Court File No : A-174-14

FEDERAL COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

AND:

Neil ALLARD, Tanya BEEMISH, David HEBERT and Shawn DAVEY

Respondents

MEMORANDUM OF FACT AND LAW OF THE RESPONDENTS

SERVICE OF A TRUE COPY
HEREOF ADMITTED
THIS 23 DAY OF
July 20 14
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INTRODUCTION

1. This appeal is about the Order of Justice Manson granting a limited constitutional exemption by way of injunctive relief, restricted by time and scope, to an identifiable and discrete group of persons who, on the evidence, demonstrated that they would be irreparably harmed if their existing right to produce medical cannabis or have a caregiver do so for them, was removed (the "Exemption Order").

2. That discrete group of medically authorized medical cannabis patients is represented by the Respondent/Plaintiffs (hereafter, the "Patients"). All of them had already been granted regulatory exemptions from the general prohibition on possessing and producing cannabis by the Appellant Health Canada. Justice Manson's Order attempted to preserve that status quo, permitting these patients to continue to possess and produce medical cannabis until an expedited trial on the merits.

3. Absent the Order, the uncontradicted evidence demonstrated that the Patients would suffer irreparable harm in the form of insufficient reasonable access to medicine, impoverishment and endangerment of their liberty and the security of their person interests.

4. Justice Manson also found that the interests of the identifiable group represented by the Patients were part of the overall public interest and that, despite the strong presumption of public interest accorded to the Appellants' legislative scheme, the balance of convenience favoured granting the limited Exemption Order by way of the injunctive relief.

5. The Appellants complain that Justice Manson erred when making his factual findings regarding irreparable harm. The Appellants also complain that Justice Manson erred in his findings regarding the balance of convenience.

6. The Appellants are, however, unable to demonstrate any palpable and overriding errors in Justice Manson's factual findings. Nor can Appellants find any such errors in the mixed issues of law and fact contained in his legal analysis.

7. The Respondents say, because of this, that the appeal should be dismissed with costs.

PART I - STATEMENT OF FACTS

Neil Allard

8. The Respondent/Plaintiff Neil Allard is disabled and suffers from "*Myalgic Encephalomyelitis*", a serious neuro-immune disorder, as well as clinical depression.[1]

9. Mr. Allard currently receives pension and wage loss replacement payments totaling approximately $2,700 net per month. When Mr. Allard turns 65 his income will decrease to $24,000 per year ($2000 per month).[2]

10. Mr. Allard also suffers sensitivity to pharmaceutical medications that caused his doctors to recommend medical marihuana as a treatment. The results have been very positive. [3]

11. Mr. Allard is currently authorized by his Doctor under the *MMAR* to use 20 grams per day and is able to provide for all his needs by producing for himself at a cost of approximately $200-300 per month. He fears that he will no longer be able to acquire safe, high-quality marihuana if he cannot produce his own. Based on illicit market and estimated Licensed Producer (LP) prices under the *MMPR* (that range from $5-12 per gram) his costs would increase to between $100 and $240 per day, or $3000 to $7200 per month, which exceeds his total pension income. Mr. Allard fears that he will be charged criminally and possibly imprisoned if he continues to produce marihuana after his permit expires. That causes him significant stress and anxiety about his future. He will also no longer be able to use raw marihuana treatments that have proved effective for illness and fears that his health will suffer. [4]

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[1] *Affidavit of Neil Allard, sworn on January 10, 2014,* paras 1-2, Appeal Book ["AB"], Volume I, Tab 9, pp.132-133, paras 1 and 2
[2] *Affidavit of Neil Allard (supra),* para 3, AB, Volume I, Tab 9, p. 133, para 3
[3] *Affidavit of Neil Allard (supra),* para. 3, AB, Volume I, Tab 9, p. 133, para 3
[4] *Affidavit of Neil Allard (supra),* paras 20–30, AB, Volume I, Tab 9, p. 137-141, paras 20-30

Tanya Beemish and David Hebert

12. The Respondent/Plaintiff Tanya Beemish is 27 years old and married to the Respondent/Plaintiff David Hebert, aged 32. They live in Surrey B.C. and have no children. She suffers from Type I Diabetes and a related complication of gastroparesis. She suffers from extreme nausea, continuous vomiting, pain, lack of appetite and sleep. She requires a GJ tube which by-passes her stomach, and is on dozens of medications that she does not find helpful and cause significant negative side effects. [5]

13. Marihuana is an effective treatment for Ms. Beemish's nausea and discomfort, stimulates her appetite, and helps with her anxiety and depression. She uses 2 to 10 g of medical marihuana per day to treat her illness. She was authorized pursuant to the *MMAR* to possess 150 g on her person and to store 1125 g at her production site. [6]

14. Ms. Beemish has been receiving a disability pension of $596 per month since December 2012, and cannot afford the estimated LP prices. Her husband Mr. Hebert is her primary caregiver and designated medical marihuana producer. The marihuana he grows costs the affordable price of $0.50 per gram.[7]

15. In October 2013, Ms. Beemish and Mr. Hebert had to move to another location due to the previous location being unaffordable. They notified Appellant Health Canada prior to September 30, 2013 of their need to relocate their production. But by the time they found a new location the September 30, 2013 deadline for seeking amended licensing (a change in the production site) imposed by the *MMPR* had passed. Their medical marihuana production license expired on or about October 20, 2013, and as a

[5] *Affidavit of Tanya Beemish, supra,* paras 1–4 and 8, AB, Volume I, Tab 11, p.192-193, paras 1-4
[6] *Affidavit of Tanya Beemish, supra,* para 5–8, AB, Volume I, Tab 11, pp.193-194, paras 5-8
[7] *Affidavit of Tanya Beemish, supra,* paras 4, 6, 9-11, 13–16, AB, Volume I, Tab 11, pp.193-196, paras 4, 6, 9-11, 13-16, *Affidavit of David Hebert,* paras 4–6, 14–16, AB, Volume I, Tab 10, pp.183-184, 187, paras 4–6, 14–16

result Ms. Beemish has not had access to her prescribed medical marihuana since that time. [8]

