NO. _______________
VICTORIA REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

VICTORIA CANNABIS BUYERS CLUB SOCIETY

PETITIONER

AND:

THE COMMUNITY SAFETY UNIT,
MEGHAN OBERG in her capacity as
DEPUTY DIRECTOR OF THE COMMUNITY SAFETY UNIT, and
THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

PETITION TO THE COURT

This proceeding has been started by the Petitioners for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

TIME FOR RESPONSE TO PETITION

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

(d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:

Supreme Court of British Columbia
850 Burdett Avenue
Victoria BC V8W 9J2

(2) The address for service of the Petitioners:

c/o Jack Lloyd Law Corporation
2459 Pauline Street
Abbotsford BC V2S 3S1

(3) The name and office address of the Petitioners' lawyer is:

Jack Lloyd Law Corporation
2459 Pauline Street
Abbotsford BC V2S 3S1

CLAIM OF THE PETITIONER

Part 1: ORDER(S) SOUGHT

1. An Order that the Respondents, and all persons having knowledge of the Order, cease any and all Cannabis Control and Licensing Act ("*CCLA*") related enforcement action against Petitioner, including any enforcement action against Petitioner's landlord, until such time as the matters set forth in this Petition have been fully and finally determined;

2. A Declaration that the Petitioner's rights and the rights of Petitioner's member-patients under sections 7, 8, 11, and 12 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") have been violated by Community Safety Unit ("CSU") enforcement actions against Petitioner;

3. A Declaration that the *CCLA*, and in particular but without limitation, sections 1, 13.1, 14, 15, 20.1, 94, 109 and 110, unduly restricts patient access to cannabis for medical purposes and therefore is inconsistent with sections 7, 8, 11 and 12 of the *Charter* and is not saved by section 1 of the *Charter*;

4. A Declaration that the *Cannabis Act* and *Cannabis Regulations*, insofar as they prevent medical cannabis consumers from having reasonable access to medical cannabis, are inconsistent with sections 7 and 12 of the *Charter* and are not saved by the operation of section 1 of the *Charter*;

5. A Declaration that the *CCLA*, as applied to Petitioner, is ultra vires the authority of the provincial government;

6. An Order that any Notices of Administrative Monetary Penalties (NAMPs) issued pursuant to section 94(2)(a) of the *CCLA* against Petitioner and any of Petitioner's agents and/or employees be stayed and that the statutory language allowing for a double administrative monetary penalty be struck as having no force or effect;

7. An Order pursuant to section 24(1) of the *Charter*, as an appropriate and just interim remedy, in the nature of an interim constitutional exemption from the *Cannabis Act*, *Cannabis Regulations* and *CCLA* for the Petitioner and the patient-members of the Petition or, alternatively, an Order enjoining the Respondent CSU from taking any enforcement action against Petitioner pending a hearing on the merits of the Petition or such further Order of the Court as may be necessary;

8. An Order pursuant to section 24(1) of the *Charter*, as an appropriate and just final remedy, in the nature of a permanent constitutional exemption from the *Cannabis Act*, *Cannabis Regulations* and *CCLA* for the Petitioner and the patient-members of the Petition or, alternatively, an Order

permanently enjoining the Respondent CSU from taking any enforcement action against Petitioner until such time as the *Cannabis Act* and *Cannabis Regulations* are amended to ensure that the full ambit and scope of the patient's constitutional rights pursuant to s. 7 of the *Charter* are protected, without any unreasonable, inconsistent and unnecessary restrictions thereon;

9. An Order declaring the *CCLA*, the *Cannabis Act* and the *Cannabis Regulations* to be of no force and effect pursuant to section 52(1) of the Constitution Act, 1982;

10. Costs; and,

11. Such further and other relief as counsel may advise and this Honourable Court may deem just.

Part 2: FACTUAL BASIS

Parties

12. The Petitioner Victoria Cannabis Buyer's Club Society (the "Society") is a non-profit Society incorporated pursuant to the laws of British Columbia. The Society provides medical cannabis to its member-patients, all of whom require reasonable access to cannabis for medical purposes.

13. The Petitioner has an address for service in care of Jack Lloyd Law Corporation, 2459 Pauline Street, Abbotsford, BC V2S3S1.

14. The Respondent Community Safety Unit ("CSU") is a cannabis enforcement service under the Policing and Security Branch of the Ministry of Public Safety and Solicitor General and is responsible for compliance and enforcement under the *Cannabis Control and Licensing Act*, [SBC 2018] c. 29 (the "*CCLA*").

15. Throughout the subject period, the Respondent Meghan Oberg has acted as the Deputy Director of the Community Safety Unit.

Background

16. The Society, and its precursor the unincorporated Victoria Cannabis Buyers Club ("VCBC"), has operated in the City of Victoria British Columbia for more than two decades.

17. The Society, and the VCBC before it, provides low barrier access to medical cannabis products to sick and suffering citizens.

18. The Society enjoys significant support from the local community, including support from the City of Victoria, and is an essential harm reduction service serving primarily persons that are unhoused, living in poverty, living on disability assistance and otherwise without reasonable access to medical cannabis.

19. The Petitioner was licensed, authorized, and encouraged by the municipality of Victoria, BC to engage in this activity pursuant to *the Business Licence Bylaw* and the *Cannabis-Related Business Regulation Bylaw* No.16-061 of Victoria. The municipality actively sought Provincial and Federal support for the Petitioner's non-profit activity.

20. The Society has, from time to time over the past two decades of operation, been the subject of enforcement action by police and other enforcement agencies. The Society's founder and director, Ted Smith, has been arrested and charged with criminal offences arising out his provision of medical cannabis to patients. The Society's baker and the person responsible for making cannabis derivative products for the patients of the Society, Owen Smith, was also criminally charged for his activity.

21. Owen Smith won *Charter* challenges to the validity of the federal government's medical cannabis access program at every level of court including the BC Supreme Court (*R v Smith,* 2012 BCSC 544), the BC Court of Appeal (*R v Smith,* 2014 BCCA 322) and a unanimous *per curiam* decision of the Supreme Court of Canada in *R v Smith,* 2015 SCC 34.

22. The medical need of the patients that access medical cannabis products from the Society has never been seriously challenged. Every court that has considered this issue has recognized that these patients, whether or not they are participants in the medical cannabis access legislation/regulation existing at the time of the various enforcement actions, had legitimate medical need for the cannabis products supplied by the Society and the VCBC.

