaries to possess, produce or distribute marihuana for medical purposes. Health Canada is the **only organization** that can legally supply marihuana seeds and dried marihuana to persons authorized to possess and/or licenced to produce marihuana for medical purposes.

On June 17, 2011, Health Canada announced proposed improvements to the MMAP that, among other things, are intended to reduce the risk of abuse and keep children and communities safe, while continuing to ensure that program participants have reasonable access to marihuana for medical purposes. One component of the planned reform of the program is the elimination of residential production of marihuana and the introduction of new, licenced commercial producers.

Consultations on the proposed changes ended November 2011. A summary of the input received during the consultation process will be published on Health Canada's website this year. Improvements to the program will not be implemented until new regulations are developed. The development of the regulatory framework has begun.

The process for applying for an authorization to possess and/or licence to produce marihuana for medical purposes under the

> MMAR will remain the same until any changes to the program are in place.
>
> [Emphasis in the original]

[9] Mr. McIlvenna then e-mailed the Minister of Health on or about Friday April 13th and in that message provided further information on his plans while expanding his request to include the licensing of users and growers. He stated that:

> By way of your Ministerial denial to allow the Northern Ontario Compassion Club the duty to provide for the community on March 20, 2012, it is the prerogative of Ryan Mcilvenna to give you a second chance to approve this REQUEST.
>
> This is a Formal Request to the Honorable Minister of Health Leona Aglukkaq, from Ryan McIlvenna and The Northern Ontario Compassion Club to provide for the community by way of
>
> a) Medical Marijuana Licensing Centre:
> A Medical Marijuana Licensing office would take information from citizens, including two pieces of valid ID, would take passport style Photo's and Medical history information with Dr. Diagnosis then the Licensing center would produce a valid membership card on the spot which would provide the person with immediate exemption from the Law. The Dr.'s job should have been completed upon diagnosing the illness of the individual. The Club would be able to provide temporary licensing with minor relief up to 70 g/week per individual, Once an individual has applied and received their temporary permit all their information is submitted to Health Canada for review and possible extension of their permit, by way of licensing growers and or increasing limitations. Until the time that Health Canada issues extension all permits given to members from the NOCC will be grown at the "Compassion Clubs" "Growing Facility" as defined in this writ.
>
> b) Distribution Center: "Compassion Club" can be defined as a place where any citizen of Canada who is suffering from or is a party to any one citizen who is suffering from an illness who congregates, for therapeutic reasons; a place where these citizens can attain licensing, purchase Marijuana, or marijuana products, can relax without intimidation, Can look at, smell and pick and pay for the variety of strain that best suits their individual needs. The Distribution Center has video surveillance that keeps all the members safe, appointments

> would be made before each appointment and security lock doors are installed for maximum protection.
> Although it is not necessary for private business's like cigarette distributors or pharmacy's to install alarms or state of the security. The NOCC has taken the responsibility and gone the distance for the protection of its members at anytime.
>
> c) Growing Facility: A farm or a group of farms. Not restricted to a single place located anywhere in Canada that meets or exceeds the standards set by the Government of Canada to produce a thing (Marijuana) that people use. To install and maintain a sufficient alarm including but not limited to security guards to protect the said facility and or community. That all members who are authorized can congregate, work, and or aid in the production of any of the things including Marijuana; that are or is being grown at the specified production site, growing facility or farm, and including any such strain of Marijuana that any one member requires for their own personal health. Growing any thing at the site is not restricted to the natural sunlight and the natural earth as well as and not limited to indoor growing methods and standards.
>
> Dated on April 13, 2012 in the city of Sudbury in the province of Ontario.
>
> [Emphasis in the original]

[10] The co-applicant, Mr. Francisco, sent an e-mail identical to the above one except without the first sentence about a "second chance", with COMMPAC substituted for NOCC, and a Kawartha Lakes dateline rather than a Sudbury one, to the Minister of Health on April 14th.

[11] The Director of the Bureau of Medical Cannabis replied to Mr. McIlvenna again on April 20, 2012, as follows:

> Dear Mr. McIlvenna,
>
> Thank you for your email of April 16, 2012, regarding your request to permit the Northern Ontario Compassion Club to licence, produce and distribute marihuana for medical purposes.

> I would like to thank you for the information. As noted in my email of April 16, 2012, I am unaware of any further active litigation relating to this document.
>
> As you have been informed, Health Canada does not licence organizations such as compassion clubs or dispensaries to possess, produce or distribute marihuana for medical purposes. Health Canada is the only organization that can legally supply marihuana seeds and dried marihuana to persons authorized to possess and/or licenced to produce marihuana for medical purposes.

[12] Mr. Francisco states that his request was also refused on April 25, 2012.

