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

MOTION RECORD
RE: Vary Injunction

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NOTICE OF MOTION

TAKE NOTICE THAT the Plaintiffs will make an Application to the Court on the 1st day of May at 9:30 a.m. or as soon thereafter as the motion can be heard, at the Federal Court of Canada, 700 West Georgia Street, in the City of Vancouver, in the Province of British Columbia.

THE MOTION will seek, pursuant to Rule 399(2) of the *Federal Court Rules*, to vary the order ("the injunctive order") granted by the Court on March 21, 2014, which provided for interlocutory relief pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms*. The terms of the variance of the injunctive order are as follows:

(i) to include all previous patients under the Medical Marihuana Access Regulations ("MMAR") and at least those who held a valid authorization to possess ("ATP") on September 30, 2013, the *MMPR* transitional date, and any others who have obtained "Medical Approval" pursuant to s. 53 of the

Narcotic Control

(ii) *Regulations* and requiring that the Office of Medical Cannabis at Health Canada be required to maintain and update its database upon notification of such approvals from a physician or patient accordingly, until further order of this court and the end date of any suspension of any declaration of invalidity;

(iii) to include all patients falling under (i) above, who held a valid personal production licence or had a valid designated production licence on September 30, 2013, continue to be exempt in accordance with the provisions of their prior licences, except expiry dates, until further order of the court or the end date of the suspension of any declaration of invalidity;

(iv) to require the Office of Medical Cannabis at Health Canada to maintain its database by keeping a record of notices of change in production sites to existing licences in order that the police might be notified of the validity of a site accordingly and provide limited ancillary assistance to approved patients or their caregivers, or physicians, such as providing copies of lost licences, and other matters, pending the decision of this court and the end date of the suspension of any declaration of invalidity, if granted;

(v) to provide that any circumstances of alleged injustice to any medically approved patient arising pending the decision of the court (or the end date of the suspended declaration of constitutional invalidity, if granted), if unable to be resolved through the Office of Medical Cannabis at Health Canada, may be brought to the attention of an officer of the Federal Court Trial Division for a summary resolution and disposition in writing.

THE MATERIAL FACTS giving rise to the Motion and not previously presented to the Court are:

a) medically approved patients had to or need to move their production site to a new location for a number and variety of reasons not limited to unaffordability of their current site as per Plaintiffs Beamish and Hebert;

b) Some had to shut down their production site for a variety of reasons, again not limited to the Plaintiffs Beamish and Hebert situation;

c) Some had to obtain a new designated grower or a permit to grow for themselves because their designated grower discontinued growing for them for one reason or another;

d) One patient (that was covered by the Order) had a fire in her house (caused by a dryer) now requires a new production site which she has available but is unable to move currently because of the failure of the Order to allow for such a change to be made in such circumstances and to allow her to do so;

e) One patient who moved without realizing that he could not move his production site and is now consequently unable to continue to produce unless he has authority to use his new location as his production site which the Order does not permit.

f) Some who cannot afford the new Licenced Producer prices and who also complain about the 150 gram limit because of their circumstances, limiting their mobility rights.

g) Some patients whose landlords refused to renew their lease, requiring the patients to move elsewhere and therefore, are unable to produce at their new location without an address change;

h) Some who had to move their production site consequent to the November 2013 Health Canada envelope that identified them as marihuana patients (subject of a class action law suit) because of safety concerns and other problems with neighbours as a result of that exposure, need to move their production sites and are unable to do so under the current terms of the Order.

i) Some patients who are unable or are experiencing considerable difficulty with the 150 gram maximum placed on their possession limits due to either working out of town, going on holidays, moving their medicine between their production and storage sites that may be at different places under the MMAR provisions while not applicable to an MMPR situation.

j) the Plaintiffs' also now rely on the evidence given in cross-examination by the Defendants' witnesses at trial, namely Jeanne Ritchot, Len Garis and Shane Holmquist as new matters before the court, not known by the court at the time of the injunctive order in defeat of the Defendant's assertions of the alleged six negative effects of the MMAR and the asserted greater magnitude of irreparable harm to the public in comparison to the irreparable harm to the medical marihuana patients, as well as in assessment of where the balance of convenience lies.

These material facts had not arisen and/or were not discovered at the time of the interlocutory hearing on March 15, 2014 from which the Order was made.

AND TAKE NOTICE that in support of the application the Plaintiffs will rely upon the following:

1. Affidavit of Jason Wilcox sworn the 1st day of August, 2014 (Trial Exhibit 23)
2. Affidavit of Mike King sworn the 18th day of September 2014 (Trial Exhibit 20)
3. Affidavits of Danielle Lukiv sworn the 15th day of October 2014 (Trial Exhibit 21) and April 24th, 2015.

Dated: April 27, 2015

John W. Conroy, QC
Counsel for the Plaintiffs
CONROY & COMPANY,
Barristers and Solicitors
Tel: 604 852 5110
Fax: 604-859-3361

No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
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PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

DEFENDANT

AFFIDAVIT OF DANIELLE LUKIV

I, DANIELLE LUKIV, legal assistant at Conroy & Company, 2459 Pauline Street, Abbotsford, British Columbia, MAKE OATH AND SAY AS FOLLOWS:

1. I am a legal assistant to John W. Conroy, Q.C., counsel for the Plaintiffs, and as such have personal knowledge of the matters and facts hereinafter deposed to, except where stated to be based on information and believe, and where so stated I verily believe them to be true.

