

SUPREME COURT OF NOVA SCOTIA

Citation: Campbell v. Nova Scotia (Community Services), 2010 NSSC 116

Date: 20100330

Docket: Hfx No. 272059

Registry: Halifax

Between:

Sally Elizabeth Campbell

Applicant

and

Minister of Community Services

Respondent

DECISION

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: February 17, 2010

Counsel: Claire McNeil and Donna Franey, counsel, and
Olga Koukidis, law student, for the applicant
Terry D. Potter, counsel for the respondent

Moir, J.:

Introduction

[1] Ms. Campbell has numerous problems with her health, and some of these cause her chronic pain and nausea. Medical marijuana is helpful for alleviating the pain, nausea, and other symptoms.

[2] Ms. Campbell receives income assistance. She applied to a social worker for an increase in the allowance to cover the cost of medical marijuana as a special need. The application was denied.

[3] Ms. Campbell appealed to the Assistance Appeal Board. The board, composed of one member, Mr. William B. Vye, received Ms. Campbell's affidavit, a copy of a letter from her physician describing her need for medical marijuana as "essential to her health and well being", and documentation from Health Canada showing the authorization under the *Controlled Drugs and Substances Act* for her to possess and use marijuana.

[4] It appears that Ms. Campbell gave evidence, as did her caseworker. The department also produced a printout from the Health Canada website in which it is said that the effectiveness of medical marijuana has not yet been scientifically proved. Ms. Campbell was represented, as was the Department.

[5] The Board denied the appeal, and Ms. Campbell applied for judicial review.

Evidence Before Assistance Appeal Board

[6] Mr. Vye recorded some of his findings of fact as follows:

- Ms. Campbell has been receiving social assistance since the mid 1980s as a disabled person and is not employed. Her sole source of income is that which is provided by her assistance support.
- It is well documented that Ms. Campbell suffers from several ailments including Hepatis C, disc degeneration, Hypothyroidism and [fibromyalgia] and suffers from many related medical problems and pain as a direct result of her disease. She has been prescribed many medications to help alleviate her problems with little success. Some have the medication has caused serious side effects and have only exacerbated her problems.
- In Oct 2002, with the support of her doctors, Ms. Campbell applied for and received a Section 56 Controlled Drug and Substance Act exemption to possess and use marihuana for medical purposes. Since [then], Ms. Campbell has been using marihuana on a regular basis to relieve her symptoms and improve her health, well being and quality of life.

- Ms. Campbell provided the Board with a letter from Dr. W.R. Vitale, M.D. dated 23 NOV, 2005. Dr. Vitale is Ms. Campbell's family doctor and has been treating her for several years. In the letter Ms. Campbell pointed out that Dr. Vitale comments that "her use of medical marihuana has proven essential to her health and well-being"
- Ms. Campbell has no drug plan or financial assistance other than that provided by the Government of Nova Scotia. She has purchased her marihuana from Health Canada and local sellers.
- On 29 NOV 2005 Ms Campbell, in correspondence provided to the Department of Community Services provided Dr. Vitale's letter and requested that the funding for the purchase of marihuana be provided by the Department as a "special need". This request was denied by the Department verbally, advising that the matter had been appealed twice and there was no provision to provide for funding of the marihuana under existing programs within the province.

[7] The evidence considered by Mr. Vye on the essential issue before him was the affidavit and testimony of Ms. Campbell and the letter from her physicians.

We do not know what Ms. Campbell said in testimony, but there is no suggestion she contradicted her affidavit. The affidavit and the letter are included in the record.

[8] The affidavit provides evidence that Ms. Campbell suffers from chronic hepatitis C, degenerative disc disease, hypothyroidism, and fibromyalgia. The symptoms include muscle pain, joint pain, and nausea. Ms. Campbell says:

My disability has caused me immense pain. Before I was prescribed medical marijuana, I was also on Interferon and Ribavarin. While taking these drugs I suffered serious and dangerous side-effects. I suffered from insomnia; anorexia, which caused me to [lose] a significant amount of weight; and became increasingly paranoid while on these drugs. As a result of the seriousness and severity of these side effects I was hospitalized in 1998 at the Abbey J Lane for several days.

Because of this she applied for authority to take medical marijuana.

[9] The use of medical marijuana was supported by her physician and a specialist. Ms. Campbell gave evidence of the results:

Since taking medical marijuana according to my doctors' instructions, medical marijuana has improved my health and well-being. It has made me feel more human; giving me the energy to do everyday things, such as laundry, washing dishes and other mundane activities. Overall medical marijuana has improved my quality of life and has been the only effective treatment to stabilize my chronic symptoms.

[10] Her physician's letter was introduced, apparently by consent without calling the witness. Dr. Vitale wrote:

I am writing as Sally Campbell's physician to state that her use of medical marijuana has proven essential to her health and well-being. It [reproducibly] relieves her symptoms of pain and nausea, and paradoxically (counter to expectations) also improves her concentration, focus and energy level. Please consider appropriate funding in her budget to obtain marijuana from a commercial or government supplier of medical marijuana.

