SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Enns*, 2023 NSSC 381

Date: 20231115
Docket: CRH-482274
Registry: Halifax

Between:

His Majesty the King

v.

Christopher Enns

APPLICATION FOR RECONSIDERATION OF SECTION 7 *CHARTER* MOTION

Judge: The Honourable Justice Joshua Arnold

Heard: November 1 and 3, 2023, in Halifax, Nova Scotia

Written Decision: December 1, 2023

Counsel: Len MacKay and Scott Millar, for the Federal Crown
Christopher Enns, Self-Represented Accused

Background

[1] Christopher Enns is charged with cannabis-related offences alleged to have occurred on or about November 8, 2017. At that time, medical cannabis was regulated by the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230, which were repealed, effective October 17, 2018, by SOR/2018-147 ("*ACMPR"*).

[2] In 2019, Mr. Enns made a motion in accordance with s. 7 of the *Charter of Rights and Freedoms*, requesting that the *ACMPR* and s. 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c.19, be declared unconstitutional on the ground that restrictions on access to medical cannabis impact liberty and security of the person by interfering with the physical and psychological integrity of his customers, contrary to the principles of fundamental justice. In that application Mr. Enns called the following civilian witnesses: Arthur Alchorn, Juanita Sherlock, Stephanie McMullen, Gizelle Lauzier, Paul Mitchell, Zena Rice, Sherry MacDonald, Bruno Deveau, and Jennifer Bower.

[3] He also called the following expert witnesses:

Name of Expert	Areas Qualified
Dr. David Rosenbloom	Pharmacy and pharmacology, the effect of delayed access to drugs including medical cannabis, and the purchase of drugs.
Dr. Stephen Gaetz	Homelessness and precarious housing in Halifax specifically, and more broadly across the country.
Eric Nash	Cannabis cultivation, production, and cannabis derivatives.
Dr. Jokubas Ziburkus	Endocannabinoid system, endocannabinoids, phytocannabinoids, cannabis plants and products, and the pre-clinical and clinical research on medical cannabis.
Dr. Zachary Walsh	Medical cannabis dispensaries, barriers to access to medical cannabis, and cannabis as a substitute for opioid medicines.

[4] I denied his application on October 29, 2019 (2019 NSSC 323).

[5] Mr. Enns's matter was scheduled for trial (and adjourned) on the following dates:

Jury Trial Dates	Date Jury Trial Adjourned	Reason for Adjournment
November 22 – December 12, 2019	November 13, 2019	Mr. Enns requested an adjournment having filed a s. 7 *Charter* constitutional challenge to the *ACMPR*'s and s. 5(2) *CDSA*.
May 13 – June 5, 2020	April 9, 2020	Adjourned by the court due to Covid-19.
June 7 – 25, 2021	May 21, 2021	Mr. Enns requested an adjournment having challenged the constitutionality of the Mellor Courthouse.
September 6 – 26, 2022	September 2, 2022	Mr. Enns requested an adjournment due to Mr. Lloyd applying to be removed as his solicitor of record.
November 20 – December 12, 2023	November 15, 2023	Mr. Enns requested an adjournment having made application to reopen the s. 7 *Charter* application.

[6] Two cases from other jurisdictions, decided after my 2019 decision denying Mr. Enns's application regarding the *ACMPR*s, have declared parts of the *ACMPR*'s unconstitutional.

[7] In *R. v. Howell*, 2020 ABQB 385, the following expert witnesses were called, and according to the decision, qualified to give opinion evidence on the following topics:

Name of Expert	Areas Qualified

Dr. Carolina Landolt	Cannabis, medical cannabis patient access and the management of complex chronic pain problems in patient and out-patient settings. The medical uses of cannabis within her specialization, rheumatology and internal medicine and chronic pain management, and the needs and obstacles of her patients that are prescribed medical cannabis within her area of expertise.
Dr. David Rosenbloom	Pharmacy and pharmacology, the effect of delayed access to drugs including medical cannabis, and the purchase of drugs.
Dr. Jokubas Ziburkus	Endocannabinoid system, endocannabinoids, phytocannabinoids, cannabis plants and products, and the pre-clinical research on medical cannabis.
Dr. Stephen Gaetz	Homelessness, precarious housing, matters related to homelessness and precarious housing, and services for those of modest means.
Eric Nash	Medical cannabis and access to medical cannabis, cannabis growing, cannabis products, and the medical cannabis regimes in Canada (now and in the past)

[8] In *R. v. Warneke*, 2022 SKKB 232, the following expert witnesses were called:

Name of Expert	**Areas Qualified**
Dr. Robert Laprairie	Pharmacology, cannabis pharmacology and the effect of intermittent and delayed access to drugs including cannabis.
Dr. Ira Price	Emergency medicine, cannabis and cannabinoid therapeutics, patient access to medical cannabis and the effects of delayed and intermittent access to cannabis for patients.

Dr. Carolina Landolt	Cannabis, medical cannabis patient access and the management of complex chronic pain problems in patient and out-patient settings. The medical uses of cannabis within her specialization, rheumatology and internal medicine and chronic pain management, and the needs and obstacles of her patients that are prescribed medical cannabis within her area of expertise.
Dr. Stephen Gaetz	Matters related to homelessness and precarious housing, and services for those of modest means.

[9] On October 23, 2023, Mr. Enns made an application for reconsideration of his s. 7 *Charter* application, asserting that there are material facts he wants to elicit that are materially different than those presented at his first application, and, if permitted to re-litigate the *Charter* motion, proposing to call the following witnesses who testified in *Howell* and/or *Warneke*:

- Dr. Stephen Gaetz
- Dr. Carolina Landolt
- Dr. Robert Laprairie
- Dr. Ira Price

[10] Mr. Enns also proposes to tender the evidence of Rielle Capler to provide evidence regarding the difficulty patients faced in obtaining a designated grower in 2017. Mr. Enns has provided an affidavit from Rielle Capler indicating that she would be prepared to provide an expert affidavit and to make herself available for cross-examination. Mr. Enns has indicated that Professor Capler testified in *Howell* and would provide the same evidence to this court. However, I have not found reference to evidence from Rielle Capler in the *Howell* decision. Mr. Enns has not provided me with an expert affidavit from Professor Capler, and I do not have any material before me indicating precisely what evidence Professor Capler may provide to this court. I therefore cannot consider Professor Capler's potential evidence in my analysis of the material changes to the evidence, because I do not know what it might include.

