Court File No.: A-339-18

FEDERAL COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

Respondent in Cross-Appeal

And

IGOR MOZAJKO

Respondent

Cross-Appellant

RESPONDENT/CROSS-APPELLANT MEMORANDUM

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RESPONDENT/CROSS-APPELLANT MEMORANDUM

WHEREAS this appeal has exactly the same facts but for the grow permit's dates of application, issuance and expiry as the Harris v. HMTQ appeal (Appeal File No.: A-258-18) which was dismissed on Sep 18 2019, but presents different arguments to counter that decision, Respondent/Cross-Appellant moves the Chief Justice of this Court to Order a 5-judge panel to hear this appeal. While the judicial comity generally requires that the court follow its prior decisions on questions of law, it may depart from a prior decision where there are cogent reasons for doing so to overturn a previous decision of the court that is manifestly wrong. One would expect a 3-judge panel to be more reticent about overturning another 3-judge panel's decision than if they were a 5-judge panel with no question on not having their jurisdiction bound by stare decisis, issue estoppel or judicial comity.

PART I - FACTS

1. On Jan 24 2017, Plaintiff obtained a Medical Document under the ACMPR for an Authorization to grow cannabis for medical purposes for a period of 6 months.

2. Under the MMAR, the 6-month period began on the Effective Date the permit was issued. Under the ACMPR, it is back-dated to the date the doctor signed the medical document. The Authorization was not processed by the July 24 2017 expiry date of the 6-month medical document and I had to obtain a new medical document and start over.

3. On Sep 02 2017, Applicant submitted a second medical document for 12 months. After more than 4 months, I received the "1-year" permit effective date Jan 09 2018 that was back-dated to Sep 02 2017 for expiry after 12 months on Sep 02 2018. Just over 11 months to get 7 months authorized out of 18 months that were prescribed. Almost one year lost.

4. On May 31 2013, the time to process an application to produce marijuana under the MMAR, was touted before Mr. Justice Roy by Dr. Stephane Lessard, Controlled Substances and Tobacco Directorate, as "done in under 4 weeks."

5. Since August 2017, more than 300 self-represented plaintiffs have filed virtually identical statements of claim in the Federal Court based on "kits" downloaded from the website of medical cannabis activist John Turmel, seeking (A) a declaration that the over-long processing time for registration to produce cannabis under the Access To Cannabis for Medical Purposes Regulations ("ACMPR") violates the plaintiffs' rights under section 7 of the Canadian Charter of Rights and Freedoms ("Charter"). The claims also seek damages under s. 24(1) "in the amount of the value of the Applicant's prescription and lost site rent and expenses during any delay which this Court may rule inappropriate."

6. The claims are being collectively case-managed by the Honourable Mr. Justice Brown. By Orders dated November 24 and December 11, 2017, Brown J. designated the action of Allan J. Harris with Court File No. T-1379-17 as the lead action, and ordered that the other actions be held in abeyance with no further proceedings permitted without leave of the Court, pending final determination of the lead action.

7. Lead Plaintiff Allan J. Harris submitted an initial application for registration to produce cannabis on June 11, 2017. After 13 weeks, he filed the present "Turmel Kit" Statement of Claim on September 11, 2017. The Registration was granted on Oct 11 2017 and expired on March 23 2018, 5.5 months later. At a preliminary hearing, Mr. Justice Brown also ordered Defendant to explain the back-dating of permits under S.8(2b) to shorten the period of exemption in any motion to strike as frivolous or vexatious compared to the old MMAR S.33(a) that started the permit when issued.

8. On Jan 17 2018, I filed a Statement of Claim for (A) Damages for the undue delay and for (B) a declaration that the "backdating" of registration certificates pursuant to ACMPR S.8(2b): "The period of use begins on the day on which the medical document is signed by the practitioner" violates section 7 so patients never get a full term, and an order that the plaintiffs' registration certificates remain valid for the full period of time indicated in the medical document pursuant to MMAR S.33(a): "A personal-use production licence expires (a) 12 months after its date of issue."

9. On March 2 2018, Health Canada issued three Class Exemptions under s.56 of the Controlled Drugs and Substances Act (Supplementary Appeal Book TabS 1/2/3) Despite there being no mention of any exemption from S.8(2b) in those orders on Page 7 of Exhibit A of Canada's motion to strike, it was heralded as changing the start from ACMPR S.8(2b) when the doctor signed back to MMAR S.33(a), when the permit was issued.

10. Patients registered before Mar 2 2018 remained short-changed. I lost over 11 months on my 18-months of medical prescription and sought its restitution immediately or added to my next permit!

11. Canada filed a motion to strike the Mozajko claim as directed. Following the filing of the motion, Mr. Harris sought leave to amend his own claim to add the allegation that the period of registration was unconstitutional. Judge Brown J. granted leave to amend and granted Canada leave to file an amended motion to strike the Harris claim.

