No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

DEFENDANT

PLAINTIFFS' REPLY

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INTRODUCTION

1. On April 24, 2015, the Federal Minister of Health, Rona Ambrose, commented to the press: "Marijuana is not medicine."[1]

2. This attitude underlies much of the Defendant's case.

3. Defendant's response to Plaintiffs' case is less about whether the *MMPR* is a constitutionally viable way for patients to access medical cannabis and more of an attack on the inherent permissibility of medical cannabis itself.

4. The preconceived biases which permeated Defendant's witness testimony (and were starkly revealed during cross-examination) also permeate Defendant's written submission. This is made apparent by the way Defendant has either ignored vast quantities of the evidence before this Honourable Court or engaged in selective myopia; focusing on certain strands of evidence as though they were separate from a larger whole.

5. The result, with respect, is the creation of a misleading narrative that attempts, ultimately unsuccessfully, to create the impression that the *MMAR* regime was somehow anarchy; a free-for-all with unregulated physicians and unregulated patients flouting the law and causing harms to themselves and society.

6. A central example of this biased approach can be drawn from the public safety issue. Defendant's public safety witnesses drew the vast majority of their evidence of risks and harms from the world of illegal non-medical cannabis production, what the RCMP call "marijuana grow operations" or, more pejoratively, "grow-ops". All of this evidence was simply irrelevant because

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[1] http://www.cbc.ca/news/canada/british-columbia/canada-s-health-minister-says-dispensaries-normalize-marijuana-use-1.3048543;

the issue in this case is whether *legal* medical cannabis production poses a real public safety risk.[2]

7. Rather than focusing on legal medical production by patients, Defendant asks this Court to rely on Defendant's evidence about harms from illegal operations by transposing that evidence to legal cannabis gardens, despite Plaintiffs' evidence that legal cannabis gardens generally, and their gardens specifically, do not pose a public safety risk.

8. Similarly, Defendant takes the position that cannabis should be treated like a pharmaceutical drug. However, while Defendant's regulatory witnesses claimed that the *MMPR* treated cannabis as much as possible like other medicines, they conceded that patients could grow other medicinal plants – even deadly ones – with no oversight at all. And they conceded that the regulations in place for obtaining approvals for pharmaceutical medicines were ill-suited to plant medicines generally. Rather, whole plant medicines fall under the Natural Health Product Regulations, which do not prevent or otherwise regulate patient access or self-production.

9. Defendant's written argument primarily relies on the affidavits it tendered as if no cross-examination of those witnesses had occurred. As a result, Defendant's written argument is simply wrong on its facts.

10. Defendant's erroneous factual assertions wholly undermine its legal arguments. Indeed, in some cases, the factual assertions demonstrate either the overbreadth of the impugned restrictions (in s. 7) or the lack of minimal impairment of the Defendant's scheme (in s. 1). And at the same time, the legal arguments, even without the clear factual errors, are incorrect.

11. In contrast to Defendant's evidence, Plaintiffs adduced convincing evidence, in both their affidavits and under cross examination, proving that their s. 7 *Charter*

[2] It is not surprising several of Defendant's expert witnesses focused on illegal marijuana grow operations rather than legal cannabis gardens when their instructions from Defendant either conflated illegal and legal sites (e.g., Garis), or did not distinguish between illegal and legal at all (e.g., Miller, Dybvig).

rights have been violated by the MMPR regime denying them reasonable access to the medicine they need.

12. Compounding its factual errors, Defendant fails to situate the public safety issue at the proper point in the *Charter* analysis by dealing with it in s. 7 rather than in s. 1 where it belongs. Further, Defendant simply ignores that it bears the onus of demonstrating that infringements of s. 7 rights are justifiable under section 1 of the *Charter*.

13. Defendant did not tender any reliable evidence that legal medical cannabis production sites pose a risk to public safety. By contrast, Plaintiffs proved with a large body of positive evidence that cannabis can be grown safely and thus does no pose a public safety risk, such that the infringements of Plaintiffs' s. 7 rights cannot be justified under s. 1.

14. Defendant has, therefore, failed to meet its onus to justify infringement of Plaintiff's s. 7 rights as reasonably justified under s. 1.

15. These deficiencies are fatal to Defendant's positions. The relief sought by Plaintiffs should be granted.

DEFENDANT'S FACTUAL ERRORS

16. Defendant's Statement of Facts bears little resemblance to the evidence actually adduced at trial. Instead, it appears to be primarily a reproduction of Defendant's witness affidavits with no recognition that their assertions were significantly undermined in cross-examination.

17. The Defendant's unwillingness to adhere to the factual record developed at trial results in so many incorrect factual assertions that Plaintiffs will only address, in the limited space available, some of the most glaring, and important, misstatements:

Assertion: The *MMPR* is required because of Canada's treaty obligations (para 11).

Evidence: The *MMPR* does not comply with the treaties. The treaties are all subject to the *Charter*.

Cross Examination of J. Richot, Transcripts, Vol. 7, p. 815 to 817
Cross Examination of J. Kula, Transcripts, Vol. 6, p. 669 to 675

Assertion: The NHPR exclude substances that may produce harm to health and society when diverted or misused.

Evidence: Many NHPs are extremely dangerous to health; some are lethal. All can be grown without criminal sanction in exactly the same way, and in the same facilities, as medical cannabis under the *MMAR*.