[11] Mr. Enns also argues that I made material legal errors when I denied his 2019 application, and that reconsideration would give the court an opportunity to correct its mistakes prior to his proceeding to trial.

[12] On November 15, 2023, I gave the parties my bare-bones bottom line decision allowing Mr. Enns's application for reconsideration, with more fulsome reasons to follow. These are my written reasons.

Position of Mr. Enns

[13] Mr. Enns argues that the proposed evidence listed above represents a material change from the evidence provided in the first application. Mr. Enns says that his "counsel made an honest and reasonable mistake as to the evidence required" (para. 11) and that the proposed expert evidence will more clearly draw a connection between a delay in accessing cannabis, and serious harm to the patient's health.

[14] Regarding the alleged errors in my 2019 decision, Mr. Enns argues that I incorrectly required him to establish "serious long-lasting harm" in order to establish a s. 7 violation, and that I failed to address why the prohibition against in-person access to cannabis provided by licenced producers ("LPs") is rationally connected to the objectives of promoting health and safety.

Position of the Crown

[15] The Crown objects to the reconsideration of the s. 7 *Charter* application, and states:

> The applicant intends to argue that the new evidence represents a material change and that the Alberta and Manitoba decisions support his argument that this Court erred in its conclusion on the issues.
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> …
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> The expert evidence being proposed by the applicant on the re-hearing of the s. 7 motion is actually quite similar to that called at the earlier hearing. The expert affiants from *Warnecke* presented here are two medical doctors and a doctor of pharmacology. The proposed evidence would address the medical use of cannabis, access to medical cannabis, and in particular, the impact of delayed access – all issues that were addressed in the original hearing. The original ruling from this Court concluded that the evidence did not establish serious long-lasting harm or life-threatening conditions, as was required by s. 7 jurisprudence in this

> area, nor did any delay in receiving licit medical cannabis amount to a breach of the principles of fundamental justice.
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> The applicant argues that the circumstances specific to the case before the Court are not relevant to the s. 7 analysis, but he ignores the balancing that is required under this analysis. As the Court noted here, the testing of and access to safe medical cannabis under the regulations must be contrasted to that offered by the applicant. While the access may be easier at his store-front dispensary, we have no idea whether the untested product is safe. These facts cannot change with a new hearing.

Relevant legal principles regarding reconsideration of a *Charter* application

[16] In *MacQueen v. Canada (Attorney General)*, 2014 NSCA 73, a civil case, Oland J.A., for the court, determined that the court did not have the jurisdiction to reconsider its decision and order. In that case, the applicants (the respondents in the original action) wanted their motion to be reconsidered in light of two decisions from the Supreme Court of Canada, released after the NSCA's decision, which the applicants claimed were highly relevant and may have produced a different conclusion on the motion.

[17] In reviewing the law that determines whether reconsideration is permissible in a civil case, Oland J.A. stated:

> [7] It is important to keep in mind that, in this case, the Court issued its order. That is because in assessing reconsideration motions, the courts have distinguished between those where the order had not yet issued although the decision had been made, and those where the order had issued. … My analysis will deal only with the latter, as that is the situation here.
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> [8] Once a court has issued its order, the general rule is that it cannot re-open the decision. See, for example, *Midland Doherty Ltd. v. Rohrer*, [1985] N.S.J. No. 121 (S.C.A.D.), where MacKeigan, C.J. stated:
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>> [5] Once a final order is issued on appeal this Court has *prima facie* no jurisdiction to open the appeal to grant a new hearing of the appeal or to correct any substantive error made by it on the appeal; a party aggrieved by our error must ordinarily look for remedy to the Supreme Court of Canada, if appeal to that Court is available.
>
> [9] Although he did not use the term, what MacKeigan, C.J. described was the effect of the common law doctrine of *functus officio*. In *Nova Scotia Government and General Employees Union. v. Capital District Health Authority*, 2006 NSCA 85, Cromwell, J.A. (as he then was) explained the principles relating to *functus officio*:

> [36] *Functus officio* is a rule about finality: once a tribunal has completed its job, it has no further power to deal with the matter. In relation to court proceedings, the principle means that, in general, once a court has issued and entered its final judgment, the matter may only be reopened by means of appeal. To this general rule, however, there are at least two exceptions: the court may correct slips and, as well, address errors in expressing its manifest intent…
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> [37] These principles developed in the context of court decisions which are subject to full rights of appeal. The existence of these full rights of appeal fostered the view that an appeal, rather than a reopening of the case before the initial decision-maker, was generally the preferred way to address errors in the initial decision.

[10] In regard to finality, the policy rationale underlying *functus officio*, the Supreme Court of Canada in *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62 elaborated:

> 79 It is clear that the principle of *functus officio* exists to allow finality of judgments from courts which are subject to appeal (see also *Reekie v. Messervey*, [1990] 1 S.C.R. 219, at pp. 222-23). This makes sense: if a court could continually hear applications to vary its decisions, it would assume the function of an appellate court and deny litigants a stable base from which to launch an appeal. …

…

[14] As the jurisprudence I have quoted has explained, generally, once a court has issued its decision and order, the matter may only be reconsidered by means of an appeal to a higher court. The decisions of this Court are subject to appeal to the Supreme Court of Canada. The respondents have taken steps to seek leave. By Order dated February 17, 2014, Justice Cromwell of the Supreme Court of Canada granted their motion to extend the time to serve and file their Application for Leave to Appeal this Court's decision, to ten business days after our decision on their intended Motion for Reconsideration.

