Date: 20080319

Docket: A-55-08

Citation: 2008 FCA 106

Present: **RICHARD C.J.**

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

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on March 19, 2008.

REASONS FOR ORDER BY: RICHARD C.J.

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REASONS FOR ORDER

RICHARD C.J.

[1] The Attorney General of Canada (Canada) seeks a stay of the judgment of the Honourable Barry Strayer, Deputy Judge of the Federal Court, dated January 10, 2008, in which he declared invalid subsection 41(b.1) of the *Marihuana Medical Access Regulations* (MMAR). Canada seeks a stay of the entire judgment until the appeal and cross-appeal are heard, and judgment is rendered by this Court.

[2] The proceeding underlining the judgment of Strayer D.J. was an application for judicial review brought by several individuals challenging the Minister of Health's refusal to issue a designated-person production licence (DPPL) to Carasel Harvest Supply Corporation (Carasel) to cultivate marihuana on their behalf. As the basis for the Minister's refusal was the predecessor to subsection 41(b.1) of the MMAR, the applicants also sought an order declaring this provision to be in violation of section 7 of the *Charter*.

[3] Subsection 41(b.1) of the MMAR provides as follows:

> 41. The Minister shall refuse to issue a designated-person production licence
> …
> (b.1) if the designated person would be the holder of more than one licence to produce;

[4] This provision limits the number of persons for whom a designated person can grow marihuana for medical use, i.e. a designated person may cultivate marihuana for only one individual.

[5] Strayer D.J. granted the application and in doing so declared subsection 41(b.1) to be invalid as contrary to section 7 of the *Charter* and set aside the Minister's refusal to issue DPPLs designating Carasel as the applicants' designated producer.

[6] He held that the liberty and security of the person interests in section 7 of the *Charter* conferred on the applicants a right to choose, on medical advice, to use marihuana for treatment of serious conditions, that right implying a right of access to such marihuana and a right not to have

one's physical liberty endangered by the risk of imprisonment from having to access marihuana illicitly.

[7] In declaring subsection 41(b.1) unconstitutional, Strayer D.J. did not suspend the declaration of invalidity. Nevertheless, he made the following observation:

> [16] At this point it may be observed, in respect of both the first and second rationales that it may well be that there could be justification for limiting the size of operations of designated producers, to facilitate supervision and inspection for quality and security. But any new regulations to this end will have to be justified as having a demonstrable purpose rationally related to legitimate state interests. No such justification has been offered to me for subsection 41(b.1).

[8] The issue on this motion is whether Canada can satisfy the well-established test for granting a stay, i.e. whether:

(a) there is a serious question to be determined in the appeal;

(b) irreparable harm will be suffered should this Court not grant the stay; and

(c) the balance of convenience favours granting a stay.

[*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311]

[9] The respondents concede that Canada has satisfied the first branch of the test for a stay.

[10] The issue of public interest, as an aspect of irreparable harm to the interest of the government, will be considered at the second stage as well as the third stage (*RJR-MacDonald*, above, at para. 81)

[11] In constitutional cases such as this, the Supreme Court of Canada has recognized that the onus on the Government of demonstrating irreparable harm to the public interest is less than is required of a private applicant:

> The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action. [*RJR-MacDonald*, supra, at 346].

[12] The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter.

[13] In my view, this assumption applies not only in the case of an application for an interlocutory injunction prior to trial but also applies where the Government is seeking to stay a judgment declaring a law to be unconstitutional (*Her Majesty the Queen v. Canadian Council for Refugees et al.*, 2008 FCA 40).

[14] The respondents have filed no evidence on this motion to show that they would suffer any harm if a stay would be granted. Each respondent is entitled under Health Canada's regulatory scheme to receive marihuana from a licit source of supply. There is no evidence on this motion that any of the respondents are being denied access to a licit supply of marihuana as a result of the operation of subsection 41(b.1) of the MMAR. Further, there is no evidence from the respondents

that the marihuana provided to Health Canada by Prairie Plant Systems Inc. (PPS) is wanting in any material way.

[15] On the other hand, Canada alleges that the effect of the judgment is to jeopardize the public interest by requiring Health Canada to issue DPPLs to producers operating large scale marihuana "grow ops" that are not subject to the prescriptive security and quality control requirements that are imposed on PPS.

[16] This is because the MMAR do not currently require DPPL holders to implement measures designed to ensure the security of their grow operations. Nor are DPPL holders required to comply with the quality and product safety requirements imposed on PPS.

[17] Canada alleges that a stay pending the appeal and cross-appeal is required to avoid these risks materializing before this Court has had the opportunity to rule on the constitutional issues.

[18] The respondents presently have access to a licit supply of marihuana. In my opinion, the public interest favours the granting of a stay pending the outcome of the appeal and cross-appeal.

[19] Accordingly, an order will be made granting Canada's request for a stay of Strayer D.J.'s judgment until disposition of the appeal and cross-appeal.

[20] The Court is prepared to assist the parties in expediting the hearing of the appeal and cross-appeal.

"J. Richard"
Chief Justice

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-55-08
STYLE OF CAUSE:	The Attorney General of Canada v. 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

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	RICHARD C.J.
DATED:	March 19, 2008

WRITTEN REPRESENTATIONS BY:

Mr. Sean Gaudet and Mr. James Gorham	FOR THE APPELLANT
Mr. Ron Marzel	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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