COURT FILE: CR-19-16; CR-19-020; CR-21-08;
CR-19-1190; CR-20-1353; CR-20-8332; CR-21-1202;
CR-21-1203; CR-22-12570MO

ONTARIO SUPERIOR COURT OF JUSTICE
(Northeast Region)

BETWEEN

REGINA

Applicant

-and-

DAVID BRENNAN, CLAYTON HILL, HARLEY HILL, NOBLE BOUCHER, LUKE KLINK, CHADWICK MCGREGOR, SARAH MCQUABBIE, MICHAEL NOLAN, DENNIS WIGMORE, DEREK ROQUE

Respondents

RESPONDENT'S FACTUM

(Responding to Crown's Application for Summary Dismissal, i.e. a "Vukelich" Application)

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PART I – OVERVIEW

1. The Respondents are charged with violating section 5 of the *Controlled Drugs and Substances Act* (*"CDSA")* and sections 9 and 10 of the *Cannabis Act* by possessing cannabis for the purpose of trafficking, sales, or distribution.

2. The charges arise out of the purported operation of indigenous medical cannabis dispensaries on indigenous land within the Province of Ontario.

3. These storefronts sold cannabis (including cannabis derivative medicines) to persons who consumed it for medical and traditional purposes. Some of those persons were authorized by the Government of Canada to possess cannabis for medical purposes. Some were not. All had medical and / or traditional reasons for their consumption of the cannabis and cannabis derivative products sold at the storefronts in dispute.

4. The Respondents seek to challenge the constitutionality of the *CDSA* and *Cannabis Act* as applied to cannabis and hemp as it relates to traditional indigenous practices. They respectfully submit that the prohibition sections of the impugned legislation infringes upon section 35 of the *Charter* because the criminal prohibition on sale or trade of indigenous cannabis to persons with a *bona fide* medical need or traditional right because cannabis and hemp form a part of their traditional rights under section 35 of the *Charter*.

5. The Respondents made clear that they intend to challenge the constitutional validity of sections 9 and 10 of the *Cannabis Act* S.C. 2018, c. 16 and the *Cannabis Regulations* SOR/2018-144 (*CRs*) and, in the alternative, claimed a remedy pursuant to section 24(1) of the *Charter of Rights and Freedoms* (*Charter*).

6. Further, the Respondents charged prior to the introduction of the *Cannabis Act* made clear their intention to challenge section 5 of the *CDSA* and its regulations in the same manner.

The Law on "Vukelich" Applications

7. The threshold for declaring a *voir dire* is low. A recent decision (*R v. Chapman and Honeyman,* 2016 BCPC 275) helpfully summarizes the considerations:

> [9] An accused person is not entitled as of right to a *voir dire* to challenge the admissibility of evidence on constitutional grounds. However, the threshold for embarking on a *voir dire* is low. The Vukelich hearing itself was never intended as a mechanism to prevent investigation of alleged *Charter* breaches where a sufficient foundation for the alleged breach could be demonstrated, nor was the Vukelich hearing itself intended to be a protracted examination of the precise details of the accused's proposed *Charter* application.
>
> [10] What underlies the Vukelich enquiry is the need to balance the accused's fair trial interests against the public interest in the efficient management of criminal trials by

> avoiding lengthy and unnecessary pretrial applications in circumstances where the remedy sought could not reasonably be granted.
>
> [11] A review of rulings following Vukelich hearings suggests that the following procedural steps should be observed:
>
> 1. The Vukelich application must be made before or at the time when the evidence is tendered. Counsel may provide a copy of the Information to Obtain in question to the trial judge, in advance of the application.
>
> 2. The procedure should be flexible and should be adapted to the circumstances of the case.
>
> 3. The onus is on the accused applying to have a *voir dire* declared.
>
> 4. The application should be determined upon the statements of counsel, if possible.
>
> 5. Counsel for the accused should summarize the facts that the accused is relying on in support of his or her submission that there has been a *Charter* breach.
>
> 6. The Court should assume for the purposes of the Vukelich application that the facts as alleged by counsel are true.
>
> 7. If the trial judge declines to declare a *voir dire* on the basis of the statements of counsel, counsel for the accused must either choose to go further, or to accept the Court's ruling, subject to his or her eventual right of appeal.
>
> 8. When counsel for the accused chooses to go further, a more formal approach will be required. That may include the filing of affidavits or an undertaking to adduce evidence. In essence, there must be some factual basis supporting the application before the trial judge can declare a *voir dire*.
>
> 9. The accused is not required to file an affidavit, as it may expose him or her to cross-examination.
>
> 10. Ultimately, if the statement of counsel or the evidence adduced on the Vukelich application do not disclose a basis on which the court could reasonably make the order sought, the application to declare a *voir dire* should be dismissed.

8. This submission sets out the Respondents' position on the evidence and the law relevant to the proposed *Charter voir dire*.

Section 35 Challenge

9. Section 35(1) of the *Constitution Act*, *1982*, sets out a legal framework for the affirmation and recognition of the existing aboriginal and treaty rights of the aboriginal peoples of Canada.[1]

10. The Respondents propose to call expert and lay evidence in support of the existence of their right to traditional use and trade of cannabis and hemp.

11. The Applicant is seeking for the Respondents' application for Charter relief to be denied pre-emptively on the basis that it cannot succeed, and they are asking the trier of fact to consider the substantive merit of the evidence, which is clearly prohibited under the *Vukelich* analysis.

12. The Crown's claim is without merit – at this stage of the analysis, particularly given the fact that no parties have been subjected to cross examination, the expert reports cannot be dissected absent the participation of the trier of fact.

