No. T-2030-13

FEDERAL COURT

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THIS 22 DAY OF
JANUARY 20 14
William F. Pentney/AM
Solicitor for
A-G-C

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

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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;

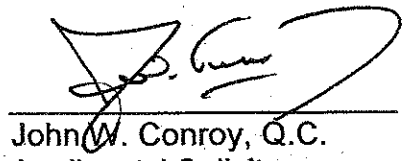
8. The Applicant/Plaintiffs seek a declaration pursuant to **s. 52 (1) of the *Charter*** that the provisions in the *MMPR* (ss.12 – 15) that specifically limit production by a 'Licenced Producer' of Cannabis to "indoors", prohibiting any, even temporary, outdoor production and prohibiting production 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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