Court File No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

DEFENDANT'S MOTION RECORD

IN RESPECT OF THE PLAINTIFFS' MOTION DATED SEPTEMBER 10, 2014 FOR AN ORDER FOR ANSWERS TO WRITTEN EXAMINATION QUESTIONS

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1. Written representations of the Defendant dated September 19, 2014.

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BETWEEN:

NEIL ALLARD
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DEFENDANT'S WRITTEN REPRESENTATIONS

IN RESPECT OF THE PLAINTIFFS' MOTION DATED SEPTEMBER 10, 2014 FOR AN ORDER FOR ANSWERS TO WRITTEN EXAMINATION QUESTIONS

INTRODUCTION

1. The Defendant makes these written representations in response to the Plaintiffs' motion dated September 10, 2014 for an order compelling answers to the Plaintiffs' questions on written examination to which the Defendant objected (collectively, the "Improper Questions") and awarding the Plaintiffs solicitor-client costs.

2. The Plaintiffs' motion should be dismissed as they have failed to demonstrate that the Improper Questions should be answered in the context of discovery. The Defendant should be awarded costs of responding to this motion on an increased scale, reflecting the fact that it is an abuse of the discovery process for the examining party to first pose an excessive number of objectionable questions and to then put the deponent to the expense of responding to a clearly unfounded refusals motion.

STATEMENT OF FACTS

3. The Plaintiffs commenced this action to challenge the constitutional validity of the *Marihuana for Medical Purposes Regulations* (the "MMPR").[1]

4. By Order dated May 2, 2014, the Court (Manson J.) ordered that this action would proceed by way of simplified action and set deadlines for the completion of certain litigation steps. In particular, the Court ordered that examinations for discovery be completed by August 15, 2014 and motions arising from examinations by September 12, 2014. The Court also ordered that that trial of this action will commence on February 23, 2015 for a duration of three weeks.[2]

5. Pursuant to the Court's May 2 Order, the Defendant received the Plaintiffs' questions on written examination on July 25, 2014.[3]

6. By letter dated August 14, 2014 to the Plaintiffs, the Defendant enclosed her answers to the Plaintiffs' written questions, which were set out in Exhibit "A" to the affidavit of Jeannine Ritchot, the Defendant's representative. In her August 14 letter, the Defendant also advised the Plaintiffs of the Defendant's objections to the Improper Questions, which are detailed in Schedule "A" to these written representations.[4]

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[1] Plaintiffs' Amended Statement of Claim filed on January 21, 2014.
[2] Order pronounced May 2, 2014.
[3] Affidavit of Danielle Lukiv made September 10, 2014 ("Lukiv Affidavit"), Plaintiffs' motion record, tab 2, at para.2.
[4] Lukiv Affidavit, Plaintiffs' motion record, tab 2, at paras.3-4 and Exs. B and C.

ISSUES

7. There are three issues on this motion:

   (a) whether the Defendant should be ordered to provide answers to the Improper Questions;

   (b) if no, whether the Plaintiffs should be permitted to serve the Defendant with re-phrased questions on the topics raised in the Improper Questions; and

   (c) whether costs should be ordered in respect of this motion and, if so, to whom and of what nature.

SUBMISSIONS

8. The Plaintiffs' motion should be dismissed. The Plaintiffs have failed to demonstrate the propriety of the Improper Questions and have not shown why the Defendant should be ordered to answer them. Furthermore, the Plaintiffs have provided no cogent justification as to why they should be permitted an opportunity to re-open their now completed examination for discovery. Finally, the Plaintiffs' request that the Defendant be punished by an award of solicitor-client costs for exercising her right not to answer objectionable questions is completely unjustified.

9. The Defendant seeks increased costs of this motion to sanction the Plaintiffs for having first asked an excessive number of objectionable questions and for then producing an unfounded refusals motion accompanied by an unjustified demand for solicitor-client costs.

I. The Plaintiffs have failed to demonstrate that the Improper Questions are not objectionable

10. The Plaintiffs seek an order under rule 97 of the *Federal Courts Rules* requiring the Defendant to provide answers to the Improper Questions. However, the Plaintiffs have not demonstrated that the Defendant's objections to the Improper Questions were unfounded. The Defendant ought not to be put to the trouble and expense of providing answers that would not serve the purpose of readying this complex case for trial.

A. Irrelevant question: Question 78

11. Question 78 is a demand by the Plaintiffs for "feedback" received by Health Canada from the public regarding the impugned MMPR following its implementation, whether such feedback is "positive or negative". The Plaintiffs suggest that the reaction of the public to the MMPR is somehow germane to determining the reasonableness of the MMPR in terms of whether it is providing an acceptable supply of quality medicine.[5]

12. However, the irrelevance of "public reaction" to determining whether or not a statute or regulation complies with the *Charter* is self-evident. A court that adjudicates a constitutional challenge to legislation cannot base its determination on whether or not the public "likes" that law.

13. Just as overwhelming public approval of a law could not save it from being struck down if it otherwise contravenes the *Charter*, the fact that some individuals may have written to the government to complain about a law would not justify a finding of unconstitutionality either.