13. Further still, the respondents clearly take a different view of the content of the expert reports and lay evidence which has been provided thus far in this matter.

14. This court must decide several issues:

- How is it alleged that section 5 of the *CDSA* and sections 9 and 10 of the *Cannabis Act* infringe the Charter?
- Has this issue been decided previously?
- Is any previous decision binding on this court?
- What evidence will the Respondents call to meet the burden on them? Will it be viva voce evidence, or affidavits, or both?
- What evidence will the Crown call in response?
- If the issue raised by the Respondents has not been decided previously, is the court time reserved for this matter appropriate?

15. These questions cannot be answered in their entirety absent a *voir dire* which the respondents have been seeking for some time.

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[1] *Constitution Act, 1982,* s. 35, being Schedule B to the *Canada Act* (UK), 1982, c 11.

Outline of The Case

16. The *CRs* authorize medical cannabis sellers to send or deliver cannabis, but do not authorize the in-person transfer of cannabis.[2] Because the in-person transfer of cannabis is not authorized by the *CRs* it is prohibited by the *Cannabis Act* and in its prior iteration, the *CDSA*.

17. The *CRs* prohibit any aboriginal, including an elder, healer or medicine man or woman from dispensing medical cannabis in person to aboriginal medical cannabis patients. Instead, aboriginal medical cannabis patients must access medical cannabis through an on-line mail order system in which a corporation mails the cannabis to the patient.

18. For aboriginal persons, having your plant medicine sent by mail from a corporation does not constitute reasonable access nor does it remotely resemble traditional trade and medical practices of aboriginal peoples. It is contrary to the aboriginal approach to traditional healing and trade. The government's program is a western medical and trade approach which is disconnected from culture, families, and community. In particular, it is completely contrary to the Amikwa people's way of life and trade.

19. The aboriginal approach to traditional healing and trade is holistic, localized and social. The aboriginal approach to traditional healing and plant medicine requires a personal relationship between the person dispensing the medical cannabis, the person receiving the medical cannabis, and the medical cannabis. The aboriginal approach to traditional healing and plant medicine focuses on the web of relationships between humans, plants, natural forces, spirits, and the land. It is a way of life and a collective dynamic.

20. There is no other substance which lends itself more to the aboriginal, and specifically the Amikwa, approach to traditional healing and trade than

[2] Sections 289-291 of the *CRs*.

cannabis. Cannabis and hemp are plant medicines, not a pill made in a western biomedicine factory operated pursuant to rules developed in Western Europe. Aboriginal traditional medicines and products have a strong history with plant medicine.

21. Also, cannabis is an iterative medical product with many different varietals that impact different people and different conditions in different ways. This suggests a more interactive and engaged relationship with the dispenser and this engaged relationship with the dispenser is important for achieving a therapeutic effect.

22. Furthermore, cannabis is a psychoactive plant which also lends itself to the holistic, social, and spiritual aboriginal approach to traditional healing and trade. Aboriginal traditional medicine is spiritual and is expressed through the land and ceremonies.

23. Cannabis impacts health in many ways, some of which enhance the general promotion of psychological and spiritual well-being. The aboriginal approach to traditional healing addresses not just the specific health issue, but also the general promotion of psychological and spiritual well-being using ceremony, counselling, and the accumulated wisdom of elders. The concept of identity plays a key role in the delivery of aboriginal community health care and trade.

24. By disregarding the aboriginal approach to traditional healing and plant medicine and trade, the *CRs* undermine patient-centred care and trade. Patient-centred care is medical care that is aligned around the values and needs of patients.[3] Patient-centred care is a holistic approach to deliver respectful and individualized care, allowing negotiation of care and offering

[3] CMA Policy, Achieving Patient-Centred Collaborative Care (2008): World Health Organization, *People Centred Health Care*, November 5, 2007.

choice through a therapeutic relationship in which persons are empowered to be involved in health decisions.[4]

25. Under the *CRs* indigenous persons must wait days or longer for their medicine to arrive by mail. The patient must wait days or longer to register with the manufacturer before even making a purchase. If there is something wrong with the medicine then it must be repackaged and sent back causing further delays. If the indigenous person is not home when the delivery arrives then it cannot be left at the residence. If a patient does not have a residence then the system frequently cannot accommodate the patient at all. The mail order system causes delays and interruptions in access to medicine which undermine patient health and cause unnecessary suffering. For indigenous persons, cannabis is the only plant medicine that cannot be access in-person and on-demand.

26. Under the *CRs* the aboriginal person's only point of contact is a customer service representative over the phone. This means that instead of an elder or medicine man or woman or even a pharmacist dispensing the cannabis and providing medical or spiritual guidance, it is dispensed by the manufacturer which is a clear and obvious conflict of interest. Cannabis for medical purposes is the only medicine that is required by law to be dispensed by the manufacturer.

27. Furthermore, the aboriginal approach to growing cannabis requires no pesticides, herbicides, or irradiation. Pesticides, herbicides and irradiation are widely used by commercial cannabis growers under the *CRs*.

28. The *CRs* constitute a wester biomedicine approach to trade and healing and a particularly flawed one at that. The *CRs* are inconsistent with the traditional

[4] Dewi WN, Evans D. Bradley H. Ulrich S. "Person-centred care in the Indonesian health care system." Int J Nurs Pract 2014:200(6)616-22.

aboriginal approach to plant medicine. For aboriginal medical cannabis patients, this is not reasonable access.

