Court of Queen's Bench of Alberta

Citation: Moms Stop the Harm Society v Alberta, 2022 ABQB 24

Date: 20220110
Docket: 2103 11484
Registry: Edmonton

Between:

Moms Stop the Harm Society and Lethbridge Overdose Prevention Society

Plaintiffs/Applicants

- and -

Her Majesty the Queen In Right of Alberta

Defendant/Respondent

Reasons for Decision
of the
Honourable Mr. Justice R. Paul Belzil

The Action

[1] On August 13, 2021, Moms Stop the Harm Society (MSTH) and Lethbridge Overdose Prevention Society (LOPS) filed a Statement of Claim against Her Majesty the Queen in Right of Alberta (Alberta), wherein, the Plaintiffs seek an Order declaring portions of a Regulation (the challenged Regulation) pertaining to the consumption of illicit drugs at Supervised Consumption Sites (SCS) to be constitutionally invalid and inoperable and of no force and effect as a result of alleged breaches of the Canadian *Charter of Rights and Freedoms.*

The Parties

[2] MSTH is described in paras 7 and 8 of the Statement of Claim as follows:

> The Plaintiff Moms Stop the Hann Society ("MSTH") is a federally registered society that comprises of the family members of individuals who live with opioid use disorder in Alberta and other parts of Canada who are experiencing harms related to or have died as a result of the opioid overdose epidemic.
>
> MSTH exists to advance the interests of people living with opioid use disorder, including advocating for policies and laws concerning substance use to embody a harm reduction approach that centers those who consume substances and their perspectives in any decision making. MSTH has advocated for legislative changes at all levels of government to make it easier to establish and access supervised consumption services and other harm reduction oriented treatment options for people who use opioids and other substances in Alberta.

[3] LOPS is described in para 10 of the Statement of Claim:

> The Plaintiff Lethbridge Overdose Prevention Society ("LOPS") is a society registered in Alberta that provides supervised consumption services to people living with opioid use disorder in Lethbridge.

The Interlocutory Injunction Application

[4] On August 26, 2021, the Plaintiffs filed an Interlocutory Injunction Application seeking an Order suspending portions of the challenged Regulation pending the outcome of the action.

[5] I heard the Interlocutory Injunction Application on December 15 and December 16, 2021.

[6] The parties agree on the test to obtain an Interlocutory Injunction, but disagree on whether the test has been satisfied.

[7] In addition to the issue of whether the test has been satisfied for the granting of an Interlocutory Injunction, the application engages the issues of Standing and the admissibility of some portions of evidence tendered by the Plaintiffs in support of the application.

[8] Given that I am not the assigned Trial Judge, and the Interlocutory Injunction Application is being heard at a very early stage of the litigation, it bears noting that my decision relates only to the Interlocutory Injunction Application and it not intended to fetter any decision which the Trial Judge may make.

[9] In particular, the Statement of Claim uses the terms “opioid use disorder”, “substance use disorder” and “opioid overdose epidemic”. For the sake of convenience, and for the purposes of these reasons only, I will use the generic term “opioid overdose epidemic”. The trial judge will decide if illicit drug use constitutes a medical disorder and whether illicit drug use constitutes an epidemic.

Factual and Legislative Background

[10] Coreen Everington is the Executive Director of the Addiction and Mental Health Branch for the Province of Alberta. Alberta’s policy towards addiction is succinctly summarized in her affidavit, filed October 29, 2021 at paragraph 12:

> Alberta's approach to addiction is recovery oriented- it is premised on the idea that recovery from the disease of addiction is *possible* for everyone, but that the path to recovery is different for each person and depends on his or her individual needs and choices. This approach requires a coordinated, recovery-oriented system of care, which Alberta has defined as:
>
> > a coordinated network of community-based services and supports that is person-centered and builds on the strengths and resilience of individuals, families, and communities to achieve a life free of illicit drugs and improved health, wellness, and quality of life for those with or at risk of alcohol and drug problems or mental health issues.