14. While it is acknowledged that evidence of input actively solicited by the government from stakeholders prior to the adoption of an impugned law can be relevant to understanding legislative intention, the same cannot be said of *ex post facto* unsolicited comments about the wisdom or efficacy of a law that is already in force.

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[5] Plaintiffs' Written Representations, Plaintiffs' motion record, tab 3, p.313 at para.30.

15. As there is no possibility that any answer provided to question 78 would generate evidence that might assist the Court in determining whether or not the impugned legislation is constitutionally valid, the Defendant should not be put to the trouble and expense of gathering any "positive or negative feedback" she may have received in relation to the new medical marijuana regime.

B. Legal questions: Questions 1-3, 12, 15-16, 18-21, 22 (portion), 23-24, 54-56, 58-59, 64-66, 88, and 91

16. On an examination for discovery, a witness may only be asked about facts, not law. Furthermore, witnesses are not to testify as to questions of law.[6] As detailed in Schedule "A" to these written representations, questions 1-3, 12, 15-16, 18-21, 22 (portion), 23-24, 54-56, 58-59, 64-66, 88, and 91 (collectively, the "Legal Questions") are all improper in that they call for legal analysis and interpretation. In particular:

(a) question 1 asks the deponent to comment about the specifics of the Ontario Court of Appeal's order in *R. v. Parker*;

(b) questions 2, 3, and 12 ask the deponent to review and interpret the *Marihuana Medical Access Regulations* ("MMAR");

(c) questions 15-16, 18, and 91ask the deponent to review and interpret the MMPR;

(d) question 19 asks the deponent to review and interpret both the MMPR and provincial legislation, and also asks the deponent to comment about "reasonable access", which is a legal standard at issue in this proceeding;[7]

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[6] *Apotex Inc. v. Pharmascience Inc.*, 2004 FC 1198 [*Pharmascience*] at para.19 aff'd 2005 FCA 144. See also *AstraZeneca Canada Inc. v. Apotex Inc.*, 2008 FC 1301 [*AstraZeneca*] at para.14.
[7] Plaintiffs' Amended Statement of Claim filed on January 21, 2014 at paras.1(b)(ii), 63, and 66(b).

(e) question 20 requires the deponent to review and interpret the MMPR and other federal legislation, and then to consider the application of that legislation to certain circumstances;

(f) question 21 requires the deponent not only to review and interpret the MMPR, but also their legislative history;

(g) the portion of question 22 at issue requires the deponent to review and interpret both federal and provincial legislation;

(h) questions 23, 64, and 65 require the deponent to review and interpret federal legislation;

(i) question 24 requires the deponent to review, interpret and compare the MMAR and MMPR;

(j) questions 54 and 55 require the deponent to review the legislative history of the MMPR;

(k) question 56 requires the deponent to review and interpret foreign law;

(l) question 58 asks the deponent whether certain federal legislation can be amended;

(m) question 59 requires the deponent to review and comment on the legislative history of the MMAR and/or MMPR;

(n) question 66 requires the deponent to review and interpret federal legislation, and then to consider the application of that legislation to certain circumstances; and

(o) question 88 requires the deponent to review and interpret the MMAR, their legislative history, and other federal legislation.

17. The Defendant should not be compelled to provide answers to the Legal Questions. The Legal Questions are improper because they do not seek facts; instead, they seek information about the impact and effect of various legislation and case law. The views of a deponent as to the interpretation or application of a statute are not only irrelevant, but also inadmissible.[8]

18. The fact that the Legal Questions are legal in nature becomes obvious when considering the steps that the Defendant's representative would have to take to respond to them. For example, in order to respond to question 1, the Defendant's representative would, at minimum, have to read the Ontario Court of Appeal's reasons for judgment and resulting order in *R. v. Parker*. Furthermore, it is likely she would also wish to consult with legal counsel as to her understanding of the outcome in *Parker* before swearing her answer to the question. These steps demonstrate that the Plaintiffs are incorrect in asserting that the Legal Questions do not require what amount to legal conclusions.

19. The Defendant's representative's experience and knowledge is irrelevant to whether the Legal Questions are proper. A deponent cannot be required to provide information on a discovery that amounts to legal analysis and conclusions, notwithstanding his or her sophistication.

20. The fact that the Legal Questions may go to issues the Plaintiffs view as being material is also irrelevant. The information sought by the Plaintiffs by way of the Legal Questions is information that should, if relevant, be ultimately submitted to the Court by the Plaintiffs in the course of their legal argument. It is not information properly sought from a deponent.

21. Given the above, the Defendant should not be required to provide answers to the Legal Questions.

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[8] *Altagas Marketing Inc. v. Canada*, 2004 FC 1682 at para.11.

