Court File No.: A-174-14

FEDERAL COURT OF APPEAL

BETWEEN:

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Appellant

and

Neil ALLARD, Tanya BEEMISH, David HEBERT and Shawn DAVEY

Respondents

MEMORANDUM OF FACT AND LAW OF THE APPELLANT

William F. Pentney
Per: **BJ Wray**
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OVERVIEW

1. In issuing an interlocutory injunction to suspend the operation of Canada's new medical marihuana regime, Justice Manson (the "Judge") erred when he found that the plaintiffs' speculative, inconclusive and contradictory evidence was sufficient to establish irreparable harm. The Judge failed to apply this Court's jurisprudence with respect to establishing irreparable harm, namely, that the evidence required to prove irreparable harm must be clear and compelling and that the moving parties must prove that irreparable harm *will* result.

2. The bare-bones evidence of economic hardship provided by the plaintiffs was insufficient to substantiate a finding of irreparable harm. Had the Judge properly applied the evidentiary standard for irreparable harm, he would not have concluded that the plaintiffs would suffer irreparable harm in the form of "severe impoverishment" if they were required to purchase their medical marihuana from licensed producers rather than continue to grow it for themselves. Further, the Judge did not consider the fact that the plaintiffs' economic hardship claim was undermined by their assertions that they would turn to the illicit market for their medical marihuana. If the plaintiffs could afford the illicit market, which the evidence showed was more expensive than the licensed producer market, than the plaintiffs could afford to buy from licensed producers.

3. The Judge also erred in his assessment of the balance of convenience when he found that this was a "clear case" in which the interests of the plaintiffs outweighed the public interest in the applicability and enforceability of validly enacted legislation. The Judge failed to fully consider Canada's extensive evidence of the public harms that the new medical marihuana regime is intended to address. He also failed to consider the full impact that an injunction would have on the nascent licensed producer marketplace. Further, despite a paucity of evidence from the plaintiffs with respect to a competing public interest, the Judge held that the balance of convenience lay in their favour.

4. If the Judge had properly considered the fact that interlocutory injunctions are extraordinary remedies, especially in constitutional cases in which interim orders of this nature effectively suspend the application of newly enacted legislation, he would not have concluded that the balance of convenience lay with the plaintiffs.

PART I - STATEMENT OF FACTS

Regulation of Drugs in Canada

5. In Canada, controlled substances are regulated through the *Food and Drugs Act* ("FDA"), the *Controlled Drugs and Substances Act* ("CDSA") and their regulations. The FDA helps to ensure that drugs sold in Canada are safe, effective, and of good and consistent quality. The CDSA and the FDA also ensure that appropriate regulatory means are in place to limit the potential for abuse and diversion, particularly for drugs and substances listed under the CDSA.[1]

6. The CDSA is the means by which Canada fulfills its international obligations under three United Nations international drug control conventions.[2] The implementation of these conventions is monitored by the International Narcotics Control Board (the "INCB").[3]

7. Section 4 of the CDSA prohibits possession of, among other substances, marihuana. Section 7 prohibits the production of marihuana. Section 55 provides that "[t]he governor in Council may make regulations for carrying out the purposes and provisions of this Act, including the regulation of the medical, scientific and industrial applications and distribution of controlled substances".

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[1] Affidavit #1 of Jeannine Ritchot ["Ritchot Affidavit"], Appeal Book ["AB"] Vol IV, Tab 21, p. 940, paras.4-9
[2] Ritchot Affidavit, AB Vol IV, Tab 21, p. 940, para. 8
[3] International Narcotics Control Board Report 2013, p. iii

8. On July 31, 2001, in response to the decision of the Ontario Court of Appeal in *R. v. Parker*, the Government of Canada promulgated the *Marihuana Medical Access Regulations* ("MMAR").[4]

9. The MMAR provided for a licence scheme whereby eligible persons who have a medical declaration signed by a medical practitioner are issued an Authorization to Possess ("ATP") marihuana. A valid ATP authorized the holder to possess up to 30 times the amount of marihuana they intended to consume daily.[5]

10. Though the MMAR were amended on numerous occasions, in their final form they permitted individuals who have an ATP to obtain lawful access to marihuana in one of three ways:

    a. through a Personal-Use Production License ("PUPL"), pursuant to which the individual was permitted to produce a determined quantity of marihuana for his or her own use;
    b. through a Designated Person Production License ("DPPL"), pursuant to which the individual was able to designate another person to produce his or her marihuana; or
    c. by purchasing dried marihuana directly from Health Canada, which contracted with a private company to produce and distribute marihuana.[6]

11. The PUPL and DPPL dictated both the maximum number of plants that could be grown simultaneously and the maximum quantity of dried marihuana that could be stored at any time.[7] Production of marihuana in accordance with a PUPL or DPPL had to be conducted only on the site designated on that PUPL or DPPL. This site could be indoors or outdoors but not both simultaneously.[8]

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[4] *R. v. Parker,* (2000), 49 O.R. (3d) 481 (C.A.); *Marihuana for Medical Access Regulations,* SOR/2001-227; Ritchot Affidavit, AB Vol IV, Tab 21, p. 942, para. 17
[5] *MMAR* s. 11(3)
[6] Ritchot Affidavit, AB Vol IV, Tab 21, P. 943, at para. 19, Exhibit B, AB Vol IV, Tab 21B, p. 1234
[7] *MMAR* ss. 24, 29, 30, 31, 34, 40
[8] *MMAR* ss. 29, 30, 40

12. Between 2001 and 2013, the number of individuals authorized to obtain marihuana under the MMAR increased significantly from 88 to nearly 37,000.[9] The number of PUPLs and DPPLs also increased dramatically from 85 to nearly 30,000.[10] Similarly, the average daily amount of dried marihuana that individuals were authorized to possess (and the corresponding number of marihuana plants that individuals were authorized to produce and possess for that purpose) also increased significantly since 2001. As of 2013, the average number of plants authorized for a personal growing operation was 101 and the estimated total number of marihuana plants authorized for production totaled nearly 3.3 million.[11]

13. As the MMAR expanded and as large quantities of marihuana were produced by individuals in homes and communities, Health Canada became aware of a number of serious unintended consequences, including:

    a. violence, including home invasion, theft, homicide, and the presence of firearms;
    b. diversion to the illicit market;
    c. production over the limit authorized by Health Canada;
    d. the presence of mould and toxic chemicals, such as pesticides and fertilizers;
    e. fire and electrical hazards;
    f. the emission of noxious odours; and
    g. various risks to children living in or near residential growing operations.[12]

14. In response to these concerns, the Government of Canada proposed changes to the regulatory framework. On June 17, 2011, a proposed reform of the MMAR was announced and a comprehensive public consultation process was

[9] Ritchot Affidavit, AB Vol IV, Tab 21, p. 944-945, para. 24
[10] Ritchot Affidavit, AB Vol IV, Tab 21, p. 945-946,para. 25
[11] Ritchot Affidavit, AB Vol IV, Tab 21, p. 945-946, paras. 25 and 26

undertaken.[13] Health Canada solicited comments from, and held meetings with, a broad array of stakeholders, including law enforcement, fire officials, parties potentially interested in becoming licensed producers, physicians and their professional regulating bodies, and municipalities, provinces and territories as well as the general public.[14]

15. One of the principles underlying Health Canada's consultation initiative was that even though dried marihuana remains an unapproved drug under the FDA, it should be treated as much as possible like all other drugs that are used for medical purposes.[15] In other words, given that the Courts have determined that marihuana is a drug that may be used for medical purposes, it should be regulated in a manner similar to all other narcotics used for medical purposes and subject to similar production standards and regulations.

