PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Chartrand*, 2020 NSPC 26

Date: 20200302
Docket: 8296683, 8296684
Registry: Kentville

Between:

Her Majesty the Queen

v.

Heidi Chartrand

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	March 2, 2020, in Kentville, Nova Scotia
Decision	March 2, 2020
Counsel:	Michael Taylor, for the Federal Crown Heidi Chartrand, self-represented

By the Court:

Overview:

[1] Ms. Chartrand seeks leave to enter into a *voir dire* to advance what is often called a *Constitutional Challenge* pursuant to the *Constitutional Questions Act*, RSNS 1989, c 89. She would then present evidence and argument in support of seeking an order declaring the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, (the "*CDSA*") and the *Access to Cannabis for Medical Purposes Regulations*, SOR/2018-144, Part 14, (the "*ACMPR"*) inconsistent with s. 7 of the *Charter of Rights and Freedoms* (the "*Charter*"), and of no force and effect pursuant to sections 24 and 52(1) of the *Charter*.

[2] The Crown, after reviewing all the materials filed by Ms. Chartrand, argues leave should not be granted. On March 2, 2020, I provided an oral decision on a busy court day that also saw Ms. Chartrand bring two *Garofoli* applications. I advised that my written reasons, subject to editing *inter alia*, would follow in short order. These are my complete reasons.

Decision:

[3] After carefully considering all of the materials filed by both parties, including a large number of affidavits, news articles, case law, and today hearing the oral submissions, I conclude Ms. Chartrand will not be permitted to enter into a *voir dire* to raise the *Constitutional Questions* she has posed. The arguments as described by her have been, by and large, considered and rejected by other courts in whose reasons I find support for my own, and, even if interesting, her arguments find no support for a remedy based on her intended witness list and the filed "can say" documents.

Background and Overview:

[4] Ms. Chartrand is charged with two counts of possessing marijuana and marijuana resin for the purpose of trafficking contrary to sections 4(1) and 5(2) of the *CDSA*. It is alleged that she made the Schedule II substances available for sale at her business the Higher Living Wellness Centre Inc. ("Higher Living").

[5] Ms. Chartrand filed her original notice on July 9, 2019 and an amended one followed in December 2019. The amended motion document, undated and unsigned, indicates December 11, 2019 may be the date it was prepared. Dealing first with the latter notice, information sought to be amended included adding a request for an order declaring, under s. 24(1) of the *Charter*, that the *ACMPR*

violates s. 7 of the *Charter*, and seeking to have sections 4(1) and 5(2) of the CDSA struck down in accordance with s. 52(1) of the *Constitution Act, 1982*. In that respect, the amendment did not differ from the original notice.

[6] Ms. Chartrand also clarifies that she is seeking an order granting appropriate and just relief pursuant to s. 24(1) of the *Charter* including without limitation an acquittal or judicial stay of her charges under the *CDSA* sections 4 and 5. She is also seeking a "writ of mandate" to "order an amendment to the *Canada Health Act* to no longer allow the major hospitals and medical clinics in Canada to delete Canadian citizens' health records which they are currently allowed to do after ten and seven years".

[7] While there is no *Introduction* section in her original application, she asks to supplement it by adding that she is not satisfied with "the current state of Health Canada's *ACMPR* medical cannabis access with emphasis of all critique being upon product safety not taking into consideration those that are hypersensitive that experience various adverse reactions too than (sic) unnecessary and unjustified impurities in licensed producer products". She also wishes to add to her intended evidence a list of hyperlinks dealing with approved pesticides and fungicides of concern. The Crown argues none of this information is properly before the court, and for reasons that will follow, I agree.

[8] Under *Grounds for Remedy* she asks the Court to agree that medical records not being kept after ten and seven years requires patients to go back to their doctors and risk the potential of cancer from x-rays and MRIs, as well as stress, to prove their medical situation in order to start the process of becoming legally exempt under the *ACMPR*.

The Requirement for Notice:

[9] Notice to the Nova Scotia Attorney General is an important first step in considering this application and is required under the *Constitutional Questions Act, supra*. While the matter had been scheduled for an earlier date, an adjournment was necessary when it became clear Ms. Chartrand had failed to provide notice. As I addressed with Ms. Chartrand last day, her use of pre-populated court forms, presumably used by others advancing similar issues in courts across Canada, led the Court and the Crown Attorney to conclude she had done so. In her eight-page July 9, 2019 *Notice of Constitutional Question,* the back indicated copied service upon the Crown Attorney's Office; the Attorney General of Nova Scotia: Constitutional Law Division; the Public Prosecution Service of Canada: Nova Scotia; the Court Clerk's Office; and the Trial Coordinator's Office.

[10] The Supreme Court of Canada considered the mandatory nature of these notice requirements in *Eaton v. Brant County Board of Education*, 1997 CanLII 366 (SCC), [1997] 1 S.C.R. 241. It held the notice provisions require litigants to file notice of a constitutional question for two central purposes: extending a full opportunity to governments to defend their legislation and ensuring that an evidentiary record that is the result of thorough examination is before the Court.

[11] As an aside, the body of Ms. Chartrand's form of notice also directed it to the attention of the presiding Justice in the Nova Scotia Court of Justice in Halifax. It was however correctly provided to this Judge of the Nova Scotia Provincial Court sitting in Kentville having jurisdiction over Ms. Chartrand.

[12] Since the last appearance it appears Ms. Chartrand has now served proper notice to the Province. It has elected not to appear on the matter.

