COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Garber v. Canada (Attorney General),*
2015 BCCA 385

Date: 20150916
Dockets: CA41883, CA41919, CA41920

Docket: CA41883

Between:

Kevin Garber

Respondent
(Plaintiff)

And

Her Majesty The Queen in the Right of Canada as represented by the Attorney General of Canada and Her Majesty The Queen in the Right of Canada as represented by the Minister of Health

Appellants
(Defendants)

- and -

Docket: CA41919

Between:

Philip Newmarch

Respondent
(Plaintiff)

And

Her Majesty The Queen in the Right of Canada as represented by he Attorney General of Canada and Her Majesty The Queen in the Right of Canada as represented by the Minister of Health

Appellants
(Defendants)

- and -

Docket: CA41920

Between:

Timothy Sproule

Respondent
(Plaintiff)

And

Her Majesty The Queen in the Right of Canada as represented by The Attorney General of Canada and Her Majesty The Queen in the Right of Canada as represented by the Minister of Health

Appellants
(Defendants)

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

On appeal from: An order of the Supreme Court of British Columbia, dated May 12, 2014 (*Garber v. Canada (Attorney General)*, 2014 BCSC 835, Vancouver Docket Nos. S141194, S142295, S141196).

Counsel for the Appellants:	J.E. Brongers B.J. Wray
Counsel for the Respondents:	K.I. Tousaw
Place and Date of Hearing:	Vancouver, British Columbia May 27, 2015
Place and Date of Judgment:	Vancouver, British Columbia September 16, 2015

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

Summary:

The appeal is from an order of the Supreme Court of British Columbia declining to stay three actions challenging the constitutionality of the Marihuana for Medical Purposes Regulations. Those regulations are the subject of challenge in proceedings, Allard v. Her Majesty the Queen in Right of Canada, brought in the Federal Court. Canada contends its intention to make Allard the national determinative case so favours a stay that the judge of the superior trial court of British Columbia erred in her exercise of discretion in refusing the stay. Held: appeal dismissed. The exercise of discretion was made applying the correct principles and no demonstrated error is established. There is no error in allowing different actions to proceed in different courts, and the order is consistent with the constitutional architecture by which the superior courts of the province retain full inherent jurisdiction.

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Canada, as represented by the Attorney General of Canada and the Minister of Health, appeals from the dismissal of its application for a temporary stay of three actions, brought by Mr. Garber, Mr. Newmarch, and Mr. Sproule respectively. In the actions, the plaintiffs challenge the constitutional validity of the *Marihuana for Medical Purposes Regulations*, SOR/2013-119. The actions are similar to claims brought by different plaintiffs in the Federal Court known as *Allard v. Her Majesty the Queen in Right of Canada*, File No. T-2030-13.

[2] In its application in the Supreme Court of British Columbia for a stay, Canada contended, as it does before us, that the similarity in the constitutional challenges mounted in these three actions to the constitutional challenges mounted in the *Allard* action, and the similarity in remedies sought in the actions in the two courts, weigh heavily in favour of a stay of the actions in the Supreme Court of British Columbia until *Allard* is determined.

[3] In general terms, the possession and production of marihuana is prohibited by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, subject to exceptions established by regulation. Such regulations allow distribution and use for medical, scientific and industrial purposes.

[4] Over the last many years, courts in Ontario and British Columbia, and the Federal Court, have addressed constitutional challenges to the regulatory regime in place with respect to medical marihuana. In the result, *Marihuana Medical Access Regulations*, SOR/2001-227 established a scheme whereby individuals, with support of authorized medical practitioners, could have lawful access to marihuana through purchase directly from Health Canada, through their own production, or through production by a designated person. The regulations limited the amount of medical marihuana a patient could possess.