…

[46] Their argument, namely, that decisions released after a court's decision and order, can ground a reconsideration, has not been the basis of a successful reconsideration hearing by any Canadian court. Moreover, as I have explained, its acceptance would severely erode the principle of finality of judgments from courts which are subject to appeal. It would cause uncertainty and additional costs for litigants, and could have far-reaching and unanticipated consequences for the administration of justice.

[47] This is not a situation where justice manifestly requires a reconsideration. There is an appeal from the decisions of this Court to the Supreme Court of Canada…

[18] However, the principles regarding reconsideration differ slightly when dealing with a criminal case, as noted by Watchuk J. in *R v Nazarek,* 2016 BCSC 1927:

> **20** Counsel agree that the law is clear that a court has the discretion to re-open a *voir dire* and to consider any further evidence that might be called on matters at issue. In support, they cite *R. v. Hayward* (1993), 86 C.C.C. (3d) 193 (Ont. C.A.), at pp. 197-198, where Doherty J.A. stated the following in connection with re-opening a case prior to a finding of guilt:
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>> A trial judge sitting without a jury may permit the reopening of the evidence at any time before sentence is passed… The decision to permit either party to reopen its case and call further evidence is within the discretion of the trial judge, and where that discretion is exercised judicially an appellate court will not interfere: *R. v. Scott*, at p. 319.
>
> **21** In providing guidance, Doherty J.A. listed the factors at pp. 197-198 that a court ought to take into consideration when deciding whether to exercise its discretion to re-open a hearing of evidence because of proposed new evidence:
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>> When faced with an application to reopen the evidence, the trial judge should first be satisfied that the proposed evidence is relevant to a material issue in the case. That determination can usually be made on the basis of counsel's summary of the anticipated evidence.
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>> ...
>>
>> Once it is determined that the proposed witness has relevant evidence to give, the trial judge must consider the potential prejudice to the other party should he or she permit the reopening of the evidence.
>>
>> ...
>>
>> The trial judge must also consider the effect of permitting a reopening of the evidence on the orderly and expeditious conduct of the trial.
>
> **22** The exercise of discretion by a trial judge with respect to applications to re-open, or to re-calling a witness for additional examination, is a function of the issues and facts that arise in a particular case, including the need for the orderly conduct of the trial.
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> **23** Concerns regarding the orderly and expeditious conduct of the trial have been frequently commented on by the judiciary. In *R. v. Sipes*, 2008 BCSC 1257, Smart J. held (at paras. 30 and 31):

> A trial judge's management power can include requiring reasonable notice and particulars of a pre-trial application from the defence, including a synopsis of the evidence to be adduced and the issues and the law to be argued. As stated in *Horan*, [2008] O.J. No. 3167 a judge owes a duty to the parties and to the public to promote the efficient use of court time and to ensure that all parties are treated fairly.
>
> It is important that each party to an application clearly knows in advance of the application what is at issue, what evidence will be led, what arguments will be made and what case law will be presented.

[19] These comments are particularly relevant when the reconsideration application relates to a pre-trial or mid-trial *Charter* ruling. In *R. v. Chaisson*, 2022 NSSC 369, Norton J. reviewed the law regarding a request for reconsideration of a *Charter* application that is brought before the final decision is made:

> [19] The Crown has referred me to a paper presented by David Schermbrucker at the Federation of Law Societies' 2022 National Criminal Law Program in Victoria, BC, titled "*Bringing and Responding to a Charter Application: Complex Issues*". On the subject of reconsideration of a decision on a *Charter* application, the author stated:
>
>> When a judge has ruled on the merits of a *Charter* motion it is generally considered to be a final ruling, subject only to a possible appeal against the eventual verdict. However the judge retains authority to reconsider their decision on a *Charter* motion until the verdict (in trial by jury) or sentence (in trial by judge alone). *Functus officio* aside, the policy concerns for clarity and finality weigh against reopening; concerns about the interests of justice weigh in favour.
>>
>> - There is a strong presumption against reconsidering or reopening a *Charter* motion, and it should only be done where truly necessary in the interests of justice.
>> - The most common circumstance to justify reconsideration is where the original facts or circumstances have materially changed in the interim, so that the previous ruling is now clearly unsound. If the parties agree—or the judge concludes—that the ruling was wrong in law, the judge may reconsider it.
>> - Another circumstance is where counsel had made an honest and reasonable mistake as to the evidence, or was misled in their conduct of the original *voir dire*.

> - Reconsideration must not work a substantive unfairness. If one of the parties has relied on the original ruling to inform their litigation strategy, this militates against reconsideration.
> - These principles apply equally to the defence and Crown parties.
>
> …
>
> [25] The law is clear that the burden is on Mr. Chaisson to establish that the original facts or circumstances have materially changed such that the original decision is clearly unsound. I cannot find here circumstances that are extraordinary, compelling, and exceptional and where justice manifestly so requires that I reconsider the pre-trial applications.

[20] Similarly, in *R. v. Orr,* 2021 BCCA 42, Dewitt-Van Oosten J.A. explained, for the court:

> [43] Before turning to the grounds of appeal, I consider it helpful to set out some well-established principles governing *Charter* applications in the criminal trial context. These principles may appear trite to some, but they are germane to the issues raised by the appellant and worth repeating.
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> [44] First, the applicant for a *Charter* remedy bears the overall burden of proving an infringement or denial of a constitutionally protected right or guarantee on a balance of probabilities. In some cases, that burden may be met by establishing a *prima facie* set of facts that triggers a presumption the Crown is then unable to rebut (such as the presumptive unreasonableness of a warrantless search). As another example, the applicant might establish an arrest (or detention) and, in response, the Crown is unable to justify the lawfulness of the liberty interference. Even in those circumstances, however, it remains the applicant's overall burden to prove that the impugned state conduct violated the *Charter*…
>
> [45] Second, constitutional claimants that seek the exclusion of evidence under s. 24(2) or an individualized remedy under s. 24(1) of the *Charter* must support their application for a remedy with a factual foundation. Allegations of constitutional violation cannot exist in a factual vacuum, or rely for their proof on conjecture, speculation, or the unsupported submissions of counsel…
>
> [46] Third, there is no automatic entitlement to an evidentiary *voir dire* in a *Charter* claim. As a result, where there is no reasonable likelihood that a *voir dire* can assist in determining the issues before the court, or no reasonable prospect of success in proving an infringement or obtaining the sought-after relief, a trial judge has clear jurisdiction to decline an evidentiary *voir dire* and to summarily consider and dismiss the application…
>
> [47] Fourth, a trial judge is entitled to revisit a *Charter* ruling made during the trial. However, that power is limited and to be exercised only when necessary because of a material change of circumstances or other development that renders a re-opening in the interests of justice, and not if it results in an unfair proceeding…