Release of a Related Decision:

[13] At the time the matter was adjourned, the Crown advised the Court and Ms. Chartrand that a similar constitutional challenge, brought by an individual in the Nova Scotia Supreme Court sitting in Halifax, had recently been denied. A copy of that decision, subject to a section 539 *CC* publication ban, was later provided to the Court and Ms. Chartrand. Today the Crown clarified that the decision is also

subject to a s. 839 *CC* publication ban, and Ms. Chartrand chose not to rely on it despite invitation to do so in the interest of her fair trial rights.

The Jurisdiction of the Provincial Court:

[14] Before reviewing my reasons for decision, it is useful to also address the jurisdiction of this court. The Provincial Court obtains its jurisdiction from statute, and as such may consider the constitutionality of laws, although it is not empowered to make a formal declaration that a law is of no force and effect pursuant to s. 52(1) of the *Constitution Act*, 1982. The Supreme Court of Canada made that clear in *R. v. Lloyd*, 2016 SCC 13, at para. 19:

> [19] The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.

[15] Taking direction from *Lloyd*, *supra*, I am unaware of any reported Nova Scotia Provincial Court decisions finding either section 4(1) or 5(2) of the *CDSA* or the *ACMPRs* constitutionally invalid. As a result, it is not open to me to decline to apply the law for reasons previously given in decisions from my bench. More importantly, there is likewise no support for Ms. Chartrand's arguments found in provincial case law. Further, there are no reported decisions from courts of

inherent jurisdiction aiding her arguments. Instead there are reported decisions from across Canada rejecting similar applications, which I will review. But first I will address in more detail the questions posed by Ms. Chartrand in her *Notice*.

(i) The Constitutional Questions:

[16] Ms. Chartrand states the *Constitutional Questions* as follows:

(1) Should the impugned definition be declared to be of no force and effect pursuant to section 52 of the *Constitution Act, 1982*?

(2) Further, is the prohibition on storefront cannabis distribution to medical patients in the context of medical cannabis dispensaries or compassion clubs, contrary to the *ACMPR* and *CDSA*?

(3) Do the *ACMPR* and the *CDSA* violate s. 7 of the *Charter* in so far as they fail to provide storefront and in person access to medical cannabis to approved patients?

(4) Does filming police warrant a street check?

(5) Does filming police activities on a separate piece of property equate to obstruction of justice?

[17] The last two items involving filming police activities, while officers were presumably executing a warrant, will not be dealt with by this Court in the context of a *Constitutional Question*. I add, Ms. Chartrand is not charged with obstruction of justice and filming is not related to the charges arising from the execution of a presumptively valid warrant.

[18] The Crown Attorney argues that the *Constitutional Questions* cannot be properly considered without support from expert testimony and the matter should not proceed because the Court cannot render decision on such important issues lacking such an evidentiary foundation. He says it is not clear from the materials filed that Ms. Chartrand's customers, friends, and others can testify about anything other than their own health concerns and explain that they wish to obtain marijuana products from Ms. Chartrand's business rather than under, what they perceive to be, a more cumbersome process set out by Health Canada. Addressing the grounds supporting her *Constitutional Questions* can shed light on the difficulties inherent in basing such an application on a lack of proper evidentiary support for same.

(ii) Grounds:

[19] The grounds for the application include a *precis* advising the Court that Ms. Chartrand is the "alleged owner and operator of a medical cannabis dispensary that

provides medically qualified patients with Charter mandated reasonable access to medical cannabis and medical cannabis derivative products". Offering more certainty, it confirms "Ms. Chartrand operated a small medical cannabis dispensary called Higher Living Wellness Centre Inc. where residents of her town were able to interact directly with cannabis medicine and a safe and private place for medical cannabis patients to access their medicine".

[20] Backtracking for a moment, there is no dispute Ms. Chartrand has standing to bring the application, and I need not set out in detail the relevant law with respect to standing. Suffice to say, just as Mr. Smith in *R. v. Smith,* 2015 SCC 34, was entitled to challenge the *MMARs,* Ms. Chartrand has standing to bring her application because she is subject to the risk of imprisonment if convicted of the offences and the section 7 *Charter* right to liberty is engaged.

[21] Ms. Chartrand says, "section 7 of the Charter protects the rights of all Canadians to have reasonable access to medicine of their choice to treat ailments or symptoms of ailments". She is correct that s. 7 of the *Charter* protects the rights of all Canadians to be free from prosecution under laws which are unconstitutionally vague, overbroad, and arbitrary, especially laws which are grossly disproportionate to any benefits achieved. This, she adds, extends to access to cannabis when used for medical purposes.

[22] Finally, Ms. Chartrand argues s. 9 of the *Charter* also protects the right of all Canadians to be free from arbitrary detention or imprisonment.

[23] Ms. Chartrand specifies her grounds, or the facts, upon which she says her arguments gain support:

1. *The right to interact with and smell cannabis*:

[24] Ms. Chartrand argues that in order to give effect to section 7 and 9 *Charter* rights to reasonable access to cannabis medicine, users must have a place in which they can interact directly both visually and by way of odour with their chosen medicine without fear of arrest, intimidation, harassment, or prosecution by government authorities, and without fear of civil actions by public bodies, for violation of public laws or rules against the cannabis plant in general.

[25] Presumably the legal means of obtaining the product under the *ACMPRs* do not afford such opportunities. The Crown argues expert testimony is necessary to form a proper foundation, noting such interaction is merely a personal preference. He says there is no expert proposed to say that personal interaction makes a difference with respect to treatment. Likewise, there is no proposed expert witness who could be properly qualified to provide opinion evidence on whether a certain kind or strain of marijuana makes any difference to treatment.

