Federal Court

Cour fédérale

Date: 20161223

Docket: T-832-16

Citation: 2016 FC 1409

Ottawa, Ontario, December 23, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

**DENNIS PEARCE, WILLIAM STODDART,
DENNIS DEFOE AND KEVIN BRYANT**

Applicants

and

THE ATTORNEY GENERAL OF CANADA

Respondent

ORDER AND REASONS

[1] The Applicants are federal inmates who, until April 1, 2016, were being prescribed a drug by the name of Gabapentin to treat chronic or ongoing pain conditions. As a result of changes to the medications' Formulary of the Correctional Services of Canada (CSC), no new prescriptions of Gabapentin, as of that date, is permitted for inmates within the CSC health care system. Some exceptions are allowed for those who suffer from three specific conditions, namely epilepsy, diabetic neuropathic pain or shingles, or for those for which Gabapentin is

deemed necessary to treat another condition upon a "non-formulary" or "extra-ordinary" request being made by an attending physician and granted by the Regional Pharmacist of the inmate's institution.

[2] On May 25, 2016, the Applicants, who no longer have access to Gabapentin, filed the present judicial review application in order to challenge the legality of these changes in the CSC Formulary. They claim that these changes are contrary to the *Corrections and Conditional Release Act*, SC 1992, c 20 (the Act) and related regulations and policies. They further claim that these changes offend their rights under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and do not conform to accepted policy regarding proper use of Gabapentin. The Applicants seek various remedies, including Orders requiring the Respondent:

(i) to immediately repeal these changes in the CSC's Formulary;

(ii) to re-institute prescription of Gabapentin to them as well as to other inmates who have been denied that drug under the amended Formulary; and

(iii) to ensure that they have prompt access to a second opinion from a specialist if denied Gabapentin or other medications, and that any such opinion is reasonably considered by the institution's physician.

[3] On November 18, 2016, two of these Applicants, Mr. Dennis Pearce and Mr. William Stoddart (also referred to herein as the "Moving Parties"), moved for interlocutory relief pending the outcome of the judicial review application. They claim that their pain can only be reduced by prescribed Gabapentin and that absent an Order enjoining the Respondent from

continuing to deprive them access to that drug pending the resolution of the said application, they will "foreseeably continue to suffer pain and related harm".

[4] In the alternative, the Moving Parties seek an Order exempting them from the application of the amended Formulary insofar as it relates to prescription of Gabapentin. In the further alternative, they seek an Order requiring the Respondent to immediately permit a physician of their choice to submit, on their behalf, a non-formulary request for prescription of Gabapentin.

[5] This is the motion the Court is being asked to determine in the present instance.

[6] It is now firmly established that, in order to be successful, the Moving Parties must satisfy each branch of the following tri-partite test:

a. The underlying judicial review application raises a serious issue, that is an issue which is neither vexatious nor frivolous or destined to fail;

b. They will suffer irreparable harm if the interlocutory relief is not granted; and

c. The balance of convenience favours the granting of such relief (*RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311, at p 334 [*RJR-MacDonald*]).

[7] It is well-settled too that when, as in the case here, the interlocutory relief sought is for all intents and purposes similar to that sought in the underlying proceeding, the Court must engaged in a more extensive review of the merits of the underlying application in order to be satisfied that it raises a serious issue (*Ahousaht Indian Band v Canada (Minister of Fisheries and Oceans)*, 2014 FC 197 at para 23).

[8] The Moving Parties contend that the issues raised in the underlying judicial review application are serious and will have a significant impact on the conduct of health services within CSC. The Respondent claims that the Moving Parties have to do more than simply list the issues to be tried, especially where the relief sought in the interlocutory injunction proceeding amounts to essentially granting the remedy sought in the judicial review application. The Respondent contends in this regard that the issues raised are not fleshed out to any appreciable degree to allow the Court to engage in the type of review of the merits of the underlying application warranted in the circumstances. The Respondent further claims that the underlying application was filed out of time and should not be considered in any event as the grievance procedure set out in the Act has not been exhausted.

[9] While the Respondent raises some serious concerns regarding the first branch of the tri-partite test, I need not to rule on them as I am of the view that the Moving Parties have failed to establish that they will suffer irreparable harm if the interim relief they are seeking is not granted.

[10] As stated by the Supreme Court in *RJR-MacDonald,* above, the notion of “irreparable harm” refers to the nature of the harm rather than its magnitude (at p 341). However, it is trite law that when addressing this criterion of the tri-partite test, the moving party has to meet a high threshold. As explained by the Federal Court of Appeal in *Glooscap Heritage Society v Canada (Minister of National Revenue),* 2012 FCA 255 [*Glooscap*],

> [31] To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and

> arguable assertions, unsupported by evidence, carry no weight.
> (*References omitted*)

[11] Here, the Court is faced with conflicting evidence as to whether the Moving Parties' conditions and related pain can only be alleviated by Gabapentin. As previously indicated, the Moving Parties claim to be suffering ongoing pain that can only be effectively managed by Gabapentin. Mr. Stoddart goes as far as alleging that he is living a "hellish existence" since Gabapentin is no longer made available to him. However, these assertions are not supported by any medical evidence and are contradicted by their assigned physician, Dr. Diana Wyatt, whose evidence is that the Moving Parties are fully functional, able to engage in their regular daily activities and do not require Gabapentin which, she opines, will not treat their pain.