16. The *Marihuana for Medical Purposes Regulations* ("MMPR") were drafted after taking into consideration the views expressed during Health Canada's extensive consultation process. On June 7, 2013, the MMPR came into force. The MMPR operated concurrently with the MMAR until March 31, 2014, when the MMAR was repealed.[16]

17. Under the MMPR, individuals who have the support of their health care practitioner to use marihuana for medical purposes may purchase their dried marihuana from licensed producers.[17] Like manufacturers of drugs under the FDA and its regulations, licensed producers under the MMPR are subject to regulatory requirements related to security, good production practices,

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[12] Ritchot Affidavit, AB Vol IV, Tab 21, p. 948-962, paras 33-79, Exhibit D, AB Vol 21, Tab 21D, p. 1300 Exhibit G, AV Vol IV, Tab 21G, p. 1391
[13]Ritchot Affidavit, AB Vol IV Tab 21, p. 962-963, paras 81-86
[14] Ritchot Affidavit, AB Vol IV, Tab 21, p. 962-963, paras. 81-86, Exhibit E AB Vol IV, Tab 21E, p. 1327, Exhibit F, AB Vol IV, Tab 21F, p. 1300
[15] Ritchot Affidavit, AB Vol IV, Tab 21, p. 962, para. 82
[16] *Marihuana for Medical Purposes Regulations,* SOR/2013-119 [*MMPR*]; Ritchot Affidavit, AB Vol IV, Tab 21, p. 963-965, paras. 86-90, Exhibit G, AB Vol IV, Tab 21G, p. 1391
[17] Ritchot Affidavit, AB Vol IV, Tab 21, p. 965, para. 91.

packaging, labeling, shipping, record keeping, reporting and distribution. They are also subject to Health Canada inspections.[18]

18. Unlike under the MMAR, individuals who use marihuana for medical purposes are no longer permitted to produce their own marihuana through a PUPL or designate another person to produce it for them through a DPPL.[19] These individuals will be permitted to obtain their supply of marihuana for medical purposes from a licensed producer only.

19. The changes to Canada's marihuana for medical purposes regime were positively recognized by the INCB in its 2013 Annual report. The INCB noted, in particular, that by phasing out personal and designated production, the MMPR has bolstered measures to prevent the diversion of marihuana into illicit channels.[20]

Transition from the MMAR to the MMPR

20. During the period between June 7, 2013 and March 31, 2014, both the MMAR and the MMPR ran concurrently, creating a transition period for the new dried marihuana supply and distribution system. In November 2013, Health Canada sent a letter to all individuals authorized to possess marihuana for medical purposes advising them of this transition. This letter explained how the changes would affect these individuals and also enclosed a lengthy document to provide additional information on the new MMPR.[21]

21. Individuals who hold an ATP under the MMAR may transition to the MMPR by 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. Individuals could also transition by using a medical declaration issued under the MMAR to

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[18] Ritchot Affidavit, AB Vol IV, Tab 21, p. 964-965, paras. 89-90; Exhibit G, AB Vol IV, Tab 21G, p. 1391
[19] Ritchot Affidavit AB Vol IV, Tab 21, p. 966, para. 93
[20] International Narcotics Control Board Report 2013, at paras. 77-79 and 380
[21] Affidavit #1 of Danielle Lukiv ["Lukiv Affidavit"], Exhibit F, AB Vol III, Tab 18F, p.726

register with a licensed producer, which can then provide them with dried marihuana for medical purposes.[22] When the MMAR were repealed on March 31, 2014, all PUPLs and DPPLs were to become invalid and Health Canada would no longer receive, process or issue applications for ATPs, PUPLs or DPPLs.[23] The MMPR has returned Health Canada to its traditional role of regulator, rather than producer and service provider.[24]

22. The MMPR do not limit the number of strains of marihuana that licensed producers may make available to registered clients.[25] Additionally, until March 31, 2014, with specific authorizations from Health Canada, persons holding a valid PUPL or a valid DPPL were able to sell or provide their marihuana seeds or plants to licensed producers and thus seek to have their particular strains preserved under the MMPR.[26]

23. Health Canada took a number of steps to ensure that there would be a continuous, stable and adequate supply of dried marihuana for medical purposes available during the transition period from the MMAR to the MMPR and thereafter.[27] These steps 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 were not able to do so.[28]

24. As of January 30, 2014, Health Canada had received more than 400 applications from prospective licensed producers, of which 8 had been issued.[29] Licensed producer estimates suggested that as of April 2014, approximately 850

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[22] Ritchot Affidavit, AB Vol IV, Tab 21, p. 965-966, para. 92
[23]Ritchot Affidavit, AB Vol IV, Tab 21, p. 966, para. 93
[24]Ritchot Affidavit, AB Vol IV, Tab 21, p. 966-967, para. 97
[25] Ritchot Affidavit, AB vol IV, Tab 21, p. 964-965, para. 90
[26] *MMPR*, s. 264
[27] Affidavit #1 of Todd Cain ["Cain Affidavit"], AB Vol V, Tab 22, p. 1582, 1584-1586, paras. 21, 30-38
[28]Cain Affidavit, AB Vol V, Tab 22, p. 1581-1583, 1584-1586, paras. 14-23, 30-38
[29] Cain Affidavit, AB Vol V, Tab 22, p. 1583-1584, paras. 24-27

kilograms of dried marihuana would be available for medical use, in addition to any accumulated inventory that has not yet been sold.[30] Health Canada also secured between 400-500 kilograms of dried marihuana as a reserve in case of a supply shortfall during the transition period.[31]

25. As of January 30, 2014, approximately 60 strains of marihuana for medical purposes were available from licensed producers at prices ranging from $5 to $12 per gram, with a number of licensed producers offering discounts as low as $3 per gram for low income users.[32]

Intended Benefits of the MMPR

26. The MMPR are intended to improve individual and public health and safety and security by addressing many, if not all, of the significant 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.[33] Health Canada considered a number of options for changing the regulatory regime, including amending or adding to the existing MMAR, but decided that the unintended negative consequences of the MMAR could not be adequately addressed in such a piecemeal fashion.[34]