2. *The inability of some to use cannabis in their rented accommodations*:

[26] Ms. Chartrand supports her position by positing that many Canadians live in assisted living residences, or other residential complexes where public and private rules apply to limit the liberty of residents to consume cannabis for medical reasons or to discuss medical cannabis openly and honestly. She also says such residences prohibit possession or use of cannabis regardless of its purpose medical or otherwise. As a result, many individuals have only one option- to purchase their cannabis medicine in a public place in violation of the law and at personal physical hazard to themselves, or to attend a private dispensary to access their medicine.

[27] The Court can accept that some people live in accommodations where they are bound by contract with a landlord who does not permit consumption of cannabis in the units. However, signing a rental contract under those terms and then requiring the use of cannabis, cannot in the opinion of the Court, form the foundation for a remedy rendering the *ACMPR* unconstitutional for the purpose of this trial.

3. *Some doctors will not prescribe cannabis*:

[28] Ms. Chartrand argues that many Canadians whose medical symptoms are effectively treated by cannabis are denied reasonable access to it because the

ACMPR requires a prescription from a doctor and many doctors will not give such prescriptions for social, political or other reasons.

[29] I note, caselaw makes clear that there is no right to a doctor let alone treatment of your choice. The latter is a medical decision, and should one disagree with a doctor's medical treatment choices, the matter is best addressed by a complaint to the Medical Society. It should go without saying that neither a court nor a province can order a specific doctor to prescribe cannabis. Doctors are professionals governed by their society and influenced by science, research and ethics.

[30] In any event, the Crown argues there is no intended expert opinion evidence proposed to establish such a foundation. Affiants asserting that they have trouble finding a prescribing doctor is simply not enough. Anecdotally, the Court is aware that many people in this jurisdiction are prescribed medical cannabis by medical doctors as set out in the numerous presentencing reports prepared for the court.

4. Health Canada procedures impede access:

[31] Ms. Chartrand argues many Canadians who can obtain a doctor's prescription are nevertheless denied reasonable access to cannabis due to extreme and unjustifiable delays by Health Canada in processing applications for licences

to consume or grow cannabis for medical purposes. She says more Canadians are denied reasonable access due to the complexity of the Health Canada application process and circumstances relating to lack of education, English language skills, homelessness, or poverty.

[32] The Crown says price along with these other considerations do not form a proper foundation for the application. By comparison, he says all drugs cost money and the system to provide same to those who are poor, homeless, lack education, or have poor language skills does not have to be perfect. Finally, without a proper foundation the Court cannot proceed to consider this issue that has, in large part, not met with success before other courts.

(iii) Caselaw Advanced in Support:

[33] Ms. Chartrand outlined court decisions said to concern s. 7 of the *Charter* and the right to reasonable access to medical cannabis- *i.e. Allard v. Canada,* 2014 FC 280 (CanLII), and *R. v. Smith,* 2015 SCC 34, [2015] 2 S.C.R. 602. The Crown reminds the Court that the latter decision involved a time when only dried cannabis could be used and possession of cannabis in any other form constituted an offence. The enactment of the *ACMPR* remedied that situation.

(iv) The intended evidentiary foundation upon which Ms. Chartrand seeks to rely:

[34] In support of her application Ms. Chartrand says she relies on:

1. Her *Notice*,
2. Oral arguments,
3. The application record,
4. The evidence at a *voir dire*,
5. Casebook to be provided,
6. Letters and affidavits from affected patients,
7. The medical history of the applicant and her patients,
8. A signed petition,
9. Evidence of the delays in the mail order system,
10. Recalls from licensed producers,
11. News articles confirming lack of testing by Health Canada,
12. Police commission minutes,
13. Videos showing police officer misconduct,
14. Witness statement of arrest,
15. Record-keeping procedures and Operating procedures for Higher Living Wellness Centre,
16. Patient video statement,
17. Patient support video, and

18. Such further and other materials and evidence as counsel may advise and the court may permit.

[35] The Court has the Notice, there is no application record, case citations were provided, and I am in receipt of numerous affidavits filed by Ms. Chartrand. I have reviewed them all. (Items 1, 3, 5, 6, 7, and 8)

[36] There is no indication from the materials filed, other than the affidavits, that the Court can expect to hear anything about delay in the mail delivery of cannabis. (Item 9)

[37] Information regarding record keeping and operating procedures at the dispensary, a patient video and a patient support video, a witness statement of arrest are not relevant to this application. (Items 14, 15, 16, and 17) The essence of the allegations is trafficking and unlawful possession of cannabis and resin; how she operated her allegedly illegal business while dispensing the Schedule II substance is not relevant to the *Constitutional Questions*, but perhaps to the issues on the trial proper.

[38] I have already determined that I will not consider, on this application, allegations of police misconduct while executing warrants. (Items 11, 12, and 13).

[39] I have also advised that the Court will not accept news articles or hyperlinks to websites asserting lack of testing at Health Canada, or other contentious topics without a proper admissible legal foundation. (Item 11)

[40] There does not appear in the filed materials any indication as to how Ms. Chartrand would lead evidence of recalls from licensed producers, nor a foundation for why this information would be relevant. (Item 10) The Crown correctly points out that none of the foregoing can find itself properly before the Court without the proper legal foundation.

(v) Remedy Sought:

[41] Should the Court find the CDSA and the *ACMPR* inconsistent with s. 7 of the *Charter*, Ms. Chartrand asks that these sections be deemed of no force and effect pursuant to sections 24 and 52(1) of the *Charter*. I have already explained why this Court has authority to grant only a section 24 remedy and not one pursuant to section 52. She seeks a judicial stay of proceedings, dismissal of the charges, quashing or staying of them pursuant to statutory and common law jurisdiction as well as pursuant to s. 24 of the *Charter* and such further and other relief as counsel may advise and the Court may permit.

