Federal Court  Cour fédérale

Date: 20140716

Docket: T-1754-12

Citation: 2014 FC 708

Ottawa, Ontario, July 16, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

NICK MANCUSO, THE RESULTS COMPANY INC., DAVID ROWLAND, LIFE CHOICE LTD (AMALGAMATED FROM, ROLLED INTO, AND CONTINUING ON BUSINESS FOR, AND FROM, E.D. MODERN DESIGN LTD. AND E.G.D. MODERN DESIGN LTD.), AND DR. ELDON DAHL, AND AGNESA DAHL

Plaintiffs

and

MINISTER OF NATIONAL HEALTH AND WELFARE, ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, ROYAL CANADIAN MOUNTED POLICE, AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendants

JUDGMENT AND REASONS

INTRODUCTION

[1] The Plaintiffs have brought an action challenging certain provisions of the *Food and Drugs Act*, RSC, 1985, c F-27 [Act] on constitutional grounds, challenging the *Natural Health Products Regulations*, SOR/2003-196 [Regulations] on constitutional grounds and as exceeding the authority delegated by the Act, and claiming damages based on alleged Charter breaches and tortious conduct in the implementation and enforcement of the Act and the Regulations. This judgment relates to two motions brought in the context of that action. The Defendants have brought a motion to strike the Statement of Claim [Claim] in its entirety, or in the alternative to strike certain paragraphs that amount to the bulk of the Claim (paragraphs 1(a), 1(b), 1(c), 1(e), 2 – 29, 34, 36 and 37-100). They also seek to amend the Claim to remove all of the Defendants except Her Majesty the Queen in Right of Canada. The Plaintiffs have brought a cross-motion seeking to stay the enforcement of s. 3(1) and (2) of the Act and large portions of the Regulations pending the outcome of the action.

BACKGROUND

[2] The Plaintiffs are present or past users, manufacturers or distributors of products that fall within the definition of "natural health product" as set out in the Regulations [natural health products], which they describe as naturally occurring dietary food supplements, nutritional food supplements and vitamins. They challenge the validity and the enforcement of the Regulations and certain sections of the Act on a number of grounds, including that:

- the federal government does not have the constitutional authority to regulate natural health substances under the division of powers set out in the *Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3, reprinted in RSC 1985, App II, No 5 [Constitution Act 1867];
- Parliament never intended the definition of "drug" in the Act to apply to natural health products and therefore the Regulations exceed the authority delegated by the Act; and
- the enactment and enforcement of the Regulations and the application of certain sections of the Act to natural health products have infringed their rights under ss. 2(a), 2(b), 7, 8, 9 and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 [Charter].

[3] The Plaintiffs also allege that they have suffered damages as a result of these alleged Charter breaches as well as heavy-handed and tortious conduct by government officials and the Royal Canadian Mounted Police [RCMP] in enforcing the Act and the Regulations.

[4] With respect to the constitutional division of powers, the Claim states that Parliament has the jurisdiction to regulate any product that has a potential health risk, but Parliament cannot extend this jurisdiction to products which pose no or a *de minimis* health risk, so that the Regulations are therefore *ultra vires* the jurisdiction of Parliament (Claim, at para 16(h)).

[5] The Plaintiff Nick Mancuso [Mancuso] is a Canadian actor who says that he has, throughout his life, relied heavily on dietary food supplements and vitamins as a conscious, informed choice regarding his health. He views the free choice to use these products as part of his belief system in terms of how to maintain good health and "in general, with respect to his bodily and psychological integrity." He resists the notion that the state can "arbitrarily and selectively dictate" what dietary supplements or vitamins can be sold to him, and alleges that restrictions on the sale of natural food products and the communication of health claims about

them violate his rights under ss. 2(a), 2(b), 7 and 15 of the Charter and have caused him mental distress.

[6] The Plaintiff David Rowland [Rowland] is an advocate of "alternative" medicine who says that he has been involved for many years with the development of natural health products. A line of dietary supplements developed by Rowland – the Vitamost® line – are or were distributed by The Results Company Inc [the Results Company], another Plaintiff described as "a small family owned business." Rowland and the Results Company allege that the product and site licensing regime imposed by the Regulations – the National Products Number [NPN] licensing scheme – has severely restricted the sale of these supplements. They say the NPN regime is "oppressive and totally unnecessary" because the products are safe, and that the Regulations are "unconstitutional and ultra vires the Act."

[7] Rowland and the Results Company allege that Health Canada has refused licences for some of their products and has withheld approval for others, causing a steep decline in their business. They allege that the NPN regime is a form of censorship that prohibits the sale of natural health products and decides which health claims can be made about them, prohibiting "all other true claims." They say that "[i]n no other industry are suppliers prevented from telling their customers the truth about what their products do." They also allege that the enforcement of the Regulations has been "excessive and abusive," employing "para-military methods of enforcement." They allege that they have suffered damage to reputation and economic losses, and Rowland alleges breaches of his rights under ss. 2, 7 and 15 of the Charter "as claimed and articulated with respect to Nick Mancuso."

[8] The Plaintiff Eldon Dahl [Dr. Dahl] has been involved in importing, exporting, preparing and distributing natural health products since purchasing an existing health food store in West Vancouver in 1984. He says he is qualified as a Naturopathic Physician. The Plaintiff Agnesa Dahl [Mrs. Dahl] is his wife, and the Plaintiff Life Choice Ltd [Life Choice] is their company, which was formed from the amalgamation of companies they previously owned or controlled (E.D. Modern Design Ltd and E.G.D. Modern Design Ltd). The Dahls and the predecessor companies of Life Choice have been subject to enforcement action under the Act and the Regulations on a number of occasions, including searches and seizures dating back to 2001. In 2004, Dr. Dahl and his then company (E.D. Internal Health) were charged with 42 counts of violating the *Customs Act*, RSC, 1985, c 1 (2nd Supp.) [Customs Act] and the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]. Dr. Dahl and E.D. Internal Health were found guilty on 33 counts and received a conditional sentence and fines: *R v Dahl*, 120998, March 26th 2004 (BC Prov Ct) [*R v Dahl #1*]; *R v Dahl*, 120998-C3, May 26, 2004 (BC Prov Ct) [*R v Dahl #2*]. In early 2010, the Dahls and their company, E.G.D. Modern Design Ltd, were charged with 33 counts of violating the Act and the CDSA. The charges against the Dahls were stayed due to delay in January 2013, while E.G.D. Modern Design pleaded guilty on 11 counts (including 8 under the Act) and was sentenced to pay fines totalling $125,250: *R v Dahl*, 2013 ABQB 54 [*R v Dahl #6*]; trial excerpt from *R v Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, 100237221Q3 (Alta QB) [*R v Dahl #7*] at pp. 52-104 (Defendant's Motion Record, at 559-611).

[9] The Dahls allege violations of their rights under ss. 7, 8 and 9 of the Charter in connection with the searches and seizures preceding the charges outlined above, which they characterize as excessive and abusive, including a "heavily armed raid" resulting in the seizure

of products and a search of their home in which they allege they were unlawfully detained and a gun was pointed at Mrs. Dahl's chest. They allege that Dr. Dahl was "falsely convicted" in 2004, and that they were "falsely and maliciously charged […] and prosecuted" beginning in 2010 "for the possession and sale of perfectly safe, natural products… [which] are arbitrarily, vaguely, and overly-broadly treated as 'drugs' and falsely and maliciously enforced as such." They say that Dr. Dahl has an unwarranted criminal record "for not only something he was not responsible for, but also due to the ***ultra vires***, unconstitutional ***Regulations*** and their excessive and abusive enforcement by the Defendants' officials" (emphasis in original). The Dahls and Life Choice also allege that Health Canada issued unfounded Health Warning Bulletins on its website regarding safety concerns with Dr. Dahl's and E.G.D. Modern Design's products, without notifying them, and has refused to remove these warnings even after the products were proven to be safe.

[10] The Dahls state that they have suffered loss of reputation, mental distress, and financial losses as a result of these events. In addition to the alleged breaches of ss. 7, 8 and 9 of the Charter, the Dahls claim that they "have also had their Charter rights, as consumers, manufacturers, and distributors, personally breached under ss. 2, 7 and 15 of the Charter for the same reasons and rationale as set out with respect to Nick Mancuso and David Rowland."

[11] Finally, the Claim states that in addition to the various constitutional breaches alleged by the "biological" Plaintiffs, the corporate Plaintiffs claim breaches of the following Charter and constitutional rights:

a) the right to freedom of expression and communication as guaranteed under s. 2 of the Charter;

b) the procedural safeguards of s. 7 of the Charter in the context of (quasi) criminal prosecution and regulatory scheme;

c) the right to equality, as a structural imperative of the underlying principle of the *Constitution Act, 1867* as enunciated by the Supreme Court of Canada in *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 [*Winner*] , which right, above and beyond s. 15 of the Charter, is also involved by the biological Plaintiffs.

[12] The Defendants argue that the Claim should be struck in its entirety without leave to amend. Should any portion of it proceed, they say that the only proper Defendant is Her Majesty the Queen in Right of Canada. The Plaintiffs argue that not only should the Claim proceed but, in addition, the Court should stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action.

ISSUES

[13] The issues that arise in this proceeding are:

1. Should the Claim, or any portion of it, be struck?
2. If the Claim is struck, should the Court grant leave to amend it?
3. If any portion of the Claim is permitted to proceed, who are the proper defendants?
4. Should the Court stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action?

ARGUMENTS

Defendants' Motion to Strike the Claim

Arguments of the Defendants

[14] The Defendants argue that the Claim should be struck in its entirety without leave to amend. They say it is in fact three separate claims combined together into one unduly complex, prolix and convoluted pleading that is so undefined and broad in scope as to be judicially unmanageable. They also argue that it does not meet the basic rules of pleading in that it fails to set out a concise statement of the material facts relied upon, is replete with bald allegations and colourful rhetoric, and pleads evidence instead of material facts in many instances. The Defendants say it is not possible for them to answer the allegations contained in the pleading by preparing a statement of defence.

[15] The Defendants also argue that the Plaintiffs are asking the Court to make findings inconsistent with previous findings made by other courts in different proceedings, and are attempting to re-litigate matters that were, or ought to have been, raised in earlier proceedings. As such, they say the Claim is an abuse of process. In addition, the Defendants argue that the corporate Plaintiffs are asserting violations of Charter provisions they are not entitled to invoke, all of the Plaintiffs are seeking prerogative relief (specifically orders in the nature of prohibition) that cannot be obtained in an action, and the Claim names improper and unnecessary parties.

[16] The Defendants acknowledge that, for the purposes of this motion, the allegations set out in the Claim are deemed to be proven unless they are incapable of proof. They state that the test for striking out pleadings under Rule 221(1)(a) of the *Federal Court Rules*, SOR/98-106 [Rules] is whether it is plain and obvious, assuming the facts pleaded to be true, that the claim discloses no reasonable cause of action – that is, it has no reasonable prospect for success: *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 at para 18 [*Hunt*]; *R v Imperial Tobacco Canada Ltd*, 2011 SCC 42 at para 17 [*Imperial Tobacco*]. They also point out that Rule 221 states a number of other grounds upon which a pleading in an action may be struck:

> 221. (1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it
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> > (a) discloses no reasonable cause of action or defence, as the case may be,
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> > (b) is immaterial or redundant,
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> > (c) is scandalous, frivolous or vexatious,
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> > (d) may prejudice or delay the fair trial of the action,
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> > (e) constitutes a departure from a previous pleading, or
> >
> > (f) is otherwise an abuse of the process of the Court,
>
> and may order the action be dismissed or judgment entered accordingly.

[17] The Defendants state that the present motion relies upon subrules 221(a), (c), (d), and (f).

[18] With respect to the argument that the Claim is scandalous, frivolous and vexatious (Rule 221(c)) and will delay the fair trial of the action (Rule 221(d)), the Defendants say that the Claim fails to meet the basic rules of pleading, is based upon bald assertions that are unsupported by

any material facts and, taken as a whole, is a lengthy and disorganized diatribe in favour of de-regulation of the production, distribution, sale and consumption of natural health products.

[19] The purpose of pleadings, the Defendants argue, is to clearly define the issues in dispute and give fair notice of the case to be met by the other side. Pleadings establish a landmark by which the parties and the court can determine the relevancy of evidence, both on discovery and at trial: *Sivak v Canada*, 2012 FC 272 at para 11 [*Sivak #2*]. Pleadings that are irrelevant, immaterial, redundant, argumentative and/or inserted for colour should be struck pursuant to Rule 221(c), and a pleading should also be struck as scandalous where it contains unfounded and inflammatory attacks on the integrity of a party: *Sivak #2*, above, at para 89; *George v Harris*, [2000] OJ No 1762 at para 18, 97 ACWS (3d) 225 [*George*].

[20] The Defendants note that there are four basic requirements of pleading. Every pleading must: (a) state facts and not merely conclusions of law; (b) include material facts; (c) state facts and not the evidence by which they are to be proven; and (d) state facts concisely in a summary form: *Carten v Canada*, 2009 FC 1233 at para 36, aff'd by 2010 FC 857. A plaintiff is required to plead with sufficient particularity the constituent elements of every cause of action raised, and cannot plead bare assertions without supporting facts, as this may prejudice the trial of the action: *Simon v Canada*, 2011 FCA 6 at para 18 [*Simon*]; *Merchant Law Group v Canada (Revenue Agency)*, 2010 FCA 184 at para 34 [*Merchant Law*]; *Johnson v Canada (Royal Canadian Mounted Police)*, 2002 FCT 917 at paras 24-25 [*Johnson*].

