NOVA SCOTIA COURT OF APPEAL

Citation: *Nova Scotia (Community Services) v. Campbell*, 2014 NSCA 94

Date: 20141022
Docket: CA 425612
Registry: Halifax

Between:

Minister of Community Services

Appellant

v.

Sally Elizabeth Campbell

Respondent

Judge: The Honourable Justice J.E. (Ted) Scanlan

Appeal Heard: September 23, 2011, in Halifax, Nova Scotia

Subject: Appeal of decision of Supreme Court wherein the court ordered the Minister of Community Services to pay monies to the respondent in relation to marijuana she had purchased from the Cannabis Buyers' Club of Canada.

Summary: The respondent was prescribed medical marijuana which would entitle her to obtain "medical marijuana" pursuant to the relevant federal regulations. She subsequently applied to have the Department of Community Services recognize marijuana as a "special need" pursuant to provincial legislation so that the Department of Community Services would pay for, or reimburse her, the cost of obtaining "medical marijuana". The Supreme Court determined that her "medical marijuana" was a "special need" within the meaning of the provincial regulations and ordered the Minister of Community Services to pay the costs of purchase.
There were two subsequent applications related to that original order. The record shows that the appellant was refusing to pay for marijuana that was not purchased in accordance with the federal legislative framework. The

marijuana the respondent acquired from the Cannabis Buyers' Club of Canada was not "medical marijuana" as that supplier did not qualify as a recognized supplier in accordance with the federal legislative scheme.

Issue: Was the Minister required to reimburse the respondent for marijuana not purchased in accordance with the **Marijuana Medical Access Regulations** or the **Controlled Drugs and Substances Act**?

Result: The most recent order of the Supreme Court directed the Minister to pay in excess of $28,000 to the respondent in relation to the cost of marijuana she acquired through the Cannabis Buyers' Club of Canada. That decision failed to take into account the fact that the original order related only to "medical marijuana". "Medical marijuana" has a specific meaning under the federal legislative scheme. Any marijuana purchased outside that legislative scheme would be sold and possessed in contravention of the **Controlled Drugs and Substances Act.** It would be contrary to the proper administration of justice to order that the Minister of Community Services be required to fund the purchase of drugs not acquired in accordance with the legislative framework.

The most recent order requiring the Minister to pay monies in relation to drugs purchased from the Cannabis Buyers' Club of Canada is set aside. The original order of the Supreme Court which recognized "medical marijuana" as a "special need" remains in effect as that issue was not before this Court on appeal. Any monies paid into court by the appellant in relation to this matter are to be returned forthwith.

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Judges:	Farrar, Bryson and Scanlan, JJ.A.
Appeal Heard:	September 23, 2014, in Halifax, Nova Scotia
Held:	Appeal allowed per reasons for judgment of Scanlan, J.A.; Farrar and Bryson, JJ.A. concurring.
Counsel:	Lyndsay C. Jardine, for the appellant Donna Franey and Amelia Cooke (Articled Student), for the respondent

Reasons for judgment:

[1] The respondent purchased marijuana from an unlicensed vendor. She submitted receipts to the Minister of Community Services and asked that the court order the Minister to pay monies to her in relation to the drugs she obtained from the unlicensed vendor. The issue in this case is whether the Minister of Community Services should be ordered by the courts of Nova Scotia to fund the purchase of marijuana which was not purchased in accordance with the provisions of the **Controlled Drugs and Substances Act**, S.C.1996, c.19? For the reasons I set out below, the answer should be no.

Background:

[2] The respondent receives support under the **Employment Support and Income Assistance Act,** S.N.S. 2000, c.27. She has a medical prescription which allows her to acquire and possess "medical marijuana" in accordance with the provisions of the M**arihuana Medical Access Regulations,** SOR/2001-227, made pursuant to the **CDSA.**

[3] In 2005 the respondent asked the Department of Community Services to fund her purchase of medical marijuana pursuant to the "special need" provisions in section 21 of the provincial **Act**. The department refused. It determined that Ms. Campbell did not meet the "special needs" provisions of the **Act**. That decision was confirmed by the Income Assistance Appeal Board. The respondent sought a judicial review of the Board decision.

[4] Ms. Campbell made application to the Supreme Court asking the court to declare that she in fact had a "special need" as described in the **Act.** That was the first of three times the matter came before the Supreme Court. While only the most recent Supreme Court order is the subject of the present appeal, it is necessary that I review the preceding orders as they provide necessary context.

[5] The first judicial review: Justice Gerald R.P. Moir rendered a decision dated March 30, 2010 wherein he quashed the Board's decision and ordered the Minister of Community Services to pay for the respondent's retroactive and ongoing medical marijuana as a "special need" (2010 NSSC 116). Justice Moir's order dated September 10, 2010 included specific reference to payment for "medical

marijuana". As to the retro-active payments he ordered that the respondent would be required to:

> …submit to the Department of Community Services proper documentation with regard to purchases of medical marijuana. (My emphasis)

[6] In her affidavit filed in support of her application before Justice Moir, Ms. Campbell stated and I quote in part:

> 7. I made this application for legal access to marijuana for medical purposes to Health Canada…
>
> 8. I am now buying dried marijuana from the federal government. Invoices are attached as exhibit D.

