IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Garber v. Canada (Attorney General),* 2015 BCSC 1797

Date: 20151002
Docket: S141195
Registry: Vancouver

Between:

Kevin Garber, Philip Newmarch, Timothy Sproule and Marc Boivin

Plaintiffs/Applicants

And

The Attorney General of Canada

Defendant/Respondent

Before: The Honourable Associate Chief Justice Cullen

Reasons for Judgment

Counsel for the Plaintiffs/Applicants:	K. Tousaw & M. Jackson
Counsel for the Defendant/Respondent:	BJ Wray & M. Nicolls
Place and Date of Hearing:	Vancouver, B.C. August 21, 2015
Place and Date of Judgment:	Vancouver, B.C. October 2, 2015

INTRODUCTION AND BACKGROUND

[1] This action challenges the constitutional validity of ss. 4, 5 and 7 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 [*CDSA*] as it applies to the four plaintiffs possessing and/or producing cannabis (a Schedule II substance) when that possession and/or production is intended for their own medical consumption. The plaintiffs say the impugned sections violate ss. 6, 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*], and are not saved by s. 1 and are therefore invalid and of no force and effect.

[2] The plaintiffs also challenge the validity of certain sections of the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 [*MMPR*], in light of ss. 6, 7 and 15 of the *Charter* and similarly seek a declaration of invalidity in relation to those impugned sections. The *MMPR* replaced the *Marihuana Medical Access Regulations*, SOR 2001-227 [*MMAR*], which were repealed on March 31, 2014. The remedy sought by the plaintiffs includes a permanent exemption/injunction permitting them to possess, transport and produce cannabis for their own medical consumption without fear of criminal sanctions.

[3] Each of the four plaintiffs/applicants has brought an application for an interim injunction/exemption which will have the effect of preserving and extending his authorization to produce, transport, store and possess medical cannabis in all its forms according to conditions which are unique to each of their circumstances.

[4] The general legislative and regulatory context within which the underlying action is brought and from which this application proceeds is fully explained in *Allard v. Canada*, 2014 FC 280 [*Allard*], in which Justice Manson of the Federal Court issued reasons for an order and an order following an application for an interlocutory injunction, or an interlocutory constitutional exemption, together with an order in the nature of *mandamus* pursuant to s. 24(1) of the *Charter*.

[5] The application in *Allard* relied on s. 7 of the *Charter* but not ss. 6 or 15, but was in other respects similar to the application before me. The explanation of the legislative scheme under attack is set out in paragraphs 5 - 16 of *Allard* as follows:

> I. *Introduction*
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> [5] The requirement of the government to provide reasonable access to marihuana for medical purposes was recognized by *R v Parker,* [2000] OJ No 2787 (CA) [*Parker*] and affirmed in *R v Mernagh,* 2013 ONCA 67, among others. In brief, *Parker* held that a failure to provide a viable medical exemption from the provisions of the *Controlled Drugs and Substances Act,* SC 1996, c 19 [CDSA] violated the liberty and security of the person guarantees under section 7 of the Charter, in a manner that was inconsistent with the principles of fundamental justice, by forcing certain individuals to choose between their liberty and their health. This direction from the Ontario Court of Appeal led first to exemptions from the CDSA pursuant to section 56 of that act, and then to the establishment of the MMAR.
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> [6] Today, the consumption and distribution of medical marihuana in Canada is governed by three sets of regulations: the *Narcotic Control Regulations,* CRC, c 1041 [the NCR], the MMAR and the MMPR. The NCR allows medical practitioners to prescribe marihuana despite the provisions of the CDSA. The MMAR was, until June 6, 2013, the primary regulatory mechanism which dictated the circumstances under which this exemption can be exercised. As of June 6, 2013, the MMPR began to take effect. These regulations made changes to the NCR and the MMAR and will run concurrent with the MMAR until March 31, 2014, when the MMAR is scheduled to be repealed in its entirety.
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> II. *Narcotic Control Regulations*
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> [7] As of the changes made by the MMPR on June 6, 2013, subsection 53(5) of the NCR provides that a medical practitioner may prescribe, transfer or administer dried marihuana to a person under their professional treatment if that dried marihuana is required for the condition being treated.
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> [8] Prior to June 6, 2013, section 53 of the NCR was not limited to “dried” marihuana.
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> III. *Marihuana Medical Access Regulations*
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> [9] While portions of the MMPR have taken effect, the MMAR is effectively the current regulatory regime for possession and production of marihuana for medicinal uses. As of March 31, 2014, it will be repealed in its entirety.
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> [10] The MMAR provides for a licence scheme whereby eligible persons who are prescribed marihuana by a medical practitioner are issued an Authorization to Possess [ATP] marihuana pursuant to section 11. A valid ATP authorizes the holder to possess up to 30 times the amount of marihuana they are prescribed to consume daily.
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> [11] The MMAR also provides for three ways by which a person may obtain marihuana. Two are relevant to this motion. They may either produce

> marihuana themselves under a Personal-use Production Licence [PPL], pursuant to section 24, or have a designated person produce marihuana for them under a Designated-person Production Licence [DPL], pursuant to section 34. These licences dictate both the maximum number of plants that can be grown simultaneously and the maximum quantity of dried marihuana that can be stored on a production site at any time.
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> [12] Production of marihuana in accordance with a PPL or DPL must be conducted only on the site designated on that PPL or DPL. This site may be indoors or outdoors, but not both simultaneously. There are no restrictions as to the location of the production facility beyond the fact that if outdoors, it must not be adjacent to a school, public playground, daycare facility or other public place frequented mainly by persons less than 18 years of age. Production in a dwelling-place is allowed.
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> [13] On June 7, 2013, the MMAR was amended to prohibit the issuance of PPLs and DPLs after September 30, 2013, unless the application for such a licence was received prior to September 30, 2013. This amendment was made in anticipation of the regulatory changes brought by the MMPR.
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> IV. *Marihuana for Medical Purposes Regulations*
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> [14] The MMPR makes substantial changes to the production scheme for medical marihuana in Canada. Notably, all PPLs and DPLs are no longer valid as of the repeal of the MMAR, and the amount that an individual is authorized to posses may be lowered in some cases.
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> [15] The MMPR mandates that dried marihuana be produced by a Licensed Producer [LP], pursuant to section 12 of the MMPR. Individuals who formerly were or could be issued an ATP must register the prescription of a medical practitioner with an LP to obtain dried marihuana. If they do so, section 3 authorizes them to obtain and possess marihuana produced by that LP. The amount authorized for possession under section 5 is lower than under the MMAR: either 150 grams or 30 times the amount prescribed for daily consumption by the individual's medical practitioner, whichever is less.
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> [16] An LP is required to meet various quality and security measures as per sections 12-101. This includes provisions in sections 13 and 14 which state that the production site may not be outdoors or in a dwelling-place.

[6] In the result, Manson J. granted "limited relief to the Applicants by preserving certain rights under the *MMAR* as of September 30, 2013" (para. 4) but otherwise dismissed the plaintiffs/applicants' motions.

[7] The order made by the Federal Court reads as follows:

> 1. The Applicants who, as of the date of this Order, hold a valid Authorization to Possess pursuant to section 11 of the *Marihuana Medical Access Regulations,* are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which are

inconsistent with the operation of the *Marihuana Medical Access Regulations,* to the extent that such an Authorization to Possess shall remain valid until such time as a decision in this case is rendered and subject to the terms in paragraph 2 of this Order;

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

3. The Applicants who held, as of September 30, 2013, or were issued thereafter a valid Personal-use Production Licence pursuant to section 24 of the *Marihuana Medical Access Regulations,* or a Designated-person Production Licence pursuant to section 34 of the *Marihuana Medical Access Regulations,* are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which is inconsistent with the operation of the *Marihuana Medical Access Regulations,* to the extent that the Designated-person Production Licence or Personal-use Production Licence held by the Applicant shall remain valid until such time as a decision in this case is rendered at trial and subject to the terms of paragraph 4 of this Order;

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

5. Scheduling directions shall be issued after consultation with counsel for the parties with the view of fixing a trial date as soon as practicable;

6. The Applicants are not bound by an undertaking pursuant to r 373(2) of the *Federal Court Rules*; and

7. The parties shall bear their own costs.

[8] Although appealed and also subjected to an application to vary, the March 21, 2014 order made by Justice Manson remains in force and in the same terms. The trial of the issues raised by the *Allard* plaintiffs has concluded and is on reserve.