[21] The Defendants point to examples of what they characterize as bald assertions unsupported by any material facts in paragraphs 6, 7, 16(t), 16(y), 35 and 36 of the Claim. They state that these are "merely examples" and that it is impossible for them to respond to "bald, vague, over-generalized, bombastic assertions." They argue that the Claim does not set out concise statements of material facts in support of recognizable causes of action in law, and is therefore not a proper pleading.

[22] With respect to the allegations of Mancuso (paragraphs 24-30 of the Claim), the Defendants say that while he claims that the regulatory schemes enforced by Health Canada officials have curtailed and eliminated the availability of "many" of the "safe products" that he seeks to consume, he has not identified any specific dietary food supplements and vitamins to which he has been denied access. In addition, while he alleges that the current regulatory scheme violates his rights under ss. 2(a), 2(b), 7 and 15 of the Charter, he has failed to plead the constituent elements of the Charter violations he asserts.

[23] With respect to the claim of a s. 2(a) violation, the Defendants say that Mancuso has failed to plead the prohibition of any practice or line of conduct with a nexus to a religious belief or morality to which he subscribes, which is required to establish a breach of s. 2(a) of the Charter: *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 56. Rather, he simply asserts a preference for certain dietary food supplements and vitamins. Without more, the Defendants argue, Mancuso's s. 2(a) claim presents no reasonable prospect of success.

[24] The Defendants say Mancuso's allegations regarding freedom of expression under s. 2(b) of the Charter are similarly deficient. Although the Supreme Court of Canada has adopted a wide definition of "expression," Mancuso has not pleaded any personal attempts to make or receive prohibited expressive activity.

[25] The Defendants say that Mancuso has also failed to properly plead a violation of s. 7 of the Charter. He must show that there is a deprivation of life, liberty or security of the person that is inconsistent with a principle of fundamental justice. He has failed to indicate any health product necessary to his bodily and/or psychological integrity that is made unavailable to him by effect of the legislation he seeks to invalidate. As such, there is no basis upon which to find a deprivation of life, liberty or personal security. Furthermore, Mancuso does not assert any discordance with a principle of fundamental justice.

[26] Finally, the Defendants say that Mancuso's allegation of a breach of s. 15 of the Charter presents no reasonable prospect of success as he has not pleaded disadvantage based on a prohibited or analogous ground. Mancuso alleges discrimination based on choice of food, dietary supplements and vitamins. This is not a prohibited ground under s. 15 and has not been recognized or pleaded as an analogous ground of discrimination.

[27] With respect to the breaches of ss. 2, 7 and 15 alleged by Rowland and Dr. and Mrs. Dahl, the Defendants argue that since these Plaintiffs rely entirely upon Mancuso's facts in support of these allegations, they have pleaded no material facts upon which it might be found

that *their* rights have been violated. In addition, their claims suffer from the same deficiencies present in Mancuso's.

[28] The Defendants also argue that the declarations sought by the Plaintiffs are so broad and undefined in scope as to be judicially unmanageable, which is reason alone to conclude that these portions of the Claim have no chance of success: *Chaudhary v Canada (Attorney General)*, 2010 ONSC 6092 at para 17. The Plaintiffs seek sweeping declarations invalidating "the entire scheme and enforcement" of the Regulations. This request is so sweeping and imprecise as to be entirely unworkable. The Plaintiffs also ask that the Court read down the definition of "drug" in s. 2 of the Act to exclude natural health products, but the requested declaration is so vague and imprecise that the Court would be unable to define with precision the scope of any constitutional invalidity or to provide meaningful guidance to the parties. The Defendants say that the Court should not issue sweeping declarations within a factual vacuum.

[29] The Defendants also argue that the Plaintiffs' action for damages has no reasonable prospect of success. An action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the *Constitution Act, 1982*: *Mackin v New Brunswick (Minister of Finance)*, 2002 SCC 13 at para 81 [*Mackin*]; see also *Vancouver (City) v Ward*, 2010 SCC 27 at para 39 [*Ward*]; *Schachter v Canada*, [1992] 2 SCR 679 at para 89 [*Schachter*]. Canadian courts, including the Federal Court, have relied upon *Mackin* to strike statements of claim where s. 24(1) damages are sought for the enforcement of legislation that was constitutionally valid at the time of enforcement: *Zündel v Canada*, 2005 FC

1612, aff'd 2006 FCA 356 [*Zündel*]; see also *Perron v Canada (Attorney General)*, [2003] 3 CNLR 198, [2003] OJ No 1348 at paras 55-56.

[30] Furthermore, the Defendants say that damages are not available for the application of a law that was constitutionally valid at the time of enforcement. Absent conduct that is in bad faith or an abuse of power, public officials are entitled to a sphere of civil immunity in respect of the acts that give effect to valid grants of statutory authority, and this immunity applies even where that grant of authority is subsequently declared unconstitutional. There are no retroactive remedies under s. 24(1) of the Charter: *Mackin*, above, at para 78; *Schachter*, above, at para 89. Since the Plaintiffs have not pleaded with any particularity any allegations of bad faith or abuse of power, even assuming the extensive constitutional invalidities they allege, the Plaintiffs would not be entitled to any damages. The Crown's actions fall squarely within the immunity.

[31] The Defendants argue that the claims of Dr. Dahl, Mrs. Dahl and Life Choice should be struck in their entirety because they are an abuse of process. The rule against collateral attack protects against attempts to challenge judicial decisions in previous proceedings. This is complemented by the doctrine of abuse of process in situations where a plaintiff accepts the legal force of a judicial order, but contests the correctness of that order and/or the factual findings underlying it for the purposes of a different proceeding with different legal consequences: *Toronto (City) v Canadian Union of Public Employees (CUPE), Local 79*, 2003 SCC 63 [*CUPE*] at paras 33-34. Canadian courts have routinely struck out civil actions where a plaintiff seeks a judicial finding different from a finding made by a trial judge in a prior criminal proceeding: *Demeter v British Pacific Life Insurance Co (1985)*, 13 DLR (4th) 318, 7 OAC 143 at paras 6-7

(CA); *Wolf v Ontario (Attorney General)*, 2012 ONSC 72 at paras 56-7 [*Wolf*]; *Sauvé v Canada*, 2010 FC 217 [*Sauvé*], aff'd in part by 2011 FCA 141.

[32] The Plaintiffs are asking the Court to revisit the legality of the searches conducted by authorities on March 31, 2004 and January 15, 2009, the correctness of the 2004 and 2013 convictions, and the factual findings underlying those convictions. Dr. Dahl and E.D. Internal Health unsuccessfully challenged the validity of three search warrants under s. 8 of the Charter in the 2004 criminal proceeding (*R v Dahl #1*, at para 10), and the Plaintiffs also unsuccessfully challenged the legality of the January 15, 2009 searches in the Alberta Court of Queen's Bench: trial excerpt from *R v Eldon Garth Dahl, Agnesa Dahl and EDG Modern Design Ltd*, 100237221Q3 (Alta QB) [*R v Dahl #5*], March 20, 2012 cross-examination on Voir Dire at pp. 40-41 (Defendant's Motion Record, at pp. 345-346). They now seek to re-litigate the constitutional validity of these same searches. In addition, they allege that they were "falsely and maliciously charged" in the latter proceeding, despite the guilty plea of E.G.D. Modern Design Ltd, with Dr. Dahl acting as principal. The Defendants argue that the entirety of paragraphs 40-41 of the Claim is premised on the assertion that, contrary to the findings of two trial judges and a plea of guilty, these Plaintiffs were subject to unlawful searches and have been wrongfully convicted. This Court would be unable to grant the remedies sought without first making findings on criminal liability, the constitutionality of police searches and/or the admissibility of evidence in a criminal proceeding that are inconsistent with prior findings made in the Plaintiffs' criminal trials. This would undermine the principles of consistency, finality and integrity in the administration of justice, and this portion of the Claim should therefore be struck out in its entirety as a collateral attack and abuse of process.

[33] The Defendants argue further that the case law clearly establishes that corporations do not possess rights under s. 7 or s. 15 of the Charter. While corporations can rely on s. 2(a) of the Charter in defence to a criminal charge, that provision cannot be used as a sword by a corporate plaintiff in civil proceedings: *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 at para 101; *Peter Hogg*, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters Canada Ltd., 2007) at 59-12.

[34] The Defendants also argue that the Plaintiffs are not entitled to seek an injunction and prohibition by way of an action, as these remedies can only be obtained on application for judicial review: *Federal Courts Act*, RSC 1985, c F-7, s. 18(3) and *Burton v Canada*, [1996] FCJ No 1059 at para 22, 65 ACWS (3d) 20 (FCTD).

[35] Should any portion of the Claim proceed, the Defendants argue that it should only continue against Her Majesty the Queen. The three named Ministers and the RCMP are not proper or necessary parties. The Claim discloses no material facts alleging any wrongdoing on the part of the named Ministers, the Minister of National Health and Welfare does not exist, naming the Attorney General of Canada is redundant, and the RCMP is not a suable entity: *Mandate Erectors and Welding Ltd v Canada*, [1996] FCJ No 1130, 118 FTR 290 at paras 19-21 (TD) [*Mandate Erectors*]; *Cairns v Farm Credit Corp*, [1992] 2 FC 115 (TD) at para 6 [*Cairns*]; *Sauvé*, above, at para 44.

Arguments of the Plaintiffs

[36] The Plaintiffs respond that the Claim should not be struck, and that the named Defendants are all proper parties to the action.

[37] The Plaintiffs note that the facts pleaded in the Claim must be taken as proven for the purposes of this motion: *Canada (Attorney General) v Inuit Tapirisat of Canada*, [1980] 2 SCR 735; *Nelles v Ontario* (1989), 60 DLR (4th) 609 (SCC) [*Nelles*]; *Operation Dismantle Inc v Canada*, [1985] 1 SCR 441; *Hunt*, above; *Dumont v Canada (Attorney General)*, [1990] 1 SCR 279 [*Dumont*]; *Trendsetter Ltd v Ottawa Financial Corp* (1989), 32 OAC 327 (CA) [*Trendsetter*]; *Nash v Ontario* (1995), 27 OR (3d) 1 (Ont CA) [*Nash*]; *Arsenault v Canada*, 2009 FCA 242 [*Arsenault*]. A claim should be struck "only in plain and obvious cases where the pleading is bad beyond argument" (*Nelles*, above, at 627), or where it is "'plain and obvious' or 'beyond doubt'" that the claim will not succeed (*Dumont*, above, at 280; *Trendsetter*, above). The fact that a claim is novel or raises a difficult point of law is not a justification for striking it: *Hunt*, above, at 990-91); *Nash*, above; *Hanson v Bank of Nova Scotia* (1994), 19 OR (3d) 142 (CA); *Adams-Smith v Christian Horizons* (1997), 14 CPC (4th) 78 (Ont Gen Div); *Miller (Litigation Guardian of) v Wiwchairyk* (1997), 34 OR (3d) 640 (Ont Gen Div). Matters not fully settled by the jurisprudence should not be decided on a motion to strike: *RD Belanger & Associates Ltd v Stadium Corp of Ontario Ltd* (1991), 5 OR (3d) 778 (CA). Indeed, the Plaintiffs say that, in order to succeed in striking a claim, the Defendants must produce a "decided case directly on point from the same jurisdiction demonstrating that the very same issue has been squarely dealt with and rejected": *Dalex Co v Schwartz Levitsky Feldman* (1994), 19 OR (3d)

463 (Gen Div). Finally, the Court should be generous with respect to the drafting of the pleadings, permitting amendment before striking: *Grant v Cormier – Grant* (2001), 56 OR (3d) 215, [2001] OJ No 3851 (CA); *Toronto-Dominion Bank v Deloitte Haskins & Sells* (1991), 5 OR (3d) 417, [1991] OJ No 1618 (Gen Div).

[38] The Plaintiffs argue that the Defendants improperly teeter-totter between asserting that certain facts are not "facts" because they are bald conclusions without evidentiary foundation on the one hand, and on the other hand that facts pleaded are not properly "*facts*" because they constitute "evidence." This is an attempt to selectively excise facts from the Claim, contrary to this Court's guidance: *Liebmann v Canada (Minister of National Defence)*, [1994] 2 FC 3 (TD) at para 20 [*Liebmann*].

[39] The Plaintiffs also argue that the Defendants confuse the declaratory relief sought with the tort damages portion of the Claim, and ignore the fact that, in the main, the Claim seeks declaratory relief. The Plaintiffs say that they are seeking: 1) in the main, declaratory relief as to the various provisions of the Regulations (Claim, at paras 1(a)(i) – (xi), 1(b)(i)-(v), 1(c) and 1(d)); 2) injunctive relief or relief in the nature of prohibition (Claim, at paras 1(e)(i) – (iv)); and 3) monetary compensation by way of damages (Claim, at paras 2(a) – (d)).