Shawn Davey

16. The Respondent/Plaintiff Shawn Davey is 37 years old and lives in Maple Ridge, BC. He suffered a substantial brain injury as a result of a motor vehicle accident in 2000. He receives an income from settlement funds and from a disability pension that totals approximately $5,000 per month. [9]

17. Mr. Davey's brain injury causes him constant major pain. He was initially prescribed various pharmaceutical medications that cost approximately $3000 per month. After six years of pharmaceutical medications, his doctors recommend he try marihuana, and he found that relieved his pain and did not have the significant side effects caused by the pharmaceutical drugs. [10]

18. Mr. Davey produces his own medical marihuana to control the quality and to reduce costs. He is authorized to consume 25 g per day, which he usually consumes orally by way of baked goods, tea and juice. Mr. Davey cannot afford LP prices. [11]

19. Mr. Davey estimates that he is able to produce his medical marihuana at a $1 - $2 per gram, for a total of $750-1500 per month, less than half of what his previous narcotic medications cost him. He is very concerned about the quality and effectiveness of his medical marihuana, as he requires a very strong dose to reduce his pain to tolerable levels. Even at $5 per gram through an LP it would cost the unaffordable amount of $125 per day or $3,750 per month. [12]

PART II - POINTS IN ISSUE

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[8] *Affidavit of Tanya Beemish, supra,* paras 4, 6, 9-11, 13–16, AB, Volume I, Tab 11, pp.193-196, paras 4, 6, 9-11, 13-16,; *Affidavit of David Hebert, supra,* paras 4–6, 14–16, AB Volume I, Tab 10, pp.183-184, 187, paras 4–6, 14–16

[9] *Affidavit of Shawn Davey, sworn January 8, 2014,* paras 1-5, AB, Volume I, Tab 12, pp.199-200, paras 1-5

[10] *Affidavit of Shawn Davey, supra,* para 6, AB, Volume I, Tab 12, p.200, para. 6

[11] *Affidavit of Shawn Davey, supra,* paras 7–12, AB, Volume I, Tab 12, pp. 200-202, paras 7-12

[12] *Affidavit of Shawn Davey, supra,* para 12, AB, Volume I, Tab 12, p.202, para 12

20. The uncontradicted affidavit evidence from the Respondents /Plaintiffs was that they would be unable to purchase sufficient quantities of medicine from LPs. Instead, they would either go without medicine impacting the security of their persons, suffer impoverishment or endanger their liberty by continuing to produce medical cannabis unlawfully. Justice Manson found, based on these facts, that the *MMPR*'s removal of personal/designated production caused irreparable harm. Was this palpable and overriding error?

21. In *Charter* litigation, the public interest can be represented by government and also by identifiable groups consisting of members of the public. The Patients represent a discrete category of persons; medically authorized consumers of medical cannabis licensed by Appellant Health Canada to possess and to produce marijuana. Justice Manson balanced the strong public interest presumption afforded to the *MMPR* with the public interest of medically authorized cannabis patients and concluded that the balance of convenience favoured granting a limited exemption preserving most, but not all, of the patient's existing *MMAR* rights while leaving intact all of the *MMPR*. Was this palpable and overriding error?

PART III - SUBMISSIONS

A. STANDARD OF REVIEW

1. Errors of fact, and mixed errors of law and fact, are reviewed for palpable and overriding error. Here, Appellants allege errors below that are properly characterized as factual, not legal or that are, at most, mixed errors of law and fact. Accordingly, the appropriate standard of review on the appeal is palpable and overriding error. [13]

B. APPLICABLE LAW

22. The Appellants do not contend that Justice Manson applied the wrong legal test for granting injunctive relief. Nor do the Appellants identify any legal errors in his application of that test to the facts presented.

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[13] *Housen v. Nikolaisen,* 2002 SCC 33, paragraphs 5–8, 26–36.

23. The Supreme Court of Canada has said that for the courts "to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute." The Patients argued, and Justice Manson agreed, that an interim order should be made to ensure that blatant violations of the Patients s. 7 *Charter* rights are not condoned and are instead avoided pending trial of this matter.[14]

24. As set out by the Federal Court in the case of *Khadr v. Canada*[15], "it is well established that interlocutory injunctions can be obtained as part of *Charter* litigation." Robert J. Sharpe clearly stated in *The Charter of Rights and Freedoms*, 2nd ed., 2002, at pages 295-296: "*Another form of injunction that may be used as a Charter remedy is the interlocutory injunction that is awarded pending a full trial on the merits. This remedy, which may also involve a temporary stay or suspension of legislation pending a full trial on its constitutionality may be of great practical importance. In a series of cases, the Supreme Court has outlined the test for granting pre-trial or interlocutory relief in Charter cases.*" The court in Khadr further commented that "there is no presumption that legislation is constitutional".

25. An injunction is appropriately granted when the constitutionality of a statute is challenged and failing to grant the injunction would cause violations of *Charter* rights: "*surely the purpose of an interlocutory injunction is to prevent a violation of Charter rights while the underlying action is being tried.*" [16]

26. The court must apply the same principles whether the remedy sought is an injunction or a stay as these are remedies of the same nature. [17]

27. The applicants for such injunctive relief are entitled to that relief if they can satisfy the test laid down in *Khadr*, *Metropolitan Stores*, and *MacDonald.* The test on an

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[14] *RJR- MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 at p.28 ("MacDonald")*
[15] *Khadr v. Canada, 2005 FC 1076 (CanLII),* [2006] 2 F.C.R. 505 at para. 19 *("Khadr")*
[16] *Khadr v. Canada, supra, at para. 20*
[17] *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 at p. 127 ("Metropolitan *Stores")*; *MacDonald, supra, p.29.*

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. [18]

28. The Appellants do not dispute that there is a serious question to be tried.

29. The Appellants' arguments rest on the remaining two factors; irreparable harm and balance of convenience. It is submitted that their arguments, however, are ultimately unpersuasive because Justice Manson's decision was neither legally incorrect nor based on palpable and overriding error as to the facts.