2. In the Affidavit #4 of Jeanine Ritchot sworn the 15th day of January 2015 (Trial Exhibit 28 and Joint book of documents volume 4) reference is made to diligent searches of the Health Canada database by Christina MacInnis, Litigation Support Officer, Litigation Support Office, Health Canada, in relation to each of the Plaintiffs, namely Neil Allard (paragraph 18), Shawn Robert Davey (paragraph 25), his associate Brian Alexander (paragraph 34), Tanya Beemish and David Hebert (paragraph 37) and in relation to each she attached their various licences for the Plaintiffs. Apparently Ms. MacInnis works as a Litigation Support Officer in the Litigation Support Office at Health

Canada and has since 2012 and her duties include, among other things, conducting record data base and file searches to locate, categorize, produce and/or provide documents in the ordinary course of litigation.

3. I am informed by John W. Conroy, Q.C., and verily believe it to be true, that in the course of his practice he is retained to defend people charged with various cannabis offences and if the allegations involve a situation where a person claims to have a licence under the *Marihuana Medical Access Regulations* the disclosure invariably indicates that the police have contacted Health Canada to check the database to determine whether or not the person has a license and, depending on the circumstances, he has been receiving as counsel, affidavits from the same Christina MacInnis as the person who has searched the databases on behalf of either the police or Crown Counsel in order to provide an affidavit with the appropriate Authorizations to Possess or Personal Production or Designated Grower Licences attached.

4. I am informed by Mr. Conroy and verily believe it to be true and have personally observed in some of these files as his legal assistant the Affidavits from Christina MacInnis and because of the implied duty of confidentiality with respect to disclosure in other matters, without divulging any personal confidential information, now produced and marked as Exhibit "A" to this my Affidavit is a redacted version of parts of one of the Affidavits we have received showing the nature of the information received with respect to the database.

5. The balance of the information in the Affidavit contained the personal and confidential information with respect to the individual and has therefore not been included. Mr. Conroy is prepared to provide the names of Crown Counsel in those cases if the names and identities of these other people or patients in those cases are disclosable, relevant and necessary.

6. That now produced and marked Exhibit "B" to this my affidavit is a copy of the minutes of a meeting of November 4th, 2014 of the Canadian Medical Cannabis Industry Association that describes in the first opening paragraph, the duties of the new Office of

Medical Cannabis at Health Canada and it is noted that it includes checking the database and providing information in response to police and other inquiries.

7. I swear this affidavit in support of a Motion to vary the injunction.

SWORN BEFORE ME at the City of Abbotsford, in the Province of British Columbia, this 24th day of April, 2015.

A Commissioner for taking affidavits within British Columbia

FARZHANA JHUTY
DHANU DHALIWAL LAW CORPORATION
2459 Pauline Street
Abbotsford, BC V2S 3S1
Telephone: 604-746-3330
Facsimile: 604-746-3331

Danielle Lukiv
DANIELLE LUKIV

8

Court File No [redacted]

BETWEEN:

HER MAJESTY THE QUEEN

- and -

[redacted]

Accused

This is Exhibit "A" referred to in the affidavit of Danielle Lutchy sworn before me at Abbotsford BC this 24 day of April 2015

A commissioner for taking affidavits for British Columbia

AFFIDAVIT OF CHRISTINA MACINNIS

I, **CHRISTINA MACINNIS**, of the City of Ottawa, in the Province of Ontario, **AFFIRM THAT**:

1. I am an employee of Health Canada (HC), currently working as a Litigation Support Officer, Litigation Support Office, HC, since 2012. My duties include, among other things, conducting record database and file searches to locate, categorize, produce and/or provide documents in the ordinary course of litigation.

2. The staff of the Litigation Support Office (LSO) report to Louis Proulx, A/Director of the Litigation Support Office. Mr. Proulx, in turn, reports to Eric Costen, Executive Director of the Office of Medical Cannabis (OMC). The OMC is part of the Healthy Environments and Consumer Safety (HECS) Branch of HC, headed by Hilary Geller, Assistant Deputy Minister.

3. As such, I have personal knowledge of the facts and matters hereinafter deposed to, save and except where any of the following information is stated to be based on information and belief, in which case I verily believe that information to be true.

MARIHUANA MEDICAL ACCESS PROGRAM (MMAP) RECORD KEEPING

4. Within HC, the office responsible for administering the Medical Marihuana Access Program (MMAP) under the Marihuana Medical Access Regulations (MMAR) was the Bureau of Medical Cannabis (BMC) (formerly known as the Marihuana Medical Access Division (MMAD)). Prior to the repeal of MMAR on March 31, 2014, MMAP responsibilities included processing applications and issuing licences, which included the review and processing of new applications for authorizations and/or licences, applications to renew or applications to amend an existing authorization and/or licence for medical marihuana. MMAP maintained a record keeping system to track information related to the program.

5. I verily believe this record keeping system was maintained in a manner consistent with the *Privacy Act* and the *Library and Archives of Canada Act.* The records were created and maintained as part of the usual and ordinary course of MMAP business. The record keeping system consisted of paper files and of an electronic database, the Safe Access to Medical Marihuana ("SAMM II"). The SAMM II database was updated with pertinent information kept in the paper files and includes information on the applications and, the actual authorizations to possess and licences to produce marihuana for medical purposes provided by HC, pursuant to the MMAR. The SAMM II database was also used to keep a record of incoming and outbound correspondence and call logs were generated in the course of these activities, as well as notes made by HC employees in respect of the activities related to the file activity, called "correspondence notes".

6. Under the *MMAR,* and depending on the type of request made, the appropriate combination of the forms listed below would have been used; for either an application for Authorization to Possess and/or to Produce marijuana for medical purposes or for a renewal. These forms are collectively referred to as "the Application".