[40] The Plaintiffs say that declaratory relief goes to the crux of the constitutional right to judicial review: *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 27-31; *Singh v Canada (Minister of Citizenship and Immigration)*, 2010 FC 757; *Canada v Solosky*, [1980] 1 SCR 821 at 830; *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at

paras 134, 140, 143 [*Manitoba Metis Federation*]. Under Rule 64, declaratory relief may be sought in the Federal Court "whether or not any consequential relief is or can be claimed." It has been held that declaratory relief can be sought in an action under s. 17 of the *Federal Courts Act*: *Edwards v Canada* (2000), 181 FTR 219, 94 ACWS (3d) 922; see also *Canada (Prime Minister) v Khadr*, [2010] 1 SCR 44. Furthermore, "[t]he constitutionality of legislation has always been a justiciable issue": *Thorson v Canada (Attorney General)*, [1975] 1 SCR 138 at 151; *Manitoba Metis Federation*, above, at para 134.

[41] The Plaintiffs do not dispute the rules of pleading asserted by the Defendants, but argue that the Claim does not suffer from the deficiencies alleged. They say that the Defendants take various assertions of fact out of context as examples of improper pleading, and seek to improperly colour the factual pleadings in their entirety on that basis. In so doing, the Defendants are not taking the Claim as pleaded, but are re-configuring it to suit their own ends, contrary to the clear direction of the Federal Court of Appeal in *Arsenault*, above, at para 10. The facts alleged must be read in their context and taken as proven.

[42] With respect to the claims of Mancuso, the Plaintiffs say that, contrary to the Defendants' assertions, the Claim sets out (at paragraphs 28, 29 and 30(a) and (b)) that Mancuso has been deprived of products and published information on those products by virtue of the Regulations and their enforcement, thereby infringing his rights under ss. 2, 7 and 15 of the Charter. The Defendants' complaints do not rise above a request for particulars, which the Plaintiffs say are provided in Mancuso's affidavit in the present motion record. The Plaintiffs argue that Mancuso's s. 7 claims are supported by the jurisprudence (*Singh v Canada (Minister of*

Employment and Immigration), [1985] 1 SCR 177; *R v Morgentaler*, [1988] 1 SCR 30; *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519; *Chaoulli v Quebec (Attorney General)*, [2005] 1 SCR 791, and that while his s. 15 claim is arguably novel, it cannot be said that it is "plain and obvious" that it cannot succeed: *Dumont*, above, at p. 280.

[43] The Plaintiffs say that the same arguments apply with respect to the Charter claims of Rowland, Dr. Dahl and Mrs. Dahl, and that the Dahls have additional claims under ss. 2, 7 and 15 of the Charter arising out of the manner in which the search warrants were executed, the fact that out-dated health advisories concerning their products have not been removed, and other facts alleged in the Claim.

[44] With respect to the argument that the declarations sought are "unmanageable and imprecise," the Plaintiffs argue that each declaration sought is, in and by itself, precise, clear and discreet. The only "broad-sweeping" declaration sought, they say, is that dietary food supplements and vitamins cannot to be treated as "drugs" under the Act, which relief is well-founded and backed by facts as to the essential differences between a "food" and a "drug."

[45] As to the purported inability to claim damages in an action that also seeks relief under s. 52 of the *Constitution Act, 1982*, the Plaintiffs argue that *Mackin*, above, is not as absolute as the Defendants suggest when it comes to damages arising from unconstitutional subordinate Regulations, and the Defendants' position has been bluntly rejected by the Supreme Court in *Manitoba Metis Federation*, above, at para 134. Furthermore, the notion that damages under s. 24(1) are not available for the application of a law that was constitutionally valid at the time of

enforcement does not cover enforcement that was in excess of, and an abuse of, authority, and bad faith and abuse of authority have been pleaded.

[46] The Plaintiffs argue that the Dahls' claims are not collateral attacks, and that the doctrines of *res judicata* and abuse of process do not apply because the judicial forum is different and the issues are different. Specifically, the criminal proceedings did not deal with the declaratory relief sought and the claim of damages for abusive and excess enforcement methods. Dealing with the Defendants' assertions about the relief sought and evidence led at the criminal trials is the purview of the trial judge in the present action and should not be dealt with on a motion to strike. The Plaintiffs argue that the present situation involves different judicial proceedings with different jurisdictions dealing with different grounds and remedies, not a collateral attack, and that recent Supreme Court jurisprudence rejects the Defendants' position on this issue: *Dunsmuir*, above; *Canada (Attorney General) v TeleZone Inc*, 2010 SCC 62 [*TeleZone*]; *Canada (Attorney General) v McArthur*, 2010 SCC 63; *Parrish & Heimbecker Ltd v Canada (Agriculture and Agri-Food)*, 2010 SCC 64 [*Parrish & Heimbecker*]; *Nu-Pharm Inc v Canada (Attorney General)*, 2010 SCC 65 [*Nu-Pharm*]; *Canadian Food Inspection Agency v Professional Institute of the Public Service of Canada*, 2010 SCC 66; *Manuge v Canada*, 2010 SCC 67 [*Manuge*]; *Sivak v Canada (Minister of Citizenship and Immigration)*, 2011 FC 402 [*Sivak #1*].

[47] With respect to the Charter claims of the corporate Plaintiffs, the Plaintiffs argue that while corporations do not have the same rights afforded to biological persons under ss. 7 and 15, they can invoke s. 2 Charter rights, s. 7 procedural rights in the context of a (quasi) criminal

scheme, and s. 7 fundamental justice rights against overbroad or impermissibly vague legislation: *R v Heywood*, [1994] 3 SCR 761 [*Heywood*]; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 [*Nova Scotia Pharmaceutical*]. They say that the only Charter relief claimed by the corporate Plaintiffs here is: 1) the void for vagueness and over-breadth doctrines under s. 7, which a corporation has the right to invoke since corporations are subject to the criminal provisions set up by the Regulations (*Nova Scotia Pharmaceutical*, above); and 2) the right to "commercial speech" under s. 2(a) and (b) of the Charter (*RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 [*RJR-MacDonald (1995)*]; *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927 [*Irwin Toy*]; *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 [*Rocket*]). They argue that corporations have a right to seek declaratory relief and obtain constitutional remedies with respect to the application and enforcement of statutes governing them: *Winner v SMT (Eastern) Ltd*, [1951] SCR 887 [*Winner*]; *RJR-MacDonald (1995)*, above.

[48] Furthermore, while the corporate Plaintiffs are not entitled to invoke the equality provisions of s. 15 of the Charter, they argue that they are entitled to invoke "the equality provisions of the underlying constitutional imperative [of] equality of treatment": Donald A MacIntosh, *Fundamentals of the Criminal Justice System*, (Agincourt: Carswell, 1989); *Winner*, above; *Bolling v Sharpe*, 347 U.S. 497 (1954); *Canada v Schmidt*, [1987] 1 SCR 500.

[49] With respect to the Defendants' argument that they are not entitled to the injunctive relief claimed, the Plaintiffs argue that nothing prevents the Court from granting injunctive relief in the course of, and ancillary to, an action (*Toth v Canada (Minister of Employment and Immigration)*

(1988), 6 Imm LR (2d) 123 (FCA) [*Toth*]; *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 [*Metropolitan Stores*]; *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald (1994)*]), and that nothing prevents the Court from granting relief "in the nature" of prohibition and/or injunction under s. 24(1) of the Charter.

[50] With respect to the proper parties to the action, the Plaintiffs argue that while Her Majesty the Queen is normally the only Defendant in claims against the government, in cases dealing with constitutional issues this Court has determined that others can be personally named: *Liebmann*, above, at paras 51-52. Furthermore, the determination of the standing of parties is not best done at the stage of a motion to strike: *Apotex Inc v Canada (Governor in Council)*, 2007 FCA 374 at para 13 [*Apotex*].

Plaintiffs' Motion for an Interim Injunction

[51] As noted above, the Plaintiffs have filed a cross-motion seeking to stay the enforcement of s. 3(1) and (2) of the Act and ss. 44, 63-83, 87, 91, 93, 94, 98 and 108-115 of the Regulations pending the outcome of the action. The parties agree that the test on such a motion is that set out in *Toth*, above (see also *RJR-MacDonald (1994)*, above, at pp. 333-334; *Metropolitan Stores*, above). That is, the Plaintiffs must establish that:

a) They have raised a serious issue for trial;

b) They would suffer irreparable harm if the provisions are not stayed; and

c) The balance of convenience favours the granting of a stay.

[52] The parties disagree on whether that test is met in the present circumstances.

Arguments of the Plaintiffs

[53] The Plaintiffs say they have raised serious issues for trial in their claim. They argue that the threshold for this element of the test is low (*RJR-MacDonald (1994)*), above, at para 50), and that such a stay is obtainable as against regulatory provisions as well as executive action: *Toth*, above; *Metropolitan Stores*, above; *RJR-MacDonald (1994)*, above. They argue that the action presents the following serious issues, among others:

> (a) That the definition of "drug" in s. 2 of the Act is overly-broad and thus violates s. 7 of the Charter (citing *Heywood*, above, at paras 48-51);
>
> (b) That the doctrine of overbreadth and others apply under s. 7, as tenets of fundamental justice, to all legislative provisions whether criminal, civil, administrative or other (citing *Nova Scotia Pharmaceutical*, above);
>
> (c) That the Regulations with respect to natural health products are *ultra vires* the Parliament of Canada and unlawfully intrude on the exclusive jurisdiction of the Provinces over civil rights, property, food, health and matters of a merely private and local nature (citing the Constitution Act, 1867, s. 92(7), (13) and (16), *Schneider v British Columbia*, [1982] 2 SCR 112 at 142; *RJR-MacDonald (1995)*, above at para 32; *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 24; *Reference Re Securities Act*, 2011 SCC 66), and is beyond the Federal government's criminal law power;
>
> (d) That the Regulations are *ultra vires* the Act as they go beyond the intent and meaning of the enacting legislation;
>
> (e) That the definition of "drug" in the Act is void for vagueness in that it encompasses any and all food and dietary supplements and / or vitamins and herbs (citing *Heywood*, above; *Nova Scotia Pharmaceutical*, above); and
>
> (f) That s. 3(1) and (2) of the Act violate the Plaintiffs' rights under s. 2(a) and (b) of the Charter and s. 1(c) of the *Canadian Bill of Rights* (citing *Irwin Toy*, above; *Rocket*, above; *RJR-MacDonald (1995)*, above).

[54] The Plaintiffs also submit that they will suffer irreparable harm if the statutory provisions are not stayed. Physical and psychological integrity is protected as a s. 7 right, and "commercial free speech" is protected under s. 2(a) and (b), and the ongoing infringement of these rights is not compensable through damages. Where a serious issue has been established and there is a potential Charter breach, irreparable harm is made out as such breaches are assumed not to be compensable through damages: *RJR-MacDonald (1994)*, above, at paras 60-61.

[55] As to the balance of convenience, the Plaintiffs argue that the provisions sought to be stayed do not deal with any health and safety issues, and that in the history of the natural health products at issue, there has been no serious injury or death attributed to them. With respect to the public interest, the Plaintiffs point to the Supreme Court's analysis in *RJR-MacDonald (1994)*, above, at paras 62-67, affirming that that the public interest is a "special factor" to be considered in constitutional cases, but noting that "the government does not have a monopoly on the public interest" and it is open to both parties in an interlocutory proceeding involving the Charter to rely upon considerations of the public interest.

Arguments of the Defendants

[56] The Defendants argue that the Plaintiffs have not raised a serious issue to be tried, largely on the basis of their argument on the motion to strike that the Claim as a whole is frivolous and vexatious. Where this is the case, they argue, no serious issue is raised: *RJR-MacDonald (1994)*, above, at p. 337.

[57] With respect to irreparable harm, the Defendants say that the Federal Court of Appeal has repeatedly stated that speculative harm is not irreparable harm (*Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12 [*Information Commissioner*]; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at paras 25, 33), and argue that the harm alleged by the Plaintiffs is speculative. For example, while Mancuso identifies three products "eliminated from the market" allegedly due to the licensing scheme being challenged, he also states in his affidavit that he uses these products "regularly and commonly." He also fails to identify any medical condition from which he suffers that will deteriorate or worsen unless a stay is granted; his claims to mental and physical distress are unspecified. Thus, the Court is left to speculate as to the nature of the harm that will result. The harms alleged by Rowland are similarly speculative. Moreover, the business income losses he alleges are compensable through damages if the Plaintiffs are successful, and thus by definition they do not constitute irreparable harm: *RJR-MacDonald (1994)*, above, at p. 341. The Defendants note that the law on damages for a Charter breach has developed substantially since *RJR-MacDonald (1994)*, such that it should no longer be assumed that alleged Charter breaches cannot be remedied through damages: see *Ward*, above.