23. For Canadians to have reasonable access to medical cannabis, they must be able to lawfully obtain medical cannabis products that meet their individual medical needs in a place in which they can access their medicine without fear of arrest, intimidation, harassment or prosecution by government authorities, and without fear of civil actions by public bodies, for violation of public laws or rules against access to cannabis generally.

24. British Columbia is in the midst of an opioid epidemic and cannabis has been proven to provide a palliative effect for opiate addicts seeking to avoid relapse or to mitigate and reduce harms. Many of the patient-members of the Society access its products for just this purpose.

25. Throughout the history of the Society and its precursor VCBC, lawful access to medical cannabis has been regulated by federal law. The provincial government has not legislated in this area. The *CCLA* purports to apply only to non-medical cannabis, despite being used against Petitioner.

26. The Society and, before it, the VCBC, has operated openly and transparently throughout this time. The Society provides a place where patient-members can access medical cannabis products that are not available from either recreational cannabis storefronts or via mail-order from federally licensed medical cannabis companies. The Society also provides a place where its patient-members can discuss with staff, volunteers and other patient-members their medical conditions and the efficacy of various medical cannabis products supplied by the Society. These important aspects of wellness and social capital are unavailable from recreational cannabis storefronts and from federally-licensed medical cannabis sellers that operate almost exclusively online and via mail order.

27. At all relevant times, the Society has served only patients with medical need for cannabis. The Society does not sell cannabis to recreational consumers and the Society has made that fact clear to Respondent CSU on multiple occasions.

28. Despite this, the Respondent CSU has, from time to time, raided the Society, seized medical cannabis products and operating capital and issued Notices of Administrative Monetary Penalty ("NAMPs") to the Petitioner and others pursuant to s. 94(4) of the *Cannabis Control and Licensing Act* (the "*CCLA*"). The NAMPs purported to impose millions of dollars in monetary penalties based on the allegation that the Petitioner was selling non-medical cannabis and possessed non-medical cannabis for the purpose of sale, in contravention of s. 15 of the *CCLA*.

29. In addition, the CSU has contacted the Petitioner's landlord (and former landlord) in an attempt to intimidate the landlord and cause the landlord to breach its tenancy agreement with Petitioner.

30. The Petitioner is not selling recreational cannabis. The Petitioner's patient-members do not obtain the various medical cannabis products supplied by Petitioner to use them for recreational purposes. Instead, the patient-members are medical cannabis consumers and the products supplied by the Petitioner are medical cannabis products outside of the scope of the *CCLA* and outside the jurisdiction of the provincial government.

31. The CSU has taken the position that anything other than cannabis provided by federally licensed medical cannabis businesses is recreational cannabis. This is both factually and legally incorrect. Factually, the patient-members of the Petitioner all use cannabis for medical purposes. Legally, the medical cannabis regulations in place in at the time of the events giving rise to the case at bar violate section 7 of the *Charter of Rights and Freedoms* and are constitutionally invalid and, therefore, are not a legally sufficient source for determining whether the Society provides access to medical cannabis.

Part 3: LEGAL BASIS

Medical Cannabis Access in Canada – A Litany of Litigation

The Parker Case

32. On July 31, 2000, the Ontario Court of Appeal confirmed the existence of a constitutional right to consume cannabis as medicine. The government chose not to appeal this decision and *R v. Parker* 135 O.A.C. 1 became the seminal case on the constitutional requirement that the government provide a means by which medical cannabis users can be exempted from the operation of the criminal law, without which the cannabis prohibition is of no force and effect.

33. In *Parker* the Ontario Court of Appeal determined that the government must provide reasonable lawful access to cannabis to medically qualified patients. The Court further determined that the *CDSA* provisions that prevented medically qualified patients from reasonable access to medical cannabis were invalid and unenforceable when government fails to implement a constitutionally viable exemption scheme.

34. The *Parker* court found that the choice of medication to alleviate effects of serious illness is a decision of fundamental personal importance and intruding into that decision-making by way of threat of criminal sanction is a severe deprivation of liberty.

35. The *Parker* court also determined that the use of the criminal law power to prevent use of marijuana for medical purposes violated the security of the person interest by interfering with Mr. Parker's physical and psychological integrity.[1]

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[1] *R. v. Parker* (2000), 188 D.L.R. (4th) 385 (Ont. C.A.).

The MMARs – Canada's First Attempt at Charter-Compliant Access

36. In July, 2001, twelve months less a day after the Ontario Court of Appeal decision in *Parker* the government promulgated the *MMARs*.[2] The *MMARs* were Canada's first attempt to comply with the *Charter* requirement that patients have reasonable access to medical cannabis. The *MMARs* were in place until 2014, with various changes arising largely due to *Charter* decisions finding the scheme inadequate.

37. Shortly after the *MMARs* were promulgated, the regulations became the subject of litigation launched by a group of medical cannabis consumers. The *MMARs* were found to be constitutionally defective in *Hitzig v. Canada* because they "fail[ed] to provide individuals who have a serious medical need to use marijuana with a legal source and safe supply of their medicine."[3]

38. Lederman, J's decision in *Hitzig I* was upheld by a unanimous Ontario Court of Appeal in *Hitzig et al v. Canada* (2003) 177 CCC (3d) 449 decided October 7, 2003 (*Hitzig II*). The overly restrictive scheme for accessing a legal supply of marijuana set out in the *MMAR* were found to pose unconstitutional obstacles to medical users' access to a legal source of supply. The *Hitzig II* court urged the government to, in effect, regulate dispensaries such as Petitioner:

> [162] **As the record makes clear, there are a number of people who already have a source of marihuana and wish to engage in compassionate supply of it to those in medical need. Indeed the Government's case rested in large part on their existence. It argued that they effectively serve as "unlicensed suppliers" for ATP holders.** It may be that not all of these people would satisfy the requirements to become DPL holders set out in the *MMAR*. However, we are satisfied that, on this record, enough would do so that taken together with existing DPL holders, the DPL mechanism as modified could then provide a licit source of supply to ATP holders. Once this

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[2] *Marihuana Medical Access Regulations*, SOR/2001-227

[3] *Hitzig v. Canada*[3], (2003), 171 C.C.C. (3d) 18 (*Hitzig* I), para.8

> modification is implemented, ATP holders would therefore no longer need to access the black market to get the marihuana they need.[4]
>
> [173]...a central component of the Government's case is that there is an established part of the black market, which has historically provided a safe source of marihuana to those with the medical need for it, and that there is therefore no supply issue. **The Government says that these "unlicensed suppliers" should continue to serve as the source of supply for those with a medical exemption. Since our remedy in effect simply clears the way for a licensing of these suppliers, the Government cannot be heard to argue that our remedy is unworkable**.[5]