27. By replacing a system of personal and designated home production with one whereby industrial producers are licensed to produce medical marihuana, the MMPR attempts to ensure that good production practices, in sanitary secure premises, will be followed. Health Canada may also inspect licensed producers and require regulatory compliance, neither of which was feasible under the MMAR. Under the MMAR, there was no meaningful ability to assess or

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[30] Cain Affidavit, AB vol V, Tab 22, p. 1584, para. 29
[31] Cain Affidavit, AB Vol V, Tab 22, p. 1585, para. 33
[32] Cain Affidavit, AB Vol V. Tab 22, p. 1584, para. 28, Exhibit D, AB Vol VI, Tab 22D, p. 1643; Affidavit #1 of Paul Grootendorst ["Grootendorst Affidavit"], Exhibit A, AB Vol IV, Tab 20A, p. 896-897
[33] Ritchot Affidavit, AB Vol IV, Tab 21, p. 964-965, para. 90

capacity to limit, to generally accepted tolerance limits for human consumption, the microbial and chemical contaminants in marihuana cultivated by personal producers. Licensed producers under the MMPR are also required to test and label their products to show levels of active ingredients such as THC and CBD.[35]

28. The MMPR eliminates government involvement in authorizing possession of marihuana for medical purposes. For example, persons using marihuana for medical purposes will no longer need to seek Health Canada approval. 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. The MMPR expand the scope of persons who may sign a medical document supporting the use of marihuana for medical purposes to include nurse practitioners. The MMPR also eliminate the need for a specialist to be consulted on the use of marihuana for medical purposes.[36]

29. While the cost of marihuana for medical purposes may initially, and in the short-term, 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.[37]

30. Despite a dearth of scientific evidence with respect to the effectiveness of certain strains for certain conditions, the MMPR are also likely to increase the availability of various strains of marihuana for medical purposes. The MMPR place no limit on the number of strains that may be made available by licensed producers. In fact, the MMPR provided a mechanism whereby licensed individuals under the MMAR could have, until March 31, 2014, sold the seeds

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[34] Ritchot cross-examination, AB Vol VI, Tab 25, p. 1894, ll. 5-11, 21-25; p. 1895, ll. 1-9; p. 1905, ll. 2-13; p. 1909, ll. 23-25; p. 1910, ll. 1-21, p. 1936, ll. 3-25; p 1937, ll. 1-7, p. 1939, ll. 3-23.
[35] Ritchot Affidavit, AB Vol IV, Tab 21, p. 964-965, paras. 89-90
[36] Ritchot Affidavit, AB Vol IV, Tab 21, p. 964-965, paras. 89-90
[37] Grootendorst Affidavit, Exhibit A, AB Vol IV, Tab 20A, p. 899-902, paras. 32-39

or plants of their preferred strains of marihuana to licensed producers. Finally, licensed producers are now required to follow good production practices, to test their marihuana and to label it appropriately.[38]

The Judgment Below

31. The plaintiffs in the action underlying the motion at issue seek various declarations pursuant to sections 24(1) and 52(1) of the *Charter*. The declarations sought rely on s. 7 of the *Charter* to invalidate the recent changes brought about by the enactment of the MMPR.[39] In particular, the plaintiffs challenge the MMPR's prohibition of the personal production of marihuana for medical purposes, the restriction on non-dried forms of marihuana, and the possession limit of 150 grams of dried marihuana.[40]

32. On January 31, 2014, the plaintiffs brought a motion for an interlocutory injunction or an interlocutory constitutional exemption to preserve the provisions of the MMAR relating to personal production, possession, production location, and storage. They also sought to suspend conflicting provisions in the MMPR pending a final resolution of the merits of their claims. In addition to either of those options, the plaintiffs sought an order in the nature of *mandamus* to compel Canada to continue processing licence applications under the MMAR. The plaintiffs did not seek interlocutory relief with respect to the fact that the form of marihuana under the MMPR is limited to dried marihuana.

33. On March 21, 2014, the Judge granted limited relief to the plaintiffs, and to a large class of medical marihuana users who were not before the Court, by preserving certain rights under the MMAR as of September 30, 2013. The Judge rejected the plaintiffs' contentions that there would be an insufficient supply of marihuana under the MMPR as well as their assertions that licensed producers will not offer the particular strains they said were necessary to meet their

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[38] Ritchot Affidavit, AB Vol IV, Tab 21, p. 964-965,paras. 89-90
[39] Plaintiffs' Amended Statement of Claim, AB Vol I, Tab 5, p. 68-71
[40] Plaintiffs' Amended Statement of Claim, AB Vol I, Tab 5, p. 69-70, paras 1(d)(e)

medical needs.[41] The Judge also dismissed their arguments with respect to the 150 gram possession limit.[42] The Judge determined that the plaintiffs' evidence on these issues was insufficient to demonstrate that they would suffer irreparable harm if an injunction was not granted.

34. The Judge erred, however, in accepting the plaintiffs' submissions with respect to the issue of affordability.[43] He found that the evidence showed the plaintiffs would be unable to afford marihuana produced by the licensed producers and that this inability would "likely affect either their health, endanger their liberty, or severely impoverish them."[44]

35. The Judge dismissed the plaintiffs' request for an interlocutory constitutional exemption because it would have exempted all medically-approved patients and their designates from the possession, trafficking and possession for the purposes of trafficking provisions in the CDSA without qualification.[45] The Judge also dismissed the plaintiffs' request for a *mandamus* order.[46]

36. On March 31, 2014, Canada filed a Notice to Appeal in respect of the Judge's decision.[47] The plaintiffs filed a Notice of Cross-Appeal on April 16, 2014.[48]

PART II –POINTS IN ISSUE

37. There are two issues to be determined on this appeal:

    a) Did the Judge err in the irreparable harm analysis by misapplying the jurisprudence of this Court with respect to the type of evidence required to establish irreparable harm, thereby basing his decision on speculative allegations of harm, contrary to law and without regard to the evidence?

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[41] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 37, paras. 89-90
[42] Reasons of Manson, J, 2014, FC 280, AB Vol I, Tab 3, p. 37, para. 91
[43] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 38-39, paras. 92-96
[44] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 38, para. 92
[45] Reasons of Manson, J, 2014, FC 280, AB Vol I, Tab 3, p. 48-49, para. 124
[46] Reasons of Manson, J, 2014, FC 280, AB Vol I, Tab 3, p. 49, para. 125
[47] Notice of Appeal filed March 31, 2014, AB Vol I, Tab 1, p. 1
[48] Notice of Cross-appeal filed April 16, 2014, AB Vol I, Tab 2, p. 6

b) Did the Judge err in the balance of convenience analysis by giving insufficient weight to the harm to the public interest and by misapprehending the facts with respect to the plaintiffs' public interest claims?