> [48] Fifth, a decision to decline an evidentiary *voir dire*, or to re-visit that ruling, will attract significant deference on appeal…
>
> [Emphasis added]

[21] In *R. v. R.V.*, 2018 ONCA 547, reversed on other grounds, 2019 SCC 41, Paciocco J.A. concluded that the power of a trial judge to reconsider an issue is clear, and stated:

> [98] The power of a trial judge to reconsider earlier rulings made within the trial they are presiding over is clear. The relevant principles are as follow.
>
> [99] The principles of *res judicata* do not apply during a hearing to decisions reached by a judge during that hearing, and a judge is not *functus officio* when a *voir dire* has ended… judges who are not *functus officio* have jurisdiction to reconsider and vary the orders that are made within a trial, in the interests of justice. Justice Sopinka said, at para. 30:
>
>> As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place.
>
> [100] Indeed, this court has held that a trial judge can change their mind up until the point when the accused has been sentenced…
>
> [101] There are, of course, limits on the authority to reconsider. It should not be used without circumspection because of the interest in finality and clarity. Nor can reconsideration produce unfairness: *R. v. Montoute*, [1991] A.J. No. 74, 62 C.C.C. (3d) 481 (C.A.), at p. 488 C.C.C. For example, it may not be appropriate to reconsider rulings that have been relied upon by one of the parties in forming a trial strategy, unless the prejudice incurred in reliance on the ruling can be remedied…
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> [102] The most common circumstance where it may be in the interests of justice to reconsider rulings is where facts have materially changed…
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> [103] However, this is not the only circumstance. Rulings have also been re-opened where a party has misunderstood the scope of an admission, or because counsel was unaware of relevant evidence at the time... A trial judge may also correct a decision that they discover was made in error…
>
> [104] It would make no sense, in my view, for s. 669.2 trial judges to be unable to respond in these ways in the interests of justice because they are bound by decisions of the judge they have replaced.

[22] In *R. v. Haevischer*, 2023 SCC 11, Martin J., for the court, clarified when the defence would be prohibited from raising a *Charter* motion in the first instance (not involving the issue of reconsideration). She stated:

> [46] The standard selected for summary dismissal on a *Vukelich*-type hearing will be based on the two sets of underlying values at play in such proceedings: trial efficiency and trial fairness. These values coexist and "both must be pursued in order for each to be realised: they are, in practice, interdependent" (*R. v. Jordan*, 2016 SCC 27, [2016] 1 S.C.R. 631, at para. 27, quoting B.C. Justice Reform Initiative, *A Criminal Justice System for the 21st Century* (2012), at p. 75).
>
> …
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> [51] The allure of efficiency is not, however, to advance simplicity or speed as ends in themselves. Complexity in criminal trials is sometimes unavoidable, and the goal is to avoid disproportionate or undue delay, which impairs the interests of justice (see *Jordan*, at para. 43). Trials, and the applications taken in respect of them, should take a *proportionate* amount of time. What is required to fairly and justly address any particular application will depend on the nature of the application and the context of the broader trial. Trial judges should guard against any "procedural step or motion that is improperly taken, or takes longer than it should" as they would "depriv[e] other worthy litigants of timely access to the courts" (para. 43)…
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> …
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> [56] In criminal cases, trial fairness is more than a policy goal: it is a constitutional imperative. A criminal trial involves allegations made by the state against an accused whose liberty is often at stake. The summary dismissal of criminal applications can curtail the accused's right to full answer and defence and the right to a fair trial protected by ss. 7 and 11(d) of the *Charter* by stopping the accused from fully making arguments and eliciting evidence on their application…There are, of course, limits to these rights. For example, accused persons are not entitled to a *voir dire* and, if a *voir dire* is granted, are not entitled to whatever style of *voir dire* they would prefer (*Vukelich*, at para. 26). The trial judge decides if and how the *voir dire* proceeds and whether it should include an evidentiary hearing. Nevertheless, summary dismissal of applications made in the criminal law context implicates and, in certain circumstances, can curtail the accused's rights.
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> [59] These concerns inform and align with existing jurisprudence, which recognizes that trial fairness requires a low threshold for holding a *voir dire*, such that most applications are heard on their merits (see *R. v. Frederickson*, 2018 BCCA 2, at para. 33 (CanLII)). Indeed, the parties before this Court generally all agree that it should not be difficult for an accused's application to proceed to a *voir dire*, though they disagree on the exact standard to be applied.
>
> …

[61] A rigorous threshold is also supported by the particular characteristics of criminal trials, including how the trial judge's broad case management powers can help ensure the efficient, effective and proportionate use of court resources as well as the accused's fair trial rights. Judges perform a gatekeeping function, and the goal is that only those applications that should be caught by the summary dismissal power are in fact summarily dismissed. Trial judges should therefore err on the side of caution when asked to summarily dismiss an application made in the criminal law context. This is especially so in light of the deferential standard of review applied on appeal to a judge's case management decisions (*Samaniego*, at para. 25; *Edwardsen*, at para. 75). The threshold and standard selected for summary dismissal must respect this Court's observation (in the context of jury selection) that "occasional injustice cannot be accepted as the price of efficiency" (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 28).

…

[66] I conclude that the appropriate standard for summary dismissal is whether the underlying application is manifestly frivolous…

[67] The "frivolous" part of the standard weeds out those applications that will necessarily fail. This Court has previously stated that the "'not frivolous' test is widely recognized as being a very low bar" (*R. v. Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250, at para. 20). Having reviewed the case law on the "not frivolous" threshold, inevitability or necessity of failure is the key characteristic of a "frivolous" application….

