

News

Medical marijuana class action lawsuit moves ahead

Health Canada mailing at issue as case clears first hurdle

MICHAEL BENEDICT

A potential landmark breach-of-privacy action against the federal government has cleared its first hurdle after the Federal Court ruled on Feb. 25 that two anonymous representative plaintiffs could lead a proposed class action arising from Health Canada's inadvertent mailing of some 40,000 letters to medical marijuana users.

Last November, the federal department sent out letters to program participants with a prominently displayed return address, "Marihuana Medical Access Program." In previous Health Canada mailings, the letters contained no return address that would identify the recipient as a marijuana user who likely possessed the otherwise illegal drug. A few days after the mailing, a senior Health Canada official said the department "deeply regrets this administrative error" and asserted that "protection of personal information is of fundamental importance to Health Canada."

In their statement of claim, the plaintiffs allege, among other things, that the mailing violated their right to privacy under Sections 7 and 8 of the *Charter of Rights and Freedoms*. They say they will be seeking "aggravated and punitive" damages for the wrongful disclosure of personal information that caused them distress and concern for their security.

"We've heard from a security guard who fears for his job and someone who spent thousands of dollars on new video surveillance and a guard dog to protect himself and his family from possible robbers," said David Robins of Sutts, Strosberg in Windsor and Toronto, one of four firms working on the class action.

Co-counsel Jane O'Neill of McInnes Cooper in Halifax, who argued the successful Federal Court motion, added that one class member was "so concerned about his family's safety after word got out that he likely had marijuana in his home that he moved his wife and children to her parents' house."

For O'Neill, the case is not about marijuana usage but about a person's health, since people qualify for the program on medical grounds, either to treat a particular symptom or for end-of-life care. "Health information is one of the most private things that exist for people," she said. "They have an absolute right to keep that information private, and Health Canada owed people in the program a duty to keep it private. In sending letters with a return address, it was negligent."

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McInnes Cooper

In addition to negligence, the statement of claim also asserts Health Canada breached an "express or implied" agreement not to disclose the members' personal information. Other claims are based on the torts of alleged breach of confidence, intrusion upon seclusion and publicity given to private life.

While the courts have recognized privacy violations with damages before, O'Neill said such a claim under the *Charter* is "novel." The statement of claim also seeks awards for costs incurred to provide security, damage to reputation, loss of employment and mental distress. Indeed, the anonymous plaintiffs, John Doe, a health-care professional in a small town, and Suzie Jones, a legal professional in Ottawa, both express concern that the revelation they are marijuana users may impact their jobs as well as their security.

While the Crown argued that class-action plaintiffs are not entitled to anonymity because other class members have the right to know who represents them and also because open-court principles should prevail, Federal Court prothonotary Martha Milczynski disagreed. "To say that these individuals must identify themselves as medical marijuana [sic] users goes to the very issues in this case, namely whether that information is private and should be kept confidential," Milczynski said in her order.

She added: "Disclosing their identities discloses...that they suffer from serious health conditions and symptoms. Identifying the plaintiffs...also discloses that they are likely to have medical marijuana in their homes — something that Health Canada itself saw as a serious safety and security risk."

"Accordingly, I am satisfied that...without the protection they seek, the important issues they



O'Neill

raise may not be determined."

For privacy tort expert Chris Hunt, a law professor at Thomson Rivers University in Kamloops, B.C., the ruling makes sense. "A failure to grant anonymity would constitute a further invasion of privacy and may dissuade litigants from pursuing tort claims to vindicate their privacy rights," said Hunt.

The next step in the proposed class action is to seek formal certification, something O'Neill expects to happen in the next few months. Most observers expect that certification will be granted, but class-action lawyer Derek McKay, counsel to Roy O'Connor in Toronto, is not so sure. "On the surface, there appears to be a common class,"

McKay said, "but there may not be common issues."

For example, "Was there simply a risk that the name was seen, or was it actually disseminated? Also, there is more than one type of damages alleged, and they may not apply to the whole class," McKay said.

Health Canada declined to comment.



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