12. On April 27 2018, Canada filed a motion to strike the Harris claim for no reasonable cause of action. Following the filing of Canada's motion, the respondent in the present matter filed a claim, the Igor Mozajko claim in addition to an allegation that the registration processing time was unconstitutional. The Mozajko claim included an allegation that Health Canada's approach to calculating the period of registration was also unconstitutional. As this allegation was not contained in the original Harris, Brown J. directed Canada to file supplemental materials if they wanted to strike the Mozajko claim. Crown argued all claims had now been mooted by those Class Exemptions but judge Brown ruled the Class Exemptions did not apply to those registered before March 2 who remained short-changed by the back-dating that was no longer being committed against new registrants.

13. By Order dated July 20, 2018, the Federal Court granted Canada's motion in part. The Court declined to strike the A) portion of the claim concerning the long processing time for registration to produce cannabis for personal medical use,

but struck the B) portion of the claim concerning the restitution of the time subtracted from the period of use by the admitted "backdating" of registration certificates as too trivial a harm to warrant Charter protection, not dismissed as mooted by such relief now being provided for those registered after March 2 2018. Restitution of the full term was the originating issue of the Harris appeal.

14. On Oct 2 2018, Judge Brown adopted his reasons for the Harris decision to allow the (A) Damages claim but strike the (B) Full Period claim:

(A) DAMAGES FOR DELAY

> **[1] This is a motion by the Defendant for an Order striking the Plaintiff's Amended Statement of Claim, i.e., his action which may also result in the Court striking some 200 similar case-managed actions. These actions are in most part identical and are copied from a website on the internet.**
> **[2] The motion is brought on the basis that it is plain and obvious that the claim fails to disclose a reasonable cause of action. In addition it is alleged that the Plaintiff's action is frivolous and vexatious. Finally, in respect of what I will refer to as the "short-changing" pleadings, the Defendant argues this issue is moot because of a regulatory or policy change. Because I am not persuaded the Defendant has established her case, the motion to strike must be dismissed. There is no merit to the argument that the pleadings are frivolous and vexatious. The Court must also reject the Defendant's submission that the short-changing claim is moot; while for some it may be moot, for this Plaintiff it is not.**
> **[3] The Defendant's motion is brought pursuant to Rule 221(1)(a) of the Federal Courts Rules, SOR/98-106 [Rules]. Rule 221 of the Rules permits the Court to strike a claim on certain grounds:**

221(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it

(a) discloses no reasonable cause of action or defence, as the case may be,..

(c) is scandalous, frivolous or vexatious,..

[4] The action sought to be dismissed, stripped to its essentials, claims Charter-damages for alleged unconscionable delays in the processing time taken between the filing of an application for, and obtaining a permit allowing an applicant to grow marijuana for medical purposes. In addition, the claim alleges delays in the processing time taken between the filing of an application to renew such a permit and when it is obtained….

[8] Permits under the ACMPR are available to persons who demonstrate their need for cannabis marijuana to treat their medical conditions. Applications for these permits must be supported by a medical document from an authorized health care practitioner - basically a prescription....

II. History and basis of right to medical marijuana

[11] The right to possess and cultivate marijuana for medical purposes has been litigated in Canada for almost two decades....

[12] Suffice it to say that the right to access marijuana and cannabis for medical purposes is guaranteed by the Charter, an undoubted legal matter having been decided by this Court, the Supreme Court of Canada, and as well, by Superior Courts in the provinces. In addition, the right of access to marijuana and other cannabis products for medical purposes is a right conferred upon individuals, on application, by the Governor in Council in subordinate legislation, i.e., regulations issued pursuant to the relevant legislation....

IV. The Plaintiff's Amended Statement of Claim

[19] The Plaintiff's Amended Statement of Claim is relatively straightforward. Factual allegations, as noted, are taken as proven. It starts with a claim for a

declaration that the long processing time for ACMPR production permits (the Plaintiff refers to the approval document as a "registration" which technically it is, but I prefer to use the word "permit") and renewals violates his section 7 Charter right to life, liberty and security. He further claims a remedy of damages under section 24 of the Charter in the amount of the value of his prescription during any delay which the Court may rule inappropriate for a reasonable processing time.