Cross Examination of T. Cain, Transcripts, Vol. 7, p. 907-908
Affidavit of T. Bauman, Exhibit Book, Vol. 2, Tab 19, p. 739-741

Assertion: *MMAR* were not intended to permit "widespread, large-scale" production that resulted from 18g/day daily dosage.

Evidence: The *MMAR* formula for plants was created by the government and could have been modified by it. Additionally, 18g/day allows for production of 89 plants, but assuming that this number of plants is "large scale" is in error and contrary to the evidence at trial. The evidence is that patients produce in many different ways; from tiny plants to large plants, in specially-constructed "bloom boxes" to purpose-built indoor gardens, outdoors, in greenhouses, in residential properties, in agricultural properties and in industrial properties. 89 plants could be large-scale or they could be grown in a small purpose-made box in the closet of an apartment.

Affidavits and cross examinaiton of all Plaintiffs, and B. Alexander
Expert Affidavit of R. Colasanti, Exhibit Books, Tab 7, Cross examination of R. Colasanti, Trancripts, Vol. 4

Cross Examination of J. Richot, Transcripts, Vol. 7, p. 850 (number of plants determined by formula created by Health Canada)
Cross Examination of E. Nash, Transcripts, Vol. 13, p. 1982 (small scale medical cannabis garden between 10 and 90 plants)
Expert Affidavit of E. Nash, Exhibit Book, Vol. 11, Tab 55

Assertion: Health Canada needed to inspect quality of self-produced medical cannabis to ensure suitability for consumption.

Evidence: No evidence was led that self-produced medical cannabis caused any *MMAR* participant any negative health effects at any point during the nearly 15 years of program. The federal government, despite regulating commercial food sales, does not inspect self-produced food for molds despite possible (and identical) negative health effects. Plaintiffs never experienced any negative health issues and self-inspected their medicine. And the *MMPR* has not prevented this risk; LP produced cannabis has been recalled for bacterial contamination after being sold to, and presumably consumed by, patients (there is, however, no evidence of negative health effects from this cannabis either).

Cross Examination of S. Davey, Transcripts, Vol. 1, p. 76, 80
Cross Examination of B. Alexander, Transcripts, Vol. 1, p. 121, 149, 152, 153
Cross Examination of D. Hebert, Transcripts, Vol. 2, p. 232
Cross Examination and Re-Examination of N. Allard, Transcripts, Vol. 3, p. 319, 370
Expert affidavit of R. Colasanti, Exhibit Books, Tab 7
Cross Examination of R. Colasanti, Transcripts, Vol. 4, p. 473, 486 (Tweed LP had mildewy cannabis plants), 488 (cannabis can be dried properly by self-producers without mould), 489 (LP sent someone mouldy cannabis), 490, 560
Cross Examination of J. Richot, Transcripts, Vol. 7, p. 759 (HC has no statistics of any MMAR producer getting sick from their self-produced cannabis) p. 841 (HC has no statistics regarding incidences of mould for self-produced cannabis), p. 903 (no evidence of Mr. Allard producing unsafe or mouldy cannabis)
Cross Examination of T. Cain, Transcripts, Vol. 7, p. 920 (recall of LP for mouldy cannabis)
Expert Affidavit of E. Nash, Exhibit Book, Vol. 11, Tab 55
Cross Examination and Re-examination of E. Nash, Transcripts, Vol. 13, p. 1940-1941, 1954, 1990

Assertion: There is little evidence of the medical value of cannabis, , or, as the Health Minister put it, marijuana is not medicine.

Evidence: There are, in fact, some clinical trials of the whole plant. There is also an overwhelming body of evidence, objective and subjective, demonstrating (contrary to the position of the Minister of Health) medicinal value and relative safety, particularly compared to pharmaceuticals. There are many clinical trials of the active compounds, and a medicine (Sativex) containing equal ratios of the two primary compounds (THC and CBD) is approved for limited uses in Canada under the FDA, demonstrating both the medicinal value and safety profile of the active compounds.

Affidavit of R. Clarke, Exhibit Books, Vol. 13, tab 68
Affidavits of the Defendants' medical experts Dr. Kalant and Dr. Daeninck, Exhibit Books, Vol. 11, Tab 58; Vol. 12, Tab 61
Affidavit of Dr. Ferris, Exhibit Book, Vol. 13, Tab 69

Assertion: Patients can never need dosages of over 5g/day.

Evidence: That amount is insufficient for all Plaintiffs in this proceeding. The average dosage in Canada is 18.2g/day, all as recommended by a physician after being advised, in the *MMAR* application forms, that 5g/day is associated with increased risks. It is likely that the amounts purchased from HC or LPs are not reflective of need but, rather, are reflective of the patients' inability to afford the medicine they need from these suppliers.

Cross Examination of S. Davey, Transcripts, Vol. 1, p. 40
Cross Examination of N. Allard, Transcripts, Vol. 3, p. 292-293
Cross Examination of J. Ritchot, Transcripts, Vol. 7, p. 793 (158 patients with medically approved dosages of over 150 grams per day), 831
Cross Examination of T. Cain, Transcripts, Vol. 7, p. 922-923
Affidavit of Dr. Ferris, Exhibit Books, Vol. 13, Tab 69

Assertion: There is no research regarding disadvantages of inhalation versus ingestion.

Evidence: All experts agreed that inhalation (ie, smoking) poses serious risks to health. Indeed, it is the primary health risk involved in consuming cannabis.