[58] Finally, with respect to the balance of convenience, the Defendants note that the public interest has central importance in assessing the balance of convenience in Charter cases (*RJR-MacDonald (1994)*, above, at p. 343), and argue that legislation is presumed to serve the public interest, even in the face of a constitutional challenge: *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9 [*Harper*]. In most cases, they say, this presumption is determinative on a motion for an interlocutory injunction, which will only be granted based on alleged

unconstitutionality in "clear cases": *Harper*, above, at para 9. It is rare for a claim alleging constitutional invalidity to meet this threshold for at least two reasons: 1) the extent and meaning of the rights guaranteed by the Charter are often ambiguous, particularly where the constitutionality of the impugned provisions has not been previously litigated; and 2) it remains open to the government to justify a breach of those rights based on s. 1 of the Charter (*Metropolitan Stores*, above, at paras 42, 44). At the interlocutory stage, the Defendants argue, a reviewing court is simply not in an adequate position to assess the merits of a reasonable limitation argument.

[59] In this case, the Defendants argue, the impugned provisions have the purpose of protecting the health and well-being of Canadians by prohibiting the advertising and labelling of drugs for serious diseases and by regulating the manufacturing, labelling, advertising and sale of natural health products. Even the temporary staying of these provisions would deprive officials of tools that Parliament and the Governor in Council have enacted to protect the health and safety of the public. Thus, in advance of any finding of unconstitutionality, the balance of convenience must favour the maintenance of validly-enacted legislation, and the Plaintiffs' motion for an injunction must be dismissed.

[60] In addition, the Defendants argue, the Plaintiffs have provided no compelling basis to rebut the presumption that the balance of convenience favours the continued operation of the challenged laws. Financial loss is not sufficient to bring a claim within the small minority of cases where the interlocutory staying of legislation can be justified: *Evangelical Fellowship of Canada v Canadian Musical Reproduction Rights Agency*, [1999] FCJ No 1391, [2000] 1 FC

586 (FCA) at para 32. There is no basis here to find that the public interest is served by granting a stay of the impugned legislation.

ANALYSIS

Motion to Strike

The Law

[61] There is no disagreement between the parties as to the rules and principles applicable in a motion to strike. The disagreement arises over their application to the facts of this case.

[62] This motion is brought under subrules 221(a), (c), (d) and (f). The Defendants say that the Claim does not satisfy the basic rules of pleading. They say it is scandalous, frivolous and vexatious, that it will prevent the fair and effective trial of the action, and that at least in part it constitutes a collateral attack on judicial decisions rendered in other proceedings. They say that the Claim is so deficient that it should be struck in its entirety.

The General Challenge

[63] As the Defendants point out, the Claim constitutes a challenge to the Act and the Regulations.

[64] In oral argument, the Plaintiffs have told the Court that they are only challenging the NPN and safe licensing aspects of the Act and Regulations as well as the overly broad definition of "drug" found in s. 2 of the Act that allows any food, dietary food supplement, nutritional food derivative, or vitamin to be classified as a drug for purposes of the legislation, even when such substances do not pose a health risk. The Plaintiffs say that they do not wish to challenge the health and safety aspects of the legislative scheme. The basic assertion is that food, dietary food supplements and vitamins should be classified as food, and not drugs, and that the enforcement and inspection system to which they are subject should be akin to the food inspection and enforcement system, and not the pharmaceutical and/or prohibited drug system.

[65] It seems to me that these objectives are adequately and clearly embodied in the CLAIM section of the Claim along with the legal ramifications and basis for the relief being sought. The issue is whether the balance of the Claim is sufficiently compliant with the rules of pleading. In other words, does the Claim plead with sufficient particularity the constituent elements of each cause of action or legal ground raised, and does it provide a sufficient factual basis in an appropriate and summary form?

[66] The Defendants, however, feel that at least portions of the CLAIM section should be struck for several reasons:

a) The claims are too broad and abstract. The substances at issue are not specified (apparently some 55,000 substances are presently regulated);

b) 1(a)(viii) is a repetition of 1(a)(i);

c) 1(a)(ix) lacks the specificity required of pleadings. The Defendants need to know the names of the officials involved, and the time and places of the violations at issue;

d) 1(a)(x) is too abstract and requires the material facts related to the Plaintiffs;

e) 1(a)(xi) is likewise too abstract and needs materials facts related to the Plaintiffs.

[67] As regards 1(a) of the CLAIM section, the Plaintiffs are merely stating in a general way the relief they are seeking and the basis for that relief. There is no need to state the specifics here if they can be found in the balance of the Claim. In my view, 1(a)(viii) is not a repetition of 1(a)(i) because it states a different legal basis for declaring the definition of "drug" to be void.

[68] As regards 1(b) of the CLAIM section, the Defendants raise the following concerns:

a) 1(b)(i) is too broad and unmanageable. It says the "entire scheme and enforcement, […] is unconstitutional in breaching section 7 of the Charter in its reverse onus enforcement […]";

b) 1(b)(ii) is likewise too broad and unmanageable. Specifics are required. The usual way to attack a scheme of enforcement is by way of judicial review of a particular administrative decision under the Act, rather than by way of an action;

c) 1(b)(iii) raises the same concerns;

d) 1(b)(iv) is too broad because it requires the Court to declare that anyone can eat what they want without restriction by the State.

[69] My reading of these paragraphs in the CLAIM section is that 1(b)(i) only deals with the "reverse onus" aspect of enforcement and that 1(b)(ii) only deals with over breadth with respect to NPN licensing and compliance costs. Hence, I see nothing inappropriate about these paragraphs.

[70] As regards 1(b)(iii), it seems to me that the reference to a "large number of persons" is a problem because it is unnecessarily broad and unmanageable. However, the intent may be that

the discrimination occurs "against any person, who, like the individual Plaintiffs, have a preference […]." Hence, the final seven lines of 1(b)(iii) should be struck with leave to amend.

[71] I also agree that 1(b)(iv) is much broader than what the Plaintiffs say is their purpose in bringing this claim. I don't see how the Court could possibly, on the facts pleaded, deal with a request for such a broad declaration, or how the Defendants could defend. Hence, this paragraph should also be struck with leave to amend.

[72] As regards 1(c) of the CLAIM section, the Defendants complain that the Plaintiffs are asking the Court to review the whole scheme for classification, inspection and enforcement of food, dietary food supplements and vitamins and declare how it should be regulated. I agree with the Defendants that this is far beyond what is required in the present case, or indeed the power of the Court. It would involve the Defendants and the Court in a broad inquiry (there are presently 55,000 approved health products) and in a broad-ranging policy discussion as to how such products are best regulated. Even if this were an appropriate role for the Court to assume – which it is not (see *Friends of the Earth v Canada (Governor in Council)*, [2009] 3 FCR 201 at paras 25, 33, 36, 39-40, 45 aff'd 2009 FCA 297; *Canadian Union of Public Employees v Canada (Minister of Health)*, 2004 FC 1334 at para 40) – the pleadings do not, when read as a whole, provide any factual basis for such a broad declaration. Paragraph 1(c) should be struck.

[73] As regards 1(e) of the CLAIM section, the Defendants have the following complaints:

a) The prerogative relief of prohibition and injunction is not available in an action;

b) 1(e)(i) is too broad and a declaration of invalidity is sufficient;

c) With respect to 1(e)(ii), there is nothing in the Claim that provides a factual or legal basis for an interference with NAFTA, GATT, the WTO, and related agreements, policies regulations, and rulings;

d) 1(e)(iii) asks for a general prohibition that goes will beyond the issues and facts set out in the Claim;

e) 1(e)(iv) is far too broad in that it refers to "any advertising" and it should be made clear that the intent is to deal with sections 3(1) and 3(2) of the Act.

[74] I see no reason to rule at this stage that the prerogative remedies are not available in an action. See my decision in *Sivak #1*, above, at paras 36-44. In *Manuge*, above, one of the companion cases to *Telezone*, above, the plaintiff sought declarations of invalidity (on both Charter and administrative law grounds), constitutional remedies and damages or restitution in the context of an action, and the Supreme Court raised no concerns with this approach in ruling that the claim should be permitted to proceed in the Federal Court: see *Manuge*, above, at paras 1, 9-10 and 17-24. In the companion case of *Nu-Pharm*, above, the Supreme Court raised no concern that the plaintiff sought injunctive relief along with damages in the same claim before this court. In *Ward v Samson Cree Nation*, [1999] FCJ No 1403, 247 NR 254 (CA), the Court of Appeal found that a claim for declaratory relief could be added to a claim for damages through an amendment to the statement of claim, though the majority and minority differed on the basis for doing so. See also *Hinton v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 215 at paras 49-50 and 54.

[75] In both *Manuge* and *Telezone*, the Supreme Court noted that there is "a residual discretion to stay an action if it is premised on public law considerations to such a degree that […] 'in its essential character, it is a claim for judicial review with only a thin pretence of a private wrong'": *Manuge*, above, at para 18, quoting *Telezone*, above, at para 78. It is not

enough, however, for a defendant to claim that some of the matters at issue would be amenable to judicial review. If there are valid causes of action pleaded – which an amended statement of claim may yet disclose in this matter – this suggests there is more than a thin pretence of private wrong and the plaintiff will normally be permitted to pursue the action: *Manuge*, at paras 19-21; *Telezone*, at para 76.

[76] Paragraph 1(e)(i) is too broad in that it refers to paragraph 1(c) which has been struck, but I don't see that the references to paragraph 1(a) or (b) cause a problem. Consequently, the reference to paragraph 1(c) should be struck from paragraph 1(e)(i).

[77] I agree with the Defendants' objections to paragraph 1(e)(ii), (iii) and (iv). The relief requested here goes well beyond what the facts and law pleaded in the rest of the Claim can support. Consequently, these paragraph should be struck.

The Damage Claims

[78] The Defendants say that the damages claims have no reasonable prospect of success and that the Plaintiffs are improperly seeking relief under both s. 24(1) of the Charter and s. 52(1) of the *Constitution Act, 1982*.

[79] Relying upon *Mackin*, above, and Justice Hughes' decision in *Zündel*, above, the Defendants say that, absent conduct that is in bad faith or an abuse of power, damages are not available where a plaintiff seeks civil remedies arising from the application of a law that was constitutionally valid at the time of enforcement.

[80] The Plaintiffs say that *Mackin* is not absolute, and does not prevent damages for unconstitutional subordinate regulations. Further, they say that *TeleZone*, and *Sivak #1*, both above, make it clear that the Plaintiffs can seek declaratory relief and damages together. They argue that *Mackin* does not cover the situation where damages are not barred by the expiry of a limitation period, and does not prevent a claim for damages where enforcement has occurred in excess and abuse of authority, or in bad faith, as pleaded in the present case.

[81] I agree that the rule in *Mackin* is not absolute. As the Supreme Court explained in *Ward*, above at para 39, the consequence of *Mackin* is that a claim for damages for state conduct pursuant to a statute that was valid at the time will be struck unless the state conduct under the law was "clearly wrong, in bad faith or an abuse of power." The rule of law demands that duly enacted laws be enforced until declared invalid, and in the absence of "threshold misconduct" as just described, no claim for damages under s. 24(1) of the Charter (or any other claim for damages) will result from that enforcement if the law is subsequently declared invalid: *Ward*, above, at paras 39, 41; *Mackin*, above, at paras 78-79. The Court in *Mackin* went on to say (at para 81):

> [81] In short, although it cannot be asserted that damages may never be obtained following a declaration of unconstitutionality, it is true that, as a rule, an action for damages brought under s. 24(1) of the Charter cannot be combined with an action for a declaration of invalidity based on s. 52 of the Constitution Act, 1982.
>
> [Emphasis added]

[82] I see nothing in *Mackin* that suggests the application of the above principles is in any way dependent on whether or not damages are barred by the expiry of a limitation period. That is a separate issue.

[83] The Plaintiffs do plead that methods of enforcement of the Act and the Regulations are in excess and are an abuse of authority at paragraphs 19-21, and make further allegations of malicious intent and improper purpose or bad faith in relation to enforcement actions against the Dahls and their company at paragraph 92. However, each of these pleadings must be struck for reasons I will outline further below. If the Plaintiffs wish to maintain an action for damages arising from the enforcement of the portions of the Act and the Regulations which they claim are *ultra vires* and unconstitutional, they will need to plead, in a manner that conforms to the rules of pleading, state conduct under those provisions that was "clearly wrong, in bad faith or an abuse of power."

The Facts

[84] The Defendants say that paragraph 6 of Claim offends the rules of pleading because it makes general, unsupported assertions about natural health products that "have been safely consumed for centuries, in various forms, without regulations, prohibition, nor enforcement as 'drugs', prior to 1985-2005."

[85] I agree that this is little more than an unsupported assertion and, in its present form, it is not possible for the Defendants to answer. The Defendants need to know at least:

a) What specific products are referred to;

b) When and where they have been consumed;

c) By whom have they been consumed;

d) In what forms have they been consumed.

[86] Paragraph 6 should be struck for failure to plead sufficient material facts to support the assertion made.

[87] Paragraph 7, likewise refers in a general way to "draconian tactics usually reserved for dangerous, armed criminals and terrorists." There are insufficient facts pleaded to support this broad assertion or to save it from being scandalous and vexatious, and, in its present form, it is impossible to defend against without investigating every instance of enforcement. The Defendants are also being asked to examine, and the Court to rule on, the erroneous classification of "any and all 'foods' as 'drugs'." As there appear to be, according to Defendants' counsel, some 55,000 substances to deal with, this is simply unworkable for the Defendants and the Court. It seems to me that some specific substances and foods are required together with the facts to support the basic assertion of arbitrary selection. Paragraph 7 should be struck.