38. Canada submits that each of these questions must be answered in the affirmative.

PART III – SUBMISSIONS

A. Standard of Review

39. Discretionary decisions to grant interlocutory injunctions are not immune from appellate review and may be overturned where the court below proceeded on a wrong principle of law, gave insufficient weight to a relevant factor, seriously misapprehended the facts, or where an obvious injustice would result.[49]

40. The standard of review on issues of fact is palpable and overriding error, and on issues of law is correctness. Questions of mixed fact and law are to be reviewed on a standard of palpable and overriding error, unless there has been an error of law that can be extricated from the mixed question of law and fact.[50]

41. In this case, although the Judge identified the basic three part legal test for the granting of an injunction as set out in *RJR MacDonald Inc. v. Canada,*[51] he made both errors of mixed fact and law and errors of law by misapplying the irreparable harm and balance of convenience elements of the test.

B. Irreparable Harm Based on Speculation

42. The Judge erred in law by accepting that the plaintiffs' speculative concerns could ground a claim of irreparable harm. The jurisprudence of this Court squarely places the onus on the applicant to lead evidence to establish the actual

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[49] *Canada v. Simon,* 2012 FCA 312 para. 22
[50] *Housen v. Nikolaisen,* 2002 SCC 33 paras. 5-8, 26-36
[51] *RJR MacDonald Inc. v. Canada (Attorney General),* [1994] 1 SCR 311, para. 43[*RJR*]

existence or real probability that irreparable harm will result if an injunction is not granted.[52]

43. It is not sufficient to show that irreparable harm may arguably result if an injunction is not granted. Similarly, allegations of harm that are merely hypothetical will not suffice to establish irreparable harm.[53] Rather, in order to establish irreparable harm, the evidence offered must demonstrate harm with particularity, not generality.[54]

44. The requirement for proof of non-speculative harm applies even where an applicant alleges that the impugned conduct is based on allegations of unconstitutionality.[55]

45. The Judge lowered the standard of evidence required to establish irreparable harm when he accepted the plaintiffs' speculative evidence on the future cost of purchasing marihuana from licensed producers and the plaintiffs' alleged inability to afford such costs. The Judge did not properly apply a central tenet of this Court's jurisprudence with respect to establishing irreparable harm, namely, that the evidence required to prove irreparable harm must be clear and compelling and that the moving parties must prove that irreparable harm *will* result.[56]

46. The plaintiffs alleged that they would suffer irreparable harm "in the form of loss of enjoyment of life and avoidable suffering"[57] because under the licensed producer system there would be an inadequate supply of marihuana, they would be unable to procure particular strains of marihuana, they would be limited to

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[52] *International Longshore and Warehouse Union, Canada v. Canada (Attorney General)*, 2008 FCA 3 [*International Longshore*] para. 25; *Stoney First Nation v. Shotclose*, 2011 FCA 232 para. 48

[53] *Canada (Attorney General) v. United States Steel Corp.*, 2010 FCA 200, para. 7; *International Longshore* paras. 21, 22, 25; *Haché v. Canada,* 2006 FCA 424, para. 11

[54] *Gateway City Church v. Canada (Min. National Rev.)*, 2013 FCA 126, paras 15, 18

[55] *International Longshore* at para. 26; *Groupe Archambault Inc. v. CMRRA/SODRAC Inc.* 2005 FCA 330, paras. 15-16

[56] *International Longshore*, para. 25

[57] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 33, para. 77

possessing 150 grams of marihuana at any one time, and they would be unable to afford the prices charged by licensed producers.

47. The Judge agreed with Canada that there was insufficient evidence to establish that there would be an inadequate supply of medical marihuana under the MMPR.[58] He also found that there was insufficient evidence to demonstrate that the plaintiffs would not have access to the particular strains of medical marihuana that they alleged were necessary for their medical conditions.[59] Finally, he held that the plaintiffs had not established that the 150 gram limit on personal possession would limit reasonable access and thereby constitute irreparable harm.[60]

48. The Judge's finding of irreparable harm was thus based exclusively on his determination that the plaintiffs could not afford to purchase their marihuana from licensed producers and that this inability would "likely affect either their health, endanger their liberty, or severely impoverish them."[61] Yet, the plaintiffs' evidence with respect to economic hardship and its potential impact on their lives was speculative, inconclusive, and contradictory.

49. The plaintiffs conceded that an increase in the cost of marihuana alone was not a basis to find irreparable harm.[62] No one is entitled to low-cost medicine and having to pay more for prescription drugs, in and of itself, cannot sustain a claim of irreparable harm. Rather, as the Judge noted, the cost of marihuana must be such that it puts the plaintiffs in a position where they are either unable to reasonably access their medical marihuana, be severely impoverished, or endanger their liberty by forcing them to rely on the illicit market or continue personal production.[63]

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[58] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 37, para. 89
[59] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 37, para. 90
[60] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 37, para. 91
[61] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 38, para. 92
[62] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 33-34, para. 78
[63] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 33-34, para. 78

50. In his analysis of whether or not the plaintiffs had established that the cost of marihuana under the licensed producer regime would cause them irreparable harm, the Judge heavily relied upon a recent decision of this Court, *Elsipogtog First Nation v. Canada (Attorney General)*, for the proposition that "sudden poverty could lead to emotional and psychological stress that could amount to irreparable harm for some individuals".[64] In applying this general proposition to the present case, the Judge failed to consider the very different factual context in *Elsipogtog* that led this Court to conclude that the applicants would face "sudden poverty".

51. In *Elsipogtog*, the evidence demonstrated that many of the current recipients of a government funding program "would experience reduced assistance" under the government's planned changes to the funding criteria and that "some recipients would become ineligible to receive income assistance."[65] Given that these individuals were already in a vulnerable economic position, and were already receiving income assistance from the government, the Court concluded that further changes that reduced the applicants' eligibility for income assistance would cause emotional and psychological stress that amounted to irreparable harm.[66]

52. The Court in *Elsipogtog* did not, however, hold that mere assertions of economic hardship will meet the threshold necessary to establish irreparable harm. Nor did the Court determine that economic hardship, on its own, constitutes irreparable harm. Rather, the evidence in *Elsipogtog* demonstrated that severe impoverishment *would* result if an interim injunction was not granted and, further, that the impoverishment was so severe that it would also result in emotional and psychological stress. In other words, the threshold for establishing irreparable harm based on economic hardship is high and the evidence required to sustain such a claim must be substantial.

