Date: 20021023
Docket: C. R. 171127 and 171636

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: R. v. Patriquen, 2002 NSSC 235]

BETWEEN:

HER MAJESTY THE QUEEN

- versus -

MICHAEL RONALD PATRIQUEN

D E C I S I O N

HEARD: At Halifax before the Honourable Justice Suzanne M. Hood on September 10, 2002

DECISION: September 10, 2002 (Orally)

WRITTEN RELEASE
OF ORAL: October 23, 2002

COUNSEL: **James C. Martin** for the Crown
Warren K. Zimmer for the accused

HOOD, J.: (Orally):

[1] Mr. Patriquen entered guilty pleas in March of this year to two offences of conspiracy to possess marihuana for the purposes of trafficking. Sentencing was originally set for August of this year and a joint recommendation was to be put forward at that time of six years imprisonment in a Federal Institution. On July 22, 2002, Mr. Patriquen was granted a license to possess a maximum 150 grams of marihuana at any time. The license expires on July 22, 2003. It was issued pursuant to the *Marihuana Medical Access Regulations*. On the same date and pursuant to the same *Regulations*, he was issued a license to produce, in his residence, marihuana for personal use. That license has the same expiry date.

[2] Mr. Patriquen makes application for the adjournment of his sentencing and for an order that his constitutional rights pursuant to ss. 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* are being infringed "by the Government of Canada's failure to provide a safe, legal supply of medical marihuana for individuals such as himself who possess a Personal Use Production License and an Authorization to possess dried marihuana under the *Marihuana Medical Access Regulations.* Secondly, he seeks a declaration that his constitutional rights pursuant to ss. 7, 12 and 15 of the *Charter* and as a holder of those licenses, "will be violated if he is sentenced to a term of imprisonment because he will not have access to a safe, legal supply of medical marihuana during said term". He seeks as a remedy that this court adjourn the sentencing from time to time, "until the Government of Canada makes available a safe, legal supply of medical marihuana to Michael Ronald Patriquen while serving a sentence of imprisonment, or such other remedy as the Court considers appropriate".

[3] It was agreed by the parties that the first issue to be determined was whether this court has jurisdiction to hear the application. I conclude that it does not for the following reasons.

[4] The Crown says that the Supreme Court is not the appropriate court to hear this application. The Crown's first argument is that Michael Patriquen should bring a civil action. The Crown says the issue does not properly arise in the Supreme Court on sentencing.

[5] Mr. Patriquen says that he is already before the court in this criminal proceeding and that it would be a duplication to have to bring a separate civil action. He says he is doing what was contemplated by the Supreme Court of Canada in *Mills v. The Queen* (1986), 26 C.C.C. (3d) 481 where Justice McIntyre said at p. 494:

> The jurisdiction of the superior court is derived from the creating statutes and the common law and from its nature as a superior court, a court in which jurisdiction is generally presumed. This court will always be a court of competent jurisdiction under s. 24(1) of the Charter at first instance. that is to say, in cases where the issue arises in matters proceeding before it or where the proceeding originated in that court because of the absence of another forum with jurisdiction. ... Considerations of convenience, economy and time will dictate that remedies under s. 24(1) will ordinarily be sought in the courts where the issues arise.

[6] Mr. Patriquen says that the issue does arise in this court in the course of his sentencing. He says he is doing what was done in *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.) when the *Charter* issue was raised in the context of a criminal trial. Mr. Parker was charged with cultivating marihuana but his defence was that he grew it to provide his own supply which he smoked to control incidence of seizures from what was described as a very severe form of epilepsy which conventional medications were only moderately successful in controlling.

[7] In *Parker*, the Ontario Court of Appeal struck down the criminal offence of possession of marihuana and concluded that the prohibition on cultivation and possession of marihuana violated the accused's security of the person rights under s. 7 of the *Charter*. In *Parker*, at para. 97, the Ontario Court of Appeal held:

> ... I conclude that deprivation by means of a criminal sanction of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of security of the person.

[8] Mr. Patriquen distinguishes his situation from that in *Wakeford v. Canada* (2000), 187 D.L.R. (4th) 175 (Ont. S.C.J.) where there were no criminal charges before the court and Mr. Wakeford had brought a civil action for a declaration that the *Controlled Drug and Substances Act*, S.C. 1996, c. 19, s. 56 violated his s. 7 *Charter* rights.