[88] Paragraph 8 is similarly problematic. It is not clear whether the Plaintiffs are asserting that the Defendants have selected and prohibited the sale of prunes, or have prohibited health claims for prunes, chamomile and oregano, or whether they are saying this could happen. And there is no indication of how these examples are connected to anything that the Plaintiffs might have suffered. Paragraph 6 refers to the Plaintiffs as consumers, producers, distributors and vendors, but unless the Defendants know which dietary food supplements and vitamins they produce, distribute, sell and consume, it is impossible to know if any of what may be hypothetical examples are reasonable or have any relevance for the Plaintiffs. Paragraph 8 should be struck for these reasons.

[89] Paragraph 9 may or may not be a reasonable hypothesis. Without specific instances, or the material facts as to the erroneous classification and arbitrary selection of all foods and substances presently classified, the Defendants cannot defend these assertions or answer hypothetical examples.

[90] The Plaintiffs appear to be avoiding specific foods and substances because they wish to have all natural health products declared foods and freely available, with the right to claim health benefits, without restraint. But they are not providing the material facts required on all natural health products to support why this is justified and allow the Defendants to answer the case and the Court to adjudicate it. Nor are they explaining or providing the facts to connect all natural health products to them.

[91] In my view, then, paragraphs 6, 7, 8, and 9 have to be struck.

[92] The Defendants object to paragraph 10 of the Claim as being argument and not facts. In my view, this paragraph contains a statement of the facts upon which the Plaintiffs rely to distinguish dietary food supplements from drugs. I see nothing improper with this paragraph.

[93] The Defendants also object to paragraph 11 as unsupported assertion and argument. There is no fact stated with respect to any particular health product and the Court is being asked to draw a single conclusion about all natural health products. In my view, however, this paragraph is a statement about Health Canada's approach to enforcement and the reasons why the Plaintiffs consider such an approach to enforcement to be inappropriate. I don't see why the

Defendants should have any difficulty in answering this paragraph. It either describes Health Canada's approach to enforcement or it doesn't.

[94] The Defendants object to paragraph 12 of the Claim as having no relevance and for not being connected to any of the Plaintiffs, and because no declaration is sought with regard to Schedule F of the Regulations. In my view, however, this paragraph does no more than provide specific facts to show that dietary food supplements are listed together with pharmaceuticals and are treated in the same way. These are facts to support the Plaintiffs' claim that natural health products are dealt with inappropriately under the Act and the Regulations. This paragraph is simple to answer. These substances either are listed, or are not listed, in Schedule F.

[95] The Defendants object to paragraph 13 as being argument, bare legal conclusions and too wide-ranging in that it refers to every dietary food supplement and every drug. It seems to me that the paragraph is an attempt to explain and provide the facts to support the Plaintiffs' principle proposition that natural health products should not be listed and treated in law like drugs because drugs have different properties and propensities from natural food products. The only sentence I can see as objectionable occurs in 13(g) and reads "we have, in Canada, an alarming growth of these diseases termed 'iatrogenic' (physician caused)." This is objectionable because there are no facts pleaded to support what is a bare conclusion and a matter of opinion. It is also irrelevant to the factual comparison between drugs and natural food products. Like "Death is the most permanent side effect of all" in 13(d), it is inserted for colour and to promote natural food products at the expense of pharmaceuticals. This sentence should be struck.

[96] The Defendants also object to paragraph 14 as being too broad and as involving a policy debate about what products should be regulated by Health Canada, which the Court cannot decide. They also argue that it contains bare conclusions and assertions rather than material facts. I have to disagree with the Defendants. Once again, the paragraph is a statement of the material facts upon which the Plaintiffs rely to distinguish "nutrients" from drugs, and these facts are recited to support their argument that nutrients should not be regulated like drugs, which in turn gives rise to the relief that is requested. I do not see this as requiring the Court to decide policy. The issue for the Court will be whether, as a result of natural food products being regulated in the way they are, have the Plaintiffs established a right to the relief they seek on the basis of the forms of action and breaches of rights which they allege?

[97] The Defendants say that paragraph 15 is improper for a number of reasons:

a) It deals with Dr. Dahl's past convictions under the CDSA and has nothing to do with the relief being sought in this claim in relation to the Act and the Regulations;

b) 15(f) does not plead facts;

c) 15(g) is colourful in its assertion that RCMP officers "have guns drawn every time when they raid vitamin suppliers." This is a fact the Plaintiffs cannot possibly know.

[98] In general, I agree with the Defendants on most of these points and, as I point out later, I also agree that the bulk of the pleadings with respect to Dr. Dahl have to be struck as an abuse of process, and the remainder must be struck for other reasons. I see nothing wrong, however, with the subparagraphs (a), (b), (c) and (h) and find that they can be separated from the other subparagraphs. It is my view that only subparagraphs (e), (f), and (g) should be struck.

[99] The Defendants object to paragraph 16 as containing unmanageable bald assertions, unsupported by material facts. The Plaintiffs concede that paragraph 16 probably belongs, for the most part, in the CLAIMS sections. I think the best approach, then, is to strike paragraph 16 in its entirety so that the Plaintiffs can correct the problem by way of amendment. However, I also point out the following:

a) There is a significant amount of overlap with the CLAIMS as already set out and the Plaintiffs should ensure that repetition does not occur;

b) Moving paragraph16(f) to the CLAIMS section will not cure the problem because these are material facts pleaded to support the assertion;

c) The kind of assertion that is found in paragraph16(g) involves a general inquiry into all of the natural health products being regulated and is not connected to the individual Plaintiffs. It is more argument than pleading;

d) The kind of bald assertion found in paragraph16(m) about "confusion" is unacceptable without the specifics. As pleaded, it is nothing more than an opinion or argument;

e) The same goes for paragraphs 16(s), (t), (u);

f) Paragraph 16(y) again refers to "Draconian methods of enforcement" as though they are ubiquitous and routine, but there are insufficient materials facts to support such an assertion.

If the Plaintiffs intend to re-draft paragraph 16 for inclusion elsewhere in the Claim, these problems should be born in mind.

[100] Paragraph 17 of the Claim alleges that the Government specifically designed the regulations to be cost prohibitive for and to eliminate small producers, distributors etc. Legislative purpose could be relevant to some of the constitutional analysis, including the division of powers issues (if found to be economic regulation of a specific industry, it would presumptively fall under the provincial power over property and civil rights). On the other hand,

if this allegation is meant to establish bad faith, then it offends the rules of pleading because bad faith has to be pleaded with more particularity, per *Merchant Law*, above. I think the Plaintiffs must amend the pleading to clarify this point, and to plead the allegation with sufficient particularity if it is intended to establish bad faith, before they can be permitted to pursue such a claim through discovery and at trial.

[101] The Defendants object to paragraph 18 of the Claim as being too broadly worded as a general attack on the regulatory scheme of the Act and the Regulations that is not connected to any material facts pleaded. It contains unsupported general conclusions – 18(b) – and applies to all applications – 18(c) – under the scheme.

[102] In my view, paragraph 18 is an attempt to provide material facts to support a general assertion that the regime under the Act and the Regulations is vague, overly-broad and arbitrary. This is necessary background for the Plaintiffs specific complaints:

a) 18(a) is a clear statement of fact;

b) 18(b) is a straight statement of fact about what qualifications are required of any decision-maker. It does not require an assessment of every decision and every official;

c) 18(c) is a statement of fact about how any application is assessed and that science plays no part and no reasons are given;

d) 18(d) is likewise a statement of fact;

e) 18(e) is likewise a statement of fact;

f) 18(f) is unacceptable as a bald, unsupported assertion and requires specific facts;

g) 18(g) is a summary of the character and impact of the facts previously pleaded but it is laden with argument.

I agree with the Defendants that these facts about the administration of the regime may not avail the Plaintiffs in the relief they seek for reasons of relevance to the Plaintiffs' own experience with the system. But at this stage, apart from 18(f) and 18(g), I don't think they can be struck as inadequate pleading. My conclusion is that 18(f) and 18(g) must be struck but that the balance of paragraph 18 can remain.

[103] This highlights a general challenge in evaluating the pleadings. In effect, we have two separate claims:

a) Claims for relief based upon individual experience; and

b) A general attack on the scheme of the Act and the Regulations.

In some cases, the same facts may go toward both. This is not prohibited. In general, it is sufficient for a party to plead the material facts and counsel is then at liberty to present in argument any legal consequences which the facts support: see *Conohan v The Cooperators*, [2002] 3 FC 421, 2002 FCA 60. I have attempted to be sensitive to this and to evaluate facts pleaded in relation to more than one type of claim or cause of action where they could reasonably be seen as relevant. Still, the Plaintiffs bear the responsibility of pleading the material facts in a manner that discloses a cause of action recognized in law, and it is inevitable that the manner of pleading will affect whether a claim is recognizable or not. The pleadings play an important role in providing notice and defining the issues to be tried, and the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action: see *Johnson*, above, at para 25. Rather, "[e]ach constituent element of each cause of action must be pleaded with sufficient particularity": *Simon*, above, at para 18.

[104] The Defendants object generally to paragraphs 19-21 of the Claim as being bare general assertions without supporting facts. As noted above, these paragraphs (and paragraphs 19 and 21 in particular), amount to a pleading that the Defendants' enforcement actions were an abuse of authority and/or conducted in bad faith. Thus, the Court must bear in mind the guidance of the Court of Appeal in *Merchant Law*, above, at para 34-35:

> [34] I agree with the Federal Court's observation (at paragraph 26) that paragraph 12 of the amended statement of claim "contains a set of conclusions, but does not provide any material facts for the conclusions." When pleading bad faith or abuse of power, it is not enough to assert, baldly, conclusory phrases such as "deliberately or negligently," "callous disregard," or "by fraud and theft did steal": *Zundel v. Canada*, 2005 FC 1612, 144 A.C.W.S. (3d) 635; Vojic v. Canada (M.N.R.), [1987] 2 C.T.C. 203, 87 D.T.C. 5384 (F.C.A.). 'The bare assertion of a conclusion upon which the court is called upon to pronounce is not an allegation of material fact": *Canadian Olympic Association v. USA Hockey, Inc.* (1997), 74 C.P.R. (3d) 348, 72 A.C.W.S. (3d) 346 (F.C.T.D.). Making bald, conclusory allegations without any evidentiary foundation is an abuse of process: *AstraZeneca Canada Inc. v. Novopharm Limited*, 2010 FCA 112 at paragraph 5. If the requirement of pleading material facts did not exist in Rule 174 or if courts did not enforce it according to its terms, parties would be able to make the broadest, most sweeping allegations without evidence and embark upon a fishing expedition. As this Court has said, "an action at law is not a fishing expedition and a plaintiff who starts proceedings simply in the hope that something will turn up abuses the court's process": *Kastner v. Painblanc* (1994), 58 C.P.R. (3d) 502, 176 N.R. 68 at paragraph 4 (F.C.A.).
>
> [35] To this, I would add that the tort of misfeasance in public office requires a particular state of mind of a public officer in carrying out the impunged action, i.e., deliberate conduct which the public officer knows to be inconsistent with the obligations of his or her office: *Odhavji Estate v. Woodhouse*, [2003] 3 S.C.R. 263, 2003 SCC 69 at paragraph 28. For this tort, particularization of the allegations is mandatory. Rule 181 specifically requires particularization of allegations of "breach of trust," "wilful default," "state of mind of a person," "malice" or "fraudulent intention."

[105] Paragraph 19 is drafted as though the enforcement methods complained of are the same in every case of enforcement and are always an excess or abuse of authority carried out for the same purpose in each case. The Plaintiffs cannot possibly know this, and it is telling that they only refer to one example in their own case (the experiences of the Dahls). A claim that does not plead sufficient material facts for the defendant to know how to answer is a vexatious pleading (*Kisikawpimootewin v Canada*, 2004 FC 1426; *Murray v Canada* (1978), 21 NR 230 (FCA)), nor can an action be brought on speculation hoping that sufficient facts will be obtained during discovery to substantiate the pleadings (*AstraZeneca Canada Inc v Novopharm Ltd*, 2009 FC 1209, aff'd 2010 FCA 112; *Sivak #2*, above, at paras 30-31). The appropriateness of enforcement procedures as well as their purpose can only be assessed and adjudicated by knowing the full facts and context of each individual case. That is an impossible action to mount and to defend when there must be thousands of instances. As drafted, this is a colourful assertion unsupported by the facts as pleaded. It has to be struck.

[106] Paragraph 20 has similar problems. It asserts a general practice but cites no specific instances. Whether or not this is a general and invariable practice is a fact that can be defended, but it need not go further than that. If it is not a general and invariable practice then the Defendants need not make or address specific instances unless the Plaintiffs have pleaded specific instances correctly. Hence, I think it needs to be made clear by the Plaintiffs whether what they refer to here is something mandated by the Act or the Regulations, or conduct set out in some administrative policy of directive, or whether they are referring to what individual officials have chosen to do that is either in breach of the Act or the Regulations or not required for the purposes of the regime. If the Plaintiffs intend this as a statement of what all officials do

then they need to plead the facts to show that it always occurs (which seems impossible to me) or individual instances of this having happened that the Defendants can answer and the Court can adjudicate. Paragraph 20 as presently drafted should be struck so that these matters can be clarified by amendment.