…

[69] However, I add the word "manifestly" to capture the idea that the frivolous nature of the application should be obvious. "Manifestly" is defined as "as is manifest; evidently, unmistakably, openly", and "manifest" is defined as "[c]learly revealed to the eye, mind, or judgement; open to view or comprehension; obvious" (*Oxford English Dictionary* (online)). Just like the civil standard for striking a claim requires that it be "plain and obvious" that the claim discloses no reasonable cause of action (or, in French, "*évident et manifeste*"), the addition of the word "manifestly" adds another layer to the "frivolous" standard and helpfully indicates that a summary dismissal motion should be based on that which is clearly revealed.

[70] …In summary dismissal motions, rather than requiring that the accused prove the existence of the Charter violation on an underlying Charter application, the Court of Appeal has required only that the accused demonstrate that it is conceivable that the claim could be allowed (*Accurso*, at para. 323).

[71] Thus, the "manifestly frivolous" standard, which connotes the obvious necessity of failure, is the appropriate threshold for the summary dismissal of applications made in the criminal law context. If the frivolous nature of the application is not manifest or obvious on the face of the record, then the application should not be summarily dismissed and should instead be addressed on its merits.

…

[73] The "manifestly frivolous" threshold also protects fair trial rights by ensuring that those applications which *might* succeed, including novel claims, are decided on their merits. Protecting fair trial rights is always important, but takes on added significance when the application in question carries great consequences. Generally speaking, the greater the consequences associated with a given application, the greater the possible impact on an accused's rights if the application is summarily dismissed…

…

[83] On the summary dismissal motion, the judge must assume the facts alleged by the applicant to be true and must take the applicant's arguments at their highest (*Vukelich*, at para. 26; *Armstrong*, at para. 8; *Gill* (BCSC), at para. 24). While there is no need to weigh the evidence or decide any facts on the summary dismissal motion, the applicant's underlying application should explain its factual foundation and point towards anticipated evidence that could establish their alleged facts. Where the applicant cannot point towards any anticipated evidence that could establish a necessary fact, the judge can reject the factual allegation as manifestly frivolous.

[84] Likewise, the judge ought to generally assume the inferences suggested by the applicant are true, even if competing inferences are proffered. The judge should only reject an inference if it is manifestly frivolous, meaning that there is no reasoning path to the proposed inference. This might be the case where a necessary fact underpinning the inference is not alleged or if the inference cannot be drawn as a matter of law (e.g., if the proposed inference is based on impermissible reasoning).

[85] A similar approach is taken to the overall application. Because the truth of the facts alleged is assumed, an application will only be manifestly frivolous where there is a fundamental flaw in the application's legal pathway: the remedy cannot be reached. For example, an application may be manifestly frivolous because the judge has no jurisdiction to grant the requested remedy (see, e.g., *Lehr*, at paras. 27-32). Alternatively, the application could put forward a legal argument that has already been rejected: applications that depend on legal propositions that are clearly at odds with settled and unchallenged law are manifestly frivolous (see, e.g., *Lehr*, at paras. 22-23).

…

> [88] These fundamental flaws ought to be manifest. If the error is not apparent on the face of the record, the application should proceed.
>
> [Emphasis added].

[23] Although in an entirely different context, when considering the issue of a late disclosure leading to a mistrial application, in *R. v. Sandeson,* 2020 NSCA 47, Farrar J.A. for the court, ruled that a mistrial should have been ordered when there was a *reasonable possibility* the late disclosure of evidence had foreclosed realistic opportunities to investigate relevant issues and advance an abuse of process claim at a new trial. Farrar J.A. determined that if there was a reasonable possibility that the new evidence could lead to a future process-oriented argument, a mistrial must be declared:

> [105] Returning to the police conduct in this matter – does it amount to an abuse of process? At this point it is important to recall that a finding of an abuse of process by the trial judge was neither requested nor necessary. Sandeson only had to show there was a reasonable possibility the late disclosure of the evidence foreclosed realistic opportunities to investigate this issue and advance an abuse of process claim at a new trial.
>
> [106] In my view, Sandeson had crossed that threshold and a mistrial should have been ordered. It would be entirely possible for a judge to find the police conduct revealed by the undisclosed information could amount to an abuse of process. I will explain why. However, the determination of whether it amounts to an abuse of process is for the judge hearing the new trial. My comments here are only to illustrate a viable argument can be made. Whether it will be successful is not for me to decide.
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> [Emphasis added].

[24] Given that this is a pre-trial proceeding, I am satisfied that the test for fresh evidence under *R. v. Palmer*, [1980] 1 S.C.R.759, is not applicable to the analysis: see *Chaisson* at para. 14.

Relevance of Remedy

[25] The Crown objected, in part, to Mr. Enns's application on the basis that the remedy he is seeking would never be available:

> Remedy
>
> The applicant has included a remedy analysis in his brief, but notes it is not necessarily to be considered at this stage. The Crown disagrees. If there is no ultimate outcome here that benefits the applicant, then it would be difficult to

> argue that re-opening the *Charter* motion would be necessary in the interests of justice. To the Crown's knowledge none of the applicants in the *Howell* and *Warnecke* were able to convince the court they were entitled to what would amount to a defence to a trafficking-related offence. For example, the conclusion found at *R v Howell*, 2020 ABQB 385, is as follows, at paras 396-398:
>
> > V. Conclusion
> >
> > Based on the foregoing, I have found breaches of the section 7 rights that cannot be saved under section 1 of the *Charter*. I am satisfied that he (like Ms. Kirkman) is entitled to grow and possess marihuana for his personal medical needs. However, I do not see that the violations of section 7 are engaged in relation to his alleged role in trafficking marihuana.
> >
> > Although the *ACMPRs* are no longer in force, I grant declaratory relief under section 52(1) of the *Constitution Act*. The specific provisions in the *ACMPRs* I have found to be invalid under section 7 of the *Charter* described above are no longer of any force or effect, particularly in any ongoing prosecutions.
> >
> > I do not consider this an appropriate case in which to order a stay of proceedings under section 24(1) of the *Charter*. However, if Mr. Howell is convicted and sentenced in this case, he may be entitled to a remedy based on *R v Nasogaluak*.