[34] The issue is delay. The Plaintiff says that delay violated his Charter-rights under section 7 to life, liberty and security of the person. There is no doubt he has such rights, and that these include his right to access a production permit for medical marijuana.
[35] In a situation like this, I take it as a given that when the Courts and the legislature (the Governor in Council in this case) declare rights and create administrative mechanisms to deliver them, those rights may not be denied through unreasonable delay. Rather the converse; the executive government, in this case the Minister of Health, has a duty to act with reasonable dispatch, absent explanation otherwise, where rights have been declared by the Courts, particularly Charter-rights. To argue otherwise may entail a less than respectful application of the law including of course delivering upon Charter-protected rights.
[36] It appears to me that the Minister of Health take the position that Charter-protected rights may be delayed unreasonably without legal consequence; although not expressed, this seems to underline the position advanced by the Defendant. I do not make a ruling in this connection, but am not persuaded that the Plaintiff has no chance to show that such a position is untenable.

[37] I am not persuaded it is plain and obvious that the Plaintiff's pleadings disclose no reasonable cause of action on the facts presumed to be true in this case. Put another way, I have concluded there is a chance the Plaintiff may succeed in his claim.

[38] I appreciate there are many related claims being case managed relating to this action; I am the case management judge, have reviewed each, and have issued a large number of orders dealing with interim and other relief. While I have stayed all interim interlocutory proceedings in the related cases, I have lifted the stay where a motion alleges a delay in the issuance of a permit of more than 60 days and invited the Crown to respond. That said, the argument that there are many related claims does not assist the Defendant; rather, it underscores the importance of the duty lying upon the Minister of Health to establish administrative mechanisms that deliver on Charter-protected rights determined not only by the Governor in Council - in the ACMPRs - but by the Supreme Court of Canada.
[39] In this connection, the Court keeps in mind that the Plaintiff has a medical condition and a prescription for marijuana to treat his medical condition. It may be found that the Minister of Health may not unreasonably delay issuing permits to the Plaintiff in his circumstances, if that is in fact his or her position. The Plaintiff wishes to grow his own marijuana, which with a permit in hand, he is entitled to do. But he cannot do that until he has the permit or renewal.
[40] And if he needs to renew a production permit, and the renewal application is unreasonably delayed with the result his original permit expires, "everything would have to be destroyed" as he claims; otherwise, he is would be subject to fine and imprisonment for the possession of unused plants and stored marijuana grown previously. As to the stress referred to in the pleadings, this is also a matter for evidence. The Plaintiff may or may not succeed; that will be determined by the evidence. The Defendant has not established it is plain and obvious such that this claim should be struck....

[42] Nothing in what is stated above should be taken as determining whether the Plaintiff will succeed or fail in his action. I make no finding of whether there is a cause of action for unreasonable delay, or if so, what

constitutes unreasonable delay. It may be that a delay of four months in processing the Plaintiff's permit application was reasonable; the point of today's ruling is that the Plaintiff has a chance of succeeding in his claim. However, it may be that the delay in the Plaintiff's case was reasonable. In that case the Defendant will succeed.

[43] In terms of damages, I am not persuaded it is plain and obvious that no damages would be awarded if the Plaintiff establishes his Charter-protected rights were infringed or denied contrary to subsection 24(1) of the Charter. It is well-established, again by the Supreme Court of Canada, that Charter breaches may be remedied under subsection 24(1) by an award of monetary damages: see for example, Vancouver (City) v Ward, 2010 SCC 27.

[44] In this respect, the Court is performing a gate-keeping function. The onus was on the Defendant and in my respectful view she failed to meet the test: it is not plain and obvious that these pleadings disclose no reasonable cause of action.

B. Is the action frivolous and vexatious?

[45] The Court has determined that it is not plain and obvious that this action discloses no reasonable cause of action. The essence of the Defendant's submission that the action is frivolous and vexatious is that the Plaintiff's claims are so lacking in material facts, and unintelligible, that it is frivolous and vexatious. The argument in this respect is contained in a single paragraph in the Defendant's memorandum of fact and law. The Defendant only states that the action should be struck as frivolous and vexatious. In my respectful view there is insufficient merit in that submission to warrant its further consideration.

(B) RESTITUTION OF FULL PERIOD

[20] The Plaintiff also seeks a declaration that back-dating the period of registration and renewal from the effective date for registration or expiry date for renewals to the date the doctor signed the prescription

under the ACMPR violates his section 7 Charter rights and claims remedy for the full term of the prescription to take effect on the effective date of the registration and on the expiry date of a renewed registration...

[25] He states that the MMAR permits began on the effective date of issuance and renewed on the same date each year. In contrast, he states that the ACMPR permits and renewals are back-dated to when the doctor signed the medical document, reducing the term of registration and renewal by the time to process the application. I note in this case his permit lasted only five or so months. We do not know when his medical document was signed.

[26] He states that not only is over 6 months to key in the data unconscionable but by shortchanging from the full-term registration under the MMAR to a half-term registration under the ACMPR, applicants or renewals always get less than the full term of medication prescribed by the measure of the unconscionable amount of time spent for processing.