30. The Appellants arguments are, at bottom, that Justice Manson did not fully canvass the evidence in his reasons. But "it is not legal error for a judge to fail to expressly mention in his reasons everything he might have said."[19]

C. JUSTICE MANSON'S DECISION WAS NOT BASED ON SPECULATION ABOUT THE IRREPARABLE HARM THAT PLAINTIFFS WOULD SUFFER ABSENT THE LIMITED EXEMPTION. TO THE CONTRARY, HE REVIEWED THE EVIDENCE FROM BOTH SIDES AND MADE FINDINGS OF FACT THAT CAN NOT BE CHARACTERIZED AS PALPABLE AND OVERRIDING ERRORS.

23. The Appellants' complaint is that Justice Manson accepted speculative or hypothetical evidence about the devastating impact that repeal of the personal/designated production rights in the *MMAR* would cause Respondent/Plaintiffs. (Appellants' Memorandum ("AM") paragraph 43)

24. This is an alleged error of fact. Therefore, to overturn Justice Manson's findings, this Court must determine that any error was palpable and overriding. The Appellants' complaints do not meet this very high standard.

25. The uncontradicted evidence from the Patients was that they were able to meet their medical needs under the *MMAR* but would not be able to meet those needs under

[18] *Metropolitan Stores, supra, p. 128; MacDonald, supra, p.43*
[19] *Roper v. Canada*, 2013 FCA 245 at paragraph 9

the *MMPR*. The evidence was uncontradicted because Appellants chose neither to cross-examine the Patients on their affidavits nor to adduce any contrary evidence.

26. The evidence demonstrated that the Respondents/ Plaintiffs are unable to afford their medicine from LPs to the point of either (a) going without sufficient supply endangering the security of their person; (b) becoming impoverished, also endangering the security of their person or (c) endangering their liberty by continuing to produce medicine unlawfully.

27. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits. [20]

28. In *Elsipogtog First Nation v. Canada (Attorney General)*[21] the Ontario Superior Court held that impoverishment, social stigma and the loss of dignity associated with severe poverty can constitute irreparable harm. The Federal Court referenced this decision favourably in the case of *El-Timani v. Canada Life Assurance Co.*[22] where an insured individual with a severe back injury had been receiving disability payments for four years when these benefits were abruptly terminated by his insurer, much like the Patients and those like them who have been successfully producing medicine at low or no cost for (in some instances) years who have now had this ability terminated.

29. In allowing an injunction requiring the insurer to continue paying the insured's benefits until trial, Madam Justice Molloy of the Ontario Superior Court accepted that "*the loss of enjoyment of life resulting from a subsistence level existence pending trial is not calculable in money.*"

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[20] *MacDonald*, supra, p.6

[21] *Elsipogtog First Nation v. Canada (Attorney General)*, 2012 FC 387 at paras. 77 to 79 *("Elsipogtog (FC)"), (upheld on appeal)*

[22] *El-Timani v. Canada Life Assurance Co.*, [2001] OJ No 2648, 106 ACWS (3d) 526 at para. 9 *("Timani"*

30. The issue of what can amount to irreparable harm was also considered in *Ausman v. Equitable Life Insurance Co. of Canada* [23], Mr. Justice Henderson said: *"The long term effect of the loss of security and the impoverished lifestyle constitutes more than the loss of money. It constitutes irreparable harm."*

31. The Federal Court has held that *"the estimated decline in income assistance rates under the Policy and the potential for ineligibility will cause emotional and psychological stress amounting to irreparable harm for some Recipients. Individuals who are reliant on income assistance are especially vulnerable even to small changes in the resources available to meet their basic needs and, for this reason, I have concluded that the Applicants have demonstrated irreparable harm."* [24]

32. As recognized by this Court in *Elsipogtog "even small changes in the resources available to the poorest and most vulnerable of Canadians to meet their basic essential needs can result in serious harm. Adding to the impoverishment of those who are already vulnerable is not something which should be taken lightly."*[25]

33. Justice Manson found that the Patients, and those like them, who are already living on modest means would be impoverished by having to now buy something as essential as medicine that they were previously able to grow (or have grown) at minimal expense. Order paragraphs 92, 94, 96.

34. The Supreme Court has found irreparable harm in commercial cases where tobacco companies challenged legislation that required health warnings on tobacco products and when the state sought access to business documents. [26]

35. It is submitted that harm is more "irreparable" in *Charter* cases due to the difficulty of obtaining damages for harm caused by unconstitutional actions.[27]

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[23] *Ausman v Equitable Life Insurance Co. of Canada,* [2002] OJ No 3066 (SC), 114 ACWS (3d) 1096, at para. 52; *Elsipogtog (FC), supra,* at paras. 78
[24] *Elsipogtog (FC), supra,* at para. 79
[25] *Elsipogtog v. Canada (Attorney General),* 2012 FCA 312 at para. 37 & 38 ("Elsipogtog (FCA)".
[26] *MacDonald (supra)* and *143471 Canada Inc. v. Quebec (Attorney General) (below).*

36. After deciding not to cross-examine the Patients on their affidavits nor to introduce evidence to the contrary, the Appellants now argue that Justice Manson erred by accepting the uncontradicted evidence of harm, specifically by making findings of fact based on (1) alleged speculation about future *MMPR* pricing; (2) bare bones information on their own incomes; (3) scant information on their own production costs (AM paragraph 53).

37. The evidence of the future cost of buying from LPs was not speculative – it was based on the costs of medicine gleaned from the very limited number of LPs actually selling medicine and was consistent with the evidence on this issue presented by Appellants.

38. For example, at paragraph 22 of the Order Justice Manson accepted that Mr. Allard would pay $6000 per month at average LP pricing ($10 per gram) and $3000 per month at low-end LP pricing ($5 per gram) and that he would risk imprisonment by continuing to produce. At paragraph 27 he performed the same exercise, indicating the cost at both average LP and "discount" pricing for Ms. Beemish. At paragraphs 30 and 31 he made similar findings for Mr. Davey, determining his cost to be $750 to $1500 per month when self-producing and $6000 per month at $8 per gram, the low end of the LP range. The court below accepted these uncontradicted facts. (Order para 93, 95).