[107] Paragraph 21 has the same problems as paragraph 19. It asserts conduct that occurs in all instances and which the Plaintiffs cannot know, the Defendants cannot defend, and the Court cannot manage or adjudicate without knowing the full facts and context of each instance. In addition, it alleges that Health Canada officials repeatedly engaged in a practice of misleading the RCMP, which is a serious allegation of bad faith that would need to be pleaded with much greater particularity to avoid being vexatious: see *Merchant Law*, above, at paras 34-35, and Rule 181. This paragraph should be struck.

[108] The Defendants object to paragraphs 22 and 23 of the Claim on the grounds that Rowland is attempting to use the doctrine of reasonable expectations as a sword in a context where, even if the facts pleaded are true, all he is saying is that his personal expectations were not met. I agree that the doctrine of reasonable expectations (or legitimate expectations as it is sometimes called) cannot be used in this way and that no valid basis is pleaded and no reasonable cause of action is set out in these paragraphs. See *Mackin*, above, at para 83. As the Supreme Court has consistently held, "[t]he doctrine of reasonable expectations does not create substantive rights, and does not fetter the discretion of a statutory decision-maker": *Moreau-Bérubé v. New Brunswick (Judicial Council),* [2002] 1 SCR 249, 2002 SCC 11 at para 78; *Baker v Canada (Minister of Citizenship and Immigration),* [1999] 2 SCR 817 at para 26; *Reference Re Canada*

Assistance Plan (B.C.), [1991] 2 SCR 525 at paras 58-59. None of the Plaintiffs could have any legitimate expectation that the Government of Canada would change the Regulations or take any other action based on a public announcement by a Minister of the Crown that he intended to follow the recommendations of a Parliamentary Committee. Paragraphs 22 and 23 should be struck.

[109] The Defendants make extensive objection to Mancuso's Charter claims as set out in paragraphs 24 to 30 of the Claim:

> (a) The claims pleaded by Mancuso are similarly composed of bald assertions of *Charter* infringements unsupported by materials facts. Mancuso pleads that the entirety of the "current scheme" violates his rights under sections 2, 7 and 15 of the *Charter*. Mancuso fails to specify the health product(s) that are not made available to him as a result of the *Food and Drugs Act* or the *Natural Health Product Regulations*, or that he has unsuccessfully taken steps to obtain any such products.
>
> (b) Mancuso also fails to plead the constituent elements of the *Charter* violations he asserts. Section 2(a) of the *Charter* protects the single integrated concept of "freedom of conscience and religion". To successfully establish a breach of section 2(a), a claimant must demonstrate that he/she has a practice or belief, having a nexus with religion or secular morality, which calls for a particular line of conduct. Mancuso has failed to plead the prohibition of any practice or line of conduct with a nexus to religious beliefs or morality to which he ascribes. He simply asserts a preference for certain dietary food supplements and vitamins. Without more, his section 2(a) claim presents no reasonable prospect for success.
>
> (c) The plaintiff's allegations relating to freedom of expression under section 2(b) of the *Charter* are similarly deficient. Although the Supreme Court of Canada has adopted a wide definition of expression, Mancuso has not pleaded any personal attempts to make or receive prohibited expressive activity.
>
> (d) To establish a breach of s. 7, a claimant must demonstrate a deprivation that is inconsistent with a principle of fundamental justice. Mancuso has failed to indicate any health product

> necessary to his bodily and/or psychological integrity that is made unavailable to him by effect of the legislation he seeks to invalidate. As a result, there is no basis upon which to find a deprivation of life, liberty pr personal security. Moreover, he does not assert any discordance with a principle of fundamental justice.
>
> (e) Finally, Mancuso's allegation of invalidity pursuant to s.15 of the *Charter* presents no reasonable prospect for success as the alleged discrimination does not fall within the purview of s.15. To succeed on a section 15 claim, a claimant must establish disadvantage on a prohibited ground or analogous characteristic. Mancuso alleges discrimination on the basis of his choice of food, dietary (food) supplements, and vitamins. This is not a prohibited ground under s.15 of the *Charter*, nor has it been recognized, or pleaded, as an analogous ground of discrimination.
>
> (f) Given the above-noted absence of material facts, the entirety of Mancuso's allegations of *Charter* invalidity should be struck as presenting no reasonable prospect for success.

[110] All I can do is agree with the Defendants. We simply don't have any facts about what Mancuso has relied upon, or any difficulties he has experienced in accessing particular natural health products. If Mancuso has, throughout his life, heavily relied upon dietary food supplements and vitamins then, presumably he has not been prevented from accessing them. His general views about freedom of choice with respect to health don't tell the Defendants or the Court how any asserted rights have been infringed. These paragraphs present no reasonable cause of action and should be struck in their entirety.

[111] Paragraphs 31 to 39 provide the basis for the claims of Rowland and the Results Company. The Results Company is claiming damages, and Rowland claims personal damages as well as a breach of his ss. 2, 7 and 15 Charter rights as claimed and articulated with respect to Mancuso, at paragraph 30 of the Claim.

[112] For reasons already given, I have already held that Mancuso has not articulated or appropriately pleaded any basis for a breach of Charter rights. This means, inevitably, that neither has Rowland, so that Rowland's Charter right claims must be struck.

[113] Rowland says that he, "as a consumer, producer, as well as a distributor of these products, further claims, personally, damages in loss of income and reputation, derived from the Results Company […]." No cause of action is pleaded to ground Rowland's claim except "the Defendants officials arbitrary, excess and abuse of authority in the enforcement of the Act and Regulations." If this is intended as a tort claim, the constituent elements of the tort need to be set out and pleaded appropriately; otherwise there is no way of knowing, defending or adjudicating this aspect of the claim. Hence, Rowland's personal damages claims should be struck for revealing no reasonable cause of action.

[114] The Results Company's claims do mention specific products and plead facts related to the company's dealings with Health Canada. Some of the complaints involve specific dealings between the company and Health Canada, and some of them allege some kind of conspiracy or policy by Health Canada to force small companies out of business in order to favour and support large pharmaceutical companies. Some of these assertions are very broad and are supported by very few facts, if any.

[115] This portion of the Claim appears to support counsel for the Plaintiffs' oral assertion that the Plaintiffs' real concern is the NPN licensing and site licensing aspects of the regulatory

scheme under the Act and the Regulations. However, the personal claims of Mancuso, Rowland and the Dahls suggest that counsel is not being entirely accurate in this regard.

[116] In addressing the Results Company's claims it is often difficult to disentangle fact and substance from some of the broad, unsupported and often colourful assertions that are made.

[117] I see nothing wrong with paragraphs 31 to 33. The problems begin at paragraph 34 which seems intended to provide a factual basis for the assertion regarding "the Defendants' officials' excessive and abusive enforcement of these (unconstitutional and ultra vires the Act) Regulations […]." So the Results Company appears not to be basing its claim for damages upon the regulatory and enforcement scheme per se, but upon its "excessive and abusive enforcement." It is hard to see, then, how the Results Company's experiences can be said to support the general declaratory relief sought in paragraph 1 of the CLAIMS section. However, it is not entirely clear from paragraph 34 that "excessive and abusive enforcement" is the real issue because paragraph 34 begins with the words "As a result of Health Canada's oppressive and totally unnecessary Natural Products ("NPN") product licensing scheme, The Results Company Inc. is quickly being put out of business and may not survive past the end of 2012."

[118] When I read the whole of paragraph 34, some of it appears to be about the NPN product licensing scheme per se, yet the sentence that immediately precedes the subparagraphs says that those subparagraphs are meant to ground the "effect of the Defendants' officials' excessive and abusive enforcement." This aspect of the claim can neither be defended nor adjudicated until this issue is clarified.

[119] Subparagraph 34(b) attributes a drop in sales "entirely to Health Canada's discriminatory NPN licensing scheme under which Health Canada has refused licences for some Vitamost® products, has withheld licenses for others, and made it cost prohibitive even to apply for licenses for most products in the Vitamost® line."

[120] If these matters were so vital to the Results Company's future, one has to wonder why the decisions in question where not subjected to judicial review, though of course this is not a pre-requisite to bringing an action for damages: see *Telezone*, *Nu-Pharm*, *Parrish & Heimbecker*, all above. However, without the specifics as to which licenses have been refused or withheld, and the costs associated with each application, it is not possible to defend or adjudicate this aspect of the Claim.

[121] Subparagraph 34(c) alleges, in effect, that Health Canada has used the NPN licensing scheme to favour "mass merchandisers" at the expense of "small family businesses" so that there is "no more level playing field, due to Health Canada." Is this meant to suggest a deliberate policy by Health Canada, a conspiracy by Health Canada Officials, or simple ignorance as to effects of the licensing scheme? This claim goes will beyond the Results Company and whatever it may have suffered. There are no facts to support such general allegations and, as it stands, this broad claim cannot be defended or adjudicated. It reads like someone's opinion rather than a factual pleading.

[122] I see nothing wrong with subparagraph 34(d) which appears to provide a specific example of excessive or abusive enforcement that can be defended and adjudicated.

[123] Subparagraph 34(e) is deficient and should be struck because no facts are provided to support what is a bald assertion. In order to defend and adjudicate this allegation, it would be necessary to know, at least, the following:

a) What are the products in the Vitamost® line apart from Advaya® which is mentioned in 34(f);

b) Which of them are innovative and why?

c) For which of the products has the Results Company experienced discrimination and what form did that discrimination take?

d) Which specific ingredients or combination of ingredients have not been documented by the sources deemed acceptable to Health Canada, who are those sources, and how has this prevented the licensing of a formulation on the Vitamost® line?

[124] Advaya® is the only specific example given in paragraph 34(f). The Plaintiffs say that they cannot comply with the Health Canada requirement and list "the exact quantity of each ingredient" because this would "reveal proprietary information protected by patent." Patents do not protect undisclosed proprietary information. The patent monopoly is given in return for public disclosure of the invention. So this makes no sense. However, the main complaint appears to be that:

> Health Canada does not allow any of the many health claims for Advaya® that the Results Company has been able to verify by means clinical trials and symptom surveys, all of which claims are compliant with U.S. guidelines for dietary supplements.

It isn't clear here whether the Results Company is objecting to a particular decision or decisions of Health Canada that have prevented such health claims - in which case the facts would be needed to ground the claim that such decision is excessive or abusive – or whether the Results

Company is saying that the Act and/or the Regulations prevent such claims – in which case the Plaintiffs need to plead how this translates into a cause of action.

[125] Paragraph 34(g) does not say which Vitamost® formulas are at issue. More importantly, however, it alleges general discrimination through NPN licensing "against complex formulations." No facts are pleaded to say whether such "discrimination" is deliberate or is simply a function of the way the system works for all complex formulations, and there is nothing to explain how this translates into a cause of action for damages that the Defendants can defend.

[126] Paragraphs 34(h) to 34(k) express little more than disagreement with the need for testing in Canada, and Health Canada's approach. The opinion is expressed that finished product testing and stability testing is unnecessary. This appears to be what the Results Company means by something that is "oppressive and totally unnecessary."

[127] The difficulty is that an opinion that simply questions the need for Health Canada's approach to testing is not the basis for any form of action, and the constituents of any form of action are not pleaded. Is this conspiracy, negligence or a malicious tort? Until the facts are pleaded and joined with the constituents of same form of action that justifies a damages claim, these paragraphs remain nothing more than a difference of opinion over the need for testing.

[128] Much the same can be said of paragraphs 34(c) to (t).

[129] As a way of summarizing what the whole of paragraph 34 amounts to in law, the Plaintiffs say in paragraph 34(s) that:

> Both NPN licensing and the DIN registration scheme that it replaces are forms of censorship which both prevents new products from coming to market and restricts the sales of those which are permitted to be sold. Health Canada decides which health claims it will allow for each product and prohibits all other true claims – including those referenced by textbooks, clinical studies, and even testimonials sworn by affidavit. This censorship is an insidious way of limiting public access to high quality formulas by restricting both the formulators who create these products and the entrepreneurs who bring them to market. In no other industry are suppliers prevented from telling their customers the truth about what their products do. Because Vitamost® products are innovative, 25 years of censorship has severely limited their sales. Customers only find out about these unique supplements by word of mouth, since TRC is prevented from advertising the benefits of taking Vitamost® formulas;

[130] If the Plaintiffs are alleging "censorship" as the legal basis of their claim and the form of action they are pursuing, then they need to show how "censorship," in law, gives rise to a cause of action. That is, they must set out the material facts they are using the label "censorship" to describe in a manner that matches the constituent elements of a cause of action that they are entitled to bring: *Simon*, above, at para 18.