[27] The Plaintiff says that the two 1-year prescriptions should end up being 24 months of registration and asks the Court to return the time short-changed from patients' permits and renewals and prevent any further short-changing.

[28] The Plaintiff says that having to see the doctor more often does cost the Plaintiff more money and having to wait for the mail to find out if the registration was renewed before its expiry date when everything would have to be destroyed does cause the Plaintiff more stress.

C. Is the allegation of short-changing moot having regard to subsequent changes?

[48] On the facts pleaded in respect of the short-changing issue, the Plaintiff seeks a declaration that the dating of the permit back to the date that the medical document was signed to coincide with the time period for use stated by his health care practitioners - the alleged "back-dating" of the permit - violates his section 7 Charter rights.

[49] In response, the Defendant's evidence is that on March 2, 2018, the Minister of Health Canada issued several class exemptions pursuant to section 56 of the Controlled Drugs and Substances Act. These exemptions apply to anyone with a permit issued on or after March 2, 2018. Pursuant to these exemptions Health Canada now issues permits with a period of use that begins on the date the permit is issued, instead of on the date that the medical document was signed by the health care practitioner.

[50] This, says the Defendant, is the very relief sought by the Plaintiff. Relief having been granted by the Minister, the Defendant says that the requested declaration is now moot. I respectfully disagree.

[51] I agree the short-changing issue raised by this Plaintiff is moot for permits dated after March 2, 2018.

[52] However, on the facts of this case, the Plaintiff's permit was dated well before that, on October 11, 2017. If the change in policy was made to apply to the Plaintiff's permit, the Defendant would be correct because the Plaintiff's permit would have been valid until October 10, 2018; in that case his claim would be moot in that respect.

[53] However, the policy change was forward looking only. As I see it, the Plaintiff did not obtain the benefit of the change in policy, because his permit was not issued on or after March 2, 2018. Therefore mootness does not apply in the Plaintiff's case.

[54] That said, I have concluded that the short-change submission should be struck because, while I understand the Plaintiff does not obtain a full year's worth of permit, and must reapply sooner as a result, his "loss" does not support an allegation of breach of section 7 Charter rights. I do not see the resulting reduction in the term of the permit or document to infringe or deny a Charter right. He simply experiences the vagaries of having to renew his permit earlier, and not getting the benefit of the full term otherwise available. Such delays may commonly occur where one applies by mail for a time-limited permit or document from government such as for example, a passport or motor vehicle license.

Even if a Charter right was breached by a reduction in the term of a permit, which I do not accept, this Court recently held in Johnson v Canada (Attorney General), 2018 FC 582 per Diner J., at para 7, "the Charter does not protect against trivial limitations of rights (Cunningham v Canada, [1993] 2 SCR 143 at 151)." Such reduction in my view would be trivial.

[55] In this respect, I revert to that part of the motion to strike based on no reasonable cause of action; I find it plain and obvious that the short-changing aspect of the Plaintiff's claim discloses no reasonable cause of action. I see no need to allow an amendment in this respect as none could save this aspect of his pleading. In any event, this Plaintiff has already been granted leave to amend twice, once on consent, but the second time on a contested motion. Therefore paragraphs 1(b), 8 and 9 of the Amended Statement of Claim must be struck.

[56] In the result, the motion to strike is dismissed except as it relates to the short-changing allegation.

"Henry S. Brown" Judge

16. On July 20 2018, Harris appealed the dismissal of the claim for the (B) Full Period Restitution and Defendant then cross-appealed against the dismissal of the motion to strike "A" claim over over-long processing time.

17. Canada now appeals the portion of Brown J.'s decision concerning registration processing time. Mr. Mozajko cross-appeals the portion of the concerning the period of registration (the Mozajko appeal).

18. On Sep 18 2019, the Federal Court of Appeal dismissed the Harris appeal (Appeal File No.: A-258-18) for (B) Restitution and granted the Crown cross-appeal to strike his (A) Damages claim.

19. My Respondent/Cross-Appellant's Memorandum addresses issues raised by the Court that may not have been addressed in the Harris Memorandum.

PART II - ISSUES:

A) RESPONDENT'S REMEDY (A):

1) RIGHT TO GROW ESTABLISHED BY LEGISLATION?

2) INSUFFICIENT FACTS TO ESTABLISH VIOLATION?

3) AFFORDABILITY AND STRAINS ALTERNATIVES?

4) INEVITABLE DELAY V. ADDITIONAL WAITING?

5) ACMPR v. CANNABIS ACT & REGULATIONS?

B) CROSS-APPELLANT'S REMEDY (B):

6) FULL PERIOD RESTITUTION?

C) CONSTITUTIONAL QUESTION

7) NO NOTICE OF CONSTITUTIONAL QUESTION?