C. Questions that call for argument, opinion, and/or speculation: Questions 11, 17, 33-34, 39, 46-47, 62-63, 67-69, 79-83, and 89-90

22. Questions asking for a deponent's opinion are not permissible on an examination for discovery unless the deponent is an expert whose expertise is put in issue by the pleadings.[9] Furthermore, because, as set out above, a witness may only be asked about facts on an examination for discovery, questions that call for the deponent to speculate or to argue the party's case are improper.[10]

23. As detailed in Schedule "A" to these written representations, questions 11, 17, 33-34, 39, 46-47, 62-63, 67-69, 79-83, and 89-90 (collectively, the "Opinion Questions") are all improper because they call for opinion, argument, and/or speculation. In particular:

(a) question 11 asks for the deponent's opinion about the reputation among patients of the marijuana sold by Prairie Plant Systems;

(b) question 17 asks for the deponent's opinion about the cost for which the licensed producers will be able to produce marijuana, the target market of licensed producers, and whether the Plaintiffs are part of that market (it also assumes facts not yet in evidence);

(c) questions 33 and 34 set out hypotheses regarding the impacts of the possession limits in the MMPR and ask for the deponent's opinion on and agreement with same, thereby calling for the deponent to engage in speculation and to argue the Defendant's case;

(d) question 39 asks the deponent to engage in speculation based on the problems found in authorized MMAR "production sites" and to provide her opinion in

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[9] *Rivtow Straits Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1977] 1 F.C. 735 (FCA) at para.2; *Bauer Nike Hockey Inc. v. Easton Sports Canada Inc.*, 2006 FC 1084 [*Bauer*] at para.56. See also *Pharmascience* at para.19 and *Kun Shoulder* at para.14.

[10] *Bauer* at paras.62, 74, and 78; *Pharmascience* at para.19; *AstraZeneca* at para.14.

respect of that speculation, thereby calling for the deponent to argue the Defendant's case;

(e) questions 46 and 47 ask for the deponent's opinion on issues pertaining to management of smells from authorized marijuana "production sites", thereby calling for the deponent to argue the Defendant's case;

(f) questions 62 and 63 ask the deponent to argue the Defendant's position in respect of the restriction imposed on marijuana production locations;

(g) question 67 asks for the deponent's opinion on whether natural healthcare products or prescribed drugs are more analogous to marijuana, thereby calling for the deponent to argue the Defendant's case;

(h) question 68 asks for the deponent's opinion on the practices of individuals who produce their own food or other substances for their own consumption, thereby calling for the deponent to argue the Defendant's case;

(i) question 69 asks for the deponent's opinion on the strains to be made available by the licensed producers, thereby calling for the deponent to argue the Defendant's case;

(j) questions 79, 80, and 81 ask for the deponent's opinion on the impact of legalization in the USA on the illicit Canadian marijuana market and authorized marijuana "production sites", thereby calling for the deponent to argue the Defendant's case;

(k) question 82 asks for the deponent's opinion on the difference between those engaged in the legal and illegal marijuana markets in terms of contacting the police when necessary thereby calling for the deponent to argue the Defendant's case;

(l) question 83 asks for the deponent's opinion on the products available to those who grow marijuana plants indoors to minimize various risks, thereby calling for the deponent to argue the Defendant's case; and

(m) questions 89 and 90 set out a hypothesis that appears to assume that certain provisions of the MMPR have already been struck down, and then asks for the deponent's opinion on that hypothesis, thereby calling for the deponent to argue the Defendant's case.

24. The Defendant should not be compelled to provide answers to the Opinion Questions. The Opinion Questions are improper because they seek the Defendant's representative's opinion on various statements, which are phrased in such a way so as to call for the representative to argue the Defendant's case, which is inappropriate.[11]

25. The fact that the Opinion Questions may be relevant and/or pertain to material facts is not relevant to considering whether they are improper. As this Court stated in *AstraZeneca Canada Inc. v. Apotex Inc.*:

> "Relevance" alone is not the test as to whether a question put on discovery must be answered. Of course, if a question is irrelevant, it need not be answered. However, if a question is relevant to some degree or another, then, if an objection is raised, the Court must consider factors such as the degree of relevance, how burdensome is it to obtain an answer, is the question fair, is it abusive and so forth.[12]

26. The Opinion Questions are objectionable because they call for opinion, argument, and/or speculation. It is improper to pose questions to a deponent on an examination for discovery that seek information other than facts.

27. The Plaintiffs' assertion that many of the Opinion Questions are proper because they seek only the deponent's agreement or disagreement to certain statements is an

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[11] *Kun Shoulder Rest Inc. v. Joseph Kun Violin and Bow Maker Inc.*, [1997] F.C.J. No. 1386 (FCTD) [*Kun Shoulder*] at para.16. See also *Pharmascience* at para.19.
[12] *AstraZeneca* at para.16.

oversimplification. For example, question 11 first purports to summarize various court decisions and to describe how medical marijuana was made available by the government, then proceeds to allege that many patients expressed a poor opinion about the suitability of that marijuana, before finally asking for the deponent's opinion regarding the reputation of government supplied marijuana among patients. The question does not simply seek the deponent's agreement or disagreement with a straightforward statement of fact.

28. Another example is question 79, which describes the USA as a "major source of demand" of illicit Canadian marijuana and asks for the deponent's agreement that the demand for such marijuana in that country has been reduced by (1) legalization of marijuana for all purposes in Washington and Colorado; and (2) legalization of marijuana for medical purposes in 22 states. To answer this question, the deponent would have to form an opinion on the complex and controversial question of what impact, if any, changes to the legal regimes that govern recreational and medical marijuana in some American states has had on American demand for illicit Canadian marijuana. The question requires consideration of social, economic and legal factors and will necessarily generate an answer in the nature of an opinion, not a statement of fact. It is inappropriate to pose such a question at an examination for discovery.