29. For the respondents, cannabis and hemp have been a part of their lives, livelihoods, and trades, since long before first contact with European invaders. Cannabis and hemp use and trade have been a practice, custom, and tradition integral to the distinctive pre-contact society of the Amikwa peoples. The claimed modern right has a reasonable degree of continuity with the pre-contact practice. The claimed modern right is demonstrably connected to and reasonably regarded as a continuation of the pre-contact practice.

30. Furthermore, Canada adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP received Royal Assent on June 21, 2021. UNDRIP provides, at Article 24, that indigenous peoples have the right to maintain their health practices.

31. Section 35 clearly protects selling and trading cannabis and hemp within this aboriginal community. This right has been in existence among the Amikwa people long before first contact with Europeans.

32. The proper legal test under section 35(1) of the *Charter* is as follows:

1. The Applicant is acting pursuant to an existing aboriginal right;
2. The right has a reasonable degree of continuity with the pre-contact practice; and
3. Any possible justification for infringement is considered.[5]

33. In order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right, and, the practice, custom or tradition made the culture of the society distinctive.[6] A court considering such an aboriginal right must take

[5] *R v. Van der Peet*, [1996] 2 SCR at para 2, 64-65.
[6] *R v. Van der Peet*, [1996] 2 SCR at paras. 46 and 55.

into account the aboriginal perspective, but do so in terms that are cognizable to the non-aboriginal legal system.[7]

34. Section 35 must be construed in a purposive manner. When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded.[8]

35. In interpreting section 35, where there is any doubt or ambiguity as to what falls within the scope and definition, such doubt or ambiguity must be resolved in favour of aboriginal peoples.[9]

36. The Respondents, in support of this argument, ask the Court to declare a *voir dire* so that they can call lay and expert evidence regarding these issues. The respondents have provided extensive expert reports and lay witness evidence to support the claim. While the Crown appears to be alleging deficiencies in this record, those purported deficiencies do not play a role in the *Vukelich* analysis.

37. Section 5 of the *CDSA* (standing alone and as modified by the *ACMPR*) and sections 9 and 10 of the *Cannabis Act* offend section 35 of the *Charter* by infringing the traditional trade rights of the respondents in a manner that is inconsistent with the *Charter* because:

- The *CDSA* is arbitrary because the object of the *CDSA* is the protection of health and safety and, with respect to cannabis, the prohibition instead causes harm to health and public safety as found by the Alberta Court of Queen's Bench in *R v Howell* 2020 ABQB 385;
- The *Cannabis Act* and the *CRs* have the same purpose, however, in the context of the Amikwa people, they have the opposite effect;
- The impugned laws, as enforced against persons like the Respondents, produce negative effects that are grossly disproportionate in comparison to any benefit to public health and safety flowing from the prohibition and serve only to group the respondents in the same class of persons as black

[7] *R v. Van der Peet,* [1996] 2 SCR at para 49.
[8] *R v Sparrow* [1990] 1 SCR 1075 at para 56.
[9] *R v Van der Peet*, *supra* at para 25.

> market recreational cannabis suppliers who seek only to profit from the cannabis plant whereas the respondents in the case at bar are clearly expressing a traditional right which is clearly rooted in history and is distinctive to their people. By making no distinction between these two classes of people, the CDSA and *Cannabis Act* endanger the public and harm public health and safety, not to mention completely disregarding the traditional role cannabis and hemp play in the life of aboriginal peoples who have traded and dealt with cannabis and hemp since long before European invaders made contact.

38. The Respondents will call lay and expert evidence, as more fully set forth below, including the extensive reports already filed. They expect to provide affidavits from lay witnesses, coupled with viva voce testimony, and will provide expert reports as required by the *Criminal Code* with viva voce testimony if necessary and/or if cross-examination on those expert reports is requested by the Crown. They also expect to introduce documentary evidence via affidavit.

39. The Respondents believe that the Court time set aside for this matter is appropriate given the length of prior, similar Charter applications in which undersigned counsel acted (*R v Howell* 2020 ABQB 385).

Evidence

40. Generally, the Respondents expect to call evidence as follows:

- Lay evidence from indigenous persons related to their difficulties obtaining reasonable access to cannabis products from commercial Licensed Producers (LPs) through the legal system including, without limitation:
  (1) endemic LP supply shortages within LPs and by virtue of Health Canada having failed to prioritize the licensing of sufficient numbers of LPs to meet patient supply needs;
  (2) multiple recalls of LP products for mold and pesticide and fungicide residues;
  (3) inadequate or non-existent supply of various types or strains of cannabis from LPs,

(4) inadequate or non-existent supply of cannabis derivative medicines from LPs at the time of these charges and thereafter despite the Supreme Court of Canada's ruling in *R v. Smith,* 2015 SCC 34;
(5) inability to lawfully purchase from multiple LPs (with limited and unreasonable exceptions) which exacerbates the supply problems;
(6) patients going for periods of time without any cannabis due to the foregoing and the requirement that products can only be obtained via mail;
(7) barriers to accessing LP cannabis by persons without credit cards and/or with no fixed addresses due to the mail-order-only aspects of the impugned laws; and
(8) inability to judge the quality of the cannabis prior to purchase due to the mail order only requirements set out above.

- Lay evidence related to indigenous people in the community who have deep familial and cultural connections to cannabis and hemp which have existed without public expression due to the longstanding criminal prohibition against cannabis and hemp and the stigma associated with it;
- Explicit and implicit discouragement by regulatory bodies, including Colleges of Physicians, Health Canada, and the Band Council, with respect to cannabis and hemp.
- Expert evidence related to the foregoing and, if necessary, to the medical efficacy and relative safety of cannabis and the need for timely access to a variety of strains of cannabis;
- Documentary evidence related to the purposes and operation of the impugned laws.