[11] Kenton Puttick is the Director of the Legislation and Policy Units (LPU) in the Addiction and Mental Health Branch in the Ministry of Health for the Province of Alberta. Alberta's regulatory scheme respecting addiction, is outlined in his affidavit filed October 29, 2021 as follows:

> 2. In the course of my employment, I was involved with implementing the *Mental Health Services Protection Act,* RSA 2018, c M-13.2 **("Act"),** and with developing the *Mental Health Services Protection Regulation,* Alta Reg 114/2021 **("Regulation")** and the Recovery-oriented Overdose Prevention Services Guide **("Guide").**
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> ...
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> 6. One focus of the LPU was to create standards for documenting clients and developing means of tracking the outcomes of referrals from supervised consumption service providers to other health and social services, including providers of addiction treatment and recovery-oriented services. This work also involved creating standards for protecting the privacy of clients.
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> 7. In 2020, The LPU, under my supervision, conducted a thorough literature review including a review of existing policies and procedures, The Findings suggested that the confidential collection of person health numbers ("PHNs") was the least intrusive means of collecting health information that would not create undue barriers to clients.
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> ...
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> 11. Once the exemption from these requirements expires, service providers will have to implement procedures that include:
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> - collecting PHNs on intake;
> - assisting clients to obtain a PHN or Alberta Health Care Insurance Plan **("AHCIP")** coverage, returning to the client documents used to verify identity when doing so, and

immediately destroying any copies of identity documents when no longer needed;

- telling clients the limited purposes in the *HIA* authorizing the collection and use of a PHN; and
- recording PHNs in the service provider's database.[6]

12. Alberta Health held an information session with service providers on June 24, 2021, which I co-chaired with Monique Gervais-Timmer, who is the statutory director under the Act.

…

16. A PHN also serves as an option for identity verification for numerous social and income support programs available through myAlbertaSupports.Alberta.ca. One of the goals of the Guide is to make 'it easier for clients to access these supports.

17. Asking clients if they have a PHN at the point of intake, even without making services conditional on providing a PHN, assists supervised consumption service provider staff to support clients in need of assistance as quickly as possible and transition them to the care they need.

[12] On page 12 of the *Guide,* the following paragraph is found:

"Clients should not be refused service while they are in the process of looking up a PHN or obtaining/renewing AHCIP coverage."

[13] Noticeable by its absence, is any reference in the *Guide* that clients will not be refused access at SCS if they refuse to provide a PHN or do not have one, and are not interested in obtaining one.

[14] Mr. Puttick was cross-examined on his affidavit on November 17, 2021.

[15] At pages 45 and 46 of the transcript, the following passages appear:

Q: And then what if they say no to that, they don't want to?

A: The guide does not provide guidance on that. We have provided written guidance to service providers and verbal guidance on this very question, and they may not refuse access to clients based on a refusal. If a client refuses, they get to still partake in the service.

[16] Mr. Puttick emphasized that the *Guide* is Alberta's policy. The importance that he attaches to the Guide is found in the following passages at pages 46, 47 and 53:

Q: So, like, what is the policy? Like, you made the policy. So is that not a requirement? It's just at one point you have to ask the patient, and then from thereon in if they say no, you don't have an ongoing obligation to collect that information?

A: I am not going to give you a more tight policy here during this cross-examination than what already exists within the guide. The guide is the policy.

Q: Yes, but it's not clear the policy about what happens if someone refuses. When they come back the next time, are they asked for a PHN? Are they required to provide a PHN?

A: So the way our compliance and -- our compliance shop is working alongside the regulation and guide, is if it says something in the regulation and guide, they're held to comply with that. If it doesn't say something in the regulation guide, they're not held to comply with it.

...

Q: And the only thing that's mandatory is the request for a PHN at intake?

A: That - - as I said, I'm not going to add or remove from what's in the guide.

Q: Right. But what you read to us indicates that the request for a PHN is mandatory at intake?

A: Right. Yeah.

[17] Thomas Mountain is the Senior Operating Officer, Addiction and Mental Health, Allied Health, Rural Health (West) with Alberta Health Services South Zone. In his affidavit, filed October 29, 2021, at paragraphs 8-12, he outlined the practice at LOPS as follows:

8. Since opening, the Lethbridge OPS has had a "soft practice" of requesting the Personal Health Numbers (PHNs) of clients as part of completing the intake form.

9. Alberta Health released its "Recovery-oriented Overdose Prevention Services Guide" in June 2021. A copy of this Guide is attached hereto as **Exhibit 2.** The purpose of this guide is to outline certain compliance requirements by the Government of Alberta for SCS and OPS.