Affidavits of Dr. Kalant, Dr. Daeninck, Dr. Ferris, Dr. Pate
Exhibit Books, Vol. 1, Tab 15; Vol. 11, Tab 58; Vol. 12, Tab 61; Vol. 13, Tab 69

Assertion: The parties agree that cultivation in a residential setting poses inherent public health and safety risks, including risk of mold, fire, home invasion, violence, diversion and negative impacts on surrounding community.

Evidence: Plaintiffs have actively taken steps to avoid those risks and have not experienced any of those harms or negative impacts. The evidence tendered at trial was that MMAR self-producers in general do not have any of these problems. All of the purported risks can be easily mitigated to reasonable levels – levels that are equal to, or less than, other lawful activities. Specific responses to Defendant's palpably erroneous factual assertions with respect to mold, fire, home invasion and diversion, follow.

Affidavits, Cross examination, and re-examination of all Plaintiffs
Expert Affidavit of E. Nash, Exhibit Books, Vol. 11, Tab 55; Direct examination of E. Nash, Transcripts, Vol. 13, p. 1940-1943
Expert Affidavit of S. Wilkins, Exhibit Book, Vol. 10, Tab 35; Direct examination and cross examination and re-examination of S. Wilkins, p. 1389-1392, 1416, 1419-1420, 1438-1440
Expert Affidavit of R. Colasanti, Exhibit Books, Vol. 1, Tab. 7

Assertion: There is a significant risk of mold or contamination of medicine in residential medical production.

Evidence: No Plaintiff ever experienced mold or contamination. All witnesses, including Defendant's experts, agreed that moisture removal was easily accomplished and that with proper ventilation, the risk of mold was mitigated or eliminated. No evidence was led of any patient ever experiencing health harms from consuming medical cannabis and no Plaintiff ever experienced any such harms.

Affidavit of J. Schutt, Exhibit Books, Vol. 13, Tab. 70
Cross Examination of S. Davey, Transcripts, Vol. 1, p. 76, 80
Affidavits and Cross Examination of B. Alexander, Exhibit Books, Vol. 1, Tab 2; Transcripts, Vol. 1, p. 121, 149, 152, 153
Affidavits and Cross Examination of D. Hebert, Exhibit Books, Vol. 1, Tab 3; Transcripts, Vol. 2, p. 232
Affidavits and Cross Examination and Re-Examination of N. Allard, Exhibit Books, Vol. 1, Tab 5;Transcripts, Vol. 3, p. 319, 370
Affidavit of R. Colasanti, Exhibit Books, Vol. 1, Tab. 7; Cross Examination of R. Colasanti , Transcripts, Vol. 4, p. 473, 488, 490, 560
Cross Examination of J. Richot, Transcripts, Vol. 7, p. 759 (HC has no statistics of any MMAR producer getting sick from their self-produced cannabis) p. 841 (HC has no statistics regarding incidences of mould for self-produced cannabis), p. 903 (no evidence of Mr. Allard producing unsafe or mouldy cannabis)
Cross Examination of T. Cain, Transcripts, Vol. 7, p. 920 (recall of LP for mouldy cannabis)
Expert Affidavit and Cross Examination of E. Nash, Exhibit Books, Vol. 11, Tab 55; Transcripts, Vol. 13, p. 1940-1941, 1954
Cross Examination of L. Garis, Transcripts, Vol. 9, p. 1308-1315 (in particular p. 1310 l. 3-11)

Assertion: Licensed medical cannabis production poses significant fire risks if equipment is installed improperly.

Evidence: Here Defendant – faced with the overwhelming evidence adduced at the trial – retreats from its heretofore blanket statement that cannabis production is inherently dangerous. The evidence is that no increased fire risk exists in properly built indoor production facilities and that lawful facilities are significantly more likely to be built properly to Code and inspected by municipal authorities than unlawful production sites. All plaintiffs as well as expert producers R. Colasanti and E. Nash engaged licenced tradespeople or inspectors to review the safety of their setup. Moreover, the risk of fire in outdoor production is nil and the risk of fire in greenhouses approaches nil.

Expert Affidavit of R. Boileau, Exhibit Books, Vol. 13, Tab 66
Expert Affidavit of R. Colasanti, Exhibit Books, Vol. 1, Tab. 7; Cross examination of R. Colasanti, Transcripts, Vol. 4, p. 476-478
Expert Affidavit of T. Moen, Exhibit Books, Vol. 10, Tab 32
Cross Examination of S. Holmquist, Transcripts, Vol. 8, p. 1038-1042
Cross Examination of L. Garis, Transcripts, Vol. 9, p. 1152-1164

Expert Affidavit of E. Nash, Exhibit Books, Vol. 11, Tab 55; Direct examination of E. Nash, Transcripts, Vol. 13, p. 1940-1943
Cross examination of J. Richot, Transcripts, Vol. 5, p. 767-770

Assertion: Cannabis gardens are at increased risk of home invasion and theft.

Evidence: No Plaintiff has ever been victimized by thieves seeking to steal their medical cannabis. Defendant failed to provide evidence that patients are at any greater risk of being victims of theft than any other citizen.

Cross examination of S. Holmquist, Transcripts, Vol. 8, p. 963-1134
Cross examination of J. Richot, Transcripts, Vol. 5, p. 767-770
Cross examination of R. Colasanti, Transcripts, Vol. 4, p. 563-564

Assertion: Diversion is a real and substantial problem.

