FEDERAL COURT OF APPEAL
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FEDERAL COURT OF APPEAL

BETWEEN:

TRUEHOPE NUTRITIONAL SUPPORT LIMITED, and
DAVID HARDY

APPELLANTS

and

THE ATTORNEY GENERAL OF CANADA and
THE MINISTER OF HEALTH OF CANADA

RESPONDENTS

APPELLANTS' MEMORANDUM OF FACT AND LAW

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PART I: STATEMENT OF FACTS

Overview

1. The *Food and Drug Act* ("FDA") grants food inspectors the power to seize and detain indefinitely without warrant any drug or article that the inspector believes on reasonable grounds contravenes or is involved in the contravention of the FDA or its regulations (the "Seizure Power").

2. The Seizure Power infringes ss.7 and 8 of the *Canadian Charter of Rights and Freedoms* (the "Charter"), and it should be declared to be of no force and effect pursuant to s.52 of the Charter.

3. In this case, FDA inspectors purportedly exercising the Seizure Power seized a medicinal drug being shipped to the personal appellant, Hardy, which was intended for treatment of his schizophrenic son, to the corporate appellant Truehope, and to customers of Truehope who suffer from mental illnesses. The trial judge found that the seizure had both a criminal law purpose (to gather evidence to support the criminal prosecution of Hardy and Truehope) and an administrative law purpose (to interdict drugs that contravened the FDA).

4. The seizure to gather evidence was not authorized by law because s.23(1)(d) does not grant criminal law seizure powers. In the alternative, if s.23(1)(d) grants the power to make criminal law seizures to gather evidence, the Seizure Power is constitutionally deficient under s.8 of the Charter because the FDA fails to require prior judicial authorization for such a seizure.

5. When used for administrative seizures, the Seizure Power is constitutionally deficient under ss.7 and 8 of the Charter because the FDA does not require notice to be given to persons, such as Hardy and Truehope, from whom the drug is seized, and because the FDA does not provide a means for such persons to apply for the release of medically necessary drugs.

6. Sections 7 and 8 of the Charter afford constitutional protection to medical autonomy, bodily integrity and psychologically integrity. State deprivation of medicinal

drugs undermines those interests. Seizures of medicinal drugs can reasonably be expected to result in physical harm and severe psychological stress, even if the drugs are only perceived to be medically necessary.

7. As a result of these constitutional deficiencies, the Seizure Power, even when used simply to stop non-compliant drugs from entering the market, is an unreasonable law under s.8 of the Charter. The statutory deficiencies infringe Hardy and Truehope's right under s.8 of the Charter to be free from unreasonable seizure.

8. Hardy and Truehope have standing because they were targeted by the Respondent for criminal investigation, and because their property was seized. Hardy additionally has standing because the seizure of drugs that are medically necessary to treat Hardy's son's mental illness caused Hardy significant emotional and psychological distress. The trial judge erred in the application of s.7 by failing to objectively recognize Hardy's distress as a Charter deprivation.

9. This is not a representative claim. The Appellants are not and have never claimed that they filed the underlying action to give voice to the Charter claims of or seek remedies for people other than themselves. They have come to the Court to challenge the Respondent's interpretation of s.23(1)(d) of the FDA and to challenge the constitutional validity of s.23(1)(d) of the FDA. They do so because the law has affected them directly and personally.

10. When challenged as to their constitutional validity, statutes must be characterized with reference to their purpose and effect. The effect of the statutory Seizure Power may be demonstrated by the Appellants not only through making hypothetical arguments, but demonstrating with evidence what effect the EMP seizure had on members of the public. It is beyond dispute that Charter issues must be properly contextualized with evidence. Evidence of the effect of the Seizure Powers also illustrates of the type of submissions Hardy and Truehope and others would have made if there had been a post-seizure process to secure the release of the seized drug.

11. The so-called "standing" issue is a malapropism and a red herring. The hearing judge was dismayed with the volume of evidence tendered and reacted unfortunately by ruling it inadmissible, despite its clear relevance to characterizing the profound effect of the statutory provision on the lives of those from whom medicinal drugs have been seized.

CONCISE STATEMENT OF FACT

A Recommended Approach to the Voluminous Appeal Book

12. This appeal primarily addresses the trial judge's legal analysis and application of the law, rather than the trial judge's statement of the facts. The Appellants respectfully recommend to the Court a review of the Affidavit of David Hardy. The remaining materials in the Appeal Book support, reinforce and amplify his account of the seizures.

Appeal Book, Vol.3, Tab 8

The Appellants and The Drug, EMP

13. The personal Appellant, David Hardy ("Hardy"), is a co-founder and operating mind of the corporate Appellant, Truehope Nutritional Support Limited ("Truehope"). Truehope is a Canadian non-profit company based in Raymond, Alberta, which distributes a drug, EMPowerPlus ("EMP"), and runs a monitoring and management program known as the Truehope Program. Consumers cannot access EMP unless they subscribe to the Truehope Program.

Appeal Book, Vol.3, Tab 8, p.386, 392

14. EMP is a nutrient and mineral supplement used to treat serious mental health conditions, including depression, bipolar disorder, attention deficit hyperactive disorder and schizophrenia. The Appellants market EMP as a potential treatment against mental health conditions on the footing that those disorders are often manifestations of nutrient and mineral deficiencies.

Appeal Book, Vol.3, Tab 8, p.392-5

15. Hardy's son, Landon, born in 1985, suffers from schizophrenia and takes EMP to treat his illness. EMP alleviates his symptoms. Pharmaceuticals other than EMP cause him undesirable side-effects. If Hardy's son stops taking EMP, he becomes psychotic

and exhibits bizarre anti-social behaviour that has resulted in his involuntary committal to a psychiatric facility.

Appeal Book, Vol.3, Tab 8, p.394-6; Vol.6, Tab 10, p.1570-6

16. In addition to Hardy's son, approximately 3,000 Canadians were being managed on EMP by Truehope at the time of the seizure. Hardy believes in the effectiveness of EMP to treat their mental health conditions. EMP has objectively enhanced the mental health of a large number of EMP consumers. The Appeal Book contains many letters from EMP users, their doctors and their relatives attesting to the efficacy of EMP.

Appeal Book, Vol.3, Tab 8, pp.393-4; Vol.4, Tab 22, pp.793-102; Vols.7 and 8

17. The Appeal Book contains conflicting scientific claims that this appeal need not necessarily reconcile: the Respondent's experts say that EMP may be no better than a placebo and contain high levels of vitamins that may be dangerous if consumed indefinitely; and the Appellants' experts say that EMP is much more effective than a placebo. There is no dispute, however, that the Appellants Hardy and Truehope and the consumers of EMP believe in the effectiveness of EMP, and that EMP works for at least some consumers.

Appeal Book, Vol.3, Tab 8, p.393; Vol.3, Tabs 10, 11, 1210; Vol.4, tab 22, pp.793-1021; Vol.10, Tab 19, p.2994; Vol.11, Tab 20, p.3157, 3173, 3260; Vol.15, Tab 32

18. At the time of the seizure, EMP was not authorized for sale in Canada under the FDA. It did not have a Drug Identification Number and the process to obtain a DIN was ill-suited to a 'natural health' product like EMP. It is an offence under s.3 of the FDA to market or import for sale in Canada an unauthorized drug as an effective treatment for conditions listed in FDA Schedule A. It is not in dispute that Hardy and Truehope's marketing and importation of EMP appeared on its face to be a violation of s.3 of the FDA. Bringing EMP into full compliance with the FDA would have been almost impossible.