PART III - ARGUMENTS

A) RESPONDENT'S REMEDY (A) ISSUES:

1) RIGHT TO GROW ESTABLISHED BY LEGISLATION?

20. The Harris Court of Appeal stated:

> **[9] Based on this amended statement of claim, the Federal Court judge, in paragraph 33 of his reasons, started with the proposition that Mr. Harris:**
>
> > **has the right to a permit to grow marijuana for medical purposes if he satisfies the criteria of a**

> **Charter-compliant permit regime established under the Controlled Drugs and Substances Act [S.C. 1996, c. 19] and Narcotic Control Regulations [C.R.C., c. 1041]. This right has been confirmed by the Supreme Court of Canada, in addition to the Federal Court and various Superior Courts.**
>
> **[16] Neither party provided any authority that would support the proposition that Mr. Harris has a constitutional right to grow his own cannabis.**

21. Respondent accepts that no court before Justice Brown has explicitly declared a right to grow. But the right to a permit to grow is conferred by the new Cannabis Regulations:

> **Registration with Minister**
> **313(1) If the requirements set out in section 312 are met, the Minister must, subject to section 317, register the applicant and issue them a registration certificate.**

22. If the Minister must register the qualified applicant, then the qualified applicant has the right to what the Minister must do. It's persuasive that the Allard and Smith Courts interpret "must" in the same way. Judge Brown is only the first court to proclaim an explicit right to that which the Minister "must" do for a qualified patient. That no other courts have found an explicit right to grow is not persuasive when the legislation itself clearly enshrines the right to a grow permit.

2) INSUFFICIENT FACTS TO ESTABLISH VIOLATION?

23. In their Harris Memorandum, the Appellant did admit:

> **33. While courts must generally accept the facts pleaded as true for the purposes of a motion to strike, they are not required to accept speculation, bald allegations or conclusory statements of law dressed up as facts.**

24. Appellant failed to indicate which "facts" Judge Brown had taken as proven that were "speculation, bald allegations or conclusory statements of law dressed up as facts" and only made the bald allegation without citing one example.

25. Brown J. spends paragraphs 16-18 explaining the need for sufficient facts and then spends paragraphs 19-28 laying out the many facts which were taken as proven:

FACT01: [19] Claim Long Processing Time violates S.7
FACT02: Damages are Value lost during undue delay
FACT03: [21] Plaintiff has Medical Document
FACT04: [22] Date submitted: June 11 2017
FACT05: Date processed: Oct 11 2017
FACT06: Date expired: Mar 23 2018
FACT07: [23] MMAR time less than 4 weeks
FACT08: [24] ACMPR time over 30 weeks
FACT09: Only 10 data fields to process
FACT10: [25] MMAR renewed on date of original issuance
FACT11: ACMPR back-dating to date doctor signed
FACT12: Period of exemption is thus reduced.
FACT13: Harris Permit lasted only five or so months
FACT14: [26] Claim over 6 months to process unconscionable
FACT15: Claim short-changing gets less than full term
FACT16: [27] Wants Restitution of time on next permit
FACT17: [28] Seeing doctor more often costs more often
FACT18: Looming expiry waiting for renewal causes stress

26. Appellant also did admit these facts:

> **19. The amended claim alleges that the plaintiff is medically authorized to use cannabis and that he applied to Health Canada on June 11, 2017, for registration to**

produce cannabis for medical purposes. It alleges that registration. was granted on October 11, 2017, and was scheduled to expire on March 23, 2018.28 The claim also alleges that the processing time is up to 30 weeks for some patients, and that the processing time for a personal or designated production licence under the former Marihuana Medical Access Regulations ("MMAR") was much shorter.

20. The amended claim alleges that the plaintiff experienced stress due to the prospect of having to destroy his cannabis plants if Health Canada ever failed to renew his registration before his existing registration expired.

27. All plaintiffs on Judge Brown's list submitted those same main facts other than application, issuance and expiry dates to establish that there were unconscionably long processing delays. No facts were proffered that the delays for medication violated rights when Chaoulli v. Quebec (Supplementary Book of Authorities #6) had the material facts establishing that delays in receiving medication deprived the plaintiff of life, liberty or security of the person. Applicants should not have to prove that delays cause harm when Chaoulli has already proven that. Delays do cause harm. Proving delays in due treatment proves the harm. The only facts needed and proffered were to prove the delay, not the harms of delay. The processing time in plaintiff's case was inconsistent with the principles of fundamental justice. And that the short-staffing bureaucratic delays unconscionably shortened the periods of use.

FACTS FOR DAMAGES

28. Chaoulli also found damages appropriate. Brown J. said there was the hope here too. Damages sought for delays in

obtaining medication by short-staffing in government bureaucracy deemed inappropriate. This isn't damages over bad legislation, it's damages over bad administration. No need to show malice. Just incompetence.