[9] It is common ground that the *Allard* order applies to the plaintiffs in the present case as the respondent Canada accepts that *Allard* is a national test case.

[10] This is a consolidated action. The original action was commenced by the plaintiff Garber on February 17, 2014. The actions brought by the plaintiffs Newmarch and Sproule were consolidated into this action on October 7, 2014, and the action brought by the plaintiff Boivin was added on April 8, 2015.

[11] Before the actions were consolidated, the respondent Canada brought an application to stay the Garber, Newmarch and Sproule actions on April 30, 2014. That application was heard by Justice Griffin, who declined to grant the stay by reasons issued on May 12, 2014 (2014 BCSC 835). Since this application was argued before me, an appeal from Justice Griffin's refusal to grant a stay, which had been heard on May 27, 2015, was dismissed on September 16, 2015 (2015 BCCA 385).

[12] In her reasons for judgment, Justice Griffin outlined some of the distinctions between the *Allard* plaintiffs and the plaintiffs Garber, Newmarch and Sproule, in which she found justification to decline a stay. In particular, she wrote as follows at paras. 47 - 52:

> [47] In the *Allard Injunction Reasons*, Manson J. granted partial relief by preserving some rights under the MMAR; but also dismissed some of the sought-after interim relief. The Court considered the three-part test for an injunction: is there a serious question to be tried; are the applicants likely to suffer irreparable harm if the interim relief is not granted; and the balance of convenience. On the question of irreparable harm, the evidence before the Court focussed on the significantly increased costs of medical marihuana under the MMPR, and found that the evidence supported a conclusion that this would pose a financial hardship on the plaintiffs (at paras.94-96) .
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> [48] In the *Allard Injunction Reasons*, Manson J. found that the plaintiffs' evidence fell short in some respects, in that they had not shown that under the MMPR:
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> a) there would be a shortage of supply of medical marihuana (at para. 89);
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> b) they will be unable to obtain a strain of marihuana suitable for their medical needs (at para. 90); and
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> c) the 150 gram personal possession limit imposed would constitute irreparable harm (at para. 91).
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> [49] With respect to the latter conclusion, it appeared from the evidence before the Court in the *Allard Injunction Reasons* that each of the plaintiff patients used a dosage of 25 grams or less per day and there was evidence

> from the Federal Crown that the 150 gram limit was based on an average use of 1-3 grams per day and reflected "appropriate dosage amounts identified in scientific literature" (at para. 86).
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> [50] The plaintiffs in the proceedings before this Court submit that they would expect to call different evidence than was before the Court in *Allard*, including, but not limited to, the problems with the 150 gram limit on possession of medical marihuana.
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> [51] Also, in *Allard*, the plaintiffs did not seek injunctive relief with respect to that aspect of the MMPR which limits the form of medical marihuana to dried marihuana (*Allard Injunction Reasons* at para. 122).
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> [52] The plaintiffs in the proceedings before this Court would not wish to make such a concession.

[13] It is in this context that the plaintiffs in the present application seek an injunction that not only parallels what was granted in *Allard*, but extends it in order to address their individual circumstances.

THE PLAINTIFFS' CIRCUMSTANCES

(i) Kevin Garber

[14] The plaintiff Mr. Garber currently holds an authorization to possess (ATP) cannabis issued by Health Canada pursuant to the *MMAR*. The ATP permitted him to possess 1,800 grams of cannabis. However, as a result of the *MMPR* and the terms of the *Allard* order, this has been limited to 150 grams since the *MMAR* was repealed on March 31, 2014. His prescribed daily dosage is 60 grams per day.

[15] Mr. Garber also holds a Personal Use Production License (PUPL) permitting him to produce 292 cannabis plants (indoors) and store 13,140 grams of cannabis.

[16] He deposed that without the *Allard* injunction he would have had to destroy about 15,000 grams of medicine that, if acquired from a producer under the *MMPR* regime, would have cost $150,000 to replace.

[17] He has sunk "much of [his] life's savings into building [his] production site" to meet his medical needs.

[18] He suffers from epilepsy and arthritis. He deposed that without proper treatment the seizures put his health and life at considerable risk. The arthritis when not treated properly causes “severe chronic pain and inflammation”. He ingests his cannabis as a tea because he has asthma, and it provides him with “significant relief” from his afflictions. He asserts that he has allergies to “virtually all over-the-counter and prescription medications.”

[19] He deposes to no negative consequences from the production, storage or use of marihuana. He deposes too to the disadvantages to him under the *MMPR* regime, including the unavailability of organically grown cannabis, the availability of only dried marihuana, and the impact on him of a limit of 150 grams of marihuana given his daily consumption/prescription of 60 grams, which leaves him unable to travel for more than two and a half days. He also deposes to emotional and psychological distress at the prospect of not being able to afford to purchase marihuana from licensed producers in sufficient quantities to meet his medical requirements. He expressed his concern that if limited to 150 grams, he “would be continually at risk of having too much or too little cannabis” because he would have to order additional product every two and a half days. He also identified the health risks associated with potentially purchasing marihuana from producers which might have “excess levels of mold”.

(ii) Philip Newmarch

[20] Mr. Newmarch is 67 and holds an ATP that, before March 31, 2014, permitted him to possess 5,010 grams of cannabis. His prescribed daily dosage is 167 grams. His PUPL permits him to produce 813 plants and to store 36,585 grams of cannabis. The total cost of replacing the possession and storage amounts from a licensed producer under the *MMPR* could exceed $400,000.

[21] Mr. Newmarch is a plant scientist and professional agronomist. He produces his marihuana indoors at a farm located in Abbotsford. He deposes to no negative consequences from his production, storage or possession and use of the marihuana. He suffers from several conditions: severe arthritis and spinal cord disease, hepatitis

C, irritable bowel syndrome, fibromyalgia, bi-lateral carpal tunnel syndrome, neuropathy of his brachial artery, and seven herniated discs, including three in his cervical spine.

[22] Cannabis provides significant relief from the conditions and symptoms he experiences, and it is the only form of medication he uses. Other medicines are contraindicated due to “food allergies and cancer”.

[23] His cost of production is 60 cents a gram as opposed to about $9 a gram he would be obliged to pay to a licensed producer under the *MMPR*.

[24] The 150 gram limit would preclude him from possessing the amount he is prescribed to use daily. He expresses concern about the cost of acquiring marihuana under the *MMPR* regime, the quality of the marihuana under that regime, the accessibility to anything other than dried marihuana and the risk, by needing to order daily, of having too little or too much marihuana in his possession at any particular time. He deposed to the likely risks to his health of having insufficient quantities and the stress of potentially breaking the law in his quest for effective medication of his conditions. He deposed to his inability to travel because of the limits on how much he can possess at a given time and distinguishes himself from others who are not limited to less than one day of prescribed dosage of marihuana. He is aware of marihuana being produced by licensed producers having excess mould and he expresses concern about the risks to his health from such marihuana. He seeks his existing *MMAR* based rights to be preserved to permit him to adequately treat his symptoms and condition.

(iii) Timothy Sproule

[25] Mr. Sproule has an ATP that permitted him to possess 1,080 grams of cannabis. His approved dosage is 36 grams. He has a PUPL issued by Health Canada permitting him to produce 176 cannabis plants indoors and to store 7,920 grams of cannabis in Abbotsford.

[26] He moved to Vancouver from Abbotsford in October 2014. He will not be permitted to change his production or storage site as he could have under the old *MMAR* regime. He wishes to move his storage site to Vancouver. As matters stand, he "would be forced to travel regularly to Abbotsford to retrieve a 3 to 4 day supply". He deposed to being caused stress by the current state of affairs if he is found in possession of over 150 grams. Mr. Sproule is disabled as a result of degenerative disc disease exacerbated by multiple motor vehicle accidents. He suffers from severe arthritis and spinal cord injury causing chronic pain, inflammation, stiffness, lack of mobility and migraine headaches. He deposes to the advantages of lawfully producing his own medicine to treat his condition and symptoms and details the disadvantages of the *MMPR* regime, including a lack of the genetic variants efficacious for him, the lack of forms other than dried marihuana, the unaffordable costs related to purchasing from a licensed producer, and the concern that the 150 gram daily limit will prevent meaningful travel. He deposed to the impact on his emotional and psychological health of the change in the conditions affecting his production, storage, possession and use.

[27] Mr. Sproule deposed that he was aware of recalls of the product of licensed producers and the contamination of some production due to an excess of mould.