[7] There is nothing to suggest that the respondent was asking Justice Moir to consider anything but marijuana that was legally obtained.

[8] In 2011 the respondent made application to the Supreme Court asking the court to impose a deadline by which the Minister of Community Services was to comply with Justice Moir's order. That application was heard by Justice Suzanne M. Hood. Questions surrounding the source of supply were not before her. She ordered that a deadline be set for reimbursement, by adding to Justice Moir's order:

> The Department of Community Services shall reimburse Sally Campbell within 20 days of receiving the proper documentation.

No other terms of Justice Moir's order were affected.

[9] The third and final time the matter went before a justice of the Supreme Court was on February 3, 2014 before Justice James Chipman. Ms. Campbell originally asked for a contempt order; suggesting the Minister failed to comply with the two previous orders. That application was amended to seek an order of declaration and *mandamus* that the Minister of Community Services owed the Applicant an amount of money (for the marijuana she had previously purchased).

[10] Justice Chipman rendered an oral decision on February 3, 2014, and signed an order February 15, 2014 requiring that:

1. The Minister shall accept the invoices from the Cannabis Buyers' Club of Canada, which Sally Campbell has provided, to be proper documentation with regard to purchases of medical marijuana, within the meaning of Justice Moir's order of September 10, 2010;
2. The Minister shall reimburse Sally Campbell in the amount of $28,376 as full payment for retroactive reimbursement of the ordered special need.
3. The Minister shall make the required reimbursement in the above amount, by providing payment made out to Sally Campbell and delivered to Dalhousie Legal Aid Service, within 20 days of this order.

[11] The Minister of Community Services now appeals Justice Chipman's order.

Analysis

[12] At the outset I would make it clear that the original decision of Justice Moir requiring the Minister to pay for "medical marijuana" is not before this Court. The provincial government makes decisions on an ongoing basis as to which drugs are funded by taxpayers, out of budgets such as the Department of Health, or in this case the Department of Community Services. This decision should not be interpreted as suggesting that the government ministries have lost the right to decide what drugs they will fund out of general revenue or the various department budgets. That is an issue to be decided, if necessary, on another day.

[13] In this appeal I focus on what Justice Chipman was being asked to do when this matter came before him. He was asked to give effect to the terms of the original order made by Justice Moir, as altered by Justice Hood. As noted above, Justice Moir was asked to rule on a very narrow issue: that is whether the Board had erred in ruling that "medical marijuana" was not a "special need" within the meaning of the provincial **Act**. He determined that it was in fact a "special need" and directed the Department pay the cost of Ms. Campbell's "medical marijuana". I refer to the submissions of Ms. Campbell's counsel in her brief of April 4, 2006 to the Assistance Appeal Board where counsel said:

> **Remedy Sought**
>
> 19. We ask that the board find that medical marijuana when licensed and supplied by the Federal Government is a special need within the meaning of Regulation 2(ab)(ii) and that Ms. Campbell's physician and her license have provided the necessary documentation to show that the drug is essential for her health and well-being.

> 20. We ask that Ms. Campbell's past and future costs of buying medical marijuana from the Federal Government be paid for by the Department of Community Services.

[14] Justice Moir dealt only with the Board's decision refusing to find Ms. Campbell's use of medical marijuana was a "special need".

[15] Justices Hood and Chipman were being asked to give effect to Justice Moir's order. Justice Moir was not asked to approve the funding of marijuana acquired from sources operating outside the provisions of the **CDSA**. Justice Moir's original order should have been interpreted as being informed by, and operating within the confines of, the laws regarding legal and illegal possession of marijuana.

[16] I am satisfied that it was an error of law to interpret Justice Moir's order in a way that would direct the province to pay for anything but legally obtained "medical marijuana".

[17] The second aspect of Justice Moir's order required the respondent to provide proper documentation so that she could receive payment or reimbursement. It would be unreasonable to interpret Justice Moir's order as directing the Minister to pay for anything other than "medical marijuana" as referred to in the **Marijuana Medical Access Regulations** and the **Narcotic Control Regulations**, C.R.C., c.1041. Receipts from persons operating outside the regulatory framework could hardly be said to be providing "proper documentation" within the meaning of Justice Moir's order. It would have been an error in law to order the Minster to pay for, or compensate the respondent for, drugs she purchased in contravention of the applicable federal statutes.

[18] In **Riley v. Nova Scotia (Minister of Community Services)**, 2011 NSSC 387 Bourgeois, J., as she then was, commented on the fact that the same Ministry was being asked to fund the purchase of equipment and supplies for growing marijuana. She noted in that case that there was no evidence the proponent was authorized to produce marijuana. She appropriately noted that it would be contrary to public policy for the Department to provide funding for purchase or manufacture of marijuana that would constitute an offence under the **CDSA** (¶ 23-24).

[19] The **MMAR** scheme provides for only three legal supply options: grow a limited supply yourself; have a designated individual produce a limited supply for you; purchase from Health Canada.