[9] There are two parts to the present application. The first is a declaration that Mr. Patriquen's rights will be infringed by the Government of Canada's failure to provide a safe legal supply of medical marihuana. In my view, that issue does not arise out of the criminal proceeding. It deals with the Government of Canada's failure to provide medical marihuana. That issue does not arise in the context of the sentencing but arises independently of any criminal proceeding in which

Mr. Patriquen is now involved. I therefore conclude that that issue does not arise in this matter. As Justice La Forest said in *Mills* at p. 566:

> ... civil remedies should await action in a civil court.

[10] He went on to say (at p. 566):

> Quite apart from division-of-powers problems that would arise from attempting to award damages and similar remedies in a criminal court, the fact is that as a practical matter, these are best dealt with in accordance with pleadings and practice appropriate to civil matters.
>
> It should be obvious from the foregoing remarks that I am sympathetic to the view that Charter remedies should, in general, be accorded within the normal procedural context in which an issue arises.

[11] In my view, a declaration that deals with the Federal Government's failure to supply medical marihuana causing an infringement of *Charter* rights is not a remedy which should be accorded in the context of a criminal trial and sentencing. That issue therefore is a civil matter. It is an issue that is far broader than the second issue which deals with the allegation that *Charter* rights will be infringed by a sentence of imprisonment.

[12] With respect to the second issue, I conclude that <u>if</u> I have jurisdiction, it should not be necessary to start a separate civil action. That, however, leaves the principal question of whether I have jurisdiction to make an order declaring that Mr. Patriquen's constitutional rights will be violated "if he is sentenced to a term of imprisonment because he will not have access to a safe legal supply of medical marihuana during said term".

[13] The Crown says that the application is premature because Corrections Canada has not yet made any decisions with respect to Michael Patriquen's health care requirements and how to accommodate them. Mr. Patriquen says that the court can deal with the issue because there is an anticipated breach of his *Charter* rights. In *Operation Dismantle*, [1985] 1 S.C.R. 441, the Supreme Court of Canada held that a s. 24(1) remedy would be available, not only in the case of an actual infringement of *Charter of Rights*, but also to prevent probable future harm when an applicant can establish an apprehension of such interference.

[14] In *R v. Vermette* (1988), 41 C.C.C. (3d) 523,, this principle was affirmed by the Supreme Court of Canada. In *R v. Gordon*, (1998), 130 C.C.C. (3d) 129, Justice Hill of the Ontario Court (General Division) said at p. 152:

> ... the scope of s. 24(1) extends as well to a preventative function respecting a threatened violation of a Charter right: *Operation Dismantle v. The Queen* ...

[15] He continued at p. 152:

> In order to establish a real and imminent threat of breach of a Charter right, an applicant for a s. 24(1) Charter remedy must demonstrate more than belief or opinion founded in conjecture or speculation.

[16] He then went on to quote at p. 152 from the judgment of Justice Dickson, as he then was, in *Operation Dismantle* as follows:

> The principles governing remedial action by the courts on the basis of allegations of future harm are illustrative of the more general principle that there is no legal duty to refrain from actions which do not prejudice the legal rights of others. A person, whether the Government or a private individual, cannot be held liable under the law for an action unless that action causes the deprivation, or threat of deprivation, of legal rights. And an action cannot be said to cause such deprivation where it is not probable that the deprivation will occur as a result of the challenged action. I am not suggesting that remedial action by the courts will be inappropriate where future harm is alleged. The point is that remedial action will not be justified where the link between the action and the future harm alleged is not capable of proof.

[17] In this case, Mr. Patriquen says there is a threat of a violation of his *Charter* rights. Justice Dickson referred to the need for proof of a link between the action and the probable harm in *Operation Dismantle*. In that case, the action itself had occurred however: that is, the government had granted permission for U. S. cruise missiles to be tested. What was not capable of proof was the future harm arising from that action.

[18] In *Vermette*, the action had also occurred. It was a statement by the Premier of Quebec disparaging many involved in a criminal trial. The Supreme Court of Canada concluded that it could not be satisfied that that action would make it impossible to select an impartial jury. Therefore, the violation of the accused's rights was determined to be speculative.

[19] In *R. v. Smith* (1989), 52 C.C.C. (3d) 97 (S.C.C.), the Supreme of Canada dealt with an application that the accused's right to a trial within a reasonable time had been infringed. The application had been brought before the preliminary inquiry was to begin and the court said that, in that sense, it was anticipatory. However, the court concluded that the judge who heard the application had the matter properly before him because he considered it on the basis that the time had already elapsed. In other words, the action had occurred which was alleged to cause the future harm, that is, not having a trial within a reasonable time.

