Court File No.: T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

TRIAL RECORD

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No. T-2030-13

FEDERAL COURT

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
J.M.
SHAWN DAVEY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANTS

STATEMENT OF CLAIM

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Vancouver, December 10, 2013 Issued by:

ORIGINAL SIGNED BY
AMANDA DUNN
A SIGNÉ L'ORIGINAL

(Registry Officer)

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TO: The Attorney General of Canada
Attention: Mr. William F. Pentney, Deputy Attorney General of Canada

THE CLAIMS OF THE PLAINTIFFS

1. The Plaintiffs claim as follows:

    a. A Declaration pursuant to s.52 (1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") that 'a constitutionally viable exemption' from the provisions of the *Controlled Drugs and Substances Act must* exist to enable the medical use of Cannabis, by medically approved persons, in any of its effective forms. This constitutional right includes the right of the patient (or a person designated by the patient as a caregiver 'person responsible for the patient' where the patient is unable to exercise this right), to both possess and use Cannabis in any forms and also to cultivate or produce and possess Cannabis in any form, for the treatment of the patient's medical condition.

    b. A Declaration, pursuant to s.52 (1) of the *Charter*, that the *Marihuana for Medical Purposes Regulations* (*MMPR*) that came into force on June 19, 2013, (and run concurrently with the *Medical Marihuana Access*

Regulations (*MMAR*) until March 31, 2014 when the *MMAR* will be repealed by the *MMPR)* are unconstitutional to the extent that:

i. They fail to provide for the continued personal production of their medicine by the patient or a designated caregiver 'person responsible for the patient' where the patient is unable to exercise this right, as provided for currently in the *MMAR;*

ii. The *MMPR* unreasonably restricts the s. 7 *Charter* constitutional right of a medically approved patient to reasonable access to their medicine by way of a safe and continuous supply and,

and are inconsistent with the s.7 *Charter* right and are not saved by s. 1 of the *Charter.*

c. A Declaration, pursuant to s.52 (1) of the *Charter*, that the limits in the *Narcotic Control Regulations (NCR), MMAR* and in the *MMPR*, to possessing, selling or providing only "dried marihuana" are arbitrary and constitute an unreasonable restriction on the s. 7 *Charter* rights of these patients and are inconsistent therewith and in violation thereof and not saved by s. 1 of the *Charter,* in accordance with the principles and findings underlying the judicial decision in ***R. v. Smith*** 2012 BCSC 544.

d. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically limit production by a 'Licenced Producer' of Cannabis to "indoors", prohibiting any, even temporary, outdoor production and prohibiting production in "a dwelling house," are unconstitutional, to the extent that they might be found to be applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits and restrictions amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*;

e. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically restrict the amounts relating to possession and storage by patients, including the "30 x the daily quantity authorized or 150 gram maximum, whichever is the lesser", and other limitations applicable or imposed upon 'Licenced Producers' in relation to their registered clients

/ patients are unconstitutional, to the extent that they are applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits in the *MMPR* amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*.

f. An Order pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just interim remedy, in the nature of:

   i. An interim constitutional exemption from ss.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the *Narcotic Control Regulations* C.R.C., c.1041 (*NCR*), the *MMAR* or the *MMPR*, including those patients who have a caregiver 'person responsible' for them designated to produce for them, including an exemption for that caregiver 'person responsible' designated producer, pending trial of the merits of the action or such further Order of the court as may be necessary;

   or, alternatively

   ii. an interlocutory exemption/injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage, by a patient or designated caregiver 'person responsible for the patient' and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers that are inconsistent with their s. 7 constitutional right under the *Charter* pending the decision of this Court on the merits of this action.

   or alternatively, and together with

   iii. an interim/interlocutory order in the nature of *mandamus* to compel the Defendant to process all applications, renewals and modifications to any licences pursuant to the *MMAR* in accordance with all of its provisions (other than those challenged as unconstitutional herein), notwithstanding ss.230, 233-234, 237-238, 240-243 of the *MMPR* relating to applications under the *MMAR*

after September 30th, 2013 as reflected in the amended *MMAR* sections 41-48.

g. An Order under s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just final remedy, in the nature of:

   i. a permanent constitutional exemption from ss.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the *Narcotic Control Regulations* (*NCR*), the *MMAR* or the *MMPR*, including those patients who have a caregiver 'person responsible' for them designated to produce for them, including that designated producer, until such further Order of the court;

   or, in the alternative

   ii. a permanent exemption/ injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage by a patient or designated caregiver 'person responsible' and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers 'person responsible' that are inconsistent with their s.7 *Charter* Rights. Such order to continue until such time as the Defendant makes appropriate amendments to the *MMPR* or otherwise to comply with any decision of this Court to ensure the full ambit and scope of the patient's constitutional rights pursuant to s. 7 of the *Charter*, without any unreasonable, inconsistent and unnecessary restrictions thereon.

h. Costs, including special costs and the Goods and Services Tax and Provincial Services Tax, on those costs, if appropriate; and

i. Such further and other relief as this Honourable Court deems appropriate and just in all of the circumstances.

THE PARTIES

2. The Plaintiff Neil Allard, is a resident of British Columbia and has been medically retired since 1999 and has an address for service, care of Conroy and Company, 2459 Pauline St., Abbotsford, BC.

3. The Plaintiff Tanya Beemish is a resident of British Columbia, unemployed, disabled and on a disability pension and the Plaintiff David Hebert is a resident of British Columbia, is Tanya Beemish's common-law husband and the person responsible for her as her caregiver and designated producer under the *MMAR* of her medicine. They have an address for delivery care of Conroy and Company 2459 Pauline St., Abbotsford, BC.

4. The Plaintiff J.M., is a resident of British Columbia, is unemployed and has been permanently disabled and on pension since 1979 and has an address for delivery care of Conroy and Company, 2459 Pauline St., Abbotsford, BC.

5. The Plaintiff Shawn Davey is a resident of British Columbia and is unemployed surviving off of settlement funds and a pension since 2000 and has an address for deliver care of Conroy and Company, 2459 Pauline St., Abbotsford, BC.

6. The Plaintiffs bring these claims for declaratory relief and interlocutory and permanent relief pursuant the *Federal Court Act* and *Rules* and ss.7 and 24(1) of the *Charter of Rights and Freedoms*, on behalf of themselves as persons ordinarily resident in Canada who have been medically approved to use cannabis as medicine as a patient under professional treatment for a condition for which the person is receiving treatment either under:

> All persons ordinarily resident in Canada who have been medically approved to use cannabis as medicine as a patient under professional treatment for a condition for which the person is receiving treatment, either under the *Narcotic Control Regulations,* C.R.C., c. 1041, the *Medical Marihuana Access Regulations (MMAR)* SOR/2001-227 since July 30th, 2001 or the *Marihuana for Medical Purposes Regulations (MMPR)* since June 19th, 2013 and in particular since September 30th, 2013.

7. The number of patients approved under the *NCR* and under the *MMPR* since June 19th, 2013 or in particular since September 30th, 2013, when no further amendments could be made to existing *MMAR* licences, are unknown. There are approximately 35,000 to 40,000 patients currently holding Authorizations to Possess (ATPs) under

the *MMAR*, of which some 24,000 – 30,000 hold Personal Production Licences (PPLs). Some 4,250 of those patients have Authorizations to Possess (ATPs) and rely upon a person responsible for them as a Designated Grower (DG) to produce their medicine for them. Some 6,000 of those patients obtain their medicine through the government supply. The specific details with respect to the Class are within the knowledge and possession of the Defendant.

8. The Defendant, Her Majesty the Queen in Right of Canada, as represented by the Attorney General of Canada, is named as the representative of the Federal Government of Canada and the Minister of Health for Canada who is the Minister responsible for Health Canada and certain aspects of the *Controlled Drugs and Substances Act* including the *Narcotic Control Regulations*, the *Marihuana Medical Access Regulations* and program and the *Marihuana for Medical Purposes Regulations* and program.

BACKGROUND

The *Controlled Drugs and Substances Act*

9. Cannabis, its preparations, derivatives and similar synthetic preparations are listed in Schedule II to the *Controlled Drugs and Substances Act*, S.C. 1996, c.19, and amendments thereto (the "*CDSA*"). Its production, possession, possession for the purposes of distribution or trafficking, and trafficking, as well as importing and exporting are prohibited by this Statute as a "controlled substance", formerly known as "narcotics".

10. Section 56 of the *CDSA* permits the Minister for Health for Canada (the "Minister") or his designate, to exempt any person, class of persons, controlled substance or precursor of an a controlled substance from the application of the *CDSA* or its Regulations if, in the Minister's or the designates opinion, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

11. While no viable constitutional medical exemption to the prohibition against the possession, possession for the purpose of trafficking, trafficking and cultivation or production of cannabis, or other offences, existed prior to July 30th, 2001, the *Narcotic Control Regulations* C.R.C., c.1041, and specifically s.53, continued pursuant to the *Controlled Drugs and Substances Act* provided as follows:

53. (1) No practitioner shall administer a narcotic to a person or animal, or prescribe, sell or provide a narcotic for a person or animal, except as authorized under this section.

(2) Subject to subsections (3) and (4), a practitioner may administer a narcotic to a person or animal, or prescribe, sell or provide a narcotic for a person or animal, if

(a) the person or animal is a patient under his professional treatment; and

(b) the narcotic is required for the condition for which the person or animal is receiving treatment.

(3) No practitioner shall administer methadone to a person or animal, or prescribe, sell or provide methadone for a person or animal, unless the practitioner is exempted under section 56 of the Act with respect to methadone.

(4) A practitioner of medicine, dentistry or veterinary medicine shall not administer diacetylmorphine (heroin) to an animal or to a person who is not an in-patient or out-patient of a hospital providing care or treatment to persons, and shall not prescribe, sell or provide diacetylmorphine (heroin) for an animal or such a person.

12. This Regulation was amended by the *MMAR* in July, 2001 to add at the end of s.53(1) the words "or the Marihuana Medical Access Regulations". On June 19th, 2013, by virtue of s.127(1) of the *MMPR*, s.53(1) was further amended to include the words at the end after the word "section", "the Marihuana Medical Access Regulations or the Marihuana for Medical Purposes Regulations." The words "Marihuana Medical Access Regulations" are to be deleted upon the repeal of the *MMAR* on March 31st, 2014 by the *MMPR*. In addition the *MMPR* adds the following as sub-section (5):

(5) A health care practitioner may administer **dried marihuana** to a person or prescribe or transfer it for a person if

(a) the person is a patient under their professional treatment; and

(b) the **dried marihuana** is required for the condition for which the person is receiving treatment. (emphasis added)

13. As a result of the decision of the Ontario Court of Appeal in ***R. v. Parker*** (2000) 49 O.R. (3d) 481 (leave to appeal to the Supreme Court of Canada dismissed) recently reaffirmed in ***Her Majesty the Queen and Matthew Mernagh*** (2013) O.C.A 67 (February 1st, 2013) (leave to appeal to SCC dismissed July 25th, 2013), the Government of Canada was required, in order to ensure that the *Controlled Drugs and Substances Act* was in compliance with the Canadian Constitution and in particular s.7 of the *Canadian Charter of Rights and Freedoms*, to put in place a "constitutionally viable medical exemption to the prohibition against the possession and cultivation of marihuana, that requires medical oversight".

14. The failure on the part of the government 'to provide reasonable access for medical purposes' as an exemption to the general prohibition violated s.7 of the *Canadian Charter of Rights and Freedoms* in that the 'liberty' and 'security of the person' of the patient was affected in a manner that was inconsistent with the "principles of fundamental justice".

15. Initially the government, pursuant to s.56 of the *CDSA* issued an "Interim Guidance" document and processed exemptions under that section until ultimately on July 30th, 2001 the *Medical Marihuana Access Regulations* (*MMAR*) came into effect.

<u>The *Medical Marihuana Access Regulations (MMAR)* SOR / 2001-227</u>

16. The *MMAR* established a framework or scheme where an individual could apply to Health Canada with the support of their medical practitioner for an "Authorization to Possess" (ATP) "dried marihuana" in accordance with an authorization for medical purposes. The Regulations set out various categories 1 – 3 relating to symptoms of various medical conditions with the latter categories requiring the involvement of one or two specialists. The ATP was subject to annual renewal.

17. There being no lawful supply of seeds or plants, the *Regulations* provided for the individual to obtain a Personal Use Production Licence (PUPL) to produce for them an amount of cannabis and to store and possess certain amounts depending upon a calculation derived from the medical practitioner's authorization of grams per day for the particular ailment.

18. A "Personal Production Licence" (PPL) pursuant to the *Medical Marihuana Access Regulations*, enables the patient to produce and store their own medicine at chosen location in amounts determined according to a formula under the regulations that is dependent upon the number of grams per day authorized by the physician.

19. In addition the *Regulations* provide for a "Designated Person Production Licence" (DPPL) authorizing someone to produce dried marihuana for the patient.

20. All licences are subject to annual renewal and specify not only the number of plants permitted to be produced, but also the amount to be stored and the location of the storage and the specific amount that the patient could possess on his or her person at any time(30 times the daily limit with no maximum).

21. The licence provides for production entirely indoors or partly indoors and partly outdoors subject to some restrictions, including a prohibition against the simultaneous production of marihuana partly indoors and partly outdoors.

22. There is no prohibition against production at one's ordinary place of residence or in any 'dwelling place' and if the production site is not owned by the producer and is not the applicant's ordinary place of residence then the consent of the owner is required.

23. Initially, these Regulations provided that a designated producer could only produce for one patient holding an ATP and there could only be three licences in one place. Furthermore the Regulations are limited to the production and supply of "dried marihuana" and no other form.

24. Subsequent to ***Parker (supra)*** as a result of further litigation, in both civil and criminal cases, including, ***Wakeford v. Canada*** [1998] O.J. 3522; [2000] O.J.1479; [2002] O.J. No. 85, Ont.CA ***R. v. Krieger*** 2000 ABQB 1012, 2003 ABCA, 2008 ABCA 394, ***Hitzig v. Canada*** (2003) 177 OAC 321, issues were raised with respect to the lack of a legal source and safe supply thereof, and the government of Canada on July 8th, 2003 announced an "Interim Policy" whereby marihuana seeds and dried marihuana grown by Prairie Plant Systems (PPS) under contract for the government for research purposes would become available to individuals having an exemption under the *MMAR* or under s.56 of the *CDSA*. This policy was to be in place until further clarification was made by the courts.

25. As a result of the Ontario Court of Appeal decision in ***Hitzig (supra)*** the Government of Canada on December 3rd, 2003 amended the *MMAR* to comply with that decision to some extent but re-enacted the provision permitting a designated producer to only produce for one patient in virtually identical terms. Consequently, while a government supply of cannabis became available to authorized permit holders who did not have a Personal Production Licence or a Designated Grower, the Designated Grower was once again still limited to producing for only one person.

26. On June 29th, 2005 the Government of Canada made further amendments to the *MMAR* re-defining the types of applicants by merging categories 1 and 2 into category 1, requiring the declaration of only one physician, and merging category 3 into 2 and eliminating the requirement of a declaration from a specialist but still requiring a consultation with one.

27. On October 3rd, 2007 further amendments were made to the *MMAR* but still leaving the designated producer's ability to produce for only one person in place. However, as a result of the decision of the Federal Court of Appeal in ***Sfetkopoulos v. AG Canada*** 2008 FC 33 (FCTD) and 2008 FCA 328 (FCA),essentially following ***Parker*** and ***Hitzig (supra)*** that provision was struck down again as being a negative restriction violating s.7 of the *Charter* in that it was arbitrary and not in accordance with the principles of fundamental justice.

28. In response, the Government of Canada on May 14th, 2009 enacted a new ratio allowing a designated producer to produce for two authorized persons.

29. The *MMAR* also provided that there could only be three production licences at one location and no more. This section was also challenged in the courts and found to be too restrictive in the case of ***R. v. Beren and Swallow*** (2009) BCSC 429 and the government's response to the striking down of that section was simply to amend the *MMAR* and allow up to four licences at one location.

<u>The *Marihuana for Medical Purposes Regulations (MMPR)*</u>

30. On June 19th, 2013 the *Marihuana for Medical Purposes Regulations (MMPR)* SOR/2013-119 came into effect. These Regulations run concurrently with the *MMAR* until March 31st, 2014 when, by virtue of s. 267 of the *MMPR*, the *MMAR* will be repealed and all personal use production licences and designated producer licences

will be terminated effective that date regardless of the dates specified on the actual licences previously issued. While "access" is increased slightly by the definition of a "Health care practitioner" being expanded to include "nurse practitioners", the question of "supply" is dealt with by providing for "licenced producers" as the sole source of supply to registered patients, doctors or hospitals for patients.

31. The *MMPR* puts in place a transitional scheme to be implemented between now and March 31st, 2014 whereby persons holding an Authorization to Possess and a Personal Production Licence or a Designated Producer will obtain a notice of authorization from the Minister to sell their plants or seeds to a licenced producer. While the ATP continues to be valid for purposes of registration with a licenced producer up until March 31st, 2015, no more applications under the *MMAR* or renewals or amendments to existing licences are permitted after September 30th, 2013. After that date the patient with an 'Authorization to Possess' is to obtain cannabis by registering as a client with a licenced producer or attending on their health care practitioner and obtaining from them a "medical document" that sets out the authorized grams per day and that authorization can only be filled by a licenced producer directly or indirectly through the doctor or a hospital obtaining it from a licenced producer. ATP's can also continue to access the government PPS supply

32. The *MMPR* continues to limit possession by a patient to "dried marihuana" and the patient cannot possess any more than 30 times the daily quantity authorized or 150 grams whichever is the lesser amount(ss.3-6). The "licenced producers" are not permitted to conduct any activity at a 'dwelling place' and production and related activities can only take place 'indoors' and not 'outdoors'(ss.12 – 15).

33. In the Government of Canada produced "Regulatory impact analysis statement" about the *Marihuana for the Medical Purposes Regulations* in the Canada Gazette, Volume 146, #50 on December 15th, 2012 it is indicated that the main economic cost associated with the proposed *MMPR* would arise from the loss to consumers who may have to pay a higher price for dry marihuana estimated to be $1.80 per gram to $5.00 a gram in the status quo to about $7.60 per gram in 2014 rising to $8.80 per gram thereafter.

34. As of November 1st, 2013 there were three approved licenced producers(LP's) and one of them is a wholly owned subsidiary of Prairie Plants Systems the former government sole contractor, and goes by the name of 'CanniMed Ltd.' It has

indicated that the price of its product will be between $8.00 and $12.00 a gram. The others are called "The Peace Naturals Project Inc' and 'Mettrum Ltd.' and their estimated prices are currently unknown to the Plaintiffs.

35. Whereas persons can be approved for the use of cannabis (marihuana) under the *Narcotic Control Regulations* or since September 30th, 2013 under the *Marihuana for Medical Purposes Regulations,* the bulk of the Class of the persons affected were approved under the *Medical Marihuana Access Regulations* since July 31st, 2001 and continuing until its repeal on March 31st, 2014. According to Health Canada statistics there are:

- 24,185 of those persons held personal use production licences ("PPLs").
- 4,251 persons held designated grower production licences (DGs).
- 6,027 persons had access to Health Canada's supply of dried marihuana (presumably through the government contractor Prairie Plant Systems).
- 27,015 licences were issued to produce entirely indoors
- 3,334 licences were issued to produce entirely outdoors.
- 2,670 licences were issued to individuals producing indoors in the winter and outdoors in the summer.

36. A research survey, supported by the UBC Institute for Healthy Living and Chronic Disease Prevention, of patient characteristics under the MMAR disclosed that some 60 to 70% of those persons authorized to possess cannabis (marihuana) for medicine are on disability pensions and that affordability was a substantial barrier to access by all income groups.

37. As of April, 2013, Health Canada authorized the production of 188,189 kg of Cannabis (marihuana) to be produced under the *MMAR* under the various licences during 2012 broken down as follows:

- 15,752.88 kg : for patients needing to use 1 to 5 g per day;
- 42,054.31kg: for patients needing to use 6 to 10 g per day;

- 89,127.44 kg: for patients needing to use 11 to 20 g per day;
- 12,795.62 kg: for patients needing to use 21 to 50 g per day;
- 3195.21 kg: for patients needing to use 51 to 100 kg per day; and
- 4,854.87 kg: for patients needing to use 101 to 150 g per day.
- Apparently there are 89 persons in Canada with authorizations to possess with dosage levels of 150 g or more per day.

38. The Plaintiffs hold the following licence/s issued by Health Canada, pursuant to the *Medical Marihuana Access Regulations (MMAR)* under the *Controlled Drugs and Substances Act* (CDSA):

- Neil Allard: personal production licence & authorization to possess as medicine
- J.M.: personal production licence & authorization to possess as medicine;
- Tanya Beemish: authorization to possess as medicine;
- David Hebert: designated grower licence (for patient Tanya Beemish); and
- Shawn Davey: authorization to possess and personal production licence.

39. The Plaintiff, Neil Allard, age 59, resides in British Colombia. He became severely ill in 1995 and unable to continue work as an Area Counselor at Veterans Affairs Canada, and by 1999 was placed on permanent medical retirement. He suffers from 'Myalgic Encephalomyelitis' and 'clinical depression'.

40. Mr. Allard currently holds an Authorization to Possess (ATP) and a Personal Production Licence ("PPL"), under the *MMAR*, and he has been so authorized on an annual basis since 2004. He is authorized to produce at his residence/dwelling house and constructed a facility for that purpose, at considerable cost and took a course through Malaspina College on how and what to do with respect to marihuana production.

41. Mr. Allard produces indoors and has produced outdoors and in a greenhouse. He is authorized to consume a daily dose of medical marihuana of 20 grams a day and uses the marihuana in various forms. These include edibles, where the dried marihuana is baked into another product for consumption ("Edibles"), juiced, where the leaves from the raw marihuana plant are blended together to form a juice for

consumption ("Juiced"), vapourized, where the active ingredients of the dried marihuana are inhaled when comingled with water particles in a vaporizer device ("Vapourized"), and in topical oils, which contain the extracted active ingredients in marihuana and are then applied directly to the skin ("Oils"). He does not smoke dried cannabis (marihuana) in cigarettes/joint form.

42. Additionally, Mr. Allard works with 13 different specific strains of marihuana that he grows organically to help manage his medical condition and says that certain strains do not work for him and are problematic and he is very concerned about quality control. He also asserts that he derives therapeutic benefit from the production of his own Cannabis plants.

43. The Plaintiff, Tanya Beemish, age 27, resides in British Colombia with her common-law spouse, the Plaintiff David Hebert. Ms. Beemish suffers from 'Type One Diabetes' and from a complication thereof called "Gastroparesis" or "delayed gastric emptying" which causes frequent vomiting and causes significant pain and nausea. She has to regularly attend the Emergency department at the Royal Columbian Hospital. She is unemployed and receives a monthly permanent disability pension.

44. Ms. Beemish has held an ATP since 2012 and her common-law spouse, the Plaintiff David Hebert also acts as the person responsible for her as her caregiver Designated Grower ("DG") as she cannot produce her medicine for herself due to her illness and they cannot afford to purchase her medicine from the illicit market. She is unemployed, disabled and on disability pension. They have constructed a safe and secure production facility in their dwelling house, having invested in appropriate equipment for production and related purposes, including safety and security.

45. Ms. Beemish presently consumes between 2-10 grams per day, usually by smoking, and vapourizing, as well as edibles by way of baked goods, juicing, and oils. She relies on two unique "blueberry cross" strains to help manage the pain of her illness. Both Ms. Beemish and Mr. Hebert are concerned about losing control over the production of her medicine in a secure and safe manner at reasonable cost.

46. The Plaintiff, J.M., age 54 resides in British Columbia. He is an unemployed, paraplegic, suffering a permanent injury at the sixth thoracic vertebra of the spine from a cliff diving accident in August 1979 and is wheelchair-bound. He suffers from

chronic and severe muscle spasms, and severe pain in his back and torso. He is on a CPP permanent disability pension.

47. J.M. received his ATP and PPL in 2001 and currently consumes 20 grams per day by way of edibles, teas and juicing (smoothies). He makes infused butter using fresh raw leaves. He does not smoke dried marihuana.

48. J.M. produces both indoors and outdoors. He constructed his own personal wheelchair accessible growing facility in which he safely and securely produces his own medicine through a clean organic process without any pesticides, fungicides, or other chemicals additives. He produces outdoors for part of the year, enabling him to reduce his costs even further and derives therapeutic benefit from the production of this medicine over the last 12 years. He cannot afford to purchase from the illicit market, including Compassion Clubs or dispensaries. He relies on a specific strain to help manage his disability.

49. The Plaintiff Shawn Davey, age 37, resides in British Columbia. He is unemployed due to a brain injury suffered in a motor vehicle accident on June 16th, 2000 and survives off of funds from a settlement in relation to the motor vehicle accident and a CPP disability pension.

50. Mr. Davey has and ATP and PPL having discontinued the use of a Designated Grower who held the Designated Person Production Licence because that grower could not produce his medicine to a satisfactory standard for him. He is currently authorized to use 25 grams per day that he consumes by way of smoking, edibles and various other forms. He produces indoors in a separate outbuilding on a 5 acre piece of property and has invested heavily in security measures and fire protection measures and has never had a toxic mold problem.

51. Mr. Davey says that he will not be able to afford to purchase from licenced producers at the estimated price of $8 to $12 a gram, nor from the illicit market or compassion clubs or dispensaries at similar prices. Cannabis (marihuana) is the only medication that he now uses having stopped the use of all other narcotics and if he is compelled to stop producing for himself at an estimated $1 to $4 a gram he

would have to return to the narcotics at a cost of approximately $3,000.00 per month, a portion of which would be defrayed by Pharmacare/insurance coverage. The cost estimated for cannabis (marihuana) from a licenced producer for a month would be more than that and not covered by any Pharmacare/insurance program.