Evidence: While any regulatory system will have incidents of non-compliance, no evidence of diversion was presented at trial. No Plaintiff engaged in diversion and no witness identified a single case in which a patient was convicted of diverting medicine.

Cross examination of S. Holmquist, Transcripts, Vol. 8, p. 963-1134
Expert Affidavit of S. Wilkins, Exhibit Books, Vol. 10, Tab 35;
Cross examination of J. Richot, Transcripts, Vol. 5, p. 767-770

Assertion: Community impacts such as smell, property values, insurance and possible access by youth in a home environment are significant.

Evidence: No Plaintiff had ever had a smell problem and any such issues are easily remedied. Insurance is available and the effect on property values is speculative at best; in fact, evidence tended to suggest that improvements to MMAR residences such as ventilation and fire safety measures may improve property value in otherwise poorly built residences. There was no evidence of access by youth to cannabis at MMAR sites, or of any negative effects to children by way of MMAR self-production or patient access to non-dried forms of medicine.

Cross examination of J. Richot, Transcripts, Vol. 5, p. 767-770
Expert Affidavit of S. Wilkins, Exhibit Books, Vol. 10, Tab 35
Expert Affidavit of R. Colasanti, Exhibit Books, Vol. 1, tab 7
Expert Affidavit of E. Nash, Exhibit Books, Vol. 11, Tab 55
Expert Affidavit of Jason Schut, Exhibit Books, Vol. 13, Tab 70

Assertion: Significant investments are necessary in order to produce medical cannabis safely. Plaintiffs do not address the hard costs of setting up a cannabis garden in the affordability analysis.

Evidence: Plaintiffs provide a chart in the appendix that specifically addresses and incorporates installation costs in analyzing the cost per gram for self-producers.

Plaintiffs' written argument, Appendix "Cost to Patients for home grown cannabis including investment cost"

Medical cannabis can be produced safely outdoors, or in a greenhouse, with virtually no investment. Mr. Allard has done this. It can be produced indoors in industrial or commercial settings, or indoors in outbuildings/barns, with none of the alleged issues related to residential production.

Affidavit of N. Allard, Exhibit Books, Vol. 1, Tab 5
Affidavit of B. Alexander, Exhibit Books, Vol. 1, Tab 2
Expert Affidavit of T. Bauman, Exhibit Books, Vol. 2, Tab 19
Expert Affidavit of S. Wilkins, Exhibit Books, Vol. 10, Tab 35

Cannabis can be produced indoors in residential settings with none of the alleged issues, and without significant investment, in setups such as a grow tent like in the case of Mr. Hebert and Ms. Beemish or an engineered grow unit like the Bloom Box. Further, larger scale indoor production has higher costs to set up but those costs can and are significantly reduced by multiple patients splitting those costs and growing together like in the case of Mr. Davey and Mr. Alexander, such that the cost per gram averaged over time and by the number of patients is approximately equal to that of a smaller setup for a single patient, and much lower than LP prices.

Affidavits and cross examinations of the Plaintiffs

Expert Affidavit of E. Nash, Exhibit Books, Vol. 11, Tab 55; Cross examination of E. Nash, Transcripts, Vol. 13
Expert Affidavit of R. Colasanti, Exhibit Books, Vol. 1, tab 7; Direct *examination of R. Colasanti, Transcripts, Vol. 4, p. 478-479*
Plaintiffs' written argument, Appendices

Assertion: Health Canada's purported inability to inspect personal gardens is an important reason to deny self-sufficiency to all patients.

Evidence: Inspections for safety issues are not within the jurisdiction of the federal government. This power resides with provinces and, if delegated, with municipalities. Municipalities have responded to medical cannabis production with specific bylaws. Plaintiffs' evidence is that patients currently do or want to comply with their individual municipalities on issues of safety including obtaining all required permits and having, and passing, all required inspections. HC inspections for construction, electrical and fire safety and other local issues is both *ultra vires* and superfluous.

Affidavits and cross examinations of all Plaintiffs
Expert Affidavit of R. Boileau, Exhibit Books, Vol. 13, tab 66
Expert Affidavit of T. Moen, Exhibit Books, Vol. 10m tab 32
Cross Examination of L. Garis, Transcripts, Vol. 9, p. 1152-1164
Direct and Cross Examination of R. Colasanti, Transcripts, Vol. 4, p. 472, 492-494, 553
Expert Affidavit of E. Nash, Exhibit Books, Vol. 11, Tab 55
Expert Affidavit of S. Wilkins, Exhibit Books, Vol. 10, Tab 35

Assertion: Plaintiffs merely prefer cannabis, they do not need it, and their physicians have simply accepted patient requests or assertions about need and dosage requirements.

Evidence: Under either the *MMAR* or *MMPR*, Plaintiffs qualify for lawful access to cannabis. Defendant's veiled and at times explicit assertion of professional incompetence and/or misconduct against Plaintiffs' physicians has no evidentiary support. In order to qualify for the *MMAR*, Plaintiffs' physicians had to identify their symptoms and conditions and were required to declare that conventional treatments had been tried or considered and been deemed to be

either ineffective or medically inappropriate. The physicians also had to indicate the daily dosage and the mode of administration. The average daily dosage of 18.2 grams per day for all MMAR patients is the result of tens of thousands of patients being treated responsibly and competently by hundreds of different doctors across Canada over a period of at least 10 years.