29. With respect to questions 67 and 68, the Plaintiffs assert that they are proper notwithstanding that they call for the deponent's opinion, because of the deponent's role as representative of the "corporate" Defendant and her special skill and knowledge. In support of this position, they rely on case law from the British Columbia Supreme Court that suggest that a deponent involved in the operations of a corporate defendant and whose expertise and experience were involved in the company's operations can be questioned in relation to opinions based on this experience and expertise.[13] Even if the British Columbia case law cited by the Plaintiffs is applicable to practice in the Federal

[13] Plaintiffs' Written Representations, Plaintiffs' motion record, tab 3, p.315 at para.40; *Westfair Properties (Pacific) Ltd. v. Aitken Wreglesworth Associates Architects Ltd.*, [1995] B.C.J. No. 225 (BCSC) at para.7.

Court, questions 67 and 68 do not go to the "operations" of the Government of Canada. Instead, questions 67 and 68 request the deponent's agreement to an analogy involving marijuana and the practices of individuals who produce their own consumables. These questions require answers from an individual with knowledge and expertise far beyond what could reasonably be expected of someone involved in the Defendant's "operations".

30. Finally, contrary to the Plaintiffs' assertion, the Defendant did not object to question 22 on the basis that it calls for opinion evidence. The Defendant objected to it on the basis that it "is a legal question and/or a request for third party information."[14]

31. Considering the above, the Plaintiffs have failed to demonstrate that the Opinion Questions are proper, or that obtaining the deponent's opinions on these subjects would assist in readying this action for trial. The Defendant should not be required to provide the opinions that are being sought.

[14] Lukiv Affidavit, Plaintiffs' motion record, tab 2, Ex. B.

D. Questions that call for evidence: Questions 25(e) (portion), 50-51, and 70(a)

32. Asking a witness to provide facts in support of the pleadings of the party is not proper at a discovery. Furthermore, as stated by this Court in *AstraZeneca Canada Inc.*, the "question "upon what facts do you rely for paragraph x of your pleading" is always improper".[15] As detailed in Schedule "A" to these written representations, questions 25(e) (portion), 50-51, and 70(a) (collectively, the "Evidence Questions") are all improper because they ask the Defendant to set out evidence. In particular:

(a) the portion of question 25(e) to which the Defendant objected requests the evidence to support an allegation in paragraphs 89-94 of the Statement of Defence;

(b) questions 50 and 51 request evidence, which may pertain to allegations in paragraph 45 of the Statement of Defence; and

(c) question 70(a) requests the evidence to support an allegation in paragraph 88 of the Statement of Defence.[16]

33. The Evidence Questions are improper because they ask the Defendant's deponent to explain how the Defendant intends to prove allegation in its pleadings. This litigation tactic is not permitted in Federal Court. As this Court stated in *Kun Shoulder Rest Inc. v. Joseph Kun Violin and Bow Maker Inc.*:

> It is proper to ask a discovery witness to speak of all the facts, surrounding a certain incident, of which the witness either knows or must properly inform himself or herself about. It is never permissible to ask a discovery witness as to the facts relied upon in support of a certain allegation, for this requires the witness to choose facts and disclose how his lawyer might prove a given allegation. While a witness may know the general approach that his or her lawyer intends to take, a witness cannot know what facts will assist until he or she knows the law. The particular facts that will be relied upon is based upon counsel's view of the

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[15] *Pharmascience* at para.19. See also *AstraZeneca* at para.14.
[16] Defendant's Statement of Defence filed on February 14, 2014.

> law. An examination for discovery of a witness seeks to discover fact, not argument as to what is relevant in order to prove a given plea.[17]

34. Furthermore, in respect of the case law from the Supreme Court of British Columbia cited by the Plaintiffs,[18] it appears the propositions the Plaintiffs have drawn from these cases contradict the case law in this Court, which is that it is not permissible to ask for facts to support the pleadings of the party.[19] In the event there is in fact a contradiction, it is the law of this Court that should prevail.

35. Finally, contrary to the Plaintiffs' assertions, the Defendant did not object to the first part of question 25(e), and did not object to questions 89 and 90 on the basis that they call for evidence.[20]

36. Given the above, the Evidence Questions are improper and the Defendant should not be required to provide answers to them.

II. <u>The Plaintiffs should not be permitted to re-phrase the Improper Questions</u>

37. While the Plaintiffs' notice of motion simply requests an order requiring the Defendant to answer the questions that were objected to, their written representations also contain a request for alternative relief "permitting the Plaintiffs to serve rephrased questions dealing with each or any of such questions as the court directs within 14 days of the court's decision and requiring the Defendant to respond within 14 days of service of the questions thereafter". No specific justification has been advanced in support of the relief beyond the assertion that if the examination for discovery had been conducted orally, the Plaintiffs could have attempted to rephrase their questions in response to objections.[21]

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[17] *Kun Shoulder* [*Kun Shoulder*] at para.16. See also *Pharmascience* at para.19.
[18] Plaintiffs' Written Representations, Plaintiffs' motion record, tab 3, p.317 at paras.54-55.
[19] *Kun Shoulder* at para.16. See also *Pharmascience* at para.19.
[20] Lukiv Affidavit, Plaintiffs' motion record, tab 2, Ex. B.
[21] Plaintiffs' Written Representations, Plaintiffs' motion record, tab 3, at paras. 15, 57-59.