52. Mr. Davey is also very concerned to ensure quality control over his production by way of organics and sanitation to ensure safety and cleanliness and the lack of contamination of any kind.

53. All of the Plaintiffs, except David Hebert, are unemployed and on disability pensions. Some of them have experienced purchasing their medicine from Compassion Clubs/Dispensaries and other aspects of the illicit market or from the government supply but determined that they could not afford to continue to do so for economic and other reasons.

54. Consequently, they each invested substantially in creating their own production facility/room in a dwelling house, or outbuilding, including investing in appropriate indoor production equipment and other related equipment to prevent the escape of odors and for safety and security purposes.

55. Some have also produced in greenhouses and outdoors, at substantial electrical costs savings, as well as indoors. Some have also invested considerable time educating themselves on how to produce, how to produce safely for their medical condition, including organic production, and how to produce certain strains of Cannabis (Marihuana) that are most effective for their medical condition.

56. All of them fear the loss of control over the safe continuous production of their own medicine at reasonable cost, including use of their developed specific effective strains, by the production by others who will be producing for many others, and fear that they will not be able to afford the cost of the medicine to be sold by the new Licence Producers, estimated to be similar to illicit market prices.

57. All of the Plaintiffs reside in British Columbia, and are therefore not limited to using only "dried marihuana" as provided in the *NCR, MMAR* and *MMPR* due to the decision in ***R v. Smith*** 2012 BCSC 544, which is on appeal, and is only applicable in British Columbia and in relation to the *MMAR*. The Plaintiffs use Cannabis in its various forms, including in its raw form for juicing, and making butter, as well as

using oils and tinctures, using it in teas, and as salves and creams for topical applications, or by making edibles and by smoking in cigarettes/joints or using a vaporizer or atomizer. Medically approved patients outside British Columbia offend against the Controlled Drugs and Substances Act if they exceed the terms of their license limiting them to "dried marihuana". It is an offense to separate or extract the resin glands from the dead plant material and a further offense to possess those resin glands, whether as resin or "hashish, or when infused into derivative products such as foods, oils or even tea. It is an offence to possess cannabis juice derived from the natural undried plant as it is not "dried marihuana".

58. The Plaintiff Allard is medically retired and the Plaintiffs Tanya Beemish and J.M. are on permanent disability pensions. They rely on specific strains and exercise particular control over their production environments due to "immune system" concerns and usually produce in their dwelling house or in an outbuilding on their property adjacent to their dwelling house. JM produces partly indoors and partly outdoors and the Plaintiff Allard has produced partly outdoors but primarily indoors and the Plaintiff Hebert on behalf of Beemish produces indoors. The Plaintiffs not only use cannabis as "dried marihuana" by smoking or vapourizing, but also use it in its natural form through cold press juicing, as well as various other methods of vaporizing and atomizing and some use extractions such as topical oils for skin conditions and many use edibles or baked goods.

59. The Plaintiffs say that they are able to produce their cannabis at between $1.00 and $4.00 a gram or less and that they will not be able to afford the estimated Licenced Producer prices which are comparable to illicit market prices and that affordability is a barrier to access across all income levels.

60. There are questions of law and fact common to the class. The claims of the Plaintiffs are typical of the claims for the class and the Plaintiffs herein will adequately represent and protect the interests of the said class.

The Constitutional Violations Alleged – Section 7 of the *Charter*

61. The Plaintiffs plead and rely on ss.1, 7, 24(1) and 52(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), Part 1 of the *Constitution Act*, 1982 being Schedule B to the *Canada Act*, 1982 (U.K.) 1982, c.11 (the "*Constitution Act 1982*").

62. The Plaintiffs say that they are entitled to a Constitutionally viable exemption from the provisions of the *Controlled Drugs and Substances Act, supra*, to enable their medically approved use of cannabis, in any or all of its effective forms. This includes the right of the patient (or a person responsible for the patient) to produce and possess the cannabis for themselves (or the patient) for medical purposes in order:

- to ensure a safe, quality controlled supply;
- at a reasonable cost that is within their economic means; and
- to do so inside or outside of their dwelling house, subject only to reasonable regulations regarding safety and security.

MMPR – The Omission to Include Personal Production

63. The Plaintiffs say that any unreasonable restriction on their constitutional right of reasonable access, including precluding them from:

- producing for themselves or if unable having somebody produce for them;
- growing in their dwelling house or outside their dwelling house;
- consuming cannabis that is other than "dried marihuana,

will cause the Plaintiffs to have to choose between their liberty and their health. Consequently, this will impact the liberty and security of their person and in a manner that is not in accordance with the principles of fundamental justice, namely, precluding arbitrariness in the deprivation of rights, that does little or nothing to advance the governments interest, gross disproportionality in effects, and an administrative structure made up of unnecessary rules that result in an additional risk to the health of the person and that are manifestly unfair, thereby violating their right to life, liberty and the security of their person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as preserved

by s.7 of the *Canadian Charter of Rights and Freedoms* and these provisions are not saved under s.1 of the *Charter*.

NCR/MMAR/MMPR – The Limitation to Dried Marihuana Only

64. The Plaintiffs say that the restriction with respect to "dried marihuana only" in the *MMPR* that also exist in the *MMAR* and *NCR* is an unconstitutional violation of s.7 of the *Charter* as an unreasonable restriction. In British Columbia that provision of the *MMAR* was struck down as unconstitutionally restrictive as that limitation did little or nothing to enhance the government's interest including the government's interest in preventing diversion of the drug, or controlling false and misleading claims of medical benefit and that it was arbitrary and violated s.7 of the *Charter* (***R. v. Smith*** 2012 BCSC 544 (currently on appeal to the BCCA). The Plaintiffs say that the decision in *Smith (supra)* should be followed federally and applied across Canada to the putative class to enable medically approved patients to consume their medicine in whatever form is most effective for them and to avoid a form that may be harmful to them, and that such a limitation in the *NCR*, *MMAR* and *MMPR* is unconstitutional as being in violation of s.7 and inconsistent therewith and is not saved by s.1.

MMPR – Other Limitations – Dwelling House, Outdoor and Possession Limits

65. The Plaintiffs say that the proposed *MMPR* restrictions preventing production in a dwelling house and preventing any production outdoors in particular, as well as other restrictions applicable to licenced producers, should not be applicable to the patient or personal producer or designated caregiver because they amount to unnecessary restrictions in relation to the patient producer or his or her designate and would be unconstitutionally too restrictive. As the patient producer or his designate would not be involved in selling any of their product to any members of the public, none of the provisions of the *MMPR* relating thereto, such as packaging and labeling and the costs thereof, including packaging arbitrary maximum amounts in containers that a person can possess on their person at any one time, such as the maximum of 150 g, regardless of one's authorized dosage, should not apply to the patient, producer or designate, and if any such limits are held to apply they should not be less than 30 times the daily dosage with no maximum, as provided in the MMAR

THE RELIEF

66. The plaintiffs claim as follows:

a. A Declaration, pursuant to s.52 (1) of the *Canadian Charter Of Rights and Freedoms* that 'a constitutionally viable exemption' from the provisions of the *Controlled Drugs and Substances Act (CDSA)*, in accordance with the principles and findings underlying the judicial decisions in ***R v. Parker***, (2000), 49 O. R. (3d) 481, ***Hitzig v. Canada*** (2003) 231 D.L.R. (4th) 104 and ***R v. Mernagh***, 2013 ONCA 67,to enable the medical use, by medically approved persons, of Cannabis, in any of its effective forms, includes the right of the patient (or a person designated as responsible for the patient), to not only possess and use Cannabis in any of its forms, but also to cultivate or produce and possess Cannabis in any form, that is effective for the treatment of the patient's medical condition;

b. A Declaration pursuant s.52(1) of the *Canadian Charter of Rights and Freedoms* that the *Marihuana for Medical Purposes Regulations* (*MMPR*) that came into force on June 19, 2013, and that run together or concurrently with the *Medical Marihuana Access Regulations* (*MMAR*) until March 31, 2014, when the *MMAR* will be repealed by the *MMPR*, are unconstitutional to the extent that the *MMPR* unreasonably restricts the s. 7 *Charter* constitutional right of a medically approved patient to reasonable access to their medicine by way of a safe and continuous supply, by failing to provide for the continued personal production of their medicine by the patient or a designated caregiver of the patient, as provided for currently in the *MMAR*, and as such violates the constitutional rights of such patients pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* and is inconsistent there with and not saved by section 1 thereof;

c. A Declaration pursuant to s.52 (1) of the *Canadian Charter of Rights and Freedoms* that the limits in *NCR, MMAR* and in the *MMPR*, to possessing, selling or providing only "dried marihuana" are arbitrary and constitute an unreasonable restriction on the s. 7 *Charter* rights of these patients and are inconsistent there with and not saved by s. 1 of the *Charter*, in accordance with the principles and findings underlying the judicial decision in ***R v. Smith***, 2012 BCSC 544;

d. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically limit production by a 'Licenced Producer' of Cannabis to "indoors", prohibiting any, even temporary, outdoor production and prohibiting production in "a dwelling house," are unconstitutional, to the extent

that they might be found to be applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits and restrictions amount to arbitrary and unreasonable restrictions on the patients s. 7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*;

e. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically restrict the amounts relating to possession and storage by patients, including the "30 x the daily quantity authorized or 150 gram maximum, whichever is the lesser", and other limitations applicable or imposed upon 'Licenced Producers' in relation to their registered clients / patients are unconstitutional, to the extent that they are applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits in the *Narcotic Control Regulations* (*NCR*) and in the *MMPR* amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*.

f. An Order under s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just interim remedy, in the nature of :

    i. a constitutional exemption from s.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the *Narcotic Control Regulations* (*NCR*), the *MMAR* or the *MMPR*, and/or those patients who have a person responsible for them designated to produce for them, including that designated producer, pending trial of the merits of the action or such further Order of the court as may be necessary

    or in the alternative,

    ii. an interlocutory exemption/injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage, by a patient or designated caregiver and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers that are inconsistent with their s. 7 constitutional right under the *Charter* pending the decision of this Court on the merits of this action;

or alternatively, and together with

iii. an interim/interlocutory order in the nature of *mandamus* to compel the Defendant to process all applications, renewals and modifications to any licences pursuant to the *MMAR* in accordance with all of its provisions (other than those challenged as unconstitutional herein), notwithstanding ss.230, 233-234, 237-238, 240-243 of the *MMPR* relating to applications under the *MMAR* after September 30th, 2013 as reflected in the amended *MMAR* sections 41-48.

g. An Order under s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just final remedy, in the nature of:

i. a permanent constitutional exemption from s.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the Narcotic Control Regulations(NCR),the MMAR or the MMPR, and/or those patients who have a person responsible for them designated to produce for them, including that designated producer , until such further Order of the court;

or, in the alternative

ii. a permanent exemption/ injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage by a patient or designated caregiver and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers that are inconsistent with their s.7 *Charter* Rights. Such order to continue until such time as the Defendant makes appropriate amendments to the *MMPR* or otherwise to comply with any decision of this Court to ensure the full ambit and scope of the patient's constitutional rights pursuant to s. 7 of the *Charter*, without any unreasonable, inconsistent and unnecessary restrictions thereon

h. Costs, including special costs and the Goods and Services Tax and Provincial Services Tax, on those costs, if appropriate; and

i. Such further and other relief as this Honourable Court deems appropriate and just in all of the circumstances.

The Plaintiffs propose that this action be tried in the City of Vancouver, Province of British Columbia.

DATED this 9th day of December 2013 at the City of Abbotsford, in the Province of British Columbia

John W. Conroy, Q.C.
Solicitor for the Plaintiff

Conroy & Co
2459 Pauline Street
Abbotsford, BC, V2S 3S1
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I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the
day of DEC 10 2013 A.D. 20
Dated this day of DEC 10 2013 20

AMANDA DUNN
REGISTRY OFFICER
AGENT DU GREFFE

No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
J.M.
SHAWN DAVEY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANTS

NOTICE OF CONSTITUTIONAL QUESTION
(Pursuant to s. 57 of the *Federal Court Act*
and Rule 69 of the *Federal Court Rules, 1998*, SOR/98-106)

The Plaintiffs/Applicants seek to confirm the ambit and scope of their constitutional right to reasonable access to Cannabis as medicine, in any of its effective forms, as medically approved persons and therefore question the constitutional validity of the ***Marihuana for Medical Purposes Regulations (MMPR)*** **SOR/2013-119** pursuant to the ***Controlled Dugs and Substances Act (CDSA)*** **S.C.1996,c.19** due to the omissions in those *Regulations* regarding patient personal production or by a designated caregiver, as currently provided for in the Marihuana Medical Access Regulations (MMAR), as well as challenges various specific sections of the ***Marihuana for Medical Purposes Regulations (MMPR)*** and seek remedies pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms* in relation to the violation of their s. 7 right to "life, liberty and the security of the person and the right not to be deprived

thereof except in accordance with Principles of Fundamental Justice and any attempted unreasonable limitation thereon.

The question is to be argued at a time and on a date to be determined that is agreeable to the parties in the Federal Court of Canada Trial Division, 700 West Georgia Street, in the City of Vancouver, in the Province of British Columbia.

The following are the material facts giving rise to the constitutional question:

1. The Applicants/Plaintiffs are all medically approved patients ordinarily resident in Canada, as patients approved under the *Narcotic Control Regulations* (***NCR***), the *Marihuana Medical Access Regulations* (***MMAR)*** or under the *Marihuana for Medical Purposes Regulations* (***MMPR),*** or more specifically patients holding either an authorization in writing from a practitioner under the ***NCR***, or an authorization to possess (ATP) together with a personal production licence (PPL) under the ***MMAR*** or having a caregiver person responsible for them designated as the grower for them (DG) under the ***MMAR*** and seek to be able to continue to personally produce or have a caregiver produce their medicine for them in that regard once they have a "medical document" under the ***MMPR***.

2. The ***Narcotic Control Regulation (NCR)*** pursuant to the former *Narcotic Control Act* but carried forward under the CDS provides in s.53(2) that a practitioner may administer a narcotic to a person or animal or prescribe, sell or provide a narcotic for a person or animal if the person is a patient under his or her professional treatment and the narcotic is required for a condition for which the person is receiving treatment. Subsection (5) has been added by the ***MMPR*** effective March 31st, 2014 to limit the administration by a health care practitioner to "dried marihuana" to a person or to prescribe or transfer it for a person that is a patient under their professional treatment and that the "dried marihuana" is required for the condition for which the person is receiving treatment.

3. The ***MMAR*** Regulations authorize in Part 2 (ss.24-33) the personal production or by a designated person (ss.34-42) a certain number of cannabis (marihuana) plants if the person is ordinarily resident in Canada and has reached the age of 18 years (s.25). The maximum number of plants to be produced is calculated depending upon the daily amount of the dried marihuana authorized in grams and the formula is set out in s.30 of the Regulations. The maximum amount that can be stored depends upon the amount one is authorized to produce and is set out in s.31 of the *Regulations*. There are no limitations on the location of the production facility insofar as a "dwelling house" is concerned as long as it is not adjacent to a school, public playground, daycare facility or other public place frequented mainly by persons under 18 years of age (s.28(g)).

4. The holder of the licence to produce may produce marihuana only at the production site and production area authorized and is not permitted to simultaneously produce marihuana partly indoors and partly outdoors and if the production area for a licence is partly indoors and partly outdoors the holder is not permitted to produce outdoors if the production site is adjacent to a school, public playground, daycare facility or other public place frequented mainly by persons under the age of 18 years (ss.52-53)

5. The ***MMAR*** in s.1 defines "dried marihuana" as harvested marihuana that's been subjected to any drying process and in s.2 the authorization to possess is limited to "dried marihuana" and consequently various other provisions of the Regulations refer to the amounts in storage of "dried marihuana" only. This limitation to "dried marihuana" only in the legislation has been successfully challenged, in British Columbia only, as unreasonable and too restrictive on the constitutional right of reasonable access for medical purposes arising under **s. 7 of the *Canadian Charter of Rights and Freedoms*** and found not to be saved under **section 1** thereof. Consequently that limitation no longer applies to those patients located in British Columbia, but continues to apply elsewhere in Canada. ***R. v. Smith* 2012** BCSC 544, an appeal is pending and was heard December 6th, 2013 and judgment reserved.

6. The Plaintiffs produce their medicine either indoors in their dwelling house or residence and/or an outbuilding on the same property and some produce outdoors on their property or other property, and some produce both indoors and outdoors, depending upon the time of the year and what is most effective for the production of their plant medicine. Consent of the owner of the property is required if the patient is not "ordinarily resident" at that property (s.27(1)(b)).

7. Some of the Plaintiffs, who are all from British Columbia, use "dried marihuana" in various forms, and including by way of smoking, vaporizing, or edibles and some use other forms that are not from "dried marihuana" that are effective for the actual individual. Some of them find that "raw marihuana", that has not been dried or had heat applied to it and that is "juiced" is more effective treatment for their particular ailment, and yet others find other extracts such as oils, salves, creams and other forms to be most effective and many use combinations of these various forms and at different times, depending upon their situation. They have also developed, after much trial and error, certain strains of Cannabis (marihuana) that they find are more effective for their particular illnesses.

8. Some of the Plaintiffs have been producing their own medicine under the ***MMAR*** for a considerable period of time, and as such invested in and constructed appropriate facilities and equipment to do so, including equipment to limit the impact of such production on others and for security purposes and have gone to considerable lengths to ensure a safe, uncontaminated, production site due to the nature of their illnesses and the need to avoid a negative impact on their weakened immune systems. They have not had any fires, nor suffered from any toxic mold nor been subjected to any attempted thefts. Most if not all of them

found that they could not afford to purchase a safe continuous quality supply of their medicine from the black market or illicit market, including the grey market of compassion clubs and dispensaries, nor the government supply through Prairie Plant Systems, and that is why they learned to produce for themselves and to control their production in terms of safety, quality and regularity substantial less cost after the initial setup and made sure that they did so in a safe and healthy place and manner.

9. On June 19, 2013 the Federal government promulgated the ***Marihuana for Medical Purposes Regulations*** (***MMPR***) to run concurrently with the ***MMAR*** until March 31, 2014 at which time the *MMAR* will be repealed (s. 209 (3) of the ***MMPR***).

10. While an ATP under the ***MMAR*** will continue to be valid for purposes of registration with a licensed producer under the ***MMPR*** until March 31, 2015, all PPL's and DG's end on March 31, 2014 by the repeal of Part 2 (ss. 24 through 57) and Part 3 (ss. 58 through 68.1) of the *MMAR*. Also, after September 30th, 2013, no new applications or renewals and modifications were permitted to any licences issued pursuant to the ***MMAR*** and consequently some patients have been unable to continue to produce because they had to move their site or for other reasons and have been compelled to either temporarily resort to the illicit market or obtain a "medical document" and endeavour to try and obtain from one of the few licenced producers. The Plaintiffs/Applicants seek to have the Defendants compelled to process those patient applications including new applications by medically approved persons endeavoring to exercise their constitutional right , pending a decision of this court on the merits of this action.

11. The ***MMPR*** makes no provision whatsoever for a patient to be able to personally produce for him or herself or to have a caregiver produce for him or her and the sole source of supply under the ***MMPR*** is through a new entity created called a "Licenced Producer" (**Part 1** ***MMPR***), who by ss.3 and 6 of the Regulations is limited once again to selling or providing only "dried marihuana" to patients (registered clients) and by s.5 the patient is limited to possessing a quantity of dried marihuana from a licensed producer that is 30 times the daily quantity authorized in grams by the Health care practitioner (section 129) or 150 grams, whichever is the lesser amount regardless of the nature of their illness or individual circumstances at any particular time. The *MMAR* does not contain the 150 gram maximum limitation.

12. Further, the ***MMPR*** prohibits a 'licensed producer' from conducting any activity at a "dwelling place," (s. 13), must only produce indoors at the specified site and outdoors is not authorized even on a temporary basis (s. 14).

The following is the legal basis for the constitutional question:

1. The Applicants/Plaintiffs are all Canadian citizens, ordinarily resident in British Columbia, Canada, that have been medically approved by their medical practitioner under the provisions of the ***Narcotic Control Regulations*, C.R.C., c.1041** or ***Marihuana Medical Access Regulations* SOR/2001-227** or the ***Marihuana for Medical Purposes Regulations* SOR/2013-119** pursuant to the ***Controlled Drugs and Substances Act* S.C.1996,c.19** to possess and under the ***MMAR*** to produce Cannabis (marihuana) for themselves as their medicine for their particular illnesses or to have the Cannabis (marihuana) grown for them by a designated grower/caregiver;

2. As a result of the decision of the Ontario Court of Appeal in ***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 Mernagh* (2013) Ont.C.A 67 (February 1st, 2013)(** leave to appeal to the SCC dismissed July 25th, 2013), the Government of Canada was required, in order to ensure that the ***Controlled Drugs and Substances Act* (CDSA)**was in compliance with the Canadian Constitution and in particular **s.7 of the *Canadian Charter of Rights and Freedoms***, to put in place a "constitutionally viable medical exemption" to the prohibition against the possession and cultivation of marihuana, that requires medical oversight. The failure on the part of the government 'to provide reasonable access for medical purposes' as an exemption to the general prohibition violated **s.7 of the *Canadian Charter of Rights and Freedoms*** in that the 'liberty' and 'security of the person' of the patient was affected in a manner that was inconsistent with the "principles of fundamental justice". This ultimately led at first to exemptions pursuant to s. 56 of the *CDSA* and then to the promulgation of the *MMAR* pursuant to section 55 of the *CDSA*.

3. Thereafter, various successful constitutional challenges took place to the unreasonable restrictions on the **s.7 *Charter*** rights of patients or their designate, in the ***MMAR*,** limiting the number of patients a designated grower could produce for, limiting how many licenses could exist at any one location, and limiting possession to 'dried marihuana'. The ambit and scope of the constitutional right to safe, continuous reasonable access to cannabis (marihuana) as medicine, including the personal production thereof or production by a designate, was continued, notwithstanding the advent of a government supply, as another option, (***Wakeford v. Canada*** [1998] O.J. 3522; [2000] O.J.1479; [2002] O.J. No. 85, Ont.CA ***R. v. Krieger*** 2000 ABQB 1012, 2003 ABCA, 2008 ABCA 394, ***Hitzig v. Canada*** (2003) 177 OAC 321; ***Sfetkopoulos v. AG Canada*** 2008 FC 33 (FCTD) and 2008 FCA 328 (FCA) and ***R v. Smith* 2012 BCSC 544**.)

4. The Applicants/Plaintiffs plead and rely on **ss. 7, 24(1) and 52(1)** of the ***Canadian Charter of Rights and Freedoms* (the "*Charter*"),** Part 1 of the ***Constitution Act*, 1982** being Schedule B to the ***Canada Act*, 1982** (U.K.) 1982, c.11 (the *"Constitution Act 1982"*) and say that the MMPR, only to the extent specifically challenged, are not saved under s. 1 of the Charter as reasonable limits that are demonstrably justified in a free and Democratic society

5. The Applicants/Plaintiffs seek a declaration, pursuant to **s.52 (1) of the *Canadian Charter Of Rights and Freedoms*** that 'a constitutionally viable exemption' from the provisions of the ***Controlled Drugs and Substances Act (CDSA)***, in accordance with the principles and findings underlying the judicial decisions in ***R v. Parker***, (2000), 49 O. R. (3d) 481, ***Hitzig v. Canada*** (2003) 231 D.L.R. (4th) 104 and ***R v. Mernagh***, 2013 ONCA 67,to enable the medical use, by medically approved persons, of Cannabis, in any of its effective forms, includes the right of the patient (or a person designated as responsible for the patient), to not only possess and use Cannabis in any of its forms, but also to cultivate or produce and possess Cannabis in any form, that is effective for the treatment of the patient's medical condition.

6. The Applicant/Plaintiffs seek a declaration under **s.52(1) of the *Charter*** that the ***Marihuana for Medical Purposes Regulations* (*MMPR*)** that came into force on June 19, 2013, and which run together or concurrently with the ***Medical Marihuana Access Regulations* (*MMAR*)** until March 31, 2014, when the ***MMAR*** will be repealed by the ***MMPR***, are unconstitutional only to the extent that the ***MMPR*** unreasonably restricts the **s. 7 *Charter*** constitutional right of a medically approved patient to reasonable access to their medicine by way of a safe and continuous supply, and are inconsistent therewith by failing to provide for the continued personal production of their medicine by the patient or a designated caregiver of the patient, as provided for currently in the ***MMAR***, and as such violates the constitutional rights of such patients pursuant to **s. 7 of the *Canadian Charter of Rights and Freedoms*** and cannot be saved by s. 1 thereof;

7. The Applicant/Plaintiffs seek a declaration pursuant to **s.52(1) of the *Charter*** that the limits in the ***NCR,*** and ***MMPR,*** as in the ***MMAR***, to possessing, selling or providing only "dried marihuana" are arbitrary, overbroad and result in grossly disproportionate effects and constitute an unreasonable restriction on the **s. 7 *Charter*** rights of these patients and producers and are not saved by s. 1 of the *Charter*, in accordance with the principles and findings underlying the judicial decision in ***R v. Smith***, 2012 BCSC 544;

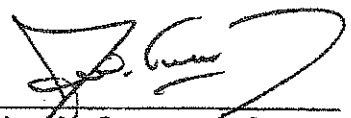
8. The Applicant/Plaintiffs seek a declaration pursuant to **s. 52 (1) of the *Charter*** that the provisions in the *MMPR* (ss.12 – 15) that specifically limit production by a 'Licenced Producer' of Cannabis to "indoors", prohibiting any, even temporary, outdoor production and prohibiting production in "a dwelling house," are unconstitutional, to the extent that they might be found to be applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits and restrictions amount to arbitrary, and overbroad limitations and result in grossly disproportionate effects and unreasonable restrictions on the patients s. 7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*;

9. The Applicant/Plaintiffs seek a declaration pursuant to **s. 52 (1) of the *Charter*** that the provision in the *MMPR* (s.5 and in particular paragraph (c)) that specifically restrict the amounts relating to possession and storage by patients, to the "30 x the daily quantity authorized or 150 gram maximum, whichever is the lesser", and other similar related limitations applicable or imposed upon 'Licenced Producers' in relation to their registered clients / patients are unconstitutional, to the extent that they are applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits whether in the *Narcotic Control Regulations* (*NCR*) and/or in the *MMPR* amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*.