Plaintiffs testified that cannabis was the only, or one of the only, effective medicines for their symptoms and/or conditions. Mr. Allard could not tolerate other medicines, and cannabis is the most effective treatment for nearly all of his many debilitating symptoms. Mr. Davey only found relief without serious side effects from cannabis and needs high doses to deal with his pain and sleeplessness. Ms. Beemish needs up to 15 grams on days with very bad symptoms such as continuous vomiting. This assertion, again, simply demonstrates Defendant's bias; to Defendant cannabis is not truly a medicine. This bias has undermined Defendant's regulatory decision-making from the inception and permeated its evidence throughout the trial.

> *Affidavits and cross examinations of all Plaintiffs*
> *Defendant assertions of professional misconduct found at Expert Affidavit of S. Holmquist, shown to be without foundation during cross-examination, and the Expert Affidavit of Dr. Daeninck, whose allegations of misconduct is based entirely on speculation, and rebutted by Dr. Ferris.*

Assertion: Plaintiffs can all obtain the medical relief they need from smoking cannabis.

Evidence: Mr. Davey testified that he could not obtain the same relief from smoking as he could from eating his cookie at night and that without the edible consumption he would be essentially unable to get a decent night of sleep due to the pain he suffers. Mr. Alexander uses his cannabis medicine topically to treat his severe arthritis in his joints. Mr. Allard uses cannabis topically to treat chronic itchiness and skin pain. Ms. Beemish consumed cannabis juice to treat the site of her disease, her stomach and gastro-intestinal tract. Beyond the Plaintiffs, patients that are unable to consume by inhalation at all (e.g., persons

with asthma or emphysema) are therefore simply unable to consume medical cannabis in that matter.

Affidavits and testimony of Plaintiffs and B. Alexander

Assertion: Plaintiffs' evidence demonstrates that safe and effective cultivation of medical cannabis requires knowledge, skill and significant resources.

Evidence: Each of the plaintiffs began with little or no skill at producing medical cannabis. Each is self-taught in terms of medical cannabis production. None experienced negative health or safety effects even when relative novices at cultivation. Plaintiffs' evidence actually demonstrates that safe and effective cultivation of personal use medical cannabis is both possible and achievable even by persons with significant physical and financial limitations and without risk to public health or safety.

Affidavits and testimony of all Plaintiffs, B. Alexander, R. Colasanti, and E. Nash, all of whom (with perhaps the exception of D. Hebert due to his experience cultivating other plants) started growing cannabis as novices.

Assertion: Plaintiffs' evidence "is consistent with the common sense notion that individuals who have sufficient financial resources to establish and maintain safe and productive personal marijuana grow operations will also have the resources to purchase medically justifiable quantities of marijuana."

Evidence: Mr. Allard would need to spend every penny of his monthly income to purchase (at a very hypothetical price of $5/g) a mere 180 grams out of the 600 grams of cannabis he consumes per month. Put another way, Defendant suggests that it is reasonable to expect a disabled permanently retired person to forego all items of discretionary spending and any savings – or even to obtain a mortgage – in order to pay a for-profit business for less than 30% of the medicine he needs each month when he could instead supply his entire need by continuing to do, safely, that which Defendant has licensed him to do for years. Mr. Davey is expected by the Defendant to also impoverish himself to purchase an inadequate amount of medicine from an LP. And Ms. Beemish certainly does

not have any money to spend on cannabis on her disability pension, but only with the help of her husband, Mr. Hebert, who can only "afford" to buy the medication at the cost of other necessities such as rent or paying back his overwhelming debts. Ms. Beemish and indeed all Plaintiffs are classically in the constitutionally-forbidden *Parker* position of having to choose (or have a caregiver do so) between their liberty and their health.

Affidavits and cross examination of all Plaintiffs
Plaintiffs' written argument, Appendices
Expert Affidavit and Cross examination of Dr. Walsh, Exhibit Books, vol. 1, tab 6; Transcripts, vol. 3, p. 376 to 451

DEFENDANT'S LEGAL ERRORS

18. The factual errors made by Defendant render hollow its corresponding legal arguments.

19. Defendant's positions on s. 7 appear to flow from a mistaken view of the starting point of any inquiry as to whether a law or rule violates the *Charter*. Defendant appears to take the view that its legislative and regulatory restrictions on individual conduct are somehow the default position. This authoritarian conception of the role of the state vis-à-vis the individual in a free and democratic society must be rejected.

20. The starting point is that individual rights to life, liberty and security of the person ought not to be constrained by the state. In order to prevent violation of those fundamental rights, protected by s. 7, the *Charter* requires that any infringements *must* accord with the principles of fundamental justice.

21. Criminalizing Plaintiffs for producing and possessing cannabis – in all its forms – for personal medical consumption is a severe entrenchment on both liberty and security of the person. In order to not violate s. 7, then, the infringements must not be arbitrary, overbroad or produce grossly disproportionate effects.

22. On the evidence at trial, properly understood and including testimony elicited during cross-examination and responded to by way of rebuttal evidence, the impugned restrictions are demonstrably arbitrary, overbroad and grossly disproportionate. Nothing in Defendant's arguments affects this conclusion.