38. That said, the Plaintiffs have not proposed any potential rephrasing of their questions in order to address the Defendant's objections. Accordingly, it cannot be assumed that it would be possible to rephrase the Improper Questions if they are given 14 days to formulate them, as the Plaintiffs suggest by their prayer for relief.

39. Even if the Plaintiffs had proposed specific new questions that it would now like to pose in light of the Defendant's objections to the Plaintiffs' Improper Questions, such relief should not be granted at this stage of this specially managed litigation, which is subject to a strict procedural schedule. Such an order will prejudice the Defendant by requiring the Defendant to respond to a second round of written questions while concurrently working on the next steps in this proceeding, the deadlines of which have already been set by the Court.[22]

40. It was incumbent upon the Plaintiffs to judiciously formulate their limited examination for discovery questions in a manner that was unobjectionable. The Plaintiffs did not do so. Instead of confining their questions to proper requests for relevant factual information, they chose to pose a series of argumentative questions apparently designed to engage the Defendant's deponent in a debate over matters of law, evidence and opinion. Their gambit having failed, the Plaintiffs should not now be given another chance to pose proper questions.

41. This is a complex and important constitutional case, which the parties must ready for hearing in an expedited manner. The Plaintiffs have not identified any cogent justification for diverting their efforts and those of the Defendant from trial preparation to prolonging the examination for discovery process. The Plaintiffs' request to re-open discovery should be denied.

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[22] Order pronounced May 2, 2014.

III. There is no basis for an award of solicitor-client costs to the Plaintiffs; increased costs should be granted to the Defendant

42. The Plaintiffs seek solicitor-client costs of their motion but make no submissions in support of this extraordinary remedy sought. The Plaintiffs' request in this respect is entirely devoid of merit and should be dismissed.

43. There is simply no basis on which to award solicitor-client costs against the Defendant. The Defendant's conduct in making the objections to the Improper Questions was not reprehensible, scandalous, or outrageous.[23] No party being examined at discovery should be saddled with a punitive costs award for exercising the right to defend oneself from objectionable questions, absent a total lack of justification for the objections.

44. To the contrary, in the circumstances of the case at bar, it is the Defendant that is entitled to increased costs of this motion. While the Defendant does not suggest that the Plaintiffs' conduct is of a nature that would warrant the ultimate sanction of solicitor-client costs, this unnecessary motion does merit an award of costs on the basis of the maximum number of units under column V of Tariff B of the *Federal Courts Rules*, payable in any event of the cause.[24]

45. This motion arose because the Plaintiffs posed the Improper Questions to the Defendant, to which the Defendant justifiably objected. The explanations provided by the Defendant for these objections should have been sufficient to persuade the Plaintiffs that they ought not to have posed the Improper Questions. Yet the Plaintiffs chose to bring the present refusals motion regardless.

46. In exercising its discretion to award costs, the Court may consider, among other things, any conduct of a party that tended to short or unnecessarily lengthen the duration of the

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[23] *Louis Vuitton Malletier S.A. v. Lin*, 2007 FC 1179 at paras. 55-56.
[24] *Federal Courts Rules,* Tariff B.

proceeding. It may also consider whether any step in the proceeding was improper, vexatious, unnecessary or taken through negligence, mistake or excessive caution.[25]

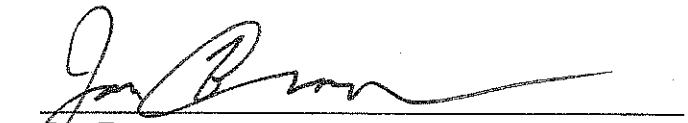
47. Examples of this include *Ultima Foods Inc. v. Canada (Attorney General)*, a case in which this Court made an increased costs award, although outside of Tariff B, as a result of, among other things, a party filing unnecessary affidavits. Furthermore, in *2045978 Ontario Inc. (c.o.b. Chaps the Original) v. Chaps Aldershot Inc. (c.o.b. Lezley's Chaps)*, this Court awarded the plaintiff increased lump-sum costs consistent with costs assessed at the upper end of column V of Tariff B. In *2045978 Ontario Inc.*, the Court determined that the plaintiffs' summary judgment motion had been unnecessary as the defendant had no defence and therefore should not have been defended the action.[26]

48. In sum, the circumstances of this motion justify an award of increased costs to the Defendant, payable in any event of the cause.

ORDER SOUGHT

49. The Defendant respectfully requests that the Plaintiffs' motion of September 10, 2014 be dismissed with increased costs to the Defendant, payable in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of September, 2014.



Jan Brongers
Counsel for the Defendant

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[25] *Federal Courts Rules*, rules 400(3)(i) and (k).
[26] *Ultima Foods Inc. v. Canada (Attorney General)*, 2013 FC 238 at paras.17 and 25; *2045978 Ontario Inc. (c.o.b. Chaps the Original) v. Chaps Aldershot Inc. (c.o.b. Lezley's Chaps)*, 2009 FC 981 at paras.6 and 9-10.