39. Instead of licensing those suppliers Canada chose to re-enact, *verbatim*, the unconstitutional restrictions on supply that had been stricken by the Court in *Hitzig II*, while announcing an interim policy of selling cannabis grown by a private company and intended for research to authorized patients.[6]

40. The Court of Appeal in *Hitzig* accepted the decision of the trial court, below, that the *MMAR*s did not meet *Charter* muster but imposed a different remedy. The trial Court below had struck the entire exemption scheme. The Court of Appeal disagreed, striking only five specific provisions and, in doing so, rendering (in its view) the *MMAR*s *Charter*-compliant and therefore the prohibition on possession, generally, valid again.[7]

41. The Court of Appeal found that there are two aspects of liberty that are implicated: the liberty interest as it relates to the possibility of criminal sanction[8] and the decisional liberty interest – the right to make decisions of fundamental personal importance unimpeded by the state.[9]

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[4] *Hitzig II (supra)* para 162 (all emphasis here and below added)

[5] *Hitzig II (supra)* para 173

[6] *Regulations Amending the Marihuana Medical Access Regulations* SOR/2003-261

[7] *Hitzig II (supra)* para 2

[8] *Hitzig II (supra)* para 91

[9] *Hitzig II (supra)* paras 92 and 93

42. The Court also found a violation of the security of the person interest because that right, as found in *Parker*, includes the right to access medication reasonably required for the treatment of serious medical conditions.[10] This impeding of access need not be by criminal law to create a security of the person violation:

> [95] In this case, the *MMAR*, with their strict conditions for eligibility and their restrictive provisions relating to a source of supply, clearly present an impediment to access to marihuana by those who need it for their serious medical conditions. By putting these regulatory constraints on that access, the *MMAR* can be said to implicate the right to security of the person even without considering the criminal sanctions which support the regulatory structure. Those sanctions apply not only to those who need to take marihuana but do not have an ATP or who cannot comply with its conditions. They also apply to anyone who would supply marihuana to them unless that person has met the limiting terms required to obtain a DPL. As seen in *Rodriguez v. British Columbia (A. G.)*, 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519, a criminal sanction applied to another who would assist an individual in a fundamental choice affecting his or her personal autonomy can constitute an interference with that individual's security of the person. Thus, we conclude that the *MMAR* implicate the right of security of the person of those with the medical need to take marihuana.[11]

43. The Court continues the analysis at paragraphs 96 – 102, reiterating the liberty and security of the person violations that exist simply because there is a prohibition and exemption scheme that stands between patients and reasonable access to cannabis. The analysis specifically includes not only the impact on patients but also on those who assist them in obtaining access by unlawfully supplying them contrary to section 5 of the *CDSA*.[12]

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[10] *Hitzig II (supra)* para 94
[11] *Hitzig II (supra)* para 95
[12] *Hitzig II (supra)* para 103 (bold emphasis supplied)

44. The *Hitzig* Court went on to deal with the appropriate remedy and what it believed would flow from that remedy – in effect a licensing by Canada of compassion clubs such as Petitioner:

> [157] Turning to the supply deficiency in the *MMAR*, the remedy proposed by these respondents does nothing to address this constitutional defect. Even if the entirety of the *MMAR* and the marihuana prohibition in s. 4 of the *CDSA* were declared invalid, those with a medical need for marihuana would remain without a licit source of supply. The proposed solution is simply not tailored to meet that problem.
>
> [160] We have also found that the *MMAR* violate the s. 7 rights of those with a medical need for marihuana because they fail to effectively remove the state barriers to a licit source of supply. As we have described, these barriers encompass a broad array of state actions: the *MMAR*, the provisions of the *FDA* and the *CDSA* and the regulations made thereunder and ultimately the criminal sanction applied to anyone (except a DPL holder) who supplies marihuana to an individual with a medical need for it.
>
> [161] We have earlier described the ineffectiveness of the DPL provisions of the *MMAR* to ensure a licit supply to ATP holders. That ineffectiveness appears to stem very largely from two prohibitions in the *MMAR*. First, a DPL holder cannot be remunerated for growing marihuana and supplying it to the ATP holder (s. 34(2)). Second, a DPL holder cannot grow marihuana for more than one ATP holder (s. 41(b)) nor combine his or her growing with more than two other DPL holders (s. 54). These barriers effectively prevent the emergence of lawfully sanctioned "compassion clubs" or any other efficient form of supply to ATP holders. Indeed, when asked in argument which specific barriers had to be removed to provide for a lawful source of supply, counsel for the Hitzig applicants immediately cited these provisions.
>
> [162**]** **As the record makes clear, there are a number of people who already have a source of marihuana and wish to engage in compassionate supply of it to those in medical need. Indeed the Government's case rested in large part on their existence. It argued that they effectively serve as "unlicensed suppliers" for ATP holders. It may be that not all of these people would satisfy the requirements to become DPL holders set out in the *MMAR*. However, we are satisfied that,**

> **on this record, enough would do so that taken together with existing DPL holders, the DPL mechanism as modified could then provide a licit source of supply to ATP holders. Once this modification is implemented, ATP holders would therefore no longer need to access the black market to get the marihuana they need.**
>
> [166] The declarations of invalidity we propose remove the single unconstitutional barrier to eligibility and sufficient barriers to supply that ATP holders will be reasonably able to meet their medical needs from licit sources. As a result, the *MMAR* as modified become a constitutionally sound medical exemption to the marihuana prohibition in s. 4 of the *CDSA*. While the record before us sustains this conclusion, it is conceivable that, as events unfold, further serious barriers could emerge either to eligibility or to reasonable access to a licit source of supply. Should that happen, the issue of the appropriate remedy might have to be revisited in a future case.[13]

45. The *Hitzig* Court also made the following comments:

> [174] Fourth, a central component of the Government's case is that there is an established part of the black market, which has historically provided a safe source of marihuana to those with the medical need for it, and that there is therefore no supply issue. **The Government says that these "unlicensed suppliers" should continue to serve as the source of supply for those with a medical exemption. Since our remedy in effect simply clears the way for a licensing of these suppliers, the Government cannot be heard to argue that our remedy is unworkable**. [14]

46. Unworkable, no. But Canada moved in a different direction.

Further Decisions Find Post-Hitzig MMARs Also Constitutionally Invalid

47. Post-Hitzig, the *MMARs* became the subject of several other *Charter*

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[13] *Hitzig II (supra)* paras 157, 160, 161, 162, 166 (boldface emphasis supplied)
[14] *Hitzig II (supra)* paras 170 and 174 (boldface emphasis supplied)

decisions finding them to be too restrictive and selectively striking down the offending portions.[15]