Form	Title
Form A	Application for Authorization to Possess Marihuana for Medical Purposes
Form B1	Medical Practitioner's Form for Category 1 Applicants
Form B2	Medical Practitioner's Form for Category 2 Applicants
Form C	Application for Licence to Produce Marihuana by Applicant
Form D	Application for Licence to Produce Marihuana by a Designated Person
Form E1	Application to Obtain Dried Marihuana
Form E2	Application to Obtain Marihuana Seeds
Form F	Consent of Property Owner
Form R	Application for Renewal of an Authorization to Possess Marihuana for Medical Purposes

7. An Application could have resulted in the issuance of one or more of the following Authorizations or Licences, depending on the type of request made and the application's compliance with the regulatory requirements.

Title	Acronym
Authorization to Possess Dried Marihuana for Medical Purposes	ATP
Personal-Use Production Licence Dried Marihuana for Medical Purposes	PUPL
Designated Person Production Licence Dried Marihuana for Medical Purposes	DPPL

Licences to produce may have either 1) permitted persons authorized to possess marijuana for medical purposes to produce it for themselves, or 2) permitted that authorized person to

designate someone else to grow marijuana for medical purposes on his or her behalf. Those authorized to possess may have chosen to purchase dried marijuana from HC, in which case, they were issued an ATP only.

8. On March 31, 2014, the *Marihuana Medical Access Regulations* (MMAR) were repealed and Health Canada no longer supplies marijuana for medical purposes. All Authorizations to Possess (ATPs), Personal-Use Production Licences (PUPLs) and Designated-Person Production Licences (DPPLs) expired on that date. Since April 1, 2014, marijuana for medical purposes is only accessible via the new system of licensed producers under the *Marihuana for Medical Purposes Regulations* (MMPR). Individuals are allowed to use either their valid Health Canada-issued ATP or a medical declaration signed by their physician to register with and place an order for dried marijuana from a licensed producer.

9. However, as a result of the ongoing litigation in *Allard et al v. HMTQ*, Health Canada will treat the following Authorizations to Possess, Personal-Use Production Licences, and Designated-Person Production Licences as extending beyond March 31, 2014, until a decision in *Allard et al v. HMTQ* is rendered. As per the Interim Injunction Order issued by the Federal Court on March 21, 2014, the following criteria must be met:

    a) Individuals must have held a valid Authorization to Possess under the MMAR on March 21, 2014.

    b) Individuals must have held a valid Personal-Use Production Licence or Designated-Person Production Licence under the MMAR on, or after, September 30, 2013, where there is also an associated valid ATP as of March 21, 2014.

10. On [redacted], the LSO received an email from [redacted] with Health Canada Legal Services, advising that a request had been received from Lesley Ann Kilgore, a Federal Crown Counsel for the Public Prosecution Service of Canada. LSO A/Manager Rosa Chiarello-Mise assigned to me the task of searching the HC record keeping system for the required records.

11. The request sought information related to [redacted], a search of the SAMM II database by birth date resulted in an alternate spelling of the last name, [redacted]

12. On February 2 and 16, 2015, I conducted searches and collected the documents from the record keeping system for the information referred to in the request.

13. Attached to this my affidavit as **Exhibit "A"** is the ATP issued to [redacted], authorizing her to possess 1200g of dried marijuana. The ATP is valid from [redacted]

14. Attached to this my affidavit as **Exhibit "B"** is the PUPL issued to [redacted] on [redacted] with a production site at [redacted] and storage site at [redacted]. The

PUPL was valid from [redacted] for [redacted]

15. Attached to this my affidavit as **Exhibit "C"** is the ATP issued to [redacted] on [redacted] authorizing her to possess 1200g of dried marijuana. The ATP is valid from [redacted]

16. Attached to this my affidavit as **Exhibit "D"** is the PUPL issued to [redacted], with a production [redacted] and storage site at [redacted] The PUPL was valid from [redacted]

17. Given the criteria set out in *Allard et al v. HMTQ*, the validity date of [redacted] ATP and PUPL issued on September 10, 2013, are extended until the end of the litigation in *Allard et al v. HMTQ*.

AFFIRMED BEFORE ME at the City of Ottawa, Province of Ontario this 16th day of February 2015

Christina MacInnis
CHRISTINA MACINNIS

A Commissioner for Taking Affidavits

Sherri Laureen Szabados, a Commissioner, etc.,
Province of Ontario, for the Government of Canada,
Department of Health.
Expires December 2, 2015

Canadian Medical Cannabis Industry Association

CMCIA Board of Directors Meeting
Health Canada (MMPR)
Thursday, November 4, 2014

MINUTES

This is Exhibit "B" referred to in the affidavit of Danielle Lukey sworn before me at Abbotsford BC this 24 day of April 2015

A commissioner for taking affidavits for British Columbia

Meeting Participants:

Health Canada	CMCIA	
Eric Costen	Marc Wayne, Chair	(Bedrocan Canada)
Brigitte Lucke	Neil Closner, Treasurer	(MedReleaf)
Sarah Baxter	Mark Zekulin	(Tweed Inc.)
Kurt Chin Quee	Denis Arsenault	(OrganiGram)
Hanan Abramovici	Eric Paul	(CannMedica Pharma)
Carol Anne Chénard	Sandra Graham	(CMCIA)

A) Overview of the Office of Medical Cannabis/Office of Controlled Substances

- The meeting commenced with an overview of the newly established Office of Medical Cannabis (OMC), as well as an overview of the division of responsibilities (i.e. scope of authority) between the OMC and the Office of Controlled Substances (OCS). The key responsibilities of OMC are: policy and regulatory development; litigation support; stakeholder engagement; and business intelligence. The OMC also supports the wind-down of the former program, including operating the 24/7 call-centre responding to police inquiries.
- The Office of Controlled Substances (OCS) remains responsible for licensing, compliance and enforcement.