Other Issues Raised that do not Fit Naturally Under Other Headings:

1. *Grounds for arrest*:

[42] Ms. Chartrand asserts the grounds upon which she was arrested were false and misleading and violated her *Charter* rights. This will of course be addressed outside a *Constitutional Question*.

2. *Impact of legalization a month after charge*:

[43] She was charged in September 2018, a month before the introduction of legalized recreational cannabis laws, and she says legalization has led to many patients losing access to a reliable legal access to their medicine. This argument was not well developed and requires one to ask exactly what it means. Is it a suggestion legalization of cannabis put drug dealers out of business? If so, was that not the intention of the legislation? The Court will not undertake consideration of the impact of legislation enacted after the date of charge.

3. *Seizure of medical records:*

[44] The *Notice* also asks that the seizure of medical records from the compassion club, which I conclude refers to items seized under warrants executed at Higher Living Wellness Centre Inc., and upon its electronics, constitutes a

serious violation of the *Charter* rights of her patients. This presumably relates to the section 7 *Charter* argument.

[45] The Court is not aware of any legal foundation for exempting such material from seizure under a presumptively valid warrant. Unlike the execution of warrants at law offices where solicitor client privilege may attach to certain documents, there does not appear to be related caselaw involving client files retained by cannabis dispensaries.

4. *Retroactive unconstitutionality*:

[46] Ms. Chartrand also argues the Court should determine the *ACMPR* was unconstitutional during any period in which registration certificates were backlogged, and also during which registered patients would not have had sufficient time to procure seeds or clones through the *ACMPR*, purchase and build a home garden, germinate and grow a successful cannabis crop, and harvest and consume a crop.

[47] I cannot consider this argument as it is without foundation in any of the filed affidavits. The Court would, once again, require admissible evidence of the existence of such a backlog at Health Canada.

Analysis:

The Vukelich Application:

[48] Finally, the Crown argues the Court should not go through an entire hearing listening to witnesses in order to determine whether there *might* be support for Ms. Chartrand's arguments. He says based on the materials filed the application should not proceed.

Position of the Parties:

[49] It is important to the Court that the parties know the Court has heard their respective arguments. So, I will set them out as clearly as possible.

[50] The Crown's application to summarily dismiss Ms. Chartrand's request for a *voir dire* is based on many reasons including that the issues in their final form are no different than those argued and settled by other courts across Canada. Not surprisingly Ms. Chartrand is opposed to his application.

[51] The Crown says her application is based primarily on a "lack of access" argument for people who use marijuana for medical reasons. He says despite repeatedly raising the need for such, Ms. Chartrand does not intend to call necessary expert evidence capable of providing support for her arguments. In considering the two lately proposed experts Ms. Chartrand does intend to call, a

Mobility Expert, Alex LeBlanc, and a Cannabinoid Expert, nurse Melissa Ellsworth, the Crown says neither have provided “can says” indicating context for their proposed expertise that could support Ms. Chartrand’s application. Instead, the “can says” that were provided do not touch on the issues necessary to advance the application. For example, the nurse’s training is not well explained and raises questions such as how she could provide expert opinion evidence on terpines when she cannot review various studies and reports and is not a toxicologist or a pharmacologist. Likewise, accessibility issues are relevant, but it is not clear how Mr. LeBlanc’s challenges due to his disabilities relate to this application in a manner not addressed in the numerous affidavits filed by others.

[52] He says the type of expert testimony needed in such a case may include pharmacologists as well as toxicologists who have highly specialized training. He also argues Ms. Chartrand’s lack of appreciation is indicative in her attempt to broaden the scope of her claim by unacceptably asking the Court to accept as fact, material contained on various websites (issues related to pesticides used to grow government authorized marijuana). Information cannot come from such sources and instead, experts are needed in areas such as the medical impacts of the regime, if any, studies regarding medical treatments involving cannabis, how the Health Canada regime is intended to operate, and how the regime actually operates in the

community. In this sphere, experts are necessary to provide opinion evidence on issues such as the effects of cannabis on people and what support if any exists for such conclusions.

[53] The Crown says the nurse attending an online American cannabis university, whatever that may be, cannot support the necessary expertise. Instead, Ms. Chartrand's proposed experts are simply people who will speak of their personal issues, preferences for strain and means of obtaining same and, while relevant, this represents but a small part of the application. It does not provide information about the system that is under attack, and the reasonableness of the regime is the issue, not perfection. The Court cannot assess reasonableness in a vacuum of knowledge on topics such as the existence of damaging impurities in the regulated cannabis source, which cannot be established by simply saying so or referencing news articles, instead it must be proven by evidence. The same applies to purported cancer risks arising from use of cannabis from the regulated source. As the Crown says, "Just because a bud tender says a person should use a certain strain for a certain ailment does not render that product better or more appropriate than traditional medicines" or I would add, the product provided under the *ACMPR*.

[54] Finally, the Crown says the issues Ms. Chartrand seeks to raise have been addressed by other courts and rejected.

[55] Not surprisingly, Ms. Chartrand argues her anticipated expert testimony does support her arguments. She says her proposed experts have produced "can says" that are relevant and find support from the programs each person has been involved with over time. For example, Ms. Ellsworth took a course and she is a nurse who "can speak to terpines, do strains matter, does dosing matter". She says Ms. Ellsworth can testify about personal sensitivities and how to grow and flush the plants. According to Ms. Chartrand, doctors are not trained to be able to answer any of those questions.