41. This procedure – a CQA application followed by the declaration of a *voir dire* – is the method by which the Courts of this and other Provinces have consistently approached prior *Charter*-based challenges to the existing cannabis regimes:

- In *R. v Beren*, 2009 BCSC 429, Crown direct leave application to the Supreme Court of Canada refused, the BC Supreme Court declared a *voir dire* on *Charter* grounds and heard lay and expert evidence establishing a breach of section 7. That *voir dire* took over 50 days in Court and in the result the Court declared portions of the then-prevailing medical exemption scheme (the *MMAR*s) constitutionally invalid, as set out in further detail below;

- In *R v Smith*, 2012 BCSC 544, the BC Supreme Court declared a *voir dire* on *Charter* grounds and heard lay and expert evidence establishing a breach of section 7. That *voir dire* required 20 days and resulted in a

declaration by the trial judge that the then-prevailing medical exemption scheme (the *MMAR*s) were constitutionally invalid, as set out in further detail below. The trial judge's decision was upheld in the BC Court of Appeal and in a *per curiam* decision of the Supreme Court of Canada (that Court also made the decision applicable not just to the *MMAR*s, which had been repealed by the *MMPR*s by the time the Court ruled, but also the *CDSA* and *MMPR,* declaring sections 4 and 5 of the *CDSA* to be invalid to the extent that those sections prevented patients from accessing medical cannabis derivative products;

- In *R v Boehme*, 2016 BCSC 2014, the BC Supreme Court declared a *voir dire* on *Charter* grounds and heard limited lay and expert evidence over the course of 7 days. The Court denied Mr. Boehme's application related to the *MMAR*s on evidentiary grounds, thus supporting the need for sufficient evidence to be called to prevail on *Charter* applications.

- In *R v Howell* 2020 ABQB 385 the Alberta Court of Queen's Bench heard 21 days of evidence relating to the cannabis regulations as they existed at the time of the charges currently before the court in the case at bar.

42. There is a long history of judicial decisions on the issue of the *Charter* and access to cannabis.

The history of cannabis regulation in Canada: Overview

43. As a result of the decision of the Ontario Court of Appeal in *R. v. Parker*[10] the Government of Canada was required, in order to ensure that the *CDSA* was in compliance with the Canadian Constitution and in particular s. 7 of the *Charter*, to put in place a "constitutionally viable medical exemption" to the prohibition against the possession and cultivation of cannabis for medically approved patients. The *Parker* Court determined that failure on the part of the government to provide "reasonable access for medical purposes" as an exemption to the general prohibition violates s. 7 of the *Charter*. The *Parker*

[10] *R. v. Parker* (2000) 49 O.R. (3d) 481 (Ont.C.A.) leave to appeal to the Supreme Court of Canada dismissed) recently reaffirmed by that Court in *Her Majesty the Queen and Matthew Mernagh* (2013) Ont.C.A 67 (February 1, 2013) (leave to appeal to the Supreme Court of Canada dismissed July 25, 2013), and recently referred to with approval by the Supreme Court of Canada in *Carter v. Canada (Atty. Gen.)*, 2015 SCC 5 at paragraph [67].

court found that patients were being forced to choose between their liberty and their health. This decision ultimately led to medical cannabis exemptions pursuant to s. 56 of the *CDSA* and then to the promulgation of the *MMAR* pursuant to section 55 of the *CDSA*. In the result, the *Parker* decision declared section 4 of the *CDSA* invalid and would have declared section 7 invalid had it been before the Court.

44. After the *MMAR* came into effect, various successful s. 7 challenges took place with respect to certain restrictions contained in the *MMAR*. These cases involved restrictions limiting the number of patients a designated producer could produce for, limiting how many production licences could exist at any one location, and limiting possession to "dried marihuana".

45. After the *MMAR*s were repealed by the *MMPR*s, a challenge was brought to the *MMPR*s in Federal Court by a group of patients. This case, *Allard v Canada*, first resulted in the issuance of an injunction preserving some elements of the *MMAR*s (involving personal and designated production of medical cannabis) and, at trial, involved some 20 days of lay and expert evidence on the constitutional issues.[11] In the result Justice Phelan of the Federal Court declared the *MMPR*s to be constitutionally invalid and contrary to section 7 of the *Charter* in their entirety, suspending his declaration for 6 months in order to allow Canada to respond legislatively. Canada did not appeal the decision in *Allard* instead allowing the *MMPRs* to be stricken and promulgating a new, third, exemption regime in their place: the *ACMPRs*. The injunction issued in *Allard* remains in place.

46. In addition, while *Allard* was pending, the BC Supreme Court issued an injunction in *Garber et al v. Canada*, 2015 BCSC 1797, a civil case involving four medical cannabis patients who argued the *ACMPR*s were constitutionally

[11] *Allard v. Canada* 2014 FC 280; *Allard v. Canada* 2016 FC 236

invalid. That injunction preserved the *MMAR* rights of the Garber Plaintiffs pending trial in that matter and the injunction remains in place.