[5] Between 2001 and 2013, the number of individuals authorized to obtain marihuana and the amounts of medical marihuana that the individuals could possess increased significantly. In response to that growth and to concerns over the structure and consequences of the scheme, Canada altered the regulatory framework. On June 7, 2013, the *Marihuana for Medical Purposes Regulations* at issue in these actions came into effect and the *Marihuana Medical Access Regulations* were repealed. The new regulations provide for individuals to possess marihuana to a limited amount with the support of an authorized healthcare professional. The new regulations also authorize the production of dried marihuana by licensed producers, and the sale and distribution of dried marihuana to individuals authorized to possess it. They do not permit individuals to grow their own marihuana or to designate another person to grow it for them as was the case under the *Marihuana Medical Access Regulations*; patients are able to obtain their supply of marihuana for medical purposes from a licensed producer only. The amount of medical marihuana a person may possess is restricted to a maximum of 150 grams. As with the former regulations, the new regulations do not permit purchase of marihuana other than in a dried form. The latter aspect of the regulations however, has been found to be too narrow and a tailored declaration of invalidity of ss. 4 and 5 of the *Controlled Drugs and Substances Act* directed to medical needs has now issued: *R. v. Smith,* 2015 SCC 34.

[6] The Federal Court action, *Allard*, was commenced in December 2013 by four plaintiffs, three of whom are users of medical marihuana and one of whom is a

person who held a licence under the former *Medical Access Regulations* to produce marihuana for her common law spouse. Two months after *Allard* was commenced, the three actions giving rise to these appeals were filed in the Supreme Court of British Columbia.

[7] In *Allard* the plaintiffs sought and were granted an interim injunction preventing repeal of the former *Marihuana Medical Access Regulations* with respect to the authorizations issued to them to produce or possess marihuana, effective until their constitutional rights are determined at trial, but subject to the exception that the current 150-gram limit for personal possession applies: *Allard v. Canada*, 2014 FC 280. Further, under the injunction, only dried marihuana may be produced and possessed by a patient. Canada has extended the application of that injunction to other persons in the same situation as the *Allard* plaintiffs.

[8] An appeal of that injunction was heard and dismissed by the Federal Court of Appeal: *Canada v. Allard*, 2014 FCA 298. We are advised that the trial process is proceeding apace in the Federal Court. Since the hearing of this appeal a motion was brought in the Federal Court to vary the injunction to include additional terms, including as to the 150-gram limit. That application was dismissed by reasons for judgment issued July 15, 2015, forwarded to us. In those reasons, Justice Phelan states that the evidentiary phase of the *Allard* trial has been completed.

[9] With the constitutional validity of the *Marihuana for Medical Purposes Regulations* before the Federal Court, Canada sought a stay of these three actions. In her reasons for judgment dismissing the application for a stay, the judge related that there are 90 claims in the Federal Court similar to the *Allard* claims, challenging the constitutionality of the *Marihuana for Medical Purposes Regulations*, and there are 24 claims in superior courts of the provinces, including the three proceedings before us and six others also commenced in the Supreme Court of British Columbia. Some litigants in the other actions, at the request of the Federal Crown, have agreed to stay their actions. Seven of the actions in other provinces have been stayed in light of the proceedings in the *Allard* action, one action has been dismissed, and one

has been discontinued. In the Federal Court, in particular, the many actions challenging the current medical marihuana regime are stayed on an interim basis pending the outcome of the *Allard* action, provided that the plaintiffs may bring applications for interim relief in the event the injunction currently in place is insufficient for the purposes alleged by those plaintiffs.

[10] In the Supreme Court of British Columbia, the Federal Crown asked the court to defer to the Federal Court because the Federal Court has national jurisdiction. The Federal Crown said it is treating *Allard* as a national test case, and observes that the plaintiffs now have the benefit of the injunction issued by the Federal Court and upheld by the Federal Court of Appeal. It says that without a stay there is a prospect of inconsistent decisions from the Supreme Court of British Columbia and the Federal Court, which would have a negative impact upon the administration of justice in British Columbia and which could undermine the applicability and enforcement of either decision in this Province.

