SUPERIOR COURT OF JUSTICE
(West Region)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

MAURICE FRENCH

Applicant

NOTICE OF CONSTITUTIONAL QUESTION

The Applicant, Maurice French, intends to question the constitutional validity of **s**ection 10 of the *Cannabis Act*, S.C. 2018, c. 16 ("*CA*") and the *Cannabis Regulations* SOR/ 2018-144 (*CRs*) and, in the alternative, claim a remedy pursuant to section 24(1) of the *Charter of Rights and Freedoms* (the *Charter*).

The constitutional question is to be argued in the Superior Court of Justice on a date to be determined at the courthouse at 80 Dundas Street, London, Ontario.

The following are the material facts giving rise to the constitutional question:

Section 7

1. The Applicant stands charged with possession of cannabis for the purpose of selling contrary to section 10(2) of the *CA*. The offence is alleged to have

occurred on December 20, 2018.

2. On December 20, 2018 the *CRs* were the regulations governing access to medical cannabis.

3. The *CRs* authorize medical cannabis sellers to send or deliver cannabis, but do not authorize the in-person transfer of cannabis.[1] Because the in-person transfer of cannabis is not authorized by the *CRs* it is prohibited by the *CA*.

4. 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.

5. For aboriginal medical cannabis patients, having your plant medicine sent by mail from a corporation does not constitute reasonable access. It is contrary to the aboriginal approach to traditional healing. It is a western medical approach disconnected from culture, families and community.

6. The aboriginal approach to traditional healing 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

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

way of life and a collective dynamic.

7. There are few medicines that lend themselves more to the aboriginal approach to traditional healing than cannabis. Medical cannabis is a plant medicine, not a pill made in a western biomedicine factory. Aboriginal traditional healing has a strong history with plant medicine.

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

9. Also, it is a psychoactive medicine which also lends itself to the holistic, social and spiritual aboriginal approach to traditional healing. Aboriginal traditional medicine is spiritual, expressed through the land and ceremonies.

10. Also, 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 health care.

11. By disregarding the aboriginal approach to traditional healing and plant medicine, the *CRs* are undermining patient-centred care. Patient-centred care is medical care that is aligned around the values and needs of patients.[2] Patient-centered care is a holistic approach to deliver respectful and individualized care,

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[2] CMA Policy, Achieving Patient-Centered Collaborative Care (2008); World Health Organization, *People Centred Health Care*, November 25, 2007.

allowing negotiation of care and offering choice through a therapeutic relationship in which persons are empowered to be involved in health decisions.[3] Ensuring that patients are involved in and central to the healthcare process is now recognized as a key component in developing high-quality care. Patient-centred care can help improve a patient's health and lower health service burdens.[4] The World Health Organization encourages patient-centered care as it is "empowering people to take charge of their own health rather than being passive recipients of services."[5] There have been numerous health care initiatives in Canada that have sought to implement patient-centred care.[6] When the aboriginal approach to traditional healing and plant medicine is permitted, the patient is empowered and the treatment is more therapeutic.

12. Under the *CRs*, the patient 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 patient 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

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

[4] Zhao, Junqiang, Gao, Shangqian, Wang, Jinfang, Liu, XInjuan, Hao, Yufang. Differentiation between two healthcare concepts: Person-centrered and patient-centrered. International Journal of Nursing Sciences 3(2016) 398-402.

[5] Raina, Rangeel Singh, Thawani, Vijay. Zest for Patient Empowerment. *J. Clin Diagn Res* v.10(6); 2016 June.

[6] These include Setting Priorities for the BC Health System in 2014, Model of Care Initiative in Nova Scotia, Cancer Care Ontario - Person Centred Care Guideline in 2015, Ontario College of Family Physicians Best Advice Guide: Patient Centred Care in a Patient's Home, Local Health System Integration Act in 2006, Alberta Health Act Consultation Reported Putting People First in 2010, Health Care Transformation in Canada by the Canadian Medical Association (CMA) in 2010, and Principles to Guide Health Care Transformation in Canada by CMA and Canadian Nurses Association (CAN) in 2011.

interruptions in access to medicine which undermine patient health and cause unnecessary suffering. Medical cannabis is the only medicine that cannot be accessed in-person and on-demand.

13. The aboriginal medical cannabis patient's only point of contact is a customer service representative who can be reached by phone. That means that instead of an elder or a medicine man 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. Medical cannabis is the only medicine that is required by law to be dispensed by the manufacturer.

14. In addition, 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*.

15. The *CRs* constitute a western biomedicine approach to healing and a particularly flawed one at that. The *CRs* are inconsistent with the traditional aboriginal approach to healing and plant medicine. For aboriginal medical cannabis patients, this is not reasonable access.