[20] In *Gordon*, the motions judge had before him an application for a s. 24(1) remedy from reasonable delay in bringing the accused persons to trial. On that application, some of the accused persons had filed affidavits and the Crown intended to cross-examine on those affidavits. The Crown's intent then was to enter, at trial, the tapes of that cross-examination or the evidence of an expert on voice identification to aid its case on voice identification from the wire tap evidence. Justice Hill concluded that *Charter* relief was necessary before the trial to prevent the use of the accuseds' voice evidence at trial which he concluded would infringe their right against self-incrimination. He concluded he had to act then or the accused persons would not be able to pursue their *Charter* remedy for the alleged infringement of their right to a trial within a reasonable time. The action which would infringe their right against self-incrimination was certain to occur.

[21] None of the above circumstances are analogous to those in this case. The action which may violate Mr. Patriquen's *Charter* rights has not occurred as it had in *Operation Dismantle, Vermette* and *Smith.* Nor is there the certainty of its occurrence or other similarities to those in *Gordon*. It is speculative at this stage to say that Corrections Canada will act in a way that violates Mr. Patriquen's *Charter* rights and that, as a result, his *Charter* rights will be violated. It is speculative to say that Mr. Patriquen will be deprived of proper medical treatment if sentenced, which deprivation will violate his right to security of the person. There is no evidence before me on this point.

[22] In *R. v. Daniels*, [1991] S.J. No. 254 (C.A.), the Saskatchewan Court of Appeal dealt with an appeal from a trial judge's order designating in which penitentiary a native woman should serve her sentence. The trial judge found that committal of Ms. Daniels to the Kingston Penitentiary would violate her s. 12 and s. 15(1) *Charter* rights. However, the Court of Appeal concluded that, since there had not, at the time of the application, been a committal to the Kingston Penitentiary, the application was premature. The court said (at p. 5, Quicklaw version):

> ...the application could be said to have been premature. That alone would be sufficient grounds to set aside the order.

[23] In this case, I conclude that since no act has yet occurred which is alleged to deprive Mr. Patriquen of his *Charter* rights, the application is premature and should be dismissed. However, in the event I am wrong on this issue, I will deal with the broader issue.

[24] Mr. Patriquen seeks an adjournment of his sentencing. He brings this application as part of the sentencing process because he says the *Charter* breach arises "in the context of the sentencing". He says the court will be implicated in the deprivation of his supply of medical marihuana. However, to grant the remedy he seeks, I must find that his *Charter* rights will be breached if he is sentenced or that an action by Corrections Canada will occur which makes it probable that deprivation of his rights will occur as a result. I am being asked for a declaration that a breach or anticipated breach of *Charter* rights will occur. The question then becomes whether that breach or anticipated breach arises in this proceeding.

[25] I am asked to adjourn the sentence, not because of past events which occurred during the criminal process or because of something that is the current state of affairs, but because of a future event which, it is submitted, I should conclude will occur if Mr. Patriquen is sentenced.

[26] I do not find the cases submitted to me by counsel for Mr. Patriquen on reduced sentences for *Charter* violations to be helpful. In those cases, the *Charter* breaches had occurred during the criminal process, that is, in the cases of *Regina v. Charles* (1987), 36 C.C.C. (3d) 286 (Sask, C.A.)*; R v. Collins* (1997), 133 C.C.C. (3d) 8 (Nfld. C.A.); *Regina v. MacPherson* (1995), 100 C.C.C. (3d) 216 (N.B.C.A.)*; R v. Stannard* (1989), 52 C.C.C. (3d) 544 (Sask. C.A.) and *R v. Carpenter*, [2002] B.C.J. No. 1037 (B.C.C.A); or, in one case, the *Charter* breach occurred at the sentencing hearing itself (*R v.* Zwicker, [1995] N.B.J. No. 502 (N.B.C.A.). In those cases, the courts considered whether those *Charter* breaches should result in a reduced sentence. This case is one where it is sought to postpone sentencing indefinitely for prospective *Charter* breaches. The issues are, in my view, quite different from situations where, for example, illegally obtained evidence is a factor in the length of a sentence imposed.