[11] Madam Justice Griffin refused the application. She recognized her jurisdiction to stay the proceedings as affirmed in s. 8 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, but said she was not persuaded she should exercise her discretion to give the relief sought. In doing so she paid particular attention to the factors listed in *Conseil Scolaire Francophone de la Colombie-Britannique v. British Columbia (Education)*, 2013 BCSC 751 at paras. 32-33. The judge observed that each plaintiff in these three cases pleads his unique medical situation and facts specific to his condition that he alleges make the current regime established by the *Marihuana for Medical Purposes Regulations* unworkable for him to the extent there is infringement of his *Charter* rights. In particular, the judge observed that with respect to at least one of the plaintiffs, there is the possibility that the limit on current maximum personal possession may not satisfy the daily dosage medically required by the plaintiff, a matter outside the terms of the *Allard* injunction. She reflects in her reasons the stated intention of counsel to amend the pleadings in each action to allege interference with the plaintiffs' mobility rights protected by s. 6 of the *Charter*, an issue not within the claims before the Federal Court in *Allard*. The judge then

observed that *Allard* may not resolve the litigation before her, saying, “it is equally possible that anything less than total victory by the plaintiffs in *Allard* will leave the claims of the plaintiffs in this proceeding unsatisfied and undetermined”. She held:

> [63] The issues being advanced in this litigation as well as in *Allard* must be determined in context of evidence and findings of fact. The findings of fact involving these plaintiffs may be different than the findings of fact involving the plaintiffs in *Allard*.
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> [64] I am also not persuaded by the Federal Crown that it is contrary to the interests of the administration of justice to have more than one proceeding advance at one time, or that the prospect of inconsistent results should be avoided. There may well be multiple decisions from courts of different jurisdictions addressing the constitutionality of the MMPR. However, this may actually assist in the development of the law. The highest court of this land may one day grapple with these issues and may indeed find its deliberations assisted by having the record of evidence of more than one trial to consider.
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> [65] Furthermore, I am not persuaded by the Federal Crown's argument that there will be a wasting of legal resources if there is not a stay of all proceedings other than the *Allard* case.
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> [66] It is one thing when litigants voluntarily agree to a temporary stay to save their own legal resources. But it is another thing to be subject to a temporary stay against the litigants' desire to proceed. The only resources sought to be saved in those cases will be that of the Federal Crown as a common defendant. However, the Federal Crown is able to accomplish considerable efficiencies in these cases: it should have only one set of documents to produce; it can rely on most of the same witnesses and content of expert opinions in each case; and can recycle its legal arguments.
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> …
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> [68] It may well be that the timing of litigation stages in this Court will take into account the timing of expected helpful judgments in other courts including the Federal Court. But since this Court does not control the proceedings in other courts, I am loathe to grant a temporary stay of these proceedings and thereby make the plaintiffs' entire claims subject to proceedings involving other parties in another court.

[12] On this appeal Canada contends that the judge erred by failing to consider:

1. the national application of a Federal Court decision on the constitutionality of the *Marihuana for Medical Purposes Regulations*, and the resulting legal consequences of potentially inconsistent orders from the Federal Court and the Supreme Court of British Columbia; and

2. the fact that Canada is treating *Allard* as a national test case and that it agrees it will be bound nationally by the outcome in that case.

[13] On its first ground of appeal, Canada says that there is potential for actual conflict between decisions in the courts of British Columbia and the Federal Court, positing the prospect of plaintiffs' success in *Allard* and failure in British Columbia. This would be a situation, Canada says, in which Canada could be required to allow an individual to cultivate medical marihuana in his or her residence but the same individual would face criminal prosecution before the British Columbia Supreme Court for home cultivation. This example, it says, shows the potential for actual irreconcilable conflict that weighs heavily in favour of a stay which, in error, the judge did not recognize.

[14] On its second ground of appeal, Canada says that the judge erred in failing to give adequate weight to Canada's position that it is treating *Allard* as a national test case.

[15] Comprehensively, as factors that weigh in favour of a stay, Canada raises the experience of plaintiff's counsel in *Allard*, the fact *Allard* was filed in the Federal Court before the plaintiffs commenced these actions, and the fact that, broadly speaking, the *Allard* claim challenges the constitutionality of contentious provisions of the *Marihuana for Medical Purposes Regulations* in a way that will have national application. Canada says that it will be wasteful to pursue these actions because they are unlikely to come to trial before a decision has been rendered in *Allard*, and it invokes the stays issued in other provincial superior courts as the example that should be followed in British Columbia. Last, Canada says the judge made too much of the differences between the pleadings in these actions and the pleadings in *Allard*.