[26] In *Haevischer,* the court discussed the relevance of lack of remedy when considering whether to hear an initial *Charter* application (not reconsideration):

> [86] An application may also be manifestly frivolous where the remedy sought could never issue on the facts of the particular application. The nature of the application will be relevant to this analysis. On certain applications, the trial judge may be able to assume the facts put forward by the applicant and, assuming those facts, determine whether the remedy sought could issue. *Garofoli* applications, where trial judges ask if the ITO could still support the issuance of the search warrant even if the challenged portions of the ITO are excised, make the point. Where the ITO still supports the issuance of the warrant, then the application can be summarily dismissed because, even if the defence could prove that the impugned portions of the ITO ought to be struck, the sought-after remedy (the exclusion of evidence obtained under the warrant) would not follow.
>
> [Emphasis added].

[27] Contrary to the Crown's position, considering the very low threshold set out in *Haevischer,* I cannot conclude that Mr. Enns would *never* be able to achieve the remedy he will be requesting. Nor can I conclude that a declaration of unconstitutionality will have no impact on Mr. Enns. For example, as noted above

in *Howell*, if the *ACMPR*s are constitutionally unsound, but the constitutionality of s. 5(2) of the *CDSA* is not compromised, should Mr. Enns be convicted, his sentence could nonetheless be impacted.

Material Change in the Evidence

[28] The crimes for which Mr. Enns is charged are alleged to have occurred in 2017. The evidence called in *Howell* and *Warneke* also relates to charges in that date range, is not new *per se*, and was certainly available to Mr. Enns to find and call in 2019.

[29] Mr. Enns's 2019 evidence established that people who purchased cannabis from his dispensary did so primarily because they found it cheaper and more convenient to access cannabis from him, rather than the methods provided by the *ACMPR*s. The evidence that Mr. Enns (and his counsel) elicited did not establish that a lack of storefront access to cannabis had a detrimental impact to his customers' health. His customers did not try to access their cannabis in all of the ways provided for by the *ACMPR*s before turning to Mr. Enns. Though many of his customers spoke about financial pressure and their inability to afford cannabis sold by LPs, the evidence did not establish that the cost of cannabis from LPs caused a delay in access or harm to the consumer's health.

[30] In 2019, Mr. Enns called expert evidence which established that LPs had limited strain availability, and that some his customers preferred the strains with higher THC concentrations that he offered over those they could purchase from LPs. Though Dr. Rosenbloom and Dr. Ziburkus testified that higher concentration THC strains can make some patients feel better than lower concentrated doses, they did not establish a medical benefit supported by evidenced-based studies, and conceded that higher concentrations can lead to an increase in adverse effects.

[31] On the reconsideration, Mr. Enns proposes to call Dr. Carolina Landolt as an expert. Dr. Landolt is a rheumatologist and is director of the Summertree Medical Clinic, which focuses on cannabinoid therapy in the management of chronic pain conditions. In her expert's affidavit she says that high THC and CBD concentration oil extracts have been beneficial to her patients. For example, she states that some patients who require cannabis to manage migraines may require a fast-acting method of absorption with a short duration of action. In those instances, she says, vaporizing cannabis would be the most beneficial ingestion method.

[32] Dr. Robert Laprairie, another proposed expert on the reconsideration, specializes in cannabis pharmacology. His affidavit provides details regarding how the body absorbs cannabis via inhalation and via ingestion. According to his proposed evidence, cannabis that is inhaled has approximately a 30% bioavailability rate with an approximately two-hour duration of effect, while ingested cannabis has a 4-12% bioavailability rate but a longer duration, approximately six hours. Dr. Laprairie notes that for some conditions like epilepsy it would be important for the patient to use methods that have fast absorption.

[33] While similar evidence was presented at the 2019 hearing by Dr. Ziburkus, I found that his evidence was not always objective, nor, in comparison with the proposed new evidence, does it provide the level of detail and specification found in Dr. Laprairie's affidavit (and his proposed evidence). Furthermore, some of Dr. Ziburkus's assertions, for example, that cannabis could treat cancer, were undermined during cross-examination at the 2019 hearing, which led me to doubt the objectivity and accuracy of his claims.

[34] Dr. Laprairie's affidavit provides summaries of clinical studies evaluating the effectiveness of cannabis products in the treatment of various health issues such as Multiple Sclerosis, chronic pain, epilepsy, cachexia, appetite, addiction, opioid sparing, anxiety, depression, post-traumatic stress disorder, and Inflammatory Bowel Disease. His affidavit provides evidence that was not elicited in 2019, when the original *Charter* application was heard, and appears useful given his in-depth analysis of how cannabis treats each of the conditions noted above.

[35] Dr. Landolt also discusses how a patient may respond differently to different cannabis strains, calling strain selection a "highly individualized and iterative process". With respect to the limited strain availability of LPs, patients may be forced to switch LPs several times before finding a strain that is effective, or if LPs sold out of a strain that is of benefit.

[36] Dr. Landolt details the challenges that medical cannabis patients faced when trying to access LP products through online ordering. Most LPs accept VISA, but the process presents a challenge for patients who do not have credit cards. In 2019, the evidence Mr. Enns presented was that some of his customers did not have credit cards and had difficulty ordering from LPs but could do so via transfers facilitated by their bank.

[37] Dr. Landolt will provide evidence that the *ACMPR*s required a two-step registration process to access cannabis from an LP. The patient had to register with

an LP, and the *ACMPR*s required their physician to forward medical documents to that LP. Dr. Landolt deposes that this created delays of days or weeks before a patient could order their cannabis. Compounding this delay are administrative errors in processing the documents which often cause additional delays and require patients to repeat the registration process. If an LP runs out of stock or stops carrying a strain that benefits the patient, they would have to register with a different LP, repeating the process above. This type of evidence was not clearly put before me in the original motion by a physician with first-hand experience working with patients who had experienced delays as a result of the LP registration process and low stock availability.