[12] Dr. Wyatt is not an employee of CSC. She is an independent and self-employed physician practicing medicine within the CSC's heath care system. Her evidence is that pain management should focus on improving function and enabling patients to engage in their regular and every day activities and that pain is successfully managed if a patient can do what he or she wants to do without significant interference from pain. She claims that this is the case for both Mr. Pearce and Mr. Stoddart.

[13] Over the last 18 months, Mr. Pearce has complained on two occasions to the College of Physician and Surgeons of Ontario about Dr. Wyatt's approach to pain management, including her approach to Gabapentin. These complaints were dismissed. The College concluded that Dr. Wyatt had performed an appropriate assessment of Mr. Pearce's condition and that it was reasonable for her to focus on Mr. Pearce's ability to function in making her treatment decisions.

[14] Mr. Pearce says he disagrees with the College's findings. However, for the purposes of this motion, these findings can simply not be ignored. Moreover, the Court cannot help but draw negative inferences from the fact that Mr. Pearce has refused Dr. Wyatt's offer to be referred, at the CSC's expense, to the Kingston Orthopedic Pain Management Institute [KOPI] in May 2016 and that Mr. Stoddard has ceased to consult Dr. Wyatt.

[15] At the hearing, counsel for the Moving Parties recognised that his clients are not claiming that the pain they are suffering is unbearable. He says that his clients are concerned with the pace of the proceedings and the effect this has on their physical and psychological well-being. This would explain why they did not move for interim relief when they filed the underlying judicial review application. I note, in this respect, that the other two Applicants, Mr. Bryant and Mr. Defoe, although they are allegedly facing the exact same situation as the Moving Parties, have yet to seek interim relief and there is no indication before me that they will do so.

[16] I cannot ignore either the fact that a few days after Mr. Pearce's transfer to the institution he is currently detained, a search of Mr. Pearce's cell revealed "an astronomical amount" of Gabapentin and Tylenol 3 in his cell. In the case of Mr. Stoddart, who had been receiving Gabapentin since 2006, he has had drug related issues with CSC on at least two occasions. On the first occasion, he failed a card audit for the medication in is possession while in the second instance, he was found to take less than the prescribed amount.

[17] The evidence before me is that pain management within correctional settings is challenging because of the importance to strike balance between treating pain and avoiding

abuse of pain killers and trafficking within these settings. In particular, the evidence shows that drugs like Gabapentin, which is valuable in prison due to its psychoactive properties, are susceptible to abuse and are, therefore, a risk to the medical well-being of inmates and the safety and security of correctional institutions. In particular, diversion, that is inmates who choose, or are coerced into, diverting medications and selling or giving them away, is an ongoing challenge for CSC.

[18] I agree with the Respondent that when the evidence is considered as a whole, Dr. Wyatt's professional opinion that the Moving Parties are fully functional, have received adequate treatment and do not require Gabapentin must be preferred to the Moving Parties' own assertions that being deprived of Gabapentin amounts to irreparable harm. In other words, the Moving Parties have failed to establish with clear and convincing evidence the existence of a real probability that unavoidable irreparable harm will result unless interim relief is granted (*Glooscap*, at para 31).

[19] The tripartite test being a conjunctive test, the failure on the part of the Moving Parties to satisfy the irreparable harm criterion suffices to dispose of the present motion. In any event, I would also have dismissed the motion on the basis that the balance of convenience does not favour the granting of the interim relief sought. In my view, the public interest in prescribing Gabapentin only in exceptional circumstances to those who do not satisfy the requirements of the CSC Formulary because of the nature of this drug and its potential for abuse within correctional settings, outweighs in the circumstances of this case the interest of the Moving Parties in enjoining CSC to give them access to Gabapentin.

[20] The Respondent is seeking costs in the amount of $2,203.90, disbursements included. The Moving Parties were not seeking costs on the motion. They claim that the Court should not order costs in this case or, should it decide to do so, that it takes into consideration their limited financial means. The Court has full discretion over the amount of costs to be awarded (*Shotclose v Stoney First Nation*, 2011 FC 1051) and I find an award of costs in the amount of $400, including disbursements, to be an appropriate one in the circumstances of this case.

ORDER

THIS COURT ORDERS that the motion is dismissed, with costs to the Respondent in the amount of $400, including disbursements.

"René LeBlanc"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-832-16
STYLE OF CAUSE:	DENNIS PEARCE, WILLIAM STODDART, DENNIS DEFOE AND KEVIN BRYANT v THE ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 20, 2016
ORDER AND REASONS :	LEBLANC J.
DATED:	DECEMBER 23, 2016

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