48. One key decision came from the Federal Court of Canada.

49. On January 10, 2008, the Federal Court Trial Decision issued its ruling in *Sfetkopoulos et.al. v. Attorney General of Canada*, 2008 FC 33. The Federal Court found the *MMAR* to be unconstitutional, agreeing that one of the restrictions stricken by the *Hitzig II* Court and re-enacted verbatim by Health Canada (the 1:1 Ratio) should be declared constitutionally invalid and, again, be stricken:

> Consequently, I have concluded that the restraint on access which subsection 41(b.1) provides [the 1:1 Ratio] is not in accordance with principles of fundamental justice…It does not adequately respond to the concerns motivating the Ontario Court of Appeal judgment in *Hitzig*…the only factor which has changed since the *Hitzig* case arose is the advent of PPS as a licensed dealer…**In my view it is not tenable for the government, consistently with the right established in other courts for qualified medical users to have reasonable access to marihuana, to force them either to buy from the government contractor, grow their own or be limited to the unnecessarily restrictive system of designated producers**."[16]

50. This decision was upheld on appeal *Canada (Attorney General) v Sfetkopoulos*, 2008 FCA 233.

51. Subsequently, the British Columbia Supreme Court decided *R v. Beren*, 2009 BCSC 429, leave to appeal to the Supreme Court of Canada denied. This case involved a supplier of a medical cannabis dispensary much like Petitioner, also located in Victoria, BC. In the result, the Court determined that the government should amend its unconstitutional

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[15] *See, e.g., Sfetkopoulos et.al. v. Attorney General of Canada,* 2008 FC 33*, Canada (Attorney General) v. Sfetkopoulos* 2008 FCA 328, *R v. Beren* 2009 BCSC 429, *R v. Smith,* 2012 BCSC 544; 2014 BCCA 322; 2015 SCC 34.

[16] *Sfetkopoulos (supra)* paras 10 and 25 (emphasis added).

regulations to license medical cannabis dispensaries:

> [72] **Thus, the evidence in this trial demonstrates that the source, the form, and the atmosphere in which cannabis is obtained, in all probability increases the effectiveness of the substance. Barriers to obtaining this type of cannabis, from a safe and supportive source which the patient believes will provide effective pain relief, contributes to the frustration of seriously ill patients**. In the *MMAR* regime, generally patients must spend months, if not years, persuading their physicians of the benefits of cannabis for them, finding a specialist who is sympathetic to their perceived need for such unorthodox medication, completing an application and finally, if successful, receiving cannabis from the government. However, it is alleged, that this source lacks a supportive network of belief in the efficacy of different strains, lacks the benefits of belief in organic growing methods, and, perhaps most important, lacks a supportive environment in using an unorthodox medication.
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> [115] The trial court decision in *Sfetkopoulos*, affirmed by the federal Court of Appeal in October 2008, dealt specifically with the issue of whether, given the government supply as a third source of medical marihuana, the restrictions created by the *MMAR* in ss. 41(b.1) and 54.1, pass constitutional muster. The trial court's decision was in relation to a judicial review of the Minister's disallowance of an application by an organization, similar to a compassion club, to produce medical marihuana for sale to more than two applicants. The trial court found that the disallowance illustrated that those specific provisions were unconstitutional.
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> [127] Adopting the reasoning in *Hitzig* and *Sfetkopoulos*, further bolstered by the evidence before this court, I find ss. 41(b.1) and 54.1 of the *MMAR* contrary to s. 7 of the *Charter*.
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> [134] Such regulation and licensing requires careful thought in drafting. Consistent with the reasoning in *Schachter v. Canada*, [1992] 2 S.C.R. 679, 93 D.L.R. (4th) 1, these provisions, unduly restricting DPLs from growing for more than one ATP or growing in concert with two other DPLs, are hereby severed from the *MMAR*.
>
> [135] **The government, in my view, will need time to put in place appropriate monitoring and enforcement mechanisms in relation to such compassion clubs. Thus, it is appropriate to**

stay the effect of this declaration of invalidity for one year.[17]

52. Canada, again, did not put into place any such mechanisms related to compassion clubs such as Petitioner. Instead, it made minor modifications to the *MMARs* and began a review of the medical cannabis regulations generally with a purported goal of eventually moving toward a more commercially oriented production and supply model. That review led to a second, also unconstitutionally limiting, set of regulations.

The MMPRs – Canada's Second Attempt at Charter Compliant Access

53. In 2014 the government introduced the *Marihuana for Medical Purposes Regulations* SOR/2013-119 (*MMPR*), an exemption scheme that fundamentally altered the prior *MMAR* system by removing from patients the option of producing for themselves and required them, instead, to purchase cannabis from mail-order-only commercial producers and retailers of dried cannabis. In effect, the government brought into place a system of highly regulated online-only businesses that had the right to obtain licensing to produce and sell dried cannabis (but no cannabis derivative products) for medical purposes.

54. Under the *MMPRs* cannabis patients were required to purchase their cannabis from licensed producers which were licensed by the federal government to grow and sell medical cannabis. Under the *MMPRs*, patients could not grow their own cannabis and they could not purchase cannabis at a storefront dispensary. Under the *MMPRs*, cannabis patients were not permitted to attend at the licensed producer facilities to purchase cannabis, rather, the cannabis had to be mailed out to the patient. Under the *MMPRs*

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[17] *Beren (supra)* paras 72, 115, 127, 134 and 135 (boldface emphasis added)

the government prohibited licensed producers from making and selling any forms of medical cannabis other than dried marihuana.

55. The *MMPRs* were swiftly challenged in a civil action brought by four plaintiffs in the Federal Court Trial Division that Canada agreed would serve as a national test case on the validity of the regulations.

56. In addition, the Smith case reached the Supreme Court of Canada (the case had commenced in the BC Supreme Court in 2012). The Supreme Court of Canada's decision impacted both the *MMARs* and the *MMPRs*.

The Smith Case – The Supreme Court Confirms that Patients Are Entitled to Access Cannabis Derivative Products

57. On June 11, 2015, in a unanimous *per curiam* decision, the Supreme Court of Canada found that the prohibition against medical cannabis patients' access to cannabis derivative medicines (ie, edible products, oils, tinctures and cannabis resin), found in both the *MMARs* and *MMPRs,* was constitutionally invalid. The Court found the requirement that cannabis patients access their medication only by way of smoking dried marihuana flowers, instead of cannabis edibles or other derivative medicines, to be a breach of liberty and security of the person and not in accordance with the principles of fundamental justice. As a result, the Court declared sections 4 and 5 of the *CDSA* to be of no force and effect to the extent they prevented patients from accessing cannabis derivative medicines.