LIST OF AUTHORITES

Legislation:

1. *Federal Courts Rules,* rules 97, 100, 296, 400, and Tariff B.

Case Law:

2. *2045978 Ontario Inc. (c.o.b. Chaps the Original) v. Chaps Aldershot Inc. (c.o.b. Lezley's Chaps)*, 2009 FC 981 (QL)

3. *Altagas Marketing Inc. v. Canada*, 2004 FC 1682 (QL)

4. *Apotex Inc. v. Pharmascience Inc.*, 2004 FC 1198 aff'd 2005 FCA 144 (QL)

5. *AstraZeneca Canada Inc. v. Apotex Inc.,* 2008 FC 1301 (QL)

6. *Bauer Nike Hockey Inc. v. Easton Sports Canada Inc.*, 2006 FC 1084 (QL)

7. *Kun Shoulder Rest Inc. v. Joseph Kun Violin and Bow Maker Inc.*, [1997] F.C.J. No. 1386 (FCTD) (QL)

8. *Louis Vuitton Malletier S.A. v. Lin*, 2007 FC 1179 (QL)

9. *Merck & Co. v. Apotex Inc.,* 2003 FCA 438 (QL)

10. *Reading & Bates Construction Co. v. Baker Energy Resources Corp.*, [1988] F.C.J. No. 1025 (FCTD) (QL)

11. *Rivtow Straits Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1977] 1 F.C. 735 (FCA) (QL)

12. *Ultima Foods Inc. v. Canada (Attorney General),* 2013 FC 238 (QL)

13. *Westfair Properties (Pacific) Ltd. v. Aitken Wreglesworth Associates Architects Ltd.*, [1995] B.C.J. No. 225 (BCSC) (QL)

SCHEDULE "A" - Page 1 of 7
TO THE DEFENDANT'S WRITTEN REPRESENTATIONS DATED SEPTEMBER 22, 2014

Plaintiffs' Question no.	Question	Defendant's Objection
1	As a result of the decision of the Ontario Court of Appeal in R. v. Parker (2000), the government of Canada was required within one year from that decision to amend the *Controlled Drugs and Substances Act* (*CDSA*) and to put in place a "constitutionally viable medical exemption" to the prohibition against the possession and cultivation of cannabis (marihuana) in the *CDSA* in order to provide reasonable access for medical purposes to medically approved patients so that such patients would not have to choose between their "liberty" if they broke the law and their "health" if they went without their medicine, isn't that correct?	Legal question
2	In response, the government of Canada ultimately promulgated the Marihuana Medical Access Regulations (*MMAR*) in 2001 that enabled such medically approved patients to cultivate or produce dried cannabis (marihuana) for themselves or have a designated grower do so for them at a specified production site, including a dwelling house, in amounts determined according to a formula set out in the regulations that depended upon the number of grams per day authorized by the medical practitioner, isn't that correct?	Legal question
3	The *MMAR* made various provisions with respect to production either indoors or outdoors, but not both at the same time, with some limitations with respect to production site location in so far as schools and playgrounds are concerned, but not otherwise and allowed a patient to possess up to a 30 day supply on their person at any time, and made provision for administrative changes to these licenses, including changes of production site addresses and other amendments, depending upon the individual circumstances, and required annual renewal through Health Canada, isn't that correct?	Legal question
11	Since the promulgation of the *MMAR* there were several court challenges to various aspects of them including *Wakeford* (s.56, exemptions and government supply) (1998); *Krieger* (Right to produce pre government supply) (2000); *Hitzig* (government supply and the DG limit to grow for one only) (2003); *Sfetkopoulos* (The DG limit to grow for one only) (2008); *Beren* (3 licenses in one place limit struck) (2009); *Smith* (BC only -the dried marihuana limitation) (2012); and *Memagh* (the doctor boycott) (2013), and some of them included an effort to have the government come up with a supply and ultimately the government made available as its supply the product made by Prairie Plant Systems, initially for research purposes, and approximately 20% of the approved patients accessed the supply, but many expressed a poor opinion about its suitability for their particular ailments and it suffered a poor reputation generally amongst patients, didn't it?	Calls for opinion
12	Consequently, for a period of time, approximately 10 years, medically approved patients were able to access a supply from government through Health Canada or produce for themselves or have a designated person grow for them as the sources of supply of their medicine, apart from the black or grey illicit markets, is that correct?	Legal question