Evidentiary Foundation for Successful Charter Challenges Relating to Cannabis

47. The closest parallel to the respondents' claims comes from *R v Smith* 2015 SCC 34. Although that case dealt with section 7 of the *Charter*, it makes clear that the trier of fact requires an extensive evidentiary record in order to rule on the issues. The Supreme Court of Canada's decision in *Smith* supports the Respondents' position in this litigation in the following ways:

- Directly linking the *CDSA* to the rights violation at issue, irrespective of the government's choice of regulatory exemption regime, confirming that the constitutionality of the *CDSA* provisions are dependent on the constitutionality of any exemption regime thereunder;[12];
- Confirming that all "medically qualified" patients qualify for s.7 *Charter* protection in relation to their individual rights and because the objective of the prohibition (protection of health and safety) is the same in both analyses under s.7 and s.1, that any limitations on the patients' rights suffer from the same disconnect between the prohibition and its object rendering it arbitrary and thereby frustrating the s.1 requirement that the limit on the right be rationally connected to a pressing objective and it is not therefore in furtherance of the public interest[13];
- Holding that evidence sufficient to establish a *Charter* violation need only be reasonable and can consist of a combination of anecdotal evidence from patients and expert opinion evidence[14];
- Holding that "…criminalization of access to the treatment in question infringes liberty and security of the person"[15] because restrictions on access to medical cannabis violate the narrow liberty interest (triggered by the threat of incarceration), the broader liberty interest (by foreclosing "reasonable" medical choices) and the security of the person interest (by forcing patients to choose between "legal but inadequate" treatments and

[12] *R v Smith* 2015 SCC 34 [RFJ] paras 17, 31-33
[13] RFJ paras 28-29
[14] RFJ paras 19-20
[15] RFJ para 20

illegal ones)[16];

- Reiterating that the object of the *CDSA* is protection of health and safety generally and that objective should not be qualified or limited by reference to other Acts or regulations (such as specifically the *Food and Drugs Act* (*FDA*) requirements) that are better described as means to achieve the goals, not goals themselves[17]; and,

- Holding that a restriction on access to medical cannabis which causes harm to health is arbitrary[18]

48. The evidence at the *voir dire* in *Smith* included "expert and personal evidence."[19] Similarly in the case at bar, the respondents' propose to call expert, lay, and elder testimony to create the evidentiary basis for the claim.

49. The case demonstrates that a successful *Charter* challenge on cannabis ground requires an evidentiary record of arguments to demonstrate a threshold infringement of the *Charter*. In *Smith* the government argued that evidence from the patients amounted to merely a subjective preference for an illegal treatment over a legal one and, therefore, only the narrow liberty interest could be implicated.[20]

50. In its discussion of the evidentiary burden, the Court in *Smith* did not establish a precise threshold but agreed with the trial judge and BC Court of Appeal that the expert evidence coupled with "the anecdotal evidence from the medical marihuana patient who testified, did more than establish a subjective preference." Instead, it was sufficient in *Smith* to simply show that that the evidence demonstrated that the patient's choices were reasonable.[21]

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[16] RFJ paras 17-18
[17] RFJ paras 24 and 26
[18] RFJ para 25
[19] RFJ para 19
[20] RFJ paras17-19
[21] RFJ para20.

51. The Respondents seek a *voir dire* to provide the Court with evidence that cannabis and hemp do indeed play a vital role in the life and culture of the Amikwa people.

52. The Respondents now stand charged with serious criminal offences for doing precisely what Canada has failed and refused to do despite the various decisions in this area of law and should be permitted to make full answer and defence to those charges including by being permitted to call evidence at a *Charter voir dire*.

Application of International Instruments in Charter

53. In the recent decision of the Supreme Court of Canada case, Quebec v. 9147-0732 Quebec inc.[22], the Court engaged in an extensive discussion regarding the role of international instruments in Charter interpretation as follows:

> [P. 25] "As we will discuss, the various instruments and case law our colleague Abella J. reviews play different roles in the analysis and receive different weight. Treating them all alike — stating that each is "indispensable" and provides "compelling and relevant interpretive support" (at paras. 100 and 107) — actually risks *undermining* the importance of Canada's international obligations:
>
> The temptation may be great to treat all international law, whether binding on Canada or not, as "optional information" and to disregard the particular interpretative onus that is placed upon courts by the presumption of conformity with Canada's international obligations. There is a significant difference between international law that is binding on Canada and other international norms. The former is not only potentially persuasive but also obligatory. This distinction matters — when we fail to uphold our obligations, we undermine the respect for law internationally. The distinction also provides the rationale for the traditional common law presumption of conformity with Canada's international obligations as well as for treating differently international norms that do not legally bind Canada.

1. [22] Quebec v. 9147-0732 Quebec Inc 2020 SCC 32

+

(J. Brunnée and S. J. Toope, "A Hesitant Embrace: The Application of International Law by Canadian Courts" (2002), 40 *Can. Y.B. Intl Law* 3, at p. 41 (emphasis added); see also J. H. Currie, *Public International Law* (2nd ed. 2008), at p. 260.)"

And

[P. 27] "A principled framework is therefore necessary and desirable, both to properly recognize Canada's international obligations and to provide consistent and clear guidance to courts and litigants. Setting out a methodology for considering international and comparative sources recognizes how this Court has treated such sources in practice and provides guidance and clarity. Given the issue raised in this case, our focus is on the use of international and comparative law in constitutional interpretation."

And

[P. 30] "A useful starting point is Dickson C.J.'s guidance in *Re PSERA*. While it appeared in a dissenting opinion, his approach to international and comparative law has since shaped the way this Court treats these sources. His consideration of the scope of s. 2(*d*) of the *Charter* looked first to Canadian and Privy Council jurisprudence and then to U.S. and international law: p. 335. On international sources specifically, he explained:

The various sources of international human rights law — declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms — must, in my opinion, be relevant and persuasive sources for interpretation of the *Charter*'s provisions.