10. The Applicants/Plaintiffs intend to seek an Order under s.24(1) of the Canadian *Charter of Rights and Freedoms*, as the appropriate and just interim remedy, for a constitutional exemption from s.4,5 and 7 of the *Controlled Drugs and Substances Act* for all medically approved patients/persons, including those holding an authorization to possess and a personal production license and those persons holding an authorization to possess and who have a person designated to produce for them under the *MMAR*, including that designated grower, pending the trial of the merits of the action, AND also together with an interim/interlocutory order in the nature of *mandamus* to compel the Defendant to process all applications, renewals and modifications to any licences pursuant to the *MMAR* in accordance with all of its provisions (other than those challenged as unconstitutional herein), notwithstanding ss.230, 233-234, 237-238, 240-243 of the *MMPR* relating to applications under the *MMAR* after September 30th, 2013 as reflected in the amended *MMAR* sections 41-48 or such further Order of the court as may be necessary.

11. The Applicant/Plaintiffs intend to seek an Order under s.24(1) of the Canadian *Charter of Rights and Freedoms*, as the appropriate and just final remedy, declaring the full ambit and scope of the medically approved patient's constitutional rights to produce, possess and store their medicine, pursuant to **s. 7 of the *Charter***, without any unreasonable and unnecessary restrictions thereon or, in the alternative, a permanent constitutional exemption from s.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons holding an authorization to possess and a personal production license and all persons holding an authorization to possess and who have a person designated to produce for them under the *MMAR*, including the designated producer, until such further Order of the court or in the further alternative, an order in the nature of a permanent exemption / injunction preserving the provisions of the ***MMAR*** relating to personal production, possession, production location and storage by a patient or designated caregiver and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the ***MMPR*** to such patients or designated caregivers, until such time as the Defendants makes appropriate amendments to the ***MMPR*** to comply with any decision of this Court with respect to the unconstitutionality thereof.

Dated: January 7th, 2014



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No. T-2030-13

FEDERAL COURT

PROPOSED CLASS PROCEEDING

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANTS

AMENDED STATEMENT OF CLAIM

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiffs. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules serve it on the plaintiff's solicitor or, where the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court, WITHIN 30 DAYS after this statement of claim is served on you, if you are served within Canada.

If you are served in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period for serving and filing your statement of defence is sixty days.

Copies of the Federal Court Rules information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

Vancouver, January ____, 2014 Issued by:

_____
(Registry Officer)

Pacific Centre, 3rd Floor
701 West Georgia Street
Box 10065
Vancouver, BC V7Y 1B6

Address of Local Office: Pacific Centre, 3rd Floor
701 West Georgia Street
Box 10065
Vancouver, BC V7Y 1B6

TO: The Attorney General of Canada
Attention: Mr. William F. Pentney, Deputy Attorney General of Canada

THE CLAIMS OF THE PLAINTIFFS

1. The Plaintiffs claim as follows:

    a. A Declaration pursuant to s.52 (1) of the *Canadian Charter of Rights and Freedoms* ("the *Charter*") that 'a constitutionally viable exemption' from the provisions of the *Controlled Drugs and Substances Act must* exist to enable the medical use of Cannabis, by medically approved persons, in any of its effective forms. This constitutional right includes the right of the patient (or a person designated by the patient as a caregiver 'person responsible for the patient' where the patient is unable to exercise this right), to both possess and use Cannabis in any forms and also to cultivate or produce and possess Cannabis in any form, for the treatment of the patient's medical condition.

    b. A Declaration, pursuant to s.52 (1) of the *Charter*, that the *Marihuana for Medical Purposes Regulations* (*MMPR*) that came into force on June 19, 2013, (and run concurrently with the *Medical Marihuana Access*

Regulations (*MMAR*) until March 31, 2014 when the *MMAR* will be repealed by the *MMPR)* are unconstitutional to the extent that:

i. They fail to provide for the continued personal production of their medicine by the patient or a designated caregiver 'person responsible for the patient' where the patient is unable to exercise this right, as provided for currently in the *MMAR;*

ii. The *MMPR* unreasonably restricts the s. 7 *Charter* constitutional right of a medically approved patient to reasonable access to their medicine by way of a safe and continuous supply and,

and are inconsistent with the s.7 *Charter* right and are not saved by s. 1 of the *Charter.*

c. A Declaration, pursuant to s.52 (1) of the *Charter*, that the limits in the *Narcotic Control Regulations (NCR), MMAR* and in the *MMPR*, to possessing, selling or providing only "dried marihuana" are arbitrary and constitute an unreasonable restriction on the s. 7 *Charter* rights of these patients and are inconsistent therewith and in violation thereof and not saved by s. 1 of the *Charter,* in accordance with the principles and findings underlying the judicial decision in ***R. v. Smith*** 2012 BCSC 544.

d. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically limit production by a 'Licenced Producer' of Cannabis to "indoors", prohibiting any, even temporary, outdoor production and prohibiting production in "a dwelling house," are unconstitutional, to the extent that they might be found to be applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits and restrictions amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*;

e. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically restrict the amounts relating to possession and storage by patients, including the "30 x the daily quantity authorized or 150 gram maximum, whichever is the lesser", and other limitations applicable or imposed upon 'Licenced Producers' in relation to their registered clients

/ patients are unconstitutional, to the extent that they are applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits in the *MMPR* amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter.*

f. An Order pursuant to s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just interim remedy, in the nature of:

   i. An interim constitutional exemption from ss.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the *Narcotic Control Regulations* C.R.C., c.1041 (*NCR*), the *MMAR* or the *MMPR*, including those patients who have a caregiver 'person responsible' for them designated to produce for them, including an exemption for that caregiver 'person responsible' designated producer, pending trial of the merits of the action or such further Order of the court as may be necessary;

   or, alternatively

   ii. an interlocutory exemption/injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage, by a patient or designated caregiver 'person responsible for the patient' and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers that are inconsistent with their s. 7 constitutional right under the *Charter* pending the decision of this Court on the merits of this action.

   or alternatively, and together with

   iii. an interim/interlocutory order in the nature of *mandamus* to compel the Defendant to process all applications, renewals and modifications to any licences pursuant to the *MMAR* in accordance with all of its provisions (other than those challenged as unconstitutional herein), notwithstanding ss.230, 233-234, 237-238, 240-243 of the *MMPR* relating to applications under the *MMAR*

after September 30th, 2013 as reflected in the amended *MMAR* sections 41-48.

g. An Order under s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just final remedy, in the nature of:

   i. a permanent constitutional exemption from ss.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the *Narcotic Control Regulations* (*NCR*), the *MMAR* or the *MMPR*, including those patients who have a caregiver 'person responsible' for them designated to produce for them, including that designated producer, until such further Order of the court;

   or, in the alternative

   ii. a permanent exemption/ injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage by a patient or designated caregiver 'person responsible' and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers 'person responsible' that are inconsistent with their s.7 *Charter* Rights. Such order to continue until such time as the Defendant makes appropriate amendments to the *MMPR* or otherwise to comply with any decision of this Court to ensure the full ambit and scope of the patient's constitutional rights pursuant to s. 7 of the *Charter*, without any unreasonable, inconsistent and unnecessary restrictions thereon.

h. Costs, including special costs and the Goods and Services Tax and Provincial Services Tax, on those costs, if appropriate; and

i. Such further and other relief as this Honourable Court deems appropriate and just in all of the circumstances.

THE PARTIES

2. The Plaintiff Neil Allard, is a resident of British Columbia and has been medically retired since 1999 and has an address for service, care of Conroy and Company, 2459 Pauline St., Abbotsford, BC.

3. The Plaintiff Tanya Beemish is a resident of British Columbia, unemployed, disabled and on a disability pension and the Plaintiff David Hebert is a resident of British Columbia, is Tanya Beemish's common-law husband and the person responsible for her as her caregiver and designated producer under the *MMAR* of her medicine. They have an address for delivery care of Conroy and Company 2459 Pauline St., Abbotsford, BC.

4. **deleted**

5. The Plaintiff Shawn Davey is a resident of British Columbia and is unemployed surviving off of settlement funds and a pension since 2000 and has an address for deliver care of Conroy and Company, 2459 Pauline St., Abbotsford, BC.

6. The Plaintiffs bring these claims for declaratory relief and interlocutory and permanent relief pursuant the *Federal Court Act* and *Rules* and ss.7 and 24(1) of the *Charter of Rights and Freedoms*, on behalf of themselves as persons ordinarily resident in Canada who have been medically approved to use cannabis as medicine as a patient under professional treatment for a condition for which the person is receiving treatment either under:

> All persons ordinarily resident in Canada who have been medically approved to use cannabis as medicine as a patient under professional treatment for a condition for which the person is receiving treatment, either under the *Narcotic Control Regulations,* C.R.C., c. 1041, the *Medical Marihuana Access Regulations (MMAR)* SOR/2001-227 since July 30th, 2001 or the *Marihuana for Medical Purposes Regulations (MMPR)* since June 19th, 2013 and in particular since September 30th, 2013.

7. The number of patients approved under the *NCR* and under the *MMPR* since June 19th, 2013 or in particular since September 30th, 2013, when no further amendments could be made to existing *MMAR* licences, are unknown. There are approximately 35,000 to 40,000 patients currently holding Authorizations to Possess (ATPs) under the *MMAR*, of which some 24,000 – 30,000 hold Personal Production Licences (PPLs). Some 4,250 of those patients have Authorizations to Possess (ATPs) and

rely upon a person responsible for them as a Designated Grower (DG) to produce their medicine for them. Some 6,000 of those patients obtain their medicine through the government supply. The specific details with respect to these statistics are within the knowledge and possession of the Defendant.

8. The Defendant, Her Majesty the Queen in Right of Canada, as represented by the Attorney General of Canada, is named as the representative of the Federal Government of Canada and the Minister of Health for Canada who is the Minister responsible for Health Canada and certain aspects of the *Controlled Drugs and Substances Act* including the *Narcotic Control Regulations,* the *Marihuana Medical Access Regulations* and program and the *Marihuana for Medical Purposes Regulations* and program.

BACKGROUND

The *Controlled Drugs and Substances Act*

9. Cannabis, its preparations, derivatives and similar synthetic preparations are listed in Schedule II to the *Controlled Drugs and Substances Act*, S.C. 1996, c.19, and amendments thereto (the "*CDSA*"). Its production, possession, possession for the purposes of distribution or trafficking, and trafficking, as well as importing and exporting are prohibited by this Statute as a "controlled substance", formerly known as "narcotics".

10. Section 56 of the *CDSA* permits the Minister for Health for Canada (the "Minister") or his designate, to exempt any person, class of persons, controlled substance or precursor of an a controlled substance from the application of the *CDSA* or its Regulations if, in the Minister's or the designates opinion, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

11. While no viable constitutional medical exemption to the prohibition against the possession, possession for the purpose of trafficking, trafficking and cultivation or production of cannabis, or other offences, existed prior to July 30th, 2001, the *Narcotic Control Regulations* C.R.C., c.1041, and specifically s.53, continued pursuant to the *Controlled Drugs and Substances Act* provided as follows:

> **53.** (1) No practitioner shall administer a narcotic to a person or animal, or prescribe, sell or provide a narcotic for a person or animal, except as authorized under this section.

(2) Subject to subsections (3) and (4), a practitioner may administer a narcotic to a person or animal, or prescribe, sell or provide a narcotic for a person or animal, if

(a) the person or animal is a patient under his professional treatment; and

(b) the narcotic is required for the condition for which the person or animal is receiving treatment.

(3) No practitioner shall administer methadone to a person or animal, or prescribe, sell or provide methadone for a person or animal, unless the practitioner is exempted under section 56 of the Act with respect to methadone.

(4) A practitioner of medicine, dentistry or veterinary medicine shall not administer diacetylmorphine (heroin) to an animal or to a person who is not an in-patient or out-patient of a hospital providing care or treatment to persons, and shall not prescribe, sell or provide diacetylmorphine (heroin) for an animal or such a person.

12. This Regulation was amended by the *MMAR* in July, 2001 to add at the end of s.53(1) the words "or the Marihuana Medical Access Regulations". On June 19th, 2013, by virtue of s.127(1) of the *MMPR*, s.53(1) was further amended to include the words at the end after the word "section", "the Marihuana Medical Access Regulations or the Marihuana for Medical Purposes Regulations." The words "Marihuana Medical Access Regulations" are to be deleted upon the repeal of the *MMAR* on March 31st, 2014 by the *MMPR*. In addition the *MMPR* adds the following as sub-section (5):

(5) A health care practitioner may administer **dried marihuana** to a person or prescribe or transfer it for a person if

(a) the person is a patient under their professional treatment; and

(b) the **dried marihuana** is required for the condition for which the person is receiving treatment. (emphasis added)

13. As a result of the decision of the Ontario Court of Appeal in ***R. v. Parker*** (2000) 49 O.R. (3d) 481 (leave to appeal to the Supreme Court of Canada dismissed) recently reaffirmed in ***Her Majesty the Queen and Matthew Mernagh*** (2013) O.C.A 67 (February 1st, 2013) (leave to appeal to SCC dismissed July 25th, 2013), the

Government of Canada was required, in order to ensure that the *Controlled Drugs and Substances Act* was in compliance with the Canadian Constitution and in particular s.7 of the *Canadian Charter of Rights and Freedoms*, to put in place a "constitutionally viable medical exemption to the prohibition against the possession and cultivation of marihuana, that requires medical oversight".

14. The failure on the part of the government 'to provide reasonable access for medical purposes' as an exemption to the general prohibition violated s.7 of the *Canadian Charter of Rights and Freedoms* in that the 'liberty' and 'security of the person' of the patient was affected in a manner that was inconsistent with the "principles of fundamental justice".

15. Initially the government, pursuant to s.56 of the *CDSA* issued an "Interim Guidance" document and processed exemptions under that section until ultimately on July 30th, 2001 the *Medical Marihuana Access Regulations* (*MMAR*) came into effect.

The *Medical Marihuana Access Regulations (MMAR)* SOR / 2001-227

16. The *MMAR* established a framework or scheme where an individual could apply to Health Canada with the support of their medical practitioner for an "Authorization to Possess" (ATP) "dried marihuana" in accordance with an authorization for medical purposes. The Regulations set out various categories 1 – 3 relating to symptoms of various medical conditions with the latter categories requiring the involvement of one or two specialists. The ATP was subject to annual renewal.

17. There being no lawful supply of seeds or plants, the *Regulations* provided for the individual to obtain a Personal Use Production Licence (PUPL) to produce for them an amount of cannabis and to store and possess certain amounts depending upon a calculation derived from the medical practitioner's authorization of grams per day for the particular ailment.

18. A "Personal Production Licence" (PPL) pursuant to the *Medical Marihuana Access Regulations*, enables the patient to produce and store their own medicine at chosen location in amounts determined according to a formula under the regulations that is dependent upon the number of grams per day authorized by the physician.

19. In addition the *Regulations* provide for a "Designated Person Production Licence" (DPPL) authorizing someone to produce dried marihuana for the patient.

20. All licences are subject to annual renewal and specify not only the number of plants permitted to be produced, but also the amount to be stored and the location of the storage and the specific amount that the patient could possess on his or her person at any time(30 times the daily limit with no maximum).

21. The licence provides for production entirely indoors or partly indoors and partly outdoors subject to some restrictions, including a prohibition against the simultaneous production of marihuana partly indoors and partly outdoors.

22. There is no prohibition against production at one's ordinary place of residence or in any 'dwelling place' and if the production site is not owned by the producer and is not the applicant's ordinary place of residence then the consent of the owner is required.

23. Initially, these Regulations provided that a designated producer could only produce for one patient holding an ATP and there could only be three licences in one place. Furthermore the Regulations are limited to the production and supply of "dried marihuana" and no other form.

24. Subsequent to ***Parker (supra)*** as a result of further litigation, in both civil and criminal cases, including, ***Wakeford v. Canada*** [1998] O.J. 3522; [2000] O.J.1479; [2002] O.J. No. 85, Ont.CA ***R. v. Krieger*** 2000 ABQB 1012, 2003 ABCA, 2008 ABCA 394, ***Hitzig v. Canada*** (2003) 177 OAC 321, issues were raised with respect to the lack of a legal source and safe supply thereof, and the government of Canada on July 8th, 2003 announced an "Interim Policy" whereby marihuana seeds and dried marihuana grown by Prairie Plant Systems (PPS) under contract for the government for research purposes would become available to individuals having an exemption under the *MMAR* or under s.56 of the *CDSA*. This policy was to be in place until further clarification was made by the courts.

25. As a result of the Ontario Court of Appeal decision in ***Hitzig (supra)*** the Government of Canada on December 3rd, 2003 amended the *MMAR* to comply with that decision to some extent but re-enacted the provision permitting a designated producer to only produce for one patient in virtually identical terms. Consequently, while a

government supply of cannabis became available to authorized permit holders who did not have a Personal Production Licence or a Designated Grower, the Designated Grower was once again still limited to producing for only one person.

26. On June 29th, 2005 the Government of Canada made further amendments to the *MMAR* re-defining the types of applicants by merging categories 1 and 2 into category 1, requiring the declaration of only one physician, and merging category 3 into 2 and eliminating the requirement of a declaration from a specialist but still requiring a consultation with one.

27. On October 3rd, 2007 further amendments were made to the *MMAR* but still leaving the designated producer's ability to produce for only one person in place. However, as a result of the decision of the Federal Court of Appeal in ***Sfetkopoulos v. AG Canada*** 2008 FC 33 (FCTD) and 2008 FCA 328 (FCA),essentially following ***Parker*** and ***Hitzig (supra)*** that provision was struck down again as being a negative restriction violating s.7 of the *Charter* in that it was arbitrary and not in accordance with the principles of fundamental justice.

28. In response, the Government of Canada on May 14th, 2009 enacted a new ratio allowing a designated producer to produce for two authorized persons.

29. The *MMAR* also provided that there could only be three production licences at one location and no more. This section was also challenged in the courts and found to be too restrictive in the case of ***R. v. Beren and Swallow*** (2009) BCSC 429 and the government's response to the striking down of that section was simply to amend the *MMAR* and allow up to four licences at one location.

<u>The *Marihuana for Medical Purposes Regulations (MMPR)*</u>

30. On June 19th, 2013 the *Marihuana for Medical Purposes Regulations (MMPR)* SOR/2013-119 came into effect. These Regulations run concurrently with the *MMAR* until March 31st, 2014 when, by virtue of s. 267 of the *MMPR*, the *MMAR* will be repealed and all personal use production licences and designated producer licences will be terminated effective that date regardless of the dates specified on the actual licences previously issued. While "access" is increased slightly by the definition of a "Health care practitioner" being expanded to include "nurse practitioners", the

question of "supply" is dealt with by providing for "licenced producers" as the sole source of supply to registered patients, doctors or hospitals for patients.

31. The *MMPR* puts in place a transitional scheme to be implemented between now and March 31st, 2014 whereby persons holding an Authorization to Possess and a Personal Production Licence or a Designated Producer will obtain a notice of authorization from the Minister to sell their plants or seeds to a licenced producer. While the ATP continues to be valid for purposes of registration with a licenced producer up until March 31st, 2015, no more applications under the *MMAR* or renewals or amendments to existing licences are permitted after September 30th, 2013. After that date the patient with an 'Authorization to Possess' is to obtain cannabis by registering as a client with a licenced producer or attending on their health care practitioner and obtaining from them a "medical document" that sets out the authorized grams per day and that authorization can only be filled by a licenced producer directly or indirectly through the doctor or a hospital obtaining it from a licenced producer. ATP's can also continue to access the government PPS supply

32. The *MMPR* continues to limit possession by a patient to "dried marihuana" and the patient cannot possess any more than 30 times the daily quantity authorized or 150 grams whichever is the lesser amount(ss.3-6). The "licenced producers" are not permitted to conduct any activity at a 'dwelling place' and production and related activities can only take place 'indoors' and not 'outdoors'(ss.12 – 15).

33. In the Government of Canada produced "Regulatory impact analysis statement" about the *Marihuana for the Medical Purposes Regulations* in the Canada Gazette, Volume 146, #50 on December 15th, 2012 it is indicated that the main economic cost associated with the proposed *MMPR* would arise from the loss to consumers who may have to pay a higher price for dry marihuana estimated to be $1.80 per gram to $5.00 a gram in the status quo to about $7.60 per gram in 2014 rising to $8.80 per gram thereafter.

34. As of November 1st, 2013 there were three approved licenced producers(LP's) and one of them is a wholly owned subsidiary of Prairie Plants Systems the former government sole contractor, and goes by the name of 'CanniMed Ltd.' It has indicated that the price of its product will be between $8.00 and $12.00 a gram. The others are called "The Peace Naturals Project Inc' and 'Mettrum Ltd.' and their estimated prices are currently unknown to the Plaintiffs.

35. Whereas persons can be approved for the use of cannabis (marihuana) under the *Narcotic Control Regulations* or since September 30th, 2013 under the *Marihuana for Medical Purposes Regulations,* the majority of the persons affected were approved under the *Medical Marihuana Access Regulations* since July 31st, 2001 and continuing until its repeal on March 31st, 2014. According to Health Canada statistics there are:

- 24,185 of those persons held personal use production licences ("PPLs").
- 4,251 persons held designated grower production licences (DGs).
- 6,027 persons had access to Health Canada's supply of dried marihuana (presumably through the government contractor Prairie Plant Systems).
- 27,015 licences were issued to produce entirely indoors
- 3,334 licences were issued to produce entirely outdoors.
- 2,670 licences were issued to individuals producing indoors in the winter and outdoors in the summer.

36. A research survey, supported by the UBC Institute for Healthy Living and Chronic Disease Prevention, of patient characteristics under the MMAR disclosed that some 60 to 70% of those persons authorized to possess cannabis (marihuana) for medicine are on disability pensions and that affordability was a substantial barrier to access by all income groups.

37. As of April, 2013, Health Canada authorized the production of 188,189 kg of Cannabis (marihuana) to be produced under the *MMAR* under the various licences during 2012 broken down as follows:

- 15,752.88 kg : for patients needing to use 1 to 5 g per day;
- 42,054.31kg: for patients needing to use 6 to 10 g per day;
- 89,127.44 kg: for patients needing to use 11 to 20 g per day;
- 12,795.62 kg: for patients needing to use 21 to 50 g per day;
- 3195.21 kg: for patients needing to use 51 to 100 kg per day; and

- 4,854.87 kg: for patients needing to use 101 to 150 g per day.

- Apparently there are 89 persons in Canada with authorizations to possess with dosage levels of 150 g or more per day.

38. The Plaintiffs hold the following licence/s issued by Health Canada, pursuant to the *Medical Marihuana Access Regulations (MMAR)* under the *Controlled Drugs and Substances Act* (CDSA):

- Neil Allard: personal production licence & authorization to possess as medicine
- (deleted)
- Tanya Beemish: authorization to possess as medicine;
- David Hebert: designated grower licence (for patient Tanya Beemish); and
- Shawn Davey: authorization to possess and personal production licence.

39. The Plaintiff, Neil Allard, age 59, resides in British Colombia. He became severely ill in 1995 and unable to continue work as an Area Counselor at Veterans Affairs Canada, and by 1999 was placed on permanent medical retirement. He suffers from 'Myalgic Encephalomyelitis' and 'clinical depression'.

40. Mr. Allard currently holds an Authorization to Possess (ATP) and a Personal Production Licence ("PPL"), under the *MMAR*, and he has been so authorized on an annual basis since 2004. He is authorized to produce at his residence/dwelling house and constructed a facility for that purpose, at considerable cost and took a course through Malaspina College on how and what to do with respect to marihuana production.

41. Mr. Allard produces indoors and has produced outdoors and in a greenhouse. He is authorized to consume a daily dose of medical marihuana of 20 grams a day and uses the marihuana in various forms. These include edibles, where the dried marihuana is baked into another product for consumption ("Edibles"), juiced, where the leaves from the raw marihuana plant are blended together to form a juice for consumption ("Juiced"), vapourized, where the active ingredients of the dried marihuana are inhaled when comingled with water particles in a vaporizer device ("Vapourized"), and in topical oils, which contain the extracted active ingredients in marihuana and are then applied directly to the skin ("Oils"). He does not smoke dried cannabis (marihuana) in cigarettes/joint form.

42. Additionally, Mr. Allard works with 13 different specific strains of marihuana that he grows organically to help manage his medical condition and says that certain strains do not work for him and are problematic and he is very concerned about quality control. He also asserts that he derives therapeutic benefit from the production of his own Cannabis plants.

43. The Plaintiff, Tanya Beemish, age 27, resides in British Colombia with her common-law spouse, the Plaintiff David Hebert. Ms. Beemish suffers from 'Type One Diabetes' and from a complication thereof called "Gastroparesis" or "delayed gastric emptying" which causes frequent vomiting and causes significant pain and nausea. She has to regularly attend the Emergency department at the Royal Columbian Hospital. She is unemployed and receives a monthly permanent disability pension.

44. Ms. Beemish has held an ATP since 2012 and her common-law spouse, the Plaintiff David Hebert also acts as the person responsible for her as her caregiver Designated Grower ("DG") as she cannot produce her medicine for herself due to her illness and they cannot afford to purchase her medicine from the illicit market. She is unemployed, disabled and on disability pension. They have constructed a safe and secure production facility in their dwelling house, having invested in appropriate equipment for production and related purposes, including safety and security.