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[64] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 32-33, para. 76, citing *Elsipogtog First Nation v. Canada (AG),* 2012 FCA 312 [*Elsipogtog*]
[65] *Elsipogtog*, para. 16

53. The plaintiffs' evidence fell far short of this threshold. Their evidence on the issue of affordability fell into three categories: speculations about the future price of medical marihuana under the new licensed producer system; bare-bones information regarding their individual monthly incomes; and, similarly scant information regarding how much it costs each of them to produce their own marihuana for medical purposes. The Judge wrongly concluded, on the basis of this incomplete, speculative and inconclusive evidence, that the plaintiffs had demonstrated irreparable harm.

54. With respect to the cost of purchasing medical marihuana from a licensed producer, the Judge accepted the plaintiffs' assertions that the price would be in the range of $8 – 12 per gram.[67] Contrary to the Judge's finding, however, the "preponderance of the evidence" did not show that this price would be the norm.[68] In the absence of conclusive evidence regarding the future cost of purchasing from a licensed producer, the plaintiffs could only state that this "estimated" cost "may" be higher.[69] This is very different from *Elsipogtog* where the evidence demonstrated that the new eligibility criteria *would* result in lowered incomes.

55. In fact, the affidavits of the individual plaintiffs are replete with speculative assertions regarding the future cost of marihuana for medical purposes. They repeatedly qualify their statements with terms such as, "estimated"[70], "if...the cost is..."[71], and "approximately"[72] . This language is illustrative of the

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[66] *Elsipogtog*, para. 16
[67] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 38, para. 94
[68] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 38, para. 94
[69] Affidavit of Neil Allard ["Allard Affidavit"], AB Vol I, Tab 9, p. 138, para. 21; Affidavit of Shawn Davey ["Davey Affidavit"], AB Vol I, Tab 11, p. 202, para. 13; Affidavit of Brian Alexander ["Alexander Affidavit"],AB Vol I,Tab 13,p. 209, para 6
[70] Allard Affidavit, AB Vol I, Tab 9, p. 138, para. 21; Davey Affidavit, AB Vol I, Tab 12, p. 202-203, para. 13
[71] Affidavit of David Hebert ["Hebert Affidavit"], AB Vol I, Tab 9, p. 135, para. 11; Affidavit of Tanya Beemish ["Beemish Affidavit"], AB Vol I, Tab 11, p. 193, para. 6
[72] Allard Affidavit, AB Vol I, Tab 9, p. 138, para 21; Davey Affidavit, AB Vol I, Tab 12, p.202-203, para. 13

uncertain and fluctuating nature of prices under the fledgling marketplace and the Judge improperly concluded that such statements could provide a basis for establishing irreparable harm.

56. On the whole, the evidence before the Judge on the current prices of medical marihuana suggested that those prices would continue on a downward trend. The evidence of Dr. Grootendorst, a professor specializing in the economics of health care at the University of Toronto, undermines the Judge's conclusion that the cost of purchasing marihuana from a licensed producer would be between $8 – 12 per gram.[73] Dr. Grootendorst noted that prices under the MMPR would be kept in check by the normal operation of the marketplace and, in particular, by competition from other licensed producers.[74] He also opined that, for a number of reasons, the market for medical marihuana would grow over time and this would continue to facilitate reductions in the cost of purchasing marihuana for medical purposes.[75]

57. The evidence also showed that several producers offered compassionate pricing for low income customers and were committed to keeping a proportion of their product far below $8 – 12 per gram.[76] The Judge's conclusion with respect to prices did not take into account these options. Instead, the Judge appears to have based his conclusion on the average pricing for the majority of the strains offered by licensed producers. There was no evidence, however, that the plaintiffs would require these higher priced strains for their particular conditions or even that, medically, one strain may be more beneficial than another for a particular condition. Additionally, given their alleged lack of financial means, it would have been reasonable to assume that the plaintiffs would be eligible for the pricing discounts offered by some licensed producers. None of these factors

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[73] Grootendorst Affidavit, Exhibit A, AB Vol IV, Tab 20A,p. 889
[74] Grootendorst Affidavit, Exhibit A, AB Vol IV Tab 20A, p. 890, paras. 10-12
[75] Grootendorst Affidavit, Exhibit A, AB Vol IV, Tab 20A, p. 891-892
[76] Grootendorst Affidavit, AB Vol IV, Tab 20A, p. 896-897, para. 27; Cain Affidavit, AB Vol V, Tab 22, p. 1584, para. 28

were considered by the Judge in his assessment of the potential cost of purchasing from licensed producers.

58. With respect to the plaintiffs' asserted lack of financial means to purchase medical marihuana from licensed producers, the evidence before the Judge was incomplete and provided an inadequate basis for establishing that the plaintiffs would experience "sudden poverty" of the magnitude contemplated in *Elsipogtog*. The Judge had before him only basic, bare-bones information about each individual plaintiff's monthly income and expenses. The plaintiffs did not provide specific evidence regarding their current financial situations, nor did they explain why they apparently could afford the costs associated with their current production of marihuana, including capital costs in relation to home ownership and maintenance, growing facilities and equipment, fertilizers, pesticides, electricity, home security, etc, but would allegedly not have the funds to buy marihuana directly. The Judge did not consider these significant gaps in the plaintiffs' evidence and, instead, simply accepted, at face-value, their bare assertions of financial hardship.

59. The Judge also failed to consider the inherent contradiction in the plaintiffs' claims that on the one hand they could not afford to purchase their medical marihuana from licensed producers, yet on the other, they would turn to the black market to purchase their marihuana.[77] If, as the plaintiffs' claim, they could not afford to buy from a licensed producer, they certainly could not have afforded to buy marihuana on the black market. On the plaintiffs' own evidence, the cost of purchasing marihuana on the black market was far more expensive than purchasing from a licensed producer.[78] The Judge did not reconcile these contradictory claims when he accepted that the plaintiffs would suffer irreparable harm in the form of loss of enjoyment of life and avoidable suffering if they were required to purchase from licensed producers.

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[77] Allard Affidavit, AB Vol I, Tab 9, p. 140-141, para 30; Davey Affidavit, AB Vol I, Tab 12, p. 202-203, para. 13; Hebert Affidavit, AB Vol I, Tab 10, p. 187, para. 16; Beemish Affidavit, AB VolI, Tab 11, p. 196, para. 16

60. While the Judge stated that evidence of irreparable harm must not be hypothetical or speculative, he nonetheless accepted precisely that type of evidence with respect to the plaintiffs' claims that they would be severely impoverished if they were required to purchase their marihuana for medical purposes from a licensed producer.[79] The Judge misapplied the jurisprudence of this Court with respect to economic hardship as an irreparable harm and made findings of fact on this issue that are not borne out by the evidence.

C. Improper Consideration of the Public Interest

61. Given the extraordinary nature of granting an interlocutory injunction in the context of a constitutional challenge to validly enacted legislation, the Supreme Court of Canada has stated that "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."[80] Contrary to the conclusion of the Judge, this is not a "clear case" in which the balance of convenience lays with the plaintiffs.