Appeal Book, Vol.3, Tab 8, pp.401-3; Vol.3, Tab 19, pp.781-7; Vol.3, Tab 21, pp.791-2; Vol. 9, Tab 13, pp.2343 and 2348

19. The Respondent did not take the potential for psychological or bodily harm to consumers, including Hardy and his family, into account in determining whether to

exercise the Seizure Power by seizing and retaining EMP. The Respondent was aware that consumers of EMP considered it necessary to their mental health.

> *Appeal Book, Vol.10, Tab 18, pp.2792, 2795, 2806-12, 2835, 2856-7, 2863, 2904;* Vol.11, Tab 23, p.3421, 3432, 3436

20. Once medicinal drugs are seized, there is no statutory mechanism for the release of medicinal drugs from the Respondent's custody, even if the continued detention of the medicinal drugs will cause the death of persons deprived of those drugs. Once seized, non-compliant drugs can only be released if the drugs no longer contravene the FDA, as might happen, for example, if the drugs are relabeled or if the Respondent assigns a DIN to the drugs.

> *Appeal Book, Vol.10, Tab 18, pp.2860-1, 2886;* Vol.12, Tab 24, p.3537

21. Truehope and a sister company, Synergy Group, were prosecuted in the Provincial Court of Alberta in 2003 and 2004 for EMP-related offences under the FDA. They were acquitted on May 14, 2004 by Judge Meagher on the basis that the defendants had established the defence of necessity and the defence of due dilligence. Judge Meagher found that consumers' access to EMP was more important than the breach of the FDA, and that the Minister of Health had left Truehope and Synergy with no reasonable alternative to committing offences under the FDA. Truehope and Synergy also succeeded on the defence of due diligence. The trial judge's findings in this respect are instructive:

> [77] The Crown argued that the Defendants were responsible for creating the risk and described their conduct as a complete failure to attempt to abide by the Regulations. However, the evidence established that the Defendants, from 1996 on, developed a vitamin/mineral supplement that was effective for the treatment of some mental illnesses without the negative side-effects of medications associated with conventional psychiatric treatments. The supplement served to reduce the risk to individuals taking the supplement, provided they participated in the Truehope program. The risk that arose was in preventing these individuals from having access to the supplement or, having access to the supplement, not having access to the Truehope program. Rather than a complete failure to abide by the Regulations, the Defendants undertook extensive efforts throughout the course of 2002 and 2003 to meet with the Minister of Health and to work with the representatives of Health Canada in order to find a resolution to the problem within the existing and pending legislative and regulatory framework.

[78] On a purely objective basis, the harm inflicted in the circumstances of this case was insignificant when compared to the harm avoided. The harm avoided was clearly and unquestionably greater than the harm inflicted...

[92] The Defendants took all reasonable care that could have been expected of a reasonable person in the circumstances to comply with the requirements of Health Canada under the *Food and Drugs Act and Regulations*. The backdrop of circumstances include that it was not possible for the Defendants to obtain a D.I.N. for the supplement, that a new Natural Health Products Directorate with an approval process suited to natural health food products was about to come into force on January 1st, 2004, that their numerous efforts to obtain a resolution to the concerns of Health Canada regarding the sale and distribution of their product were being largely ignored by Health Canada, and that the thousands of individuals who had found relief from mental illness through the supplement without the negative side effects of conventional medications were relying upon them to continue to sell and distribute their product and to maintain the Truehope program. The fact that the Minister of Health in March 2004 made an agreement for the sale and distribution of the supplement and the operation of the Truehope program that continues to this day is evidence that the Defendants acted reasonably in 2003 and that there was no other reasonable legal alternative at the time. Therefore, the Defendants took all due care to comply with the *Act and the Regulations*. The Defendants have established on a balance of probabilities that the Defendants took all reasonable care to comply with the *Food and Drugs Act and Regulations* that would be expected of a reasonable person in these circumstances and are entitled to the defence of due diligence.

R. v. Synergy Group of Canada Inc., 2006 ABCP 196 (CanLII)

The 2003 Seizures

22. Health Canada inspectors seized and detained shipments of EMP from a UPS warehouse in Vancouver on April 17, 2003 and May 16, 2003, pursuant to FDA s.23(1)(d). The seized shipments were addressed to 41 individual EMP customers and were packaged together in lots addressed to Synergy Group, the sister company of Truehope.

Appeal Book, Vol.1, Tabs 4 and 5; Vol.4, Tabs 25, 26

23. The purpose of the seizures was both administrative (to ensure compliance with the FDA) and criminal (to gather evidence to support a criminal prosecution). The seized EMP was taken to Burnaby, samples of EMP were tested by the Respondent to reveal its composition, and the results of the tests were disclosed to Truehope during its prosecution. Prior to the seizure, there was a long history of interactions during which FDA inspectors threatened Truehope with prosecution.

Appeal Book, Vol.4, Tab 31, p.1057; Vol.11, Tab 23, p.3367 and 3414; Vol.11, Tab 23-5, p.3458

24. Truehope had ordered the shipment from the Utah–based supplier on behalf of the 41 individuals. But for the seizure, Truehope was entitled to take possession of the EMP shipment. Truehope was contractually obliged to distribute the EMP to the 41 individual EMP consumers. They intended to do so through UPS.

Appeal Book, Vol.3, Tab 8, pp.406-7; Vol.6, Tab 9, pp.1505-1507

25. One of the shipments was addressed personally to the Appellant Hardy and to the "David Hardy Family". It was intended for use by himself, his son and the remainder of his family. The seizure caused Hardy significant and enduring distress because he expected his son to be deprived of the only effective treatment for his mental health condition. The seizure also caused Hardy significant and enduring distress because he was responsible for ensuring the delivery of EMP to other consumers who, like Hardy's son, require EMP to treat their mental health conditions. Hardy was "very worried", "concerned that he might have to witness his children revert to the psychiatric ward", and he "took the seizure as nothing less than a threat to their lives", and "believed the detention posed a significant threat to the health and safety of [the] 21 participants and [his] family". Hardy's stress level is confirmed by his son.

Appeal Book, Vol.3, Tab 8, pp.395, 407 and 410; Vol.4, Tab 30, p.1051; Vol.4, Tab 31, p.1059; Vol.7, Tab 10, p.1575

26. Aside from the distress arising from his son's condition, Hardy expected adverse reactions from other consumers deprived of EMP. Based on the medical advice he received from prominent psychiatrists and psychologists, Hardy believed that the seizure placed the consumers of EMP, for whom he felt responsible, at risk of suicides and other serious but sub-lethal psychoses and depressive episodes. Hardy's appreciation of the risks was reinforced by suicides that had been reported as a result of EMP seizures by the Respondent. Truehope received many panicked calls from participants and this increased Hardy's sense of responsibility and stress level. Participants' panic is confirmed by the notes of calls received on a crisis line set up by the Respondent Minister.

Appeal Book, Vol.3, Tab 8, pp., 394, 407-11; Vol.5, Tabs 46 and 47; Vol.7, Tab 11, pp.1586-1967

27. Hardy, his son, and many other participants deprived by the Respondent of EMP were prepared to personally carry EMP from the US into Canada despite believing this activity constitute unlawful smuggling.

> *Appeal Book, Vol. 6, Tab 9, pp.1519-20; Vol.6, Tab 10, p.1576; Vol.7, Tab 11, p.1616, 1620, 1642, 1674, 1773, 1839, 1856*

28. Health Canada's "Interim DIN Enforcement Directive", POL-0003, effective January 1, 2001, and its "Seizure Policy", POL-0007, draw a distinction between administrative and criminal searches. The Search Policy confirms that, for seizures under the FDA, "the <u>objective</u> is to maximize control of an article deemed to be in contravention of the *Act and Regulations*, <u>*not*</u> to gather evidence for the purpose of prosecution." The Search Policy provides the following definition: "Evidentiary seizure: A seizure undertaken to obtain evidence, generally under the authority of a criminal warrant under the *Code*".