(iv) Mark Boivin

[28] The plaintiff, Mr. Boivin, is 37. He is unemployed due to health complications. He has income of approximately $90,000 a year from an insurance settlement and a CPP disability pension. He is a quadriplegic as a result of catastrophic injuries which he suffered in a motor vehicle accident. He is "permanently disabled, paralyzed and wheelchair bound". His health-related complications are set out in paragraphs 7- 8 of his affidavit, which read as follows:

> 7. More specifically, I suffer from serious health complications and conditions such as Chronic Paralysis (Quadriplegia), Syringomyelia, Constant and Severe Neuropathic Pain (chronic), Severe Muscle Spasticity (chronic), Autonomic Dysreflexia (dangerous and potentially life threatening condition), Insomnia, Urological complications associated with spinal cord injury and others.

> 8. The health condition that I suffer from can be described as irremediable, since there are no viable treatment options available and is considered to be irreversible or incurable. In addition, the prognosis of my health condition is not expected to improve over the duration of my life.

[29] Mr. Boivin deposed that the pain and suffering he experiences from his injuries was "intolerable" until he tried marihuana and found it to be "highly effective". He was medically approved for the use of medical marihuana in 2007 after "undergoing all available conventional treatment options that were deemed to be medical medically appropriate…".

[30] He obtained an *MMAR* authorization in 2008, consisting of a PUPL and an ATP. His most recent PUPL and ATP were issued to him on October 14, 2013, and were valid until the repeal of the *MMAR* in favour of the *MMPR*. He spent considerable funds to construct a production site and considered that amortized over 30 to 40 years it would pay for itself in savings relative to the cost of purchasing marihuana produced by licensed producers.

[31] His most recent PUPL permits the production of 195 plants indoors and the storage of 8,775 grams of cannabis. His most recent ATP permitted him to possess a maximum of 1,200 grams of cannabis and was based on oral consumption of 40 grams per day. However, on November 4, 2014, Mr. Boivin's medical practitioner changed his prescription and authorized him to consume up to 100 grams of cannabis per day.

[32] Mr. Boivin deposes as to the efficacy of his own specific and unique strains of medical marihuana, which he has developed over the past six or seven years, and the difficulties he would face if he were no longer able to produce his own.

[33] He deposed as follows in paragraphs 51- 52 of his affidavit as to the economic effect of the *MMPR* regulations on him:

> 51. At an average market cost of $8.58 per gram, plus an added 12% to account for Federal and Provincial taxes on this product means that I must incur the 100% out-of-pocket expense of: $961.21 per day, or $29,240.00 per month, or $350,842.00 per year. These figures do not include the required shipping and handling component, which would add approximately 21

> separate shipments per month, at a cost of approximately $25.00 per shipment, plus applicable taxes. I am also very concerned about theft or loss of my medicine if shipped in the mail and, therefore, interruption of my supply of medicine and the harms to my mental and physical health that would result. I am also very concerned about the administrative hurdles required to order 21 monthly packages and the possibility that if I receive two at once I will be unlawfully possessing more than 150 grams of dried marihuana and would then be required to destroy any excess without any compensation.
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> 52. Absent the constitutional exemption from the prohibitions in s. 4, s. 5 and s. 7 of the *Controlled Drugs and Substances Act* (*CDSA*) on marihuana (Cannabis) for personal medical use granted by the Federal Court of Canada, when shipping and handling fees and applicable taxes are also taking into account, the *Marihuana for Medical Purposes Regulations* (*MMPR*) requires that I must incur a 100% out- of- pocket expense of $357,937.00 average cost per year, to purchase an unapproved medication, with unknown efficacy in the treatment of my irremediable health condition and symptoms. By contrast, I know the efficacy and inputs into the production of my medicine I currently produce for myself.

[34] As to the impact of the 150 gram limit, he deposed as follows at paragraphs 77- 78 of his affidavit:

> 77. Absent a permanent constitutional exemption from the prohibitions on marihuana in the *Controlled Drugs and Substances Act* (*CDSA*) for personal medical use the limit on possession of a maximum of 150 grams of marihuana under section 5 of the *Marihuana for Medical Purposes Regulations* (*MMPR*), has a significant effect on my ability to travel for any duration greater than a day and a half, due to the fact that I am restricted by the injunction order in Allard et., al. and by the *Marihuana for Medical Purposes Regulations* (*MMPR*), to have in my possession (including possibly in storage) any quantity greater than 150 grams or, a day and a half worth of my prescribed dosage requirement of marihuana.
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> 78. Absent a permanent or interim constitutional exemption from the prohibitions on marihuana in the *Controlled Drugs and Substances Act* (*CDSA*) for personal medical use, the possession limit of a maximum quantity of 150 grams of marihuana imposed on me under section 5 of the *Marihuana for Medical Purposes Regulations* (*MMPR*), interferes with my life, my autonomy and my dignity, and I suffer discrimination due to the fact that I have an irremediable health condition that requires up to 100 grams of marihuana per day, to effectively treat it. The maximum quantity of 150 grams imposed on me, only allows me to have in my possession a maximum quantity which equates to one and a half days' worth of the medication that I require to effectively treat my health condition and symptoms.

[35] In that context, Mr. Boivin identifies the discrimination inherent in permitting only those with a prescribed dosage of 5 grams per day or less to possess up to a 30-day supply as the basis for a claim of a *Charter* infringement.

[36] Mr. Boivin also asserts that the limit on the number of plants he can cultivate pursuant to his PUPL disadvantages him relative to "licensed producers" under the *MMPR*, who are not restricted with respect to the number of plants they can grow. He deposes as follows at paragraphs 110 -111 of his affidavit:

> 110. I do not understand how one group of identified persons are free to choose to cultivate any number of plants that they deem to be appropriate in their circumstances, which would allow for the potential to increase efficiencies and productivity, or to increase cost effectiveness related to, and in the context of the production of marihuana for medical purposes, while another group of identified persons are deprived of that very same freedom of choice and are instead disadvantaged by being subject to restrictions on the number of plants that they are permitted to cultivate at any one time, which effectively forces them to incur higher input costs and be subject to a lower threshold of efficiency and productivity and severely restricts their ability to make decisions that are of fundamental importance, which are critical to their dignity, autonomy and to the physical and psychological integrity of their person, in the context of the production of marihuana for personal medical purposes.
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> 111. Absent a permanent constitutional exemption from the prohibitions on marihuana under sections 4 and 7 of the *Controlled Drugs and Substances Act (CDSA*), I am deprived of the freedom that other identified persons, or groups of persons enjoy within the context of the production of marihuana for medical purposes, and I am deprived the freedom to make life choices that are of fundamental importance related my health and wellbeing, to my autonomy, and to my dignity, and ultimately to the physical and psychological integrity of my person, in the context of the personal production of marihuana for my own medical purposes.

THE RELIEF SOUGHT

[37] The interim orders sought by the plaintiffs are set out in paragraphs 1-4 of Part 1 of the Notice of Application as follows:

> 1. An Order under section 24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just interim remedy, in the nature of an interlocutory exemption / injunction preserving and extending Plaintiffs' Authorization to Possess and Personal-Use Production License (and/or compelling Respondent Minister of Health to process any renewals or changes thereof) or, in the alternative, a constitutional exemption from sections 4, 5 and 7 of the *Controlled Drugs and Substances Act* as applied to Schedule II substances pending trial of the merits of the action or such further Order of the court as may be necessary; and,
> 2. An Order under section 24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just interim remedy, in the nature of an interlocutory exemption / injunction preserving and/or extending Plaintiffs'

existing rights to produce, transport, store and possess medical cannabis, in all of its forms on the terms and conditions set out below:

a. Kevin Garber; Produce 292 plants and store 13,140 grams of cannabis at the address set out in his MMAR licenses and possess up to 1800 grams of cannabis on his person;

b. Philip Newmarch; Produce 813 plants and store 36585 grams of cannabis at the address set out in his MMAR licenses and possess up to 5010 grams of cannabis on his person;

c. Timothy Sproule; Produce 176 plants at the address set out in his MMAR license, store 7920 grams of cannabis at his current residential address in Vancouver, BC, possess up to 1080 grams of cannabis on his person and transport 7920 grams of cannabis from his production to his storage site;

d. Marc Boivin; Produce 486 plants and store 21870 grams of cannabis at the address set out in his MMAR licenses and possess up to 3000 grams of cannabis on his person; and,

3. An Order under section 24(1) of the *Canadian Charter of Rights and Freedoms*, as the appropriate and just interim remedy, in the nature of an interlocutory exemption / injunction permitting Plaintiffs to produce and store medical cannabis at any address at which they reside if such address is different from the address set out in paragraph 2 above;

4. Such other and further relief that this Court may find just and appropriate in the circumstances; …

[38] In other words, Mr. Garber and Mr. Newmarch seek the rights they had under the *MMAR* immediately before its repeal. That is, they seek the right to produce and store the quantities set out in their PUPLs and preserved by the order in *Allard*, and they seek to increase the amount they are entitled to possess from the *MMPR* amount (150 grams) to the amounts listed in their most recent ATPs (13,140 grams for Mr. Garber and 36,585 grams for Mr. Newmarch).