62. The jurisprudence distinguishes between interlocutory injunctions that would result in the broad suspension of validly enacted legislation and interlocutory injunctions that would exempt a discrete and limited number of individuals from the operation of the legislation pending the outcome of the trial. The Supreme Court of Canada has indicated that the distinction between suspension and exemption cases is an important consideration in the balance of convenience analysis.[81]

63. In suspension cases, the balance of convenience will normally require litigants who challenge the constitutional validity of laws to comply with those laws unless and until those laws are declared unconstitutional. Exceptions from this general rule should be rare.[82] This is because the public interest is much less likely to be

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[78] Allard Affidavit, AB Vol I, Tab 9, p. 138 para. 21
[79] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 33-34; 36, paras. 78, 87
[80] *Harper v. Canada (Attorney General)*, 2000 SCC 57 [*Harper*], para. 9
[81] *RJR* paras. 73, 80
[82] *RJR* para. 87

detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of the law is suspended entirely.[83] Further, some exemption cases may amount to suspension cases because granting the exemption to one litigant risks "provoking a cascade of stays and exemptions."[84]

64. In determining the balance of convenience, the Judge did not properly consider the fact that this is a suspension case – both because the plaintiffs effectively requested a suspension of the new medical marihuana regime for all authorized medical marihuana users and because of the number of individuals in essentially the same situation as the plaintiffs. Accordingly, the Judge did not properly assess the harm to the public interest.

65. Rather, the Judge accorded excessive weight to the interests of the applicants and failed to properly take into account Canada's extensive evidence on the intended public benefits of the newly enacted MMPR. The Judge held that the balance of convenience lay with the plaintiffs because medically-approved patients under the MMAR have a public interest in legal access to marihuana for medical purposes.[85] The evidence demonstrated, however, that not only does the MMPR protect this particular public interest, it actually enhances legal access to marihuana for medical purposes. The Judge also ignored the evidence with respect to the dramatic impact that an injunction of this magnitude would have on the newly created licensed producer marketplace.

66. The Judge was required to conduct the balance of convenience analysis on the assumption that the impugned law is "directed to the public good and serves a valid public purpose."[86] Additionally, Canada provided several affidavits to support the public benefits that the MMPR aims to achieve and to demonstrate that the rapid expansion of the number of individuals authorized under the MMAR had

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[83] *RJR* para. 80; *Manitoba (AG) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110,[Metropolitan Stores], paras. 80-84
[84] Metropolitan Stores, para. 80
[85] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p.46, para. 117

significant unintended negative consequences that resulted in risks to the health, safety and security of individuals licensed to possess and produce marihuana for medical purposes, and to the public in general.[87]

67. Over the years, Health Canada received thousands of pieces of correspondence regarding the MMAR, the vast majority of which expressed significant concerns with the impact that personal and designated production in private residences had on the everyday lives of Canadians.[88] These same concerns were extensively documented in numerous RCMP reports and Criminal Intelligence Briefs on the MMAR that were before the Judge.[89] This evidence demonstrated that many, if not all, of the harms associated with illicit marihuana grow operations are also applicable to legal MMAR growing operations.[90]

68. Additionally, the Judge had before him first-hand, concrete evidence of these harms. Cst. Shane Holmquist provided numerous examples of the problems that arose under the MMAR that he personally witnessed in his tenure as an RCMP officer. Cst. Holmquist has been involved in dozens of MMAR investigations and, unlike the Plaintiffs' experts, he could attest to the actual realities of the large-scale personal production of marihuana for medical purposes in residential settings.[91]

69. Cst. Holmquist noted that police investigations over the past decade revealed numerous criminal abuses under the MMAR program, including production over the legal limit, and the production and trafficking of marihuana for personal gain by individuals authorized to possess and produce marihuana for medical

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[86] *Harper*, para. 9; *RJR*, para 71

[87] Affidavit of #1 of Shane Holmquist ["Holmquist Affidavit"], AB Vol III, Tab 19, p. 760-766, paras. 29-57; Ritchot Affidavit, AB Vol IV, Tab 21, p. 948-950, paras. 33-41

[88] Ritchot Affidavit, AB Vol IV, Tab 21, p. 950, para 42; Ritchot cross-exam, AB Vol VI, Tab 25, p. 1889, ll. 4-8

[89] Holmquist Affidavit, Exhibit D, AB Vol III, Tab 19D, p. 783, Exhibit E, AB Vol III, Tab 19E, p. 791; Exhibit H, AB Vol III, Tab 19H, p. 806, Exhibit L, AB Vol III, Tab 19L, p. 870

[90] Holmquist Affidavit, Exhibit L, AB Vol III, Tab 19L, p. 870

purposes. These investigations also revealed the involvement of organized crime at MMAR grow sites.[92]

70. The Judge also had before him several law enforcement reports outlining the problems with the diversion of medical marihuana to the illicit drug market under the MMAR.[93] For example, a 2010 RCMP Report found that numerous individuals were producing over their specified legal limit of marihuana plants and that in some cases the excess produced was diverted to the illicit drug market, generating personal profit for the license holder.[94] This finding was consistent with an earlier RCMP Criminal Intelligence Brief on the MMAR which also noted that production and trafficking for personal gain was a problem under the MMAR.[95]

71. More recently, a 2012 RCMP report on the criminal exploitation of the MMAR found that not only were individual license holders exploiting the marihuana for medical purposes regime, but that it was also subject to infiltration by organized crime. In particular, this report found that "[g]aining access to or control of a medical marihuana grow operation is highly desirable for criminal networks due to the array of opportunities it would present for the illicit production and diversion of high-grade medical marihuana."[96]Also in 2012, the Capital Region Integrated Marihuana Enforcement (CRIME) Task Force on Vancouver Island found that organized crime was benefiting from production and trafficking under

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[91] Holmquist Affidavit, AB Vol III, Tab 19, p. 754-755, paras. 1-6, Exhibit A, AB Vol III, Tab 19A, p. 769

[92] Holmquist Affidavit, AB Vol III, Tab 19, p. 757, para. 14, Exhibit D, AB Vol III, Tab 19D, p. 783, Exhibit E, AB Vol III, Tab 19E, p. 791, Exhibit F, AB Vol III, Tab 19F, p. 803, Exhibit H, AB Vol III, Tab 19H, p. 806

[93] Holmquist Affidavit, Exhibit D, AB Vol III, Tab 19D, p. 783, Exhibit E, AB Vol III, Tab 19E, p. 792, Exhibit H, AB Vol III, Tab 19H, p. 806

[94] Holmquist Affidavit, Exhibit H, AB Vol III, Tab 19H, p. 816

[95] Holmquist Affidavit, Exhibit E, AB Vol III, Tab 19E, p. 796

[96] Holmquist Affidavit, Exhibit D, AB Vol III, Tab 19D, p. at p. 784

the MMAR. Twenty-seven percent of their investigations resulted in the execution of search warrants at MMAR locations.[97]