> *Appeal Book, Vol.5, Tabs 56 and 57, pp.1415-1421*

29. It is not in dispute that the seizure and detention provisions of the FDA, on the face of the provisions currently enacted, authorized the seizures. In particular, s.23(1) of the FDA provides that an Health Canada inspector may seize and detain for such time as may be necessary any article that he or she believes on reasonable grounds contravene FDA or its regulations. Section 26 of the FDA requires the inspector to release the article when he or she is satisfied that the FDA and its regulations have been complied with. The Appellants concede that there were reasonable grounds to believe that there was an ongoing contravention of the FDA and its regulations. The sole dispute is the constitutional validity of s.23(1)(d) of the FDA.

The Decision Under Appeal

30. The learned hearing judge determined that the Respondent's seizure of EMP had a criminal law investigative purpose of gathering evidence for the prosecution of Hardy and Truehope for offences under the FDA. However, the judge decided that Hardy and Truehope did not have a privacy interest in the seized shipment:

> [128] In my opinion, the following factors establish that Mr. Hardy and Truehope have no credible basis upon which to make a *Charter* complaint about the seizure: in the two years preceding the seizure there was a high degree of personal contact between Mr. Hardy and officials of Health Canada; during this period, Mr. Hardy

knew that Truehope and Synergy were acting in violation of the *FDA* and the *FDA Regulations*; Health Canada was patient in making it clear that the violations could not be disregarded and compliance with the law was required; and, most importantly, Mr. Hardy flatly refused to devise a way to put Synergy and Truehope into compliance. Thus, when all factors are considered, I find that Mr. Hardy and Truehope has no privacy right in the product seized, and, as a result, the seizure had not superadded impact on either of them.

> *Decision*, paras.126-128

31. The learned hearing judge also found, in the alternative, that if Hardy and Truehope had a privacy interest in the seized EMP, that the seizure was a "reasonable" exercise of the seizure power set out in the legislation. His reasoning is as follows:

> [129] Even if some negligible privacy interest can be found in favour of Mr. Hardy and Truehope which engages Section 8 rights, on the factors cited I find that the result is the same. In this situation, it is agreed that, since the seizure of the April shipment was conducted without a warrant, a rebuttable presumption arises that the seizure is unreasonable; if a seizure is not for an administrative purpose, the presumption is difficult to rebut (*Hunter et al. v. Southam Inc.* 1984 CanLII 33 (S.C.C.), [1984] 2 S.C.R. 145). Nevertheless, in my opinion, the presumption is rebutted on the highest standard. I find that the seizure was very reasonable for both the administrative and criminal law investigative purpose of stopping long standing illegal conduct.
>
> *Decision*, para.129

32. The learned trial judge failed entirely to articulate and apply the constitutional principle set out in *R. v. Connor* that the constitutional validity of search powers set out in legislation depends on whether those search powers are themselves reasonable, and failed entirely to grapple with the issue of prior judicial authorization. The analysis of the learned judge was confined to the issue of whether, assuming the validity of the search power, there were reasonable grounds for the exercise of the search power in all the circumstances. In other words, the learned trial judge failed to undertake an analysis of whether the seizure provisions of the FDA are constitutionally valid and therefore of no force and effect.

33. In respect of s.7, the learned trial judge dismissed the claim that the seizure violated Hardy's right to be free from infringements of his security of the person. His reasoning was as follows:

> [112] The principal impression that arises from Mr. Hardy's evidence is that he is a strong, dedicated, creative, and very determined person. At the time of the seizures he filled many roles: entrepreneur with substantial business development and management skill; visionary leader and supporter of the use of natural health products for a therapeutic purpose; challenger of government authority perceived to be unfair and uncaring; dedicated supporter of persons in need of health care; and supportive and caring father for his own unwell children.
>
> [113] The evidence of activity within each of these roles is difficult to separate. The evidence of Mr. Hardy's disappointment and frustration as a builder of a successful and trusted natural health care business in the challenging atmosphere of conflict with government regulation is difficult to separate from the evidence of his personal feelings of caring and concern for users of Empowerplus who felt threatened by the seizures.
>
> [114] I have no doubt that throughout Landon's life, Mr. Hardy suffered a great deal of emotional anxiety over his son's poor mental heath, and that the seizures produced some immediate fear for his son's safety. However, with respect to Landon's continuing access to Empowerplus after the seizures, when viewed realistically and on the basis of Mr. Hardy's own evidence, Landon's access was never in doubt. Mr. Hardy knew of options to assure supply, and, in fact, did take up these options to ensure supply.
>
> [115] With respect to the seizures, Mr. Hardy's resilience is impressive. His immediate response was to help facilitate and manage a very successful campaign with Health Canada. Indeed, in an effort to secure access into the future, as a principal in TrueHope and as an Applicant in these proceedings, he has fought hard during the past six years to bring his health care concerns to hearing through the present Application.
>
> [116] Therefore, given Mr. Hardy's proven strong character, and given the complexity of the factors in play in the history of TrueHope's and Mr. Hardy's experience with Health Canada leading to the seizures as described, I cannot find that the test for Mr. Hardy's Section 7 challenge has been met; I cannot find that the seizures, understood in context, had a serious and profound effect on Mr. Hardy's psychological integrity.
>
> [117] Thus, I dismiss Mr. Hardy's Section 7 *Charter* claim.
>
> *Decision*, paras.112-7

34. In challenging the constitutional validity of the Seizure Power, the Appellants argued for a characterization of the purpose and effect of the relevant provisions of the FDA. The Appellants argued that proper construction of the Seizure Powers should be informed by the effect of the exercise of the Seizure Powers on the consumers of the drug, who believe the drug to be indispensable to their mental health.

35. To demonstrate the effect of the Seizure Powers, the Appellants introduced expert evidence of the benefits of EMP, expert evidence of harm to consumers flowing from deprivation of EMP, evidence of consumers of EMP of their perceptions of benefits of EMP and risks of harm resulting from deprivation of EMP. The learned trial judge interpreted this evidence to be an attempt by the Appellants to lay claim to the Charter rights of non-parties.

PART II: ISSUES ON APPEAL

36. The issues on appeal are as follows:

a. The seizure in this case infringed the Charter rights of the Appellants, either because the seizure was not authorized by law or because the law was unreasonable.

b. No true issue of standing arises in this case.

PART III: SUBMISSIONS

The Seizure Power

37. The first step in reviewing a statutory provision for Charter compliance is to correctly interpret the statutory provision and in particular its purpose and scope.

R. v. Sharpe, 2001 SCC 2, [2001] 1 S.C.R. 45 at para.32

38. The FDA provides health inspectors with the power to seize and detain any article related to a contravention of the FDA (the "Seizure Power"). The Seizure Power is intended to implement a larger regulatory framework for medicinal drugs and health products.

39. The Seizure Power under the FDA is set out as follows in s.23:

> 23.(1) Subject to subsection (1.1), an inspector may at any reasonable time enter any place where the inspector believes on reasonable grounds any article to which this Act or the regulations apply is manufactured, prepared, preserved, packaged or stored, and may…
>
> (d) seize and detain for such time as may be necessary any article by means of or in relation to which the inspector believes on reasonable grounds any provision of this Act or the regulations has been contravened.