10. Page 12 of the guide states "service providers must have policies and procedures in place respecting the collection and use of each client's personal health number (PHN). This ensures clients can be easily referred to a continuum of services within the healthcare system." This requirement was originally to come into effect on September 30. 2021 but its implementation has now been postponed to January 3. 2022.

11. In anticipation of the original deadline. the Lethbridge OPS renewed its emphasis on its practice of requesting PHNs on July 6 2021. A copy of the current practice for requesting PHNs at the Lethbridge OPS is attached as **Exhibit** 3. In short. AHS staff ask all clients for a PHN at intake. However. if a client refuses to provide one, they are still provided service at the OPS. No one is turned away for a failure to provide a PHN. This process is not anticipated to change when the Guide comes into effect on January 3. 2022.

12. As of October 2021, approximately two thirds of clients of the Lethbridge OPS do not have a PHN on file. I am informed that as far as the Lethbridge OPS staff are aware. no client has ever walked away without receiving service due to being asked to share a PHN.

[18] During argument, I requested that the implementation date for the challenged Regulation be extended from January 3, 2022 to January 31, 2022, which Alberta agreed to.

Standing

A. LOPS

[19] LOPS asserts that it has both a direct interest standing and public interest standing.

[20] Alberta concedes that LOPS, which provides a supervised consumption site in Lethbridge, is directly affected by the challenged Regulation and has a direct interest standing to pursue this action.

[21] Alberta does not agree that a party can have both a direct interest standing and a public interest standing and notes that there is no case authority supporting this proposition. I agree with Alberta's position and conclude that LOPS has a direct interest standing only.

B. MSTH

[22] Alberta submits that MSTH is not directly affected by the challenged Regulation and therefore lacks direct standing. I agree.

[23] The issue then becomes whether MSTH has a public interest standing.

[24] In ***Canada (Attorney General) v. Downtown East side Sex Workers United Against Violence Society***, 2012 SEC 45, the Court reviewed the law pertaining to public interest standing.

[25] At paragraphs 2 and 51 the following passage appears:

> 2. In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court...
>
> 51. The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable. For adversarial determination. Courts should take a practical and pragmatic approach. The existence or other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter arc under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues...

[26] Alberta concedes that MSTH has raised a serious justiciable issue and has a genuine interest in the litigation.

[27] However, Alberta disputes that the claim by MTSH is a reasonable and effective way to bring this matter before the Court.

[28] LOPS will fully advance this claim. I do not accept that MSTH could raise any additional issues which will not be raised by LOPS, nor do I accept that MSTH could present additional evidence over and above the evidence which will be presented by LOPS.

[29] In the result, MSTH is denied public interest standing for the Interlocutory Injunction application. The Trial Judge will decide if MSTH has standing in the action.

Evidence of the Applicants

[30] The Applicants filed a number of supporting affidavits, which are listed alphabetically as follows:

1) "TF"- Sworn August 21, 2021

[31] TF is a user of illicit drugs, who deposes that he will not access SCS if he is required to provide personal information, including a PHN. He further deposes that his position will remain unchanged even if he is more likely to die while using illicit drugs outside of SCS.

2) Dr. Sahil Gupta – Sworn August 31, 2021

[32] Doctor Gupta is a Physician in Toronto. His practice is focused on inner-city populations. He deposes that implementing the requirement to disclose personal information will result in users refusing to access SCS, resulting in users sustaining medical harm.

3) Dr. Elaine Hyshka – Sworn August 21, 2021 & November 8, 2021

[33] Doctor Hyshka is a Canada Research Chair in Health Systems Innovation and is an Assistant Professor at the University of Alberta's School of Public Health. She attached to her affidavits, a large volume of research articles and data which conclude, that requesting information at SCS will discourage use of SCS, resulting in medical harm to users.

4) Dr. Bonnie Larson – Sworn August 31, 2021

[34] Doctor Larson is a Family Physician with a Certificate of Added Competence in Addictions Medicine.

[35] She deposes that if the *Guide* is implemented, many users will no longer access SCS, putting them at higher risk of death or disability, resulting from hypoxic brain injury.