45. Ms. Beemish presently consumes between 2-10 grams per day, usually by smoking, and vapourizing, as well as edibles by way of baked goods, juicing, and oils. She relies on two unique "blueberry cross" strains to help manage the pain of her illness. Both Ms. Beemish and Mr. Hebert are concerned about losing control over the production of her medicine in a secure and safe manner at reasonable cost.

46. (deleted)

47. (deleted)

48. (deleted)

49. The Plaintiff Shawn Davey, age 37, resides in British Columbia. He is unemployed due to a brain injury suffered in a motor vehicle accident on June 16th, 2000 and

survives off of funds from a settlement in relation to the motor vehicle accident and a CPP disability pension.

50. Mr. Davey has and ATP and PPL having discontinued the use of a Designated Grower who held the Designated Person Production Licence because that grower could not produce his medicine to a satisfactory standard for him. He is currently authorized to use 25 grams per day that he consumes by way of smoking, edibles and various other forms. He produces indoors in a separate outbuilding on a 5 acre piece of property and has invested heavily in security measures and fire protection measures and has never had a toxic mold problem.

51. Mr. Davey says that he will not be able to afford to purchase from licenced producers at the estimated price of $8 to $12 a gram, nor from the illicit market or compassion clubs or dispensaries at similar prices. Cannabis (marihuana) is the only medication that he now uses having stopped the use of all other narcotics and if he is compelled to stop producing for himself at an estimated $1 to $4 a gram he would have to return to the narcotics at a cost of approximately $3,000.00 per month, a portion of which would be defrayed by Pharmacare/insurance coverage. The cost estimated for cannabis (marihuana) from a licenced producer for a month would be more than that and not covered by any Pharmacare/insurance program.

52. Mr. Davey is also very concerned to ensure quality control over his production by way of organics and sanitation to ensure safety and cleanliness and the lack of contamination of any kind.

53. All of the Plaintiffs, except David Hebert, are unemployed and on disability pensions. Some of them have experienced purchasing their medicine from Compassion Clubs/Dispensaries and other aspects of the illicit market or from the government supply but determined that they could not afford to continue to do so for economic and other reasons.

54. Consequently, they each invested substantially in creating their own production facility/room in a dwelling house, or outbuilding, including investing in appropriate indoor production equipment and other related equipment to prevent the escape of odors and for safety and security purposes.

55. Some have also produced in greenhouses and outdoors, at substantial electrical costs savings, as well as indoors. Some have also invested considerable time educating themselves on how to produce, how to produce safely for their medical condition, including organic production, and how to produce certain strains of Cannabis (Marihuana) that are most effective for their medical condition.

56. All of them fear the loss of control over the safe continuous production of their own medicine at reasonable cost, including use of their developed specific effective strains, by the production by others who will be producing for many others, and fear that they will not be able to afford the cost of the medicine to be sold by the new Licence Producers, estimated to be similar to illicit market prices.

57. All of the Plaintiffs reside in British Columbia, and are therefore not limited to using only "dried marihuana" as provided in the *NCR, MMAR* and *MMPR* due to the decision in ***R v. Smith*** 2012 BCSC 544, which is on appeal, and is only applicable in British Columbia and in relation to the *MMAR*. The Plaintiffs use Cannabis in its various forms, including in its raw form for juicing, and making butter, as well as using oils and tinctures, using it in teas, and as salves and creams for topical applications, or by making edibles and by smoking in cigarettes/joints or using a vaporizer or atomizer. Medically approved patients outside British Columbia offend against the Controlled Drugs and Substances Act if they exceed the terms of their license limiting them to "dried marihuana". It is an offense to separate or extract the resin glands from the dead plant material and a further offense to possess those resin glands, whether as resin or "hashish, or when infused into derivative products such as foods, oils or even tea. It is an offence to possess cannabis juice derived from the natural undried plant as it is not "dried marihuana".

58. The Plaintiff Allard is medically retired and the Plaintiff Tanya Beemish is on permanent disability pension. They rely on specific strains and exercise particular control over their production environments due to "immune system" concerns and usually produce in their dwelling house or in an outbuilding on their property adjacent to their dwelling house. (deleted) The Plaintiff Allard has produced partly outdoors but primarily indoors and the Plaintiff Hebert on behalf of Beemish produces indoors. The Plaintiffs not only use cannabis as "dried marihuana" by smoking or vapourizing, but also use it in its natural form through cold press juicing, as well as various other methods of vaporizing and atomizing and some use

extractions such as topical oils for skin conditions and many use edibles or baked goods.

59. The Plaintiffs say that they are able to produce their cannabis at between $1.00 and $4.00 a gram or less and that they will not be able to afford the estimated Licenced Producer prices which are comparable to illicit market prices and that affordability is a barrier to access across all income levels.

60. (deleted)

The Constitutional Violations Alleged – Section 7 of the *Charter*

61. The Plaintiffs plead and rely on ss.1, 7, 24(1) and 52(1) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), Part 1 of the *Constitution Act*, 1982 being Schedule B to the *Canada Act*, 1982 (U.K.) 1982, c.11 (the "*Constitution Act 1982*").

62. The Plaintiffs say that they are entitled to a Constitutionally viable exemption from the provisions of the *Controlled Drugs and Substances Act, supra*, to enable their medically approved use of cannabis, in any or all of its effective forms. This includes the right of the patient (or a person responsible for the patient) to produce and possess the cannabis for themselves (or the patient) for medical purposes in order:

- to ensure a safe, quality controlled supply;
- at a reasonable cost that is within their economic means; and
- to do so inside or outside of their dwelling house, subject only to reasonable regulations regarding safety and security.

MMPR – The Omission to Include Personal Production

63. The Plaintiffs say that any unreasonable restriction on their constitutional right of reasonable access, including precluding them from:

- producing for themselves or if unable having somebody produce for them;
- growing in their dwelling house or outside their dwelling house;

- consuming cannabis that is other than "dried marihuana,

will cause the Plaintiffs to have to choose between their liberty and their health. Consequently, this will impact the liberty and security of their person and in a manner that is not in accordance with the principles of fundamental justice, namely, precluding arbitrariness in the deprivation of rights, that does little or nothing to advance the governments interest, gross disproportionality in effects, and an administrative structure made up of unnecessary rules that result in an additional risk to the health of the person and that are manifestly unfair, thereby violating their right to life, liberty and the security of their person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as preserved by s.7 of the *Canadian Charter of Rights and Freedoms* and these provisions are not saved under s.1 of the *Charter.*

NCR/MMAR/MMPR – The Limitation to Dried Marihuana Only

64. The Plaintiffs say that the restriction with respect to "dried marihuana only" in the *MMPR* that also exist in the *MMAR* and *NCR* is an unconstitutional violation of s.7 of the *Charter* as an unreasonable restriction. In British Columbia that provision of the *MMAR* was struck down as unconstitutionally restrictive as that limitation did little or nothing to enhance the government's interest including the government's interest in preventing diversion of the drug, or controlling false and misleading claims of medical benefit and that it was arbitrary and violated s.7 of the *Charter* (***R. v. Smith*** 2012 BCSC 544 (currently on appeal to the BCCA). The Plaintiffs say that the decision in *Smith (supra)* should be followed federally and applied across Canada (deleted) to enable medically approved patients to consume their medicine in whatever form is most effective for them and to avoid a form that may be harmful to them, and that such a limitation in the *NCR, MMAR* and *MMPR* is unconstitutional as being in violation of s.7 and inconsistent therewith and is not saved by s.1.

MMPR – Other Limitations – Dwelling House, Outdoor and Possession Limits

65. The Plaintiffs say that the proposed *MMPR* restrictions preventing production in a dwelling house and preventing any production outdoors in particular, as well as other restrictions applicable to licenced producers, should not be applicable to the patient or personal producer or designated caregiver because they amount to unnecessary

restrictions in relation to the patient producer or his or her designate and would be unconstitutionally too restrictive. As the patient producer or his designate would not be involved in selling any of their product to any members of the public, none of the provisions of the *MMPR* relating thereto, such as packaging and labeling and the costs thereof, including packaging arbitrary maximum amounts in containers that a person can possess on their person at any one time, such as the maximum of 150 g, regardless of one's authorized dosage, should not apply to the patient, producer or designate, and if any such limits are held to apply they should not be less than 30 times the daily dosage with no maximum, as provided in the MMAR

THE RELIEF

66. The plaintiffs claim as follows:

a. A Declaration, pursuant to s.52 (1) of the *Canadian Charter Of Rights and Freedoms* that 'a constitutionally viable exemption' from the provisions of the *Controlled Drugs and Substances Act (CDSA)*, in accordance with the principles and findings underlying the judicial decisions in ***R v. Parker***, (2000), 49 O. R. (3d) 481, ***Hitzig v. Canada*** (2003) 231 D.L.R. (4th) 104 and ***R v. Mernagh***, 2013 ONCA 67,to enable the medical use, by medically approved persons, of Cannabis, in any of its effective forms, includes the right of the patient (or a person designated as responsible for the patient), to not only possess and use Cannabis in any of its forms, but also to cultivate or produce and possess Cannabis in any form, that is effective for the treatment of the patient's medical condition;

b. A Declaration pursuant s.52(1) of the *Canadian Charter of Rights and Freedoms* that the *Marihuana for Medical Purposes Regulations* (*MMPR*) that came into force on June 19, 2013, and that run together or concurrently with the *Medical Marihuana Access Regulations* (*MMAR*) until March 31, 2014, when the *MMAR* will be repealed by the *MMPR*, are unconstitutional to the extent that the *MMPR* unreasonably restricts the s. 7 *Charter* constitutional right of a medically approved patient to reasonable access to their medicine by way of a safe and continuous supply, by failing to provide for the continued personal production of their medicine by the patient or a designated caregiver of the patient, as provided for currently in the *MMAR*, and as such violates the constitutional rights of such patients pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* and is inconsistent there with and not saved by section 1 thereof;

c. A Declaration pursuant to s.52 (1) of the *Canadian Charter of Rights and Freedoms* that the limits in *NCR, MMAR* and in the *MMPR*, to possessing, selling or providing only "dried marihuana" are arbitrary and constitute an unreasonable restriction on the s. 7 *Charter* rights of these patients and are inconsistent there with and not saved by s. 1 of the *Charter*, in accordance with the principles and findings underlying the judicial decision in ***R v. Smith***, 2012 BCSC 544;

d. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically limit production by a 'Licenced Producer' of Cannabis to "indoors", prohibiting any, even temporary, outdoor production and prohibiting production in "a dwelling house," are unconstitutional, to the extent that they might be found to be applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits and restrictions amount to arbitrary and unreasonable restrictions on the patients s. 7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*;

e. A Declaration, pursuant to s.52 (1) of the *Charter*, that the provisions in the *MMPR* that specifically restrict the amounts relating to possession and storage by patients, including the "30 x the daily quantity authorized or 150 gram maximum, whichever is the lesser", and other limitations applicable or imposed upon 'Licenced Producers' in relation to their registered clients / patients are unconstitutional, to the extent that they are applicable to a patient generally, a patient personal producer or his or her designated caregiver as such limits in the *Narcotic Control Regulations* (*NCR*) and in the *MMPR* amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*.

f. An Order under s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just interim remedy, in the nature of :

    i. a constitutional exemption from s.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the *Narcotic Control Regulations* (*NCR*), the *MMAR* or the *MMPR*, and/or those patients who have a person responsible for them designated to produce for them, including that designated

producer, pending trial of the merits of the action or such further Order of the court as may be necessary

or in the alternative,

ii. an interlocutory exemption/injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage, by a patient or designated caregiver and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers that are inconsistent with their s. 7 constitutional right under the *Charter* pending the decision of this Court on the merits of this action;

or alternatively, and together with

iii. An Order in the nature of mandamus to compel the Defendant to process all Applications, Renewals or modifications to any licences applied to pursuant to the *MMAR* in accordance with all of its related provisions, notwithstanding ss.230, 233-234, 237-238, 240-243 of the *MMPR* that relate to such applications under the *MMAR* that were made before and after September 30, 2013 and a declaratory Order that those medically approved persons are entitled to continue to possess, store and use marihuana for medical purposes both before and after March 31st, 2014 and that they are not required to destroy all product as of that date.

g. An Order under s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just final remedy, in the nature of:

i. a permanent constitutional exemption from s.4,5 and 7 of the *Controlled Drugs and Substances Act* for all persons medically approved under the Narcotic Control Regulations(NCR),the MMAR or the MMPR, and/or those patients who have a person responsible for them designated to produce for them, including that designated producer , until such further Order of the court;

or, in the alternative

ii. a permanent exemption/ injunction preserving the provisions of the *MMAR* relating to personal production, possession,

production location and storage by a patient or designated caregiver and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers that are inconsistent with their s.7 *Charter* Rights. Such order to continue until such time as the Defendant makes appropriate amendments to the *MMPR* or otherwise to comply with any decision of this Court to ensure the full ambit and scope of the patient's constitutional rights pursuant to s. 7 of the *Charter*, without any unreasonable, inconsistent and unnecessary restrictions thereon

h. Costs, including special costs and the Goods and Services Tax and Provincial Services Tax, on those costs, if appropriate; and

i. Such further and other relief as this Honourable Court deems appropriate and just in all of the circumstances.

The Plaintiffs propose that this action be tried in the City of Vancouver, Province of British Columbia.

DATED this 20th day of January 2014 at the City of Abbotsford, in the Province of British Columbia

John W. Conroy, Q.C.
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Court File No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

STATEMENT OF DEFENCE

1. The Defendant admits the allegations contained in paragraphs 10, 11, 12, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 32, 33, and 40 (1st sentence) of the Amended Statement of Claim.

2. The Defendant denies the allegations contained in paragraphs 7, 9, 13, 14, 15, 20, 21, 24, 27, 29, 30, 31, 34, 35, 37, 38, and 44 of the Amended Statement of Claim.

3. The Defendant has no knowledge of the allegations contained in paragraph 2, 3, 5, 36, 39, 40 (2nd sentence), 41, 42, 43, 45, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, and 59 of the Amended Statement of Claim.

The Parties

Neil Allard

4. The Plaintiff Neil Allard has held a Personal-Use Production Licence (PUPL) for dried marihuana for medical purposes and an Authorization to Possess (ATP) dried marihuana for medical purposes since July 9, 2004.

5. From July 9, 2004 to July 9, 2005 Mr. Allard was authorized to produce 19 plants indoors or 5 plants outdoors and to use a proposed daily amount of dried marihuana of less than or equal to 5 grams.

6. From July 9, 2005 to July 9, 2006 Mr. Allard was authorized to produce 25 plants indoors and to use a proposed daily amount of dried marihuana of less than or equal to 5 grams.

7. From July 9, 2006 to October 7, 2012 Mr. Allard was authorized to produce 37 plants indoors or 10 plants outdoors and to use a proposed daily amount of dried marihuana of less than or equal to 10 grams.

8. From October 8, 2012 to March 31, 2014 Mr. Allard is authorized to produce 98 plants indoors and to use a proposed daily amount of dried marihuana of less than or equal to 20 grams of marihuana per day.

9. Mr. Allard's ATP continues to be valid from April 1, 2014 to July 15, 2014 for the purpose of registering with a licenced producer to purchase marihuana for medical purposes.

Tanya Beemish

10. From January 4, 2013 to January 4, 2014 the Plaintiff Tanya Beemish was authorized to use a proposed daily amount of dried marihuana of less than or equal to 5 grams.

11. Ms. Beemish no longer holds a valid ATP.

David Hebert

12. The Plaintiff David Hebert was issued a Designated Person Production Licence (DPPL) for dried marihuana for medical purposes on January 4, 2013, with an expiry date of January 4, 2014. The DPPL authorized Mr. Hebert to produce 25 plants indoors for use by Tanya Beemish, in accordance with her ATP.

13. Mr. Hebert no longer holds a valid DPPL.

Shawn Davey

14. The Plaintiff Shawn Davey was first issued an ATP on July 16, 2010. His ATP authorized him to use a proposed daily amount of dried marihuana of less than or equal to 10 grams. A designated person was authorized to produce 49 plants indoors for his use.

15. On July 19, 2011, a PUPL and an ATP were issued to Mr. Davey authorizing him to produce 59 plants indoors and to use a proposed daily amount of dried marihuana of less than or equal to 12 grams.

16. On July 19, 2012, a PUPL and an ATP were issued to Mr. Davey authorizing him to produce 69 plants indoors and to use a proposed daily amount of dried marihuana of less than or equal to 14 grams.

17. Mr. Davey applied to revoke his PUPL on or about December 22, 2012. As a result, a new ATP was issued to him on February 18, 2013. At that time, a designated person was authorized to produce 69 plants indoors for his use.

18. On September 26, 2013, a PUPL and an ATP were issued to Mr. Davey authorizing him to produce 112 plants indoors and to use a proposed daily amount of dried marihuana of less than or equal to 25 grams. His PUPL and ATP expire on March 31, 2014.

19. Mr. Davey's ATP continues to be valid from April 1, 2014 to September 26, 2014 for the purpose of registering with a licenced producer to purchase marihuana for medical purposes.

This is Not a Class Action

20. In response to paragraphs 6 and 7 of the Amended Statement of Claim which imply that all individuals presently holding an ATP are "parties" to this proceeding, the Defendant says this is not a class action. The Defendant nevertheless acknowledges that any declarations made with respect to the constitutionality of the impugned legislation will impact not only the Plaintiffs, but also all individuals who are presently authorized to possess or produce marihuana for medical purposes, any individuals who may wish to be authorized in the future as well as current and future licensed producers, first responders (police, fire, ambulance), neighbours of residential properties where marihuana is presently grown for medical purposes, as well as the public at large.

The Defendant

21. In response to paragraph 8 of the Amended Statement of Claim, the Defendant admits that Her Majesty the Queen in Right of Canada, as represented by the

Attorney General of Canada, is properly named as the defendant to this action as it implicates the Government of Canada and the Minister of Health.

22. The Minister of Health is statutorily responsible for the promotion and preservation of the physical, mental and social well-being of the people of Canada and for the administration of legislation and regulations that relate to the health of the people of Canada. The Minister of Health presides over the Department of Health, which is also known as Health Canada.

Annual Renewal

23. In response to paragraph 20 of the Amended Statement of Claim, a medical practitioner may specify a period of usage of less than 12 months. The medical declaration under the MMAR requires a medical practitioner to indicate if the period of usage is less than 12 months.

Background Facts

Regulation of Drugs in Canada

24. In Canada, drugs and controlled substances are regulated through the *Food and Drugs Act* (FDA), the *Controlled Drugs and Substances Act* (CDSA) and the regulations made under those Acts. These two Acts and their regulations form the legislative and regulatory framework for access to and control of drugs in Canada. Together the FDA and the CDSA help to ensure that drugs sold in Canada are safe, effective and of high quality and that appropriate regulatory means are in place to limit the potential for abuse and diversion, particularly for drugs and substances listed under the CDSA.

25. The FDA and its regulations provide a framework to regulate the safety, efficacy and quality of drugs. The *Food and Drug Regulations* (FDR) set out a framework for the authorization of drugs for sale in Canada. Drug manufacturers submit evidence on the efficacy, dosage, route of administration, contraindications, side

effects and quality of drugs proposed for sale. Health Canada drug reviewers must have reached a conclusion where the overall benefits of a drug outweigh its risks before a drug can be authorized for sale in Canada.

26. The overall objective of the FDA is to protect the health and safety of Canadians by regulating drugs, medical devices, foods and cosmetics through a series of prohibitions and requirements, including establishing standards for manufacturing, labelling, licencing and advertising.

27. The FDA establishes rigorous processes to ensure that drugs made available for therapeutic use meet appropriate safety, efficacy and quality standards. The FDA contains offences and penalties for contraventions of the provisions of the FDA and FDR.

28. The overall objectives of the CDSA are the maintenance and promotion of public health and safety. The CDSA provides the legislative framework for the control of substances that can alter mental processes and that, though they may have therapeutic benefits, also may produce harm to health and to society when diverted or misused. These controls include regulation of the production, distribution and storage of controlled substances as well as their records and reporting requirements.

29. The CDSA imposes strict controls on access to substances that have a potential for misuse and/or diversion by prohibiting possession, production, and distribution of controlled substances, except as authorized by regulations. The CDSA also contains offences and penalties for possession, trafficking and production of scheduled substances and their precursors.

30. The CDSA is one of the means by which Canada fulfills its international obligations under the three United Nations international drug control conventions: the *Single Convention on Narcotic Drugs*, 1961 (as amended by the 1972

Protocol); the *Convention on Psychotropic Substances, 1971*; and, the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (Drug Conventions).

Regulation of Marihuana in Canada

31. Marihuana is the common name for *Cannabis sativa* (i.e., cannabis). Marihuana is an annual plant that starts out as a seed and completes its lifecycle within a one-year period. By using fertilizers and growing marihuana indoors in a controlled environment of high powered lights, a marihuana cultivator can get marihuana plants to complete their lifecycle in a two or three-month period.

32. Female marihuana plants develop flowers, known as buds, which contain a psychoactive ingredient called delta-9-tetrahydrocannabinol (THC) one of the main active components of cannabis. The buds are harvested, dried and consumed.

33. The CDSA, the FDA and their respective regulations apply to marihuana. Marihuana, THC and cannabidiol (CBD) and resin are considered drugs under the FDA and controlled substances under the CDSA.

34. Two cannabis-based drugs, other than dried marihuana, have been authorized for sale under the FDR and are available by prescription in Canada: Sativex ® and Cesamet ®.

35. To sell these products in Canada, the manufacturers are required to meet the rigorous requirements prescribed by the FDA and FDR. Accordingly, these products are of consistent content and chemical composition, have been manufactured in accordance with the Good Manufacturing Practices Guidelines and are subject to adverse event reporting and recall, should these drugs have unexpected negative impacts. There are also regulations pertaining to their

labelling and packaging to prevent these products from being distributed and sold in a manner that is false, misleading, deceptive or likely to create an erroneous impression regarding their character, value, merit or safety.

36. There has been no application to Health Canada to approve dried marihuana as a drug for sale under the FDA. As such, dried marihuana has never been approved for sale as a therapeutic drug in Canada and the safety and efficacy standards applied to other drugs for theraputic use have not been met.

Development of the *Medical Marihuana Access Regulations*

37. Under Health Canada's Marihuana Medical Access Program, Canadians have been able to access marihuana for medical purposes since 1999. At that time, individuals could be authorized to possess dried marihuana or to produce a limited number of marihuana plants for medical purposes via s. 56 of the CDSA. This provision allows the Minister to exempt any person or class of persons from the application of the CDSA or its regulations if necessary for a medical or scientific purpose or if it is otherwise in the public interest.

38. In response to the decision of the Ontario Court of Appeal in *R. v. Parker*, Canada promulgated *Marihuana Medical Access Regulations* (MMAR) in 2001. The MMAR were created to provide access to dried marihuana for medical purposes in a more regulated environment, rather than via a discretionary exemption from the application of s. 56 of the CDSA.

39. Though the MMAR were amended on numerous occasions, in their final form they permit individuals who have the support of an authorized medical practitioner to obtain lawful access to marihuana in one of three ways:

(a) through a Personal-Use Production License (PUPL), pursuant to which the individual is permitted to grow a designated quantity of marihuana for his or her own use;

(b) through a Designated Person Production License (DPPL), pursuant to which the individual may designate another person to grow his or her marihuana; or

(c) by purchasing dried marihuana directly from Health Canada, which contracts with a private company to produce and distribute marihuana.

The Expansion of the Marihuana Medical Access Program under the MMAR

40. From their inception in 2001, the MMAR attempted to achieve three goals:

(a) to strike a balance between providing legal access to dried marihuana for medical purposes, while controlling access to a controlled substance and unapproved drugs with limited benefit and risk information;

(b) to respect existing federal legislation, including the FDA and CDSA, as well as Canada's international obligations under the United Nations Drug Conventions; and

(c) to protect the individual and public health, safety and security of all Canadians.

41. These goals have been seriously compromised by the rapid unanticipated expansion of the Marihuana Medical Access Program, which was originally intended to provide legal access to dried marihuana to a relatively small number of seriously ill Canadians.

42. Since 2001, the number of individuals who have received medical authorization to possess marihuana for medical purposes, the quantities of dried marihuana that such individuals have been authorized to produce, and the size of residential marihuana growing operations that have been authorized under the MMAR have grown exponentially.

43. Between 2001 and 2013, the number of individuals authorized to possess marihuana under the MMAR increased from less than 100 in 2001 to over 29,000 in April 2013, and to more than 37,000 by January 2014. At its current rate of

growth, more than 50,000 individuals would likely be authorized to possess marihuana for medical purposes by the end of 2014. By 2022 it is anticipated that number would likely increase to 300,000 – 400,000 individuals.

44. The vast majority of users authorized to possess marihuana for medical purposes under the MMAR obtain their marihuana either by growing it themselves under a PUPL or by designating someone else to do so on their behalf through a DPPL. Of the 37,884 individuals who held valid ATPs as of January 8, 2014, approximately 66% produced their own marihuana for medical purposes under a PUPL, and 12% designated another person to do so on their behalf.

45. The daily amount of dried marihuana that individuals are authorized to possess under the MMAR is determined by the amount indicated on the medical declaration signed by their medical practitioner. This average daily amount has increased significantly since 2001, and as of December 12, 2013, was 17.7 grams of dried marihuana per day.

46. On average, one gram of marihuana produces between three and five marihuana cigarettes (joints). As such, a daily average of almost 18 grams translates into the consumption of between 54 and 90 joints every day. By contrast, individuals who purchased their dried marihuana from Health Canada have on average purchased between one and three grams per day.

47. The MMAR authorize production of a particular number of plants under a PUPL or DPPL based on the individual's daily dosage and an estimated yield of medical marihuana plants. However, in practice, growers are known to grow very large marihuana plants that yield significantly greater amounts of dried marihuana than that which is estimated in the MMAR.