39. Indeed, the facts regarding pricing at the time of the hearing that were found by Justice Manson matched the very cost estimates made by the Appellant Health Canada in the government's own Regulatory Impact Analysis Submission (RIAS) accompanying the *MMPR*. Those estimates (conducted prior to the *MMPR* coming into force) confirmed that price increases were likely to occur in the *MMPR* and that the individual patients would be the most impacted. Order paragraph 95.

40. Ultimately, based on the evidence from LP's and Appellants' witnesses, the estimated price increases dovetailed with the actual LP pricing and wholly supported the findings that Justice Manson made. (Order para 95).

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[27] *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick,* [2002] S.C.J. No. 13, [2002] 1 S.C.R. 405 at paras. 78 to 80; *143471 Canada Inc. v. Quebec (Attorney General); Tabah v. Quebec (Attorney General),* [1994] 2 S.C.R. 339.

41. The prices listed by Justice Manson are the actual prices that were being charged by LPs at the time of the injunction hearing. The price information came from the Patients *and* from the Appellants' witness. This is not speculation, nor is it hypothetical.

42. Similarly, the evidence of the Respondents/Plaintiff's financial positions, including their incomes and costs of production, came from their uncontradicted affidavits. This evidence was neither speculation nor hypothetical. Indeed, Appellants do not seriously suggest it is. Rather, the Appellants complaint seems to be that the evidence was "scant" or "bare bones". But even accepting this characterization as accurate, relying scant or bare bones evidence on a factual point that was not disputed is not palpable and overriding error.

43. It is submitted that evidence was neither speculative nor were the prices "mere assertions" as suggested by Appellants (AM paragraph 52).

44. The Appellants real complaint seems to be that evidence of *possible future pricing* of cannabis in the *MMPR*, as the fledgling industry developed, would be speculative. But the findings made by Justice Manson were, appropriately, based on the *actual* prices at the time of the hearing and, therefore, evidence of the *actual* harms that the Patients would suffer if their *MMAR* rights were stripped from them.[28]

45. Moreover, that harms occur in the future and are difficult to quantify does not make them speculative. Here, Justice Manson appropriately recognized that there is a difference between speculative harm and harm that will occur in the future. It is the "likelihood" of harm, not its futurity, that matters (Order para 87). And he found that irreparable harm to the Patients, based on the evidence before him, was likely to occur if he did not grant the request for an injunction. (Order paras 92, 95).

46. Other aspects of the decision demonstrate that Justice Manson understood that he could not found a decision on speculative evidence. He rejected some of the

[28] Ironically, the Appellants complain that Justice Manson also erred by *refusing* to accept their speculative evidence about the possible downward pricing trends for the start-up businesses participating in this novel market. (AM paragraph 56, 57).

Respondents /Plaintiff's arguments *as speculative,* notably their arguments (1) that LPs had insufficient supply to meet the medical needs of Canadians (para 89); (2) that LPs would not have adequate levels of different strains of cannabis (para 90); and (3) that the 150 g possession limit imposed by the *MMPR* would cause the Patients harm (para 91). His rejection of these claims as speculative demonstrates that he canvassed the evidence before him, and made his factual findings on harm, fully cognizant that his decision could not be based on speculation.[29]

47. Once the harm was established on the evidence, in the context presented it was and is irreparable.

48. As noted above, "irreparable" refers to the nature of the harm, not its magnitude and typically refers to harm that cannot be rectified by money damages or cannot be cured, usually because one party cannot collect damages from another. Here, harm to the Patients cannot be cured by money and even if it could, the government is only liable for damages due to legislative change if it acted in bad faith. Therefore, once harms were established, they were "irreparable" within the meaning of that term. Justice Manson noted this "wrinkle" in the case at para 88 and 96 of his Order.

49. The irreparable harms that the Patients would suffer without the Exemption Order were established by uncontradicted evidence. That evidence came from the Patients, from the Appellants' witnesses and correlated with the Appellants' own pre-*MMPR* estimates of price increases in the RIAS. Justice Manson did not base his decision on speculation, hypotheticals or mere assertions. Accordingly, the Appellants have not demonstrated any palpable and overriding error in his findings of fact. It is submitted this aspect of the appeal should be dismissed.

[29] The finding on the 150 gram possession limit is the subject of a portion of the cross-appeal and is dealt with in detail below.

D. JUSTICE MANSON WAS CORRECT THAT IN *CHARTER* LITIGATION THE PLAINTIFFS REPRESENT AN IDENTIFIABLE GROUP WHOSE INTERESTS ARE INCLUDED IN THE MAKEUP OF THE "PUBLIC INTEREST" AND HIS FINDING ON THE BALANCE OF CONVENIENCE WAS NOT IN ERROR.

43. The fundamental question to be answered in the final stage of the analysis is whether granting an injunction is just and equitable in all of the circumstances.[30]

44. In answering this question, particularly in *Charter* cases, it is important to understand that the Appellants do not have a monopoly on the public interest. *All parties* to an interlocutory injunction proceeding may rely on considerations of the public interest and may tip the scales of convenience by demonstrating a compelling public interest in granting or refusing the relief. Moreover, the notion of "public interest" includes both the concerns of society generally and the particular interests of identifiable groups.[31]

45. The Appellants suggest that this case is a "suspension" case, not an "exemption" case, and that, therefore, Justice Manson failed to properly weigh the harm to the public interest that would allegedly flow from granting the Exemption Order. The Appellants say that this harm exists because the Exemption Order effectively suspended the *MMPR* for those that meet its terms and due to the number of persons in the discrete group represented by the Patients. AM paragraph 64.

46. The *MMPR* are not suspended whatsoever for anyone including those meeting the terms of the Exemption Order. Those persons may still participate in the *MMPR* scheme by, for example, becoming clients of LPs, if willing and financially able to do so. Only the provisions of the *MMPR* that repealed the long-standing *MMAR* right to produce one's own medicine (or have a caregiver produce it) are affected by the Exemption Order.

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[30] *MacDonald, supra*, at para. 63
[31] *MacDonald, supra, at paras. 70 & 71. Elsipogtog (FCA), supra, at para. 41*

47. The number of people affected by the Exemption Order does not turn the exemption into a suspension.[32]

48. Despite the Appellants' strained construction of the relief sought and granted, this is not a suspension case. Even if it were, Supreme Court of Canada jurisprudence is clear that Justice Manson had the power to grant the requested relief and, further, that even in suspension cases the appropriate way to parse out which claims are entitled to relief is to apply the appropriate test to the facts.