[16] In support of all its submissions, and because the case arises in the context of courts with jurisdictional overlap, Canada invokes the approach taken in cases discussing *forum non conveniens*, exemplified by *472900 B.C. Ltd. v. Thrifty Canada Ltd*. (1998), 57 B.C.L.R. (3d) 332; 168 D.L.R. (4th) 602, applied in *Wenngatz v.*

371431 Alberta Ltd., 2013 BCCA 225 at para. 27. The issue of *forum non conveniens*, however, used to sort out the preferred jurisdiction in which proceedings should be brought, addresses parallel proceedings involving the same parties in different states. That is not the situation that is before us – the parties are not the same in the Federal Court and the Supreme Court of British Columbia. I have not found the *forum non conveniens* approach helpful.

[17] This leaves us with the task of determining whether we should interfere with the order refusing to stay these actions.

[18] It must be said, foremost, that the order appealed engages the discretion of the judge in managing the trial court's processes. Accordingly it attracts a high degree of deference from this Court. As a general proposition, we may interfere with discretionary decisions of the trial court only when this court considers the judge acted on a wrong principle, or failed to give sufficient weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport),* [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1*; Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14; *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

[19] In my view, neither of the grounds of appeal establishes an error in principle. Nor do the reasons of the judge demonstrate that she failed to give sufficient weight to all relevant considerations.

[20] As to the principles applied by the judge, I consider she approached her task correctly, referring to the usual criteria for a stay of proceedings. She recognized that the related proceedings in the Federal Court will have a material impact on the issues that arise in these actions, but found that there were issues of fact and law raised in these pleadings, as drawn and as intended to be amended, that will not be resolved by *Allard*. She addressed the issue of economy and efficiency in the passage I have replicated. The stay sought is temporary, but in the event the challenge to the legislation in *Allard* is unsuccessful, the plaintiffs in this litigation will be advancing their additional bases for finding the impugned regulations are

unconstitutional. In the event a stay has issued, they will do this later in time than they otherwise would have done. The temporary nature of the stay proposed and its potential duration, which does not appear to be long, does not greatly assist Canada, in my view.

[21] There is, as the judge recognized, a risk of inconsistent results. However, in the event the plaintiffs in *Allard* are successful, and assuming that result will be known before the conclusion of these actions, the litigation may be trimmed, if anything is left to be decided, to the additional claims or relief sought. In the event the plaintiffs in *Allard* are unsuccessful, the plaintiffs in this case still will be entitled to bring their actions, contending that *stare decisis* does not bind the courts of British Columbia. Therefore the potential for inconsistent verdicts is not avoided by issuing a stay; it is, at most, only postponed. On my reading of her reasons for judgment, the judge recognized the potential for inconsistent results and was not alarmed at the prospect. For the reasons I have just stated, I cannot say she erred in her discretionary analysis.

[22] The second ground of appeal rests on Canada's intention to treat *Allard* as a test case. No doubt *Allard* will sort out common issues relating to the authorizations and licences provided to individuals to possess, and possibly produce, marihuana in different forms. But the convenience to Canada does not translate, in my respectful view, to foreclosing a citizen from bringing an action in a superior court of his or her province. It is not, by itself, a basis to stay proceedings if, in the considered view of the judge, a stay should not issue. At the hearing of this appeal, Canada strongly urged us to weigh the potential costs to the litigants and courts of proceeding in more than one jurisdiction on substantially the same issues, and observed that these plaintiffs, and other persons in Canada, by agreement will gain the advantage of the interlocutory injunction issued in *Allard* that has the effect of retaining some of the advantages perceived by plaintiffs to adhere to the former regulations.

[23] Canada noted that an expedited hearing process in the Federal Court has been utilized, and compared the progress of *Allard* to the slower track of these actions.

[24] In my view, these aspects do not provide a basis in principle to interfere with the judge's order. That *Allard* has proceeded expeditiously is commendable, but is not a reason we may say the judge erred in declining to stay these actions.