[39] Mr. Sproule also seeks to restore the amounts in his PUPL and preserved by *Allard* (produce 176 plants and store 7,920 grams) as well as to restore his right to possess up to 1,080 grams of cannabis on his person, as was his right under the *MMAR*. He also seeks to change his storage site from Abbotsford to Vancouver and to be able to transport 7,920 grams from his production site to his storage site.

[40] Mr. Boivin, due to the increase in his prescription from 40 to 100 grams a day, seeks an increase in the number plants he may grow to 486, the number of grams of

cannabis he may store to 21,870, and the number of grams he may possess to 3,000.

[41] All four of the plaintiffs also seek an interim remedy permitting them to store medical cannabis at any address where they reside.

THE LEGAL CONTEXT

[42] In the recently decided case of *R. v. Smith,* 2015 SCC 34 [*Smith*], the Court declared that ss. 4 and 5 of the *CDSA* are of no force and effect to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes. Accordingly, the aspect of the order sought in paragraph 2 of Part 1 of the Notice of Application relating to the production, transportation, storage and possession of medical cannabis “in all its forms” is no longer contentious.

[43] Both counsel for the plaintiffs and counsel for the respondent Canada agree that the principle authority governing this application is *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [*RJR-MacDonald*].

[44] *RJR-MacDonald* affirmed the three-part test for the granting of interlocutory or interim relief established in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 [*Metropolitan Stores*]: the applicant must establish (a) that there is a serious question to be tried; (b) that irreparable harm will result if the relief sought is not granted; and (c) that the balance of convenience favours the granting of the relief sought.

[45] The Court in *RJR-MacDonald* was confronted with an interlocutory application for relief from compliance with certain tobacco products control regulations as part of a larger, partly *Charter*-based, challenge to the constitutionality of those regulations.

[46] In the context of an application preventing the enforcement of regulations, the Court noted:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute. [pp. 333–34]

[47] With respect to the first step, the Court concluded that the applicant in a *Charter* case need only demonstrate "a serious question to be tried" rather than "a strong *prima facie* case", which had been the standard prior to *American Cyanamid Company v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.). The Court concluded that the "serious question" formulation was sufficient in a constitutional case where "the public interest is taken into consideration in the balance of convenience" (p. 337, quoting *Metropolitan Stores* at p. 128).

[48] There is thus no justification for the Court in this application to engage in a prolonged examination of the merits of the case advanced by the plaintiffs. Indeed, in light of the decision in *Allard*, there is no real contest that there is, in this case, a serious question to be tried.

[49] As to the step requiring the applicant to establish irreparable harm, the Supreme Court in *RJR–McDonald* stated that any alleged harm to the respondent or to the public interest should the relief be granted. Thus, the only issue at this stage is:

> whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application. [p. 341]

[50] The Court noted that "irreparable" refers to the nature of the harm suffered rather than its magnitude (p. 341). It concluded that assessing irreparable harm in interlocutory applications involving *Charter* rights:

> is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable

> harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases. [p. 341]

[51] The Court concluded that, as a result, that:

> it is appropriate to assume that the financial damage which will be suffered by the applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm. [p. 342]

[52] The third step, determining where the balance of inconvenience lies, involves "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits" (*RJR-MacDonald* at p. 342, quoting *Metropolitan Stores* at *p.* 129). The Court in *RJR-MacDonald* made the point that it is often the balance of inconvenience test that will determine the result in applications involving *Charter* rights.

[53] It is in this stage that the public interest, which is at stake in *Charter*-based challenges to legislative validity, is to be considered. The Court in *RJR-MacDonald* confirmed the decision in *Metropolitan Stores* that "in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be 'given the weight it should carry.'" (p. 343).

[54] The Court considered it appropriate that "it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest" because the concept of the public interest is broad enough to include both "the concerns of society generally and the particular interests of identifiable groups." (p. 344).

[55] However, the Court noted that a public authority's onus of proving irreparable harm is less than that of a private litigant, and the court should in most cases assume irreparable harm to the public interest where it is demonstrated that the authority is charged with the duty of promoting or protecting the public interest and that the impugned regulation "was undertaken pursuant to that responsibility" (p. 346). It is generally inappropriate for a court to "attempt to ascertain whether actual

harm would result from the restraint sought" as that would involve impermissibly evaluating the effectiveness of government action rather than restraining the government when it infringes fundamental rights (p. 346).

[56] Public interest considerations will weigh more heavily in "suspension" cases than "exemption" cases because "the public interest is much less likely to be 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" (*RJR-MacDonald* at p. 347).

[57] That is the general legal context of this application. The more specific legal context emerges from a review of Justice Manson's reasons.

[58] The application in *Allard* rested on s. 7 of the *Charter*. Justice Manson found that there was a serious question to be tried: the affidavits established that the applicants' liberty interests may be infringed should they continue to produce marihuana and exercise their right to "make fundamental life choices regarding their health" (para. 74). Justice Manson also found, given the concerns expressed about the effectiveness and safety of the marihuana produced by licensed producers, that the impugned Regulations under *MMPR* engaged the s. 7 rights to security of the person because it forced the applicants to choose between healthcare and imprisonment.

[59] As to the presence of irreparable harm, Justice Manson referred to the description in *RJR-MacDonald* – that it refers to the nature, not the magnitude, of the harm – and then referenced *El-Timani v. Canada Life Assurance Co.*, [2001] O.J. No. 2648, 28 C.C.L.I. (3d) 195 (S.C.J.); *Elsipogtog First Nation v. Canada (Attorney General)*, 2012 FC 387, aff'd 2012 FCA 312; and *Ausman v. Equitable Life Insurance Co. of Canada*, [2002] O.J. No. 3066, 46 C.C.L.I. (3d) 14 (S.C.J.), as authorities supporting the proposition that impoverishment and loss of security constitute irreparable harm because they engender social stigma, loss of dignity, and emotional and physiological stress. Justice Manson noted the evidence that the applicants were unable to afford the rates charged by licensed producers, could not

ensure safe high-quality product and (as this was before *Smith*) could only purchase dried marihuana.

[60] Justice Manson found that the harm alleged must be “real and substantial” (para. 87). He did not accept that there would be a shortage of supply under the *MMPR* regime, nor did he find that the plaintiffs established that the licensed producers would not offer “the particular strains necessary to meet their medical needs.” (para. 90). He also found that the applicants had failed to prove that the 150 gram limit would constitute irreparable harm.

[61] However, he was satisfied that the applicants had shown that they would be unable to afford marihuana produced by the licensed producers as of March 31, 2014 and this inability would likely affect either their health, endanger their liberty, or severely impoverish them (at para. 92). He wrote, at para. 96, that, “[g]iven the difficulties in receiving damages in constitutional cases … and the findings of irreparable harm in *Ausman*, *El-Timani*, and *Elsipogtog* (FC and FCA), which were based on the effects of severe and immediate financial hardship”, the applicants would suffer irreparable harm if the injunction were not granted.

[62] Finally, Manson J. found that the balance of convenience favoured the applicants and noted that maintaining the status quo has less merit in the context of *Charter* litigation, particularly given issues raised as to what constitutes the status quo in the case before him (at para. 97).

[63] He noted that the public interest factor includes both concerns of society generally and the particular interest of an identifiable group (at para. 98). He also noted that in dealing with the potential suspension of a validly enacted law on grounds of unconstitutionality, “a clear case” is necessary to overcome the public interest in enforcing the law (at para. 99).

[64] He concluded at paragraph 100 as follows:

> [T]here is a strong presumption in favour of legislation enacted by Parliament being in the public interest, but this presumption is rebuttable if the Applicants

> can show their injunctive relief would serve a public interest greater than that served by maintaining the challenged legislation.