48. As the amounts of marihuana for medical purposes that individuals are authorized to possess has increased, so too have the corresponding amounts that they are authorized to produce through PUPLs and DPPLs.

49. For example, the total number of indoor plants authorized to be grown under PUPLs and DPPLs in 2012 was more than 1.4 million. In 2013, this figure more than doubled to more than 3.2 million indoor plants, which includes more than 2 million plants in British Columbia alone.

50. The vast majority of marihuana plants that are grown pursuant to PUPLs or DPPLs are grown indoors. For example, on December 3, 2013, there were 30,271 production locations authorized under either a DPPL or PUPL, of which 26,294 were indoor only, 709 were outdoor only and 2,768 were indoor and outdoor.

51. The number of marihuana plants that can be grown in any particular location has also increased as court decisions have resulted in the MMAR being amended to allow authorization of up to four production licences to operate at a single location.

52. The MMAR permit the production of marihuana inside residential dwellings designed and built for human occupancy. As a result, many of the authorized production facilities are located in residential properties in urban and suburban communities, some of which are multi-unit dwellings with shared walls, foundations, hallways and other infrastructure systems.

Unanticipated Consequences of the MMAR

53. The rapid expansion of uptake under the MMAR has had significant unintended consequences. Exponential growth in the number of persons seeking to possess and to produce marihuana for medical purposes, the increase in amounts produced and possessed, and the increase in the number of people who could grow in one

location, when combined with the fact that the production of marihuana was taking place in private dwellings that are not constructed for large-scale horticultural production, have resulted in risks to the health, safety and security of individuals licensed to produce marihuana for medical purposes, their neighbours and for the public in general.

54. Residential marihuana production sites are linked to the presence of excess moisture in homes creating a risk of mould (particularly associated with drying of marihuana), fire and electrical hazards, the presence of toxic chemicals like pesticides and fertilizers, the emission of noxious odours and various risks to children living in or near the residential growing operations.

55. Large scale residential marihuana production has led to production and possession of amounts greater than that authorized by Health Canada and diversion to the illicit market, which is particularly attractive given the street value of dried marihuana (approximately $10 to $15 per gram) and the high costs of constructing and operating marihuana production facilities.

56. It is impossible for Health Canada to conduct effective inspection of the tens of thousands of production sites across the country, particularly given the legal requirement to either obtain permission, or a warrant, to enter a private dwelling.

57. Production of marihuana in homes exposes residents and their neighbours to the risk of violent home invasion by criminals who become aware that valuable marihuana is being produced and stored in the home.

58. There are also practical difficulties in imposing quality and safety standards on production by personal producers of marihuana for medical purposes that may lack the capacity, knowledge or motivation to implement them. This situation poses individual health and safety risks for those seriously ill persons who consume marihuana, not knowing what kind or level of microbial or chemical

contaminants it may contain, or what standards should be or have been used for products such as fertilizers or pesticides.

59. All of the foregoing harms have impacted individual producers as well as others living at the same address, in adjacent residential units, and/or surrounding communities.

60. The MMAR were never intended to permit such widespread, residential, large-scale marihuana production and, as a result, they do not adequately address the public health, safety and security concerns that accompany such production.

61. Grave concern about the harms associated with personal production under the MMAR have been expressed to Health Canada by stakeholders including municipalities, fire and police authorities, homeowners, neighbours and program participants.

Development of the *Marihuana for Medical Purposes Regulations*

62. Following extensive public consultation, the *Marihuana for Medical Purposes Regulations* (MMPR) came into force on June 7, 2013. The MMPR created a framework that replaces the MMAR, which will be repealed on March 31, 2014.

63. The regulatory changes set out in the MMPR are intended to address the significant unintended negative consequences that resulted from the MMAR. At the same time, the MMPR are intended to improve access to quality dried marihuana for medical purposes, which, like other drugs used for medical purposes, will be required by regulation to be produced using Good Production Practices under secure and sanitary conditions. Furthermore, the FDA will apply to licensed producers.

64. Under the MMPR, three key activities are authorized: (a) the possession of dried marihuana for medical purposes by individuals who have the support of an authorized health care practitioner; (b) the production of dried marihuana by licensed producers; and (c) the sale and distribution of dried marihuana by licensed producers and hospitals to individuals who may possess it.

65. Like manufacturers of drugs under the FDA and FDR, licensed producers under the MMPR will be subject to regulatory requirements related to security, Good Production Practices, packaging, labelling and shipping, record keeping, reporting and distribution. The MMPR provide for adverse reaction reporting and recall of dried marihuana by the licensed producer.

66. Unlike the situation that prevailed under the MMAR, individuals authorized to possess marihuana under the MMPR will no longer be permitted to grow their own marihuana through a PUPL or to designate another person to grow it for them through a DPPL. Such persons will be permitted to obtain their supply of marihuana for medical purposes from a licensed producer only.

Transition from the MMAR to the MMPR

67. During the period between June 7, 2013 and March 31, 2014, both regulatory regimes run together, creating a transition period for the new dried marihuana supply and distribution system.

68. Individuals who hold an ATP under the MMAR may transition to the new framework using their ATP for up to one year after its date of issue unless a period of less than 12 months has been indicated in their medical declaration.

69. Individuals can also transition to obtaining their legal supply of dried marihuana for medical purposes under the MMPR by using a medical declaration issued

under the MMAR to register with a licensed producer that can then provide them with dried marihuana for medical purposes.

70. Under the MMPR, personal and designated licenses to produce dried marihuana for medical purposes issued under the MMAR will be phased out, until March 31, 2014 when the MMAR will be repealed and all such licenses will become invalid.

71. On repeal of the MMAR, Health Canada will no longer receive, process or issue applications for ATPs, PUPLs or DPPLs. The MMPR will return Health Canada to its traditional role of regulator, as with other drugs, rather than producer and service provider.

72. The MMPR do not limit the number of strains of marihuana that licensed producers may make available to registered clients.

73. The MMPR provide that until March 31, 2014, with specific authorizations from Health Canada, persons holding a valid PUPL or a valid DPPL may sell or provide marihuana seeds or plants to licensed producers. This makes it possible for a licensed producer to cultivate and sell an individual's preferred strain of marihuana. Licensed producers may also conduct research and development on cannabis if they wish under their licence.

74. Health Canada has taken a number of steps to provide for reasonable access to a legal, continuous, stable and adequate supply of dried marihuana for medical purposes is available during the transition period from the MMAR to the MMPR and thereafter.

75. These steps have included developing models to estimate demand and supply, encouraging applications from potential licensed producers, streamlining the application process for production licenses and devising contingency plans for

accessing a supply of dried marihuana to meet demand in the event that licensed producers are not able to do so.

76. Health Canada has purchased a significant quantity of overstock marihuana from a private company, Prairie Plant Systems, as a reserve in case of a supply shortfall during the transition period. As of this date, it has not yet needed to be used.

77. To date, Health Canada has received more than 400 applications from prospective licensed producers, of which 8 have been issued. Health Canada estimates that by March 31, 2014, over 20 producers will be licensed to produce marihuana for medical purposes with an annual production capacity of 45,000 kilograms of dried marihuana.

78. As of January 30, 2014, approximately 60 strains of marihuana for medical purposes are available for sale by licensed producers at prices ranging from approximately $5 to $12 per gram, with a number of licensed producers offering discounts for low income individuals.

Anticipated Benefits of the MMPR

79. The MMPR are intended to improve the way in which those who use marihuana for medical purposes may access quality products in a number of ways, while at the same time reducing negative impacts created by the MMAR.

80. A number of provisions in the MMPR are intended to make the administrative process of obtaining marihuana for medical purposes significantly quicker and easier than under the MMAR.

81. The MMPR is intended to increase the accessibility of marihuana for medical purposes for many individuals. The MMAR impeded access for those individuals who:

(a) could not afford the significant investment of capital required to set up and operate a marihuana production facility;

(b) did not live in homes where the setting up of a marihuana production facility was permitted or was practically feasible;

(c) did not have the knowledge or ability to construct and maintain a marihuana production facility;

(d) did not have access to a reliable designated grower; and

(e) were not satisfied by the strain of marihuana that was offered for sale by Health Canada under the MMAR.

82. While the cost of marihuana for medical purposes may initially increase for those who have already invested in marihuana production facilities, that cost is likely to decrease significantly over time as a result of factors such as competition among licensed producers, economies of scale, lower costs for skilled labour and technological innovation.

83. The MMPR are also likely to increase the availability of various strains of marihuana for medical purposes. As noted above at paragraphs 70-71, the MMPR place no limit on the number of strains that may be made available by licensed producers and provide a mechanism whereby individuals may sell the seeds or plants of their preferred strains of marihuana to licensed producers. Unlike under the MMAR, licensed producers are now required to test their marihuana and label it with the percentage of THC and CBD.

MMPR's Possession Limits

84. The MMPR limits the amount of marihuana for medical purposes that individuals with medical support may possess at any time to either 30 times the daily quantity of dried marihuana indicated by the individual's health care practitioner, or 150 grams of dried marihuana, whichever is less.

85. This limit is intended to decrease the risk of diversion to the illicit market and the extent to which individuals possessing marihuana for medical purposes become targets for theft and violence.

MMPR's Production Location Restrictions

86. Under the MMPR, licensed producers will not be permitted to grow marihuana in residential dwelling places or outdoors.

87. With respect to residential dwelling places, this restriction is designed to mitigate the numerous public health and safety concerns that have arisen in respect of the proliferation of increasingly large marihuana production facilities in private dwellings that are not constructed for large scale horticultural production.

88. With regard to the restriction on outdoor production of marihuana for medical purposes, this is intended to decrease the risk of diversion as well as cross-contamination with other nearby crops, particularly industrial hemp.

The Restriction on Non-Dried Marihuana

89. Like marihuana itself, the possession, production and distribution of cannabis preparations and derivatives (e.g. oils, salves, edible products, creams made with extracts, etc.) are prohibited by the CDSA. The MMAR, the MMPR and the *Narcotic Control Regulations* (NCR) provide for access to dried marihuana only and not cannabis derivatives and preparations. This is so for several reasons.

90. First, the *Parker* decision, which precipitated the promulgation of the MMAR, was based on the fact that the Court found that the claimant demonstrated a medical need for access to dried marihuana (as opposed to cannabis derivatives or preparations).

91. Second, although only limited clinical evidence exists regarding the use of marihuana for medical purposes, what does exist is limited to either dried marihuana or to formulated therapeutic products that have been approved under the rigorous process prescribed by the FDR (e.g. Sativex ® and Cesamet ®). By contrast, the risks and benefits of unapproved cannabis derivatives and preparations are not sufficiently known.

92. Third, unlike approved therapeutic products, which are of consistent content and chemical composition, have been manufactured using regulated manufacturing practices, and are subject to adverse event reporting and recall capacity, the production, possession and distribution of unapproved cannabis derivatives and preparations present serious threats to health and public safety.

93. In particular, the extraction of cannabis active components and preparations from marihuana plant material through chemical processes involves the use of volatile solvents that can trigger health problems and can cause explosion and fire. This poses serious health and safety hazards, including severe life threatening burns. The carrying out of such potentially dangerous processes is of particular concern in clandestine residential laboratories.

94. Finally, if cannabis preparations and derivatives were permitted under the MMAR, MMPR or NCR, it would be difficult for law enforcement officials to determine that a marihuana product had been produced from a legally-obtained source of dried marihuana.

The Defendant's Legal Position

Section 7 of the *Charter*

95. Section 7 of the *Charter* provides that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

96. In response to paragraphs 61-65 of the Amended Statement of Claim, the Defendant says that the impugned provisions do not deprive the Plaintiffs of life, or the security of the person. While the Defendant acknowledges that the potential sanction of imprisonment, should the Plaintiffs engage in criminal conduct prohibited by the impugned legislation, does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality or overbreadth.

97. In the further alternative, the Defendant says that any breach of s. 7 of the *Charter* is justifiable as a reasonable limit under s. 1.

The Elimination of Personal Production does not violate section 7 of the *Charter*

98. The Plaintiffs' life and security of the person interests are not engaged by elimination of personal production in the MMPR.

99. The rights to life and security of the person do not encompass a right to produce one's own medication in order to avoid the cost of purchasing commercially available equivalents. This is an economic interest which is not protected by s. 7 of the *Charter*. Further, the rights to life and security of the person do not encompass the right to a particular drug of choice where reasonable alternatives are available. As the plaintiffs may lawfully purchase any commercially available strain of dried marihuana from a licensed producer, the prohibition on personal production does not engage the Plaintiffs' security of the person or life interests. In the alternative, if the restriction on personal production does engage the Plaintiffs' life or security interests, any such deprivation is consistent with the principles of fundamental justice.

100. While the Defendant acknowledges that the potential sanction of imprisonment should the Plaintiffs personally produce marihuana in

contravention of the impugned legislation does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality or overbreadth.

101. The restriction on personal production furthers pressing goals that are consistent with the goals of health and public safety that underlie the regulation of marihuana under the CDSA, the particulars of which are set out at paragraphs 24 to 30.

102. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

Limits on Production Locations do not violate Section 7 of the *Charter*

103. Limits on medical marihuana production locations do not engage the Plaintiffs' life or security of the person interests.

104. The rights to life and security of the person do not encompass a right to produce controlled substances in the location of one's choosing. As the plaintiffs may lawfully purchase any commercially available strain of dried marihuana from a licensed producer, the limits on production location do not engage the Plaintiffs' security of the person or life interests. In the alternative, if the restriction on personal production does engage the Plaintiffs' life or security interests, any such deprivation is consistent with the principles of fundamental justice.

105. While the Defendant acknowledges that the potential sanction of imprisonment, should the Plaintiffs contravene the limits on production locations established by the impugned legislation, does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality or overbreadth.

106. The restriction on residential and outdoor production furthers pressing goals that are consistent with the promotion of health and public safety that underlie the regulation of marihuana under the CDSA, the particulars of which are set out at paragraphs 24 to 30.

107. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

Limits on Possession Amounts do not violate section 7 of the *Charter*

108. The MMPR's limits on the amount of marihuana for medical purposes that the Plaintiffs may possess do not engage the Plaintiffs' life or security of the person interests.

109. The rights to life and security of the person do not encompass a right to possess unlimited quantities of controlled substances. The fact that the Plaintiffs are limited at any time to possessing 30 times the daily quantity of dried marihuana indicated by their health care practitioner or 150 grams of dried marihuana, whichever is less, does not prevent them from obtaining their prescribed dosages. It simply means that, in some cases, certain individuals may have to increase the frequency of deliveries of marihuana as compared to individuals whose prescribed dosages are lower.

110. While the defendant acknowledges that the potential sanction of imprisonment should the plaintiffs contravene the limits on possession amounts established by the impugned legislation does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality or overbreadth.

111. In the alternative, if the MMPR's possession limits do engage the Plaintiffs' liberty or security interests, any such deprivation is consistent with the principles of fundamental justice.

112. The restriction on possession amounts furthers pressing goals that are consistent with the goals of health and public safety that underlie the regulation of marihuana under the CDSA, the particulars of which are set out at paragraph 85.

113. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

Prohibition on Non-Dried Marihuana does not violate s. 7 of the *Charter*

114. The fact that the MMPR only makes dried marihuana available does not engage the Plaintiffs' life or security of the person interests.

115. The right to life and security of the person do not encompass the right to produce and possess controlled substances in a form or manner of one's choosing, regardless of medical need or the availability of reasonable alternative treatments.

116. While the Defendant acknowledges that the potential sanction of imprisonment should the Plaintiffs produce or possess non-dried marihuana in contravention of the impugned legislation does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality or overbreadth.

117. In the alternative, if the restriction on the availability of non-dried marihuana does engage the Plaintiffs' liberty or security interests, any such deprivation is consistent with the principles of fundamental justice.

118. This restriction furthers pressing goals that are consistent with the goals of health and public safety that underlie the regulation of marihuana under the CDSA, the particulars of which are set out at paragraphs 89 to 94.

119. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

Section 1 of the *Charter*

120. In the further alternative, if the MMPR do violate s. 7 of the *Charter*, any such violation represents a reasonable limit under s. 1 of the *Charter*.

Judgment and Relief Sought

121. The Defendant says that the Plaintiffs are not entitled to the relief that is sought at paragraph 66 of the Amended Statement of Claim, including the request for interim injunctive relief.

122. The Defendant says that the claim should be dismissed with costs.

123. The Defendant consents to the hearing of this matter in Vancouver.

DATE: February 14, 2014

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FORM 171C
Rule 171

REPLY

No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

DEFENDANTS

REPLY

1. The Plaintiffs admit the allegations contained in paragraphs 4-19, 20 (first sentence and second sentence to the words "authorized in the future") 21-29, 32-33, 35, 37-39, 45 (first sentence), 47 (first sentence), 51, 52, 62, 64-70, 72-73, 80, 84, 86, 95.

2. The Plaintiffs deny the allegations contained in paragraphs 40-43, 46, 53-61, 63 (first sentence), 74.

3. The Plaintiffs have no knowledge of the allegations contained in paragraphs 20 (the last portion of the second sentence after the word "future"), 44, 45 (second sentence), 47 (second sentence) and puts the Defendants to the strict proof of the details in that regard, 48-50.

4. In reply to the latter part of paragraph 20, the Plaintiffs say that whatever the impacts are of any Declarations made by the Court with respect to the constitutionality of the impugned legislation on current and future licenced producers, first responders (police, fire, ambulance) neighbours of residential properties where marihuana is presently grown for medical purposes, as well as the public at large, will be different types of impact in that it will not necessarily

impact their constitutional rights and any potential impacts on them are remedial by reasonable regulation to render such impacts to be minimal or non existent. The Plaintiffs put the Defendants to the strict proof of such impacts on such groups enumerated between 1999 and 2014.

5. While the Plaintiffs admit paragraphs 24-30, the Plaintiffs say that Canada's international obligations are subject to Canada's Constitution and in particular the provisions of the *Canadian Charter of Rights and Freedoms* and that the legislation referred to, including in particular the *Food and Drugs Act (FDA),* while also extending to the regulation of food and natural health care products, the focus of such regulations is in relation to the sale of such products to the public and not the production of such products for personal consumption that not for distribution to anyone else in Canada by way of sale or otherwise.

6. In reply to paragraph 31, the Plaintiffs say that the complete life cycle of the marihuana plant varies depending upon a large number of variables including whether or it is produced from seed or clones, indoors or outdoors or partly indoors and partly outdoors, with or without fertilizer and subject to various other factors and variables.

7. In reply to paragraph 34, the Plaintiffs understand that Sativex ® is whole plant based whereas Cesamet ® is synthetic and understands that they are prescribed for certain specific ailments at substantial cost.

8. In reply to paragraph 36, the Plaintiffs, while admitting the first sentence, and accepting the first part of the second sentence, reply that the safety and efficacy standards that apply to other drugs for therapeutic use may not have been met but that it is known and documented by the Defendants that Cannabis and its cannabinoids have no lethal dose ratio and are relatively non-toxic to healthy, developed cells and organs and are not central nervous system depressants so they will not cause respiratory failure such as ethanol and/or opiate based drugs. There have been an estimated 120 controlled clinical trials in the USA assessing the therapeutic efficacy of Cannabis and cannabinoids in some 6,500 subjects, a cohort of subjects substantially greater than would typically participate in clinical trials for more conventional therapeutics that are usually approved on the basis of a single clinical trial.

9. In reply to paragraphs 40-52, the Plaintiffs say that the Defendants were required by the courts to provide a constitutionally viable exemption from the *CDSA* to provide reasonable access to Cannabis to medically approved patients. The Plaintiffs say that the Defendants are responsible for the formula in the Regulations that did not limit the size of plants but nevertheless also required destruction of any excess to stay within prescribed storage limits. The Plaintiffs further say that the Defendants failed to attend upon and rectify complaints during the course of the *MMAR* program to ameliorate any negative impacts that developed and it failed in its responsibility under the regulations to inspect licenced premises to ensure public health, safety and security for producers and

their neighbours and others alike and that all of the problems identified, the specific details and numbers of which are unknown to the Plaintiffs and are within the possession and control of the Defendants, are remedial by reasonable regulation including modification to existing regulations to eliminate any of the impacts described without the need to abolish the ability to personally produce or have a caregiver produce for one in a healthy, safe and secure manner with no risk to any members of the public, including first responders and others identified.

10. In reply to paragraphs 53-61, the Plaintiffs say they have no knowledge of the specific abuses or incidents of 'misuse' alleged relative to the total number of program participants and locations and put the Defendants to the strict proof thereof in relation to each alleged negative consequence. The Plaintiffs accept that there have been a number of misuses/abuses by a minority of permit holders and say that they have arisen in part due to the failure on the part of the Defendants to remedy complaints and conduct inspections and to ensure reasonable regulation of all to prevent abuses and protect legitimate patients that are in full compliance with the law. The Defendants designed the program and its Regulations and have the power and ability to modify those Regulations in order to ensure that the law is complied with and still provides a viable exemption instead of abolishing the personal production and designated caregiver provisions without any attempt at remediation short of prohibition, resulting in obvious negative consequences to at least those patients who are acknowledged to be unable to afford the increased prices.

11. In further answer to paragraphs 53-61, the Plaintiffs say that ironically the over supply apparently produced by misuser/abusers of the program (as well as a result of legalization developments internationally and in the USA, including extensive medical legalization) has resulted in a substantial glut on the illicit market resulting in many of the illicit operations going out of business, a reduction in the cost of marihuana per gram in the illicit market and a substantially reduced interest on the part of organized criminals and others in thefts due to the reduced value of the product and the inability to dispose of it at a reasonable price.

12. In reply to paragraph 63, the Plaintiffs say that the *MMPR* will not improve access for medically approved patients who will not be able to afford the new increased Licenced Producer prices nor those who could not afford illicit market prices and learned to produce in a safe and secure manner in their dwellings at less cost than estimated by Licenced Producers and will deprive them of their choice over the nature and quality of their medicine that they have developed, some of them over the last 14 years of the *MMAR* Program. The *Food and Drugs Act* applies to those who produce and sell food and drugs and natural health care products to the public to protect the public but not those who produce such items as food or grow medicinal plants for themselves only and not for distribution.

13. In reply to paragraph 71, the Plaintiffs say that the repeal of the *MMAR* will result in the violation of the s.7 constitutional rights of some medically approved

patients who, due to their inability to afford Licenced Producer prices or otherwise, will be forced to choose between their liberty and health. The Plaintiffs welcome the Defendants withdrawal from the production of drugs and its return to the role of a regulator so as to ensure they will have more time and resources to ensure the proper enforcement of the regulations for the benefit of the great majority of law abiding patients who have not contributed to nor participated in any of the unintended consequences alleged.

14. In reply to paragraphs 74-78, the Plaintiffs say that the steps taken by the Defendants to provide for reasonable access to a legal continuous stable and adequate supply have not been reasonable and the models used to estimate demand and supply do not reflect the reality of the Canadian demand by patients in accordance with the *MMAR* provisions based on prior years of operation of the program, including the amounts approved by their physicians overall, including the grams per day approved over time in individual cases and have made no provision for a viable reasonable continuous supply for such approved patients like the Plaintiffs and others like them who cannot afford estimated Licenced Producer prices or their special programs and choose to maintain control over the quality and production of their own medicine at a lesser cost than licenced producers, over many years.

15. In reply to paragraph 76 the Plaintiffs point out that the quantity of overstock referred to comes from Prairie Plant Systems which originated as the government research supply and as a result of litigation resulted in the Defendants making this supply available to patients, but it was found to be ineffective and of undesirable quality by a substantial majority of the approved patients, as documented by the Defendants, and it is unreasonable for the Defendants to rely upon such inadequate, and ineffective supply when they know it to be considered as an inferior quality product by the substantial majority of the *MMAR* patients.

16. In reply to paragraphs 77 and 78, the Plaintiffs put the Defendants to the strict proof of the amount available ready to be sold by Licenced Producers by March 31st, 2014, the detailed price ranges and particular details of the discounts offered for low income individuals confirming that they do not go below $3.00 a gram.

17. In reply to paragraph 79, the Plaintiffs say while the *MMPR*'s intent may be achieved for some medically approved patients and may reduce some negative impacts that arose as a result of the Defendant's failure to properly regulate and inspect under the *MMAR*, the *MMPR* will not improve the situation for the Plaintiffs and others similarly situated who will not be able to afford the Licenced Producer prices, have developed a process where they can produce their own good quality medicine effectively at a cost that they can afford, and who are able to do so without any negative impacts on any others and who are willing to be subject to additional reasonable regulations to facilitate continuation of their personal production or by a designated caregiver.

18. In reply to paragraph 81, the Plaintiffs say that the intent of the *MMPR* will not be met except to a limited extent and that the *MMPR* will continue to impede access to those who will not be able to afford the estimated Licenced Producer prices and who have invested in a safe and secure set up and production facility that has enabled them to produce their quality medicine at a reasonable cost below even all special programs offered by Licenced Producers.

19. In reply to paragraph 82, the Plaintiffs say that the *MMPR* makes no provision for those medically approved patients who will not be able to afford the initial increases referred to over the period of unestimated time indicated. The Plaintiffs say that Licenced Producers will never be able to produce cannabis at a cost equivalent to their ability to produce their own medicine in there already safe and securely constructed facilities that they have developed to be effective over time. Consequently, the Plaintiffs say that they will be denied reasonable access to their medicine due to the failure on the part of the Defendants to provide or allow for a viable exemption for them to continue at least during this alleged time that remains undefined and for the foreseeable future.

20. In reply to paragraph 83, the Plaintiffs say that there are sufficient strains available in the market currently and that Licenced Producers will not be able to custom produce for each patient supplying them with a particular strain due to the enormous number of different strains and enormous number of different patients and the Plaintiffs are content with the current strains that they have been working with and that have proved to be effective for them without the need to resort to others and to recommence the process they had been involved in over many years of finding effective strains that work for them.