B) RPIC/A/RPIC update

- Health Canada noted that the MMPR are clear on the requirement for RPICs and A/RPICs in monitoring activities of staff with cannabis.
- CMCIA's proposal is not consistent with the MMPR and would require amendments to change the requirements of the RPIC and A/RPICs.
- Health Canada is taking a risk-based approached to its compliance and enforcement activities and is prioritizing issues of public health and safety (e.g. risk of diversion). RPIC and A/RPIC monitoring of staff supports minimizing risk of diversion.
- Health Canada recognizes the need for security clearances for both additional A/RPICs, as well as new licensed producer applicants.
- CMCIA noted opportunities to improve the security application form and offered to provide suggestions to Health Canada (e.g. how to reflect what an applicant was doing when self-employed).

- CMCIA asked if it might be possible for Health Canada to circulate top 10 compliance issues being identified with licensed producers, noting the desire of licensed producers to be compliant regulated parties.

C) Advertising / Health Claims

- CMCIA noted that guidance on advertising would be appreciated by licensed producers. In the meantime, CMCIA noted that they are developing their own internal policy given their aim to be as self-regulating as possible.
- Health Canada noted that under the legislative and regulatory frameworks for producers of marijuana for medical purposes that no advertising to the public is permissible. The MMPR align marijuana for medical purposes to the advertising requirements in existence for other narcotic drugs. Information on advertising is available on the Health Canada Health Products and Food Branch website.
- Health Canada noted that the June 30, 2014 communiqué was clear about the restrictions under the FDA, NCR and MMPR with respect to advertising. For example, it is not acceptable for a licensed producer to make any therapeutic claims regarding marijuana for medical purposes.
- Health Canada stressed that advertising is an important compliance and enforcement issue.

C) Import / export

- CMCIA asked if there was a list of approved countries for import and export purposes.
- Health Canada noted that this information would be managed by the International Narcotic Control Board (INCB) and is available online in the INCB's estimates report.
- On the question of export, while the MMPR allow for export, it is possible only in certain very limited circumstances. For example, export is only be permitted for medical or research purposes. The receiving country must first issue an import permit, before Health Canada will consider granting an export permit. The importing country must also have valid estimates from the INCB in order for the transaction to proceed.

D) Licensing and Renewals

Licensing

- CMCIA inquired about how many producers would be licensed.
- Health Canada noted that the MMPR do not provide a limit to the number of licences that can be issued. The department continues to process applications. Currently there are approximately 300 active applications.
- CMCIA raised concerns about approvals of licence amendments to support expansion plans.
- Health Canada noted that the MMPR is a regulated free market, but that the department also has a responsibility to minimize risk of diversion.
- Health Canada noted that in making requests to expand operations that licensed producers should provide a business case supporting the expansion, especially given data provided in the monthly reports shows that licensed producers have an available inventory.

Renewals

- CMCIA asked if licence renewals would be for one year in the second year of the program.
- Health Canada noted that all licences under the *Narcotic Control Regulations* are one year licences for licensed dealers.
- Health Canada stressed that if producers plan to change anything in their operations, they should notify Health Canada in advance, noting that it would be better not to wait until licence renewal.
- Renewals should be submitted three months in advance. Renewed licensed will only be provided on the day that the earlier licence expires.

Labelling and Packaging

- Health Canada noted a request that was provided to all licensed producers asking for examples of licensed producer labels. This information will support Health Canada in working with licensed producers to address the concern that clients are registering once and not re-ordering, raising concerns clients may be putting illicit product in licit packaging.

E) Regulatory update: Communication of information

- Health Canada is working on finalizing the regulatory package for the Minister's review in the coming weeks.
- Health Canada expects the final regulations will come into force in Winter 2015
- Once Health Canada has confirmation of that approval CMCIA will be notified.

F) Education

- CMCIA announced a partnership with the CCIC for CME (accredited) education sessions, starting with a five city tour.
- The CMCIA partnership is through an unrestricted grant. The content of the session will be decided by the CCIC and Dr. Ware. CMCIA noted that it has no control over the content of the program.
- There will not be a presence of individual companies at the education events, but the CMCIA on behalf of the industry.
- Health Canada noted that CMCIA should consider that there may be criticisms of conflict of interest at the CCIC roadshow.
- Health Canada noted that both its RFPs on education mentioned in the past are on hold. It is hoped that next steps will be determined after a meeting with healthcare associations in a couple weeks.

G) Claiming Medical expenses

- CMCIA noted that clients are requesting information from licensed producers on whether marijuana for medical purposes can be claimed on a client's income tax.
- Health Canada indicated that licensed producers should direct their clients to CRA.

H) Affordability Strategy

- CMCIA noted its ongoing concern with the affordability of marijuana for medical purposes, especially in consideration of current litigation.
- Health Canada confirmed that the issue of cost is central to many of the cases against the MMPR before the courts.
- Health Canada estimated there are currently 28,000 former licensees covered by the injunction.

I) Allard case – Injunction

- Health Canada noted that the hearing on the appeal and the cross appeal of the injunction is scheduled to take place on November 24. The cross-appeal challenges the limit of 150 grams, and dates cited in the original order, and to compel Health Canada to resume administering the former program in part.
- CMCIA asked if there was anything they could do to support the current litigation.
- Health Canada noted that the Department of Justice would be interested in hearing from licensed producers who have evidence regarding the quality of the plants that they received as a result of transfers from former MMAR growers. Any notes as to the quality, condition of that product, etc would be useful to the government's efforts in defending the MMPR. Health Canada noted that it would be following-up with a request to that effect.

