Top Court Says: Hands Off My (Medical) Stash!

The Supreme Court of Canada has refused to let the federal government appeal recent Federal Court decisions that struck down regulations on the medical marijuana trade. The result is that a producer may provide marijuana to more than one customer.

On April 23, 2009, a three-judge panel denied the Government of Canada leave to appeal the Federal Court of Appeal decision in *Canada (Attorney General) v. Sfetkopoulos*.[1] The panel did not give reasons.[2]

The Federal Court of Appeal decision had upheld a trial decision from January 2008, *Sfetkopoulos v. Canada (Attorney General)*.[3] Several users of medical marijuana applied to the federal Minister of Health to designate a company in Smith Falls, Ontario, as their producer. The company was licenced to produce marijuana for only one medical user. Federal regulations prohibited granting a licence to provide marijuana for more than one user. (The exception is the government's main supplier, which operates in a disused mine in Flin Flon, Manitoba and provides marijuana to the government for distribution to medical users. Many of them find the Flin Flon product "too weak."[4])

The trial judge struck down the restriction in the regulations, finding them contrary to section 7 of the *Canadian Charter of Rights and Freedoms* ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"). The judge summarized prior case law: "What the Charter requires is that government not hinder for no good reason those with demonstrated medical need to obtain this substance."[5] He found the government's reasons inadequate, and therefore the restraint on users' access "not in accordance with the principles of fundamental justice," in part because the single-supplier scheme for stronger marijuana would leave some users "to seek marihuana in the black market. The Ontario Court of Appeal said that this is contrary to the rule of law, to pressure a citizen to break the law in order to have access to something he medically requires."[6]

When the federal government appealed to the Federal Court of Appeal, it made two arguments. It said the trial court wrongly required the government, as respondent, to establish that its policy was *not* contrary to fundamental justice. The appeal court was not persuaded that the trial judge had wrongly reversed the burden of proof. The government also questioned the finding at trial that only 20 percent of medical marijuana users use the Flin Flon product. The appeal court

found no error in the trial judge's finding.[7]

The government also asked, in the event that the trial decision was upheld, that the appeal court suspend the declaration that the regulation is constitutionally invalid for one year, so that the government could put in place a new regulatory scheme. The appeal court was not sympathetic: suspension is a "somewhat exceptional remedy" that calls for special circumstances, and in any event the declaration of invalidity had already been in place for ten months, and the government had not asked for a suspension at trial.[8]

The Supreme Court's denial of leave to appeal leaves the original Federal Court trial decision intact. The government will presumably hurry to revise its regulations.

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[1] 2008 FCA 328.
[2] Supreme Court of Canada, Judgments in Appeal and Leave Applications (23 April 2009).
[3] 2008 FC 33.
[4] Janice Tibbets, "Supreme Court upholds end of federal pot growing monopoly" *National Post* (23 April 2009).
[5] *Supra* note 3 at para. 7.
[6] *Ibid*. at para. 19. The relevant Ontario appeal court case is *Hitzig v. Canada*, 2003 ONCA 30796.
[7] *Supra* note 1 at paras. 4-5.
[8] *Ibid*. at para.s 6-7.