[131] If the Plaintiffs are simply seeking damages as relief under s. 24(1) of the Charter, then they need to plead the facts that will support the accusations of bad faith or abuse of power by public officials: see *Ward*, above, at para 39; *Mackin*, above, at paras 78-79. The same applies to civil causes of action: simply enforcing a statute and regulations that were valid at the time will not give rise to a cause of action (*Mackin*, at para 78), and there is no cause of action for legislating or failing to legislate in a manner that is adverse to a party's interests or may cause

them to incur losses: see *Welbridge Holdings Ltd v Greater Winnipeg*, [1971] SCR 957; *Mahoney v Canada*, [1986] FCJ No 438, 4 FTR 259 (FCTD); *Kwong Estate v Alberta*, [1978] AJ No 594, 96 DLR (3d) 214 (ABCA).

[132] I see nothing in paragraph 34 that pleads facts to establish "excessive and abusive enforcement" as opposed to the simple enforcement of what is, in the Plaintiffs' opinion, an "oppressive and totally unnecessary […] licensing scheme."

[133] All in all, I see nothing pleaded in paragraph 34 that sets out a concise statement of material facts that could support a recognizable cause of action in law.

[134] There is nothing in paragraphs 35 and 36, which attempt to summarize the Plaintiffs position, that saves the pleadings from the problems I have identified above. As drafted, with the exception of subparagraph 34(d) (addressed above) and the background information provided in paragraphs 31-33 and 35, the whole of section C of the Claim is little more than the personal views of Rowland and his company, the Results Company, that the NPN licensing scheme is unnecessary and has not allowed him to make the profits he would like to have made, because it discriminates in favour of larger companies who are better able to meet the costs involved.

[135] Consequently, it is my view that paragraphs 31 to 39 of the Claim should be struck.

[136] The Defendants object to the claims of Dr. Dahl, Ms. Dahl and Life Choice as an abuse of process and as a collateral attack upon judicial decisions made in previous proceedings.

[137] The Defendants allege that:

> Dahl, Mrs. Dahl and Life Choice Ltd. ask this Court to revisit the legality of the searches conducted by authorities on March 31, 2004 and January 15th 2009, the correctness of their 2004 and 2013 criminal convictions, and the factual findings underlying those convictions. For example:
>
> > (a) In their 2004 criminal proceeding, Dahl and E.D. Internal Health unsuccessfully challenged the validity of three search warrants pursuant to s.8 of the *Charter*. The plaintiffs now seek to re-litigate the constitutionality of these search warrants and the actions taken under their authority.
> >
> > (b) In the 2013 criminal proceedings, E.G.D. Modern Design Ltd., with Dahl acting as principal, pleaded guilty to eleven charges under the *Food and Drugs Act* and the *Controlled Drugs and Substances Act*. Despite their guilty plea, the plaintiffs allege in this action that they were falsely and maliciously charged.
> >
> > (c) The plaintiffs unsuccessfully challenged the legality of the January 15th 2009 searches in the Alberta Court of Queen's Bench. The plaintiffs plead in this proceeding that these searches were contrary to sections 7, 8 and 9 of the *Charter*.
>
> On a generous and fair reading, the entirety of paragraphs 40-101 of the statement of claim is premised on the assertion that, contrary to the findings of two trial judges and their own pleas of guilt, these plaintiffs were subject to unlawful searches and have been wrongly convicted. This court would be unable to grant the remedies sought by the plaintiffs in this action without first making findings on criminal liability the constitutionality of police searches and/or the admissibility of evidence in a criminal proceeding that are inconsistent with prior findings made in the plaintiffs' criminal trials. Because such findings would necessarily undermine the principles of consistency, finality, and integrity in the administration of justice, this portion of the statement of claim should be truck in its entirety as a collateral attack and abuse of process.

[138] Paragraphs 40 to 55 provide background information about the Dahls, some of their business endeavours and four encounters with Health Canada. It seems to me that the description of the first four encounters with Health Canada provides no information that is relevant to the relief sought in this action, but the Defendants have conceded that, on their own, these paragraphs are inoffensive.

[139] The facts pleaded by the Dahls provide the only possible factual basis found in the Claim for excessive and abusive enforcement and, indirectly at least, highlight the poverty of the rest of the pleadings on this issue.

[140] The Plaintiffs go on to describe a search that took place in March 2001 that led to criminal conviction in 2004, and a search in January 2009 that led to criminal conviction in 2013.

[141] Dr. Dahl says that, as a result of the first criminal proceedings, he:

> Now has a criminal record for not only something he was not responsible for, but also due to the *ultra vires*, unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials.

[142] The convictions stemming from the 2001 investigation were under three different statutes. Dr. Dahl's company, E.D. Internal Health Ltd, pleaded guilty to sixteen charges under the Act and the Regulations and received a fine of $5,600: see *R v Dahl #2*, above, at para 18. The 42 charges that went to trial were all under the Customs Act and the CDSA. These charges related to importing anabolic steroids or their derivatives and mis-describing these goods on customs forms. The Plaintiffs say some of these substances are not considered anabolic steroids

and are not controlled in the United States and should not be in Canada, but as it stands they are listed in Schedule IV (s. 23) of the CDSA. Dr. Dahl and E.D. Internal Health Ltd were found guilty after trial on 33 counts under ss. 153(a) and 159 of the Customs Act and ss. 5(2) and 6(1) of the CDSA (*R v Dahl #1*, above). Dr. Dahl received a conditional sentence and fines totalling $116,360, and E.D. Internal Health Ltd received fines totalling $232,720.

[143] There is nothing pleaded that shows why the convictions under the Customs Act and the CDSA have any relevance to the present Claim. Based on the pleadings, the validity and enforcement of those statutes is not at issue. Only the 16 convictions resulting from the guilty pleas of E.D. Internal Health under the Act and the Regulations could have any possible relevance here.

[144] Dr. Dahl complained of breaches of s. 8 of the Charter at the trial before Justice Lytwyn who found no violation of s. 8: see *R v Dahl #1*, above, at para 10. If Dr. Dahl disagreed with this finding, he could have appealed Justice Lytwyn's decision. He cannot now come before this Court and have these searches re-examined with a view to finding a breach of s. 8 of the Charter.

[145] Dr. Dahl complains that he now has a criminal record for something he was not responsible for. However, E.D. Internal Health accepted responsibility for the 16 charges under the Act and the Regulations through its guilty pleas, and a competent Court found that Dr. Dahl and E.D. Internal Health were responsible for 33 additional offences under the Customs Act and CDSA. He cannot now come before this Court and ask for the same issues to be re-determined.

[146] Dr. Dahl also says that due to the 2004 trial, he now has a criminal record "due to the ultra vires unconstitutional Regulations and their excessive and abusive enforcement by the Defendants' officials." There are two components to this allegation: that the Regulations are *ultra vires* and unconstitutional, and that their enforcement leading up to the trial and convictions in 2004 were abusive and excessive.

[147] In large measure, the claim of abusive enforcement amounts to an attempt to re-litigate the validity of the three search warrants related to the 2004 criminal proceeding. As I have already noted above, their constitutionality has already been decided by Justice Lytwyn. The attempt to re-litigate that issue here is, if not strictly speaking a collateral attack on the legal effect of the 2004 convictions, certainly an abuse of the Court's process that should not be permitted to proceed: see *CUPE,* above, at paras 33-55; *Wolf,* above, at paras 54-57.

[148] While the Plaintiffs refer to *TeleZone*, above, and its companion cases to argue that the collateral attack and abuse of process doctrines should not apply where the forum is different and the issue to be decided is different, those cases do not avail the Plaintiffs here. They dealt with the question of whether an administrative decision must first be challenged through judicial review before an action for damages can be brought based on the consequences of those decisions. The Supreme Court found that such a detour was not necessary, nor were the actions in question collateral attacks on the administrative decisions in question. In so finding, the Court emphasized the differences between the nature and purpose of judicial review on the one hand and proceedings to determine civil liability on the other (see *TeleZone*, above, at paras 20-31, 60-68). Thus, the Plaintiffs are not wrong to suggest that differences in the nature of the issues at

stake can affect the application of the collateral attack and abuse of process doctrines. However, none of these cases suggested that matters squarely decided in previous criminal court proceedings can be re-litigated by the party against whom those matters were decided in future civil proceedings in which they seek to obtain damages. In my view, this scenario goes to the very heart of the abuse of process doctrine, in that it would bring the administration of justice into disrepute, and cannot be permitted for the reasons stated in *CUPE*, above.

[149] The Plaintiffs also plead at paragraph 70 under the heading "Post March 21, 2001" that:

> After the investigation, all of Dr. Dahl's Canadian shipments were stopped from entering Canada. Customs sent everything for inspection or held them up. His only alternative was to close his Canadian business. He ended up selling his stock and exclusive product lines at cost and also his warehouse.

If this is intended to be an allegation of excessive enforcement so as to ground a claim for damages, it is not properly pleaded. On the most generous reading, it can be seen as an attempt to plead a claim in negligence, but the Plaintiffs have not pleaded what duty or standard of care was owed to them and how it was breached. Even if it could be established that the customs officials in question owed a private law duty of care to the Plaintiffs, which is a steep hill to climb (see *Cooper v Hobart*, [2001] 3 SCR 537, 2001 SCC 79; *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562, 2001 SCC 80), they have not pleaded any facts that could be taken as a breach of that duty. There is nothing to suggest that customs official were doing anything other than carrying out their statutory duties reasonably and in good faith. Likewise, the allegation cannot ground a claim for malicious prosecution as there is no indication that a prosecution resulted from these alleged customs enforcement activities, let alone that this was done without reasonable cause and was motivated by malice: see *Nelles v Ontario*, [1989] 2 SCR 170. A claim

of misfeasance in public office would require a pleading that a public office holder engaged in deliberate and unlawful conduct in his or her capacity as a public officer, and was aware both that their conduct was unlawful and was likely to harm the Plaintiff: *Odhaviji Estate v Woodhouse*, [2003] 3 SCR 263 at paras 22-23, 28 [*Odhaviji Estate*]. None of this has been pleaded here with respect to the actions of customs officials. Thus, paragraph 70 should be struck.

[150] As regards the alleged legal invalidity of the Regulations, both as being *ultra vires* the Act and unconstitutional, I do not see how the 2004 convictions have any bearing on that claim. As already noted above, the convictions under the Customs Act and CDSA are irrelevant, and any attempt to impugn the 16 convictions of E.D. Internal Health under the Act and the Regulations is an abuse of the Court's process: see *CUPE*, above, at paras 33-55; *Wolf*, above, at paras 54-57. The time to challenge those charges based on the purported legal invalidity of the Regulations was before entering guilty pleas on behalf of E.D. Internal Health.

[151] Dr. Dahl says he is not questioning the fact of his convictions; he says, however, that this does not prevent him from attempting to show in these proceedings that the Regulations under which E.D. Internal Health was convicted were unconstitutional. I agree, but Dr. Dahl cannot use the fact of the unchallenged convictions to demonstrate unconstitutionality, which he is trying to do. The argument appears to be that the Regulations and the scheme of the Act are so absurd that they led to Dr. Dahl's criminal convictions in 2004. They certainly did not lead to the convictions under the Customs Act and CDSA, and the unchallenged convictions under the Act and the Regulations are not a factual basis for the unconstitutionality of the Regulations.

Moreover, the notion that Dr. Dahl is not attempting to impugn the 2004 convictions through the present Claim is belied by pleadings that attack the factual underpinnings of those convictions – including that certain evidence "went unnoticed by the Trial Judge" (para 72), and that Dr. Dahl "was charged with products that were never actually in his possession" (para 74) – and the allegation that Dr. Dahl was "falsely convicted in 2004" (para 98).

[152] Dr. Dahl appears to be arguing that the Regulations are making criminals out of innocent people, but if he has been convicted he is not an innocent person. He simply feels that the offences he was convicted of should not be offences. Without more, this is not a ground for unconstitutionality.

[153] If the Court is intended to see the convictions as part of the harm flowing from the allegedly invalid Regulations, then the principles from *Mackin*, above, apply. Setting aside the claims about excessive searches, already dealt with above, the Plaintiffs have not pleaded the kind of threshold misconduct (i.e. conduct that is "clearly wrong, in bad faith or an abuse of power") that would be necessary to create the possibility of damages following a declaration of invalidity: see *Mackin*, above, at paras 79-82; *Ward*, above, at paras 39-40.

[154] The second search and seizure took place in January 2009 and this led to charges in January 2010. Dr. Dahl, Mrs. Dahl and their company, E.G.D. Modern Design Ltd, were each charged with 33 regulatory and criminal offences under the Act, the CDSA, and their respective Regulations: *R v Dahl #6*, above at para 3. The trial commenced on March 19, 2012, and two defence applications were heard, including an unsuccessful challenge to four of the six searches

based on s. 8 of the Charter. However, due to the late disclosure of certain documents by the Crown, the trial was adjourned and there were difficulties rescheduling it within a reasonable time. The resulting delay infringed the Dahls' rights under s. 11(b) of the Charter, and the charges against them were stayed. However, Justice Jeffrey of the Court of Queen's Bench found that the Charter considerations applied differently to a corporate defendant: unlike for individual defendants where security of the person considerations such as prolonged anxiety and stigma figured prominently, with respect to corporate defendants, s. 11(b) serves exclusively to protect the right to a fair trial. There was no evidence that E.G.D. Modern Design's ability to make full answer and defence had been impaired, and the charges against that company were permitted to proceed: see *R v Dahl #6*, above, at paras 9, 14-15.