49. In *MacDonald*, *supra*, the Supreme Court found that it did not matter which relief was sought as:

> *"To hold otherwise would be inconsistent with this Court's finding in Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., [1987] 1 S.C.R. 110. In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in Metropolitan Stores strictly and not by a restrictive interpretation of this Court's jurisdiction".*[33]

50. Moreover, in *Metropolitan Stores*, supra, the Supreme Court considered that the test was set too high in *Morgentaler* by Linden J., when concluding that it is only in "exceptional" or "rare" circumstances that the courts will grant interlocutory injunctive relief: "It seems to me that the test is too high at least in exemption cases when the impugned provisions are in the nature of regulations applicable to a relatively limited number of individuals and where no significant harm would be suffered by the public."[34]

51. Paragraph 65 of the Order sets out precisely what the Respondents/Plaintiff's requested - exemptions and/or mandamus. Mandamus and one of the two requested exemptions (a broad one) were refused.

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[32] That many sick and suffering citizens are part of the discrete group of persons granted exemptions in the Exemption Order provides support for Justice Manson's decision on the balance of convenience, as detailed below

[33] *MacDonald, supra, at pp. 4 and 5*

[34] *Metropolitan Stores, supra, at para 84; R v. Morgentaler, 1988 CanLII 90 (SCC).*

52. Justice Manson's remedy does not broadly apply to all medically authorized persons, despite the Patients' request that it do so. Nor does it require Appellant Health Canada to continue processing new personal exemptions or even changes to otherwise-valid exemptions.[35]

53. The Appellants primary complaint on the 'balance of convenience' analysis appears to be that Justice Manson failed to find, as fact, that the Appellants' evidence about the intended public interest benefits of the *MMPR* outweighed the public interest considerations represented by the Patients. AM paragraph 65.

54. The Appellants, however, demonstrate no palpable and overriding error in those findings.

55. The Appellants say Justice Mason was required to assume that the *MMPR* was intended to provide public benefits. He recognized that, and did so. He also found that, even doing so, the balance favoured the Patients. This was not an error. Order paragraph 100, 117.

56. The Appellants position would essentially create a bright line rule that courts are unable to grant injunctions to litigants against government legislation. As Justice Manson recognized, that is not the law. Public interest in *Charter* litigation *includes* concerns of identifiable groups, such as that represented by the Patients. Order paragraphs 98, 117.[36]

57. Nor can it reasonably be argued that Justice Manson ignored the litany of purported evils of home gardening under the *MMAR* as set out in paragraphs 67 - 78 of the AM. This evidence, along with evidence from the Patients countering much of it as overblown was before Justice Manson. He canvassed it at length (Order paras 106-113)

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[35] Indeed, the under inclusiveness of Justice Manson's Order has prompted litigation presently before this Court and is the subject of the cross-appeal in this matter.
[36] *MacDonald paragraph 65*

and agreed that seeking to prevent these harms was part and parcel of the public interest.[37] (Order paragraphs 106-113, 117).

58. Then, acting in his role as trier of fact, Justice Manson found that the balance favoured the Patients. (Order para 120).

59. The Appellants are forced to concede this point (and by implication that their argument is factual, not legal, and subject to the palpable and overriding error standard) at paragraph 79 of the Appellant's Memorandum:

> "79. Canada's extensive evidence of the public harms associated with the personal production of medial marihuana did in fact lead the Judge to conclude that Canada's public interest in the MMPR "is embodied by the *strong presumption* that the MMPR regime will increase individual and public health, safety, and security by reducing abuses and problems associated with the MMAR" [emphasis added]. However, despite this "strong assumption", the Judge held that the plaintiff's speculative evidence with respect to their financial burdens outweighed these significant benefits."

60. The Patients say 'Precisely'. Despite Justice Manson finding that the *MMPR* was strongly presumed to increase health and safety, on the facts before him he found the balance still favoured granting the limited Exemption Order. The Appellants are unable to argue that he ignored their evidence or made factual errors in his review of that evidence. In effect, the Appellants agree with his review, just not his conclusion. This is not palpable and overriding error.

61. A similar analysis demonstrates the paucity of the Appellants' claims regarding the speculative harms they alleged would befall LPs if the Exemption Order was granted. Justice Manson recognized these possible harms to LPs but understood those harm would be speculative in any "start-up business" in a "novel market." (Order paragraphs 115, 116, 119).

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[37] Even the evidence of Appellants' witness, Constable Holmquist, referenced a 2009 RCMP report showing only 70 licensing violations and 40 sales for profit associated with *MMAR* production; hardly widespread diversion. Order para 45.

62. Faced with this, the Appellants resort to claiming, in effect, that the public interest only includes the goals of government, calling the interests represented by the Patients only "individual interests." AM at paragraph 82. That is not the law.

63. As Justice Manson found, the public interest includes the Patients and others like them having constitutionally adequate access to medical treatment in the form of cannabis. [38]

64. Contrary to the Appellants suggestion, Justice Manson didn't "appear" to conclude that the removal of the *MMAR* rights to produce and possess impeded that access; he did so conclude. AM paragraph 83. Order paragraphs 92 – 96, 119.

65. To be clear, it is not the establishment of the commercial regime created by the *MMPR* that interferes with the Patients' interest in adequate access to medicine, it is the concomitant removal of their ability to produce for themselves or have a caregiver do so in their home gardens.

66. The Appellants rather cheekily suggest (contrary to the evidence and Justice Manson's findings of fact) that the *MMPR* would actually benefit the Patients' access to medicine. AM at paragraph 87.

67. That the bureaucratic processes to obtain legal access to dried marihuana have been somewhat simplified is, one assumes, cold comfort to those who can now more easily qualify to be unable to afford medicine. AM at paragraph 85.

68. The Appellants do not explain how the Patients legal access to medical cannabis is facilitated by either making them into criminals for doing what they have done under license from Appellants for years or forcing them to suffer with insufficient quantities of medicine because they cannot afford to buy it from the private for-profit commercial enterprises created by the *MMPR*.