[38] In 2019, the evidence established that Mr. Enns charged less than LPs for cannabis products, and that the average price per gram from LPs was $9.17. The price difference between the products from LPs and products from Mr. Enns was a factor in his customers' choice to purchase from Mr. Enns rather than LPs. However, the evidence also established that it was significantly less expensive to grow your own cannabis or purchase it from a designated grower.

[39] In the 2019 hearing, Eric Nash provided evidence that physical requirements and residential by-laws may present challenges that would prevent patients from growing their own cannabis. However, the alternate options for accessing medical cannabis were still available.

[40] On the reconsideration, Mr. Enns proposes to provide evidence detailing the upfront costs of growing your own cannabis, which could be prohibitively high. Mr. Enns says that he will call more detailed evidence than was elicited in 2019, to explain the difficulty that patients face in finding a designated grower. I accept that this evidence could help to establish that some medical cannabis users were unable to access cannabis.

[41] The proposed expert evidence suggests that between the registration process, unstable stock availability, and limited payment options, accessing medical cannabis from LPs has been marked by chronic delay. This evidence expands on, and provides details that had not been objectively, clearly, and quantitatively presented at, the 2019 hearing.

[42] For example, in the 2019 hearing Eric Nash testified about the delay patients may encounter when registering with LPs and the difficulty in obtaining products. However, his evidence was undermined by the general nature of his statements. His personal involvement in the cannabis industry undermined his objectivity and

credibility. The experts who could provide empirical data from peer reviewed studies, such as Zachary Walsh, discussed challenges in access to medical cannabis under the *MMAR* and the *MMPR*s, the previous regulatory regimes, but did not provide empirical evidence on access under the *ACMPR*s.

[43] The final area in which the proposed evidence significantly differs from the original evidence is the information provided about the harm that patients suffer when they experience a delay in access to their medicine. Dr. Landolt provides evidence from her experience as a physician treating patients with migraines, chronic pain, or inflammatory bowel disease. She indicates that inconsistent access to medical cannabis can worsen their day-to-day symptoms that are treated by cannabis, undermine their progress in establishing a pain management strategy, impact their daily routine, and cause unnecessary suffering. For patients who use cannabis to assist with their management of opioid therapy, Dr. Landolt will provide evidence that inconsistent access may force patients to escalate their opioid dosage, which would undermine their therapeutic goals of reduction or discontinuance of that class of drug.

[44] As noted, since the 2019 hearing, two judges in other jurisdictions have heard similar *Charter* applications, but with different expert evidence, and those judges came to conclusions in direct contradiction to my decision. Some of the evidence Mr. Enns now wants to call in the reconsideration of his s. 7 *Charter* application is materially different than what he called at his original hearing, and while it was likely discoverable in 2019, it certainly has the possibility of impacting the outcome of the reconsidered application.

[45] Given the substantial similarity between this case and the issues and the proposed expert evidence in *Howell* and *Warnecke*, I have also considered the evidence referenced in these hearings that Mr. Enns specifically wants to replicate in the reconsideration hearing. In *Warneke*, the court found that the LP mail order system caused delays in accessing medication and therefore engaged s. 7 of the *Charter*. In coming to that conclusion, the court accepted the following evidence:

- Derivatives in the form of oils were not strong enough for some patients and the cost was prohibitively high;

- Homeless patients would have significant barriers to accessing cannabis from LPs using online ordering;

- Some patients did not know how to grow cannabis and did not know someone who would grow it for them;

- Delay in accessing cannabis caused patients to experience "interruptions in medication routine (which) caused unnecessary and significant suffering" (para. 101); and

- Evidence did not establish that prohibiting storefront dispensaries was necessary or helpful to stem the risk of diversion into criminal markets.

[46] In *Howell*, the court also dealt with a *Charter* challenge to the *ACMPR*s on the same grounds as in *Warneke*. The court in *Howell* likewise determined that the prohibition on LPs setting up storefronts caused delays in access to medical cannabis and therefore engaged s. 7 of the *Charter*. In finding that the prohibition was not in accordance with the principles of fundamental justice and was therefore unconstitutional, the court relied on the following findings and evidence:

- The purpose of the *ACMPR*s is in conjunction with the *CDSA* purpose of maintaining and promoting public health and safety;

- Some patients experienced delays when registering with LPs;

- Some patients experienced problems with LPs due to lack of availability of products they needed or delay in changing LPs to access available products;

- LPs do not adequately serve the homeless due to online ordering requirements, payment requirements and residential delivery requirements;

- For some patients the health benefits of cannabis are dependant on the strain, potency and manner of dosage. For some patients concentrations of oil higher than 30mg/mL can provide superior results;

- Home delivery requirement for most LPs denies access to the homeless;

- Some patients are unable to access designated growers and unable to grow cannabis themselves, or were unable to make concentrated products;

- Though there are barriers created by the online ordering requirement, patients with these challenges can access libraries and social services for assistance; and

- There was no evidence that oil greater than 30mg/ml concentration carried increased health risks.

[47] The testimony of the experts called in *Howell* and *Warneke*, which Mr. Enns proposes to replicate at the reconsideration hearing, could reasonably have an impact on Mr. Enns's *Charter* motion.

[48] The unusual circumstances in relation to Mr. Enns's trial (and this motion) are unlikely to be repeated. He was charged with cannabis-related crimes in 2017. The law relating to cannabis has changed significantly since then. According to the evidence I heard at the 2019 motion, the medical research relating to cannabis at that time was relatively limited. Mr. Enns's trial was adjourned several times, spanning four years. Much has changed since 2019 regarding the use of cannabis (although this motion obviously relates to the state of things in 2017).

[49] Mr. Enns's proposed evidence at the reconsideration hearing will involve evidence from experts that were not called in the original hearing, including Dr. Carolina Landolt, Dr. Laprairie, and Ira Price. These experts can be expected to provide more detailed and more credible evidence than was called in the 2019 hearing, including the practical challenges patients faced when trying to order from LPs, the limited availability of high THC content oils <u>and</u> why some patients <u>require</u> them, and the harm that patients suffer when they have delayed or intermittent access to cannabis.