[27] Is there something in the act of sentencing or the process of sentencing that will cause an infringement of Mr. Patriquen's *Charter* rights? In my view, the answer is no. If such an infringement occurs, it will be as a consequence of the sentencing. Sentencing someone to a term of imprisonment in circumstances such as those of Mr. Patriquen does not, in and of itself, cause a violation of his *Charter* rights. It is what may or will happen to him once imprisoned that may breach his *Charter* rights. It arises from the fact of being in prison, not from being sentenced to prison. In this case, there is no evidence that a *Charter* breach will actually occur and the Crown has not concede that it will. The Crown says that if a *Charter* breach occurs, it will be because of the rules of

Corrections Canada, not because of the sentence I impose. The Crown therefore says that the appropriate court to deal with such a breach or allegation of breach is the Federal Court which they say is the court of competent jurisdiction.

[28] Provincial superior courts have an inherent supervisory jurisdiction over both federal and provincial departments and tribunals. The Supreme Court of Canada said of this jurisdiction in *Canada (Labour Relations Board) v. Paul L'Anglais Inc.*, [1983] 1 S.C.R. 147 (at p. 5 of the Quicklaw version):

> Since Confederation, the superior courts of the provinces have preserved and continued to exercise the superintending and reforming power they previously enjoyed, not only over provincial but over federal agencies as well.

[29] However, the *Constitution Act 1867* reserved to Parliament the right:

> ... to divest the provincial superior courts of this power and confer it on another court.

[30] That is what Parliament did in enacting s. 18 of the *Federal Court Act,* R.S.C. 1985, c. F-*7*. It provides:

> 18 (1) Subject to section 28, the Trial Division [of the Federal Court) has exclusive original jurisdiction
>
> (a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto,* or grant declaratory relief, against any federal board, commission or other tribunal; and
>
> (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

[31] In *Wakeford v. Canada*, a distinction was recognized between proceedings challenging legislation and proceedings challenging administrative action of a federal board, commission or tribunal acting pursuant to valid legislation. In *Wakeford*, *supra,* the Ontario Court of Appeal concluded that the provincial superior court had jurisdiction to consider whether the *Controlled Drug and Substances Act* infringed Mr. Wakeford's *Charter* rights. However, it also concluded that allegations that the Minister failed to do certain things was not properly before the Ontario superior court because they "would involve judicial review of the acts of the Minister and falls squarely within the exclusive jurisdiction of the Federal Court" (para. 44).

[32] In *Daniels*, *supra*, the trial judge, on sentencing, concluded that, if Ms. Daniels, a native woman from Saskatchewan, served her sentence in the penitentiary at Kingston, Ontario, it would infringe her *Charter* rights. She therefore declared one section of the *Criminal Code* and a section of the *Penitentiary Act, R.S.C.*, 1985, c. P-5 invalid and ordered that the Commissioner of Corrections not incarcerate Ms. Daniels in the Kingston, Ontario penitentiary. At the Saskatchewan Court of Appeal, the court concluded that the trial judge erred in finding that the legislative provisions were the cause of the matter complained of. The court concluded that the trial judge wrongly came to the conclusion that the Commissioner of Corrections had no choice but to send Ms. Daniels to Kingston. It also concluded that, if the Commissioner had no choice, it was not because of the impugned provisions of the *Criminal Code* and the *Penitentiary Act*. The Court of Appeal said that, if the Commissioner had no choice, it was caused by:

> ... his failure to provide other facilities, incarceration in which would not result in alleged Charter violations (p. 5 Quicklaw version).

[33] The Saskatchewan Court of Appeal said in the penultimate paragraph of its decision:

> Accordingly, the *Charter* violation, if there was one, stemmed not from ss. 731 and 15, but from an anticipated act or an actual default by the Commissioner of Corrections, that is, anticipated committal of Ms. Daniels to Kingston, or more correctly, failure to provide penitentiary facilities which meet the requirements of the *Charter*. These things are independent of the sentencing process in the criminal trial. The trial judge's function ended with imposition of a sentence in a penitentiary – under the *Criminal Code*, she had no right to designate which penitentiary in which the sentence was to be served. The next step, the application under the *Charter* was concerned not with the criminal trial, including the imposition of sentence, but with the administration of the sentence, something confided to the Commissioner of Corrections under the *Penitentiary Act*. Since the order made was directed to the exercise or non-exercise of his powers and duties, it was in the nature of a *mandamus* or prohibition. Such a remedy directed to a federal tribunal (and that includes the Commissioner) is within the exclusive jurisdiction of the Federal Court of Canada under s. 18 of the *Federal Court Act*...

[34] The Supreme of Court of Canada dismissed an application for leave to appeal that decision of the Saskatchewan Court of Appeal.