69. To the contrary, there was no evidence before Justice Manson that the *MMPR* benefits the Patients.

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[38] *MacDonald, supra, at paras. 65, 70, 71.; Elsipogtog (FCA), supra, at para. 41*

70. The Appellants also complain that granting the Exemption Order might harm the new commercial market. AM at paragraphs 88 and 89.

71. The Appellants' position seems to be that critically and chronically ill Canadians, like Mr. Allard, Ms. Beemish and Mr. Davey, should suffer deprivation of medicine impacting the security of their persons, impoverishment that will also have that effect and potential liberty violations so that, eventually, the for-profit businesses licensed under the *MMPR* can succeed and then possibly reduce prices at some point in the future. AM paragraphs 89 through 91.

72. The Appellants' argument on this point demonstrates that they do not actually object to speculative evidence; they simply wanted Justice Manson to accept speculative evidence that favours their position. Even then, the Appellants' expert Dr. Grootendorst did not conclude that granting an exemption *would* cause the LP market to crash. That was one of three possible scenarios to which he would not assign any probability. Order paragraph 53.

73. Even the speculative harm to the LP market alleged by the Appellants is overblown. At paragraphs 90 and 91 of the AM, the Appellants suggest that the Exemption Order applies to "nearly the entire existing medical marihuana customer base."

74. The Patients say, first, that they and others like them are not "customers." They are critically and chronically ill Canadians suffering from significant health conditions who are currently able to affordably provide themselves medicine. Their *Charter* rights and their health should not be sacrificed to ensure the possible profits of commercial enterprises.

75. Factually, the evidence before Justice Manson was that there were some 1 million possible *MMPR* "customers." The approximately 30,000 to 40,000 to which the

Exemption Order is applicable is a tiny fraction of this potential market. Order paragraphs 34 and 43.[39]

76. The Appellants are unable to demonstrate that Justice Manson ignored any of the facts. Similarly, they are unable to demonstrate that he applied an improper legal test to those facts. Instead, the Appellants are left with an argument that Justice Manson, after considering all of the evidence before him and applying the appropriate legal analysis, made conclusions of fact that the Appellants disagree with. This is not palpable and overriding error.[40]

77. Finally, on the issue of balancing, Justice Manson's decision also appropriately recognized that choice of remedy had a role to play. The trial in this matter was fast-tracked (trial commences February 2015) and the remedy imposed was the injunctive relief to protect the Patients from irreparable harm due to the omissions in the *MMPR* affecting them while preserving all of the rest of the enacted *MMPR* and applying the *MMPR* 'possession limits' to the *MMAR* exemptees . (Order para 121).

78. Justice Manson rejected the Patients' request for a broad exemption from the *CDSA* (Order paragraph 124). The Court also rejected the request for mandamus to compel the Respondents to continue the *MMAR* program by processing new patients who qualified pending trial (Order paragraph 125).

79. Instead, he made an Order that was "the least intrusive to the legislative sphere" and issued an Exemption Order applicable only to "those who currently hold a valid ATP, who held a valid DPL or PPL as of September 30, 2013, or hold a valid amended or new DPL or PPL that was issued after September 30, 2013, from the repeal of the *MMAR* and any provisions of the *MMPR* which are inconsistent with the relevant provisions of the *MMAR*, pending an expeditious trial and a decision of this case on its merits." Order para 126.

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[39] Notably, the inception of the commercial licensing in the MMPR preceded the repeal of *MMAR* home and designated gardening provisions demonstrating that the Appellants recognized that the two systems could and would have some temporal overlap. The Exemption Order extends that overlap, but is so limited that it cannot reasonably be said to negate the entire market.

[40] Nor, applying the test for legal error, was it incorrect.

80. In granting this relief, Justice Manson was careful to limit the exemption to only protect against the irreparable harms he found as fact, refusing to exempt the Patients from the 150g personal possession limit imposed by the *MMPR* (but not existing under the *MMAR*) (Order para 127).

81. It is submitted that the Appellants are unable to demonstrate any error in the legal analysis, nor are they able to demonstrate any palpable and overriding error in the factual findings supporting Justice Manson's decision on balance of convenience. The appeal should be dismissed.

CONCLUSION ON APPEAL

82. Justice Manson found, after a full review of the factual record before him, that the Patients would suffer irreparable harm pending trial if an injunction was not granted. This was based on actual evidence, not speculation or hypotheticals, including uncontradicted affidavit evidence from the Patients. Appellants have demonstrated no palpable and overriding errors with these factual conclusions.

83. In addition, Justice Manson found that the balance of convenience favoured granting injunctive relief. He did so after acknowledging that the Appellants were entitled to a strong presumption that the MMPR was intended to benefit the public interest. He appropriately determined that the Patients, representing a discrete and identifiable group, also represented the public interest. The Appellants have identified no legal error in his analysis, nor have they demonstrated that his conclusions were based on palpable and overriding factual errors.

84. For these reasons, the appeal should be dismissed, with costs.

SUBMISSIONS ON CROSS-APPEAL

85. It is submitted that the Appellants are unable to demonstrate any error in the legal analysis, nor are they able to demonstrate any palpable and overriding error in the factual findings supporting Justice Manson's decision on balance of convenience. The appeal Justice Manson found the Cross-Appellants/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.

86. The Court also found that the "balance of convenience" favoured granting an injunction/exemption preserving those rights under the *MMAR* for these Patients pending trial. Order paragraph 120.

87. These conclusions, as detailed above, were based on the evidence before him and should not be overturned on this appeal.

88. Justice Manson, however, erred in law by failing to provide all of these Patients with a responsive and effective remedy, not just some of them.

89. 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*. [41]

90. The Exemption Order does not provide any remedy to Ms. Beemish and Mr. Hebert (or those similarly situated Patients) who were and continue to be "medically-approved" under the *MMAR* but who required administrative changes, such as an address change for their production site, and were unable to obtain those modifications prior to September 30, 2013 and have continued to be unable to do so since.