21. In reply to paragraph 85, the Plaintiffs say that this maximum possession limit is unreasonable and unduly restrictive and no similar limits are imposed upon others who possess prescribed drugs or natural health care products under the *Controlled Drugs and Substances Act* or *Food and Drug Act* or *Narcotic Control Regulations* and the limits proposed will make travel away from one's premises or producer for any length of time or distance to be problematic depending upon the patient's dosage per day and how long and how far away the patient will be from the source of supply. This will be particularly complicated in the case of patients using means other than the smoking (that has a negative impact upon their health, as documented by the Defendants) of "dried marihuana" or other products. The Plaintiffs further say that the substantial majority of patients are law abiding citizens who have no interest in the diversion of any of their medicine to the illicit market which they see as diminishing in any event as a result of oversupply and an apparent trend towards legalization. As in the past, the Plaintiffs will take appropriate security measures in relation to their premises and persons to ensure that they are not the victims of crime.

22. In reply to paragraphs 87-88, the Plaintiffs put the Defendants to the strict proof with respect to the details alleged beyond anecdotal evidence and say that the problems identified are subject to reasonable regulation and remediation and fail

to take into account the substantial majority of law abiding medical patients, like the Plaintiffs who have not experienced any public health or safety concerns as a result of producing in their dwelling places and who have reasonable sized production facilities in private dwellings that have been constructed professionally and subjected to inspection to ensure no public health and safety concerns and are in full compliance with the *MMAR*.

23. In reply to paragraph 88 the Plaintiffs put the Defendants to the strict proof of the matters alleged therein and say that they have not experienced any such problems in their outdoor production, take adequate security steps to ensure no diversion, have never had a complaint of cross contamination from others nearby, including the industrial hemp growers and say that once again there are remedial measures that can be taken short of prohibition of personal production by patient or caregiver to address any concerns.

24. In reply to paragraphs 89-94 the Plaintiffs say that the complete answer is contained in the decision of the Supreme Court of British Columbia in *R. v. Smith* 2012 BCSC 544 that specifically dealt with the limitation or restriction to dried marihuana only finding that this restriction did little or nothing to enhance the State interest, including the State interest in preventing diversion of the drug, or controlling false and misleading claims of medical benefit. The court found the restriction to be arbitrary and that its engagement of the rights to liberty and security of the person did not accord with principles of fundamental justice. The Defendants have simply reenacted in the *MMPR* the provision that was struck down by the courts in the *MMAR*, in British Columbia, and therefore will prejudice and set back the acquired rights of patients under that decision.

25. In further reply to paragraphs 89-94, the Plaintiffs say that the creation of any such products is for their personal consumption and not for sale to the public, and accepts that it is their responsibility to do so in a safe and secure manner that does not put themselves or any members of the public at risk and puts the Defendants to the proof of any specific problems that have arisen in relation to such products in British Columbia since the decision in *Smith* on April 13th, 2012.

26. In reply to paragraphs 95- 97 generally and paragraphs 98 through 102 (dealing with the elimination of personal production), and paragraphs 103 through 107 (dealing with limits on production locations), the Plaintiffs say it is not a matter of "avoiding the cost of purchasing commercially available equivalents" of their medicine, but that they simply cannot afford those costs due to their limited income and wish to control the nature and quality of their medicine and its cost, which includes production in their dwelling house to avoid the cost of producing elsewhere, and with the ability to move the plants outdoors from time to time, or even temporarily, to reduce electrical costs, instead of being compelled to rely on others. The Plaintiffs say that, like Terrence Parker, their cultivation of cannabis (marihuana), in their dwelling place, is incidental to their need to possess it for its therapeutic medical use, as approved by their physicians, for the treatment of their diagnosed illnesses. Like Terrence Parker this allows them to control the

quality of the product they use and to maximize its benefit and minimize the risks from a tainted or adulterated product, from the illicit market (or a licensed producer) and enables them, out of economic necessity, due to their being on disability pensions and/or of relatively limited economic means, and unable to afford illicit market or license producer prices, to obtain their medicine at reduced costs, without the need to rent additional premises, and enables them to spend what little income they have on necessities of life, food, shelter, transportation, and clothes, instead of licit or illicit street prices that are out of reach economically to them. Like Terrence Parker the Plaintiff's assert that they are entitled, as medically approved patients, to a constitutionally viable medical exemption to the prohibition against the possession and cultivation or production of cannabis (marihuana) for their medical health. The removal of this existing constitutional exemption under the *MMAR* will cause the plaintiffs, and approximately some 38,000 patients apparently similarly situated to have to, once again, choose between their liberty and their health and any reduction in the availability of their medicine for them will severely affect the security of their persons and is arbitrary, overbroad, and results in grossly disproportionate effects in violation of section 7 of the Canadian Charter of Rights and Freedoms.

27. In reply to paragraphs 108-113 (dealing with the limits on possession amounts), the Plaintiffs say that as part of their "viable constitutional exemption" they are entitled as medically approved patients to possess a sufficient quantity of their medicine as may be required depending upon the particular situation or circumstances at any particular time. An individual's illness and the amount of medicine that that individual requires is a fundamental personal decision between the patient and his physician that should not be interfered with by the government. Canada is a large country and while being able to possess up to 30 times the daily quantity of marihuana indicated by the health care practitioner under the *MMAR* appeared to be satisfactory to enable travel for up to a month away from one source of supply, the limit in the *MMPR* to 150 g at any time, will unreasonably restrict the viable constitutional exemption that some the Plaintiffs and others similarly situated are entitled to possess at any time by limiting their ability to travel away from their production facility and to have reasonable quantity of their medicine available to them wherever they may be, depending upon the grams per day approved by their physician. To interfere in this decision between the doctor and his patient is arbitrary, overbroad, will result in grossly disproportionate effects for some patients in violation of s.7 of the *Charter*.

28. In reply to paragraphs 114-119 (dealing with the prohibition on non-dried marihuana) the Plaintiffs, once again rely on the decision of the Supreme Court of British Columbia *in R v. Smith*, 2012 BCSC 544, which was heard by the Court of Appeal for British Columbia in December, 2013 and judgment is still reserved. The Plaintiffs say that the limitation or restriction or prohibition on the use of non-dried marihuana, approved by their physicians, does little or nothing to enhance the government's interest, including the government's interest in preventing diversion of the drug, or controlling false and misleading claims of medical

benefit. In accordance with Smith, the Plaintiffs say that this prohibition or restriction is arbitrary and engages their rights to liberty and the security of their person, and if removed from patients, including the Plaintiffs and others in British Columbia that are lawfully entitled to use non-dried marihuana as a result of the Smith decision, that decision by the Defendants, will cause them to have to choose between their liberty and their health if that restriction is re-imposed upon them and will remove the benefit they enjoy under that decision to the use of more effective medicine and to avoid the smoking of the medicine, which, as the Defendants have documented is harmful to their health. The Plaintiffs say that this prohibition is in violation of their rights under section 7 of the *Charter* and is arbitrary, overbroad and will result in grossly disproportionate effects.

29. In reply to paragraph 120 the Plaintiffs say that the onus is on the Defendants to prescribe by law and demonstrably justify, in a free and democratic society. any reasonable limits on their s. 7 *Charter* rights. The Plaintiffs say that the objective of the *MMPR*'s removal of personal production by patients of cannabis (marihuana) or by a designated caregiver, and the other limitations in the *MMPR* identified, and only to the extent applicable to personal producers or their designated caregivers, are not of sufficient importance to warrant the overriding of the Plaintiffs constitutional rights that are in issue. The Plaintiffs say that the objective is not "pressing and substantial" in all of the circumstances; that the means chosen is not reasonable and demonstrably justified; and while there might be a rational connection between the means chosen and the objective, the means chosen does not impair the right as little as possible in order to achieve the objective and, there is no proportionality between the objective and the effects of the legislation on the *Charter* protected interests of the Plaintiffs and others similarly situated, that it limits.

Dated: February 27, 2014

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Federal Court | Cour fédérale

Facsimile Transmittal Form / Formulaire d'acheminement par télécopieur

TO / DESTINATAIRE(S):

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DATE: May 2, 2014
TIME / HEURE : 3:55 pm
Total no. of pages (including this page) / Nombre de pages (incluant cette page) : 4

SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour : **T-2030-13**
Between / entre : ***Neil ALLARD et al v HMQ***
Enclosed is a true copy of the Direction / Order / Judgment / Reasons of / Vous trouverez ci-joint une copie conforme de l'ordonnance / jugement / motifs de : **Mr. Justice Manson**
Dated / date : **May 2, 2014**

COMMENTS / REMARQUES :

Please note that Rule 398 of the *Federal Courts Rules* has changed and the Registry will not be sending certified copies of decisions of the Court, unless a copy is requested by the party. If you do require a copy, please advise the Registry in writing.

Pursuant to section 20 of the Official Languages Act all final decisions, orders and judgments, including any reasons given therefore, issued by the Court are issued in both official languages. In the event that such documents are issued in the first instance in only one of the official languages, a copy of the version in the other official language will be forwarded on request when it is available.

Conformément à l'article 20 de la Loi sur les langues officielles, les décisions, ordonnances et jugements définitifs avec les motifs y afférents, sont émis dans les deux langues officielles. Au cas où ces documents ne seraient émis, en premier lieu, que dans l'une des deux langues officielles, une copie de la version dans l'autre langue officielle sera transmise, sur demande, dès qu'elle sera disponible.

Federal Court Cour fédérale

Date: 20140502

Docket: T-2030-13

Vancouver, British Columbia, May 2, 2014

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN
IN RIGHT OF CANADA

Defendant

ORDER

UPON the Court issuing oral directions on March 20, 2014 requiring the parties to submit a joint proposed timetable for completion of the remaining steps;

AND UPON the Court issuing a further direction on April 3, 2014 requiring the joint proposed timetable to be submitted by April 7, 2014;

AND UPON reading correspondence from counsel for the parties dated April 3, 2014 requesting an extension of time;

AND UPON reading correspondence from counsel for the parties dated April 17, 2014, and hearing submissions of counsel on May 2, 2014;

THIS COURT ORDERS that:

1. This action will proceed by way of simplified action, as agreed to by the parties and pursuant to Rules 295 to 299 of the *Federal Courts Rules*, with two exceptions:

   i. The parties will not be limited to the fifty question limit provided by Rule 295, but will be limited to a reasonable limit not to exceed one hundred questions, unless otherwise permitted by the Court on application by either party;

   ii. The parties will not be prohibited to bring pre-trial motions under Rule 298, but must seek leave of Court by way of motion to bring any such pre-trial motions.

2. The Parties shall complete the steps set out below on or before the dates indicated:

July 15, 2014	Parties' Lists of Documents
August 15, 2014	Examinations for Discovery
September 12, 2014	Motions arising from Examinations for Discovery
October 1, 2014	Requisition for PTC and PTC Memoranda
November 1, 2014	Expert Reports
December 1, 2014	Trial Record (including Joint Book of Documents)
December 12, 2014	Rebuttal Expert Reports
January 9, 2015	Plaintiffs' Affidavits
January 23, 2015	Defendant's Affidavits

3. Any requests to admit and responses thereto shall be completed by October 17, 2014.

4. The Plaintiffs shall be jointly limited to 15 witnesses and the Defendant to 15 witnesses, including both fact and expert witnesses unless the parties otherwise agree. Witnesses shall be made available for cross-examination at trial.

5. In order to ensure reasonable proportionality in respect of this mater, the parties are agreed that the Defendant's document production and list of documents will be limited to four categories of documents in its possession:

   i. Publicly available documents that explain the evolution of the impugned legislative and regulatory regime;

   ii. Health Canada internal medical marihuana regulation policy documents;

   iii. Health Canada consultation documents for the new *Marihuana for Medical Purposes Regulations*;

   iv. Medical and scientific research documents relating to medical marihuana in the possession of Health Canada.

6. Trial is to commence on February 23, 2015, at 9:30 am (PST), in the city of Vancouver, Province of British Columbia, 701 West Georgia Street, for a duration of three (3) weeks, which includes closing arguments.

7. The parties shall submit written memoranda of fact and law within seven (7) days of the completion of the trial.

"Michael D. Manson"
Judge

Court File No.: T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

DEFENDANT'S PRE-TRIAL CONFERENCE MEMORANDUM

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Solicitor for the Defendant

TABLE OF CONTENTS

PART I – NATURE OF PROCEEDING

1. This proceeding is an action brought by four individuals, Neil Allard, Tanya Beemish, David Hebert, and Shawn Davey (the "Plaintiffs"), who challenge the constitutionality of certain aspects of Canada's new medical marijuana regulatory regime. They say that it violates their s. 7 *Charter* rights to liberty and security of the person.

2. The four aspects of the regime with which the Plaintiffs take issue are the following:

> (a) the replacement of a regulatory regime which once permitted home cultivation of marijuana with one that provides access to marijuana through licensed producers;
>
> (b) the prohibition on cultivation of marijuana in dwelling places and outdoor areas;
>
> (c) the limits on the amount of marijuana for medical purposes that can be possessed by an authorized individual; and
>
> (d) the prohibition of production and possession of marijuana in non-dried form (e.g., cannabis oils, salves, tinctures, edibles, etc.).

3. The Defendant Canada asserts that the new regime is constitutionality sound as it provides for reasonable access to a lawful supply of marijuana for those with a demonstrated medical need, while addressing the significant public health, safety and security concerns that arose under the former regime that permitted home cultivation. There is no constitutional right of unlimited access to marijuana from any source, in any amount, and in any form.

PART II – ADMISSIONS

4. As is set out at paragraph 1 of its statement of defence, the Defendant admits the allegations contained in paragraphs 10, 11, 12, 16, 17, 18, 19, 22, 23, 24, 25, 26, 27, 28, 32, 33, and 40 (1st sentence) of the amended statement of claim.

PART III – FACTUAL AND LEGAL CONTENTIONS

5. The Defendant makes the following factual contentions:

Marijuana is a Harmful Recreational Drug

i. When consumed, marijuana can have negative consequences on the physical, psychological and social well-being of the user.

ii. Marijuana is one of the most trafficked illicit drugs in Canada. Indeed Canada is also among the top producers of illicit marijuana in the world. Organized crime is involved in all levels of the marijuana trade. Canadian criminal producers have developed the capacity and sophistication to produce on a commercial scale some of the most potent marijuana in the world.

iii. Canada is a signatory to three United Nations conventions that address the production, manufacture, import, export, distribution, use and possession of narcotic drugs, including marijuana: *Single Convention on Narcotic Drugs, 1961*, as amended by the *1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961*; *United Nations Convention on Psychotropic Substances, 1971*; and, *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*. The aim of the conventions is to combat drug addiction, the abuse and illicit trade of narcotic and psychotropic drugs like marijuana, and to limit their use to medical and scientific purposes.

The Regulation of Drugs in Canada

iv. In Canada, drugs and controlled substances are regulated through the *Food and Drugs Act* (FDA) and the *Controlled Drugs and Substances Act* (CDSA). The purpose of the former is to ensure that drugs sold in Canada are safe, effective and of high quality. The purpose of the latter is to protect health and safety while reducing the potential for controlled substances and precursors from being diverted to the illicit market.

v. The FDA and its regulations are designed to protect the health and safety of Canadians by establishing standards for drug manufacturing, labeling, licensing and advertising. In particular, they require drug manufacturers to submit evidence regarding the safety, efficacy and quality of all drug products intended for sale in Canada to Health Canada. Drug products are only authorized for sale if their clinical benefits outweigh the risks associated with their use.

vi. The CDSA provides a legislative framework for the control of substances that impact mental processes and which, notwithstanding any therapeutic value they may have, can harm health and society when diverted or misused. These controls include prohibiting the possession, production and distribution of controlled substances except as authorized by regulation or via an exemption under s. 56 of the CDSA.

The *Medical Marihuana Access Regulations* (MMAR)

vii. Historically, individuals could be authorized to possess dried marijuana or to produce a limited number of marijuana plants for medical purposes pursuant to exemptions issued under s. 56 of the CDSA. This provision allows the Minister to exempt any person or class of persons from the application of the CDSA or its regulations if necessary for a medical or scientific purpose or if it is otherwise in the public interest.

viii. In response to the decision of the Ontario Court of Appeal in *R. v. Parker*, Canada promulgated the *Medical Marihuana Access Regulations* (MMAR) in 2001. The MMAR were designed to provide access to dried marijuana for medical purposes in an expressly regulated environment, as opposed to discretionary exemptions issued pursuant to s. 56 of the CDSA.

ix. Under the MMAR, authorized persons who had the support of a medical practitioner could obtain lawful access to marijuana in one of three ways: (1) through a Personal-Use Production License (PUPL), pursuant to which the individual was permitted to grow a designated quantity of marijuana for his or her own use; (2) through a Designated Person Production License (DPPL), pursuant to which the individual could designate another person to grow a determined number of marijuana plants for him or her; or (3) by

purchasing dried marijuana directly from Health Canada, which contracted with a private company to produce and distribute marijuana on its behalf.

Undesirable Consequences of the MMAR

x. Since 2001, the number of persons authorized to possess marijuana for medical purposes and the volume of marijuana such persons were authorized to produce under the MMAR has grown exponentially. This rapid expansion of marijuana production in residential dwellings has resulted in a number of undesirable consequences, namely, increases in risks to the health, safety and security of individuals producing marijuana for medical purposes at home, their neighbours, and the public in general.

xi. In particular, residential marijuana production poses various risks such as fire, electric hazards, mould, noxious odours and exposure to toxic chemicals. Such risks are borne by the occupants and neighbours of homes where marijuana is produced, including children.

xii. Furthermore, the exponential growth of marijuana production under the MMAR has increased the risk of diversion of marijuana to the illicit recreational market. Residential production also exposes residents and their neighbours to the risk of violent home invasion by criminals seeking illicit access to marijuana.

xiii. It is not possible to reasonably mitigate these risks through a system of home inspections, both because of the large numbers of residences involved and because of the heightened level of constitutionally protected privacy interests in private dwellings..

xiv. Similarly, it would not be practicable to attempt to impose quality or safety standards on home marijuana cultivators who may lack the capacity, knowledge or motivation to implement them. This situation poses a particular risk for seriously ill persons who may then consume non-standardized marijuana that could contain dangerous microbial or chemical contaminants.

xv. These grave concerns about the harms associated with residential production of marijuana under the MMAR were expressed to Health Canada by various stakeholders, including municipalities, fire and police authorities, homeowners, health care professionals, neighbours and program participants.

Access to Marijuana under the MMAR

xvi. Access to medical marijuana under the MMAR was not optimal for those individuals who: (1) could not afford the significant capital costs required to grow marijuana; (2) did not live in homes where growing marijuana was permitted or practically feasible; (3) did not have the knowledge or ability to grow marijuana; (4) did not have access to a reliable designated grower; and/or (5) were not satisfied with the strain of marijuana that was offered for sale by Health Canada under the MMAR.

The *Marihuana for Medical Purposes Regulations* (MMPR)

xvii. Following public consultation, the *Marihuana for Medical Purposes Regulations* (MMPR) came into force on June 7, 2013. The MMPR created a regulatory framework designed to replace the MMAR, which was repealed on March 31, 2014.

xviii. The MMPR permitted the following: (1) possession of dried marijuana for medical purposes by individuals who have the support of an authorized health care practitioner; (2) production of dried marijuana by licensed producers; and (3) sale and distribution of dried marijuana by licensed producers to individuals medically authorized to possess it.

xix. Like manufacturers of drugs under the FDA and FDR, licensed producers under the MMPR are subject to stringent regulatory requirements related to security, Good Production Practices, packaging, labeling, shipping, record keeping and reporting. The MMPR also provide for adverse reaction reporting and recalls of non-compliant marijuana by licensed producers, if necessary.

xx. Unlike the situation that prevailed under the MMAR, individuals authorized to possess marijuana for medical purposes must now purchase it exclusively from these regulated licensed producers, thereby ensuring the availability of good quality marijuana for medical purposes that is safely produced.

xxi. The MMPR limit the amount of marijuana for medical purposes that individuals with medical support may possess at any time to either 30 times the daily quantity of dried marijuana indicated by the individual's health care practitioner, or 150 grams of dried marijuana, whichever is less. This limit is intended to decrease the risk of diversion to the illicit market and to prevent individuals who possess marijuana for medical purposes from becoming targets for theft and violence.

xxii. Under the MMPR, licensed producers are not permitted to grow marijuana in residential dwelling places. This restriction is designed to mitigate the numerous public health and safety concerns that have arisen in respect of

the proliferation of increasingly large marijuana production facilities in private dwellings that are not designed for horticultural production.

xxiii. Under the MMPR, licensed producers are not permitted to grow marijuana outdoors. This restriction is designed to decrease the risk of diversion as well as cross-contamination with other nearby crops, particularly industrial hemp.

xxiv. The regulatory changes set out in the MMPR are intended both to address the significant unintended negative consequences that resulted from the MMAR, and to provide all medically authorized patients with access to quality dried marijuana for medical purposes.

The Restriction on Non-Dried Marijuana

xxv. Like marijuana itself, the possession, production and distribution of cannabis preparations and derivatives (e.g., oils, tinctures, salves, edible products, creams made with extracts, etc.) are prohibited by the CDSA. The MMPR (and, prior to its repeal, the MMAR) and the *Narcotic Control Regulations* (NCR) only provide for lawful access to marijuana for medical purposes in dried form.

xxvi. This effective prohibition on "non-dried marijuana" stemmed initially from the fact that the *Parker* decision that precipitated development of the MMAR was based solely on judicial acceptance of a right to accessible marijuana in dried form. However, the policy justification for maintenance of this prohibition is threefold.

xxvii. First, although only limited clinical evidence exists regarding the use of marijuana for medical purposes, the evidence that does exist is limited to either dried marijuana or formulated therapeutic products that have been approved under the rigorous process prescribed by the FDR (e.g., Sativex ® and Cesamet ®). The risks and benefits of unapproved cannabis derivatives and preparations are not sufficiently known.

xxviii. Second, the production, possession and distribution of unapproved cannabis derivatives and preparations present serious threats to health and public safety. In particular, the extraction of cannabis' active components and preparations from marijuana plant material through chemical processes can involve the use of volatile chemicals that can cause explosions and fire.

xxix. Third, it would be difficult for law enforcement officials to determine with any confidence that cannabis preparations and derivatives were in fact produced from a legally-obtained source of dried marijuana and constitute a quantity of marijuana that does not exceed an individual's possession limit.

Licensed Producers

xxx. To date, Health Canada has received more than 1000 applications from prospective licensed producers, of which 22 have been licensed so far.

xxxi. These licensed producers are selling dozens of different strains of marijuana at prices ranging from approximately $5-$12 per gram. Several of the licensed producers offer "compassionate pricing" discounts for low income customers.

Strains of Marijuana

xxxii. The MMPR place no limit on the number of strains that may be made available by licensed producers. The MMPR also provided a mechanism whereby individuals previously authorized to possess marijuana under the MMAR could sell the seeds or plants of their preferred strains of marijuana to licensed producers.

xxxiii. Other than differences in the relative proportions of various cannabinoids (particularly THC and CBD), there is virtually no scientific basis for the claim that different strains of marijuana have differing effectiveness as treatments for particular symptoms.

Compliance with International Conventions

xxxiv. The International Narcotics Control Board (INCB) is the independent and quasi-judicial control organ for the implementation of the United Nations drug conventions.

xxxv. While the INCB has repeatedly criticized Canada for the regime set up by the MMAR, the Board recently characterized the changes brought about by the MMPR as positive, particularly in relation to the phasing out of personal cultivation and the adoption of other measures aimed at preventing diversion.

Medical Marijuana Regulation in Other Jurisdictions

xxxvi. Canada's MMPR is consistent with the approaches taken to the regulation of access to marijuana for medical purposes in other jurisdictions such as the Netherlands, Israel and the United States, particularly with respect to promoting commercial production by licensed producers over residential production by consumers.

Appropriate Doses of Marijuana for Medical Purposes

xxxvii. While marijuana has not been approved as a drug under the FDA and the FDR, the applicable scientific literature as well as the experience of patients in the Netherlands and Israel indicate that an appropriate dosage to be employed when marijuana is used for medical purposes is in the range of up to three grams per day, regardless of the method of administration (i.e. smoked, vaporized or consumed orally).

xxxviii. By contrast, there is scant medical justification for the consumption of marijuana for medical purposes above 5 grams per day.

The Plaintiffs

Neil Allard

xxxix. Under the MMAR, the Plaintiff Neil Allard held a PUPL and an ATP since July 9, 2004.

xl. Mr. Allard is currently authorized to produce 98 plants indoors and to use a daily amount of dried marijuana of less than or equal to 20 grams of marijuana.

xli. Mr. Allard has never had his marijuana tested for mould or other contaminants. He has never had his marijuana tested to determine the concentration of cannabinoids such as THC or CBD.

xlii. Mr. Allard is retired. His pension and disability benefits total approximately $33,049.61 per year, after taxes. He has no debt. He owns his home, whose worth was recently assessed at $241,300. He owns a car worth $3,000. He has approximately $23,000 in savings.

Tanya Beemish

xliii. From January 4, 2013 to January 4, 2014 the Plaintiff Tanya Beemish had an ATP under the MMAR that authorized her to possess a daily amount of dried marijuana of less than or equal to 5 grams.

xliv. Ms. Beemish no longer holds a valid ATP.

xlv. Ms. Beemish now purchases marijuana on the black market at a cost of $4 per gram.

xlvi. Ms. Beemish receives approximately $619 per month in Canada Pension Plan benefits and has no debt.