[20] Before concluding I wish to specifically address some of the issues raised by the respondent.

[21] The respondent argues that the interpretation of the phrase "medical marijuana" was not before the reviewing judge and, therefore, cannot constitute part of this appeal. The Minister's counsel referred to Health Canada invoices that were paid and the fact that "the Department cleared the way for her to be able to buy from Health Canada". At one point the reviewing justice also referred to "medical marijuana". There is no doubt that Moir, J. was aware of what constitutes "medical marijuana" and the applicable regulations. As noted earlier, the Assistance Appeal Board was asked by respondent's counsel to find that "medical marijuana, when licensed and supplied by the Federal Government is a special need." She did not ask for funding of marijuana purchased from illegal sources.

[22] The respondent also argues that the appellant could have appealed Justice Moir's order but chose not to. The suggestion is that the present appeal of Justice Chipman's order is an attack on Justice Moir's order in contravention of the collateral attack rules. I agree that common law doctrines limit a party's ability to attack the substance of a court order through what has been referred to as collateral attack. (**Toronto (City) v. C.U.P.E., Local 79***,* 2003 SCC 63). I am not satisfied that the appellant has in any way offended those common law rules. If any party is guilty of a collateral attack on Justice Moir's order it is the respondent. She has attempted to chip away at the clear intent of the order through repeated applications before numerous judges, and finally, without appeal, has an order in hand which has substantially altered the original order. She has managed this without the benefit of appeal.

[23] In the respondent's factum there is reference to **Hitzig v. Canada**, [2003] O.J. No. 3873 (C.A.) which the respondent argues stands for the proposition that government agencies are expected to provide a legal supply of marijuana to medical users. A review of that case does not reveal any obligation on governments to participate directly or indirectly in the commission of any criminal offence. The Court noted in **Hitzig**:

> 114 The state's obligation to obey its own laws not only serves as an invaluable brake on the exercise of state power against the individual, it also makes the state a role model for its citizens. By adhering to the law, the state encourages its citizenry to do likewise: *Rodriguez, supra*, at 608. Because it obeys and honours the law, the state can assume the moral high ground, which justifies state prosecution and punishment of individuals who break the law. As the entrapment

> jurisprudence demonstrates, loss of that moral high ground, through for example, active solicitation of criminal conduct, will foreclose prosecution by the state: *R. v. Mack*, [1988] 2 S.C.R. 903.
>
> 115 The state's obligation to obey the law is fundamental to our system of justice. No one would argue that it does not have general acceptance among reasonable people: *Rodriguez*, *supra*, at 607. The state's obligation to obey the law is well established at common law through the process of judicial review, is implicitly recognized in the preamble to the *Constitution Act, 1867*, (U.K.), 30 and 31 Vict., c. 3, is expressly recognized in the preamble to the *Constitution Act, 1982*, and is further recognized in s. 52 of the *Constitution Act, 1982*. We have no hesitation in concluding that the state's obligation to obey the law is a principle of fundamental justice.
>
> 116 The MMAR do not require the state to violate the law….

[24] The record reveals that there was substantial discussion before Justice Chipman about whether the respondent would be reimbursing the Cannabis Buyers' Club of Canada or whether she may not "do the right thing" and keep the money for herself. It appears from the record that the marijuana she obtained from the Club may have been acquired on credit or perhaps had been doled out by them based on compassion. That entire discussion of credit, or compassion misses the point of Justice Moir's order. Justice Moir referred specifically to "medical marijuana". Although he did not refer to the applicable federal regulations, a reasonable interpretation of that order would suggest that he would not have ordered the Minister to pay for marijuana that was acquired other than through legal means. Marijuana is a "controlled substance" as defined within the **CDSA**. If Justice Moir were to have ordered the Ministry to pay for drugs that were acquired through anything but authorized means, such an order would be an affront to the administration of justice and would no doubt engender disrespect for the laws which control drugs, and disrespect for the courts which are duty bound to uphold the law.

[25] The fog of the respondent's pleadings is not such that this Court should be complicit in ordering the financing of the purchase of drugs outside the regulatory framework. It is unacceptable to order that money be paid to the respondent simply because she bought the illegal drugs. This would be to pretend that the Minister is not financing the purchase of illegal drugs just because the Minister does not control the payment to the illegal provider. The respondent is only entitled under Justice Moir's order to be paid for "medical marijuana" upon producing proper documentation from a legal supplier. She could not demand

retro-active, current, or future payments by producing receipts or other documentation from non-legitimate sources.

[26] The receipts were not "proper documentation" for the purchase of "medical marijuana". The record is clear that the Cannabis Buyers' Club does not meet the criteria to legally supply the respondent with marijuana.

Conclusion

[27] Justice Chipman's order should be set aside. Justice Moir's order should remain in effect with the implied condition that proper documentation means receipts from Health Canada or a legitimate supplier as provided for in the **MMAR**.

[28] The monies paid into court by the appellant shall be returned to the appellant forthwith.

Scanlan, J.A.

Concurred in:

Farrar, J.A.

Bryson, J.A.