91. The Exemption Order also does not provide any effective remedy to other medically-approved Patients who otherwise qualified for exemptions under the *MMAR* but failed to obtain/or renew *MMAR* licensing before the Appellant Health Canada ceased processing new licensing requests and renewals (September 30, 2014 for Personal-Use and Designated-Person Production Licenses and March 31, 2014 for Authorizations to Possess).

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[41] *See R. v. Parker (2000) 49 O.R. (3d) 481 (Ont.C.A.) (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).*

92. Finally, the Exemption Order does not provide any effective remedy to Patients holding valid production licenses on September 30, 2013 but whose Authorizations to Possess expired between September 30, 2013 and March 21, 2014 (the date of the Exemption Order and Justice Manson's cut-off for qualifying for that Exemption Order, collectively the "Cutoff Dates").

93. The Patients submit that Justice Manson could and should have:

a) Granted an interim Order in the nature of a constitutional exemption for all medically approved patients and their designated growers if applicable, from ss. 4, 5 and 7 of the Controlled Drugs and Substances Act, followed by a suspension of that exemption for a reasonable period of time to enable the Government of Canada to devise a simple procedure for the registration (? Issuance?) of such medically approved and exempted patients with valid permits pending trial, to avoid the violation of their s. 7 *Charter* rights in the interim period;

b) Ordered that all Patients that held a valid Authorization to Possess (ATP) on March 31, 2014 (instead of March 21, 2014) ,were covered by the Exemption Order, so that all medically approved patients under the *MMAR*, such as the Ms. Beemish and others similarly situated, were and are protected by the interim Exemption Order;

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

d) Ordered that existing possession limits authorized for a particular patient under the *MMAR* continue instead of imposing the *MMPR* requirement that the maximum quantity of dried marihuana authorized for possession shall be that which is specified by their license or 150 g, whichever is less.

e) Included an Order in the nature of Mandamus as the appropriate and just remedy under section 24 (1) of the Canadian *Charter of Rights and Freedoms*, to compel the

Respondents by way of Cross-Appeal, to put in place a procedure pending trial to enable the processing of new medically approved patients whose s. 7 constitutional rights would otherwise be violated, pending trial; or

f) Issued a writ of superintending control in order to have the Court accept and issue exemptions or make administrative changes to existing exemptions for all medically-authorized persons.

PART I – FACTS ON CROSS-APPEAL

94. Finally, the Exemption Order does not provide any effective remedy to Patients holding valid production licenses on September 30, 2013 but whose Authorizations to Possess expired between September 30, 2013 and March 21, 2014 (the date of the Exemption Order and Justice Manson's cut-off for qualifying for that Exemption Order, collectively the "Cutoff Dates").

95. The Patients submit that Justice Manson could and should have:

The Cross Appellants/Plaintiff Patients submit that persons who would otherwise have been medically-qualified under the *MMAR* but whom are not provided responsive and effective remedies by the Exemption Order fall into the following general categories:

A. Patients, like Ms. Beemish and Mr. Hebert, who had valid production and possession licenses 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 with their medicine;

B. Patients who were formerly licensed under the *MMAR* but who were either unable or chose not to renew their licensing prior to the Cutoff Dates because of the imminent cancellation of the *MMAR* program;

C Patients who would have been medically-qualified under the terms of the *MMAR* (and/or whom are medically-qualified under the terms of the *MMPR*) but who were not *MMAR* participants;

D. Patients who require quantities of medical cannabis such that the 150 gram possession limit contained in the *MMPR* and imposed by the Exemption Order on their ongoing *MMAR* possession are caused irreparable harm by their inability to travel or be away from their production site for other than short periods of time due to this limitation.

96. 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 Exemption Order including the harms caused by the inability to afford medicine.

97. As the evidence below 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.

98. If able to produce for themselves (or have a caregiver produce for them) under the *MMAR*, Justice Manson 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.

99. If not permitted to be self-sufficient in this way, Justice Manson 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.

100. 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.[42]

101. Despite this finding, Justice Manson failed to craft or provide a remedy that was/is responsive to and effective at ameliorating these harms. He was aware that, due to a change in residence on October 30, 2013 coupled with the *MMPR*'s arbitrary cut-off

[42] And at average LP pricing of $10 per gram, the cost skyrockets to $600 to $3000 per month, well beyond what is affordable. Order paragraph 27

date for renewing *MMAR* production licensing (September 30, 2013) Mr. Hebert was no longer able to lawfully produce medicine for Ms. Beemish. Order paragraph 26. *MMPR* sections 234, 237, 242, 243

102. Justice Manson did not identify any legal or factual reason to exclude Patients like Ms. Beemish from the Exemption Order.

PART II – POINTS IN ISSUE ON CROSS-APPEAL

103. Justice Manson's Exemption Order provided an effective and responsive remedy to some, but not all, of the Patients he found would be irreparably harmed by the *MMPR*'s repeal of the personal and caregiver production licensing in the *MMAR*. Was his failure to provide a fully effective and responsive remedy for all incorrect?

104. The facts before Justice Manson demonstrated that the 150 gram possession limit imposed by the *MMPR*, but not present in the *MMAR*, restricted Patients to possessing limited quantities of medicine. In some instances, Patients would only be able to lawfully possess less than one week's supply. Despite this, Justice Manson found that no irreparable harm resulted. Was this erroneous?

PART III – SUBMISSIONS ON CROSS-APPEAL

A. STANDARD OF REVIEW

105. The Cross Appellants/Patients submit that Justice Manson's failure to provide a responsive and effective remedy, after a finding that all of the medically approved Patients met the test for the granting of an injunction, was legal error. That error is reviewable on a standard of "correctness". [43]

106. The Cross-Appellants/Patients submit that Justice Manson's factual finding that the *MMPR* imposition of a 150 gram limit on possession did not cause irreparable harm was error. That factual finding is reviewed for palpable and overriding error. *Housen, supra.*

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[43] *Housen v. Nikolaisen,* 2002 SCC 33, paragraphs 5 – 8, 26 – 36.