58. The *Smith* case arose out of Mr. Owen Smith's activities as the maker of cannabis derivative products for the VCBC. The Petitioner supplies many of these same products to its members today. The CSU seized many of these products from the Petitioner in its enforcement actions, depriving the patient-members of access and causing them harm.

59. Mr. Smith was not a Health Canada authorized legal supply source for medical cannabis patients. In addition, the VCBC had relatively loose

membership standards and did not confine its membership to only those holding a Health Canada authorization to possess cannabis for medical purposes. Despite this, at every level, the Courts accepted that the patient-members of the VCBC did use cannabis for medical purposes.[18]

The Allard Decision – The MMPRs Declared Constitutionally Invalid

60. On February 24, 2016 in *Allard v. HMTQ* 2016 FC 236 (*Allard*) Mr. Justice Phelan of the Federal Court found the *MMPRs* to be unconstitutional in what Canada agreed was to be the national test case on whether those regulations complied with the *Charter*. Canada had used the pendency of the *Allard* case as a sword to seek, mostly but not always successfully, stays of proceedings of various challenges to the *MMPRs* brought across Canada.[19]

61. The Court described the case as follows:

> [3] This is another decision in a line of cases starting with *R v Parker*, (2000) 2000 CanLII 5762 (ON CA), 49 OR (3d) 481, 188 DLR (4th) 385 (ONCA) [*Parker*], and culminating in *R v Smith*, 2015 SCC 34 (CanLII), [2015] 2 SCR 602 [*Smith*], that have examined, often with a critical eye, the efforts of government to regulate the use of marihuana for medical purposes and the various barriers and impediments to accessing this necessary drug.
>
> [4] Like other cases, this most recent attempt at restricting access founders on the shoals of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*], particularly s 7, and is not saved by s 1.

1. The *Canadian Charter of Rights and Freedoms* guarantees	**1.** La *Charte canadienne des droits et libertés*garantit les

[18] See, for example, *Smith BCSC* paragraph 75; *Smith BCCA* paragraphs 95, 96, 104, 105, 109; *Smith SCC* paragraphs 5, 20.
[19] See, eg, *Garber et al v Canada,* 2014 BCSC 835.

the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
…	…
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

> [7] The focus of this litigation is the most recent response of the federal government to the teachings of *Parker* that effectively mandated a regime to make marihuana available for medical purposes to persons in need. The Court in *Parker* held that the criminal prohibition against the possession of marihuana in s 4 of the *Controlled Drugs and Substances Act*, SC 1996 c 19 [CDSA], was of no legal effect absent a constitutionally acceptable medical exemption from that prohibition.[20]

62. Also important is to understand that despite a primary focus in the evidence in *Allard* being on lack of affordable access to cannabis absent the right to personally produce it, or have a designate produce it for the patient, the case was neither about affordability nor a right to grow medical cannabis. Instead, it was about whether the new *MMPR* regime provided patients with reasonable access to medical cannabis:

[20] *Allard v. HMTQ* 2016 FC 236 paras 3, 4 and 7

> [14] To the extent that affordability was advanced as a ground of s 7 violation, it has not been made out. More importantly, it is not necessary to make such a finding. Affordability can be a barrier to access, particularly where it is a choice made to expend funds on medical treatment to the detriment of other basic needs. However, this case does not turn on a right to "cheap drugs", nor a right "to grow one's own", nor do the Plaintiffs seek to establish such a positive right from government.[21]

63. Justice Phelan identified the section 7 interests at issue, drawing from and relying upon the decisions in *Parker*, *Hitzig* and *Sfetkopolous*, indicating and emphasizing that one such interest is the right of patients to have access to their medicine without undue interference from the state:

> [48] The "liberty interest" identified by Justice Strayer would include:
>
> - the right to choose, on medical advice, to use marihuana for the treatment of serious conditions (which right implies a right of access to marihuana); and
> - the right not to have one's physical liberty endangered by the risk of imprisonment from having to access marihuana illegally.
>
> The "security interest" included similar rights for those with a medical need to have access to medication <u>without undue interference</u> (this Court's emphasis). [22]

64. Critically, Justice Phelan noted that a primary concern of the *Sfetkoplous* court was that the restrictions in the *MMAR*s, even post-*Hitzig*, did not address the underlying problem that patients were still forced to seek medicine from unlawful sources.

> [52] On the issue of the movement to a supply model, the Court stated that:

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[21] *Allard (supra)* para 14
[22] *Allard (supra)* para 48

> [18] … That may well be a laudable goal and if ever reached would make unnecessary litigation such as the present case. But we do not know when this new age will dawn and in the meantime the courts, in their wisdom, have concluded that persons with serious conditions for which marihuana provides some therapy should have reasonable access to it. It is no answer to say that someday there may be a better system. Nor does the hope for the future explain why a designated producer must be restricted to one customer.

In the present case, one of the issues is why a customer must be restricted to a single supply.

[53] The restraint on access was not in accordance with the principles of fundamental justice because it did not respond to the concerns motivating the *Hitzig* decision and left ATP holders, who are unable to grow for themselves and who cannot engage a designated producer due to MMAR restrictions, to seek marihuana in the black market.

[54] In Justice Strayer's view (one which could with slight adaption be replicated here):

> [19] … it is not tenable for the government, consistently with the right established in other courts for qualified medical users to have reasonable access to marihuana, to force them either to buy from the government contractor, grow their own or be limited to the unnecessarily restrictive system of designated producers. At the moment, their only alternative is to acquire marihuana illicitly and that, according to *Hitzig*, is inconsistent with the rule of law and therefore with the principles of fundamental justice.

As seen earlier, the MMPR limits a patient to a single government-approved contractor and eliminates the ability to grow one's own

> marihuana or to engage one's own designated producer. That system is likewise not tenable. [23]

65. In other words, the *MMPR* limiting patients to a single set of government approved contractors was insufficient to provide reasonable access and therefore offended the *Charter*.

66. At paragraph 56 Justice Phelan characterizes the BCSC decision in *Beren* as, in effect, being about a failure of Canada to provide patients with practical access to a supply of medical cannabis despite the amendments to the *MMAR*s that followed the *Hitzig* and *Sfetkopolous* decisions.