15	On June 7, 2013 the Marihuana for Medical Purposes Regulations (*MMPR*) were promulgated and ran concurrently with the *MMAR* until March 31, 2014, when they would have the effect of repealing the *MMAR* in their entirety, and existing patients under the *MMAR* were required to complete any renewals or changes to their permits under the *MMAR* on or before September 2013, isn't that correct?	Legal question
16	The *MMPR* by repealing the *MMAR* eliminated the ability of patients to produce for themselves or have a designated grower do so for them, and compels them to obtain their medicine only from government Licensed Producers (LP's) at market prices and by obtaining a medical document from a medical practitioner and providing it to the LP in order to have that LP ship to them a labeled package of medicine and it is the label that constitutes the proof of lawful possession by the individual, isn't that correct?	Legal question
17	The evidence in these proceedings to date from the Plaintiffs indicates that they have been able to produce for themselves at $.50 to $3 per gram – don't you agree that these individuals are not part of the license producer's target market, as they, the Licensed Producers are unable to produce cannabis (marihuana) for that cost in accordance with the *MMPR* provisions and that therefore the target for the LPs are those who can afford $3 a gram and up - isn't that correct?	Calls for opinion
18	The *MMPR* creates a government authorized supply for those who can afford market prices and makes no provision for those patients who cannot afford those prices do they?	Legal question
19	No provision is made in the *MMPR* or elsewhere by the government of Canada or in conjunction with the Provinces to ensure reasonable access to their medicine by those who cannot afford the LP market prices, is there?	Legal question
20	There is no provision in the *MMPR* or elsewhere under the jurisdiction of the Federal government of Canada that will provide financial assistance, or insurance to those patients who cannot afford the Licensed Producer prices – is there?	Legal question
21	The plight of those who simply cannot afford or will not be able to afford the Licensed Producer prices was not considered or addressed in the preparation for or in the proposed *MMPR* nor is there any such provision in the legislation itself is there?	Legal question
22	As indicated in paragraph 36 of the Defence, 'dried marijuana' is not an 'approved' drug for sale in Canada and this means…patients cannot claim coverage under any provincial insurance scheme for reimbursement of the cost of purchase, isn't that correct? [This is only the part of the question to which the Defendant has objected.]	Legal question; Request for third party information
23	The concept of an 'approved drug' under the *Food and Drugs Act* relates to being'approved for sale' not simply approved for personal use, isn't that right?	Legal question

24	The *MMPR* limit production and possession to "dried marihuana" only and the patient is only permitted to possess up to 30 times their daily limit or 150 g, whichever is less, whereas the *MMAR* allowed possession up to 30 times the daily limit with no limit to 150 g, isn't that correct?	Legal question
25(e)	The reasons why the government has limited the use of Cannabis (marihuana) to its dried form only in the *MMAR* and has continued that limitation in the *MMPR and added it to the NCR, are set out in paragraphs 89 through 94* of *the Statement of Defence and raise the following questions;* (e) What...evidence exists to support this allegation in relation to patients who produce for themselves or their designated grower caregivers and that do not "distribute" to others? [This is only the part of the question to which the Defendant has objected.]	Calls for evidence
33	Bearing in mind the above program statistics, this limitation may work for those with dosages in excess of 5 g per day who can possess 150 g or a 30 day supply on their person at any time when out and about under the *MMPR,* but all of those with greater than 5 g per day authorizations become more and more limited in their ability to be away from their home or storage site as their dosage increases to the point where those with 150 g a day authorizations or greater will remain virtually housebound - isn't that correct?	Calls for argument and opinion; Speculative
34	This will also mean that those with greater than 5 g per day authorizations will require multiple shipments from an LP at greater shipping costs to fulfill the requirements, as there is no provision for storage, and may have difficulties picking up and transporting their allowances from the local post office to their residences and other such complications because of that possession limitation to 150 gm. - isn't that correct?	Calls for argument and opinion; Speculative
39	Can you point to any particular problem arising in any of these circumstances where the problem could not have be prevented by initial licensing, permitting and inspections followed by regular inspections or the problem could not be remediated or fixed and reoccurrence prevented?	Calls for argument and opinion; Speculative
46	The number of complaints about smell relative to the total number of authorized production sites is relatively small isn't it indicating most have been able to control without offending or impacting others haven't they?	Calls for argument and opinion
47	There are various types of filters and other devices available on the market to reduce and control smell so that any smell problem can be mitigated - isn't that correct?	Calls for argument and opinion
50	What evidence is there that the average 17.7 grams of dried marihuana per day is being smoked as opposed to put into edibles or other extracts or derivatives and consumed in that fashion?	Calls for evidence
51	What evidence do you have as to how much a person might consume per day in edibles or other extracts or derivatives, including juicing?	Calls for evidence
54	What is the source of the formula in the *MMAR* that determined the number of plants a person could produce depending upon their authorized grams per day?	Legal question
55	That formula does not specify the size of the plants to be produced nor does it provide for a maximum upper limit on the number of plants does it?	Legal question