[50] The proposed new evidence therefore differs significantly from the evidence called at Mr. Enn's 2019 hearing. There is nothing manifestly frivolous about the application. It is not obviously destined to fail. No prejudice to the Crown has been identified, other than the obvious prejudice resulting from the delay in bringing this matter to trial.

[51] Simply because this is Mr. Enns's trial and he has asked this court to reconsider his *Charter* application based on new evidence would not, on its own, persuade me that justice requires the reconsideration of the application, given that much of the new evidence is <u>similar</u> to what the court heard in the 2019 hearing. However, the whole of the evidence Mr. Enns proposes to call could potentially impact my determination of the constitutionality of the challenged provisions in the *ACMPR*s. In my opinion, trial fairness requires reconsideration of Mr. Enns's s. 7 *Charter* application.

[52] Since I have found that Mr. Enns's *Charter* application should be reconsidered because of the material change in circumstances, there is no need for me to determine whether I made any material legal errors in denying his 2019 application.

Timing of the Application

[53] Mr. Enns suggests that, due to the last-minute filing of this application, his jury trial could proceed as scheduled and then, if he was convicted, he could then proceed with his application to reconsider his s. 7 *Charter* application regarding the *ACMPR*s. I do not agree with his procedural proposal.

[54] In *R. v. Head,* [1986] 2 S.C.R. 684, McIntyre J., for the court, explained when a judge is *functus officio*:

> 25. It is generally accepted that a trial judge sitting without a jury is not *functus officio* until he has finally disposed of the case. Where the accused is acquitted the trial judge will have exhausted his jurisdiction when the accused is discharged and the trial judge cannot then reopen the case. Following a finding of guilt, however, the judge's duties are not spent until after a sentence is imposed. The trial judge can, in exceptional circumstances and before the imposition of the sentence, reopen the case to permit the accused to tender further evidence. This principle, stated over one hundred years ago in *R. v. Clouter & Heath* (1859), 8 Cox C.C. 237, has recently been reaffirmed in Canada….If the judge, sitting alone, were *functus* as regards the determination of guilt as of the moment of that determination, he would have no jurisdiction to reopen the case.

[55] In *R. v. Hobbs*, 2010 NSCA 62, Beveridge J.A. stated for the court that a judge is essentially *functus* once the jury verdict has been recorded and the jury discharged, unless there has been a finding of guilt and the judge has to deal with any matters related to sentencing:

> [11] In my opinion, the law is clear. In jury trials, once the jury verdict has been recorded and the jury discharged, there is a very narrow jurisdiction for a trial judge to do anything but sentence the offender. The jurisdiction is limited to dealing with an issue of receiving and recording the jury's true verdict... The trial judge was eminently correct in his analysis and conclusion that he lacked jurisdiction to deal with the appellant's application. Accordingly, this ground of appeal fails.

[56] In *R. v. Pelletier* (1995), 97 C.C.C. (3d) 139, [1995] S.J. No. 115 (Sask. C.A.), Tallis J.A., stated for the court:

> **17** The need for timely objection to admissibility of evidence was stressed in *R. v. Kutynec*:
>
> ...

> Manifestly, the Charter application by the accused must precede the admission of the evidence. To have it admitted before a jury subject to alter exclusion following a successful Charter application, would invite a mistrial. The procedure to be followed is no different when a judge is the trier of fact.
>
> If these two processes relating to the reception of evidence by the court are not kept conceptually separate, the trial process becomes confused and repetitive. In the interests of conducting an orderly trial, the trial judge is entitled to insist, and should insist, that defence counsel state his or her position on possible Charter issues either before or at the outset of the trial.

[57] Based on Mr. Enns's proposal, if he is acquitted by the jury, then the *Charter* motion would be moot and/or would not be able to proceed because the presiding judge would be *functus officio*. However, if the jury finds Mr. Enns guilty, *Hobbs* confirms that the presiding judge would equally have no jurisdiction to hear this type of *Charter* motion (not exclusively related to sentencing) after the jury's verdict of guilt.

[58] Additionally, it would be an affront to the jury system to summons hundreds of potential jurors for the jury pool, empanel between 12 and 14 jurors as the *petit jury*, take them out of their regular lives for weeks to hear the trial, and only then, if a conviction is entered, have a judge determine whether the legislation they were ruling under was constitutional. That process would not be an appropriate use of judicial resources. It defies logic.

[59] The reconsideration of the s. 7 *Charter* motion challenging the legislation must be heard and determined in advance of Mr. Enns's jury trial. Mr. Enns's proposed new experts are not available to provide evidence until January 2024. Therefore, the trial has to be adjourned again, and additional dates need to be set for the s. 7 *Charter* motion.

Conclusion

[60] Mr. Enns has demonstrated that there has been a material change in the circumstances. The proposed evidence that Mr. Enns will provide upon a reconsideration of the *Charter* hearing has the potential to change the outcome of his challenge to the constitutionality of provisions in the *ACMPR*s and, potentially, s. 5(2) of the *CDSA*.

[61] This situation is also extraordinary because, due to the passage of time between my 2019 decision and this application, *Howell* and *Warnecke* were decided contrary to my decision. Of course, this court is not bound by these other decisions. However, Mr. Enns proposes to introduce the same evidence that impacted the outcome of *Howell* and *Warnecke* in other jurisdictions. That proposed new evidence is persuasive enough to allow for reconsideration, considering the low threshold for bringing a *Charter* motion. This creates an exceptional circumstance where it is in the interests of justice to reconsider this matter and have a new hearing on the merits of the application.

[62] The merits of this application should be determined at a full hearing. As I have discussed above, the hearing on Mr. Enns's *Charter* application must be heard before his jury trial. As Mr. Enns's trial was due to begin on November 20, 2023, it unfortunately must be adjourned once again, to accommodate Mr. Enns's (latest) last-minute application.

Arnold, J.