> [56] In 2009, the BCSC rendered its decision in *Beren*, dealing with a challenge to s 5 and 7 of the CDSA. It focused on the failure of the MMAR to provide practical access to medical marihuana for those whose medical conditions would appear to fall within the exemption provided, despite the amendments following *Hitzig* and a change in policy with respect to the availability of medical marihuana for qualified patients through government supply. [24]

67. Justice Phelan concluded that the teachings of the courts in relation to access to medical cannabis as of the promulgation of the *MMPR* were that restrictions on that access must be strictly limited – and that by further restricting lawful supply options the *MMPR*s went in the wrong direction:

> [58] In the context of the MMAR at the time of its replacement by the MMPR, the judicial teachings were **that access for approved medical patients was mandated by the *Charter* and that restrictions on access, use and supply were to be strictly limited**. It is evident that Canada struggled with these two conflicting notions of access and control, as well as the direction toward greater access.
>
> As seen in its structure and evident from a review of its operation, **the MMPR moved in the opposite direction**.[25]

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[23] *Allard (supra)* paras 52 - 54
[24] *Allard (supra)* para 56
[25] *Allard (supra)* para 58 (boldface emphasis supplied)

68. Justice Phelan also touched on *Smith* and understood it as generally supportive of the jurisprudence and court decisions seeking to improve access to medical cannabis but focused on a particular aspect of that access.[26]

69. Justice Phelan also acknowledged and discussed the role that dispensaries such as Petitioner have played in providing access to patients:

> [162] Although dispensaries were not a focus of the parties' submissions**, I find Ms. Shaw's evidence to be extremely important as dispensaries are at the heart of cannabis access**. Particularly, she states that with the pronouncement of the proposed regulation, consultation was denied and a number of dispensaries closed in 2012 and 2013 due to the potential that the new system would not serve their membership. However, in March 2014, the number of dispensaries was estimated at 36. Over the last year, this number has increased exponentially and is now estimated at around 103 across Canada.[27]

70. This is important because the practical reality as found in *Allard* is that dispensaries such as Petitioner remained, in 2015, central to providing reasonable access to patients despite the fact that the *Hitzig* court had found reliance on these unlawful suppliers to be an affront to the rule of law more than a decade previous:

> [163] Although not legal under any past or previous medical marihuana regulations, current trends in dispensary growth suggest a connection between the restrictions to access under the MMPR and the need for patients to obtain their medical marihuana from illicit sources.[28]

71. Justice Phelan then undertook the section 7 analysis and commences by noting that the restriction to LPs only as a supply option is critical:

> [174] A critical restriction under the MMPR (in addition to the usage restriction to dried marihuana) is that medical marihuana

[26] *Allard (supra)* para 64
[27] *Allard (supra)* para 162 (boldface emphasis supplied)
[28] *Allard (supra)* para 163

> patients must purchase their marihuana from LPs and that is the only legal access option.[29]

72. Justice Phelan's own analysis of the liberty and security of the person interests supports and expands on that conducted by prior courts. He concludes that both the criminal-sanction liberty interest and decisional liberty interest are infringed. Further, he agrees with the *Hitzig* court's conclusion that security of the person is infringed by the scheme standing in the way of patient's making decisions of fundamental personal importance.

> [187] In my view, the liberty interest is engaged in two distinct ways – the right not to have one's physical liberty endangered by the risk of imprisonment and the right to make decisions of fundamental personal importance. Previous jurisprudence has established that choice of medication including cannabis to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance. In relation to this particular state action, the MMPR, I find that the analysis can be conducted in three different ways.
>
> [188] Firstly, following the Hitzig analysis, liberty is at risk for those who cannot access the LP regime if they cultivate or purchase outside the regime for any reason, including affordability, dosage and strain preference, as they risk conviction and imprisonment. The risk is also manifested if they stray outside the conditions set for their possession by the MMPR – possessing more than 150 grams.
>
> [189] Secondly, the scheme stands between the Plaintiffs and their right to make this decision of fundamental importance unimpeded by state action. Decisions of fundamental importance, particularly in the medical context, were most recently canvased in Carter v Canada, 2015 SCC 5 (CanLII), [2015] 1 SCR 331:
>
>> [67] The law has long protected patient autonomy in medical decision-making. In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30 (CanLII), [2009] 2 S.C.R. 181, a majority of this Court, per Abella J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent

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[29] *Allard (supra)* para 174

> individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also R. v. Parker (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in Fleming v. Reid (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., Ciarlariello v. Schacter, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; Malette v. Shulman (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and Nancy B. v. Hôtel-Dieu de Québec (1992), 1992 CanLII 8511 (QC CS), 86 D.L.R. (4th) 385 (Que. Sup. Ct.). [Emphasis added] [30]

73. Justice Phelan concluded that the *MMAR* caselaw was applicable and that the *MMPR*s were actually more impeding to access than the *MMAR*s were:

> [190] The case law decided under the MMAR applies to the analysis of the MMPR's constitutionality as the case law addressed the limitations and prohibitions imposed on medical marihuana including the cultivation, distribution and use, finding such limitations to engage section 7 rights. The limitations in the MMPR are more impeding than the MMAR in prohibiting home growth, invalidating PUPL and DPPLs and limiting the amount an individual is authorized to possess.
>
> [194] Justice Strayer stated in Sfetkopoulos at para 10, that "liberty" comprehends the right to make decisions of fundamental personal importance including the right to choose on medical advice to use marihuana for treatment of serious conditions, and that right implies a right of access to such marihuana. It would also include the right not to have one's physical liberty endangered by the risk of

[30] *Allard (supra)* paras 187-189

> imprisonment from having such access illicitly. At the time of both Sfetkopoulos and Hitzig, there was a regime in place to access marihuana legally, and similar to the case at hand, that regime had limitations. The limitations were assessed at the second stage of the section 7 analysis.
>
> [195] Third and most convincingly, the individuals are restricted under the MMPR to purchasing from a LP. The decision to cultivate cannabis for medical purposes **or purchase cannabis from the black market, such as a store front dispensary, could result in criminal prosecution**. Any offence that includes incarceration in the range of possible sanctions engages liberty (Re BC Motor Vehicle Act, 1985 CanLII 81 (SCC), [1985] 2 SCR 486 at p 515). Both parties are in agreement that, at the least, the liberty interest is engaged due to the threat of criminal prosecution and incarceration if the Plaintiffs or approved patients decide to access their marihuana outside the regulatory regime.
>
> The maximum penalty for producing cannabis is 14 years in prison. [31]

74. Justice Phelan also linked his analysis to that of the SCC in *Smith* in a way that has direct bearing on the case at bar because it clearly contemplates that the liberty impact extends to those who, like Mr. Owen Smith did with the VCBC and like the Petitioner continues to do today, seek to facilitate patient's reasonable access:

> [196] The above analysis of the MMPR's engagement of the liberty interest is consistent with the Supreme Court's recent decision in *Smith* – although that case dealt with the MMAR and more narrowly focused on the prohibitions on the means of consumption. The Court held that:
>
> > a) the prohibition on possession of cannabis derivatives infringes Smith's liberty interest by exposing him to the threat of imprisonment on conviction under s 4(1) or 5(2) of the CDSA; and
> >
> > b) the prohibition limits liberty by foreclosing reasonable medical choices through the threat of criminal prosecution.