Section 35

16. In addition to the facts set out above, the Applicant sets out further facts with respect to the s. 35 argument.

17. The Applicant was dispensing medical cannabis to members of the Anishinaabe people. The Applicant is a member of the Anishinaabe people. The aboriginal approach to traditional healing and plant medicine, discussed above, has been in existence among the Anishinaabe people long before first contact with

> Europeans. It is a practice, custom and tradition that was integral to the distinctive pre-contact aboriginal society. 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.

The following is the legal basis for the constitutional question:

Section 7

1. Section 10 of the *CA* and the *CRs* contravene the section 7 rights of aboriginal medical cannabis patients by prohibiting aboriginals from dispensing medical cannabis in-person to aboriginal patients.

2. Accused persons have standing to challenge the constitutionality of laws under which they are charged whether or not the alleged unconstitutional effects are directed at them.[7]

3. The Supreme Court of Canada has held, as other cases have, that the cannabis prohibition is directly dependant on the constitutionality of the medical regime.[8] As such, the Applicant in this case has standing to challenge the constitutionality of the medical cannabis regime based on the regime's effects on his own rights under the *Charter* as well as the rights of other cannabis patients.[9]

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[7] *R. v. Smith*, [2015] 2 S.C.R. 602 at paras. 11-13; *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295 at paras. 38-41 and 47-48.

[8] *R. v. Smith*, *supra*, at paras. 11-13; referred to with approval by the Supreme Court of Canada in *Carter v. Canada (Atty. Gen.)*, 2015 SCC 5 at para. 67.

[9] *R. v. Parker*, 2000 CanLII 5762 (ONCA), at para 78; *Smith*, *supra*, at paras 11-13.

4. In the seminal cannabis decision of *R v Parker* (2000), 135 O.A.C. 1 the Ontario Court of Appeal determined that the government must provide "reasonable access" to cannabis for medically qualified patients.

Liberty interest #1 – The right not to have one's physical liberty endangered by the risk of physical imprisonment

5. The possibility of imprisonment infringes the right to physical liberty. Any offence that includes incarceration in the range of possible sanctions engages liberty.[10]

6. The right to physical liberty engages medical cannabis patients who must purchase from the black market for any reason including an inability to access their medicine in a legal manner.[11] The right to physical liberty also engages those who provide medical cannabis to patients who are having difficulty with access or are uncomfortable with access. These compassionate helpers also face risk of imprisonment.[12]

Liberty interest #2 – The right to make personal choices about medical care free from state interference

7. The right to liberty protects the right to make fundamental personal choices free

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[10] *Smith*, *supra*, at para 17; *Parker*, *supra*, at para 92; *B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 515.

[11] *Allard*, *supra,* at para 188;

[12] *Smith*, *supra*, at paras. 11, 12 and 17.

from state interference.[13]

8. Justice La Forest, writing for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ on this issue, articulated the liberty interest in *B.(R.) v Children's Aid Society of Metropolitan Toronto*,

> In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30 , Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy, and choice in decisions going to the individual's fundamental being. She stated, at p. 166:
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> > Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.[14]

18. In the context of medical care, the liberty right entitles adults to direct the course of their own medical care.[15]

19. The court in *Carter* noted that the principle that adults should be entitled to direct the course of their own medical care is not just protected by s. 7's guarantee of liberty and security of the person, but also underlies the concept of informed consent. In *Malette v. Shuman*, a leading informed consent case, the

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[13] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 64;

[14] *B.(R.) v Children's Aid Society of Metropolitan Toronto,* [1995] 1 S.C.R. 315 at para. 80.

[15] *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 67; *Manitoba v. C. (A.)*, 2009 SCC 30 at para. 40; *Allard*, *supra*, at paras 187, 189 (FC).

court indicates that the purpose of the doctrine of informed consent is "plainly intended to ensure the freedom of individuals to make choices that accord with their own values regardless of how unwise or foolish those choices may appear to others…[16]

20. In the context of medical cannabis, when a patient is presented with a means of access to medical cannabis, "the simple interference with making a decision about bodily integrity and medical care has been held to trench on liberty."[17]

Security of the Person – The right to make choices concerning one's own body and have control over one's own physical and psychological integrity

21. The right to security of the person is undermined by a criminal prohibition that interferes with a person's choices concerning their physical and psychological integrity.[18] The right to security of the person is breached by a criminal law that restricts a person's reasonable access to medical cannabis reasonably required for the treatment of a medical condition representing a danger to life or health.

22. In *Allard* the court found that "security of the person is engaged, even independently of criminal sanction, by the establishment of a regulatory regime which restricts access to marihuana."

Principles of Fundamental Justice - Arbitrariness

23. A law is arbitrary if it imposes limits on liberty or security of the person that are inconsistent with the law's objectives, have no direct connection to that law's

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[16] *Carter v Canada (Attorney General)*, [2015] 1 S.C.R. 331, at para 67; *Malette v. Shulman* (1990), 67 D.L.R. (4th) 321 (Ont.C.A.) at para. 19.

[17] *Allard*, *supra*, at para 191.