[56] Mr. LeBlanc, she says, is an advocate for people dealing with disabilities. He would speak about "accessibility to housing for people with disabilities, growing in apartments, and difficulties people face". He can address situations involving people without internet access who cannot place an order for cannabis through licenced producers, and the poor who do not have bank accounts and cannot afford to purchase from producers. She says the Court needs to know about their challenges, and how the existence of a local dispensary helps to overcome same.

[57] She asks the Court to accept "quality datasheets" regarding pesticides as commonly accepted information. She mentions a class-action lawsuit against a major producer as support for her argument, adding information can be found in

newspaper reports. She says the case law advanced by the Crown's arises from areas outside of Nova Scotia and does not take into account the rural nature of the province, the lack of Internet service through which to place orders, the circumstances of those without bank accounts or who are too poor to buy marijuana. By way of example, she says a person who has an infection can seek a doctor's opinion versus simply attending a pharmacy for medication. She says not unlike that person who wishes to attend to the doctor, her patients want to obtain advice from budtenders and not simply order online. She says her experts can provide testimony on this issue.

[58] All these issues, she says, need to be discussed and that is why the matter should proceed with the two named experts. *Smith* supports her matter proceeding because in that case the people did not have legal access to edibles and oils. She says *Smith* granted such access in 2015 and presumably the *ACMPR* regime thwarts such access and the enactment of the *Cannabis Act* demonstrates a recognition of problems with the *ACMPRs*.

The Law:

[59] The law is clear, before embarking on a *voir dire* a trial judge has discretion to decide whether to do so. This matter of judicial discretion is aimed at ensuring

court resources are used efficiently. The rules in *R. v. Vukelich* (1996), 1996 CanLII 1005 (BC CA), 108 C.C.C. (3d) 193 (B.C.C.A.), have been endorsed by the Supreme Court of Canada in many cases including *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 (CanLII), [2005] 3 SCR 343 on an analogous issue. Expressing concern about the increasing length of court proceedings, the Court said at para 34, citing Finlayson J.A., in *R. v. Durette* (1992), 1992 CanLII 2779 (ON CA), 72 C.C.C. (3d) 421 (Ont. C.A.):

> Just as we have tried to restrict the trial of an accused on the merits to factual issues that are directly raised in the particular case, so should we strive to restrict pre-trial Charter motions to matters of substance where defence counsel can establish some basis for a violation of a right. Unless we, as courts, can find some method of rescuing our criminal trial process from the almost Dickensian procedural morass that it is now bogged down in, the public will lose patience with our traditional adversarial system of justice. [p. 440]

[60] Judges must be more decisive than they have been in the past because far too much judicial time is consumed by the conduct of these kinds of inquiries (*R. v. Vukelich, supra,* at para 34.) I take clear direction from the Supreme Court of Canada to employ mechanisms to rescue the system from meritless applications. One such mechanism is the power to decline to embark upon an evidentiary hearing at the request of one of the parties when that party is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court. There is no point in proceeding to a *Charter* application unless resolution

of the issue might lead to the end of the prosecution or to the exclusion of evidence. (*Kapp*, 2006 BCCA 277)

[61] The procedure to follow on an application such as this is within the discretion of the court. While Ms. Chartrand argues that she did not have enough time to reply to the Crown's application to dismiss, both parties filed their briefs in December 2019. Ms. Chartrand filed voluminous materials and is aware she had time to provide additional materials should she have seen fit to do so. I remind myself that the foundation for the Crown's application rests on its position that her materials filed on the *Constitutional Question* are inadequate. As a result, his arguments essentially rest on "the facts or anticipated evidence underlying the alleged *Charter* breach are in legitimate dispute" (*R. v. McDonald*, 2013 BCSC 314)

[62] The Court must undertake a balancing process between Ms. Chartrand's fair trial interest and the public interest in the Court managing proceedings.

[63] In doing so the Crown suggests I ask myself the following questions:

a. Is it a proper pretrial *Charter* issue?

b. If it is, what is the reasonable likelihood that the hearing can assist in determining the issues before the court?

c. If there is a violation, the Court must determine if it would result in the remedy sought by the applicant.

d. If there is no remedy available, then there is no need for hearing.

[64] In this hearing, Ms. Chartrand receives the benefit of the Court presuming her allegations are true, subject to the evidence.

[65] The Court in *R v Armstrong*, 2010 BCSC 1041 (CanLII), [2010] BCJ No 1486 (S.C.) at para 29 summarized the procedure to be followed in a *Vukelich* application, not unlike the Crown has proposed in this case:

> 1. the trial judge should assume the truth of the facts the applicant seeks to prove to establish his entitlement to a constitutional remedy;
>
> 2. the trial judge should consider whether those facts disclose a basis in law for the constitutional remedy on the grounds set out in the applicant's notice; and
>
> 3. if the trial judge concludes that the applicant would not be entitled to a constitutional remedy on those grounds, even if he proved the facts he alleges, the trial judge can exercise his or her discretion and decline to embark on an evidentiary hearing.

[66] In *R v Tash*, 2008 CanLII 1541 (ON SC), [2008] O.J. No.200 (S.C.J.), Hill J. commented upon circumstances where a *Charter* application should be dismissed without a hearing. At para. 23 he stated:

> In light of the court's conclusion, the following cautionary observation is warranted. In any given case, as said, the trial court may decline to hear a *Charter* application where, on balance, and having regard to all relevant circumstances such as the degree of non-compliance, the measure of prejudice to the Crown, the degree of disruption in the proceedings, the history of the litigation, and the absence of any real indication of a prospect of success on the application, justice and fairness to all parties justifies such a disposition.