72. The findings in these various reports were consistent with the evidence of Cst. Holmquist who testified that he attended numerous MMAR locations where MMAR growers were involved in trafficking marihuana.[98] He noted that even when a grower is within his or her authorized plant count, they can grow "monster plants" that yield an extraordinary amount of marihuana.[99] He also found that MMAR licenses were used to disguise large-scale commercial grow operations and that MMAR license holders can use their authorized possession amount to disguise trafficking operations.[100]

73. In addition to this significant evidence with respect to the diversion of medical marihuana to the illicit market, the Judge had before him evidence of numerous other harms that the MMPR is intended to address, including the risk of violent home invasion ("grow rips") by criminals who become aware that marihuana is being produced and stored in the home.[101] The most recent data from British Columbia indicated that between 2007-2010, the number of grow rips at medical marihuana residences grew from 2 per year to 18 per year.[102] It would have been reasonable for the Judge to assume that the number of grow rips between 2010-2013 increased even further because of the dramatic increases in the number of MMAR participants in those years.

74. Canada also provided evidence that the risk of violence to the general public is heightened when a residence contains a marihuana growing operation because criminals may target either the wrong address or one where a marihuana

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[97] Holmquist Affidavit, AB Vol III, Tab 19, p. 760, para 28 and Exhibit F, AB Vol III, Tab 19, p. 803
[98] Holmquist Affidavit, AB III, Tab 19, p. 757, para 15
[99] Holmquist Affidavit, AB Vol III, Tab 19, p. 757, para 15
[100] Holmquist Affidavit, AB Vol III, Tab 19, p. 758, paras 17, 18 and 20
[101] Holmquist Affidavit, AB Vol III, Tab 19, p. 765-766, paras 50-54, Exhibit L, AB Vol III, Tab 19L, p. 870, Exhibit M, AB Vol III, Tab 19M, p. 879, Exhibit N, AB Vol III, Tab 19N, p. 880, Exhibit O, Tab 19O, p. 882
[102] Holmquist Affidavit, AB Vol III Tab 19M, p. 879

growing operation was believed to be active.[103] A law enforcement report found that grow rips "often lead to the violent victimization of the medical grower, or in some cases, the violent victimization of innocent bystanders."[104]

75. The evidence also contained numerous examples of correspondence that Health Canada received from individuals whose residences are located next door to, or in the same neighborhood as, a medical marihuana residential growing operation. These individuals detail the fear and stress that they live with everyday because of the criminal activities associated with these operations, including vandalism, break-ins, and physical violence.[105]

76. A significant amount of the correspondence received by Health Canada on the MMAR also identified the fire risks of residential medical marihuana growing operations as a major public safety concern.[106] The evidence before the Judge revealed that MMAR grow operations were at a higher risk to catch fire than residences without a marihuana grow operation.[107] One law enforcement report, for example, found that the current research on this issue indicates that this risk of fire is 24 times greater for a marihuana grow operation than for a regular home.[108] Given that marihuana growing operations require the use of high powered lights that are not designed for residential home use, and the fact that marihuana plants require 12-18 hours of light a day, it is not surprising that these operations would face an increased risk of fire.[109]

77. The MMPR also addresses the health concerns associated with the personal production of marihuana for medical purposes. The evidence demonstrated that the presence of marihuana growing operations in residential dwellings increases the risk of mould and other chemical contamination in the home and

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[103] Holmquist Affidavit, Exhibit L, AB Vol III, Tab 19L, p. 870
[104] Holmquist Affidavit, Exhibit H, AB Vol III, Tab 19H, p. 830
[105] Ritchot Affidavit, AB Vol IV, Tab 21, p. 953-960, paras. 54-75
[106] Ritchot Affidavit, AB Vol IV, Tab 21, p. 953-960, paras. 54-75
[107] Holmquist Affidavit, AB Vol III,Tab 19,p 761, para 36, Ex. H,AB Vol III, Tab 19H, p 806
[108] Holmquist Affidavit, Exhibit H, AB Vol III, Tab 19H, p. 832

surrounding neighbourhood.[110] Mould and other contaminants are also a concern with respect to the marihuana itself. As Cst. Holmquist explained, when marihuana bud is cured and dried, it loses 60-80 percent of its weight in moisture and, if not cured properly, the bud will develop mould.[111] This poses health and safety risks for those seriously ill persons who consume the marihuana because they do not know 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.

78. Canada also provided evidence on the risks that medical marihuana residential grow operations pose to children. While Cst. Holmquist attested that children in these locations experience the same risks as adults: fire, electrocution, mould, and violence he also noted that the existence of unauthorized marihuana products at these locations that are particularly attractive to children and pose an additional danger. He had seen, for example, candy suckers and candies containing THC that could very easily be ingested by an unsuspecting child.[112]

79. Canada's extensive evidence of the public harms associated with the personal production of medial marihuana did in fact lead the Judge to conclude that Canada's public interest in the MMPR "is embodied by the *strong presumption* that the MMPR regime will increase individual and public health, safety, and security by reducing abuses and problems associated with the MMAR" [emphasis added].[113] However, despite this "strong presumption", the Judge held that the plaintiffs' speculative evidence with respect to their financial burdens outweighed these significant benefits.

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[109] Holmquist Affidavit, AB Vol III, Tab 19, p. 761-762, paras. 36-39
[110] Holmquist Affidavit, AB Vol III, Tab 19, p. 760-762, paras. 29-35
[111] Holmquist Affidavit, AB Vol III Tab 19, p. 761-762, para. 32
[112] Holmquist Affidavit, AB vol III, Tab 19, p. 766, paras. 55-57, Exhibit P, AB Vol III, Tab 19P, p. 884
[113] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 46, para. 117

80. While the Judge made note of these numerous public harms,[114] he gave them insufficient weight in assessing the balance of convenience and did not address the fact that these serious harms would continue to exist, and thereby undermine the central objectives of the legislation, if the plaintiffs and all similarly situated individuals were allowed to continue personal and designated production in their homes. The public interest in ensuring the applicability and enforceability of validly enacted law must weigh heavily in determining the balance of convenience and the Judge failed to take this factor into account.[115]

81. Instead, the Judge contrasted the extensive public benefits of the MMPR with the plaintiffs' narrower personal interest in maintaining the current regime, which he described as "competing public interests".[116] The plaintiffs, however, offered no evidence to support their proposition that suspending the operation of the MMPR by allowing all users of marihuana for medical purposes to continue personal production under the MMAR will be in the public interest.[117] Rather, the plaintiffs baldly asserted in their memorandum of fact and law filed in the Court below that the public interest is "not represented by the views of the Federal government" or by the repeal of the MMAR.