[18] *Smith*, *supra* note 31, at para 18; *Parker*, *supra*, note 31, at paras 92-97, 106 and 110.

objectives, or are unnecessary in order to achieve those objectives. Such a law exacts a constitutional price in terms of rights without furthering the public good that is said to be the object of the law.[19]

24. Where the criminal law intersects with medical treatment, it is a principle of fundamental justice that an administrative structure made up of unnecessary rules, which result in an additional risk to the health of the person, is manifestly unfair and does not conform to the principles of fundamental justice.[20]

25. An arbitrary, overbroad or grossly disproportionate effect on one person is sufficient to establish a breach of s. 7.[21]

26. The objective of s. 10 of the *CA* is the protection of public health and safety.[22]

Principles of Fundamental Justice – Overbreadth

27. A law violates the overbreadth principle if it is rational in its effect on liberty and security of the person in some cases, but in others it overreaches in its effect and is arbitrary.[23] If it were found that there was a rational connection between the objective of the law and some, but not all, of its impacts then the prohibitions would be overbroad.[24]

Section 1

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[19] *Bedford v. Canada* [2013] 3 S.C.R. 1101 at paras 107, 111-112, and 118-119; *Carter, supra,* at para. 83.

[20] *Parker, supra,* at paras 116-117.

[21] *Bedford*, *supra* note 34, at para 123.

[22] *Smith*, *supra*, at para 24.

[23] *Bedford*, *supra*, at paras. 112 - 117.

[24] *Allard)*, *supra*, at para. 267 (FC).

28. On a section 1 analysis the government bears the onus on a preponderance of probabilities and must be rigorously held to this standard.[25] The government must pass all stages of the section 1 analysis or the legislation fails.

    i. The legislative objectives must be pressing and substantial to warrant overriding a constitutional right; and

    ii. The means chosen to attain those objectives must be proportional to the ends, in that:

        (a) the limiting measures must be carefully designed or rationally connected to the legislative objective;

        (b) the limiting measures must impair the right as little as possible; and

        (c) there must a proportionality between the deleterious effects of the offending legislation and the legislative objective.[26]

29. The legislative objective is as set out above the protection of health and safety.[27]

30. The means chosen to attain the legislative objective are not proportionate to the ends. The limiting measures are not rationally connected to the legislative objective. The limiting measures do not impair the right as little as possible. There was no proportionality between the deleterious effects of the offending legislation and the legislative objective.

31. Section 1, in contrast to section 7, looks at whether the negative impact on the rights of individuals is proportionate to the overarching public interest, not just

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[25] *R*. v. *Oakes*, [1986] S.C.J. No. 7 at paras 70-71.

[26] *Ibid* at paras 73-74.

[27] *Smith*, *supra*, at para 24.

the law's purpose. In this case, like *Smith*, the law's purpose and the overarching public interest are the same, health and safety. As such, the law must fail the section 1 test for the same reason it failed the section 7 rational connection test. If the law is not rationally connected to its objective then the limiting measures are not carefully designed or rationally connected to that objective. As well, the limiting measures do not impair the right as little as possible. The law must fail the proportionality test under section 1.[28]

United Nations Declaration on the Rights of Indigenous Peoples

32. 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.

Section 35

33. Section 10 of the *CA* contravenes s. 35 of the *Charter* and is of no force and effect with respect to the Applicant by virtue of section 52 of the *Charter*.

34. Section 10 of the *CA* infringes the Applicant and his community's aboriginal right to traditional healing which includes selling and trading plant medicine within his aboriginal community. This right has been in existence among the Anishinaabe people long before first contact with Europeans.

35. The test under section 35(1) of the *Charter* requires:

1st – That the Applicant is acting pursuant to an existing aboriginal right;
2nd – That the right has a reasonable degree of continuity with the pre-contact

[28] *Smith*, *supra*, at para 29; *Bedford*, *supra*, at para. 125.

practice; and

3rd – Any possible justification for infringement is considered.[29]

36. 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. The practice, custom or tradition made the culture of the society distinctive. [30] A court considering such an aboriginal right must take into account the aboriginal perspective, but do so but do so in terms that are cognizable the non-aboriginal legal system.[31]

37. The nature of s. 35 suggests that it be construed in a purposive way. 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.[32]

38. In interpreting section 35, where there is any doubt or ambiguity as to what falls as to what falls within the scope and definition, such doubt or ambiguity must be resolved in favour of aboriginal peoples.[33]

DATED at Toronto, this 16th day of April 2022.

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[29] *R. v. Van der Peet,* [1996] 2 S.C.R. at para. 2, 64-65.

[30] *R. v. Van der Peet,* [1996] 2 S.C.R. at paras. 46 and 55.

[31] *R. v. Van der Peet, supra*, at para. 49.

[32] *R. v. Sparrow,* [1990] 1 SCR 1075 at para. 56.

[33] *R. v. Van der Peet, supra*, at para. 25.

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