29. The Value of the Damages for rent and expenses and the value of the product that should have been grown during the unconscionable delay is now fixed.

30. Facts the Crown argued they needed to know:
- What medical condition? is not a fact Judge Brown needed to know to adjudicate whether the time for processing was unconscionably long;
- Why he doesn't choose other medication available? is not a fact Judge Brown needed to know to adjudicate whether the time for processing was unconscionably long;
- Why he chooses to grow rather than purchase? is not a fact Judge Brown needed to know to adjudicate whether the time for processing was unconscionably long.

31. The facts the Defendant says are missing to make the case are not facts Judge Brown needed to know in order to adjudicate whether the time for processing was unconscionably long. Knowing only the start and expiry dates of the permit, the judge did not need to know any of these other facts Defendant argues are missing. The facts identified as lacking by the Defendant were not deemed relevant facts by the judge. Why would he need to know what illness the patient was suffering while waiting 9 months for his permit? Or why he prefers not buying irradiated and pesticide-laden product from an expensive L.P. with taxes and shipping costs?

3) AFFORDABILITY AND STRAINS ALTERNATIVES?

32. The Harris Court wrote:

> **14... There is nothing in his statement of claim to indicate that there would be any difference between the marihuana that he would grow and the marihuana that he could have purchased from a person authorized to sell marihuana under the ACMPR...**
> **[19].. There is nothing to indicate that Mr. Harris would not have been otherwise able to obtain marihuana during this waiting period from a person authorized to sell marihuana under the ACMPR.**

33. In the Allard decision, Justice Phelan had written:

> **(3) Affordability and Access Discussion**
> **[204] Affordability as a barrier to accessing cannabis for medical purposes was a major issue in this case raised by the Plaintiffs, rebutted by the Defendant and therefore must be addressed. As the litigation developed, its importance plateaued. The cost of purchasing from LPs and the cost of personal cultivation have very little to do with the engagement of liberty and security interests except as it relates to the economic dimensions of access. This case is about the restriction on access imposed by the MMPR regime. Costs are a consequence of the regime; not an independent grounds.**
> **[205] This is not a case about economic interests. Specifically, the Plaintiffs are not requesting to place a positive obligation on the government to subsidize the cost of accessing cannabis for medical purposes. As stated earlier, this is not a case about the entitlement to inexpensive medication.**
> **[206] However, the interests have an economic dimension due to restriction of access caused by affordability. Although affordability (as defined by both Dr. Walsh and Dr. Grootendorst) encompasses a choice, this choice is only necessary due to state action, which must be Charter compliant. It is not a lifestyle choice or a preference choice as argued by the Defendant.**

[207] A choice argument was put forward by the government in PHS, where it argued that any negative health risks drug users may suffer if Insite is unable to provide them with health services, are not caused by the CDSA's prohibition on possession of illegal drugs, but rather are the consequences of the drug users' decision to use illegal drugs (para 97). The relevant portion of the Supreme Court's response is found at paras 103 to 105:

> **[105] The issue of illegal drug use and addiction is a complex one which attracts a variety of social, political, scientific and moral reactions. There is room for disagreement between reasonable people concerning how addiction should be treated. It is for the relevant governments, not the Court, to make criminal and health policy. However, when a policy is translated into law or state action, those laws and actions are subject to scrutiny under the Charter: Chaoulli, at para. 89, per Deschamps J., at para. 107, per McLachlin C.J. and Major J., and at para. 183, per Binnie and LeBel JJ.; Rodriguez, at pp. 589-90, per Sopinka J. The issue before the Court at this point is not whether harm reduction or abstinence-based programmes are the best approach to resolving illegal drug use. It is simply whether Canada has limited the rights of the claimants in a manner that does not comply with the Charter.**

[208] Similar to PHS, the issue before this Court is not whether the MMPR is the best policy; it is whether the restrictions imposed by the MMPR limit the Plaintiffs in a manner that is Charter compliant. The Defendant argues that the Plaintiffs are able to afford the cannabis with the LP regime. Their strain preference is not supported medically and therefore the LP regime adequately facilitates this access. As a result, the MMPR does not engage liberty or security interests except by the concession mentioned earlier.

[209] The Court does not find the Defendant's arguments to be sound. It is argued that the evidence does not establish that purchasing marihuana in medically

appropriate amounts is prohibitively expensive for anyone. This is a skewed assumption for two reasons. First, the Court is not to determine what is expensive and what is not. It is to determine whether affordability is a barrier to access and whether affordability is inherently about a choice. If this choice involves access to medicine, the case law establishes that the choice is of fundamental personal importance.