David Hebert

xlvii. The Plaintiff David Hebert is Ms. Beemish's common law spouse.

xlviii. Under the MMAR, Mr. Hebert was issued a DPPL on January 4, 2013, with an expiry date of January 4, 2014. The DPPL authorized Mr. Hebert to grow 25 plants indoors for use by Ms. Beemish, in accordance with her ATP.

xlix. Mr. Hebert no longer holds a valid DPPL.

l. When he was doing so, Mr. Hebert spent between 50-100 hours per month cultivating marijuana for Ms. Beemish.

li. Mr. Hebert is employed as an Environmental Protection Officer with the British Columbia Ministry of the Environment. He earns approximately $58,000 per year.

lii. Neither Mr. Hebert nor Ms. Beemish has ever had the marijuana grown by Mr. Hebert tested for mould or other contaminants. Nor have they ever had the marijuana tested to determine its concentration of cannabinoids such as THC or CBD.

Shawn Davey

liii. Under the MMAR, the Plaintiff Shawn Davey was first issued an ATP on July 16, 2010.

liv. On September 26, 2013, a PUPL and an ATP were issued to Mr. Davey authorizing him to produce 112 plants indoors and to use a daily amount of dried marijuana of less than or equal to 25 grams.

lv. Mr. Davey presently receives $4,500 per month from an annuity as well as $530 per month from a disability pension. He owns a truck which is worth approximately $2,000, an ATV which is worth approximately $3,000, a camper which is worth approximately $1,000, and has approximately $10,000 in savings.

lvi. Mr. Davey has never had his marijuana tested for mould or other contaminants. Nor has he ever had his marijuana tested to determine its concentration of cannabinoids such as THC or CBD.

Affordability of Purchasing from a Licensed Producer

lvii. The Plaintiffs all have the financial means to purchase medically justifiable quantities of marijuana from licensed producers. As such, they all have reasonable access to a lawful supply of medical marijuana.

lviii. While the marginal per gram cost of obtaining marijuana from a licensed producer as opposed to cultivating at home may initially be higher for some individuals who have already invested in marijuana production facilities, it is possible that that cost will decrease over time as a result of factors such as competition among licensed producers, economies of scale, lower costs for skilled labour and technological innovation.

6. The Defendant makes the following legal contentions:

i. The impugned provisions of the medical marijuana regulatory regime do not violate s. 7 of the Charter.

ii. In the alternative, any breach of s. 7 of the Charter is justifiable as a reasonable limit under s. 1.

The Provision of Access to Medical Marijuana Exclusively Through Licensed Producers Does Not Violate Section 7 of the *Charter*

iii. The Plaintiffs assert that the replacement of a medical marijuana access regime that permitted home cultivation with one founded upon supply being assured by licensed producers engages their s. 7 Charter interests for two main reasons. First, they say that they cannot afford to purchase a sufficient quantity of marijuana from licensed producers to meet their medical needs. Second they say that they will not be able to obtain the strains of marijuana from licensed producers that they require for their medical needs. As is set out above, both of these contentions are factually unfounded.

iv. Furthermore, even if a hypothetical plaintiff could demonstrate that, notwithstanding his or her financial capacity to cultivate marijuana at home, that plaintiff is incapable of purchasing marijuana from licensed producers, no breach of s. 7 of the Charter would arise. This is because the rights to life, liberty and security of the person under s. 7 of the Charter do not encompass a right to produce one's own medication in order to avoid the cost of purchasing commercially available equivalents.

v. Such economic interests are not protected by s. 7 of the Charter. Nor does s. 7 include the right to access a particular drug of choice where reasonable alternatives are available.

vi. For the same reasons, requiring medical marijuana to be obtained from licensed producers does not fall within the s. 7 liberty interest that protects the ability to make fundamentally personal decisions that go to the core of what it means to enjoy individual dignity and independence.

vii. The Plaintiffs' assertion that their inability to cultivate marijuana at home under the MMPR will deprive them of access to the strains of marijuana that they require in order to manage their medical symptoms (and thus engage their s. 7 Charter interests) is also unfounded.

viii. The MMPR place no limit on the number of strains that may be made available by licensed producers, and there are currently more than 80 different strains available for purchase from licensed producers. The MMPR also provided a mechanism whereby individuals were permitted to sell the seeds or plants of their preferred strains of marijuana to licensed producers in order to have them produce a specific strain that they can then purchase.

ix. Furthermore, other than differences in the relative proportions of various cannabinoids (particularly THC and CBD), there is little scientific basis for the claim that different strains of marijuana have differing effectiveness as treatments for particular symptoms.

x. In the alternative, if the restriction on personal production does engage the Plaintiffs' life or security interests, any such deprivation is consistent with the principles of fundamental justice.

xi. While the potential sanction of imprisonment should the Plaintiffs personally produce marijuana in contravention of the impugned legislation does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality and overbreadth.

xii. The restriction on personal production furthers pressing goals that are consistent with the goals of health and public safety that underlie the regulation of marijuana under the CDSA. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

Limits on Production Locations Do Not Violate Section 7 of the Charter

xiii. The MMPR's limits on outdoor and residential cultivation do not engage the Plaintiffs interests under s. 7 of the Charter.

xiv. This is so because the right to life, liberty and security of the person does not encompass a right to produce controlled substances in the location of one's choosing.

xv. Nor do the MMPR's limits on production locations fall within the s. 7 liberty interest that protects the ability to make fundamentally personal decisions that go to the core of what it means to enjoy individual dignity and independence.

xvi. In the alternative, if the restriction on production locations engages the Plaintiffs' life or security interests, any such deprivation is consistent with the principles of fundamental justice.

xvii. The restriction on residential and outdoor production furthers pressing goals that are consistent with the promotion of health and public safety that underlie the regulation of controlled substances such as marijuana under the CDSA, including the prevention of their diversion and abuse. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

xviii. Similarly, while the potential sanction of imprisonment, should the Plaintiffs contravene the limits on production locations established by the impugned legislation, does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality and overbreadth.

Limits on Possession Amounts Do Not Violate Section 7 of the Charter

xix. The MMPR's limit on the amount of marijuana that may be possessed at any time by authorized persons does not violate the Plaintiffs' s. 7 Charter rights.

xx. This is so because the right to life, liberty and security of the person does not encompass a right to possess unlimited quantities of controlled substances.

xxi. The Plaintiffs' assertion that the MMPR's possession limit engages their liberty interests because it interferes with their ability to travel is unfounded. If the Plaintiffs were to choose to travel while possessing marijuana in their current authorized amounts, they would simply have to

return to their homes every few days or weeks to replenish their supply. This period would be even longer (6 weeks to 5 months) if they consumed a quantity of marijuana more in line with what international experience has shown is medically justifiable (i.e., up to 3 grams per day).

xxii. A limit on marijuana possession which reduces an individual's range of convenient travel destinations does not engage s. 7 of the Charter as the choice of how far to go on a voyage is not a fundamentally personal decision that goes to the core of what it means to enjoy individual dignity and independence. In other words, there is no right to lengthy travel protected by s. 7 of the Charter.

xxiii. In the alternative, if the MMPR's possession limit does engage the Plaintiffs' life, liberty or security interests, any such deprivation is consistent with the principles of fundamental justice.

xxiv. While the potential sanction of imprisonment should the Plaintiffs contravene the limits on possession amounts established by the impugned legislation does engage their liberty interests, any such deprivation would not violate any principles of fundamental justice, including arbitrariness, gross disproportionality and overbreadth.

xxv. The restriction on possession furthers pressing goals that are consistent with the goals of health and public safety that underlie the regulation of marijuana under the CDSA.

xxvi. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

Prohibition on Non-Dried Marijuana Does Not Violate s. 7 of the Charter

xxvii. The prohibition on non-dried marijuana does not violate s. 7 of the Charter.

xxviii. The right to life, liberty and security of the person does not encompass the right to produce and possess controlled substances in a form or manner of one's choosing, regardless of medical need or the availability of reasonable alternative treatments.

xxix. Nor does this limit fall within the s. 7 liberty interest that protects the ability to make fundamentally personal decisions that "go to the core of what it means to enjoy individual dignity and independence."

xxx. While the potential sanction of imprisonment should the Plaintiffs produce or possess non-dried marijuana in contravention of the impugned legislation does engage their liberty interests, any such deprivation would

not violate any principles of fundamental justice, including arbitrariness, gross disproportionality and overbreadth.

xxxi. In the alternative, if the restriction on the availability of non-dried marijuana does engage the Plaintiffs' liberty or security interests, any such deprivation is consistent with the principles of fundamental justice.

xxxii. This restriction furthers pressing goals that are consistent with the goals of health and public safety that underlie the regulation of marijuana under the CDSA.

xxxiii. The MMPR furthers these goals in a manner that is neither grossly disproportionate, overbroad nor arbitrary.

Section 1 of the Charter

xxxiv. In the further alternative, if the MMPR do violate s. 7 of the Charter, any such violation represents a reasonable limit under s. 1 of the Charter.

PART IV – ISSUES TO BE DETERMINED AT TRIAL

7. The issues to be determined at trial are:

i. whether a regulatory regime that provides for access to medical marijuana exclusively through licensed producers violates s. 7 of the Charter;

ii. whether the requirement that medical marijuana be grown indoors and in buildings other than dwelling places violates s. 7 of the Charter;

iii. whether limiting the amount of marijuana that can be possessed to the lesser of 150g or 30 times what has been authorized by a medical practitioner violates s. 7 of the Charter;

iv. whether limiting production and possession of medical marijuana to its dried form violates s. 7 of the Charter; and

v. if any of the above aspects of the MMPR are found to constitute violations of s. 7 of the Charter, whether they are reasonably justifiable under s. 1.

PART V – RULE 263 ISSUES

Possibility of Settlement

8. The Defendant is of the view that there is no possibility of a negotiated settlement of this constitutional challenge to federal legislation.

Simplification of Issues

9. The Defendant is of the view that there are no additional measures that ought to be taken to simplify the issues to be determined by the Court at trial.

Expert Witnesses

10. As per the Direction of the Court (Manson J.) dated May 2, 2014, the parties must file any expert reports by November 1, 2014 and any rebuttal expert reports by December 12, 2014.

11. The Defendant is of the view that there are no issues that will arise from the affidavits of Defendant's expert witnesses.

Lay Witness Affidavits

12. As per the Direction of the Court (Manson J.) dated May 2, 2014, the Plaintiffs must file their affidavits by January 9, 2015 and the Defendant must file its affidavits by January 23, 2015.

13. The Defendant is of the view that there are no issues that will arise from the affidavits of Defendant's lay witnesses.

The Possibility of Obtaining Admissions

14. As per the Direction of the Court (Manson J.) dated May 2, 2014, any notices to admit and responses thereto must be completed by October 17, 2014.

The Issue of Liability

N/A

Damages

N/A

Duration and Date of Trial

15. As per the Direction of the Court (Manson J.) dated May 2, 2014, the trial of this matter is scheduled for a duration of three weeks, commencing on February 23, 2015.

Advisability of an Assessor

16. The Defendant does not believe an assessor would be appropriate.

Interpreters

17. The Defendant does not believe that interpreters will be needed as there is no indication that any of the witnesses will be testifying in a language other than English.

Notice of Constitutional Question

18. The Plaintiffs have served a Notice of Constitutional Question in accordance with s. 57 of the *Federal Courts Act*.

Trial Record

19. The Trial Record should consist of the documents listed under Rule 269.

Any Other Matter

20. The Defendant will advise of any other matters during the course of the pre-trial conference.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 29th day of September, 2014.

Jan Brongers
Counsel for the Defendant

Court File No.: T-2030-13

FEDERAL COURT

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

REQUISITION FOR PRE-TRIAL CONFERENCE

THE DEFENDANT REQUESTS that a date be set for a pre-trial conference in this action.

THE DEFENDANT CERTIFIES:

1. All examinations for discovery which the defendant intends to conduct are complete.

2. A settlement discussion under Rule 257 of the *Federal Courts Rules* was held on September 26, 2014.

3. The pre-trial conference should be held at Vancouver.

4. The defendant is available at any time except October 7 to 10, 2014.

5. The pre-trial conference will be in English.

Date: September 29, 2014

William F. Pentney
Deputy Attorney General of Canada
Per: **Jan Brongers**
Department of Justice
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Solicitor for the Defendant

TO: Conroy & Company
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V2S 3S1

Solicitor for the Plaintiffs

No. T-2030-13

FEDERAL COURT

BETWEEN:

NEIL ALLARD
TANYA BEEMISH
DAVID HEBERT
SHAWN DAVEY

PLAINTIFFS

AND:

HER MAJESTY THE QUEEN IN THE RIGHT OF CANADA

DEFENDANT

PLAINTIFFS' PRE-TRIAL CONFERENCE MEMORANDUM

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(A) A concise statement of the nature of the proceeding

1. The Plaintiffs have been medically approved by their medical practitioner under the provisions of the *Narcotic Control Regulations (NCR)* or the *Medical Marihuana Access Regulations (MMAR)* or the *Marihuana for Medical Purposes Regulations (MMPR)* pursuant to the *Controlled Drugs and Substances Act (CDSA)* to possess and (under the *MMAR)* to produce Cannabis (marihuana) for themselves as their medicine for their particular illnesses or to have the Cannabis (marihuana) grown for them by a designated grower/caregiver.

2. By way of statement of claim filed on December 10, 2013, the Plaintiffs commenced an action against the Defendant with respect to aspects of its proposed repeal of the *MMAR* on the grounds of the unconstitutionality of the *MMPR* in that regard.

3. The Plaintiffs plead and rely on *sections 7, 24(1) and 52(1)* of the *Charter*, Part 1 of the *Constitution Act*, 1982 and say that the *MMPR*, only to the extent specifically challenged, are not saved under s. 1 of the *Charter* as reasonable limits that are demonstrably justified in a free and Democratic society.

4. The Plaintiffs seeks declarations, pursuant to *sections 7, 24(1) and 52(1)* of the *Charter*, Part 1 of the *Constitution Act*, 1982:

    1. that a "constitutionally viable exemption" from the provisions of the *CDSA* to enable the medical use, by medically approved persons, of Cannabis (in any of its effective forms), includes the right of the patient (or a person designated as responsible for the patient) to not only possess and use Cannabis in any of its forms, but to also cultivate or produce and possess Cannabis in any form that is effective for the treatment of the patient's medical condition;

    2. that the *MMPR (*which came into force on June 19, 2013) are unconstitutional only to the extent that they unreasonably restrict the s. 7 *Charter* constitutional right of a medically approved patient to reasonable

access to their medicine by way of a safe and continuous supply, and are inconsistent therewith by failing to provide for the continued personal production of their medicine by the patient or a designated caregiver of the patient, as provided for currently in the *MMAR* in violation or that will result in the violation of the constitutional rights of such patients to liberty and the security of their persons, pursuant to s. 7 of the *Canadian Charter of Rights and Freedoms* and cannot be saved by s. 1 thereof;

3. that the limits in the *NCR*, and *MMPR*, as in the *MMAR*, to possessing, selling or providing only "dried marihuana" are arbitrary, overbroad and result in grossly disproportionate effects and constitute an unreasonable restriction on the s. 7 *Charter* rights of these patients and producers and are not saved by s. 1 of the *Charter*, in accordance with the principles and findings underlying the judicial decision in *R. v. Smith*, 2012 BCSC 544 (since affirmed by the BC Court of Appeal in *R. v. Smith* 2014 BCCA 322 except as to remedy).

4. that the provisions in the *MMPR* (ss.12 – 15) that specifically limit production by a 'Licenced Producer' of Cannabis to "indoors", prohibiting any, even temporary, outdoor production and prohibiting production in "a dwelling house," are unconstitutional, to the extent that they might be found to be applicable to a patient generally, a patient personal producer or his or her designated caregiver. Such limits and restrictions amount to arbitrary, and overbroad limitations and result in grossly disproportionate effects and unreasonable restrictions on the patients s. 7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*.

5. that the provision in the *MMPR* (s.5 and in particular paragraph (c)) that specifically restrict the amounts relating to possession and storage by patients, to the "30 x the daily quantity authorized or 150 gram maximum,

whichever is the lesser", and other similar related limitations applicable or imposed upon 'Licenced Producers' in relation to their registered clients/ patients are unconstitutional, to the extent that they are applicable to a patient generally, a patient personal producer or his or her designated caregiver. Such limits, whether in the *NCR* and/or in the *MMPR*, amount to arbitrary unreasonable restrictions on the patients s.7 *Charter* right to possess, produce and store for their medical purposes, and are inconsistent therewith and these limitations are not saved by section 1 of the *Charter*.

5. In addition, the Plaintiffs seek an Order under s.24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just final remedy, declaring the full ambit and scope of the medically approved patient's constitutional rights to produce, possess and store their medicine, pursuant to **s. 7 of the *Charter***, without any unreasonable and unnecessary restrictions.

6. In the alternative to (5) above, the Plaintiffs seek a permanent constitutional exemption from s.4,5 and 7 of the *CDSA* for all persons holding an authorization to possess and a personal production license as well as all persons holding an authorization to possess and who have a person designated to produce for them under the *MMAR*, including the designated producer, until such further Order of the court

7. In the further alternative to (5) and (6) above, the Plaintiffs seek an order in the nature of a permanent exemption/injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage by a patient or designated caregiver and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers, until such time as the Defendant makes appropriate amendments to the *MMPR* to comply with any decision of this Court with respect to the unconstitutionality thereof.

8. The Defendant does not admit the Plaintiffs' claims and the substantive facts on which it is brought as set out in its defence dated February 14, 2014.

(B) Any admissions of the party

9. The Defendants have advised that they will not be requesting any admissions. The Defendants have admitted in paragraph 1 of the Statement of Defence the allegations contained in the Amended Statement of Claim at paragraphs 10-12, 16-19, 22-28, 32-33 and 40 (first sentence). The Plaintiffs anticipate requesting further admissions from the Defendants in accordance with the Order of Manson J. requiring such requests to admit and the responses thereto to be completed by October 17th, 2014.

(C) The factual and legal contentions of the party

10. The Plaintiffs have been medically approved by their medical practitioner under the provisions of the *NCR*, C.R.C., c.1041 or *MMAR* SOR/2001-227 or the *MMPR* SOR/2013-119, pursuant to the *CDSA* S.C.1996, c.19, to possess, and under the *MMAR*, to produce Cannabis (marihuana) for themselves as their medicine for their particular illnesses or to have the Cannabis (marihuana) grown for them by a designated grower/caregiver;

11. As a result of the decision of the Ontario Court of Appeal in *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), the Government of Canada was required, in order to ensure that the *CDSA* was in compliance with the Canadian Constitution and in particular s. 7 of the *Canadian Charter of Rights and Freedoms*, to put in place a "constitutionally viable medical exemption" to the prohibition against the possession and cultivation of marihuana. The failure on the part of the government 'to provide reasonable access for medical purposes' as an exemption to the general prohibition violated s. 7 of the *Canadian Charter of Rights and Freedoms* in that the 'liberty' and 'security of the person' of the patient was affected in a manner that was inconsistent with the "principles of fundamental justice". The court found that patients were being forced to choose between their "liberty" and their "health". This ultimately led at first to

exemptions pursuant to s. 56 of the *CDSA* and then to the promulgation of the *MMAR* pursuant to section 55 of the *CDSA*.

12. Thereafter, various successful constitutional challenges took place to the unreasonable restrictions on the s. 7 *Charter* rights of patients or their designate, in the *MMAR*, limiting the number of patients a designated grower could produce for, limiting how many licences could exist at any one location, and limiting possession to 'dried marihuana'. The ambit and scope of the constitutional right to safe, continuous, reasonable access to cannabis (marihuana) as medicine, including the personal production thereof or production by a designate, was continued, notwithstanding the advent of a government supply, as another option. The ambit and scope of the program was considered by the Federal Court Trial Division and the Federal Court of Appeal in striking down a provision of the Regulations as a negative restriction on the section 7, liberty and the security of the person constitutional rights in *Sfetkopoulos* (infra); See also *Wakeford v. Canada*, [1998] O.J. 3522; [2000] O.J.1479; [2002] O.J. No. 85, (Ont. C.A.); *R. v. Krieger*, 2000 ABQB 1012, 2003 ABCA 85, 2008, ABCA 394; *Hitzig v. Canada* (2003), 177 OAC 321; *Sfetkopoulos v. AG Canada*, 2008 FC 33 (FCTD) and 2008 FCA 328 (FCA) and *R v. Smith*, 2012 BCSC 544 and affirmed in 2014 BCCA 322 except as to remedy, and *R. v. Beren and Swallow* 2009 BCSC 429.)

13. The Plaintiffs plead and rely on ss. 7, 24(1) and 52(1) of the Canadian *Charter* of Rights and Freedoms (the "*Charter*"), Part 1 of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (U.K.) 1982, c.11 (the "Constitution Act 1982") and say that the *MMPR*, only to the extent specifically challenged, are not saved under s. 1 of the *Charter* as reasonable limits that are demonstrably justified in a free and Democratic society.

14. In addition to the specific judicial decisions considering the issue of medical marihuana and the specific *MMAR* program, referred to above , the Plaintiffs also rely upon the decisions of the Supreme Court of Canada in R. *v. Malmo Levine; R. v. Caine*, 2003 SCC 74, with respect to the evidence of harm at that time (paras 40 – 61), pointing out the distinction between the recreational and medical use cannabis

(marihuana) arising under s.7 of the Charter(para.88), and the propriety of balancing societal and individual interests in s.7 (para's 94 – 99) and the decisions of that court in *Canada (Atty. Gen.) v. PHS Community Services Society*, 2011 SCC 44, and *Canada (Atty. Gen.) v. Bedford*, 2013 SCC 72, on the issues of s. 7 *Charter* analysis where "liberty" and "the security of the person" are engaged, and the applicable "principles of fundamental justice" such as "arbitrariness, overbreadth and gross disproportionality in effects", and as setting out a recent consideration of the proper procedure in *Charter* analysis, including matters pertaining to section 1 thereof.

15. The Plaintiffs seek a declaration, pursuant to s. 52 (1) of the Canadian *Charter* Of Rights and Freedoms that 'a constitutionally viable exemption' from the provisions of the *Controlled Drugs and Substances Act* (*CDSA*), in accordance with the principles and findings underlying the judicial decisions in *R v. Parker*, (2000), 49 O. R. (3d) 481; *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104; and *R v. Mernagh*, 2013 ONCA 67; and the decisions of this Court and the Federal Court of Appeal in *Sfetkopoulos v. AG Canada* 2008 FC 33 (FCTD) and 2008 FCA 328 (FCA), supra; to enable the medical use, by medically approved persons, of Cannabis, in any of its effective forms, includes the right of the patient (or a person designated as responsible for the patient), to not only possess and use Cannabis in any of its forms, but also to cultivate or produce and possess Cannabis in any form, that is effective for the treatment of the patient's medical condition.

16. The Plaintiffs seek a declaration under s.52(1) of the *Charter* that the *Marihuana for Medical Purposes Regulations* (*MMPR*) that came into force on June 19, 2013, and which run together or concurrently with the *Medical Marihuana Access Regulations* (*MMAR*) until March 31, 2014, when the *MMAR* will be repealed by the *MMPR*, are unconstitutional only to the extent that the *MMPR* unreasonably restricts the s. 7 *Charter* constitutional right of a medically approved patient to reasonable access to their medicine by way of a safe and continuous supply, and are inconsistent therewith by failing to provide for the continued personal production of their medicine by the patient or a designated caregiver of the patient, as provided for currently in the *MMAR*, and as such violates the constitutional rights of such patients pursuant to s. 7 of the

Canadian *Charter* of Rights and Freedoms and cannot be saved by s. 1 thereof;

17. The Plaintiffs also seek other various declarations pursuant to s.52(1) of the *Charter* that are set out in detail in the prayer for relief in the Statement of Claim as set out above. They include declarations with respect to the limitation of "dried marihuana", the limitations on "Licenced Producers" in relation to producing "indoors" and preventing even temporary indoor production and prohibiting production in a dwelling house. They also seek declarations with respect to the 150 gram maximum that a Licenced Producer can ship and a patient possess at any time.

18. The Plaintiffs intend to seek an Order under s. 24(1) of the *Charter*, as the appropriate and just final remedy, for a constitutional exemption from s.4, 5 and 7 of the *Controlled Drugs and Substances Act* for all medically approved patients/persons, including those holding an authorization to possess and a personal production licence, and those persons holding an authorization to possess and who have a person designated to produce for them under the *MMAR*, including that designated grower. The Plaintiffs further sought an interim/interlocutory order in the nature of mandamus to compel the Defendant to process all applications, renewals and modifications to any licences pursuant to the *MMAR* in accordance with all of its provisions (other than those challenged as unconstitutional herein), notwithstanding ss. 230, 233-234, 237-238, 240-243 of the *MMPR* relating to applications under the *MMAR* after September 30th, 2013, as reflected in the amended *MMAR* sections 41-48, or such further Order of the court as may be necessary.

19. Or, in the further alternative, the Plaintiffs seek an order in the nature of a permanent exemption / injunction preserving the provisions of the *MMAR* relating to personal production, possession, production location and storage by a patient or designated caregiver and related ancillary provisions, and if necessary, limiting the applicability of certain provisions of the *MMPR* to such patients or designated caregivers, until such time as the Defendants makes appropriate amendments to the *MMPR* to comply with any decision of this Court with respect to the unconstitutionality thereof.

20. The *Narcotic Control Regulation (NCR)* pursuant to the former *Narcotic Control Act,* but carried forward under the *CDSA*, provides in s.53(2) that a practitioner may administer a narcotic to a person or animal or prescribe, sell or provide a narcotic for a person or animal if the person is a patient under his or her professional treatment and the narcotic is required for a condition for which the person is receiving treatment. Subsection (5) has been added by the *MMPR* effective March 31, 2014 to limit the administration by a health care practitioner to "dried marihuana" to a person, or to prescribe or transfer it for a person that is a patient under their professional treatment, and that the "dried marihuana" is required for the condition for which the person is receiving treatment.