[65] On the evidence before him, Justice Manson found that the applicants are representative of an identifiable group: medically approved patients under the *MMAR* regime. He found the public interest reflected in the group to be "that patients should have legal access to medication reasonably required for the treatment of a medical condition. As discussed above, this group will be irreparably harmed by the effects of the *MMPR*" (para. 117).

[66] He described the public interest underlying the respondent's position to be:

> 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*. This interest includes any negative impact an injunction would have on [licensed producers] by reducing the size of their market, and any expenditure necessitated by Health Canada as a result of this injunction. [para. 117]

[67] He found that the nature of the irreparable harm to the plaintiffs constituted a clear case outweighing "the public interest in wholly maintaining the enacted regulations which are presumed to, among other things, increase the health, safety and security of the public." (para. 119).

[68] He therefore found that the balance of convenience favoured the applicants to the extent it justified granting them their "access to medical marihuana through the previous *MMAR* regime with respect to possession and production" on certain terms (para. 120).

[69] As to the appropriate relief, Manson J. sought the least drastic means to protect the applicants' rights while preserving the will of Parliament (at para. 121). Accordingly, he ruled that an exemption should be granted to "those who currently hold a valid ATP, who hold a valid DPL or PUPL as of September 30, 2013, or hold a valid amended or new DPL or PUPL that was issued after September 30, 2013" from the repeal of the *MMAR* and from any provision of the *MMPR* inconsistent with the relevant *MMAR* provisions "pending an expeditious trial and a decision of this case on its merits" (para. 126).

[70] Justice Manson clarified that the terms of production and use governing the applicants are those of their previous *MMAR* licenses, with the exception that the 150 gram limit imposed by s. 5(c) of the *MMPR* would apply as he "was unconvinced that the Applicants would suffer irreparable harm as a result of the imposition of this limit until trial." (para. 128).

[71] The evidence which was before Justice Manson in relation to the 150 gram limit included an affidavit from Jeannine Ritchot sworn January 15, 2014.

[72] Paragraph 145 of that affidavit reads as follows:

> 145. Health Canada established a possession cap for individuals who are authorized to use marijuana for medical purposes. This cap could not exceed an individual's monthly amount (daily dosage times 30), up to a maximum amount of 150 grams. In establishing this, Health Canada took into account a number of factors, including purchasing habits of individuals who bought their dried marihuana from Health Canada; the daily dosage information set out in "Information for Health Care Professionals", which indicates 1-3 grams per day as a reasonable dosage standard; and concerns raised by law enforcement about potential for diversion. A cap of 150 grams would allow an individual who possesses 150 grams who consumed 5 grams of dried marihuana per day, a daily dosage slightly higher than that set out in "Information for Health Care Professionals" to possess a one month supply at any given time.

[73] In an affidavit sworn July 10, 2015, for the purpose of this case, Eric Costen, the Executive Director of the Office of Medical Cannabis, adopted the explanation of the 150 gram possession limit set out Ritchot affidavit above and deposed as follows at paragraph 56 of his affidavit:

> 56. Individuals may possess 150 grams at any one time; however, the 150 gram limit is not a consumption limit. Those individuals whose medical practitioner supports daily dosages that are higher than those contemplated above, may order marijuana more frequently to accommodate their daily dosage amount.

[74] Following Justice Manson's decision and order there were a number of other related proceedings before the trial in *Allard* was heard.

[75] On November 24, 2014, the Federal Court of Appeal heard Canada's appeal and the applicants/respondents' cross-appeal. The Court of Appeal upheld Justice

Manson's injunction and dismissed the respondent's cross-appeal, except to remit the matter of the application of the injunction to the respondents Beemish and Hebert to Justice Manson for clarification (*Canada v. Allard*, 2014 FCA 298 at para. 23).

[76] With respect to the cross-appeal on the issue of maintaining the 150 gram limit, the Court held, at para. 22:

> [22] Finally, I do not agree with the respondents' contention that the judge erred in his determination that they failed to show irreparable harm based on the 150-gram possession limit. He exercised his discretion and considered both parties' interest, arguments and evidence. There is no basis for our Court's intervention on this issue and I therefore decline to expand the scope of the judge's order.

[77] At the appeal hearing on November 24, 2014, the *Allard* respondents sought to adduce fresh evidence. That application was dismissed.

[78] An application to vary Justice Manson's injunction was heard by Justice Phelan on July 15, 2015. Justice Phelan's reasons are indexed at 2015 FC 866. The *Allard* applicants relied on "'new matters arisen/discovered', some of which are matters heard at trial" (para. 4). The new evidence the plaintiffs sought to adduce was "the same or similar" to what they sought to adduce on appeal (para. 6).

[79] Phelan J. held in relation to the new evidence as follows at para. 12:

> [12] The matters raised on this motion are not truly new. The evidence before Justice Manson related specifically to the supposed new matters:
>
> a) the impact that the inability to renew personal production licences or designated- person production licences after September 30, 2013, had on some users. Specifically, the Plaintiffs, Mr. Hebert and Ms. Beemish, gave evidence before Justice Manson on the difficulties of renewing licences and amending the address on licences;
>
> b) the impact of the 150 gram personal possession limit was specifically before Justice Manson in evidence from Mr. Allard and Ms. Lukiv. Justice Manson made a clear finding that on this issue the Plaintiffs had not established irreparable harm;

c) the matter of the prices and strains offered by licensed producers under the MMPR was directly before Justice Manson. The Plaintiffs' "new" evidence is an updating of current circumstances, as was heard at trial. Justice Manson anticipated that there would be developments in this area. To the extent that anything new or of significance has arisen, it was heard by this Court at trial. For reasons given, it is premature to reach a conclusion on this aspect of the case; and,

d) as to the status of the MMAR administrative regime, there was evidence before Justice Manson as to the closing out of the MMAR system. The transition to a new system was an important aspect of Justice Munson's balance of convenience considerations.

[80] He ruled as follows at paras. 15–19:

> [15] The Plaintiffs seek to expand the scope of the Injunction Order. By doing so, it would disrupt the balance of convenience analysis and throw open the whole of the Injunction, leading potentially to its unravelling.
>
> [16] Justice Manson carefully crafted his Order. As he himself notes;
>
> > … in crafting the terms of this Order, I have considered the least drastic means available to protect the rights of the Applicants while preserving the will of Parliament.
>
> [17] It is clear that in considering this balance in the Applicants' (Plaintiffs') favour, the Injunction Order did not embrace all medically approved users of marihuana or that the previous MMAR structure was to be maintained.
>
> [18] It is also evident that some people and some circumstances would not enjoy the benefits of the Injunction Order. It is erroneous to describe this as an inadvertent omission or a "falling between the cracks".
>
> [19] The Plaintiffs not only seek to expand the class of users covered by the Injunction Order but also to recreate in part the MMAR with new staff and resources. That aspect is an important part of the balance of convenience analysis which could undermine the existing Injunction Order. The Plaintiffs are engaging in an exercise equivalent to pulling a thread on a sweater – sometimes the whole unravels.

THE PLAINTIFFS' POSITION

[81] The plaintiffs focus their arguments on the harm which they would suffer if the injunction is not granted. They base their arguments in part on the arguments in *Allard*, but also argue that the 150 gram threshold puts them all at risk in several unique ways because their high daily dosages would require constant

replenishment. This may result in an under-supply to their medical detriment, or an over-supply (inadvertent or deliberate) to their legal detriment. They argue that they are effectively unable to travel because they cannot take enough medical marihuana with them to span the length of any trips and hence, their mobility rights are infringed. They also argue that their equality rights under s. 15 are infringed because, unlike others who use medication, they are limited to having only a small supply. 150 grams will satisfy their needs for less than a day, in the case of Mr. Newmarch; for two and a half days, in the case of Mr. Garber; for a day and a half, in the case of Mr. Boivin at his new dosage level; and for four days, in the case of Mr. Sproule.

[82] The plaintiffs detail their anxiety and concern about the risks that arise from the need to frequently replenish their supply: exposure to criminal sanctions if too many doses arrive simultaneously and inadequate supply if doses are delayed. They rely on these unique circumstances as the basis for the unique relief they seek.

[83] The plaintiffs rely on the facts that they are seeking an exemption rather than a suspension and that they simply seek preservation of the status quo as it relates to production and possession of their medical marihuana cannabis.