40. The FDA and its regulations provide for many kinds of contravention, ranging from the trivial to the severe. One of the central prohibitions is found in s.3 of the FDA:

> 3.(1) No person shall advertise any food, drug, cosmetic or device to the general public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.
>
> 3.(2) No person shall sell any food, drug, cosmetic or device
>
> (a) that is represented by label, or
>
> (b) the person advertises to the general Public as a treatment, preventative or cure for any of the diseases, disorders or abnormal physical states referred to in Schedule A.

41. Schedule A to the FDA lists a number of significant health conditions including depression, anxiety, heart disease, arthritis, cancer, etc.

42. The FDA also creates a comprehensive set of labeling and packaging requirements, the contravention of which is prohibited under s.9:

> 9.(1) No person shall label, package, treat, process, sell or advertise any drug in a manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character, value, quantity, composition, merit or safety.
>
> 9.(2) A drug that is not labeled or packaged as required by, or is labeled or packaged contrary to, the regulations shall be deemed to be labeled or packaged contrary to subsection (1).

43. The term "drug" is defined as follows by s.2 of the FDA:

> "drug" includes any substance or mixture of substances manufactured, sold or represented for use in
>
> (a) the diagnosis, treatment, mitigation or prevention of a disease, disorder or abnormal physical state, or its symptoms, in human beings or animals,
>
> (b) restoring, correcting or modifying organic functions in human beings or animals...

44. Labelling and packaging regulations for "drugs" under the FDA are voluminous and byzantine. "Drugs" require a Drug Identification Number and acquisition of a DIN is a complicated and expensive process. Manufacturers require an FDA licence for making "drugs". Any breach of these requirements is a statutory or regulatory contravention sufficient to authorize seizure.

45. The FDA creates a criminal offence under s.31 for any breach of the Act or its regulations. The offence is punishable by a fine of up to $5,000.00 and imprisonment for a term of up to three years. In interpreting the purpose and effect of s.23(1)(d), it may be important to recognize that the word "contravention" is synonymous with the word "offence".

46. Taking the above provisions together, then, the Seizure Powers allow for seizure, among other things, of drugs used and held out to treat serious health conditions. Indeed, the drugs seized in this case were used and held out to treat serious health conditions.

47. There is no statutory process for an individual to seek the return of medically necessary drugs seized pursuant to s.23(1)(d). Section 26 is a related provision that does nothing for the people from whom the drugs have been seized:

> 26. An inspector who has seized any article under this Part shall release it when he is satisfied that all the provisions of this Act and the regulations with respect thereto have been complied with.

48. There is no provision requiring inspectors to give notice to a person whose property has been seized under s.23(1)(d) of the FDA.

49. The FDA contains no requirement that the Respondent must obtain prior judicial authorization for the seizure. The search warrant process under s.487 of the *Criminal Code* provides for search warrants for searches and seizures where there are reasonable grounds in respect of any Act of Parliament, which includes the FDA.

The Criminal Purpose Seizure: Prior Judicial Authorization

50. The learned hearing judge made a finding of fact that the seizure by FDA inspectors had the criminal law purpose of gathering evidence to use in prosecuting Hardy and Truehope. The seized items were moved to a secure storage locker, samples of the drug were taken for analysis, tests were performed, Certificates of Analysis were created, and a criminal prosecution against Truehope was prosecuted through to acquittal.

51. The Appellants do not take issue with the hearing judge's finding of fact that the seizures' purpose was to gather evidence for use in a criminal prosecution. Even if that

finding was one of mixed fact and law, the standard of review is palpable and overriding error.

Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235 at paras.30-31, 36-37

52. The Appellants say that s.23(1)(d) of the FDA does not authorize seizures for the purpose of gathering evidence to be used in a criminal prosecution. Alternatively, if s.23(1)(d) authorizes seizures for use in prosecutions, then s.23(1)(d) is constitutionally invalid because it does not require prior judicial authorization.

53. In the Appellant's submission, Parliament has already provided a Charter-compliant means to gather evidence for criminal prosecution for criminal FDA offences. Section 487 of the Criminal Code provides for search warrants to be issued in respect of offences against any Act of Parliament, which includes the FDA. Because there is already a criminal seizure power under s.487 of the Code, it is unnecessary to interpret s.23(1)(d) of the FDA to authorize criminal purpose searches and seizures. Criminal law searches and seizures are authorized by Parliament where prior judicial authorization is obtained under s.487 of the Criminal Code.

54. Section 23(1)(d), judging by its placement within a set of administrative powers to inspect articles and take copies of document, etc., appears to have been intended to provide FDA inspectors with the power to inspect and seize items to prevent the ongoing contravention of the FDA by keeping non-compliant goods off the market and away from consumers.

55. Section 21 of the FDA permits the Minister to appoint inspectors and inspectors are granted powers under s.23. Under s.22, inspectors must produce certificates on demand if their authority is questioned. Peace officers and public officers as defined by the Criminal Code are not permitted to exercise powers under s.23 of the FDA unless, in addition to being peace officers, they are also certified by the Ministers as inspectors. If Parliament had intended s.23 to create a criminal law search and seizure power, surely police officers would have been granted authority to exercise that power.

56. In the interests of candour, the Appellants acknowledge that at the hearing below, the appellants argued, backed by *C.E. Jamieson*, which appeared to be binding authority,

finding was one of mixed fact and law, the standard of review is palpable and overriding error.

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56. In the interests of candour, the Appellants acknowledge that at the hearing below, the appellants argued, backed by *C.E. Jamieson*, which appeared to be binding authority,

that s.23(1)(d) authorized searches only for the purpose of gathering evidence for use in a criminal prosecution under s.31 of the FDA. Muldoon, J. decided primarily on federalism grounds that the sole purpose of s.23(1)(d) was to authorize criminal searches. This position was backed by the observation in *R. v. Jarvis* that in most cases, though not all, if an offence is reasonably thought to have occurred, it is likely that the criminal investigation function is triggered.

> *C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General)* (1987), [1988] 1 F.C. 590, [1987] F.C.J. No. 826 (F.T.C.)
>
> *R. v. Jarvis*, 2002 SCC 73; [2002] 3 S.C.R. 757 at para.89

57. However, the decision under appeal concluded that *C.E. Jamieson* is not binding authority. There are accordingly conflicting decisions from the courts below regarding the purpose of s.23(1)(d), and it falls to this Court to characterize s.23(1)(d) of the FDA as having a criminal purpose, an administrative purpose, or both.

58. The Appellant elects on this appeal to take the position that the hearing judge erred in finding that Parliament's intention in enacting s.23(1)(d) was to authorize criminal law searches and seizures. In the submission of the Appellants, s.23(1)(d) authorizes administrative seizures, not to gather evidence, but only to take drugs off the market if there is some concern about regulatory compliance.

59. The alternative, that is, the conclusion that s.23(1)(d) enacts a criminal evidence-gathering power, leads via *Hunter v. Southam* to the conclusion that s.23(1)(d) is constitutionally invalid.

60. Section 8 of the Charter requires prior judicial authorization for a criminal search. This doctrine has two aspects: "prior" and "judicial". The requirement of "prior" authorization is the requirement that the balance of interests between the government interest in gathering evidence and the individual's interests in being left alone is to be assessed prior to the search:

> ... a *post facto* analysis would, however, be seriously at odds with the purpose of s.8. That purpose is, as I have said, to protect individuals from unjustified state intrusion upon their privacy. That purpose requires a means of preventing unjustified searches before they happen, not simply of determining, after the fact, whether they ought to have occurred in the first place. This, in my view, can only

be accomplished by a s system of prior authorization, not one of subsequent validation.