[210] Secondly, this assumption implies that the average MMAR patient, who is currently authorized to consume approximately 18 grams a day, will suffice on 1 to 5 grams a day. This conclusion cannot be made by the Court because such a conclusion ignores the evidence on tolerance, method of consumption and other personal characteristics and needs of the individual. The Court is in no position to establish the maximum dosages which should be made available.

[211] It is unnecessary to debate whether the Plaintiffs' preference of one strain versus another is medically established. There is enough anecdotal evidence that the type of strain affects the patients' choice in treating their illnesses. Additionally, there is enough evidence that currently, the LP regime may not have an adequate supply of a patient's dose amount in their preference of strain.

[212] The Plaintiffs have established that the MMPR has undermined the health and safety of medical marihuana users by diminishing the quality of their health care through severe restrictions on access to medical marihuana. It is the restriction that engages s 7 interests.

[213] Overall, the question is whether these limitations are in accordance with the principles of fundamental justice. It is clear that section 7 liberty and security of the person rights are both engaged.

34. There is still no evidence that the LP regime has an adequate supply of a patient's dose amount in their preference of strain. And given the thousands of local

strains that have been produced by local growers over previous years, there is little chance the L.P. regime can satisfy the demand for effective strains.

35. Since October 2019, the template for new Statements of Claim for damages from undue delay now states:

> **2. The Plaintiff Possesses a Medical Document to use cannabis for medical purposes under the Cannabis Act & Regulations.**
> **[ ] That I can afford to grow my own strains myself but cannot afford retail prices, taxes and shipping costs from Licensed Producers makes a difference;**
> **[ ] That I can afford Licensed Producer prices, sales tax and shipping costs but want to avoid taxes and shipping and garden my own strains for myself makes a difference. Why should I suffer the loss of rent on my site during the processing delays due to short-staffing just because I can afford to go elsewhere while the short-staffing delays continues?**

36. The Harris Court of Appeal concluded:

> **[19] However, these facts do not provide any indication of how his "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" as provided in section 7 of the Charter, was engaged.**
> **[20] The facts, as alleged by Mr. Harris, are insufficient to support a claim based on section 7 of the Charter in relation to his initial application for registration under the ACMPR.**

37. The Chaoulli precedent provided the facts of how the right to life, liberty and security was engaged and plaintiffs should not need to again explain how much the violation of rights by undue delay found in Chaoulli hurts them personally but only to show that the delay in medical treatment did occur. And Judge Brown found that the dates of

application, issuance and expiry were all the data needed to determine the period of time under examination for violation of rights.

4) INEVITABLE DELAY V. ADDITIONAL WAITING?

38. The Court wrote:

> **[19]... When a person grows his or her own marihuana there will necessarily be a delay for the time that it takes the marihuana plant to mature and produce a usable product. Mr. Harris does not provide any facts as support for his allegation that the additional waiting time of four months for his registration (which would then allow him to grow his own plants) deprived him of his right to "life, liberty and security of the person".**

39. Chaoulli may not have considered inevitable delay but most certainly did consider undue additional waiting. Chaoulli did not consider whether additional waiting only violates the rights of those without alternatives. Though patients may have to suffer some inevitable delay after the clock on the permit starts ticking, the objection here is to the undue additional waiting in starting the clock ticking, not the 4 weeks it has usually taken under the previous regime.

5) ACMPR V. CANNABIS ACT & REGULATIONS?

40. The Harris decision noted:

> **[21] In this case, there is also an additional basis for striking that part of Mr. Harris' amended statement of claim related to his requested declarations with respect to the ACMPR. Since these regulations have been repealed, any declaration with respect to these regulations would be meaningless. The Crown, however, did not raise this issue.**

C. Conclusion

[23] As a result, Mr. Harris has not pled sufficient facts to support his claims for the declarations (which, as noted above, are also in relation to regulations that have been repealed) and the damages that he is seeking.

41. The Crown did not raise the issue of the ACMPR having been repealed and supplanted by the Cannabis Act and Regulations on the Statement of Claim because the appeal book contained the wrong claim. Justice Brown ordered the Statement of Claim amended to switch the ACMPR to the Cannabis Act & Regulations for:

A) a declaration that the long processing time for Production Registrations under the Cannabis Act & Regulations violates the patient's S.7 Charter Right.

42. At no point has the Defendant offered any reason why it now takes so much longer than the 4 weeks it used to take under the MMAR with a much simpler form. They only offer the lame excuse that it takes time to verify the data though it is the same data verified under the MMAR in "under 4 weeks." Respondent/Cross-Appellant submits that waiting almost a year to get my medication permit is undue delay that has violated my right to Life, Liberty and Security under S.7 of the Charter.