J) MMAR

- CMCIA raised concerns about former MMAR participants growing more plants than allowed on their licence.
- Health Canada noted that this has been a longstanding concern with the old program. However, at this time the MMAR are repealed and those still growing are likely doing so as a result of the Allard court injunction.
- Licensed producers are encouraged to put municipalities with questions about the MMPR or the old program in touch with Health Canada.

K) HC position on consumables

- CMCIA noted that they do not endorse a product that is smoked, citing concerns that the medical community has with smoked product.
- Health Canada noted that there is no scientific evidence regarding the health effects of cannabis products, such as oils and other edibles. The peer-reviewed research that is currently available examines the effects of dried cannabis.
- Health Canada noted that the issue of enabling access to a range of cannabis products is central to many of the court challenges against the MMPR.
- CMCIA asked if Health Canada would help fund their research. Health Canada noted that it could not fund clinical trials. Health Canada's role is to review and determine if a clinical trial could be approved.

Canadian Medical Cannabis Industry Association

1) College of Family Physicians' recommendations
CMCIA
• CMCIA noted its collective disappointment with the College of Family Physicians of Canada preliminary guidance document. The document ignores a large body of evidence and makes selective use of references and information.

Monthly Stats as of September 30, 2014 Demand: in line with last period or slightly below, in general the growth trend slowing somewhat	
patients authorized	12,417
Shipments monthly	7, 243 (18% growth)
Cannabis sold this month:	227 kilos (16% growth from last time)
Total amount sold to date:	994 Kilos
Authorized Physicians	805
Nurse practitioner	1
Average amount authorized	3.9
Approved LP	22 -- 6 staged licences to grow
Amounts produced this month	708 kilos (fell about 20% from previous month but second highest month ever)
Production capacity on LP licences	39,000kg
Amounts in inventory	2,029kg

- Health Canada is planning to provide further guidance on reporting to all licensed producers, particularly for inventory and amounts destroyed.
- CMCIA noted that they were trying to understand the aggregate numbers and asked if Health Canada would be willing to further developing the presentation of aggregate market data.
- Health Canada indicated that it would consider that, noting its need to respect business confidentiality and public safety interests.

3. CMCIA-OMC/OCS on-going relations

- There was overall agreement with the usefulness of the meetings between CMCIA and Health Canada.
- It was suggested that there might be value in having meetings take place less frequently (i.e. every two months).
- CMCIA will target January 2015 for the next meeting.

Canadian Medical Cannabis Industry Association

CMCIA- OMC/OCS November 4, 2014 Meeting

Action Items

1. CMCIA – to provide Health Canada with suggested improvements to the security clearance form/security clearance approval process.

2. Health Canada –to consider circulating the top 10 compliance issues seen amongst licensed producers of marijuana for medical purposes.

3. Health Canada – to provide additional guidance/clarity on advertising (e.g. with plain language examples), noting that the June 30 communiqué is a good reference document for licensed producers with questions about advertising.

4. Health Canada -- to provide CMCIA with the weblink to the International Narcotic Control Board Estimate Report

5. CMCIA members – to respond to request from the Office of Controlled Substances regarding product labels.

Written Representations

Brief history of interlocutory proceedings

1. On March 21, 2014, Mr. Justice Manson granted interlocutory injunctive relief ("*the injunctive order*") in the following terms:

- The Applicants who, as of the date of this Order, hold a valid Authorization to Possess pursuant to s. 11 of the *Marihuana Medical Access Regulations,* are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which are inconsistent with the operation of the *Marihuana Medical Access Regulations,* to the extent that such an Authorization to Possess shall remain valid until such time as a decision in this case is rendered and subject to the terms in paragraph 2 of this Order;

- The terms of the exemption for the Applicants holding a valid Authorization to Possess pursuant to s. 11 of the *Marihuana Medical Access Regulations* shall be in accordance with the terms of the valid Authorization to Possess held by that Applicant as of the date of this Order, notwithstanding the expiry date stated on that Authorization to Possess, except that the maximum quantity of dried marihuana authorized for possession shall be that which is specified by their licence or 150 grams, whichever is less;

- The Applicants who held, as of September 30, 2013, or were issued thereafter a valid Personal-use Production Licence pursuant to s. 24 of the *Marihuana Medical Access Regulations*, or a Designated-person Production Licence pursuant to s. 34 of the *Marihuana Medical Access Regulations,* are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which is inconsistent with the operation of the *Marihuana Medical Access Regulations,* to the extent that the Designated-person Production Licence or Personal-use Production Licence held by the Applicant shall remain valid until

such time as a decision in this case is rendered at trial and subject to the terms of paragraph 4 of this Order;

- The terms of the exemption for an Applicant who held, as of September 30, 2013, or was issued thereafter a valid Personal-use Production Licence pursuant to s. 24 of the *Marihuana Medical Access Regulations* or a Designated-person Production Licence pursuant to s. 34 of the *Marihuana Medical Access Regulations,* shall be in accordance with the terms of their licence, notwithstanding the expiry date stated on that licence;

2. The court made the following further findings with respect to the patients as a whole:

- the Plaintiffs were "representative of an identifiable group: medically-approved patients under the *MMAR* regime" who "would be irreparably harmed" by the effect of the repeal by the *MMPR* of the *MMAR* provisions with respect to supply; namely the personal production or designated grower production licenses (collectively, the "Patients").

  Order paragraph 117

- the "balance of convenience" favoured granting an injunction/exemption preserving those rights under the *MMAR* for these Patients pending trial.