21. The Plaintiffs are all medically approved patients ordinarily resident in Canada, as patients approved under the *NCR*, the *MMAR* or under the *MMPR.* More specifically, they are patients holding either an authorization in writing from a practitioner under the *NCR*, or an authorization to possess (ATP) together with a personal production licence (PPL) under the *MMAR,* or are having a caregiver person responsible for them designated as the grower for them (DG) under the *MMAR.* They seek to be able to continue to personally produce or have a caregiver produce their medicine for them in that regard once they have a "medical document" under the *MMPR.*

22. The *MMAR* Regulations authorize in Part 2 (ss.24-33) the personal production or by a designated person (ss.34-42) a certain number of cannabis (marihuana) plants if the person is ordinarily resident in Canada and has reached the age of 18 years (s.25). The maximum number of plants to be produced is calculated depending upon the daily amount of the dried marihuana authorized in grams and the formula is set out in s.30 of the Regulations. The maximum amount that can be stored depends upon the amount one is authorized to produce and is set out in s.31 of the *Regulations.* There are no limitations on the location of the production facility insofar as a "dwelling house" is concerned as long as it is not adjacent to a school, public playground, daycare facility or other public place frequented mainly by persons under 18 years of age (s.28(g)) if the production is entirely outdoor or partly indoors and outdoors.

23. The holder of the licence to produce may produce marihuana only at the production site and production area authorized and is not permitted to simultaneously produce marihuana partly indoors and partly outdoors and if the production area for a licence is partly indoors and partly outdoors the holder is not permitted to produce outdoors if the production site is adjacent to a school, public playground, daycare facility or other public place frequented mainly by persons under the age of 18 years (ss.52-53).

24. The *MMAR* in s.1 defines "dried marihuana" as harvested marihuana that's been subjected to any drying process and in s.2 the authorization to possess is limited to "dried marihuana" and consequently various other provisions of the Regulations refer to the amounts in storage of "dried marihuana" only. This limitation to "dried marihuana" only in the legislation has been successfully challenged in *R. v. Smith*, 2012 BCSC 544, (affirmed by the BCCA, except as to remedy 2014 BCCA 322), in British Columbia only, as unreasonable and too restrictive on the constitutional right of reasonable access for medical purposes arising under s. 7 of the *Canadian Charter of Rights and Freedoms* and found not to be saved under section 1 thereof. Consequently that limitation no longer applies to those patients located in British Columbia, but continues to apply elsewhere in Canada. The appeal by the Crown in *R. v. Smith* was heard December 6, 2013 and on August 14th, 2014 the majority (written reasons of Garson, J.A. concurred in by Levine, J.A., Chiasson, J.A. dissenting), allowed the appeal but only to the extent of varying the remedy ordered by the Trial Judge of striking out the word "dried" in the legislation and upheld that the restriction to dried marihuana in the *MMAR* breached the s.7 rights of individuals who had been issued authorizations to possess but required other forms of cannabis to treat the symptoms of their serious illness, as being arbitrary and unjustifiable in a free and democratic society. The majority suspended the effect of its judgment for one year in order to allow Parliament time to determine how best to amend "the regulatory scheme" to ensure its constitutionality.

25. The Plaintiffs produce their medicine either indoors in their dwelling house or residence and/or an outbuilding on the same property and some produce outdoors on their property or other property, and some produce both indoors and outdoors, depending upon the time of the year and what is most effective for the production of their plant medicine. Consent of the owner of the property is required if the patient is not "ordinarily resident" at that property (s.27(1)(b)). Some of the Plaintiffs, who are all from British Columbia, use "dried marihuana" in various forms, including by way of smoking, vaporizing, or edibles, and some use other forms of marihuana other than "dried marihuana" that are effective for the particular individual. Some of them find that "raw marihuana", which has not been dried or had heat applied to it, for example raw marihuana juice extracted by a juicer machine, to be a more effective treatment for their particular ailment. Other effective forms of treatment derived from raw marihuana include the use of extracts such as oils, salves, creams. Individual prescribers have developed these treatment techniques after much trial and error, and as a result have determined that the use of raw marihuana in various forms is a more effective for the treatment of the prescriber's particular illness. Some of the Plaintiffs have been producing their own medicine under the *MMAR* for a considerable period of time, and as such have invested in and constructed appropriate facilities and equipment to do so, including equipment to limit the impact of such production on others and for security purposes, and have gone to considerable lengths to ensure a safe, uncontaminated, production site to the need to avoid a negative impact on their weakened immune systems cause by their various illnesses. They have not had any fires, nor suffered from any toxic mold, nor been subjected to any attempted thefts. Most of the Plaintiffs found that they could not afford to purchase a safe, continuous and consistent quality supply of their medical marihuana from the black market, including the grey market of compassion clubs and dispensaries, nor could they acquire what they need through the government supply provided by Prairie Plant Systems. As a result of the inadequacies of supply of medical marihuana just described, the Plaintiffs produce their own marihuana, and have taken substantial steps to control their production of marihuana to ensure the safety, quality and regularity of the marihuana produced, at an affordable cost, and they have made sure that their medical marihuana is grown in a safe and

entitled to a constitutionally viable exemption from the *CDSA* that provides them with reasonable access to their medicine. Under the existing case law involving the ambit and scope of s.7 in this context a right to produce for oneself was included. The Government proposes to take that away completely. It is submitted that that is at least 'arbitrary' as contrary to the purposes of the *CDSA*, 'overbroad' in going beyond what is necessary and will result in 'grossly disproportionate effects' at least upon those who will no longer be able to afford a reasonable effective continuous supply, violating some s.7 patients rights and that in order to do so the onus is on the Government to establish that the *MMPR* is a reasonable limit to that extent under s.1 of the *Charter*.

39. Section 1 of the *Charter* guarantees the rights and freedoms set out in the *Charter* and sets out the explicit criteria against which limitations on those rights and freedoms may be measured. The onus of proving that a limitation on a *Charter* right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold limitation. The standard of proof is on a balance of probabilities. (1) the objective to be served by the measure limiting a *Charter* right must be sufficiently important, at least relating to societal concerns that are pressing and substantial in a free and democratic society, to warrant overriding a constitutionally protected right or freedom; and (2) the means must be reasonable and demonstrably justified, in proportion to the importance of the objective. The proportionality test involves 3 components – (i) the measure must be fair and not arbitrary, carefully designed to achieve the objective in question, and rationally connected to that objective; (ii) the means should impair the *Charter* right as little as possible; and (iii) they must be a proportionality between the effects of the limiting measure and the objective.

The Plaintiffs

Neil Allard

40. The Plaintiff, Neil Allard ("Mr. Allard") has been unable to work for Veterans Affairs Canada since 1995 and Health Canada declared him on permanent medical retirement in 1999. He suffers from "*Myalgic Encephalomyelitis*", a serious neurimmune

disorder, as well as clinical depression.

41. Mr. Allard currently receives pension and wage loss replacement payments totaling approximately $2,700 net per month. When the Mr. Allard turns 65 his income will decrease to $24,000 per year.

42. Mr. Allard suffers a sensitivity to pharmaceutical medications which caused his doctors to recommend medical marihuana as a treatment. . The results have been very positive.

43. Mr. Allard initially obtained his medical marihuana through the BC Compassion Club Society in Vancouver, but found that he could not afford the costs of approximately $500 per month, and he was not satisfied with the quality and types of marihuana that were available. He realized that to obtain the types of marihuana he needed to treat his illness, and at a cost he could afford, he would have to produce for himself. He did his own research, took a course on medical marihuana, and then obtained the appropriate licences. He has been able to produce outdoors in the summer and in a greenhouse part of the year. He produces indoors in the winter months.

44. Mr. Allard's indoor site was built by professional certified tradespeople, in the basement of his home, to ensure safety and building standards were met. An inspection was conducted by BC Hydro. He ensures all precautions are taken, to avoid any contaminations such as mold. He has installed significant security features.

45. The Mr. Allard is currently authorized by his Doctor under the *MMAR* to use 20 g 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 grows organically and each plant often yields less than an ounce. He uses dried cannabis, as well as oils and tinctures, which effectively treats his illness. 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 licenced producer prices, which range from $5-12 per gram, his costs would increase to between $100 and $200 per day, or $2000 to $3000 per month, which

exceeds his total pension income.

46. The Mr. Allard fears that he will be charged criminally and possibly imprisoned if he continues to produce marihuana, after his permit expires, which 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.

Tanya Beemish and David Hebert

47. The Plaintiff, Tanya Beemish ("Ms. Beemish") is 27 years old and married to the Plaintiff, David Hebert, aged 32 ("Mr. Herbert"). 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.

48. Marihuana is an effective treatment for Ms. Beemish's for her 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 to possess 150 g on her person and to store 1125 g at her production site, which she will no longer be able to do.

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

50. In October 2013, Ms. Beemish and Mr. Hebert had to move to another location due to the previous locations being unaffordable. While they notified Health Canada prior to September 30, 2013of their need to relocate by the time they found a new location the September 30, 2013 deadline had passed. Their medical marihuana production licence has expired on or about October 20, 2013, and as a result the

Plaintiff Tanya Beemish has not had access to her prescribed medical marihuana since that time.

51. Ms. Beemish's only alternative to her husband producing for her is to seek out a lower price by way of the illicit market. They cannot risk her husband being criminally charged and possibly imprisoned for continuing to produce for her at a cost that they can afford. Consequently, she has had to return to pharmaceutical treatments, which has side effects that exacerbate her illness.

52. Mr. Hebert took the necessary steps to ensure that the marihuana production facility was secure, safe and healthy, and would not impact on their neighbours. They have never had any complaints despite in the marihuana production facility being located in a garage in a townhouse connected to neighbouring townhouses. All electrical work was approved by a certified electrician.

53. Mr. Hebert is an agricultural technician, biologist, and environmental professional. He utilized integrated pest management to grow two specific types of organic marihuana for his wife that are most effective for treating her illness, and he does not trust others to provide his wife with a safe continuous supply of the particular medical marihuana she needs.

54. If Mr. Hebert were to continue producing marihuana without a permit and were charged criminally, he would lose his job and he has concerns about accessing the medicine through the illicit market.

Shawn Davey

55. The Plaintiff Shawn Davey ("Mr. 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.

56. 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.

57. 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 produces medical marihuana with Mr. Alexander, who is also a *MMAR* licenced producer, who suffers chronic pain from traumatic injuries and suffers from significant osteoarthritis and sciatica. Mr. Alexander also cannot afford licenced producer prices and fears he will have to resort to the illicit market to obtain his medicine.

58. Mr. Davey took necessary steps to ensure that their production facility was properly constructed, safe, and secure. There is an extensive fire suppression, alarm and security system.

59. Mr. Davey estimates that he is able to produce his medical marihuana at a $1 - 2per 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. At $5 per gram through a Licenced Producer it would cost the unaffordable amount of $125 per day or $3,750 per month.

60. Mr. Davey fears and is very stressed about having to go back to the narcotics and other medications that caused significant negative side effects instead of being able to continue to use a medicine with the approval of his doctor that is more effective for him.

Additional Relevant Facts

61. According to University of British Columbia, Department of Psychology, Assistant Professor Zachary Walsh, PhD., R. Psych ("Professor Walsh"), "affordability" is as a significant problem for medical marihuana users across all income groups, but in particular for the lowest income groups. Professor Walsh comes to this conclusion

as a result of his work in the "Cannabis Access for Medical Purposes Survey" study ("The CAMPS Study"). This investigation indicated that in the lowest income groups, which comprise between 50 and 70% of medical marihuana patients, there was considerable difficulty affording their medicine and a large number of them would have to choose between obtaining their necessary medicine (marihuana) and other basic necessities.

62. The CAMPS Study determined that it was the actual cost of the cannabis that was the major barrier to access in terms of affordability. The median amount spent by participants in the study was $200 a month and 54% of them reported that they were sometimes or never able to buy a sufficient quantity of cannabis to relieve their symptoms, and approximately one third of those surveyed reported they often or always had to choose between cannabis and other necessities (e.g., food, rent and other medicines) because of lack of money. Over 50% of the respondents indicated that financial considerations interfered with their ability to treat symptoms of cannabis. Affordability disproportionately impacts the most seriously ill patients, who were twice as likely as healthier patients to have to choose between cannabis and other necessities. The Study concluded that the financial strain across all income groups, and in particular the poor and the most sick, demonstrated the need to integrate marihuana therapy within a subsidized medicine framework.

63. The Health Canada Regulatory Impact Analysis Statement regarding the Marihuana for Medical Purposes, including the Delsys Research Group, Inc. Cost-Benefit Analysis of December 2012 adds support to the CAMPS Study findings by suggesting that removing personal production of medical marihuana as an option for patients will aggravate the problem of affordability.

64. The CAMPS Study also looked at the question of "availability" and determined that almost a one third of the respondents were self-producing and that the most important reason for doing so was quality (39%), followed by price (36%), avoiding the black market (29%), selection of a specific strain of cannabis (24%) and safety (12%). The major reasons for not producing for oneself were lack of space, expense or legal

concerns.

65. Most medical marihuana users continue to obtain their marihuana from illicit sources. Some have licences to produce and some had designated growers, but fewer than 2% were purchasing from Health Canada's supply.

66. Dr. David Pate addresses the detailed effects of marihuana in forms other than dried flowers. The trial judge in *R v. Smith (supra)* accepted Dr. Pate's conclusion as findings of fact in *R. v. Smith (supra)*, which findings were not challenged on appeal by the Crown. The active medicinal compounds of marihuana are found in structures called glandular trichomes, which contain resin that contain THC and CBD, the primary active medicinal ingredients. There are different mechanisms for getting the therapeutic medicinal components, whether THC or CBD, into the body. Oral ingestion is one method that has a benefit of prolonging the medicinal effects, though therapeutic levels of the compounds take longer to build up to effective concentration than with smoking. Oral ingestion is a preferred method for persons with chronic pain or glaucoma because of the continuous therapeutic dose. Smoking, by contrast, may be preferred for acute pain or conditions requiring rapid onset of effect. Oral ingestion does not produce the potential harms associated with smoking plant material. Oral ingestion can also be of additional benefit to those suffering from gastro-intestinal conditions, as the dose is delivered directly to the site of pathology. Other methods of ingestion are possible, such as topical and sublingual sprays applied to the skin. These methods require separation of the active compounds from the inert plant material.

67. The Plaintiffs say that there is in existence an industry that provides various types of equipment to ensure the absence of mold and ensuring fire and electrical safety as well as security systems if necessary, designed to enable individuals to produce indoors food, flowers, herbal natural health care products, that can also be used for the production of cannabis (marihuana) and that substantially reduce or eliminate any risks of mold, fire and electrical safety and security. The production of such plants indoors can take place in an apartment, residence, including the basement of a residence or separate room, or in an outbuilding or even in an industrial or

agricultural area by way of a collective garden with any such risks being ameliorated or completely eliminated. While reasonable regulations and limitations may be required depending upon individual circumstances in relation to dwelling places as an example, this does not justify the complete prohibition on the freedom or liberty of a medical patient to participate in the production of their own medicine where feasible to do so, much like growing their own food or herbs or flowers but for their own use and not for sale or distribution to the public.

68. Professor Susan Boyd, a rebuttal expert for the Plaintiffs on the issue of Public Safety has examined these types of 'problems', as they are often stated by the Defendant, and has found the citation of such problems to be lacking any real scientific basis, indeed, to be mere assumptions that in turn rest on other assumptions gleaned from mere anecdotes and having little or no basis in statistics or a broader analysis, nevertheless gradually taking shape as an espoused and accepted myth. Referencing published material and scientific studies, Professor Boyd points out that, for example, studies which indicate firearms to be more present at grow-operations are actually overstated, with firearms present in almost the same proportion as there might be in households without grow operations that otherwise have valid firearms licences. Similarly, in reviewing the work of Darrel Plecas and Len Garis relied upon by the Defendants, who state there are increased risks of fire from grow operations, Professor Boyd found that there was little or no evidence to actually substantiate this claim, and that in fact the statistics relating to same were overstated. It was also found that concerns relating to "mold" were not cross-referenced with other factors that could cause the phenomenon outside of grow operations. Finally, Professor Boyd points out that irrespective of whether there was a basis to state that there are safety risks associated with legal grow operations, there was nothing indicating that such risks could not be addressed with monitoring, training, or education, something which the Defendant has only engaged on a limited basis or not at all. Finally, notwithstanding the alleged outcry regarding health and public safety risks associated with licenced grow operations, Professor Boyd could not discern any peer reviewed or scholarly research that could serve as a basis for such a position.

69. The concerns raised by Professor Boyd would appear to be borne out in the evidence contained in the "Cost Benefit Analysis of Regulatory Changes for Access to Marihuana for Medical Purposes" (December 20102) prepared for Health Canada as part of the Regulatory Impact Analysis (the "Delsys Report"), cited by Health Canada at the time of the announcement of the proposed changes and posted on its website., This report appears to take as a given certain costs associated with maintaining the licenced grow operation regime, which costs include public safety and health risks, including risks of fire, relying primarily on the RCMP authored Report for the Association of Police Chiefs that contains very limited and mostly anecdotal information regarding a very minor number of abuses relative to the total number of licence holders during the period. At pages 64-82 of the Report, there is an outline of fire risks associated with grow operations, however, it is unclear how the statistics relate to licenced and non-"misusing" licenced operations, as opposed to fully clandestine operations. Furthermore, it does not appear that there is an analysis regarding the risk of fire as between licenced and legitimate operations and illicit grow operations within homes; the study further states that much of the risk is associated with "faulty wiring" but, again, there is no analysis as between that and "faulty wiring" associated with any other kind of electrical operations within homes. The overall risk of fire is estimated to be very low overall. The Report declines to assess other risks such as mould, toxic chemicals and risks to children given the lack of evidence to support any reasonable calculations.

70. Overall, the Delsys report appears to take several leaps of faith to reach a hoped-for conclusion about greater costs associated with grow operations: "possible" misuse, "possible" fire and other "possibilities" are placed one on top of each other, with the extrapolated result being that there "will be" heavy social, safety, and economic costs associated with grows, but at no point are studies or statistics provided regarding what actually *is*, i.e. how many fires there have been and how many public safety concerns have actually accrued as a result of licenced grows. The one RCMP Report from 2007 to 2010 referred to above appears to be the major source relied upon by authors and the Government despite its major limitations and minor sample. This is particularly important given that Medical Marihuana production facilities have

been operating across Canada for several years (almost 14 years the *MMAR* Program has existed) and actual raw data on fire, misuse, and other aspects of public safety should be readily available. The 2007 Fire Report covering fires across Canada do not mention such production facilities as a significant risk of fires. Most house fires arise in kitchens from leaving a pot, not some 'pot', on the stove. Significantly, the Delsys report concludes that after their analysis there is no clearly superior result that supports the status quo or the proposed new policy and the sum of benefit and cost changes across all stakeholders is negative. In particular, the one class of stakeholder bears a cost in terms of the price increases, namely the users of marihuana for medical purposes, whereas others, such as the general public, the government and license producers are estimated to be better off. The patients are predictably, the ones who are going to suffer, apparently based on flimsy evidence in relation to the risk of the general public, major cost savings to the government, some of which will occur in any event by getting out of production and not having to approve patients.

71. In response to Examination for Discovery questions with respect to the status of Licenced Producers under the *MMPR* currently, the Defendants provided the following information:

> "Although there are presently 21 licensed producers, only 13 of these are licensed to sell to clients. Of these 13, 8 had actually made sales to clients by June 30, 2014. These 8 licensed producers had collectively sold a total of 537 kg by that date.
>
> As of June 30, 2014, licensed producers that produced domestically (i.e. as opposed to importation) had 1134 kg of dried marijuana in inventory, out of the 1795 kg that they had collectively produced to date. "...as of July 28, 2014, Health Canada had received 955 license applications, of which 21 have been granted and 183 have been refused.
>
> The "ready to build" letter is not a mandatory step in the application process and applicants with such a letter are not guaranteed a license. Ready to build letters are requested occasionally by applicants under both the *Narcotics Control Regulations* and the *Marihuana for Medical Purposes Regulations* for project management purposes. The letter attests that the physical security requirements, as presented in an applicant's proposal, would meet Health Canada's requirements as of the date of the issuance of the letter. That said, a total of 34 applicants have obtained a ready to build letter. 13 of these 34 became licensed producers.

72. Detailed information as to the production of dried marihuana in kilograms as of June 30th, 2014 was provided with respect to 10 of the Licenced Producers and noted that LP#1 had produced 24 kilograms but had no sales of that date and while it had produced dried marihuana did not have any registered clients as of yet. LP#2 had also produced 24 kilograms of dried marihuana as of June 30th, 2014 but had sales. No details were given. LP#3 had produced 36 kilograms of dried marihuana as of June 30th, 2014 but had no sales because it had produced dried marihuana but had its licence to sell suspended due to issues with good production practices. LP#4 had produced 43 kilograms of dried marihuana as of June 30th, 2014 and was selling to the public. LP#5 had produced 50 kilograms of dried marihuana as of June 30th, 2014 but was not selling to the public because it was required to conduct a recall and had it's licence to sell suspended due to issues with good production practices. LPs#6 - #10 produced 72, 163, 175, 266, and 942 kilograms of dried marihuana respectively as of June 30th, 2014 and all were selling to registered patients.

73. It is understood that somewhere between 6,500 and 10,000 patients have registered with Licenced Producers compared to the 38,000 persons with authorizations to possess as of March 31, 2014.

74. The appeal and cross-appeal from the injunctive relief granted March 21st, 2014 by Manson, J. is to be heard in the Federal Court of Appeal on November 24th, 2014 and at that time in relation to the cross appeal the Plaintiff/Respondents (Appellants by way of cross-appeal) will seek to adduce new evidence before that Court to update the Court with respect to the multitude of problems experienced by persons with ATPs under the *MMAR* with respect to the need to change their production sites and other variables as well as an update with respect to the problems experienced by individual patients in relation to their access to medical marihuana from Licenced Producers under the *MMPR* and that information will be available for the Pretrial Conference.

(D) A statement of the issues to be determined at trial

75. Plaintiffs say that the issues to be determined at trial are:

a. Whether the *MMPR* provide a "constitutionally viable medical exemption" to the *CDSA* by providing a 'reasonable continuous safe supply' of cannabis as medicine for all medically approved patients and/or their caregivers or do they leave, at least some medically approved patients, in a position of having to choose between their liberty and their health in violation of s.7 of the *Charter*?

b. Whether limitations on the production of cannabis to indoors only, and not in a dwelling place, or anywhere else, by a medically approved patient, are reasonable limits demonstrably justified in a free and democratic society under s.1 of the *Charter*?

c. Whether the maximum limit of 150 grams that a medically approved patient can possess at any time is a reasonable limit demonstrably justified in a free and democratic society under s.1 of the *Charter*?

d. Whether limiting possession of cannabis (marihuana) to its dried form only is a reasonable limit demonstrably justified in a free and democratic society under s.1 of the *Charter*?

(E) Documents

76. The plaintiff relies on the documents in his list of documents and will make sure they are assessable digitally for the purposes of the pretrial conference, including any prior affidavits of statements of expert witnesses.

(F) Rule 263 Issues

Possibility of Settlement

77. There does not appear to be any possibility of a negotiated settlement because this is a constitutional challenge to federal legislation.

Simplification of Issues

78. The Plaintiffs are of the view that there are no additional measures that ought to be taken to simplify the issues to be determined by the Court at trial.

Expert Witnesses

79. As per the Direction of the Court (Manson, J.) dated May 2, 2014, the parties must file any expert reports by November 1, 2014 and any rebuttal expert reports by December 12, 2014.

80. The Plaintiffs do not expect any objection to Defendants proposed expert witnesses that could disqualify that witness from testifying and if there are will advise once the expert witnesses are known or confirmed.

81. It is anticipated that there will be a need for rebuttal witness evidence.

The Possibility of Obtaining Admissions

82. As per the Direction of the Court (Manson, J.) dated May 2, 2014, any notices to admit and responses thereto must be completed by October 17, 2014.

The Issue of Liability

N/A

Damages

N/A

Duration and Date of Trial

83. As per the Direction of the Court (Manson, J.) dated May 2, 2014, the trial of this matter is scheduled for a duration of three weeks, commencing on February 23, 2015.

Advisability of an Assessor

84. The Plaintiffs do not believe an assessor would be appropriate.

Interpreters

85. The Plaintiffs do not believe that interpreters will be needed as there is no indication that any of the witnesses will be testifying in a language other than English.

Notice of Constitutional Question

86. The Plaintiffs have served a Notice of Constitutional Question in accordance with s.57 of the *Federal Courts Act*.

Trial Record

87. The Trial Record should consist of the documents listed under Rule 269.

Any other Matter

88. The Plaintiffs will advise of any other matters during the course of the pre-trial conference.

All of which is respectfully submitted.

DATED: September 30, 2014

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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

REQUISITION FOR PRE-TRIAL CONFERENCE

THE PLAINTIFFS REQUEST that a date be set for a pre-trial conference in this action.

THE PLAINTIFFS CERTIFY:

1. All examinations for discovery which the plaintiffs intend to conduct have not been completed because the Defendants objected to numerous questions and the issues arising therefrom are a subject of a Motion to the Court in writing under Rule 369 of the *Federal Court Rules* 1998 seeking an order pursuant to Rules 240 and 241 requiring the Defendants to answer the questions in issue. This Motion is currently being considered by the Court. In addition the Defendants in relation to some questions undertook to provide answers at a later time and some of those answers remain outstanding. Consequently the Plaintiffs are unable to certify that all examinations for discovery that the plaintiffs intend to conduct have been completed.

2. A settlement discussion has taken place on September 26th, 2014 under Rule 257 of the *Federal Courts Rules* and it has been determined that because this is a Constitutional challenge to Government legislation, there is no possibility of settling any or all of the issues in the action.

3. The pre-trial conference should be held at Vancouver.

4. The parties are available at any time except: October 2, 3,14-17, 21, 23, 24, 27 November 5, 6, 7, 10, 13, 17, 18, 19, 24, 26, 27, 28.

5. The pre-trial conference will be in English.

DATED: October 1, 2014

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