SECTION 7 IS ENGAGED BECAUSE LIBERTY AND SECURITY OF THE PERSON ARE INFRINGED

23. Defendant attempts to narrow the issue at the threshold engagement stage to simply one of affordability. This misses the mark. Affordability is a symptom of the harms caused by the *CDSA* prohibition on producing cannabis for one's own medical use (a prohibition that previously contained the *MMAR* exemption regime that was terminated by the *MMPR*).

24. Interposing a criminal prohibition between a patient and their ability to produce and possess a safe and effective natural plant medicine for their serious illnesses is, standing alone, a severe infringement of their medical autonomy. That patients would be impoverished and forced to spend every dime they have in order to purchase insufficient quantities of that same plant from for-profit companies is a stark illustration of the severity of the rights deprivation.

25. Similarly, Defendant attempts to portray Plaintiffs' claim as seeking a freestanding right to produce cannabis. This is a strawman argument. Plaintiffs do not claim any "freestanding right" to produce cannabis. What Plaintiffs claim is what every Canadian enjoys since the *Charter* was enacted; rights to life, liberty and security of the person that may not be infringed by the state except in accordance with the principles of fundamental justice.

26. Here, the state interposes a criminal prohibition between a patient and access to plant-based medicine. This entrenches liberty because of the possibility of imprisonment. It also engages liberty and security of the person because it constitutes a significant interference with autonomy in medical decision making, forces patients to choose between liberty and health, compels patients

to consort with the black market in order to obtain sufficient quantities of medicine, and creates severe state-induced stress and physical suffering.

THE RESTRICTIONS HARM HEALTH AND SAFETY AND THEREFORE VIOLATE THE PRINCIPLES OF FUNDAMENTAL JUSTICE

27. Notably, Defendant says little about the objective of the *CDSA* in its s. 7 argument. Instead of focusing on the objective, and how that objective is actually undermined by the impugned restrictions, Defendant attempts to redirect the s. 7 analysis by focusing on questions of affordability, discussing its various regulatory schemes (primarily intended for commercial production and sale of pharmaceutical drugs) at length and re-stating the affidavit evidence of its public safety witnesses as if their evidence had not been significantly undermined during cross-examination.

28. In fact, Defendant invites this Court to make the error that the Supreme Court of Canada cautioned against in *Carter*: defining the objective too broadly and therefore pre-ordaining the outcome of the s. 7 inquiry. [3] Defendant wants this Court to accept that the objective is protecting health and safety by means of a comprehensive regulatory scheme, conflating the objective (protecting health and safety) with the means it has chosen to attempt to achieve that objective (implementing a comprehensive regulatory scheme or schemes).

29. In this way, Defendant attempts to avoid confronting the inescapable fact that its restrictions cause harm rather than prevent it. The restrictions cause harm to patients and society generally, and to the Plaintiffs specifically. This contradiction between the objective and the effects of the restrictions demonstrates the arbitrariness of those restrictions.

30. The evidence at trial was that making criminals out of patients for producing and possessing their medicine harms their health. Forcing them to buy

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[3] *Carter, supra,* para.77 citing *RJR-MacDonald Inc. v. Canada (Attorney General),* [1995] 3 S.C.R. 199 at para.144. *RJR-MacDonald* is an apt comparison because there the impugned measures were "but one facet of a complex legislative and policy scheme to protect Canadians from the health risks of tobacco use."

inadequate amounts and thereby both be under-medicated and impoverished harms their health. The evidence was, further, that forcing patients to smoke their medicine creates harm to health. Additionally, preventing patients from ingesting cannabinoids orally, topically or in concentrated forms harms their health by denying them a more effective method of dealing with their symptoms and conditions. In these ways, the actual effects of the law undermine and run contrary to its objective and are grossly disproportionate in their effects on patients.

DEFENDANT'S ARGUMENTS BELONG IN SECTION 1, NOT SECTION 7, BECAUSE THEY ARE ABOUT PURPORTED PUBLIC BENEFITS

31. The bulk of the arguments found in Defendant's s. 7 analysis are properly considered in s. 1, not s. 7.

32. The Supreme Court in *Bedford* made clear that the s. 7 analysis is not concerned with the purported social benefits of the impugned restrictions and reinforced in *Carter* that public good was a topic for s. 1, not s. 7. Therefore, Defendant's claims about purported public safety benefits flowing from prohibiting personal production, dosages, preventing diversion and the like are properly situated in s. 1, not s. 7.[4]

DEFENDANT'S ARGUMENTS ARE UNSUPPORTABLE ON THE EVIDENCE AT TRIAL

33. Defendant's various claims are unfounded and unsupportable on the evidence at trial.

Affordability

34. Defendant's arguments about affordability are specious. The suggestion that Plaintiffs "could afford to purchase their marijuana from Licensed Producers" is simply false. Plaintiffs could afford to purchase *some* cannabis from LPs but

[4] *Bedford, supra,* para.121, *see also Carter, supra,* at para.95

even if they spent all of their available income on that medicine it would be an insufficient amount.

35. Even accepting Defendant's suggestion (contrary to the evidence of every Plaintiff and conflicting with Health Canada's own information about dosages in Canada) that 5g/day is all anyone could ever need, the Plaintiffs (and many other similarly or worse off financially) would be unable to afford sufficient supply. When Health Canada contracted with Prairie Plant Systems to produce Cannabis at between $10 and $12 per gram and the government sold it to patients at $5 a gram (subsidizing it to the tune of at least 50%), it discovered that many medically approved patients could not afford $5 a gram and they ended up in arrears. Ultimately, Health Canada cut them off their supply and took steps to recover the more than $1,000,000.00 in arrears outstanding from those patients.