56	Other countries and particularly individual States in the USA do not use such a formula but set a specific number of plants instead don't they?	Legal question
58	The Regulations can be amended to change the formula to limit the number of plants or their sizes couldn't they?	Legal question
59	Why did the government require an inspector to obtain permission or a warrant before entering a private dwelling to determine whether or not a licencee is conducting their operation in accordance with the licence granted to them by Health Canada?	Legal question
62	Is it the government's position that Cannabis (marihuana) cannot be safely produced in: (a) any dwelling house by a patient under any circumstances?; (b) any outbuilding by a patient under any circumstances?: (c) in a collective garden by a group of patients in an agricultural or industrial or commercial zone subject to local government regulation? (d) Are these concerns limited to large marijuana production facilities in private dwellings that are not constructed for such and not to small production facilities in such dwellings that are at least partially constructed for such?	Calls for argument and opinion
63	If not, please provide the factual basis in detail of the government's position and how it applies to all dwelling houses including those that have carried out specific construction to enable such production?	Calls for argument and opinion
64	The Food and Drugs Act has regulations governing "Natural Healthcare Products" and whereas cannabis (marihuana) is excluded from those regulations because it is a controlled substance under the *Controlled Drugs and Substances Act* (*CDSA*), nevertheless, those products are defined as "A plant or a plant material, an alga, a bacterium, a fungus or a non-human animal material" and those regulations govern the sale of such items to others or to the public and do not regulate anyone from personally producing such for themselves - is that correct?	Legal question
65	Similarly, there is nothing in the Food and Drugs Act that regulates or limits an individual's ability to produce one's own food for one's own consumption or for the consumption of one's family and friends, so long as the food produced is not sold to the public - is that correct?	Legal question
66	There are no federal regulations under any federal statutes that preclude an individual from producing his or her own food or herbs or flowers for one's own personal use in one's own home or garden, including an outbuilding or other location, so long as the substances are not for public distribution and are not controlled under the *CDSA,* are there?	Legal question
67	Cannabis (marihuana) that is grown is a plant and harvested as such, and then perhaps used in dried form or in other forms such as edibles, juices, but not in a pill form, is much more analogous to a natural healthcare product than the usual prescribed drugs that are usually in pill form, wouldn't you agree?	Calls for argument and opinion

68	Wouldn't you agree that people who produce food or other substances for their own consumption will naturally and understandably take steps (perhaps not always successfully) to ensure that they follow best practices to avoid any problems to their own health?	Calls for argument and opinion
69	The evidence in these proceedings from the Plaintiffs and others indicates that some of them have spent considerable time and effort trying to develop a particular strain or strains of cannabis (marihuana) that is effective for their particular illness and that they wish to continue doing so and fear the loss of the use of the strain if compelled to cease production and resort solely to the products available to Licensed Producers - is it Health Canada's position that these Licensed Producers will be able to produce the individual strains for the individual patients on an individual basis economically or is it expected that the patients will simply be limited to those strains made available by the License Producers and no others?	Calls for argument and opinion
70(a)	The basis for the *MMPR* precluding any production of [sic] outdoor whatsoever is set out in paragraph 88 of the Defence as intended to decrease the risk of diversion and prevent cross contamination of nearby crops, particularly industrial hemp - (a) What evidence is there of any such problems having arisen under the MMAR by those who were permitted to grow outdoors or both?;	Calls for evidence
78	What feedback either positive or negative has Health Canada received regarding the *MMPR* program to date and in particular regarding individual LPs and their product and service from a reasonable access perspective or otherwise?	Irrelevant
79	In the past the major source of demand for illicit Canadian produced cannabis (marihuana) was the USA (about 80% of our market and about 5% of theirs as most of theirs is grown by Americans for Americans in America and the rest comes through the Mexican border) and this demand has been substantially reduced not only by the legalization of cannabis (marihuana) in Washington State and Colorado for all purposes, but also by virtue of the legalization of access to cannabis (marihuana) for medical purposes in some 22 states - hasn't it?	Calls for argument and opinion
80	This reduction in overall demand in the illicit market coupled with some abuse by a minority of *MMAR* Licensees diverting their product into the illicit market has resulted in an overall glut or oversupply that has reduced prices and resulted in the closing down of many illegal operations, hasn't it?	Calls for argument and opinion
81	This in turn has reduced the risk of violence associated to "Grow rips" or break and enters for such purposes themselves, given that the robbers will be unable to sell the product easily given the lesser demand and oversupply, isn't that correct?	Calls for argument and opinion
82	Legal operations under the *MMAR* are/were required to have in place acceptable security systems to prevent against robberies and the evidence is that these were effective and that legal operators would call the police in the event of such attempted robberies, whereas those engaged in the illicit market would not- is that correct?	Calls for argument and opinion

83	Those who wish to grow any type of plant indoors have available to them a wide array of products to produce any such plants indoors safely from any electrical and fire risks, and from a toxic mold risks by use of dehumidifiers and other devices and from security risks by the use of various alarms, cameras and other devices and including devices to reduce smell or odor and including entire indoor growing tents or containers as an entire industry or number of industries exist to supply all of these things to the legal market- isn't that correct?	Calls for argument and opinion
88	The *MMAR* provided for notification of a change in the production site address, requiring the consent of the owner/landlord if the property was not owned by the patient/applicant, and one of the purposes of keeping a record of the production site was to provide a database accessible by the police to keep law enforcement informed as to which sites are legal and which ones were not when engaged in the general enforcement of the *CDSA* - isn't that correct?	Legal question
89	If personal production or production by a caregiver is permitted to continue it would be relatively simple to devise a process whereby a person could change their production site address if necessary and give notice thereof to Health Canada or any other government department or agency, including the police - wouldn't it?	Calls for argument and opinion
90	If not, why not?	Calls for argument and opinion
91	If an MMPR patient is unhappy with the product, such as the License Producer being unable to produce a strain that works for them, or the product is otherwise ineffective, apart from complaining to the Licensed Producer the patient will have to re-attend on his medical practitioner to obtain a new medical document in order to attempt to access medicine from a different Licensed Producer, is that correct?	Legal question