43. The Harris Claim was dismissed without leave to amend. If the additional information needed to satisfy the court's factual requirements is now being proffered by new October plaintiffs below are that I can't afford the alternatives or that I can but don't want to lose 11 months of product and rent payments while I wait for short-staffed Health Canada to get to my file and if my appeal is

dismissed for such wants, I would ask for leave to amend to the upgraded template with the latest other 2 dozen new plaintiffs below.

B) CROSS-APPELLANT'S REMEDY (B):

6) FULL PERIOD RESTITUTION

POINTS IN ISSUE
A) Not all permit short-changing was mooted after March 2?
B) Damages not too trivial for remedy to be granted?
C) Remedy too trivial not to have been granted?

A) NOT ALL PERMIT SHORT-CHANGING WAS MOOTED AFTER MARCH 2?

44. After March 2 2018, renewed permits are still being back-dated to before the original permit expires thus continuing to reduce the total period of use. All renewals continue to lose some of their present prescriptions not by back-dating to when the doctor signed but by back-dating to the date of issuance of the renewal permit before expiry of the original! So patients get the full term in the renewed permit but it overlaps the end of the original permit providing unneeded double exemption.

B) DAMAGES NOT TOO TRIVIAL FOR REMEDY TO BE GRANTED?

45. Though delays in obtaining passports and vehicle licenses may cause trivial damage, delays in obtaining medication are not too trivial to engage the S.7 Charter protection. Delay for your passport or motor vehicle license won't kill you as delay for your prescription could. Also,

passports and licenses do not cost thousands of dollars to obtain as do medical permits. Considering some patients may pay several thousand for a permit, it's not just going back more often that is costly but losing the paid-for permit time they did not receive.

46. The latest victim-plaintiff, Steve Vetricek T-1371-18, paid $2,000 for his medical document and Health Canada didn't have its registration processed in 9 months! Appellant Jeff Harris paid $2,300 for a medical permit. Many people are paying in the hundreds if not thousands for medical documents when their own personal doctors have been intimidated away from participation with a "Dosage Verification Letter" and harassing phone calls from Health Canada and provincial doctor associations. The financial loss suffered from the subtraction of more than half of the period of use for a high-priced medical document is not too trivial a damage to warrant S.7 protection from such inaction due to government short-staffing. With over 15,000 patients, the value of the time lost must be in the millions.

C) REMEDY TOO TRIVIAL NOT TO HAVE BEEN GRANTED?

47. A remedy ordering the re-issuance of 15,000 permits with updated expiry dates ort simply adding the previously-subtracted time back in at the end of the next permit was too trivial not to have been granted. The computer-program would . A 15,000 permit print-run and 15,000 stamps are all it would cost to remedy damages or adding the time back in costs nothing for all those deprived before March 2 2018.

C) CONSTITUTIONAL QUESTION

7) NO NOTICE OF CONSTITUTIONAL QUESTION?

48. In the recent appeal of Harris v. HMTQ (A-175-19) of a motion to strike a S.52 claim of constitutional violation, both Justices Pelletier and Gauthier noted that there had been no Notice of Constitutional Question for the motion to strike a constitutional claim. Justice Gauthier said "the constitutionality must be argued to some extent if the Crown says the claim of unconstitutionality is frivolous."

49. The Crown arguing that the facts do not show a constitutional violation is as constitutional an argument as me arguing that the facts do show a constitutional violation. In moving to strike a S.52 claim of constitutional violation, Respondent submits that a Notice of Constitutional Question should have been given herein as well. The Appellant failed to file a Notice of Constitutional Question below and therefore, Judge Brown's dismissal of the motion was therefore justified for other reasons and should be not be overturned.

Part IV - Order sought

39. Respondent/Cross-Appellant seeks an order:

(A) dismissing the appeal against the judgment of Brown J. which dismissed the motion to strike the action;

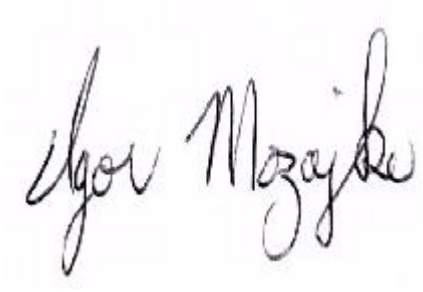
(B) granting the appeal to allow the claim for Health Canada to make restitution of the time improperly subtracted from full term of the period of the permits registered before March 2 2018 to proceed;

(C) ordering the same remedies to apply in the appeal of Allan J. Harris.

Part V - Authorities

No authorities necessary

Dated at Wasaga Beach Ontario on Feb 26 2020.



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File No.: A-339-18

FEDERAL COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

Respondent in Cross-Appeal

and

IGOR MOZAJKO

Respondent

Cross-Appellant

RESPONDENT/CROSS-APPELLANT MEMORANDUM

For the Respondent:

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