36. Similarly, Defendant's argument about the actual cost of personal cultivation is a based on a tortured reading of the facts. Mr. Davey's contribution to the shared production location was $15,000. He spends $830 per month, or $9,960 per year. His per gram production cost at his prescribed 25 g/day or 9,125 g/year is, compared against his annual outlay, just over $1 per gram ($1.09). If his facility cost is amortized over only one year, it raises the per gram cost to $2.73 per gram for the first year and that cost returns to $1.09 per gram thereafter. If the facility is amortized over 5 years, the per-gram cost is $1.42 for each of the first five years, returning to $1.09 per year thereafter. Under any scenario, the cost is (a) affordable to Mr. Davey without requiring him to spend every penny he has; (b) significantly less than what he would have to pay an LP; (c) low enough that he can produce sufficient quantities of medicine and not have to go without.

37. Defendant's argument about opportunity costs ignores that Plaintiffs enjoy cultivating cannabis and find it therapeutic. Mr. Allard testified that working with his medicinal plants was itself therapeutic. Mr. Davey echoed these sentiments. Mr. Hebert and Mr. Alexander also said they enjoyed the activity,

like a hobby. When an activity brings a person enjoyment, independent health benefits and provides access to necessary medicine in sufficient quantities, it cannot properly be characterized as a hidden cost. Indeed, it is a hidden benefit.

38. Moreover, Defendant never bothers to actual articulate the calculation it asserts makes it "reasonable to conclude that the per gram cost of producing...is significantly higher than Plaintiffs assert and is more in line with the prices offered by Licensed Producers." That is because it cannot. The evidence does not support that conclusion.

Medical Need and Dosages

39. Defendant ignores the record evidence repeatedly because in order to prevail it must convince this Honourable Court to agree with its bias; that the case is really about a preference rather than a need. That Plaintiffs simply do not want to buy from LPs even though they could do so. To reach this conclusion, Defendants constantly pretend that the physician-approved dosages of the Plaintiffs are merely numbers that do not reflect actual usage and medical need, despite the uncontradicted evidence given by the Plaintiffs themselves.

40. To reach this conclusion, Defendant implicitly slurs both Plaintiffs and their physicians. [5] Defendant asserts that the Plaintiff patients have simply "persuaded" their physicians they need the authorized dosages. No evidentiary support for this assertion is offered, other than a vague suggestion that Mr. Allard increased his dosage in order to produce more plants (an odd assertion given that he cultivates less plants than he is permitted to).

41. Characterizing Plaintiffs as requiring extraordinarily high dosages, if accepted, simply underscores the overbreadth problem with Defendant's absolute prohibition on personal medical production. In an effort to regulate *some* conduct (e.g., personal production by persons with low dosages that could reasonably access sufficient quantities from LPs) Defendant overreaches and

[5] In the case of S. Holmquist and Dr. Daeninck, the slurs are explicit.

prohibits *all* conduct. Put another way, if Plaintiffs are indeed outliers then the application of the *CDSA* prohibition to them is overbroad because that prohibition coupled with the *MMPR* provides reasonable access only to persons requiring significantly less medical cannabis.

42. In any event, the state should not be the arbiter of the reasonable amount of safe, effective natural plant medicine that a physician approves for a patient. That role is properly given to physicians in both the *MMAR* and *MMPR*. Defendant chose to make physicians, in consultation with patients, the professionals responsible for dosages. No maximum dosages exist in the *MMPR*. Indeed, no dosage requirements of any kind appear in the *MMPR*. Given this regulatory state of affairs, Defendant's position on whether any particular dosage is "medically justifiable" is irrelevant; responsibility for making that decision has been ceded, by Defendant's choice, to doctors.

Economic rights and Inspection Regime

43. This case is not about whether s. 7 protects economic rights. Plaintiffs do not seek to have the government pay for their medical cannabis. Plaintiffs do not assert that the government must subsidize their purchases of cannabis from LPs (a practice the government engaged in under the *MMAR* by subsidizing the PPS cannabis sold by HC).

44. Put another way, this case is not about positive rights. It is about the state using the criminal law to absolutely prohibit Plaintiffs from self-producing medical cannabis and from possessing it in various forms.

45. Defendant attempts to blur this line by suggesting that allowing personal production would *require* the government to implement a costly and massive inspection regime. There is no evidence to support this claim. To the contrary, all Plaintiffs have been able to safely and effectively produce medical cannabis without a single inspection (or assistance of any kind) from Defendant. The purported safety risks identified by Defendant can be mitigated and inspections

for these issues are within municipal jurisdiction. The evidence is that municipalities can and do require medical cannabis producers to comply with relevant local requirements. Labs to test the personally produced medicine apparently exist and are available, and no evidence was led that any *MMAR* participant ever suffered a single negative health consequence arising from unsafe medicine. There is neither requirement nor need, on the evidence, for Health Canada to implement any inspection regime.[6]

46. Moreover, Defendant acknowledges that the *MMPR* is silent on how patients may consume their medicine. Defendants concern with implementing an extensive inspection regime to ensure the safety of what patients consume apparently does not extend to ensuring that patients are safely making their own edible products under the *MMPR*.