[31] *Allard (supra)* paras 190, 194 and 195 (boldface emphasis supplied)

> The Plaintiffs have made their case that their liberty interests are engaged by the MMPR regime.[32]

75. As for security of the person, Justice Phelan agreed with the *Hitzig* court's conclusion that security of the person is infringed simply by the establishment of a regulatory regime that restricts access to cannabis. [33]

76. Justice Phelan determined that the restrictions were arbitrary because they impeded access:

> [234] First, considering how the MMPR impacts each Plaintiff, the effects of the restrictions are contrary to the objective of the MMPR to improve access.
>
> [235] Second, there is no real connection between restricting access to cannabis for medical purposes to purchasing from LPs and the objectives of reducing risks to health and safety and improving access. The health and safety concerns that the law purports to disparage were not established and there was inadequate evidence to conclude that access was overall improved. In fact, access was further restricted. [34]

77. Justice Phelan also found the *MMPR* to be overbroad.[35]

78. Justice Phelan's declaration of invalidity was suspended for six months to allow Canada to respond. The federal government did not appeal the ruling, instead, on August 24, 2016 the federal government replaced the *MMPRs* with the *ACMPRs*. In pith and substance, the ACMPRs that came into force post-*Allard* remain the law of the land with respect to medical cannabis access today.

79. In 2018, the Government of Canada promulgated the *Cannabis Act*, legalizing the production, sale and possession of cannabis for recreational purposes. The *Cannabis Act* and *Cannabis Regulations* also regulate access to

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[32] *Allard (supra)* para 196
[33] *Allard (supra)* para 199
[34] *Allard (supra)* paras 234 and 235
[35] *Allard (supra)* para 271

medical cannabis and in effect mirror the ACMPRs that were promulgated subsequent to the decisions in *Smith SCC* and *Allard.*

80. In 2020, the Alberta Court of Queen's Bench (as it then was) issued its decision in *R v Howell,* 2020 ABQB 385. In that decision, the Court considered the constitutionality of the ACMPRs in the face of a challenge by a cannabis cultivator.

81. The *Howell* Court provided a history of the litigation in this area, characterizing Canada's response to *Allard* this way:

> [64] The *ACMPR* purported to fix the problem created by *Smith* by allowing for the production of cannabis oil. It also permitted authorized individuals to make and possess extracts, edibles or other derivative products as long as they did so without using highly flammable, explosive or toxic organic solvents. Medical practitioners (physicians and nurse practitioners) could provide a medical document prescribing the daily quantity of cannabis for that person and the duration of the prescription, up to one year. The authorized individual was allowed to possess a total quantity of dried cannabis (or its equivalent) of the lesser of 30 times the daily quantity or 150 grams.
>
> [65] LPs were carefully regulated with respect to a number of matters, including facilities, production practices, quality control, safety and security measures. The *ACMPR* simplified the process to obtain a medical authorization to possess medical marihuana by transferring the authorization process to medical practitioners, instead of Health Canada.
>
> [66] Personal production was permitted so as to allow a single person to grow medical cannabis for their own use. Designated Producers could grow for the use of two registered persons (including the DP). This limit was unchanged from the *MMPR* following *Sfetkopoulos*.
>
> [67] The number of DPLs per site was limited to 4 registrations, up from 3 following *Beren*.
>
> [68] While cannabis oil was permitted, the concentration of THC was limited to 30 mg/100 mL in oil, and 10 mg in capsules.

82. The *Howell* Court made the following findings of fact and law that are relevant to the situation presented by the Petitioner:

[284] As noted by the majority in *Smith* (at para 18), "forcing a person between a legal but inadequate treatment and an illegal but more effective choice" infringes security of the person.

[290] I am also satisfied from the evidence of Mr. Howell, Ms. Wilkinson, Ms. Kirkman, and Dr. Ziburkus that concentrations of higher than 30 mg/mL THC in cannabis oil or extracts can provide superior results than less potent concentrations in some patients.

[293] My conclusion is that both liberty and security of the person are impacted by the limitation on THC concentration.

[298] Dr. Goetz's evidence is uncontradicted in this case that the home delivery requirement denies access to the homeless. There was evidence that many medical practitioners will not allow their offices to be the mailing address for medical marihuana prescribed for their patients. That also denies access to homeless patients of those patients. While shelters may be used, there is evidence (and I can also take judicial notice) that there are many people living "rough," many people who do not like shelters or social service agencies because of restrictions on drug and alcohol use. There is no evidence before me as to why medically-prescribed marihuana should not be as available to patients as with other prescription drugs.

[300] The medical benefits of cannabis oil were recognized in *Smith* and were incorporated into the *ACMPR*. However, there should be some rationale for limiting concentrations to 30 mg/mL to justify that restriction on access. While it is possible that there be some medical explanation or some health and safety issue, I do not think that the information provided by Mr. Cain overcomes the need for such higher concentration products being available to certain people.

[315] If the objective of the *ACMPR* was to provide reasonable but safe access to medical marihuana, there does not appear to be any reasonable justification for the limitation on the THC concentration in oil and extracts.

[316] In my view, that prohibition fails because it is arbitrary. While there might be some rational connection between the concentration and the objectives of the legislation, no connection beyond theoretical has been established in the evidence. It is difficult to conclude that the prohibition is overbroad because of the absence of any evidence justifying the need for the limitation at all, let alone the maximum concentration. Having found the prohibition to be arbitrary, I do not have to make any determination on rational connection and overbreadth.