> A requirement of prior authorization, usually in the form of a valid search warrant, has been a consistent prerequisite for a valid search and seizure both at common law and under most statutes. Such a requirement puts the onus on the state to demonstrate the superiority of its interest to that of the individual. As such it accords with the apparent intention of the *Charter* to prefer, where feasible, the right of the individual to be free from state interference to the interests of the state in advancing its purposes through such interference.
>
> I recognize that it may not be reasonable in every instance to insist on prior authorization in order to validate governmental intrusions upon individuals' expectation of privacy. Nevertheless, where it is feasible to obtain prior authorization, I would hold that such authorization is a precondition for a valid search and seizure.
>
> *Hunter v. Southam*, [1984] 2 S.C.R. 145 at p.160

61. The requirement that prior authorization be "judicial" means that the person granting prior authorization for the search must be capable of "acting judicially" by making a neutral and impartial decision:

> The purpose of a requirement for prior authorization is to provide an opportunity, before the event, for the conflicting interests of the state and the individual to be assessed, so that the individual's right to privacy will be breached only where the appropriate standard has been met, and the interests of the state are thus demonstrably superior. For such an authorization procedure to be meaningful it is necessary for the person authorizing the search to be able to assess the evidence as to whether the standard has been met, in an entirely neutral and impartial manner. At common law the power to issue a search warrant was reserved for a justice... The person performing this function need not be a judge, but he must at a minimum be capable of acting judicially....
>
> Under the scheme envisaged by s.10 of the *Combines Investigation Act* it is clear that the Director exercises administrative powers analogous to those of the Minister under s.231(4) of the *Income Tax Act*. They too are investigatory rather than adjudicatory, with his decision to seek approval for an authorization to enter and search premises equally guided by considerations of expediency and public policy...
>
> It is rather a conclusion that the administrative nature of the Commissioner's investigatory duties (with its quite proper reference points in considerations of public policy and effective enforcement of the Act) ill-accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state.
>
> *Hunter v. Southam*, [1984] 2 S.C.R. 145 at p.162-4

62. The requirement for prior judicial authorizations applies to both searches and seizures. A seizure under s.8 is the taking of a thing from a person by a public authority without that person's consent. Here, there was no consent and none could be implied from the circumstances.

R. v. Dyment, [1988] 2 S.C.R. 417 at para.26

63. It would appear that the Respondent is already well aware of the requirement for prior judicial authorization for criminal enforcement purposes. In its own Search Policy, the Respondent confirms that its inspectors should generally obtain a warrant under the *Criminal Code* to obtain evidence for the purpose of a prosecution.

Appeal Book, Vol.5, Tabs 56 and 57, pp.1415-1421

64. It is insufficient for the Respondent to say that its criminal investigations could be conducted in compliance with the *Charter*. If Parliament wished to enact a criminal law search power under the FDA, it could easily comply with the Charter by enacting a requirement for prior judicial authorization.

Hunter v. Southam, [1984] 2 S.C.R. 145 at p.153

65. The conclusion that s.23(1)(d) creates a criminal law search and seizure power runs contrary to the principle that if there are two interpretations of a statutory provision, one of which is Charter-compliant and the other one of which is not Charter-compliant, the Courts are to prefer the interpretation that ensures the compliance of the provision with the Charter:

> Where a statute is open to more than one interpretation, one of which is constitutional and the other of which is not, the interpretation which is consistent with the constitution should be adopted

R. v. Bershaw, [1995] 1 S.C.R. 254 at para.29

66. In this case, Parliament should be presumed to know the law, especially trite law like *Hunter v. Southam*, the effect of which the Respondent acknowledges in its Search Policy. If we accept that Parliament intended to comply with the Constitution, we are left with a purely administrative seizure power under s.23(1)(d). In that case, the Respondent's criminal purpose seizure, which was purported to be authorized by s.23(1)(d), infringes s.8 of the Charter because it was not authorized by the law relied upon.

R. v. Collins, [1987] 1 S.C.R. 265, 1987 CanLII 84 at para.23

67. If, notwithstanding the arguments above, this Court finds that s.23(1)(d) is intended by Parliament to authorize seizures for the purpose of gathering evidence for criminal prosecutions, then s.23(1)(d) infringes s.8 of the Charter because it does not require prior judicial authorization for the search and seizure. In that case, the seizure infringes s.8 because the law itself is unreasonable.

68. The Respondent's recognition in its own policy of the requirement to obtain a warrant in this context for a criminal law seizure supports the conclusion that that are no exceptional circumstances that would justify a seizure in the absence of prior judicial authorization.

69. The Appellants submit that the more elegant approach is for this Court to find that Parliament's intention accorded with the law as set out in *Hunter v. Southam.*

70. In either event, the criminal purpose seizures under appeal infringed s.8 of the Charter. Section 23(1)(d) either does not authorize seizures to gather evidence or else s.23(1)(d) is constitutionally invalid.

The Administrative Seizure: Once the Respondent takes Medicinal Drugs it Cannot Give them Back

71. The FDA authorizes the seizure of drugs, including medically necessary drugs. The seizure of medically necessary drugs can be expected to cause distress to those from whom they are seized. The deprivation of medically necessary drugs restricts medical choices and derogates from medical autonomy. These interests are recognizable as Charter-protected interests.

72. Hardy and Truehope argues on this appeal that if Parliament wishes to authorize the taking of medicinal drugs, then Parliament must, as a constitutional minimum, provide a time-sensitive process for an individual to attempt to secure the return of drugs that are medically necessary. There must be a statutory mechanism for adjudicating the balance between technical compliance with the FDA regulations and the health and autonomy of the individual.

Reading Section 7 and 8 Interests Together in Statutory Context

73. Section 8 of the Charter of Rights and Freedoms guarantees the right to be free from unreasonable search and seizure. Three conditions must be met for a search or seizure to be reasonable under s.8: (a) it must be authorized by law; (b) the law itself must be reasonable; and (c) the manner in which the search was carried out must be reasonable. In relation to the administrative law seizure, this appeal concerns itself only with branch (b): the reasonableness of the legislation itself. The learned hearings judge erred by failing to address this issue.

> *R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CanLII 84 at para.23
>
> *R. v. Stillman*, [1997] 1 S.C.R. 607, 1997 CanLII 384 at para.25

74. The question of whether a law itself is reasonable must be assessed in context. In *R. v. McKinlay Transport Ltd.*, 1990 CanLII 137 (S.C.C.), the Court reiterated the need for a flexible and purposive test. Wilson J. stated:

> Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful.
>
> *R. v. McKinlay Transport Ltd*, [1990] 1 S.C.R. 627, 1990 CanLII 137 at p.645
>
> *R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554 at para.26

75. A thorough analysis of the reasonableness of the Seizure Power in this case may be conducted under ss.8 of the Charter, not because s.7 is not triggered, but because s.8 provides a more specific and complete illustration of the s.7 rights that arise in this particular context, making a s.7 analysis redundant. As set out in *R. v. Mills*,

> Given that s.8 protects a person's privacy by prohibiting unreasonable searches or seizures, and given that s.8 addresses a particular application of the principles of fundamental justice, we can infer that a reasonable search or seizure is consistent with the principles of fundamental justice. Moreover, as we have already discussed, that principle of fundamental justice include the right to make full answer and defence. Therefore, a reasonable search will be one that accommodates both the accused's ability to make full answer and defence and the complainant's privacy right.
>
> *R. v. Mills*, [1999] 3 S.C.R. 668 at paras.88-88

76. Constitutionally recognized interests in medical autonomy, psychological integrity and bodily integrity, about which more will later be said, can be incorporated into the s.8 analysis. This notion has a long lineage. As far back as *Hunter v. Southam*, the Court noted, in the context of rejecting a suspicion-based standard:

> The problem is with the stipulation of a reasonable belief that evidence may be uncovered in the search. Here again it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the state in such intrusions come to prevail over the interests of the individual in resisting them...
>
> ... Where the state's interest is not simply law enforcement as, for instance, where state security is involved, or where the individual's interest is not simply privacy as, for instance, when the search threatens his bodily integrity, the relevant standard may well be a difference one.
>
> *Hunter v. Southam*, [1984] 2 S.C.R 145 at p.167-8

77. Section 8 is grounded in man's physical and moral autonomy. Protection from search and seizure is essential for the well-being of and autonomy of the individual. At its core, s.8 protects the individual's right to be left alone by the state.