Legislative and Regulatory Framework

[13] The relevant legislative and regulatory provisions for the regulation of marijuana used for medical purposes and the statutory exemption provision are as follows:

Controlled Drugs and Substances Act **S.C. 1996, c. 19**	**Loi réglementant certaines drogues et autres substances** **L.C. 1996, ch. 19**
56. The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.	**56.** S'il estime que des raisons médicales, scientifiques ou d'intérêt public le justifient, le ministre peut, aux conditions qu'il fixe, soustraire à l'application de tout ou partie de la présente loi ou de ses règlements toute personne ou catégorie de personnes, ou toute substance désignée ou tout précurseur ou toute catégorie de ceux-ci.
Marihuana Medical Access Regulations **SOR/2001-227**	**Règlement sur l'accès à la marihuana à des fins médicales** **DORS/2001-227**
2. The holder of an authorization to possess is	**2.** Le titulaire d'une autorisation de possession peut

authorized to possess dried marihuana, in accordance with the authorization, for the medical purpose of the holder.

3. A person is eligible to be issued an authorization to possess only if the person is an individual who ordinarily resides in Canada.

24. The holder of a personal-use production licence is authorized to produce and keep marihuana, in accordance with the licence, for the medical purpose of the holder.

32. The Minister shall refuse to issue a personal-use production licence if

(*a*) the applicant is not a holder of an authorization to possess;

(*b*) the applicant is not eligible under section 25;

(*c*) any information or statement included in the application is false or misleading;

(*d*) the proposed production site would be a site for the production of marihuana under more than four licences to produce; or

(*e*) the applicant would be the holder of more than two licences to produce.

avoir en sa possession, conformément à l'autorisation, de la marihuana séchée à ses propres fins médicales.

3. Est admissible à l'autorisation de possession la personne physique qui réside habituellement au Canada.

24. Le titulaire d'une licence de production à des fins personnelles est autorisé à produire et garder, conformément à la licence, de la marihuana à ses propres fins médicales.

32. Le ministre refuse de délivrer la licence de production à des fins personnelles dans les cas suivants :

a) le demandeur n'est pas titulaire d'une autorisation de possession;

b) le demandeur n'est pas admissible selon l'article 25;

c) la demande comporte des déclarations ou renseignements faux ou trompeurs;

d) le lieu proposé pour la production de marihuana serait visé par plus de quatre licences de production si la licence était délivrée;

e) le demandeur deviendrait titulaire de plus de deux licences de production si la licence était délivrée.

34. (1) The holder of a designated-person production licence is authorized, in accordance with the licence,	**34.** (1) Le titulaire d'une licence de production à titre de personne désignée est autorisé à mener, conformément à la licence, les opérations suivantes :
(*a*) to produce marihuana for the medical purpose of the person who applied for the licence;	*a*) produire de la marihuana aux fins médicales du demandeur de la licence;
[. . .]	[. . .]
41. The Minister shall refuse to issue a designated-person production licence	**41.** Le ministre refuse de délivrer la licence de production à titre de personne désignée :
(*a*) if the designated person is not eligible under section 35;	*a*) dans le cas où la personne désignée n'est pas admissible selon l'article 35;
(*b*) if the designated person would become the holder of more than two licences to produce; or	*b*) dans le cas où la personne désignée deviendrait titulaire de plus de deux licences de production;
(*b.1*) [Repealed, SOR/2009-142, s. 1]	*b.1*) [Abrogé, DORS/2009-142, art. 1]
(*c*) for any reason referred to in paragraphs 32(*a*) to (*d*).	*c*) dans les cas visés aux alinéas 32*a*) à *d*).

Standard of Review

[14] In *Sfetkopoulos v Canada (Attorney General)*, 2008 FC 33, aff'd 2008 FCA 328, leave to appeal to SCC refused, [2008] SCCA No 531 (QL), this Court found at para 8 that the standard of review with respect to such ministerial decisions concerning supplying medical marijuana was correctness:

> **8** While neither party raised this issue, I take it that it is incumbent on me to address it as this is a judicial review of a decision of the Minister or his delegate with respect to applications for designation

> of a supplier. Such decisions are of course reviewable under the [page410] *Federal Courts Act* [R.S.C., 1985, c. F-7, s. 1 (as am. by S.C. 2002, c. 8, s. 14)] without any privative clause. The nature of the question is essentially one of constitutional law. As such it is more amenable to authoritative determination by the courts rather than the Minister. While the parties have put some facts in issue, they were not facts which were put before the Minister: they are "legislative" facts presented to assist the constitutional analysis in this Court and are for determination by the Court. For these reasons I am satisfied the standard of review of the Minister's decision is correctness.

[15] In addition, in 2013 the Federal Court of Appeal discussed the standard of review for a decision involving legislative interpretation by the Minister of Health in *Takeda Canada Inc v Canada (Minister of Health)*, 2013 FCA 13, at paras 28-29, 32-33:

> **28** The Supreme Court has spoken of a presumption that the standard of review is reasonableness for the legislative interpretations of administrative decision-makers: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraph 34. But that is a rebuttable presumption that can be overcome upon an analysis of the four relevant factors discussed in *Dunsmuir*, [2008] 1 S.C.R. 190.
>
> **29** In my view, the presumption is overcome. All of the factors relevant to determining the standard of review lean in favour of correctness review. In this case, the nature of the question is purely legal. There is no privative clause. The Minister has no expertise in legal interpretation. There is nothing in the structure of the Act, this regulatory regime or this particular legislative provision that suggests that deference should be accorded to the Minister's decision. This analysis of the factors mirrors that in *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40 at paragraphs 101-105 (sometimes also referred to as "*Georgia Strait*"); *Sheldon Inwentash and Lynn Factor Charitable Foundation v. Canada*, 2012 FCA 136 at paragraphs 18-23.
>
> [. . .]
>
> **32** In this case, Parliament empowered the Governor in Council to establish through regulation an administrative scheme that provides for data protection. Parliament could have given this matter to courts, but it did not. Due to this primary indication of