[317] As a result, I find that the limit on THC concentration infringes a person's rights to life, liberty and security by limiting

> choices of beneficial medicinal products. That is so because people risk criminal prosecution possessing infringing substances, and the criminalization of these infringing substances limits their right to make medical choices that benefit their health.
>
> [318] I have found there were a number of problems for people with legitimate needs for medical cannabis in accessing the strain they required in the form and concentration they required in a timely and affordable manner. I do not need to repeat the difficulties and delays outlined above.
>
> [346] My conclusion is that the delivery restrictions in the *ACMPR*s are arbitrary. That said, this finding may not influence LPs as to how they choose to get their products into the hands of their customers. Like having retail outlets, it is likely beyond governmental power to dictate to a private enterprise how many outlets it must have. The marketplace generally makes those determinations, but for local zoning restrictions.
>
> [360] I am satisfied that the *ACMPR*s violate section 7 in relating to the prohibition on concentrations of THC in cannabis oil and extracts above 30 mg/mL, and in the manner of distribution of medical cannabis by LPs.
>
> [393] I thus declare that sections 67(1) (limiting concentrations) and sections 93(1)(d)(i), 133(2)(a), 130(1)(b) and 189(1)(e) (to the extent that they prohibit distribution and delivery or pick-up of medical marihuana to places other than the patient's ordinary residence, the office if their medical practitioner, or a shelter) are contrary to section 7 of the *Charter* and are of no force and effect.
>
> [394] Since the *ACMPR*s have been repealed, I find it unnecessary to suspend this declaration.

83. As the Court in *Howell* noted, the ACMPRs have been repealed. The *Cannabis Regulations* now govern access to medical cannabis. Those *Regulations* are, however, in pith and substance no different from the unconstitutional ACMPRs and the restriction on high-dosage THC products remain in place as do the restrictions on where medical cannabis may be delivered/accessed by patients.

84. In *His Majesty the King and Seeman,* 2022 SKKB 232, a case involving the operation of three different store-front medical cannabis dispensaries such as Petitioner, the Court determined that the ACMPRs were

constitutionally invalid and violated the *Charter* rights of medical cannabis patients. In particular, the Court found that the ACMPR prohibition on store-front dispensaries was arbitrary.[36]

85. In coming to this conclusion, the Court found that restricting patient medical cannabis access to online only methods actually caused harm, contrary to the goal of the access regime:

> [100] The evidence establishes that while there were patient frustrations and established delays with the on-line ordering system (as in Ferkul), the problem went much deeper than that. There was considerable compelling evidence tendered in this application that satisfied me that the prohibition against in-person dispensaries and the limitation of access to on-line ordering resulted in delays that were detrimental to the health of many patients.
>
> [101] From pharmacological and clinical perspectives, Dr. Landolt and Dr. Laprairie both spoke of the harmful consequences of delays or interruptions in accessing medical cannabis used for pain management and to treat various diseases. I will not repeat their evidence, but it satisfied me that interruption in a consistent medication routine caused unnecessary and significant suffering for the patients whose only relief comes from consistent medical cannabis treatment.
>
> [112] In this case, the evidence was overwhelming that the restriction to an online system of ordering and accessing medical cannabis undermined the health and safety of patients and was not rationally connected to the overarching goal of providing reasonable access in furtherance of the broader objective of public health and safety. If the objective of the ACMPR was to provide a greater range of options to address the reasonable access concerns of the courts in Smith SCC and Allard, I find that prohibiting LPs from operating in-person dispensaries was unnecessary and actually prevented or undermined reasonable access for many people.

86. The Court also determined that the ACMPRs restriction on high THC products was unconstitutional: “[119] I am satisfied that the ACMPR violate

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[36] *Seeman*, paragraph 98.

s.7 to the extent they prohibit LPs from distributing concentrations of THC in cannabis oil and extracts above 30 mg/ml."

87. The state of the law, then, is:

i. *Parker* linked the validity of the broad prohibition on cannabis possession and production with the existence of a *Charter* compliant medical exemption regime.

ii. *Hitzig* confirmed that as of that decision the *MMARs* were not *Charter* compliant.

iii. *JP* applied the *Parker* principle and found that as of the date of decision the prohibition on non-medical possession (which was all that was before it) was of no force and effect due to the lack of a *Charter* compliant medical exemption as found in *Hitzig*.

iv. *Smith* confirmed (1) that the validity of the overall *CDSA* prohibition was linked to the validity of the medical exemption regime, (2) that this validity extended beyond section 4 and included section 5 of the *CDSA* and, (3) that as of 2015 the medical exemption scheme in the *MMARs* and *MMPRs* was not *Charter* compliant.

v. *Sfetkopolous* and *Beren* confirmed that the post-*Hitzig MMARs* were constitutionally invalid.

vi. *Allard* confirmed that the *MMPRs* were also constitutionally invalid.

vii. *Howell* and *Seeman* confirmed that the ACMPR restrictions on THC dosages and online only access points for patients are constitutionally invalid.

viii. The *Cannabis Regulations* contain the same or substantially identical restrictions on medical cannabis access as the *ACMPRs*.

88. Petitioner's position is that the federal government's medical cannabis regulatory scheme remains constitutionally deficient, that Petitioner provides patients with reasonable access to medical cannabis, not recreational cannabis, and that any reliance by the Respondent CSU on the existence of the federal regulations as justification for classifying Petitioner as a recreational cannabis retailer subject to the *CCLA* is both factually and legally inappropriate.

89. Further, the attempts by Respondent CSU to apply the *CCLA* to Petitioner are ultra vires the jurisdiction of the provincial government as the provincial government has no jurisdictional ability to regulate or restrict access to cannabis for medical purposes.

90. Further, the application of the *CCLA* to the Petitioner infringes the *Charter* rights of the Petitioner's member-patients by depriving them of reasonable access to medical cannabis and, therefore, are of no force and effect.

Part IV – MATERIAL TO BE RELIED UPON

91. At the hearing of the Petition the Petitioner will rely upon the foregoing law, any additional caselaw that may be relevant to the issues set out, and:

a. The affidavit of Ted Smith;

b. The affidavit of Kim Bialkowski;

c. The affidavit of Robin Dyke;

d. The affidavit of Julia Furstenau;

e. The affidavit of Mark Miller;

f. The affidavits, reports and/or testimony of expert witnesses to be identified;

g. The affidavits and/or viva voce testimony of the affiants above and such other and further patient-members of the Petitioner that the Court will accept;

h. Such other and further evidence as the Petitioner may adduce and the Court will accept.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 2d DAY OF MAY, 2023 BY:

____
KIRK TOUSAW, Counsel to Petitioner

To be completed by the court only:

Order made

in the terms requested in paragraphs [specify] of Part 1 of this notice of application

with the following variations and additional terms:

[specify]

Date: [month, day, year]

Signature of ______________________________

Judge Master