> *R. v. Dyment*, [1988] 2. S.C.R. 417 at para.17
>
> *Hunter v. Southam*, [1984] 2 S.C.R. 145 at p.159

Constitutional Interests Affected by the Seizure

78. This is not a search case in which the Appellant seeks to shelter information from the watchful eyes of the state. This is a seizure case in which state-imposed deprivation of a physical substance, EMP, has had profound effects on persons, including Hardy. To understand how the seizure of his EMP affected Hardy, it is necessary to examine, in the context of Hardy's life, the effects of the deprivation on the people around Hardy.

79. Hardy's personal EMP was seized. His name was on the bill of lading. His EMP was intended to be used by himself, his son for treatment of his mental illness, and his other children. Hardy's son was relying on his father to produce the EMP for use as a medicinal drug. The seizure interfered with Hardy's right to be left alone. The seizure imposed on him significant anxiety and psychological stress.

80. In *New Brunswick v. G.(J.)*, Lamer, C.J.C, writing for all members of the Court, held security of the person protects against government action that has a "serious and profound effect on a person's psychological integrity":

> For a restriction of security of the person to be made out, the impugned state action must have a serious and profound effect on a person's psychological integrity...
>
> The effects of state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.
>
> *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, 1999 CanLII 653

81. *New Brunswick v. G.J.* deals specifically with the context of interference with family life:

> State removal of a child from parental custody pursuant to the state's *parens patriae* jurisdiction constitutes a serious interference with the psychological integrity of the parent. Besides the obvious distress arising from the loss of companionship of the child, direct state interference with the parent-child relationship, through a procedure in which the relationship is subject to state inspection and review, is a gross intrusion into a private and intimate sphere... A combination of stigmatization, loss of privacy, and disruption of family life are sufficient to constitute a restriction on security of the person.
>
> *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999 3 S.C.R. 46, 1999 CanLII 653 (S.C.C.) at 3

82. The Respondent did not deprive Hardy of a normatively neutral object, such as a shipment of soccer balls or a socket wrench. The Respondent deprived Hardy of what Hardy reasonably considered to be a medically necessary treatment for his son's mental illness. The Respondent intended the deprivation of the medical treatment to be permanent. Hardy believed, quite reasonably, that the deprivation of EMP would cause the return of his son's bizarre and destructive symptoms, and would result in his involuntary committal to a psychiatric ward.

83. In *G.(J.)*, it was specifically noted that the effect of government action is to be assessed in relation to a person of "reasonable sensibilities". Unusual psychological vulnerability or, alternatively, psychological resilience and stoicism, are not to be factored into this analysis. The question to be asked is how a reasonable father would be

psychologically affected by the news that the government intended permanently to deprive his son of the only feasible treatment for his son's mental illness.

84. In the decision under appeal, the learned judge erroneously relied on his finding of Hardy's high capacity for enduring stress to find that Hardy's security of the person was unaffected by the Respondent's seizure of his family's medicine. This error effectively imposed a *Charter* penalty for strength of character. It is respectfully submitted that this error should be reversed on appeal.

85. Once it is recognized that Hardy's personal interests were affected by the seizure, it is open to Hardy to argue that the FDA is constitutionally inadequate because of its effects on others. As stated by the Ontario Court of Appeal in *Parker*:

> … it is open to Parker to challenge the validity of the marijuana prohibition not only on the basis that it infringes his s.7 rights because of his particular illness, but that it also infringes the rights of other suffering other illnesses.
>
> *R. v. Parker* (2000), 188 D.L.R. (4th) 385, 2000 CanLII 5762 (Ont.C.A.) at para.80

The Effects of Seizure on Medical Autonomy

86. The Courts have repeatedly and reliably responded where government action, legislation or regulation have interfered with medical autonomy.

87. The leading decision on the intersection of medical treatment and the criminal law is *R. v. Morgentaler*. In that case, three judges wrote for the five-person majority, with Wilson J. taking the view that has come to be accepted. She held that the right to liberty, "properly construed, grants an individual a degree of autonomy in making decisions of fundamental personal importance" and "guarantees to every individual a degree of personal autonomy over important decisions intimately affecting their private lives." Beetz J. held that security of the person "must include a right to access medical treatment for a condition representing a danger to life or health without fear of criminal sanction".

> *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 1988 CanLII 90

88. Following *Morgentaler*, the Courts have embraced the notion that life, liberty and security of the person includes a degree of personal autonomy over health-related decisions. The right to choose medical treatment is fundamental to a person's dignity and

autonomy. State action which has the likely effect of impairing a person's health engages the fundamental right under s.7 to security of the person. This right is equally important in the context of treatment for mental illness.

> *R. v. Monney*, [1999] 1 S.C.R. 652, 1999 CanLII 678 at 156
>
> *Starson v. Swayze*, 2003 SCC 32, [2003] 1 S.C.R. 722 at para.75

89. The medical marijuana cases elaborate the right to choose medical treatment as an right to choose one's medicine:

> In my view, Parker has also established that the marijuana prohibition infringed the second aspect of liberty that I have identified – the right to make decisions that are of fundamental personal importance. As I have stated, the choice of medication to alleviate the effects of an illness with life-threatening consequences is a decision of fundamental personal importance.
>
> *R. v. Parker*, 184 D.L.R. (4th) 385, 2000 CanLII 5762 at para.102

90. The precept in *Parker* was upheld by the Ontario Court of Appeal again in 2003 in *Hitzig*, a case in which the Respondent administered a regulatory regime for access to medical marijuana:

> [93] Here, as in *Parker*, there is no doubt that the decision by those with medical need to do so to take marijuana to treat the symptoms of their serious medical conditions is one of fundamental personal importance. While this scheme of medical exemption accords them a medical exemption, it does so only if they undertake an onerous application process and can comply with stringent conditions. Thus, the scheme itself stands between these individuals and their right to make this fundamentally important personal decision unimpeded by state action. Hence, the right to liberty in this broad sense is also implicated by the *MMAR*...
>
> [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 marijuana 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...
>
> [99] As we have said, the right to liberty, viewed more broadly, encompasses the right to make decisions of fundamental personal importance, such as the decision to use marijuana when necessary to control symptoms of serious medical conditions.
>
> *R. v. Hitzig* (2003), 231 D.L.R. (4th) 104, 203 CanLII 30796 (Ont.C.A.)

91. The situation with EMP is the same as the situation with medical marijuana. Just as the MMAR interfered with access to medical marijuana, the seizure regime under the FDA interferes with access to EMP.