[25] These are not cases such as *Ainsworth Lumber Co. v. A.G. of Canada*, 2001 BCCA 105, in which the same parties were before a provincial superior court and the Tax Court. Rather they are ones in which the plaintiffs seek to utilize the courts of general jurisdiction as contemplated by the constitutional design of Canada. In *A.G. Canada v. Law Society of B.C.*, [1982] 2 S.C.R. 307, a case arising from Mr. Jabour's challenge to restrictions upon lawyers advertising, the Supreme Court of Canada considered the role of provincial superior courts in relation to the *Combines Investigations Act,* R.S.C. 1970, c. C-23, a federal statute that often is the subject of litigation before the Federal Court. Justice Estey for the court reflected on the place in confederation of the provincial superior courts and of the Federal Court, which in 1970 became the successor to the Exchequer Court of Canada. He observed at 326-27:

> There is, however, another and more fundamental aspect to this issue. The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the *Constitution Act* and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the *Constitution Act). As* was said by Pigeon J. in *R. v. Thomas Fuller Construction Co. (1958) Ltd. et al.,* [1980] 1 S.C.R. 695*,* at p. 713:
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> > It must be considered that the basic principle governing the Canadian system of judicature is the jurisdiction of the superior courts of the provinces in all matters federal and provincial. The federal Parliament is empowered to derogate from this principle by establishing additional courts only for the better administration of the laws of Canada.
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> Earlier in his judgment Pigeon J. quoted from Chief Justice Ritchie in *Valin v. Langlois* (1879), 3 S.C.R. 1, at pp. 19-20:

> ... These courts [provincially organized superior courts] are surely bound to execute all laws in force in the Dominion, whether they are enacted by the Parliament of the Dominion or by the Local Legislatures, respectively. They are not mere local courts for the administration of the local laws passed by the Local Legislatures of the Provinces in which they are organized. They are the courts which were the established courts of the respective Provinces before Confederation, . . . They are the Queen's Courts, bound to take cognizance of and execute all laws, whether enacted by the Dominion Parliament or the Local Legislatures, .. .

…

[26] After affirming that Parliament could not preclude a provincial superior court from determining the constitutional validity of legislation, Justice Estey said at 328:

> In my view Parliament lacks the constitutional authority to so provide. To do so would strip the basic constitutional concepts of judicature of this country, namely the superior courts of the provinces, of a judicial power fundamental to a federal system as described in the *Constitution Act.* At the same time it would leave the provincially-organized superior courts with the invidious task of execution of federal and provincial laws, to paraphrase the *Valin* case, *supra,* while being unable to discriminate between valid and invalid federal statutes so as to refuse to "execute" the invalid statutes.

[27] I recognize that Canada's proposition is not that the Supreme Court of British Columbia lacks jurisdiction to hear the case. However, its proposition that the judge erred in declining to stay proceedings in the Supreme Court of British Columbia because Canada had designated a case in the Federal Court as the test case, comes very near to a challenge to the ability of the superior trial court in this province to manage its own processes. While saying the Supreme Court of British Columbia should defer to the Federal Court, the appellant is really saying in these circumstances it must defer to the Federal Court. Yet the path of two or more cases proceeding on similar or overlapping issues is well trod in Canada, and reflects the essential character of confederation, with architecture that respects the beauty of the differences between jurisdictions.

[28] Earlier I set out much of the judge's reasoning in rejecting the argument that these proceedings should await the conclusion of *Allard*, and in declining to defer progress towards the final resolution of these actions until after the *Allard* action is

completed. This weighing of various factors, considering always that *Allard,* in any event, will not produce a final order in these actions and that these plaintiffs have raised some issues different than those being addressed in *Allard*, appears to me to be well within the discretion of the judge. It was open to her, of course, to stay the actions as was done elsewhere, but in my view it was not mandatory. It will also be open to the Supreme Court of British Columbia to manage its processes for efficient resolution of all the actions filed before it. However, here the judge provided principled reasons for refusing the application, having weighed the values engaged in the question, and I would leave it to the trial court to continue to manage these and the other actions.

[29] I conclude there is no basis upon which we may interfere with the judge's exercise of her discretion. I would dismiss the appeal.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Garson"