82. The evidence showed that Canada implemented the MMPR after extensive consultation with the Canadian public, including individuals who use marihuana for medical purposes. The plaintiffs offered no evidence of how the public interest (as opposed to their individual interests) would be served by granting an injunction that would prevent the operation of a policy initiative that clearly does afford significant benefits to the public at large.[118]

83. In the absence of evidence from the plaintiffs that could sustain a public interest claim, the Judge turned to the jurisprudence that established a right to reasonable access to medical marihuana. Relying on the *Parker* decision, the Judge

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[114] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 44-45, paras. 108-113
[115] *Harper*, para. 9
[116] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 47, para. 118
[117] *RJR*, para. 80

described the public interest of the plaintiffs as having legal access to marihuana for medical purposes.[119] He appears to have concluded that the MMPR interferes with this interest, despite the fact that the plaintiffs' interest in having legal access to marihuana for medical purposes is actually facilitated by the MMPR and despite the fact that *Parker* does not stand for the proposition that the plaintiffs have a legal interest in cheap medical marihuana or in the personal production of medical marihuana.

84. While, for some individuals who already have access to a home cultivation facility, the per gram cost of purchasing medical marihuana from licensed producers could be higher than the per gram non-capital cost of home-grown marihuana (a fact which cannot be conclusively determined on the evidence, as noted above), when all of the features of the MMPR are considered as a whole, the notion of "competing public interests" with respect to reasonable access to medical marihuana cannot be sustained.

85. For example, in order to facilitate access to medical marihuana, the MMPR eliminates Health Canada's involvement in authorizing the possession of marihuana for medical purposes. Similarly, there are numerous provisions in the MMPR that are intended to make the administrative process of obtaining medical marihuana significantly quicker and easier than under the MMAR. Additionally, the MMPR expands the scope of persons who may sign a medical document supporting the use of marihuana for medical purposes to include nurse practitioners. The MMPR also eliminates the need for a specialist to be consulted on the use of marihuana for medical purposes.[120]

86. All of these features of the MMPR have modernized and streamlined Canada's marihuana for medical purposes regime and are intended to improve the health and safety of all Canadians, including those who assert a need to access to medical

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[118] *RJR*, para. 92
[119] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 38, para. 117 citing *R. v. Parker*, [2000] OJ No 2787 (CA), para. 97
[120] Ritchot Affidavit, AB Vol IV, Tab 20, p. 964-965, paras. 89-90

marihuana. In fact, the MMPR is responsive to recent court cases in which medical marihuana users have raised complaints regarding restrictions within the MMAR regime.[121]

87. The Judge did not sufficiently take into account the myriad ways in which the MMPR benefits the public in general and the plaintiffs in particular. If he had done so, the balance of convenience would have tipped in Canada's favour. This is far from a "clear case" in which the alleged highly speculative harms outweigh the extensive, demonstrable public benefits.

88. Finally, the Judge failed to fully consider the impact that an interim injunction would have on the newly created licensed producer marketplace and dismissed Canada's evidence on this issue as "speculative".[122] This evidence, while predicated on economic models of marketplace development, cannot be so dismissed.

89. Dr. Grootendorst, who specializes in analyzing the interrelationship between economics and health care, provided his expert opinion on the impact that an injunction would have on licensed producers. He opined that if medical marihuana users were exempt from the requirement to purchase their medical marihuana from licensed producers, then the size of the legal market for medical marihuana would be smaller than otherwise.[123] Dr. Grootendorst's evidence established that the failure of the projected market to materialize would negatively affect the commercial viability of licensed producers and would undermine the implementation of the MMPR. He further concluded that depending on the number of users who did not procure their medical marihuana from licensed producers, the impact on licensed producers would increase, potentially to the point of the collapse of the new marketplace. This opinion was not disputed by any of the plaintiffs' experts.

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[121] *Hitzig v. Canada*,[2003]O.J. No. 12(SCJ); *Hitzig v. Canada*, 231 DLR (4th)104(ONCA); *Sfetkopoulos v. Canada (A.G.)*, 2008 FC 33; aff'd 2008 FCA 328
[122] Reasons of Manson, J, 2014 FC 280, AB Vol I, Tab 3, p. 47, para. 119
[123] Grootendorst, Exhibit A, AB Vol IV,Tab 20A,p. 891,para 9, p 904-905,para 43, 44

90. Whether by virtue of the broad scope of the Judge's order or the fact that a narrower exemption would inevitably provoke a cascade of stays and exemptions, the effect in the present case is to suspend the application of a key element of the new regime for an extremely large segment of medical marihuana users. This is precisely this scenario that Dr. Grootendorst predicted would have the greatest impact on the new licensed producer marketplace. He stated that if the number of medical marihuana users who procure their marihuana from licensed producers became extremely low, it is likely that the newly created market would cease to exist.[124]

91. The Judge acknowledged that the injunction "may, for a limited period of time, have an effect on the size of the market available for [licensed producers]" but failed to grasp the actual impact of permitting nearly the entire existing medical marihuana customer base to continue growing their own marihuana. The significantly smaller legal market created by the injunction will, according to Dr. Grootendorst, result in fewer licensed producers which, in turn, will reduce the degree of price competition and cost-reducing technological innovation in the production of medical marihuana, thus creating the very harms (higher prices, lack of strains and supply) that the plaintiffs alleged would arise if an injunction was not granted.[125]

92. The Judge failed to properly consider the foregoing significant harms to the public interest in his assessment of the balance of convenience and erroneously concluded, on speculative and inconclusive evidence of irreparable harm, that the plaintiffs' injunction request should be granted.

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[124] Grootendorst Affidavit, Exhibit A, AB Vol IV, Tab 20A, p. 905, para. 44

PART IV – ORDER SOUGHT

93. The Appellant requests that:

a. the appeal be allowed;

b. the judgment of the Federal Court Judge be set aside;

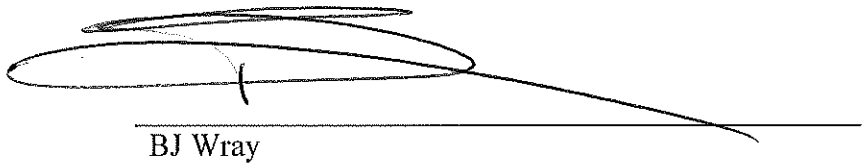
c. the Federal Court of Appeal grant the judgment that the Federal Court should have granted, namely, that the plaintiffs' motion for interlocutory relief be dismissed;

d. costs of the within appeal be awarded to the Appellant; and

e. such further and other relief as counsel may advise and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Vancouver, in the Province of British Columbia, this 10th day of June, 2014.



BJ Wray
Counsel for the Appellant

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[125] Grootendorst Affidavit, Exhibit A, AB Vol IV, Tab 20A, p.904, para. 43

PART V - LIST OF AUTHORITIES