[11] The department produced documents from the Health Canada website suggesting that the effectiveness of medical marijuana has not yet been scientifically proved.

Decision of Assistance Appeal Board

[12] Mr. Vye referred to s. 2(ab)(ii) of the *Employment Support and Income Assistance Regulations*, N.S. Reg. 25/2001, which defines need to include "another item or service that is in the opinion of a caseworker essential for an applicant...".

[13] Mr. Vye found that "the appellant has fallen short in satisfying the board that the medical use of marijuana is essential to her health and well being."

[14] Mr. Vye referred to a dictionary definition of "essential" as "necessary; indispensable". He asked himself, "Is the use of medical marijuana necessary and indispensable to the health and well being of the appellant?"

[15] Mr. Vye answered this question by saying, "it is evident that the appellant is ill, suffers from her illness and [ingestion] of marijuana seems to alleviate her suffering to some degree". He concluded:

But, based only on Ms. Campbell's evidence and the vague and unchallenged 23 NOV 05 letter of Dr. Vitale...I am not convinced that the use of medical marijuana is "essential" to Ms. Campbell.

Issues

[16] Ms. McNeil's submissions subdivide a more general issue of legislative interpretation and an equally general issue about Mr. Vye's fact-finding. I find it easier to organize my decision according to the more generalized issues:

1. What is the standard of review?
2. Was there an error in interpreting the statute and regulations?
3. Is the finding that medical marijuana is not essential for Ms. Campbell reasonable?
4. What remedy is appropriate?

Standard of Review

[17] Recently, I had to determine the standard of review for Assistance Appeal Board decisions: *Legere v. Nova Scotia (Community Services)*, [2010] N.S.J. 84 (S.C.). Findings of fact are reviewable only for their reasonableness, but an interpretation of the statute or regulations must be correct.

Statutory Interpretation

[18] The Assistance Appeal Board was not faced with a difficult issue of statutory interpretation. Context, including statutory purposes and the ministerial obligation to provide assistance, do little to alter the ordinary meaning of "essential" once the reader grasps that in s. 2(ab)(ii) the word does not refer to the essence of a person or thing, but refers to the necessity of a thing for some essential condition of the applicant, such as health.

[19] Mr. Vye correctly proceeded on the basis that the drug recommended for Ms. Campbell must be "essential to her health and well being". He committed no

error in likening this to "necessary and indispensable to the health and well being of the applicant".

Unreasonable Finding

[20] The finding was that the evidence was inadequate to show that the recommended medication was essential to Ms. Campbell's health and well being. That is what "only" denotes in "based only on Ms. Campbell's evidence and the vague and unchallenged...letter of Dr. Vitale". That being treated as the "only...evidence", Mr. Vye was "not convinced that the use...is 'essential'" to Ms. Campbell.

[21] Note that no finding was made against Ms. Campbell's credibility or, beyond its supposed vagueness, the unchallenged evidence from Dr. Vitale.

[22] There is nothing vague in Dr. Vitale's letter. He says that use of the recommended medication "has proven essential to her health and well-being" and it "[reproducibly] relieves her symptoms of pain and nausea".

[23] Mr. Potter argues that the letter is vague because it leaves many questions unanswered. The department did not require Dr. Vitale's attendance for cross-examination. I do not see how the absence of detailed answers to questions flowing from the general opinion expressed by the physician makes the general opinion "vague". On the contrary, it is clear though general.

[24] Short of a finding against Ms. Campbell's credibility, and there is no hint of such, it was unreasonable to conclude that her evidence fails to establish the necessity of the recommended medication. She gave evidence that she suffers from serious diseases. She gave evidence of debilitating physical, emotional, and cognitive symptoms. She gave evidence that the recommended medication significantly improves the symptoms and allows her to function, and that the alternatives, Interferon and Ribavarin, caused dangerous side effects.

[25] That being the evidence, there being no suggestion that Ms. Campbell contradicted her affidavit or, otherwise, lacked credibility, there was only one rational finding available to the Assistance Appeal Board. Medical marijuana is essential for Ms. Campbell.

[26] Mr. Potter argues that the documents from the Health Canada website produced by the Department at the Assistance Appeal Board hearing contradict the evidence of Ms. Campbell and Dr. Vitale. There are two problems with that. Firstly, the information is about the state of scientific proof and not Ms. Campbell's own experience. Whatever scientific evidence Parliament had before it, it made an exception to the illegality of marijuana for people who, like Ms. Campbell, have a medical need for it. Secondly, the decision is not based on the reported absence of scientific proof. It turns on the evidence of Ms. Campbell and Dr. Vitale "only".

Conclusion

[27] I will grant an order under Rule 7.11(c) requiring the Department to pay the expenses of Ms. Campbell's special need for medical marijuana. Counsel may address costs in written submissions.

J.