B. *CHARTER* REMEDIES MUST BE EFFECTIVE AND RESPONSIVE FOR ALL. JUSTICE MANSON'S ORDER WAS NEITHER.

107. 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. [44]

108. 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*."[45]

109. This generous approach to *Charter* interpretation "holds equally true for *Charter* remedies." *Doucet-Boudreau* at paragraph 24. This is because a right is only protected when there are appropriate remedies for violations of that right:[46]

> "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). 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."**

110. In the case at bar, after finding that irreparable harm would flow from the *MMPR*'s removal of the personal and designated production rights in the *MMAR*, Justice Manson was required to craft a responsive and effective remedy for **all** medically approved Patients who qualified under the *MMAR*. Unfortunately, the remedy he crafted was/is neither fully responsive to those harms nor effective for many

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[44] *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 SCR 3 at paragraph 25.
[45] *Doucet-Boudreau* at paragraph 23 -25
[46] *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)*

medically-qualified persons including Ms. Beemish and her designated caregiver spouse Mr. Hebert.

111. Justice Manson could have crafted a remedy or remedies that would have been both responsive and effective for all.

112. In *Parker* the Court of Appeal canvassed the appropriate choice of remedy, concluding that a broad constitutional exemption granted below by Sheppard J. c was inappropriate and substituting a declaration of invalidity of the *CDSA* provisions, together with a suspension of that declaration for a reasonable period of time to enable the Government to try and make the provisions constitutional and a specific exemption was granted to Mr. Parker during that period of suspension of the declaration of invalidity.[47]

113. Here, Justice Manson similarly had available to him the option of declaring the production and possession offences in the *CDSA* to be constitutionally invalid, followed by a suspension of that declaration for a limited time to allow the Cross-Respondent Health Canada to implement simple administrative processes to ensure ongoing coverage for all medically approved patients, and provisions for granting an exemption to medically-qualified Patients during the suspension period.

114. This was, in effect, the remedy preferred by the Ontario Court of Appeal in *Parker* that led to the promulgation of the *MMAR* as the Government's response that it is now trying to replace more than 10 years later with the *MMPR*

115. In that case, the trial judge had "read down" the *CDSA* to exempt all "persons possessing or cultivating cannabis marihuana for the personal medically approved use." *Parker* paragraph 195.[48]

116. The *Parker* 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

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[47] *Parker* paragraphs 195 – 209

[48] This remedy, in the case at bar, would actually have been preferable to the Exemption Order because at least it would have covered all medically-approved Patients, including Ms. Beemish

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.[49]

117. Here, the Patients respectfully submit that the most appropriate way to address the irreparable harms created by the repeal of the *MMAR* provisions allowing personal (and caregiver) production would have been to declare the *CDSA* provisions banning possession, trafficking (to allow designated producers to transfer medicine to their patients) and production (sections 4,5 and 7 of the *CDSA*), to be constitutionally invalid and to suspend that declaration for a limited time (perhaps 30 days) to allow the government to respond with interim procedures while granting an interim exemption to medically-authorized persons during that suspension period.

118. 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.

119. 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. 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.

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[49] *Parker* at paragraphs 198 – 205

120. In addition, as an alternative or in conjunction with the injunction/exemption granted, Justice Manson could have maintained (issued a writ of) superintending control permitting Patients who were medically-qualified but whom otherwise did not meet the terms of the Exemption Order to submit documentation to the Court to qualify for an exemption and to Order Health Canada to address concerns arising pending trial. [50]

121. Alternatively, Justice Manson could have read in a medical exemption to the *CDSA* provisions on production, trafficking and possession with immediate interim effect covering all medically-qualified persons, as the trial court did in *Parker*.

122. Finally, Justice Manson could have declared the *MMPR* provisions that repealed the *MMAR* to be invalid, thus preserving that system pending a trial on the merits and/or could have ordered Cross-Respondent Health Canada to continue to process *MMAR* applications pending trial.

123. All of these options would have appropriately addressed the irreparable harms the Court below found flowed from the repeal of those *MMAR* provisions and, therefore, would have provided a responsive and effective remedy to all Patients including those like Ms. Beemish and her caregiver spouse Mr. Hebert and many others similarly situated.

C. JUSTICE MANSON ERRED BY NOT FINDING IRREPARABLE HARM FLOWING FROM THE 150 GRAM POSSESSION LIMIT IMPOSED BY THE *MMPR*

124. Justice Manson found that the Patients failed to establish irreparable harm flowing from the *MMPR*'s imposition of a possession limit of 150 grams when away from their production site or storage site. The *MMAR* had permitted Patients to possess up to a 30-day supply of medicine when out or away from their site.

125. The Patients submit that Justice Manson committed palpable and overriding error in making this finding.

126. Because of the 150 gram limit:

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[50] *See, eg, Doucet-Boudreau*, paragraphs 87 – 88.

A. Mr. Allard is permitted only a 7.5 day supply of medicine;
B. Ms. Beemish is permitted only a 15 day supply of medicine;
C. Mr. Davey is permitted only a 6 day supply of medicine.

127. This significantly curtails these Patients' mobility rights guaranteed by section 6 of the *Charter*. It in effect prevents these Patients from, for example, visiting out-of-province family for any extended time periods or from accepting work in other provinces.

128. Indeed, the combination of the 150 gram limit and the inability to make administrative changes to one's licensing means that Patients who move are unable to possess or even store anything but a small supply of medicine. In that situation, the Patients are put back into the position of suffering the irreparable harms Justice Manson found – either to risk their liberty by possessing more than permitted or go without sufficient medicine.

129. Having found that irreparable harm flows from having an insufficient supply of medicine, Justice Manson erred by failing to exempt the Patients from the 150 gram possession limit. It is submitted that this error was palpable and overriding and should be reversed.

CONCLUSION ON CROSS-APPEAL

130. This is *Charter* litigation involving violations of the Patient's section 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, but his remedy was neither responsive to all those harms nor effective at preventing all of them pending trial in this matter. Accordingly, the remedy he imposed was incorrect as a matter of law and should be reversed by this Court, with costs and the appropriate remedy imposed that applies to all patients pending trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 22, 2014

JOHN W. CONROY, Q.C.
Counsel for the Respondents

PART V - LIST OF AUTHORITIES

Statutes & Regulations **Page #**

Caselaw