Decision:

[67] After hearing submissions on today's date and reviewing all the material filed in support of the *Constitutional Question*, I decline to allow it to proceed. I reach this conclusion aware that Ms. Chartrand is not a lawyer and has no doubt met challenges in preparing for what anyone would find a legally complex application. However, court resources being finite, it is incumbent upon trial judges to jealously guard their use and ensure applications destined to fail do not proceed and squander limited judicial resources.

[68] These are my detailed reasons for reaching such a conclusion.

Sufficiency of Notice:

[69] The documents filed included a *Notice of Constitutional Question: Pursuant to s. 7 and 24(1) of the Charter*, a *Motion to Amend Constitutional Question* and numerous affidavits.

[70] I note none of the motions are signed, they reference the wrong court, they are vague and suffer from a lack of focus. The majority of these concerns I can overlook in the interest of trial fairness, however, I cannot condone late filing and misleading the Court that the Nova Scotia Attorney General was served, Ms. Chartrand having confirmed the latter on the record saying rather than serve she sent an email to a ".gc.ca" email account (federal government email address) that was not answered. There are also two co-accused persons, not joining in on this application, who have been sidelined as Ms. Chartrand's applications are considered.

[71] Ms. Chartrand has added to and changed the focus of her application expecting the Crown and the Court to keep up with and address all these changes on very short notice. This is an unrealistic expectation in the busy criminal justice system. By way of example, adding newly expressed concerns related to pesticide use in government sanctioned operations and asking the Court to order Health Canada to take steps regarding storage of health records. This former topic she intends to establish by news reports and Health Canada notices.

[72] The final notice details have all been outlined above, and I will address each of her arguments as though there was a factual foundation for each supplied in the affidavits filed in support.

(i)The Affidavits:

[73] Ms. Chartrand intends to establish by affidavit evidence of her "patients" who used her services at the Higher Living, that they bought from her, used her product successfully, and face challenges under the *ACMPR* regime offered by Health Canada. Ms. Chartrand is also aware that the law has changed since she was charged, with the enactment of the *Cannabis Act* and the regulations made thereunder on October 17, 2018. However, the *ACMPR*s still govern medical access to cannabis.

[74] I was very concerned that Ms. Chartrand's proposed witness list did not propose calling experts to address issues for which such would be necessary. However, since last day she has provided an affidavit from Mr. LeBlanc who she proposes the Court qualify as an *Accessibility Expert*. His affidavit seeks to demonstrate his "qualifications as an Accessibility Expert in order to become a qualified expert with the province of Nova Scotia". He is disabled as a result of primary progressive multiple sclerosis, uses marijuana in an oil form to treat his

symptoms, is poor, faces challenges growing his own crop and cannot do so in his residence. He advocates for free access to cannabis and wishes to start a cannabis business. I could not, based on his affidavit, qualify him as an accessibility expert. His is not much different from that of the other filed affidavits. There is simply nothing in his affidavit that supports qualification, his suggested testimony is simply personal experience evidence.

[75] Ms. Melissa Ellsworth, a nurse, is proposed as an expert in cannabinoids. It is more important to say what she is not. She is not a toxicologist, pharmacologist or even a medical doctor. She has taken an online program at the Cannabis Training University located in USA. She simply cannot provide support for Ms. Chartrand's application and, based on materials filed, a court could not qualify her as an expert capable of supporting Ms. Chartrand's application.

[76] Cory, J., speaking for the Supreme Court of Canada in *MacKay et al. v. Government of Manitoba* (1989), 1989 CanLII 26 (SCC), 61 D.L.R. (4th) 385 remarked at p. 388:

> *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to

> expect and indeed to insist upon the careful preparation and presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.

> *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[77] To that end, Ms. Chartrand filed numerous affidavits from her former clients and other marijuana users. Unlike *MacKay*, hers is not bereft of a factual foundation, but is so with respect to expert evidence. I do not propose to review in detail the massive number of affidavits filed in this matter, but I have read them all, many were short and in template form. The affidavits speak of a preference to obtain marijuana from Ms. Chartrand, the affiants appreciate the club atmosphere, her lower prices, and their perception of specialized knowledge from budtenders and the healing properties of cannabis based on preferred strains. The affidavits are from cannabis users who speak to their illness and personal experiences obtaining cannabis; necessary evidence, but not without the context provided by expert witnesses.

[78] For example, Debbie Stultz-Giffin from *Maritimers Unite for Medical Marijuana* provided an undated and unsigned affidavit. She is poor and suffers from MS. She says she has used marijuana for many years to treat her MS and prefers to buy it from Higher Living. Her organization provided Higher Living a certificate of registration in May 2019. She and others worry about the lack of, sometimes free, cannabis they were provided, the advice they received, the opportunity to consume cannabis that they could see and smell at the club.

[79] No doubt Ms. Chartrand seeks to call evidence from all or many of the numerous affiants. However, along with concerns over Ms. Chartrand's ability to lay an evidentiary foundation at a *voir dire*, the Court is also aware that the issues she seeks to address through her affiants have been canvassed and dismissed in a number of cases. It is worth reviewing those cases.

The Law:

[80] *Vancouver (City) v. Karuna Health Foundation*, 2018 BCSC 2221, involved the City of Vancouver's efforts to shut down medical marijuana dispensaries pursuant to provincial laws. The Court found the bylaws did not unduly restrict access to medical cannabis nor did they infringe sections 2(b), 7, or 16 of the *Charter*. As a result, the City was not estopped from enforcing its bylaws and the

Court found it was unnecessary and inappropriate to resolve the constitutionality of either the *ACMPR* or the *CDSA* as they pertained to medical cannabis.