DEFENDANT'S LACK OF COGENT EVIDENCE OF HARM, OR EVEN RISK, IS FATAL TO ITS SECTION 1 JUSTIFICATIONS

47. As noted above, Defendant has improperly placed concerns over public health and safety within the rubric of its s. 7 analysis when that discussion should properly occur in s. 1.

48. At the same time, Defendant appears to suggest that it has provided clear and cogent evidence of various public health and safety risks inherent in personal medical cannabis production.

49. In doing so, Defendant forgets or ignores the cross-examination of its own public health and safety experts including Chief Garis and Corporal Holmquist. The evidence of both of these key defence witnesses was demonstrated to not

[6] One would reasonably expect that the federal government could, should it choose to, put into place administrative procedures (common to other regulated areas) to enable "spot audits" of any licensed cannabis garden if inspection was deemed necessary.

be evidence at all but, rather, a series of truth claims and conclusions that had no methodologically sound evidentiary backing.

50. Perhaps the most glaring instance of this is the invocation, at paragraphs 273-274 of Defendant's argument, of the idea that inferences should be made about diversion of medicine on the basis of the mere existence of large or "monster" plants. At trial, when various scenarios were put to Cpl. Holmquist as to how the existence of large plants could lead to inferences other than trafficking of excess product, Cpl. Holmquist himself *agreed that his conclusion had no evidentiary foundation whatsoever and was pure conjecture.*[7]

51. Further misplacing their understanding of the evidence and their evidentiary burden, Defendant claims at paragraph 85 of its argument that the expert evidence of Professor Susan Boyd should be accorded no weight at all because she has not undertaken a rigorous study demonstrating that public health and safety concerns of marijuana grow-operations do not exist. While it is true Professor Boyd did not undertake a study of public health concerns posed by growing cannabis, this assertion is entirely beside the point because Professor Boyd was not tendered as an expert in public health and safety concerns posed by growing cannabis. Rather, she was tendered as an expert in research methodology and on "drug scares".[8] In executing her instructions to comment on the research metholodogy, analysis and conclusions made by Defendant experts Chief Garis and Constable Holmquist, Professor Boyd clearly and effectively explains how the evidence proffered by Defendant's public health and safety experts is in actuality not evidence at all but rather truth claims that are not supported by methodologically sound research. It is their evidence, not hers, that should be accorded zero weight.

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[7] Cross examination of Holmquist, Transcripts, Vol. 8, p. 1011 to 1013

[8] As explained in Professor Boyd's expert report, "drug scares" involve claimsmakers asserting truth claims about the danger of drugs that have no evidentiary support in order to invoke public fear for the purpose of acquiring popular support for political anti-drug campaigns.

52. The fact is that Defendant provided no actual evidence supporting its public health and safety concerns and therefore has not, and cannot, meet its onus pursuant to section 1 of the *Charter*.

53. On the evidence Defendant cannot prove that the impugned restrictions on producing and possessing medical cannabis – in all its forms – are needed at all, much less rationally connected to the objective of protecting health and safety and minimally impairing of patients' rights.

CONCLUSION

54. In order to make its arguments, Defendant must first convince the Court to either ignore or misunderstand the evidence presented at trial. This effort at obfuscation should be rejected.

55. This case, at bottom, is about whether the state may impose a criminal prohibition on seriously ill Canadians that substantially interferes with their medical choices, puts them at risk of arrest and jail and causes them to choose between health, liberty and/or impoverishment.

56. Framing the case as being about positive rights is a red herring. The law since *Parker* requires government to enact a "viable constitutional exemption to the *CDSA*". On the evidence at trial, the *MMPR* is simply not a viable constitutional exemption from the *CDSA*. It does not provide safe and continuous access to medical cannabis for all medically qualified patients. Defendant's arguments to the contrary must fail.

57. Suggesting that Plaintiffs are asserting a mere preference for self-production over purchasing from LPs is false.

58. Pretending that the government must impose a costly and comprehensive inspection regime on personal producers in order to ensure safety ignores that these – and thousands more – patients have been safely and effectively producing their medicine for years and that such a regime is not required for the

self-production of food or natural health products, or even for personal consumption of pharmaceutical drugs. It is when these products are offered to the public for sale as medicine that such inspection schemes are required and imposed.

59. Implying that Plaintiffs are simply lying about their medical cannabis usage rates is neither supported by the evidence nor proper argument because Defendant never put that proposition to any Plaintiff in cross-examination.

60. When considered in light of the actual evidence presented at the trial, Defendant's arguments must, therefore, fail.

61. The *CDSA* prohibition on Plaintiffs' self-production of medical cannabis in any form and related place restrictions and possession limits deprives them of liberty and security of the person. In doing so, it causes them significant harm to health and safety and therefore runs contrary to the purpose of the CDSA. This is arbitrary.

62. Even if some of the risks claimed by Defendant are real and occur with a few lawful medical producers, application of the *CDSA* prohibition to Plaintiffs is overbroad because there is no evidence that they, nor any statistically significant number of medically approved patients, experience any of those risks or harms.

63. Finally, even if some risk to health and safety exists, the evidence is that applying a criminal prohibition to attempt to prevent these risks causes patients irreparable harm and therefore grossly disproportionate effects.

64. The impugned restrictions violate section 7 in a manner that cannot be justified in a free and democratic society and are therefore not saved by section 1. Plaintiffs are entitled to and should be granted the relief they seek from this Honourable Court.

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