[84] The plaintiffs say waiting for the outcome in *Allard* could result in prejudice to them. They say that even with the benefit of the *Allard* injunction, they can only possess very small amounts beyond their daily prescription (except for Mr. Newmarch, who needs to replenish daily). They submit that this restricts their mobility, reduces their opportunities to work elsewhere, places them in an unequal position with respect to others requiring medication and, in the case of Mr. Sproule, requires frequent trips between Vancouver and Abbotsford to obtain his supply of marihuana. Further, if the *Allard* challenge is dismissed, the plaintiffs in this action will be compelled to apply to seek the status quo without any benefit of the *MMAR* regime.

[85] The plaintiffs say on that basis that they have met all three of the *RJR-MacDonald* criteria both with respect to the scope of the *Allard* injunction and also

with respect to the 150 gram limit. They point out that of the *Allard* plaintiffs, the largest daily dose was 25 grams. The plaintiffs say that the concerns expressed by the respondent about the need to re-create the *MMAR* regime if the plaintiffs are successful is not valid as this is not a national test case, unlike *Allard*. They say that there is no requirement that there be wholesale revisions to the present regime. The plaintiffs also say that there is no evidence of damage to the public interest if Mr. Sproule's storage place is changed or if the plaintiffs' possession amount is increased to permit them a 30-day supply of medication.

[86] The plaintiffs say that the argument raised by the respondent to resist their application is a “floodgates” argument and is the same one used in the stay application that was dismissed by Justice Griffin. They submit that the respondent’s argument depends on what other patients might or might not do. It is speculative harm not based in evidence.

THE POSITION OF THE RESPONDENT

[87] The respondent's primary position is that this application ought to be adjourned until the decision in *Allard* is rendered. The respondent notes that there are currently 305 Federal Court actions other than *Allard* relating to the repeal of the *MMAR*. Those actions were stayed on the basis that many of the individuals were covered by *Allard* and the actions would deal with the same essential issues. Issues not resolved by *Allard* could be dealt with by the other actions, if necessary, once *Allard* is decided.

[88] The respondent also notes that *Smith* was decided by the Supreme Court of Canada on June 11, 2015, and as a result patients have been permitted to possess cannabis oil and fresh marihuana and to alter chemical or physical properties of those materials.

[89] The respondent submits that as the plaintiffs are already covered by the *Allard* order, and the effects of *Smith* have been accommodated and will also be

dealt with in the *Allard* litigation, the plaintiffs "have failed to demonstrate that they are entitled to a varied form of that order."

[90] Canada submits that granting this order would "open the door for thousands of similar applications" for those "not completely satisfied" with the Federal Court's injunction in *Allard*.

[91] The respondent submits that the applicants are seeking relief that was before the court in *Allard* and was not granted. The respondent asserts that granting such relief in this action would upset the delicate balance struck by the Federal Court, and the plaintiffs have not clearly demonstrated that it is warranted. The respondent emphasizes that the Federal Court and the Federal Court of Appeal have not seen fit to vary the *Allard* injunction in the face of variation applications that seek terms similar to those sought by the plaintiffs in this case.

[92] The respondent points out that the Federal Court of Appeal dismissed the plaintiffs' application to adduce new evidence to address the impact of the 150 gram limit and the ability of the plaintiffs to change the address of their storage and production sites. The respondent argues that without the limitations in the injunction order in *Allard*, the balance of convenience would have swung to favour Canada. The "Federal Court has provided a clear and cogent rationale for limiting the terms of its injunction order" and the plaintiffs have not demonstrated a reason for this Court to depart from the Federal Court's conclusion.

[93] The respondent says that the evidence relied on by the *Allard* plaintiffs is akin to what is before the Court here and merits no different treatment. The defendant emphasizes the prospect of a ruling favourable to the plaintiffs opening the floodgates and "the approximately 28,000 individuals … covered by the *Allard* injunction will shift their injunction variation claims to various provincial superior courts …".

[94] The respondent also submits that this application is premature and that the plaintiffs should await the outcome of *Allard* to see whether a stand-alone, separate injunction is necessary in this case.

[95] Canada submits that there is no evidence of irreparable harm to the plaintiffs and that the balance of convenience favours Canada. Canada cites the delay in bringing this application as demonstrative of the level of harm experienced by the plaintiffs.

[96] The respondent contends that the only evidence of harm is the impact of the 150 gram day limit on the plaintiffs' ability to travel to visit out-of-province family or friends. The respondent says that is speculative harm and a short-term inconvenience, and is not the sort of impact that engages s. 6 of the *Charter*. Canada says that the plaintiffs have not demonstrated either that the 150 gram limit or the limitations on the location of the plaintiffs' production and storage facilities amount to irreparable harm, and point to the fact that the Federal Court and Federal Court of Appeal considered and rejected similar claims based on similar evidence in *Allard*.

[97] Canada says that the evident fact that the plaintiffs have continued to produce, store and possess medical marihuana under the *Allard* injunction terms undermines their position that they would suffer irreparable if the injunction were not granted in the terms that they seek.

[98] As to the balance of convenience, Canada relies on the careful balance achieved by Manson J. in *Allard* and submits that the dismantling of the *MMAR* regime may need to be reversed should the application be granted on the terms sought. Canada points out that under the *MMAR* there were strict requirements to be met to change possession, storage or production locations or licenses, and an order made without regard for these requirements would be very problematic. It would hinder Canada's efforts to fulfil its obligation to protect public health and safety and would allow the plaintiffs to exist outside of any regulatory scheme, resulting in threats to public safety and health goals. Even if the Court envisioned establishing a

new licensing scheme, it would create significant problems because the apparatus of the *MMAR* no longer exists. As such, Canada argues that a broadened injunction would significantly intrude into the legislative sphere.

[99] The respondent says a broadened injunction would provide a precedent for all *Allard* injunction holders to seek a broadened injunction and would thus have a significant impact on the respondent.

[100] Finally, the respondent submits that a constitutional exemption is unwarranted because it is much too broad and intrusive a remedy. The respondent submits that the persuasive reasoning of Justice Manson in *Allard* should prevail and, if this Court does not adjourn to await the outcome in *Allard*, it should do no more than grant the same interim relief as was granted in *Allard*. The respondent relies on the principle of judicial comity in urging this Court to adopt the reasoning and rationale of the Federal Court in *Allard* and to decline to grant injunctive relief broader than that already granted in *Allard*.

DISCUSSION AND CONCLUSION

[101] The fundamental distinction between the position of the plaintiffs and that of the respondent rests on the dual nature of cannabis. To the plaintiffs it is a medicine which alleviates their medical conditions and ameliorates their symptoms. Their affordable access to it is critical to their physical and psychological well-being.

[102] To the respondent, marihuana is primarily a proscribed drug whose presence and proliferation represent a risk to public health and to public safety.

[103] To the plaintiffs, regulations which govern the medical uses of marihuana must be flexible enough to avoid violating the liberty, mobility and equality interests of those whose condition justifies its production, storage and possession.

[104] To the respondent, the governing regulations must be sufficiently restrictive to serve the public interest in abating concerns associated with the production, storage and possession of significant amounts of marihuana.

[105] As I read the judgment of Justice Manson in *Allard*, having found a serious question to be tried, some degree of irreparable harm to the plaintiffs in that case, and that the balance of convenience favoured their position, his residual focus was in granting a form of injunctive relief that struck a balance between addressing the public interest represented on one hand by an interim vindication of the plaintiffs' asserted rights, and the public interest represented by the need to abate the risk to the public health and to public safety, on the other hand.

[106] Those public health and safety risks identified by Justice Manson include the diversion of medical marihuana to the black market, the prospect of home invasions and theft of medical marihuana, the danger of fires and electrical hazards arising from production operations, the risk of mould and toxic chemicals arising in the course of marihuana production, noxious odours, and the risk to children from production, storage and possession of marihuana.

[107] It is quite evident that what Manson J. was confronted with was an application seeking an order with a broad reach potentially involving "all medically-approved patients". In the result, although his order was confined to the two successful applicants before him, it was evident that it would apply equally to all others in the same position as those applicants – those holding a valid ATP, and/or a PUPL, and/or a DPL – and would exempt them from the repeal of the *MMAR* and from the operation of the *MMPR* so far as they are inconsistent with the *MMAR*, except for the 150 gram limit.

[108] In other words, the Manson J. order, by its very nature, has a broad compass and clearly necessitated a careful calibration of its effect on the competing public interests represented by the parties to the litigation before him.