5) Claire O'Gorman – Sworn August 31, 2021

[36] Ms. O'Gorman is a Registered Nurse and has a Masters Degree in Public Health. She worked at the Safeworks Supervised Consumption Site at the Sheldon M. Chumir Health Centre in Calgary, as a Program Manager between 2019- 2020.

[37] She deposes that if the *Guide* is implemented, large numbers of drug users will no longer access SCS and, that requesting a PHN, even on a voluntary basis, establishes a barrier to accessing them.

6) Bernadette Pauly- Sworn August 31, 2021

[38] Bernadette Pauly of Victoria, BC is a Registered Nurse, with a PHD and is a recognized community engaged scholar in Canada, in the area of health equity, harm reduction and substance use. She deposes that requesting a PHN will deter some drug users from accessing SCS, exposing them to medical harm.

7) Timothy Slaney – Sworn August 30, 2021

[39] Timothy Slaney is a Director of LOPS. He deposes that the *Guide* will deter substance users from accessing SCS, exposing them to medical harm.

Limited Use of Evidence for the Applicants

[40] No attempt was made to qualify any of the affiants as experts qualified to be provide opinion evidence on the Interim Injunction Application.

[41] The trial judge will determine whether any of the affiants will be qualified to provide opinion evidence at trial and if so, to what extent.

[42] Counsel for Alberta submits that some of the affidavits contain inadmissible hearsay and some contain inadmissible comments on the legality and propriety of the challenged Regulation.

[43] These issues will also be resolved by the trial judge.

[44] For the limited purpose of deciding this Interlocutory Injunction application, I am prepared to accept that some admissible evidence will be presented at trial supporting the position of the Applicants, that the challenged Regulation will create barriers to users accessing SCS.

The Tri Partite Test

[45] It is common ground between the parties that the granting of an Interlocutory Injunction is a discretionary remedy, which engages the tri partite test affirmed in ***RJR- MacDonald Inc. v Canada (Attorney General)***, [1994] 1 SCR 311:

[46] 1) Is there a serious issue to be tried?

2) Will the applicants suffer irreparable harm if the Injunction is not granted?

3) Does the balance of convenience favour granting the Injunction, that is, which of the parties will suffer the greater harm from granting the Injunction or refusing the Injunction?

1) Is there a serious issue to be tried?

[47] It is well established that the threshold of this part of the test is low and that the issue of public interest in the enforceability of validly enacted legislation is properly considered at the balance of convenience stage.

[48] In ***AC and JF v Alberta***, 2021 ABCA 24 at paragraph 27, it was observed that the low initial threshold does not preclude the Court considering the relative strength of the Plaintiffs' claim in deciding whether to grant the requested relief.

[49] Alberta concedes that there is a serious issue to be tried.

2) Will the Applicants suffer irreparable harm if the Injunction is not granted?

[50] The issue of irreparable harm is viewed from the perspective of the applicants and refers to the nature of the harm suffered and not its magnitude. It is harm which either cannot be quantified in monetary terms or it cannot be cured.

[51] The applicants argue that in the context of this case, irreparable harm is established if one or more illicit drug users refuse to attend at SCS if a requirement is in place to request a PHN, even on a voluntary basis, resulting in these individuals being exposed to serious adverse medical consequences, some of which may result in death.

[52] Quantifying irreparable harm in this case is extremely challenging which is often the situation which arises in *Charter* cases. In particular, quantifying the number of illicit drug users who may be impacted by the challenged Regulation is impossible to determine with any degree of precision.

[53] As noted, although I have been provided with a large volume of evidence supporting the position of the applicants, it is not appropriate for me to supercede the role of the trial Judge, who will determine issues of admissibility and the weight to be attached to evidence. Having said this however, it is still necessary for me to consider the evidence for the limited purpose of deciding this Interlocutory Injunction application.

[54] With these limitations in mind, I am satisfied that the applicants have met the burden of establishing that irreparable harm will occur to some illicit drug users if the Interlocutory Injunction is not granted.

3) Does the balance of convenience favour granting the Injunction, that is, which of the parties will suffer the greater harm from granting the Injunction or refusing the Injunction?