  Order paragraph 120

3. On December 15, 2014, the Federal Court of Appeal ("FCA") dismissed the Defendant's appeal of the injunctive order. In the same judgment, with respect to the Plaintiffs' cross-appeal to expand the scope of the injunctive order to cover the circumstances of the Plaintiffs Beamish and Hebert and to permit the change of addresses, the FCA directed the Plaintiffs to obtain clarification from Mr. Justice Manson as to whether he intended the order to cover the plaintiffs Beemish and Hebert.

4. Following the judgement of the FCA, the Plaintiffs filed a written motion requesting Mr. Justice Manson reconsider his injunctive order in the following terms:

a. that all Patients that hold a valid Authorization to Possess ("ATP") on March 31, 2013 (instead of March 21, 2014, to allow for the annual renewal process in the *MMAR*) or, in the alternative, on the September 30, 2013 transition date, are covered by the Exemption Order, so that all medically approved patients under the *MMAR*, such as Ms. Beemish and others similarly situated, were and are protected by the interim Exemption Order;

b. that all Patients exempted by the Order, such as Mr. Hebert and Ms. Beemish, and others similarly situated, can change the address of their production site by simply filing a change of address form with Health Canada (as was permitted pursuant to the *MMAR Regulation 46*) or such other agency (such as the police) chosen by the Defendant Government of Canada pending trial.

5. By order dated December 31, 2014, Mr. Justice Manson determined:

"the Federal Court of Appeal remitted the issue of the scope of the interlocutory injunction for clarification only, to specify whether the injunction applied to Ms. Beemish and Mr. Hebert. There is no reconsideration to be made and certainly no expansion of the scope of my decision to apply to anyone other than the plaintiffs in the proceeding.

In considering the balance of convenience, I specifically chose the relevant transitional dates of September 30, 2013 and March 21, 2014, to limit the to extend only to those individuals who held valid licenses to either possess or produce marijuana for medical purposes as of those relevant dales.

[4]Accordingly, only those plaintiff who had a valid license on September 30, 2013 could continue producing marijuana for medical purposes, and only those plaintiffs who held a valid authorization to possess marijuana for medical purposes at the time of my decision on March 21, 2014 could continue to so possess.

[5] In considering the balance of convenience, the remedy I granted was intended to avoid unduly impacting the viability of the Marijuana

for Medical Purposes Regulations (MMPR) and to take into consideration the practical implications of the Marijuana Medical Access Regulations (MMAR) licensing regime no longer being in force.

[6] Given that Ms. Beemish did not possess a valid license to possess on March 21, 2014 (the license having expired on January 4, 2014) and that Mr. Hebert could no longer renew his designated production license (having moved residence on October 30, 2013) neither Ms .Beemish nor Mr. Hebert were covered by the injunctive relief granted. The fact that they did not possess valid licenses as of the transitional dates was determinative of their inability to be covered by the injunctive remedy granted.

Variance of an order

6. Rule 399(2) of *Federal Court Rules*, provides that:

> *(2) On motion, the* ***Court may*** *set aside or* ***vary an order***
>
> *(a)* ***by reason of a matter that arose or was discovered subsequent to the making of the order;*** *or*
>
> *(b) where the order was obtained by fraud*

7. The Plaintiffs now bring this motion, pursuant to Rule 399(2) of the to vary the injunctive order, based on the introduction of new evidence, including evidence heard at trial that was not before Mr. Justice Manson when he rendered his decision on March 21, 2014 or his clarification, on December 31, 2014 (no new evidence admissible).

8. The terms of the variation sought ("the sought relief") involve the expansion of the current scope of the injunctive order so as:

> a. to include **all previous patients** under the Medical Marihuana Access Regulations ("*MMAR*") and at least those who held a valid authorization to possess ("ATP") on September 30, 2013, the *MMPR* transitional date, and any others who have obtained "Medical Approval" pursuant to s. 53 of the *Narcotic*

Control Regulations and requiring that the Office of Medical Cannabis at Health Canada be required to **maintain and update its database** upon notification of such approvals from a physician or patient accordingly, until further order of this court and the end date of any suspension of any declaration of invalidity;

b. to include **all patients** falling under (i) above, who held a valid personal production licence or had a valid designated production **licence on September 30, 2013, continue to be exempt** in accordance with the provisions of their prior licences, except expiry dates, until further order of the court or the end date of the suspension of any declaration of invalidity;

c. to require the Office of Medical Cannabis at **Health Canada be required to maintain its database by keeping a record of notices of change in production sites** to existing licences in order that the police might be notified of the validity of a site accordingly and provide limited ancillary assistance to approved patients or their caregivers, or physicians, such as providing copies of lost licences, and other matters, pending the decision of this court and the end date of the suspension of any declaration of invalidity, if granted;

d. to provide that **any circumstances of alleged injustice** to any medically approved patient arising pending the decision of the court or the end date of the suspended declaration of constitutional invalidity, if granted, if unable to be resolved through the Office of Medical Cannabis at Health Canada, **may be brought to the attention of an officer of the Federal Court Trial Division for a summary resolution** and disposition in writing.

New matters arisen/discovered

9. The Plaintiffs submit that persons who would otherwise have been medically-qualified under the *MMAR* but whom are not provided responsive and effective remedies by the injunctive order fall into the following general categories:

i. Patients, like Ms. Beemish and Mr. Hebert, who had a valid production but

not possession license on the Cutoff Dates but who require, for a variety of possible reasons, administrative changes (e.g. a change in the production site) in order to be able to continue to lawfully supply themselves or their patient if a DG with their medicine;

ii. Patients, who had valid production and possession license is on the Cutoff Dates but who, for a variety of possible reasons (e.g. an unrelated fire at the site requiring them to move to a new site) have to be able to move their site in order to be and to continue to produce and obtain their medicine.