[35] In this case, no legislative provisions are impugned. I am therefore not asked to strike down invalid legislation. As in *Daniels*, I must characterize the substance of the complaint. I am asked to conclude, similar to the conclusion

in *Daniels*, that imprisoning Mr. Patriquen in any federal institution will deprive him of his ss. 7, 12 and/or 15 *Charter* rights. If that is the case and it is not established as the trial judge was satisfied it was in *Daniels*, what is or would be the cause of these *Charter* violations?

[36] In *Daniels*, the trial judge "assumed that the Commissioner of Corrections had no choice" as to where to place Ms. Daniels. In this case, Mr. Patriquen submits that I should assume that the Commissioner will be unable to meet his medical needs. If that is the case, what is the reason for it? To paraphrase *Daniels*, it is because of his failure to provide for Mr. Patriquen's medical needs in a way which would not result in a *Charter* violation; that is, to provide penitentiary facilities which would meet *Charter* requirements such as in *Daniels*. Continuing to paraphrase *Daniels*, the *Charter* violation, if there was one, would stem from an anticipated act or actual default by the Commissioner of Corrections. That is independent from the sentencing and involves administration of the sentence which is within the purview of the Commissioner of Corrections. That puts the anticipated act or actual default within the exclusive jurisdiction of the Federal Court.

[37] In leaving this application to be dealt with, if necessary, by the Federal Court, the Commissioner of Corrections will have an opportunity, as the Crown put it, "to do his job". If Mr. Patriquen alleges he does not do so or does so in a way that violates his *Charter* rights, the matter may then be dealt with in the Federal Court where the Commissioner of Corrections will have the opportunity to be heard.

[38] In *Mills*, *supra,* the Supreme Court of Canada said at p. 491:

> In s. 24(1) of the Charter the right has been given, upon the alleged infringement or denial of a Charter right, to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The Charter has made no attempt to fix or limit the jurisdiction to hear such applications. It merely gives a right to apply to a court which has jurisdiction.

[39] As Justice La Forest said in *Mills* at p. 566:

> But there must at all times be a court to enforce this remedy. The notion that the remedy must fail or be ineffective for lack of a competent court within the confines of the ordinary procedures for the administration of criminal justice can no more be imagined than can the notion of a right without a remedy.

[40] The Nova Scotia Court of Appeal had the opportunity in *Mousseau v. Canada* (1993), 107 D.L.R. (4th) 727 (N.S.C.A.) to consider whether the Nova Scotia Supreme Court, a provincial superior court, had jurisdiction to grant a remedy

pursuant to s. 24(1) of the *Charter* with respect to a matter falling within the exclusive jurisdiction of the Federal Court pursuant to s. 18 of the *Federal Court Act*, R.S.C. 1985, c F-7. The application was brought for a *Charter* declaration that the Attorney General of Canada and the Millbrook Band Council unlawfully discriminated against the applicants in the provision of housing subsidies to them on the Millbrook Reserve.

[41] Justice Chipman said at p. 731 of the decision:

> There is no doubt that the authorities referred to by the chambers judge support the proposition that s. 18 of the *Federal Court Act* cannot be read so as to deprive provincial superior courts of their jurisdiction to determine the constitutional validity and applicability of federal legislation.

He continued at p. 733:

> There is, however, a distinction between jurisdiction to determine the constitutional validity or the applicability of legislation on the one hand and jurisdiction to pass upon the *manner* in which a board or a tribunal functions under such legislation on the other.

At p. 735 he said:

> In my opinion, the issue in this case relates not to whether the legislation under which the appellants functioned infringed the Charter, but whether the *manner* in which they functioned under that legislation did so. The question is whether in such circumstances this amounts to a constitutional issue over which the Supreme Court has jurisdiction in the face of s. 18 of the Federal Court Act. Strong policy considerations exist for answering this question in the negative.

He then concluded at p. 735:

> In my opinion, the activities of federal agencies pursuant to federal law - as distinct from the law itself - are clearly matters which can be scrutinized under the Charter only by a court which is otherwise one of competent jurisdiction within the meaning of s. 24(1) of the Charter. The Supreme Court is not such a court.

He therefore dismissed the application.

[42] In this case, there is a court of competent jurisdiction to deal with this issue when and if the time comes to do so. The Federal Court is the court of competent jurisdiction. The Nova Scotia Supreme Court is not.

[43] I therefore dismiss the application.

Hood, J.