[109] In the course of his reasons, Manson J. referenced the evidence of Jeannine Ritchot, the former director of Medical Marihuana Regulatory Reform at Health Canada. Ms. Ritchot oversaw the administration of the *MMAR* and conducted policy development of the *MMPR*. She opined that the rapid expansion of those licenced to possess marihuana under the *MMAR*, from 477 in 2002 to 37,884 by January 2014

compromised the goals of the *MMAR* regime, which were to strike a balance between providing legal access to marihuana for medical purposes, to respect existing federal legislation, and to protect the individual and public health, security and safety of all Canadians (*Allard* at para. 55).

[110] Justice Manson noted in Ms. Ritchot's evidence that as of December 3, 2013:

> … the average number of plants licensed for indoor growth was 101, the average number of plants licensed for outdoor growth was 11, and the average daily dosage [was] 17.7 grams per day. Despite this, the average amount of marihuana used by those being supplied by Health Canada was between 1 and 3 grams. [para. 55]

[111] There was other evidence before Justice Manson (and before me) that the optimal daily dosage was between one and three grams, and that in Israel, another jurisdiction permitting the possession of medical cannabis, the limit on possession was 50 grams.

[112] Before considering the legitimacy of the plaintiffs' applications to impose and extend the *Allard* injunction, it is necessary to consider Canada's position that this application, even for an order applying the *Allard* injunction in the same terms, should be adjourned pending a decision in *Allard* to see whether such an order is even necessary.

[113] I do not accept Canada's argument. In my view, it is akin to the application to stay dismissed by Justice Griffin, upheld by the Court of Appeal. Justice Griffin held as follows at paras. 61 - 64:

> [61] The plaintiffs submit that due to their own unique facts, their challenge to the medical marihuana regulatory regime could have quite a different emphasis, and outcome, than the challenge in *Allard*, and that having to await the outcome of that litigation would be unjust.
>
> [62] I am persuaded by the plaintiffs' submissions. The plaintiffs are alleging that the medical marihuana laws interfere with their *Charter* rights in a way that is deeply personal and which has grave impacts on their health. It would be unjust to stay the entirety of their litigation pending the outcome of litigation being advanced by different parties in a different court.
>
> [63] The issues being advanced in this litigation as well as in *Allard* must be determined in context of evidence and findings of fact. The findings of fact

> involving these plaintiffs may be different than the findings of fact involving the plaintiffs in *Allard*.
>
> [64] I am also not persuaded by the Federal Crown that it is contrary to the interests of the administration of justice to have more than one proceeding advance at one time, or that the prospect of inconsistent results should be avoided. There may well be multiple decisions from courts of different jurisdictions addressing the constitutionality of the MMPR. However, this may actually assist in the development of the law. The highest court of this land may one day grapple with these issues and may indeed find its deliberations assisted by having the record of evidence of more than one trial to consider.

[114] The plaintiffs have the right to pursue this action even though there may be some overlap with the *Allard* action, and, even if there are inconsistent results, that is an acceptable part of the process contemplated by the presence of jurisdictions which overlap.

[115] Insofar as the justification for an order akin to that granted in *Allard* is concerned, I am satisfied that the conditions for interim injunctive relief as set out in *RJR-MacDonald* are met, essentially on the same basis that satisfied the court in *Allard*.

[116] There is a serious question to be tried at least with respect to s. 7 and in the case before me counsel for the plaintiffs have also pleaded ss. 6 and 15 of the *Charter*.

[117] I am also satisfied that the plaintiffs have established irreparable harm given the prospect that if they are not exempted from the *MMPR* and subjected to the *MMAR*, they will lose substantial sums of money, they will be unable to fund their prescribed medications in future, they will be forced to choose between their health and their liberty, and/or they will be exposed to the stress and indignity of impoverishment. Those conditions are particularly acute in the case of Mr. Boivin, whose vulnerability due to his compromised health is manifest.

[118] As to the balance of convenience, the prospect that the applicants in the present case will be subjected to the significant harms identified, potentially in violation of their *Charter*-protected rights, weighs more heavily in my view than the prospect of harm to the public interest caused by not wholly maintaining the enacted

regulations, particularly in light of the *Allard* order which strikes a careful balance to minimize harm to the public interest represented by Canada's position.

[119] Accordingly, I conclude that it is not premature to at least grant the same order that was granted in *Allard* to the applicants at bar. The critical question is whether, and if so, to what extent, the application and evidence before me justifies extending or modifying the *Allard* order to address the particular circumstances of the applicants in the present case.

(i) The 150 Gram Limit

[120] Justice Manson's ruling with respect to the retention of the 150 gram limit on possession was based on a finding that there was no irreparable harm to the applicants before him. It is not clear what evidence was before him which led to that conclusion. In particular, it is not apparent from his judgment what evidence there was of the size of daily doses prescribed or which were at issue, or what impact of the 150 gram limit would have on the *Allard* applicants. Of the two successful applicants in *Allard*, one, Mr. Davey, had a daily dosage of 25 grams, and the other, Mr. Allard, had a daily dosage of 20 grams.

[121] Although the *Allard* applicants sought to adduce new evidence of the impact of the 150 gram limit in their cross-appeal to the Federal Court of Appeal, that application was denied. They also brought an application to adduce new evidence on the application to vary before Justice Phelan, the trial judge. Justice Phelan rejected the new evidence and held with respect to the 150 gram limit as follows, at para. 12:

> [T]he impact of the 150 gram personal possession limit was specifically before Justice Manson in evidence from Mr. Allard and Ms. Lukiv. Justice Manson made a clear finding that on this issue the Plaintiffs had not established irreparable harm;

[122] Justice Manson's ruling referred to by Justice Phelan was simply that he "was unconvinced that the Applicants would suffer irreparable harm as a result of the

imposition of this limit until trial" (*Allard* at para. 128). There was no reference in his judgment to the evidence of Mr. Allard or Ms. Lukiv referred to by Justice Phelan.

[123] That being so, while there is no basis to doubt that Justice Manson's determination was correct in light of the legal and factual context before him, it does emphasize that a determination of irreparable harm is case-specific and dependant on the evidence adduced and relied on.

[124] The applicants before me rely, not only on s. 7 of the *Charter*, but also on ss. 6 and 15 – the mobility provision and the equality provisions. Those sections read as follows:

> 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
>
> (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
>
> (*a*) to move to and take up residence in any province; and
>
> (*b*) to pursue the gaining of a livelihood in any province.
>
> (3) The rights specified in subsection (2) are subject to
>
> (*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
>
> (*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
>
> (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.
>
> …
>
> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[125] The respondent, Canada, challenges the validity of the plaintiffs' reliance on section 6, citing the following passage from *Canadian Egg Marketing Agency v. Richardson*, [1998] 3 S.C.R. 157 at para. 72:

> The reasoning adopted in *Black*, *supra*, regarding the scope of s. 6 reflects the fundamental purpose underlying the section, which is to guarantee the mobility of individuals to other provinces in the pursuit of their livelihood by prohibiting discrimination based on residence. In the context of an economy characterized by modern communications and forms of goods and services which are easily transported across great distances, it must be recognized that the hallmark of mobility required by s. 6 is not physical movement to another province, but rather any attempt to create wealth in another province. Restricting the scope of s. 6 to physical movement would undermine the purposes of the mobility guarantee by arbitrarily excluding from the protections of s. 6 those who attempt to pursue their livelihood in another province by means other than physical movement. In our view, taking into account the purposes of s. 6, any attempt by residents of an origin province to create wealth, whether by production, marketing, or performance in a destination province constitutes "the gaining of a livelihood in any province" (emphasis added) and satisfies the requirement of mobility implied by the title of the section. In this case, residents of an origin province (the Northwest Territories), seek to market something of value – eggs – in other destination provinces. This is clearly an attempt to "pursue the gaining of a livelihood" in another province and engages the mobility right guaranteed by s. 6.

[126] Canada says s. 6 is not engaged by the limitations on travel applicable to the applicants in the present case. Rather, it has to do with the right to move to and/or earn a livelihood in any province of Canada. The issue of the scope of the s. 6 mobility right was not fully argued before me. Suffice it to say that the restrictions on travel occasioned to the applicants by the limits on their ability to possess sufficient medication to last them more than a day or two, thus confining them close to their homes, may at least be relevant to a consideration of the s. 7 and the s. 15 infringements which are alleged.

[127] The point is simply that the plaintiffs are constrained in their ability to travel for any reason, which places a restraint on their freedom of movement unless they are willing to forego the medication prescribed for their conditions in the amounts deemed to be effective.