> Parliamentary intention, the presumption of reasonableness review of administrative decision-makers' decisions in *Alberta Teachers' Association* should apply. However, this presumption can be rebutted in particular cases by examining the normal standard of review factors which shed more light on the matter. This approach, which I shall call the *Alberta Teachers' Association* approach, is the one I have followed.
>
> **33** I am reluctant to carve out administrative decisions from the *Alberta Teachers' Association* approach merely because the administrative decision-maker is a Minister, as is the case here. For one thing, the *Alberta Teachers' Association* approach aptly handles the breadth of Ministerial decision-making, which comes in all shapes and sizes, and arises in different contexts for different purposes. In addition, Ministerial decision-making power is commonly delegated, as happened here. It would be arbitrary to apply the *Alberta Teachers' Association* approach to decisions of administrative board members appointed by a Minister (or, practically speaking, a group of Ministers in the form of the Governor in Council), but apply the *Georgia Strait* approach to decisions of delegates chosen by a Minister. Finally, although this Court's decision in *Georgia Strait* postdates that of the Supreme Court in *Alberta Teachers' Association*, I consider myself bound by the latter absent further direction from the Supreme Court: see *Canada v. Craig*, 2012 SCC 43 at paragraphs 18-23; see also earlier expressions of uncertainty concerning the standard of review of Ministerial decision-making in *Global Wireless Management v. Public Mobile Inc.*, 2011 FCA 194, [2011] 3 F.C.R. 344 at paragraph 35 (leave denied, [2011] S.C.C.A. No. 349, April 26, 2012) and *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, 420 N.R. 364 at paragraph 19 (leave denied, April 5, 2012, [2011] S.C.C.A. No. 412).

[16] In my view, the present matter similarly involves a purely legal question and not a matter of health in which the Minister might possess special expertise.

[17] I find that the standard of review for the Minister's decision is correctness.

Analysis

[18] None of the parties to this application brought evidence of any specific procedure to follow in requesting a s. 56 exemption. Procedural fairness dictates that if such an exemption was requested, the Minister has to respond to that request, rather than only referring the applicants to the MMAR. A generous reading of the initial feedback form submission and of the subsequent e-mail request can be interpreted together as the applicants seeking such an exemption.

[19] However, the Minister's misinterpretation of the request was understandable given its form of presentation and its failure to address any of the issues relating to an exemption. The applicants provided no evidence that the exemptions they sought would be "necessary for a medical or scientific purpose or is otherwise in the public interest". The Minister's response pointed to the grave policy issues involved, notably:

a. Marihuana is not approved as a therapeutic drug in any country in the world and current scientific evidence does not establish the safety and efficacy of cannabis to the extent required by the *Food and Drug Regulations* for marketed drugs in Canada;
b. Medical marihuana supply programs are subject to risks of abuse;
c. The Minister of Health is required to balance keeping children and communities safe with continuing to ensure that medical marihuana program participants have reasonable access to marihuana for medical purposes.

[20] The grant of remedies under s. 18.1 of the *Federal Courts Act* is discretionary. The magnitude of the deviations from the current MMAR provisions which the applicants sought if

allowed would amount to a complete rewrite of the regulations and give rise to the serious risks of abuse described by the Minister. I find that if the decision were sent back to the Minister of Health to remedy any perceived procedural error, there is no possibility of a different conclusion being reached on the present evidentiary record. Nothing bars the applicants from resubmitting their request to the Minister with more complete supporting evidence.

[21] The applicants appeared to advance an argument at the oral hearing to the effect that the current legislative structure is unconstitutional as being "dishonourable". Pursuant to s. 57 of the *Federal Courts Act*, this was a question over which I had no jurisdiction, as the required notice had not been served on the federal and provincial Attorneys General at least ten days before the hearing. In any event, the recent case of *R v Mernagh*, 2013 ONCA 67, leave to appeal to SCC requested [2013] SCCA No 136, upheld the constitutionality of the legislative and regulatory scheme.

[22] The applications are dismissed without costs as none were requested.

JUDGMENT

THIS COURT'S JUDGMENT is that the applications are hereby dismissed without costs.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-821-12 T-894-12
STYLE OF CAUSE:	THE NORTHERN ONTARIO COMPASSION CLUB, RYAN MCILVENNA v. THE ATTORNEY GENERAL OF CANADA DEREK FRANCISCO and CENTRAL ONTARIO MOBILE MARIJUANA PATIENT ALLIANCE CO-OPERATOR (COMMPAC) v. THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	May 21, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	ANNIS J.
DATED:	June 21, 2013

APPEARANCES:

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David Cowie	FOR THE RESPONDENT

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