[81] *R. v. Ferkul*, 2019 ONCJ 893, was the most persuasive case reviewed by the court. After concluding Mr. Ferkul had standing to bring the s. 7 *Charter* challenge, the Court outlined the following, worth including here in a rather large section:

> [11] The question then becomes whether the restriction of liberty is in accordance with the principles of fundamental justice. Those principles include arbitrariness, overbreadth, and gross disproportionality. Furthermore, as held in *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 123, "The question under s. 7 is whether *anyone's* life, liberty or security of the person has been denied by a law that is inherently bad; a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of s. 7."
>
> [12] Each of these principles involves comparison with the object of the law that is challenged: *Bedford*, at para. 123. The object of the ACMPR is to "provide Canadians with a greater range of options to access cannabis for medical purposes in order to address the issue of reasonable access as identified by the court [in *Smith* and *Allard*]": ACMPR Regulatory Impact Analysis Statement, Affidavit of Todd Cain, Respondent's Record, Volume I, Tab 1a. This purpose fits within the CDSA's objective of protection of health and public safety: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 129.
>
> [13] The Applicants submit that the ACMPR creates eight main barriers to medical cannabis access that are not in accordance with the principles of fundamental justice. These barriers are:
>
> 1) Delivery delays and a lack of on-demand timely access;
>
> 2) Ordering and delivery issues by persons who have limited or no access to the Internet or no banking facilities or no permanent residences to facilitate delivery of their medicine;
>
> 3) High costs associated with minimum purchase requirements and shipping from licensed producers;

4) A lack of face-to-face contact with sales and service personnel for patients who need to ask questions about and receive information about their medicine;

5) An inability of patients to see and smell their medicine when purchasing – which has a negative impact on their ability to choose their medicine;

6) Delays in obtaining licenses to possess, access or grow their medicine;

7) Limited availability of strains preferred by and needed by patients to treat their illness; and

8) Limits on cannabis derivatives that make access to cannabis derivatives illusory at best.

[14] The Applicants argue that the CDSA prohibitions and the ACMPR's mail order system stand in the way of a medical cannabis patient making autonomous medical decisions. A patient who needs pain or symptom relief should be entitled to immediate relief offered through an on-demand access channel.

[15] In my view, the barriers that the Applicant highlights do not rise to a level of infringing s. 7 of the *Charter*.

[16] When it comes to health care, Chief Justice McLachlin and Justice Major wrote in *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35 at para 104, "The *Charter* does not confer a freestanding constitutional right to health care. However, where the government puts in place a scheme to provide health care, that scheme must comply with the *Charter*." But just because the scheme must comply with the *Charter*, it does not mean that the government "must do everything possible to save the lives of its citizens in every circumstance, including funding all potentially life-saving treatments": *Flora v. Ontario Health Insurance Plan*, 2007 CanLII 339 (ON SCDC) at para. 227.

[17] In my view, the Applicants are seeking a system that provides perfect access (which is not constitutionally required), rather than one that provides reasonable access (which is constitutionally protected).

[18] The ACMPR regime provides multiple avenues to access cannabis for medical purposes. Indeed, it provides medical cannabis patients with more options than any previous regime. Since *Smith* and *Allard v. Canada*, 2016 FC 236 were decided, the ACMPR now permits medical cannabis patients to both possess and produce cannabis derivatives and to purchase and possess cannabis oil. It also allows patients to designate others to produce derivatives for those patients with their cannabis. Also, unlike in *Allard* where patients could only purchase cannabis for medical purposes from licensed producers, the *ACMPR* permits patients to grow it for themselves or to designate a third party to grow it for them. The ACMPR permits all authorized patients nationwide to access cannabis for medical purposes. Access is not dependent on being located in or near a city centre or

having access to transportation. Storefront access would not necessarily improve the plight of the homeless or those living in precarious housing since it would be impossible to provide enough storefronts in both urban and remote communities to provide practical access to this marginalized group.

[19] Delay in accessing health care has been found to infringe s. 7 of the *Charter* in certain landmark Supreme Court of Canada cases. As the Court of Appeal explains in *Flora v. Ontario Health Insurance Plan*, 2008 ONCA 538 at paras. 98-100:

> [98] In *Chaoulli*, the pivotal consideration was the fact that the impugned prohibition on private health insurance "conspired" with excessive costs in Quebec's public health care system to force Quebeckers onto the wait lists that pervaded the public system. It was this connection between the statutory prohibition on private health insurance and the delays in the public system that anchored the *Chaoulli* holding that the wait lists constituted a deprivation of rights protected under s. 7. In other words, the statutory prohibition in issue was directly linked to the harm suffered by Quebeckers who were compelled by the prohibition to rely on the public health care system and to endure the consequences of significant wait lists.
>
> [99] A similar link between state action and delays in accessing health care grounds the Supreme Court of Canada's decision in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, [1988] S.C.J. No. 1. In that case, the Supreme Court concluded that the s. 7 right to security of the person for women was jeopardized by the mandatory therapeutic abortion committee system established by the Criminal Code, R.S.C. 1985, c. C-46, which forced women who sought abortions to suffer significant delays in treatment with attendant physical risk and psychological suffering. *Morgentaler*, at p. 59, per Dickson C.J.C. and, at pp. 105-106, per Beetz J., Estey J. concurring.
>
> [100] To similar effect is the Supreme Court's decision in *Rodriguez v. British Columbia (Attorney General)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, [1993] S.C.J. No. 94, 107 D.L.R. (4th) 342, which holds that governmental interference with a citizen's bodily integrity -- such as a criminal law prohibition on assisted suicide -- constitutes a deprivation of security of the person under s. 7.