In particular, the similarity between the policies and provisions of the *Charter* and those of international human rights documents attaches considerable relevance to interpretations of those documents by adjudicative bodies, in much the same way that decisions of the United States courts under the Bill of Rights, or decisions of the courts of other jurisdictions are relevant and may be persuasive. The relevance of these documents in *Charter* interpretation extends beyond the standards developed by adjudicative bodies under the documents to the documents themselves. [Emphasis added; pp. 348-49.]"

And

[P. 31] "Continuing, Dickson C.J. then clarified that *not all* of these sources carry identical weight in *Charter* interpretation, stating that "the *Charter* should generally be presumed to provide protection at least as great as that afforded by similar provisions *in international human rights documents which Canada has ratified*": p. 349 (emphasis added). This proposition has

since become a firmly established interpretive principle in *Charter* interpretation, the presumption of conformity: *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 S.C.R. 386, at para. 65; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245, at para. 64; *Kazemi*, at para. 150; *Divito v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 47, [2013] 3 S.C.R. 157, at para. 23; *Health Services and Support — Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 70."

And

[P. 39] "In this case, the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, and the *International Covenant on Civil and Political Rights*, Can. T.S. 1976 No. 47 ("*ICCPR*"), are both binding on Canada, thus triggering the presumption of conformity. However, we agree with our colleague that neither extends protection from cruel and unusual punishment to corporations."

And

[P. 41] "Another important distinction is between instruments that pre- and post-date the *Charter*. Within the *Big M Drug Mart* approach itself, courts are called on to consider the "historical origins of the concepts enshrined" in the *Charter* when determining the scope of a *Charter* right: p. 344. International instruments that pre-date the *Charter* can clearly form part of the historical context of a *Charter* right and illuminate the way it was framed. Here, whether Canada is or is not a party to such instruments is less important, as the "drafters of the *Charter* drew on international conventions because they were the best models of rights protection, not because Canada had ratified them": L. E. Weinrib, "A Primer on International Law and the

Canadian Charter" (2006), 21 *N.J.C.L.* 313, at p. 324. In this case, then, the context of the English *Bill of Rights*, and the Eighth Amendment is highly relevant as each contained similar — but, importantly, not identical — protections as s. 12, as we have explained above. Similarly, it is entirely proper and relevant to consider the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), which Canada voted to adopt and which inspired the *ICCPR*, the *International Covenant on Economic, Social and Cultural Rights*, Can. T.S. 1976 No. 46, and related protocols Canada has ratified: Weinrib, at p. 317."

54. Accordingly, the International Covenant on Civil and Political Rights[23] and the Universal Declaration of Human Rights[24] are binding in Canada, and are to be applied in an interpretation of Section 35 (1) of the Charter of Rights, as well as the United Nations Declaration on the Rights of Indigenous Peoples[25].

55. Again, the Supreme Court of Canada had some very relevant commentary on the interpretation of Section 35 (1), in R v. Desautel[26], as follows

> [P. 41] "The Crown suggested that insight into the scope of s. 35(1) can be drawn from the *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada*. I agree that drafting history can be relevant to constitutional interpretation (see R. v. Poulin 2019 SCC 47, at para. 78). But in this case it sheds no light. There is nothing in the record to show that the members of the Committee turned their minds at all to the question of noncitizen or non-resident Aboriginal peoples of Canada."

56. This conforms to the use of United Kingdom Debates referenced in the Affidavit of Stacy Amikwabi (aka McQuabbie) at paragraph 50, Exhibit "27".

57. In discussing the Van Der Peet test, the Court, in R v. Desautel commented as follows:

> [P. 55] "I would emphasize that the assessment of continuity, both at the second and third stages, is a highly fact-specific exercise. As McLachlin C.J. wrote in Mitchell, at para. 36, the weighing of evidence in Aboriginal claims "is generally the domain of the trial judge, who is best situated to assess the evidence as it is presented, and is consequently accorded significant latitude in this regard" (see also Côté, at para. 59)."
>
> And
>
> [P. 63] "The Crown and the intervener Attorney General of Alberta submit that this was an error, because continuity requires an ongoing presence in the lands over which an Aboriginal right is asserted. As my discussion of

[23] International Covenant on Civil and Political Rights
[24] Universal Declaration of Human Rights
[25] United Nations Declaration on the Rights of Indigenous Peoples
[26] R v. Desautel 2021 SCC 17 Carswell BC 1186

continuity should make clear, this has never been part of the test for an Aboriginal right. Nor is there any basis for adding it to the test, even where the claimant is outside Canada. As Lamer C.J. explained in Van der Peet, at para. 65, "an unbroken chain of continuity" is not required. Indeed, as McLachlin J. (dissenting, but not on this point) noted in Van der Peet, at para. 249, "it is not unusual for the exercise of a right to lapse for a period of time".”

And

[P. 64] “In effect, we are asked to hold that an Aboriginal right can be lost or abandoned by non-use: a proposition that Lamer C.J. left undecided in Van der Peet, at para. 63. Would accepting this proposition risk "undermining the very purpose of s. 35(1) by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers" (*Côté*, at para. 53; see also McNeil, at pp. 133-35)? It is better not to decide the issue here, as it does not arise in light of the factual findings of the trial judge. The law should be developed through cases where determination of such issues is required, where there is an adequate evidentiary basis, and where the issues are the subject of full submissions and thorough consideration at trial and at the appellate level.”