10. There have been many problems experienced by "medically approved patients" who fell through the cracks or experienced problems since the injunctive order.

Affidavit of Jason Wilcox sworn the 1st day of August, 2014 (Trial Exhibit 23)
Affidavit of Mike King sworn the 18th day of September 2014 (Trial Exhibit 20)
Affidavits of Danielle Lukiv sworn the 15th day of October 2014 (Trial Exhibit 21) and April 24th, 2015.

11. It is submitted that medically approved patients falling into these categories are subject to the same irreparable harms as those patients who qualify under the injunctive order including the harms caused by the inability to afford their medicine.

12. As the evidence before the court on the injunction proceedings, and affirmed at trial, demonstrated, 54% of medical-cannabis Patients surveyed are sometime or never able to purchase sufficient quantities of medicine and one-third are forced to choose between medicine and other necessities such as food.

Order paragraph 35.

13. If able to produce for themselves (or have a caregiver produce for them) under the *MMAR*, the Court found that for these Patients *"their cost of production in conjunction with their daily rate of consumption and their monthly income, allows them to live within their means."*

Order paragraph 93.

14. If not permitted to be self-sufficient in this way, the Court found that "*the cost to the Applicants of obtaining marihuana from an LP would exceed their incomes or consume an unacceptably large portion of it. I find that this would either leave them unable to legally access marihuana for medical purposes in accordance with their physician's authorization, or without the financial means to provide for themselves otherwise.*"

Order paragraph 94.

15. Ms. Beemish fits squarely into this category. Buying medicine from an LP represents a massive increase in cost: "even a cost of $5 per gram is a tenfold increase in what it costs Mr. Hebert to produce marihuana for Ms. Beemish." Ms. Beemish has a Canada Pension Plan disability pension of $596.73 monthly. She consumes 2 – 10 grams of cannabis per day, representing a daily cost at the lowest end of LP pricing of $10 - $50 per day or approximately $300 - $1500 per month, well beyond her means.

Order paragraphs 24, 27

16. It is the Plaintiff's position that by virtue of matters either (a) which occurred since the injunction hearing on March 17, 2014 and/or (b) were discovered since that date, including evidence given at trial, the court ought now to vary the injunctive order to additionally provide for the sought relief.

17. The new matters upon which the Plaintiffs rely are, *inter alia*:

- Medically approved patients had to or need to move their production site to a new location for a number and variety of reasons not limited to unaffordability of their current site as per Plaintiffs Beamish and Hebert;
- Some had to shut down their production site for a variety of reasons, again not limited to the Plaintiffs Beamish and Hebert situation;

- Some had to obtain a new designated grower or a permit to grow for themselves because their designated grower discontinued growing for them for one reason or another;
- One patient (that was covered by the Order) had a fire in her house (caused by a dryer) now requires a new production site which she has available but is unable to move currently because of the failure of the Order to allow for such a change to be made in such circumstances and to allow her to do so;
- One patient who moved without realizing that he could not move his production site and is now consequently unable to continue to produce unless he has authority to use his new location as his production site which the Order does not permit.
- Some who cannot afford the new Licenced Producer prices and who also complain about the 150 gram limit because of their circumstances, limiting their mobility rights.
- Some patients whose landlords refused to renew their lease, requiring the patients to move elsewhere and therefore, are unable to produce at their new location without an address change;
- Some who had to move their production site consequent to the November 2013 Health Canada envelope that identified them as marihuana patients (subject of a class action law suit) because of safety concerns and other problems with neighbours as a result of that exposure, need to move their production sites and are unable to do so under the current terms of the Order.
- Some patients who are unable or are experiencing considerable difficulty with the 150 gram maximum placed on their possession limits due to either working out of town, going on holidays, moving their medicine between their production and storage sites that may be at different places under the *MMAR* provisions while not applicable to an *MMPR* situation.

18. Moreover, the Plaintiffs' also rely on the evidence given in cross-examination by the Defendants' witnesses at trial, namely Jeanne Ritchot, Len Garis and Shane Holmquist in defeat of the Defendant's claim, at the injunction hearing, that there were

six negative factors of the *MMAR*, namely (1) Diversion (2) Home Invasion and Theft (3) Fires and Electrical Hazards (4) Mold and Toxic Chemicals (5) Noxious Odours (6) Risks to Children. The Defendant then claimed that as a result of these factors (a) the harm to the public in permitting injunctive relief outweighed the harm to the Plaintiffs and (b) that these factors support the balance of convenience in favour of the Defendant.

Injunctive criteria

19. The test on an application for an interlocutory injunction requires the applicant to establish: (a) there is a serious question to be tried; (b) that he will suffer irreparable harm if injunctive relief is not issued; and (c) the balance of convenience favours granting the injunction in that the moving party is likely to suffer greater harm than the respondent if the injunction is refused.

Manitoba (A.G.) v Metropolitan Stores, (1987) 1 SCR p. 128
RJR-MacDonald Inc. v Canada (Attorney-General) (1994) 1 SCR 311, p.43

20. With reference to the relevance of the private law test of irreparable harm in *Charter* cases, i.e. harm not compensable in damages, the federal court determined that "*the issue is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.*"

Human Rights Institute of Canada v. Canada (Minister of Public Works and Government Services), 1999 CanLII 9377 (FC), [2000] 1 FC 475 (point 2)

Charter remedy

21. The new matters now before the court indicate that a charter remedy is required in more expansive terms to protect the interim interests of medical marihuana patients, pending a final order.

22. A purposive approach to remedies in the context of the *Charter* requires that both the purpose of the right being protected and the purpose of the remedies provision be promoted. To do so, courts must issue effective, responsive remedies that guarantee full and meaningful protection of *Charter* rights and freedoms.

Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 SCR 3 at

paragraph 25.

23. This is consistent with the "well accepted" principle that the *Charter* must be given *"generous and expansive interpretation"* in order to avoid narrow, technical approaches that could "subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*."
Doucet-Boudreau, supra, at paragraph 23 -25

24. This generous approach to *Charter* interpretation "*holds equally true for Charter remedies.*" This is because a right is only protected when there are appropriate remedies for violations of that right: *"Purposive interpretation means that remedies provisions* ***must*** *be interpreted in a way that provides "a full, effective and meaningful remedy for Charter violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach"* (*Dunedin, supra*, at paras. 19-20).

> *Doucet-Boudreau* at paragraph 24.
> *Doucet-Boudreau* at paragraph 25 (emphasis added).
> *See also Canada (Attorney General) v. PHS Community Service Society 2011 SCC 44 at paragraphs 141 through145 (SCC)*

25. A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi remedium*: where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. **First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies."**

26. Given the information/evidence now before the court, together with the findings of Mr. Justice Manson at the injunction hearing, irreparable harm would flow should the injunctive order not be varied to include the terms sought by the Plaintiffs.

27. The current injunctive order is neither fully responsive to those harms nor effective for many medically-qualified persons including Ms. Beemish and her designated caregiver spouse Mr. Hebert and as now fully known.

28. In the case of *Parker,* the appellate Court, citing *Schacter v Canada*, [1992] 2 S.C.R. 679, determined that while reading in was an available and appropriate option due to the defects in the *CDSA*, the basic responsibility for fixing the *Charter* violations lay with the legislature and, therefore, a declaration of invalidity coupled with a suspension of that declaration and an interim exemption was the most appropriate remedy. The court pointed out that it was for the legislature to 'legislate' any changes not the Court.

R v Parker (2000) 49 O.R. (3d) 481 (Ont.C.A.) at paragraphs 198 – 205

29. It is respectfully submitted that the government could relatively easily implement such interim administrative options, including for example, accepting the streamlined medical declarations under the *MMPR* as sufficient medical authorization to issue possession and production licenses consistent with the *MMAR* scheme. It would also be relatively easy to allow for things like address and dosage changes by way of streamlined notifications and adjustments to the database operated by Health Canada and which it is now known continues to exist and operate.

30. It should be remembered that one of the reasons for notifying Health Canada of changes to production sites is to facilitate law enforcement knowledge of whether a production site they may be investigating is legally authorized or not.

31. The investigation and charging of medically approved patients who, due to necessity, have had to move their production sites would result in the potential destruction of their medicine and production facility pending trial where, in their defense, the law still entitles them to reasonable access based on *Parker* (*supra*) to avoid being placed in a position where they have to choose between their liberty and their health. The failure to provide them with a remedy to prevent this harm, pending trial, places them exactly in that position, which has been held to violate their s.7 *Charter* constitutional rights.

32. This is *Charter* litigation involving violations of the Patient's s. 7 rights to life, liberty and security of the person. Because of that, any remedies must be responsive to the *Charter* breaches and effective at ameliorating those breaches. Justice Manson

found that all the Patients would suffer irreparable harm to their security of the person and liberty interests,

New matters indicate expansion of injunctive order as an appropriate interim Charter remedy

33. It is clear from the judgments of Mr. Justice Manson on March 21, 2104 that on the issue of irreparable harm, he found this criteria had been established in favour of the Plaintiffs while his clarification judgement, dealing with the reason to restrict the dates (and thereby exclude Plaintiffs Beamish and Hebert from protection), was focused on the issues of balance of convenience and December 31, 2014.

34. The new matters, since discovered and now before the court, including the fundamental fact that Health Canada in fact continues to maintain and operate its *MMAR* patient database, despite the repeal of the *MMAR*, has significantly altered the previously founded balance of convenience to the extent that the balance of convenience now favours variance in the terms sought.

35. Accordingly, not only has the level of irreparable harm expanded and increased, it is now properly and fully known to the court by virtue of the evidence given by the Plaintiffs and others at trial and as relied upon in this motion.

36. Based on existing appellate authority, all medically-authorized persons are constitutionally entitled to reasonable access to medical cannabis and the failure to provide that access violates s. 7 of the *Charter*.

> *R. v. Parker (supra), (leave to appeal to the Supreme Court of Canada dismissed) recently reaffirmed by that Court in Her Majesty the Queen and Matthew Memagh (2013) Ont.C.A 67 (February 1, 2013) (leave to appeal to the Supreme Court of Canada dismissed July 25, 2013) and referred to with approval by the Supreme Court of Canada in Carter v. Canada (Attorney General),* 2015 SCC 5

37. The investigation and charging of medically approved patients who, due to necessity, have had to move their production sites, would result in the potential destruction of their medicine and production facility pending trial where, in their

defense, the law still entitles them to reasonable access based on *Parker* (*supra*) to avoid being placed in a position where they have to choose between their liberty and their health.

38. The lack of a current remedy to prevent this harm, pending trial, places them exactly in that position, which has been held to violate their s.7 *Charter* constitutional rights.

39. It is submitted that medically approved patients falling into these categories are subject to the same irreparable harms as those patients who qualify under the injunctive order including the harms caused by the inability to produce their medicine at a new location (change address).

Conclusion

40. Given the evidence now before the court, a remedy should be provided for those not specifically provided for in the injunctive order and unable to change their addresses and therefore lawfully produce their medicine.

41. In weighing the injunctive test and the new evidence available to the court, all factors fall squarely in favour of the Plaintiffs and consequently, the variance ought to be granted in the terms sought.

DATED: April 27th, 2015

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