92. Delay in accessing medical treatment has been found to violate the right to life, liberty and security of the person. In *Chaoulli v. Quebec (Attorney General)*, delay in obtaining medical treatment, caused by regulatory restrictions on private insurance, was found to constitute a violation of the s.7 protection of security of the person. The reasoning was as follows:

> [119] In this appeal, delays in treatment giving rise to psychological and physical suffering engage the s.7 protection of security of the person just as they did in *Morgentaler*. In *Morgentaler*, as in this case, the problem arises from a legislative scheme that offers health services. In *Morgentaler*, as in this case, the legislative scheme denies people the right to access alternative health care. (That the sanction in *Morgentaler* was criminal prosecution while the sanction here is administrative prohibition and penalty is irrelevant. The important part is that in both cases, care outside the legislatively provided system is effectively prohibited.) In *Morgentaler*, the result of the monopolistic scheme was delay in treatment with attendant physical risk and psychological suffering. In *Morgentaler*, as here, people in urgent need of care face the same prospect: unless they fall within the wealthy few who can pay for private care, typically outside the country, they have no choice but to accept the delays imposed by the legislative scheme and the adverse physical and psychological consequences this entails. As in *Morgentaler*, the result is interference with security of the person under s.7 of the *Charter*...
>
> [123] Not every difficulty rises to the level of adverse impact on security of the person under s.7. The impact, whether psychological or physical, must be serious. However, because patients may be denied timely health care for a condition that is clinically significant to their current and future health, s.7 protection of security of the person is engaged.
>
> *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791 at para.119-123

Striking the Balance Between the Administrative Objective and the Charter Protected Interests

93. This Court is required to articulate a balance between the government objective and the Charter-protected interests.

94. The Appellants say that the administrative enforcement objective of the exercise of the Seizure Power is simply to remove non-compliant drugs from the market. This

objective is intended to protect consumers from potentially dangerous drugs and from substituting hokum for efficacious and safe drugs. The non-compliant drugs that may be seized by the Respondent range from the trivially mislabeled to the lethally toxic. The non-compliant drugs may also range from the inefficacious to the life-saving.

95. On the one hand, the Appellants acknowledge that it would not be constitutionally required for the Respondent to obtain prior judicial authorization for each administrative exercise of the Seizure Power. Immediate seizure of drugs may be called for in some circumstances.

96. On the other hand, the Appellants say that s.7 and 8 require that immediate notice of the seizure be given to the persons from whom drugs are seized and a timely opportunity be provided to those persons to apply for the return of the seized goods. Timely notice and an opportunity to respond to government action or proposed government action are among the bedrock principles of administrative and constitutional fairness and fundamental justice.

97. In *Holmes v. Canada*, the Royal Bank challenged the constitutional validity of a without-notice seize-and-sell provision under the *Income Tax Act* on the basis that the lack of notice and opportunity to pay out the tax debt infringed s.8. The British Columbia Court of Appeal found as follows:

> In my opinion, the seizure of chattels under the *Income Tax Act* without notice to the taxpayer of an intention to seize the chattels and without giving the taxpayer reasonable time, following the notice, to discharge the tax debt, in circumstances where there is no reasonable ground for a belief that the taxpayer intends to avoid the payment of the tax debt, may constitute an unreasonable course of conduct and an unreasonable seizure…
>
> I think that the principle in *Lister v. Dunlop*, [1982] 1 S.C.R. 726, that a person from whom a seizure is being made under a security instrument is entitled to receive such notice of the proposed seizure as is reasonable in the circumstances, is a principle that is not confined to security instruments but applies to all seizures under contact and to all seizures under a statutory scheme that does not specifically provide otherwise, unless the person on whose behalf the seizure is made has first obtained a trial judgment under court processes that contemplate the giving of notice of the proceedings to the person from whom the goods are to be seized.
>
> *Holmes v. Canada* (1992), 90 D.L.R. (4th) 680, 1992 CanLII 4036 at p.20-21

98. In this particular context, where s.23(1)(d) of the FDA authorizes seizure of medically necessary drugs, immediate notice is necessary to avoid adverse health consequences. In *Fleming v. Reid*, the Ontario Court of Appeal considered whether the wishes of a substitute decision-maker for a mentally incompetent person not to be medicated could be overridden by the state without a hearing. The found that it could not, and that a hearing is necessary:

> A legislative scheme that permits the competent wishes of a psychiatric patient to be overridden, and which allows a patient's right to personal autonomy and self-determination to be defeated, without affording a hearing as to why the substitute consent-giver's decision to refuse consent based on the patient's wishes should not be honoured, in my opinion, violates "the basic tenets of our legal system" and cannot be in accordance with the principles of fundamental justice: Reference re s.94(2) of the Motor Vehicle Act (British Columbia), [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, at p.503 S.C.R., p.302 C.C.C.
>
> *Fleming v. Reid*, (1991), 82 D.L.R. (4th) 298. 1991 CanLII 2728 (Ont.C.A.).

99. Undue delay of medical treatment is recognized as constitutionally offensive, and should be avoided, especially if it can be simply avoided without hardship to the government. Delay in notice may, as it did in this case, deprive individuals of treatment.

> *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 34, [2005] 1 S.C.R. 791 at para.119-123

100. Moreover, it is constitutionally required for Parliament to establish a process whereby persons from whom medically necessary drugs were seized to apply on short notice for access to the drugs. This process would openly contemplate that, in some cases, a drug's non-compliance with FDA regulations would be outweighed in the balance by medical necessity of the person applying for access to the drug.

101. In essence the Appellant seeks a process akin to the Medical Marijuana Access Regulations that would create exceptions to compliance in cases of medical necessity. The result would be the same as in *Hitzig* and *Parker*. Such a scheme allows for the government to pursue its legitimate objectives without undue interference with the medical autonomy of individuals. The Ontario Court of Appeal discussed the balance to be struck as follows:

> [157] ... The state interest in strict regulation of drugs must be balanced against the risk to Parker's life and health posed by the administrative structure

> established by Parliament and the government. The state cannot hold out as a generally available defence the possibility of possessing the drug in accordance with a prescription when Parker is practically precluded from availing himself of the defence...
>
> [161] ... There may be circumstances in which the state interest in regulating the use of new drugs prevails over the individual's interest in access. This, however, is not one of those circumstances. The evidence establishes that the danger from the use of the drug by a person such as Parker for medical purposes is minimal compared to the benefit to Parker's life and health without it. ...
>
> *R. v. Parker* (2000), 188 D.L.R. (4th) 385, 2000 CanLII 5762 (Ont.C.A.) at paras.157 and 161
>
> *Hitzig v. Canada* (2003), 231 D.L.R. (4th) 104, 2003 CanLII 30796 (Ont.C.A.)

102. Aside from medical marijuana, Parliament has repeatedly demonstrated its ability and willingness to accommodate and balance the Charter interests of individuals from whom items have been seized. Section 110(4) of the Customs Act requires notice to persons from whom articles have been seized. Sections 129 to 135 of the Customs Act, for example, provide a mechanism for the return of goods seized under the Customs Act, even in circumstances where there has been a contravention of the Customs Act. There is no reason why the FDA cannot contain similar provisions.

103. The constitutional deficit cannot be remedied by changing the exercise of discretion by inspectors. The FDA does not provide inspectors with the discretion to return seized drugs to individuals, even if the ongoing detention of those drugs threaten the lives of those from whom they are seized. For the same reason, judicial review does not afford a process for the return of life-saving drugs that are not compliant with the strictures of the FDA and its regulations. The lack of procedural options for the return of medically necessary drugs infringes s.8 of the Charter.