And

[P. 66] “I am of the view that, *unlike* the right claimed in *Mitchell*, the very purpose of the right claimed by Mr. Desautel is not to cross the border. The mobility right, if it exists, is incidental in this case. Sovereign incompatibility would relate solely to the issue of whether there can be an Aboriginal right to enter Canada — an issue that is not raised here, because Mr. Desautel was not denied entry to Canada. Moreover, this issue was not fully addressed by the courts below. Therefore, the question of whether the appropriate framework is sovereign incompatibility or infringement/justification under *Sparrow* should be left for another day, when the Court has a proper set of facts to answer the question.”

58. One of the most important observations of the Supreme Court in R v. Desautel was as follows:

[P. 68] “Before 1982, common law Aboriginal rights were recognized in Canada under British imperial law (*Calder*, at pp. 328 and 402; *Mitchell*, at

paras. 62-64). Under the imperial doctrine of succession, when Britain took possession of a new territory, the laws in force in that territory were presumed to continue (subject to some exceptions). This doctrine was not limited to practices, traditions or customs that were "integral to the distinctive culture" of the Aboriginal people, as in *Van der Peet* . This suggests, on the one hand, that the test for a common law right may be met even where the *Van der Peet* test is not."

And

[P. 69] "On the other hand, this Court has held that the existence of a common law Aboriginal right is sufficient to ground a s. 35(1) right (*Delgamuukw*, at para. 136). Recognizing common law Aboriginal rights alongside s. 35(1) rights would require the Court to resolve this apparent tension. As Richard Ogden writes, while a legal historian might one day accept that the effect of the *Van der Peet* trilogy was to create a new test, and a new doctrine, the Supreme Court has stated that the doctrine which gives rise to section 35 rights is the same doctrine that gave rise to common law Aboriginal rights.

("'Existing' Aboriginal Rights in Section 35 of the *Constitution Act, 1982*" (2009), 88 *Can. Bar Rev.* 51, at p. 84; see also G. Otis, "Le titre aborigène: émergence d'une figure nouvelle et durable du foncier autochtone?" (2005), 46 *C. de D.* 795, at p. 800.)"

59. In conclusion, the Supreme Court of Canada made the following significant observations:

[P. 85] "When the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada were recognized and affirmed by the enactment of the *Constitution Act, 1982*, this gave rise to an obligation for the courts to "give effect to that national commitment" (R. v. Marshall [1999] 3 S.C.R. 533 ("Marshall No. 2"), at para. 45). As the majority of this Court recently confirmed in *Uashaunnuat*, at para. 24:

Although s. 35(1) recognizes and affirms "the existing aboriginal and treaty rights of the aboriginal peoples of Canada", defining those rights is a task that has fallen largely to the courts. The honour of the Crown requires a generous and purposive interpretation of this provision in furtherance of the objective of reconciliation. [Emphasis added, citation omitted.]"

And

> [P. 86] "In my view, the authoritative interpretation of s. 35(1) of the Constitution Act, 1982, is for the courts. It is for Aboriginal peoples, however, to define themselves and to choose by what means to make their decisions, according to their own laws, customs and practices."

60. The Respondents to the Motion also relied on the legal principles enunciated in Beaver v. Hill[27] by the Ontario Court of Appeal.

61. The Respondents to this Motion for Summary Dismissal rely on the discussion of the Supreme Court of Canada in Nevsun Resources[28] as follows:

> "It was not plain and obvious that the plaintiffs' claims against the defendant based on breaches of customary international law could not succeed. In the absence of any contrary law, the customary international law norms raised by the plaintiffs formed part of the Canadian common law and potentially applied to the defendant. It was not plain and obvious that Canadian courts could not develop a civil remedy in domestic law for corporate violations of the customary international law norms adopted in Canadian law. It was at least arguable that the plaintiffs' allegations encompassed conduct not captured by certain existing domestic torts."

62. The Supreme Court of Canada, in Nevsun, observed as follows:

> P. 2: "The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases."

63. The court, in discussing adjudication of international law by Canadian Courts, observed as follows:

> P. 49: "The decision in Hunt confirms that there is no jurisdictional bar to a Canadian court dealing with the laws or acts of a foreign state where "the question arises merely incidentally" (p. 309). And in Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (S.C.C.), this Court noted that, in certain circumstances, the adjudication of questions of international law by Canadian courts will be necessary to determine rights or obligations within

[27] Beaver v. Hill 2018 ONCA Carswell ONT 16797
[28] Nevsun Resources Ltd. V. Araya 2020 Carswell BC 447 17

our legal system, and in these cases, adjudicating these questions is "not only permissible but unavoidable" (para. 23; see also Gib van Ert, "The Domestic Application of International Law in Canada", in Curtis A. Bradley, ed., The Oxford Handbook of Comparative Foreign Relations Law (2019), 501)."

64. The Court then made observations regarding motions to stake a claim, and stated as follows:

"This Court admonished in Imperial Tobacco that the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. ... Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial. [para. 21]"

65. The Court also discussed how national judges must develop an international perspective in the field of human rights, and states as follows:

P. 70: "Canadian courts, like all courts, play an important role in the ongoing development of international law. As La Forest J. wrote in a 1996 article in the Canadian Yearbook of International Law: "[I]n the field of human rights, and of other laws impinging on the individual, our courts are assisting in developing general and coherent principles that apply in very significant portions of the globe. These principles are applied consistently, with an international vision and on the basis of international experience. Thus our courts — and many other national courts — are truly becoming international courts in many areas involving the rule of law. They will become all the more so as they continue to rely on and benefit from one another's experience. Consequently, it is important that, in dealing with interstate issues, national courts fully perceive their role in the international order and national judges adopt an international perspective."