[55] In ***Harper v Canada (Attorney General),*** 2000 SCC 57, the Court observed at paragraph 5 that the applications for Interlocutory Injunctions against the enforcement of still-valid legislation raise special considerations:

> Applications for interlocutory injunctions against enforcement of still-valid legislation under constitutional attack raise special considerations when it comes to determining the balance of convenience. On the one hand stands the benefit flowing from the law. On the other stand the rights that the law is alleged to infringe. An interlocutory injunction may have the effect of depriving the public of the benefit of a statute which has been duly enacted and which may in the end be held valid, and of granting effective victory to the applicant before the case has been judicially decided. Conversely, denying or staying the injunction may deprive plaintiffs of constitutional rights simply because the courts cannot move quickly enough: R. J. Sharpe, *Injunctions and Specific Performance* (loose-leaf ed.), at para. 3.1220.

[56] In ***AC and JF v Alberta***, at paragraph 19, the competing interests were expanded upon:

> Cases where the court is asked to grant interim relief enjoining the operation of apparently validly enacted legislation pending a trial on the constitutionality of that legislation present a unique challenge. The court is asked to make an order temporarily suspending legislation before it can determine that the plaintiff has

> established a violation of rights, and in the absence of a fully formed record. Granting the interim relief risks offending the public interest in the enforcement of legislation. Failing to grant the relief risks a continuing breach of the plaintiff's asserted constitutional rights, which itself is contrary to the public interest. These competing but important interests must be balanced.

[57] The public interest is an important issue in applications of this type and is considered at the balance of convenience stage.

[58] In ***RJR- MacDonald Inc. v Canada (Attorney General)*** at pages 344, 346 and 347 the following passages succinctly describe the heavy burden faced by private applicants who allege that public authorities are not respecting the public interest and the limited role the *Charter* plays in determining the public interest:

> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.
>
> In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. 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.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

[59] In ***Harper v Canada (Attorney General),*** at paragraph 9, it was observed that valid legislation is presumed to preserve a public good:

> Another principle set out in the cases is that in considering the grant of an interlocutory injunction suspending the operation of a validly enacted but challenged law, it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed. As Sopinka and

Cory JJ. stated in *RJR--MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, at pp. 348-49:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law -- in this case the spending limits imposed by s. 350 of the Act -- is directed to the public good and serves a valid public purpose. This applies to violations of the s. 2(*b*) right of freedom of expression; indeed, the violation at issue in *RJR--MacDonald* was of s. 2(*b*). 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. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.

[60] The issue is then reduced to whether the case for the applicants falls within the category of “clear cases”, which would justify granting an Interlocutory Injunction against the enforcement of a law on the grounds of alleged unconstitutionality.

[61] In my view, the answer is no.

[62] The opioid overdose epidemic raises a number of very complex issues. Public Health Authorities in Alberta are struggling to respond to this epidemic, as are Public Health Authorities in every other Province and Territory in Canada.

[63] The challenged *Regulation* is part of an overall strategy to respond to the opioid overdose epidemic within the broader framework of the healthcare system.

[64] Whether one agrees or disagrees with this approach, it cannot be denied that Alberta is responding with a defined policy and not ignoring the issue.

[65] SCS operate under the protection of s. 56.1 of the *Controlled Drugs and Substances Act* which provides for an exemption from the application of the *Act* allowing for the consumption of prohibited drugs.

[66] The applicants argue that the challenged *Regulation* encroaches on federal jurisdiction in criminal law by allegedly undermining the legislative purpose of s. 56.1, thus engaging the issue of paramountcy. I do not agree.

[67] Legislative responsibility for health is shared between the Federal Government and the Provinces with the delivery of health services, falling squarely within provincial jurisdiction.

[68] If this Interlocutory Injunction application succeeded, Alberta’s ability to formulate addictions policy, pending the outcome of the action, would be severely restricted. As noted

above, at the Interlocutory stage of the proceedings, this must be assumed to be contrary to the public interest.

[69] LOPS has not met the burden of demonstrating that the suspension of the challenged *Regulation* would provide a public benefit greater than the public interest provided for in the challenged *Regulation*.

[70] In the result, I conclude that the balance of convenience does not weigh in favour of granting the Interlocutory Injunction and accordingly, the application is dismissed.

Heard on the 15th and 16th day of December, 2021.
Dated at the City of Edmonton, Alberta this 10th day of January, 2022.

R. Paul Belzil
J.C.Q.B.A.

Appearances:

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Aleisha Bartier and Nathaniel Gartke
Alberta Justice
for the Defendant/Respondent