[20] The ACMPR does not prohibit any medical cannabis patient from taking advantage of the medical service provided by the regulations. There is no doubt that the ACMPR's mail order system provides some inherent delay in obtaining medical cannabis, but the evidence before me falls short in establishing that the mail order delay could lead to serious long lasting harm or life-threatening conditions that were found to exist in *Chaoulli*, *Morgentaler*, and *Rodriguez.* Rather, the evidence in this Application demonstrates that the medical cannabis patients wish immediate access to help manage pain levels and to alleviate

> symptoms: See affidavits of Kenneth Webber, Sylvie Duggan, Maxine Abena Mackenzie, Marcel Wilson, Rick Vrecic, Elizabeth Swartz, and Karlee Boyce, Applicants' Application Record, Volume III.
>
> [21] The medical cannabis patients' evidence presented at this Application share many similar concerns over the expense, delay, and frustrations in dealing with the mandated mail-order system the ACMPR put in place. For example, the affidavit of Kenneth Webber states:
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> > As a low-income individual, my only option is to purchase from a local dispensary or compassion club, or use a pre-paid VISA card to make purchases from Aurora, however that is more expensive and time consuming: Affidavit of Kenneth Webber, Applicants' Application Record, Volume III, Tab 11, para. 27
>
> [22] The affidavit of Sylvie Duggan states:
>
> > The rules for payment with Tweed make it very difficult for me to make a single order because of the fact that I do not have a credit card. I only have a debit card and I cannot use a debit card to purchase from Tweed because my bank is TD Bank and they will not do business with Tweed…In order to purchase my medical cannabis I have to go to my bank and get a money order, then I have to get the money order faxed to Tweed, then I have to phone Tweed to make sure they received the fax money order, and then it takes up to three days after that for them to ship the cannabis to me…I have mobility issues due to my illness and having to go to the bank, then the employment office, and then the post office can exacerbate my symptoms of COPD, lupus, and fibromyalgia…I prefer to have person-to-person contact when it comes to my medical needs and concerns: Affidavit of Sylvie Duggan, Applicants' Application Record, Volume III, Tab 12, paras. 7, 8, 12, and 17.
>
> [23] In my view, the access to medical cannabis provided by the ACMPR achieves the object of the ACMPR and therefore, individuals' rights are not limited arbitrarily and the negative effects of the ACMPR regime (delay, cost, and frustrations) are not completely out of sync with the object of the law: *Carter*, at para. 89.
>
> [24] I find no infringement of s. 7 of the *Charter*.

[82] Distinguishing the case at bar from that of *Ferkul*, Mr. Ferkul brought expert evidence in concert with that of non-experts, to support his application. Yet, he was unsuccessful in persuading the provincial court judge that the *ACMPR* regime represented a breach of the section 7 *Charter* right. Interestingly Ms. Chartrand's

intended arguments in large part mirror those of Mr. Ferkul. For example, concern about the inability of the regime to allow seeing and smelling and delays involved in the process.

[83] Her original arguments include some doctors not providing prescriptions, and some owners of residential accommodations not being allowed use in their units. However, just as the evidence in *Ferkul* was unpersuasive, so is the intended evidence of Ms. Chartrand.

[84] Referencing paragraph 20 of *Ferkul*, this Court has also not been provided *proposed* evidence "establishing that the mail order delay could lead to serious long lasting harm or life-threatening conditions that were found to exist in *Chaoulli*, *Morgentaler*, and *Rodriguez."* Instead, the proposed *"*evidence in this Application demonstrates that the medical cannabis patients wish immediate access to help manage pain levels and to alleviate symptoms." That would of course require expert opinion evidence to establish such an evidentiary basis.

[85] While Ms. Chartrand argues the listed items erect barriers to her patients' use of cannabis and derivatives, I cannot agree that they are unreasonable barriers that can be addressed in a *voir dire* in the manner she suggests and lead to establishing an infringement of section 7 of the *Charter*.

[86] The issue of the *Charter* and healthcare was addressed in *Chaoulli v. Quebec (Attorney General), supra*, wherein the Court held, "the *Charter* does not confer a freestanding constitutional right to healthcare. However, where the government puts in place a scheme to provide healthcare, that scheme must comply with the *Charter'*. But requiring *Charter* compliance does not mean that the government "must do everything possible to save the lives of its citizens in every circumstance, including funding all potentially life-saving treatments": *Flora v. Ontario Health Insurance Plan*, 2007 CanLII 339 (ONSC DC) at para, 227.

[87] It is clear, by extension, there is no constitutional requirement that a perfect system be in place to provide access to medical marijuana. Rather, reasonable access is what is constitutionally protected. The *ACMPR* provides many opportunities and avenues for access for medical purposes: (1) a licenced producer, (2) an authorization to produce, or (3) an authorized designated person to produce.

[88] After reviewing the affidavits that Ms. Chartrand filed on her application, I am not persuaded that she or her clients are unable to access medical marijuana pursuant to the scheme set out in the *ACMPR* and, as a result, any individual rights are not limited arbitrarily under a regime out of sync with the object of the law. I see no valid reason to allow this application to proceed, I am exercising my discretion as protector of scarce court resources to reject this baseless application.

The Crown's application is granted; Ms. Chartrand will not be permitted to enter into a *voir dire*.

[89] Judgment accordingly.

van der Hoek J.