(Hon. Gérard V. La Forest, "The Expanding Role of the Supreme Court of Canada in International Law Issues" (1996), 34 Can. Y.B. Intl Law 89, at pp. 100-1)"

66. The Supreme Court of Canada then outlined the doctrine of adoption as set out in R v. Hape5 , and concluded as follows:

P. 90: “As these cases show, Canada has long followed the conventional path of automatically incorporating customary international law into domestic law via the doctrine of adoption, making it part of the common law of Canada in the absence of conflicting legislation. This approach was more recently confirmed by this Court in Hape, where LeBel J. for the majority held: “Despite the Court's silence in some recent cases, the doctrine of adoption has never been rejected in Canada. Indeed, there is a long line of cases in which the Court has either formally accepted it or at least applied it. In my view, following the common law tradition, it appears that the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation. The automatic incorporation of such rules is justified on the basis that international custom, as the law of nations, is also the law of Canada unless, in a valid exercise of its sovereignty, Canada declares that its law is to the contrary. Parliamentary sovereignty dictates that a legislature may violate international law, but that it must do so 5 R v. Hape, 2007 2 S.C.R. 18 expressly. Absent an express derogation, the courts may look to prohibitive rules of customary international law to aid in the interpretation of Canadian law and the development of the common law. [Emphasis added; para. 39.]

It is important to note that he concluded that rules of customary international law should be automatically incorporated into domestic law in the absence of conflicting legislation. His use of the word "may" later in the paragraph cannot be taken as overtaking his clear direction that, based on "a long line of cases", customary international law is automatically incorporated into Canadian law. Judicial decisions are not Talmudic texts whereby each word attracts its own exegetical interpretation. They must be read in a way that respects the author's overall intention, without permitting a stray word or phrase to undermine the overarching theory being advanced.”

67. The Court discussed the issue of international law being part of domestic law, when the Court stated as follows:

“Therefore, as a result of the doctrine of adoption, norms of customary international law — those that satisfy the twin requirements of general practice and opinio juris — are fully integrated into, and form part of, Canadian domestic common law, absent conflicting law (Oonagh E. Fitzgerald, "Implementation of International Humanitarian and Related International Law in Canada", in Oonagh E. Fitzgerald, ed., The Globalized Rule of Law: Relationships between International and Domestic Law (2006), 625, at p. 630). Legislatures are of course free to change or override them, but like all common law, no legislative action is required to give them effect (Kindred, at p. 8). To suggest otherwise by requiring legislative endorsement,

upends a 250 year old legal truism and would put Canada out of step with most countries (Verdier and Versteeg, at p. 528). As Professor Toope noted, "[t]he Canadian story of international law is not merely a story of 'persuasive' foreign law. International law also speaks directly to Canadian law and requires it to be shaped in certain directions. International law is more than 'comparative law', because international law is partly our law" (Stephen J. Toope, "Inside and Out: The Stories of International Law and Domestic Law" (2001), 50 U.N.B.L.J. 11, at p. 23 (emphasis in original)."

68. The Court then engaged in a discussion regarding the prevention of violations of jus cogens and norms of customary international law as being unique, and observed as follows:

P. 129 "Effectively and justly remedying breaches of customary international law may demand an approach of a different character than a typical "private law action in the nature of a tort claim" (Ward v. Vancouver (City), [2010] 2 S.C.R. 28 (S.C.C.), at para. 22, citing Dunlea v. Attorney General, [2000] NZCA 84 (New Zealand C.A.)). The objectives associated with preventing of jus cogens and norms of customary international law are unique. A good argument can be made that appropriately remedying these violations requires different and stronger responses than typical tort claims, given the public nature and importance of the violated rights involved, the gravity of their breach, the impact on the domestic and global rights objectives, and the need to deter subsequent breaches."

69. The Court then finally concluded as follows:

> P.132 "Customary international law is part of Canadian law. Nevsun is a company bound by Canadian law. It is not "plain and obvious" to me that the Eritrean workers' claims against Nevsun based on breaches of customary international law cannot succeed. Those claims should therefore be allowed to proceed."

70. All of the issues of poverty and issues arising from apartheid are the causes of this deprivation. Life, liberty and security of the person have been taken away through genocide and apartheid, and the effects are constant economic put-downs to perpetuate the genocide and apartheid. This is not about personal autonomy, but nation and community autonomy. These issues can only be explored through the exposure of the acts of genocide and apartheid.

RELIEF SOUGHT

71. The Respondents submit that they will be able to meet any threshold imposed by this court regarding the necessity of this Charter application. An evidentiary foundation has been provided which more than sufficiently outlines the validity of the claim and which must be ruled on by the trier pursuant to a *voir dire*.

72. Costs of this Application

All of which is respectfully submitted.

DATED at Toronto, Ontario, this 13th day of September, 2022.

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SCHEDULE "A"

1. *R v. Chapman and Honeyman,* 2016 BCPC 275
2. R v Van der Peet
3. R v Sparrow
4. R v Howell
5. R v Smith
6. Quebec v. 9147-0732 Quebec Inc 2020 SCC 32
7. International Covenant on Civil and Political Rights
8. Universal Declaration of Human Rights
9. United Nations Declaration on the Rights of Indigenous Peoples
10. R v. Desautel 2021 Carswell BC 1185
11. Beaver v. Hill 2018 ONCA Carswell ONT 16797
12. Nevsun Resources Ltd. v. Araya 2020 Carswell BC 447 17
13. R v. Hape 2007 SCC 26 Carswell ONT 3563

COURT FILE: CR-19-16; CR-19-020; CR-21-08; CR-19-1190; CR-20-1353; CR-20-8332; CR-21-1202; CR-21-1203; CR-22-12570MO

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