[128] In my view, that aspect of the plaintiffs' claim, together with the risk that the necessity of frequently replenishing their supply courts either an over-supply,

exposing them to criminal sanction, or an under-supply, exposing them to insufficient medication for their conditions, constitutes irreparable harm. The plaintiffs have deposed to the impact upon them of all these consequences of the 150 gram limit, and I am satisfied that those consequences are not merely speculative harm or a mere inconvenience as argued by Canada.

[129] It must be borne in mind that the applicants' health is significantly compromised (and in the case of Mr. Boivin, severely compromised) and their need for medication in the amounts prescribed has not been challenged by the respondent through cross-examination or otherwise. That being the case, a geographical confinement enforced by the need to frequently replenish a necessary supply of medication, and the risk of harm from either an under- or over-supply, are not matters that can be disregarded in assessing the nature of the harm being caused.

[130] In that circumstance, it is necessary to consider where the balance of convenience lies with respect to exempting the plaintiffs from the 150 gram limit.

[131] As I understand Canada's argument with respect to this issue, it is that any exemption from the 150 gram limit would upset the delicate balance established in *Allard*. It would inspire many other medical cannabis users to launch actions and bring applications to similarly seek exemptions from the 150 gram limit which would represent a significant incursion into the legislative sphere and would controvert the presumed public interest in limiting the risks associated with the production, storage and possession of this otherwise unlawful drug.

[132] In my view, it is significant that in *Allard*, Justice Manson was not required to strike a balance with respect to the 150 gram limit. He found on the evidence before him that that limitation did not constitute irreparable harm and accordingly he did not undertake the balancing exercise necessary under the balance of convenience test.

[133] In the present case, on the evidence before me, I have found irreparable harm and therefore it is necessary to consider where the balance of convenience lies.

[134] There is little evidence before me that granting an exemption from the 150 gram limit in the anomalous cases before me would provoke wholesale litigation that would have the effect postulated by the respondent.

[135] Justice Griffin's decision to decline to stay this action and her reasons for it have been known since May 12, 2014. As I understand it, that decision has not inspired multiple actions and applications.

[136] While there may be some precedential value to a decision granting an exemption from the 150 gram limit, the prescribed dosages and the other circumstances affecting the present applicants are, or appear to be, highly distinctive. They are not likely to serve as a precedent for the majority of medical marihuana users who are, on average, prescribed doses of less than one half of that prescribed to Mr. Sproule, whose prescription is the lowest of the four applicants before me.

[137] I conclude that the prospect that a ruling with respect to these four applicants will open the floodgates of litigation has not been established to the extent of tipping the balance of convenience in favour of Canada. Each of the four applicants has a complex of issues which necessitate the use of marihuana as opposed to other medications; the health issues each applicant suffers from are serious and irremediable. Each, but particularly Mr. Boivin, are very vulnerable as a result of their conditions, and in my view, their particular circumstances tip the balance of convenience in their favour insofar as a 150 gram limit is concerned. I therefore would grant them an exemption from that limit by permitting them to possess a 10-day supply of medical marihuana: in the case of Mr. Sproule, up to 360 grams; in the case of Mr. Garber, up to 600 grams; in the case of Mr. Boivin, up to 1,000 grams; and in the case of Mr. Newmarch, up to 1,670 grams.

[138] In my view, those figures will strike a balance between the public interest in limiting the risks to public safety and public health by avoiding the right to possess an overabundance of marihuana, and it will limit the number of medical cannabis users who would benefit from a challenge to the 150 gram limit, while at the same time ameliorating the restrictions on the applicants' ability to travel with their medications. It will also avoid the need for frequent replenishments of supply, and in the case of Mr. Sproule, it will avoid the need for frequent trips to and from Abbotsford "to retrieve a three to four-day supply".

(ii) The Change of Address for Production and Storage

[139] I am not satisfied on the balance of convenience test that an order permitting Mr. Sproule to store 7,920 grams of marihuana at his current residential address, or to permit the plaintiffs to produce and store medical marihuana at any address where they reside if such address is different from the address set out in paragraph 2 of the notice of application, is appropriate. Specifically, I am not satisfied there is any irreparable harm to the plaintiffs generally, or Mr. Sproule in particular, in maintaining the present locations for the production and storage of marihuana, particularly as, under the order I have made, they are able to acquire up to a 10-day supply of medical marihuana at one time. Even if there were irreparable harm, in my view, granting such an order would engage the likelihood of wholesale attempts to obtain similar orders by others licensed to produce and store medical marihuana. In the absence of an existing regulatory framework to assess and monitor production and storage sites, the orders sought would have an incongruent impact on the respondent Canada to deal with public health and safety issues on an interlocutory basis. For those reasons, I find the balance of convenience favours Canada (if there were irreparable harm established) and the status quo should prevail. I accordingly decline to make any orders changing the location of the plaintiffs' production and/or storage facilities.

(iii) The Change to the Number of Plants and Quantity of Stored Marihuana for Mr. Boivin

[140] In my view, the critical consideration in connection with this application is the nature and the extent of Mr. Boivin's vulnerability.

[141] The prescription for a dosage of up to 100 grams daily, although high, has not been challenged by the respondent. I accept that people with less serious injuries and conditions are unlikely to establish either irreparable harm or that the balance of convenience favours them in changing the status quo as Mr. Boivin seeks to do. I acknowledge that the discordance in daily dosages between those who obtain medical marihuana from Health Canada and those who are permitted to produce their own may raise questions about whether some users' prescriptions are unnecessarily high.

[142] In the case of Mr. Boivin, however, it appears that his increased dosage was prescribed as a result of the "dynamic and degenerative nature of his irremediable health condition and symptoms". Thus, his vulnerability due to his condition is extreme and his ability to produce and store a sufficient quantity of marihuana to enable him to use his prescribed dosage is a core consideration in determining whether there is irreparable harm and in determining where the balance of convenience lies.

[143] In my view, the applicant Boivin has demonstrated both irreparable harm and that the balance of convenience favours him. Few other medical marihuana users are likely to suffer from the same extreme complex of conditions as he, and few would encounter likely success in seeking a change from the status quo on an interlocutory basis.

[144] That being so, the impact on Canada is not likely to be significant, whereas the impact on Mr. Boivin, if he is denied the opportunity to provide for himself, is significant and anomalous. I would grant the order sought in relation to the changes in Mr. Boivin's right to produce and store marihuana.

(iv) The Alternative Remedy of an Exemption from Sections 4, 5, and 7 of the *CDSA* as applied to Schedule II Substances Pending Trial of the Merits of the Action

[145] I would not give effect to the plaintiffs' alternative remedy. It is a very broad and instrusive remedy.

[146] As pointed out by Justice Manson in *Allard* at para. 124:

> [124] The first form of relief requested by the Applicants is inappropriate. It would exempt medically-approved patients and their designates from the possession, trafficking, and possession for the purposes of production provisions in the CDSA without qualification. This is not the intent of the MMAR, which defined the circumstances under which medically-approved patients could possess and grow marihuana and in what quantities. The relief sought would grant them exemption from the provisions of the CDSA without limitation.

[147] I agree with Manson J.'s analysis and would dismiss the application of the plaintiffs for an exemption from ss. 4, 5 and 7 of the *CDSA*.

(v) Summary of Orders Made

[148] The order will be made in the same terms as the *Allard* order except that the plaintiffs in the present case will be exempt from the 150 gram personal possession limit imposed by s. 5(c) of the *MMPR* to the following extent:

(a) Kevin Garber will be entitled to possess up to 600 grams of cannabis on his person;

(b) Philip Newmarch will be entitled to possess up to 1,670 grams of cannabis on his person;

(c) Timothy Sproule will be entitled to possess up to 360 grams of cannabis on his person; and

(d) Marc Boivin will be entitled to possess up to 1,000 grams of cannabis on his person.

[149] Additionally, Marc Boivin will be permitted to produce 486 plants and store 21,870 grams of cannabis at the address set out in his *MMAR* licences.

[150] The application for an order for a constitutional exemption from ss. 4, 5 and 7 of the *CDSA* is dismissed.

[151] The application by Timothy Sproule to store 7,920 grams of cannabis at his current residential address in Vancouver and to transport 7,920 grams from his production site to his storage site is dismissed.

[152] The application to permit the plaintiffs to produce and store medical cannabis at any address where they reside if such address is different from those set out in their *MMAR* licences is dismissed.

[153] The parties shall bear their own costs.

"A.F. Cullen ACJ"

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Associate Chief Justice Cullen