Standing is a Non-Issue

104. No true issue of standing arising in this case. The Respondents purported to use the Seizure Power against the Appellants. The Appellants have standing to challenge the constitutionality of that seizure, including the constitutionality of the law relied on by the Respondent. Any standing issues end there. The hearing judge mischaracterized the issue of the admissibility of evidence of the effect of the law as one of standing. The trial judge also erred in law in not admitting the evidence of the effect of the law.

105. The Appellants challenge the constitutional validity of s.23(1)(d) of the FDA, seeking a declaration that s.23(1)(d) is of no force and effect under s.52 of the Charter. To have standing to challenge the constitutional validity of a statute, an applicant must establish "a direct personal interest in the impugned provisions". The test was set out this way in *Finley*, referring to the general rule of a personal stake in the outcome of the litigation:

> A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails.
>
> *Finley v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at para.22
>
> *Downtown Eastside Sex Workers United Against Violence*, 2010 BCCA 439 (CanLII) at paras.29-31
>
> *Holmes v. Canada* (1992), 90 D.L.R. (4th) 680, 1992 CanLII 4036 (B.C.C.A.) at p.23

106. Charter issues should not be decided in an evidentiary vacuum. Charter issues should be contextualized by evidence. Charter issues should not be decided solely on the basis of the effect of legislation on one individual. The case law is replete with cases in which parties with standing are said to be required to lead broad evidence of the effect of legislation on the public at large. For example, in *R. v. Parker*, the Ontario Court of Appeal unambiguously stated:

> ... it is open to Parker to challenge the validity of the marijuana prohibition not only on the basis that it infringes his s.7 rights because of his particular illness, but that it also infringes the rights of other suffering other illnesses.
>
> *R. v. Parker* (2000), 188 D.L.R. (4th) 385, 2000 CanLII 5762 (Ont.C.A.) at para.80
>
> see also *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras.81, 82 and 88; *Canadian Egg Marketing Agency v. Richardson*, [1998] 2 S.C.R. 157 at paras.91, 97, 99 and 100

107. In *Danson*, for example, the Court distinguished between adjudicative facts, namely, those that concern the immediate parties, and legislative facts, namely, those that establish the purpose and background of legislation, including its social, economic and cultural context. The Court most unambiguously stated the following, *contra* the view of the hearing judge below:

> In general, any *Charter* challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.
>
> *Dawson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 at 23
>
> See also *MacKay v. Manitoba*, [1989] 2 S.C.R. 357

108. The hearing judge erred in paragraph 72 by conflating and confusing the rule for private interest standing with the rules for admissibility of evidence in s.52 Charter litigation. In effect, the judge below found that the appellants lacked standing to rely on evidence that the Charter rights of others were violated. His decision was as follows:

> [72] In conclusion, I find that Counsel for the Respondent' argument on the law of standing is correct. Thus, I find that Mr. Hardy's standing can only be used for the purpose of bringing his own personal Section 7 and Section 8 challenges on the evidence of the direct impact the seizures had upon him. I make a similar finding with respect to TrueHope's Section 8 challenge.

109. The hearing judge's finding in paragraph 72 distorts the meaning and purpose of the rule on private interest standing. In law, a litigant has or does not have standing to <u>seek a remedy</u>. It is, with respect, semantically disordered to suggest that a litigant may or may not have standing <u>to rely on evidence</u>.

110. The rules determining the evidence on which a party may rely is part of the law of evidence and is governed primarily by the rule that evidence must be relevant to be admitted for consideration. In Charter litigation where a remedy is sought under s.52, it does a disservice to the judiciary as the guardian of the Charter, and it is inconsistent with binding authority, to decide that contextualizing evidence of the effect of a statute on members of the public is inadmissible.

111. In the Appellants' submission, the law is well-served by a clear separation between the law of standing and the law of evidence. Conflating these procedural areas can only do both of them harm.

PART IV: NATURE OF ORDER SOUGHT

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112. On June 25, 2010, Madam Justice Layden-Stevenson made an order that this appeal be adjudicated in two stages: the first stage will address the issues of (a) whether the Appellant's Charter rights have been infringed and (b) whether the Appellants "lack standing to rely on evidence of the infringement of Charter rights of others", and the second stage will address remedies.

113. The Appellants seek the following orders:

a. A declaration that s.23(1)(d) of the FDA does not authorize criminal law searches for the purpose of gathering evidence for use in the prosecution of offences, and a declaration that the criminal law seizure in this case was not authorized by law and therefore an unreasonable seizure;

b. A declaration that s.23(1)(d) of the FDA infringes the s.8 rights of the Appellants because:

    (a) Section 23(1)(d) does not provide for immediate notice to the persons from whom drugs are seized; and

    (b) Section 23(1)(d) does not provide a timely process for affected individuals to seek the return of medically necessary drugs;

c. A declaration that s.23(1)(d) is of no force and effect; and

d. An order requiring the Respondents either to return the seized goods to the Appellants or to provide the Appellants within a reasonable time with a satisfactory opportunity to argue for the return of the seized goods.

114. The Appellants acknowledge that the relief sought in sub-paragraphs (c) and (d) above are not available at this stage of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29th OF OCTOBER, 2010

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PART V: LIST OF AUTHORITIES

Para.	Case
106	*Canadian Egg Marketing Agency v. Richardson*, [1998] 2 S.C.R. 157.
56	*C.E. Jamieson & Co. (Dominion) v. Canada (Attorney General)* (1987), [1988] 1 F.C. 590, [1987] F.C.J. No. 826 (F.T.C.).
92, 99	*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791.
107	*Dawson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086.
105	*Downtown Eastside Sex Workers United Against Violence*, 2010 BCCA 439.
105	*Finley v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607.
98	*Fleming v. Reid* (1991), 82 D.L.R. (4th) 298, 1991 CanLII 2728 (Ont. C.A.).
99, 105	*Holmes v. Canada* (1992), 90 D.L.R. (4th) 680, 1992 CanLII 4036 (B.C.C.A.).
51	*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.
60, 61, 64, 76, 77	*Hunter v. Southam*, [1984] 2 S.C.R. 145.
107	*MacKay v. Manitoba*, [1989] 2 S.C.R. 357.
80, 81	*New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, 1999 CanLII 653.
65	*R. v. Bershaw*, [1995] 1 S.C.R. 254.
106	*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295.
66, 73	*R. v. Collins*, [1987] 1 S.C.R. 265, 1987 CanLII 84.
62, 77	*R. v. Dyment*, [1988] 2 S.C.R. 417.
90, 101	*R. v. Hitzig* (2003), 231 D.L.R. (4th) 104, 203 CanLII 30796 (Ont. C.A.).
56	*R. v. Jarvis*, 2002 SCC 73; [2002] 3 S.C.R. 757 (S.C.C.)
74	*R. v. McKinlay Transport Ltd.*, [1990] 1 S.C.R. 627, 1990 CanLII 137.
75	*R. v. Mills*, [1999] 3 S.C.R. 668.
88	*R. v. Monney*, [1999] 1 S.C.R. 652, 1999 CanLII 678.
87	*R. v. Morgentaler*, [1988] 1 S.C.R. 30, 1988 CanLII 90.
85, 89, 101, 106	*R. v. Parker* (2000), 188 D.L.R. (4th) 385, 2000 CanLII 5762 (Ont. C.A.).
74	*R. v. Rodgers*, 2006 SCC 15, [2006] 1 S.C.R. 554.

Para.	Case
37	*R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45.
73	*R. v. Stillman*, [1997] 1 S.C.R. 607, 1997 CanLII 384.
21	*R. v. Synergy Group of Canada Inc.*, 2006 ABCP 196 (CanLII)
88	*Starson v. Swayze*, 2003 SCC 32, [2003] 1 S.C.R. 722.