[155] Ultimately, E.G.D. Modern Designs Ltd, with Dr. Dahl acting as principal, pleaded guilty to 11 charges, eight under the Act and Regulations, and three under the CDSA. Regarding the eight offences under the Act and the Regulations, the company was fined $2,500 for each of five of these offences, and the maximum $5,000 each for the remaining three since they revealed "an intent to consciously organize and operate surreptitiously, wilfully circumventing the law after having experienced the effect of being caught once before": *R v Dahl #7*, above, at p. 94 (Defendant's Motion Record, at p. 601). The Court made an explicit finding that Dr. Dahl was the controlling mind of the corporate defendants convicted in both 2004 and 2013 (*R v Dahl #7*, above, at p. 93 (Defendant's Motion Record, at p. 600):

> In both cases, the senior officer or representative of the corporation was the same, Mr. Eldon Dahl. In each case he was the controlling mind.
>
> A corporation faces criminal liability for the criminal acts of its representatives. Here, each corporation, the old 2004 corporation, E.D. Internal Health, and now the entity before me, E.G.D.

> Modern Design Ltd., were directed and controlled by the same individual.

[156] As noted above, Dr. Dahl, Mrs. Dahl and E.G.D. Modern Design Ltd unsuccessfully challenged the search warrants and their execution in the proceeding in the Court of Queen's Bench in Alberta: *R v Dahl #5*, above, at pp. 176-192 (Defendant's Motion Record, at pp. 481-497). Justice Jeffrey reviewed the whole process of the search of the Dahls' home and the reasons for the entry with guns drawn and found as follows:

> Here, the police did not depart from the knock and announce approach. They drew their weapons rather then keeping them holstered, that is all. They did not escalate the entry into a dynamic entry. [page 188, lines 25-28]
>
> In my view, in the heat of the moment and the uncertainty of what they might face, the apparent lack of cooperation justified the police considering whether they had misread the Dahls. Some of the alleged offences here did involve the *Controlled Drugs and Substances Act*, not matters some might consider of lesser severity such as the other charges under the *Food and Drugs Act*. Investigations and searches associated with alleged offences under the *Controlled Drugs and Substances Act* can be met with violence. Weapons are not uncommon in these contexts. [page 188, lines 34-40]
>
> Here, the police did not do anything else that escalated the entry other than draw their guns to help ensure their own safety. I do not find this manner of conduct of the search warrant at Number 19 unreasonable in the circumstances and dismiss the application to exclude evidence resulting from the search here. [page 189, lines 33-36]

[157] In the present proceedings, the Dahls say the search of their home was unconstitutional, that they were unlawfully detained during that search, and that they were falsely and maliciously charged.

[158] E.G.D. Modern Design Ltd pleaded guilty to eight charges under the Act and Regulations and another three under the CDSA. Dr. Dahl was the principal who entered these pleas and was found to have been the directing mind of the corporation with respect to the alleged illegal conduct. Under these circumstances, there is no reasonable prospect of succeeding on a claim of malicious prosecution. The Plaintiffs would not only have to establish that the proceedings concluded in their favour, but that they were instituted without reasonable cause and were motivated by malice: see *Nelles*, above; Lewis N Klar, *Tort Law*, 5th ed (Toronto: Carswell, 2012) at p. 67. Dr. and Mrs. Dahl had the charges against them stayed, which could be seen as a termination of the proceedings in their favour. The Plaintiffs have alleged that the Defendants' enforcement actions had an improper purpose of driving small entities out of the natural health products industry (see para 92(i) of the Claim). However, given that E.G.D. Modern Design pleaded guilty to11 of the charges, with Dr. Dahl confirming to the Court on its behalf that it was admitting the essential elements of each of the offences (see *R v Dahl # 7*, above, at p. 90), and given the Court's finding that Dr. Dahl was the directing mind whose illegal and criminal conduct gave rise to the company's criminal liability, there is no possibility of establishing that there was a lack of reasonable and probable cause for the Defendants to pursue the prosecution. Moreover, the allegation of malice is not properly pleaded because it is a bald allegation with no supporting material facts presented: see *Merchant Law*, above, at paras 34-35. The allegation of malicious prosecution and all of the accompanying allegations to malicious intent and being "falsely and maliciously charged" and "falsely and maliciously prosecuted" in paragraphs 92-93 must be struck.

[159] Moreover, given that the legality of the search of the Dahl's home was explicitly ruled upon by Justice Jeffrey in this proceeding, which resulted in guilty verdicts against one of the Plaintiffs based on guilty pleas entered by Dr. Dahl as the corporation's principal, the attack on the constitutionality of that search in this proceeding is an abuse of process that must be struck: *CUPE*, above, at paras 33-55. The court made an explicit finding that the search of the Dahl's home was lawful and carried out in a reasonable manner in the circumstances: see *R v Dahl #5*, above, at pp. 176-189.

[160] Like the 2004 convictions, the 2009 convictions of E.G.D. Modern Design Ltd are not relevant to the alleged invalidity of the impugned Regulations. The time to challenge these charges based on the purported unconstitutionality of the Regulations was before entering guilty pleas on behalf of E.G.D. Modern Design Ltd.

[161] Two further allegations by the Dahl's require brief comment. Arguably, each discloses a potential cause of action, but both must nevertheless be struck from the present Claim.

[162] The Dahls allege unlawful detention "contrary to ss. 7, 8 and 9 of the Charter" during the search of their home (para 92(c)). Section 9 of the Charter provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." The Plaintiffs plead at paragraph 90 of the Claim that:

> [Dr. Dahl] and his wife sat in their living room for 11 hours and were prevented from moving or seeing the Health Canada agents search the entire residence. When questioned if they were under arrest, Dr. Eldon Dahl was told that they were just being "detained" and not to move…

There is jurisprudence holding that the lawful authority to detain is not necessarily implied in the lawful authority to search and seize granted by a search warrant, and a detention in these circumstances may be arbitrary, especially if it is prolonged: see for example *R. v Douglas*, 2012 SKQB 250. The Defendants have not pointed to any explicit ruling on this point by the Alberta courts, and accepting the facts as pleaded, I cannot say at this stage that a claim on this basis, either in tort or based on s. 9 of the Charter, has no reasonable chance of success.

[163] There is also the matter of the warnings allegedly published by Health Canada about the Plaintiffs' products. They allege at paragraphs 81-84 of the Claim that Health Canada published two warnings, on August 21, 2008 and September 3, 2008 respectively, alleging that the products of Dr. Dahl and E.G.D. Modern Design were contaminated with bacteria and unsafe, and has refused to remove these warnings from its website even though the products were later licensed as "proven safe" by the Defendants' officials. The Plaintiffs have not pleaded deliberate unlawful conduct so as to ground a claim of misfeasance in public office (see *Odhavji Estate*, above), but read generously, these pleadings could reveal a claim for negligence. Even if this is so, however, it is not a claim that can be considered by this Court as currently pleaded.

[164] The problem with both of these claims is that, at least as pleaded, they have no connection whatsoever with the content of the Act or Regulations that are challenged in this proceeding. Not only does this present practical problems for the discovery process and any eventual trial of the action, which would inevitably be disjointed, but there is a more fundamental problem relating to the jurisdiction of this Court. As Justice MacKay observed in *Mandate Erectors*, above, at para 15, the second part of the jurisdictional test set out in *I.T.O.* -

International Terminal Operators Ltd. v Miida Electronics Inc. et al., [1986] 1 SCR 752, 28 DLR (4th) 641 [*ITO*] states that in order for the Federal Court to have jurisdiction, there must be an "existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction." In removing the named ministers from the style of cause, he found that they could not be sued in their representative capacity, were not sued in their personal capacity, and if they had been, the claims would have been in tort and would have been outside the jurisdiction of this Court. Certain other named defendants were also removed as defendants, as the Court found that the federal laws implicated in the claim were not essential to the disposition of the claims made against them within the terms of the *ITO* test: *Mandate Erectors*, above, at paras 18-19.

[165] I find the same is true in the present case. The Dahls have not demonstrated in their pleadings that there is anything about the challenged Act and Regulations that is essential to the disposition of their claims of unlawful detention or negligence in warning the public about their products. These are distinct tort (and perhaps Charter in the former case) claims that have nothing to do with a federally enacted law, and nothing to do with the broader challenge the Plaintiffs are trying to make to the Act and Regulations in their Claim. If the Dahls' wish to pursue those allegations, they must do so in a provincial superior court. They may encounter limitation issues, but that is of no concern here.

[166] It may be that these allegations are not intended to ground independent causes of action, but are instead intended to indicate damages suffered as a result of the impugned provisions of the Act and Regulations, or state misconduct in relation to those instruments that could permit a

damages claim despite the principles stated in *Mackin*. If so, then the Plaintiffs need to plead some connection between the impugned provisions of the Act and Regulations and the allegedly unlawful conduct.

[167] For the above reasons, paragraphs 56-93 of the Claim, and any references to wrongful conviction, malicious prosecution, false advisories, or unlawful searches appearing elsewhere in the Claim in reference to the allegations in those paragraphs must be struck. Paragraphs 40-55 seem inoffensive, but they do not disclose any cause of action either on their own or in connection with any other remaining portions of the Claim, and should be struck on that basis.

[168] There follows a series of paragraphs in which the Dahls describe the losses they and their companies have suffered as a result of the alleged unlawful conduct of the Defendants (see paras 95-101). However, each of the causes of action that could ground a claim to damages has been struck above. Since I have decided to grant leave to amend the Claim, I think the most prudent course is to strike these paragraphs and allow the Plaintiffs to amend them in accordance with the amended causes of action.

[169] In paragraph 97(g) of the Claim, Dr. Dahl and Mrs. Dahl also assert that they have "had their Charter right […] personally breached under ss. 2, 7, and 15 of the Charter for the same reasons and rationale as set out with respect to Nick Mancuso and David Rowland."

[170] As I have already ruled that Mancuso and Rowland have not pleaded the facts required to establish such breaches, it follows that there are no material facts pleaded to establish breaches of the Dahls' ss. 2, 7, and 15 Charter rights.

The Charter Claims of the Corporate Plaintiffs

[171] The final portion of the Claim relates to allegations of Charter breaches by the corporate Plaintiffs, which are The Results Company Inc and Life Choice Ltd, the latter being the successor company to E.D. Modern Design Ltd and E.G.G. Modern Design Ltd. The Plaintiffs plead the following in this regard at paragraph 102 of the Claim:

> The Plaintiffs state, for the sake of clarity, that while the within Statement of Claim clearly sets out which Charter and constitutional breaches are involved, as being infringed, with respect to the biological Plaintiffs, the corporate Plaintiffs also claim the following Charter and constitutional rights have been breached:
>
> (a) the right to freedom of expression and communication as guaranteed under s. 2 of the Charter;
>
> (b) the procedural safeguards of s. 7 of the Charter in the context of (quasi) criminal prosecution and regulatory scheme;
>
> (c) the right to equality, as a structural imperative of the underlying principle of the Constitution Act, 1867 as enunciated by the Supreme Court of Canada in *Winner v. S.M.T. (Eastern) Ltd.*, [1951] S.C.R. 887, which right, above and beyond s. 15 of the Charter, is also involved by the biological Plaintiffs.

[172] With respect to the s. 7 claim, the Supreme Court has consistently held that the word "everyone" in s. 7 of the Charter does not include a corporation. Corporations do not have s. 7 rights because the protected interests – life, liberty and security of the person – are attributes of

natural persons and not artificial persons: see at *Irwin Toy*, above, at paras 94-96; *Dywidag Systems International, Canada Ltd. v Zutphen Brothers*, [1990] 1 SCR 705 at paras 6-7 [*Dywidag Systems*]; Hogg, above, at p. 47-5. Without a deprivation of one of these protected interests, the principles of fundamental justice – or "procedural safeguards of s. 7 of the Charter" as the Plaintiffs refer to them – do not come into play. At a minimum, corporations cannot obtain relief on s. 7 grounds under s. 24(1) of the Charter, because s. 24(1) provides remedies for those whose rights have been violated: *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at para 37 [*Big M*]. On the other hand, a corporation can defend against a criminal or regulatory charge on the basis that the law under which it has been charged violates the Charter rights of individuals (including their s. 7 rights), and is therefore constitutionally invalid: see *Big M*, at paras 37-43 (regarding s. 2(a) of the Charter), and *R v Wholesale Travel Group Inc.*, [1991] 3 SCR 154 at paras 21-26 per Lamer CJ and Sopinka J, with Gonthier, Stevenson and Iacobucci JJ expressing agreement at para 236 [*Wholesale Travel*]. Does this mean that corporations can also launch a proactive challenge to the constitutional validity of a law on s. 7 grounds when they are not defending against a criminal or quasi-criminal charge? The Supreme Court has said they cannot, in *Dywidag Systems*, above, at para 7:

> [6] There can now be no doubt that a corporation cannot avail itself of the protection offered by s. 7 of the Charter. In *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, the majority of this Court held that a corporation cannot be deprived of life, liberty and security of the person and cannot therefore avail itself of the protection offered by s. 7 of the *Charter*. At page 1004 it was stated:
>
> > […] it appears to us that [s. 7] was intended to confer protection on a singularly human level. A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light

> of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.
>
> [7] It is true that there is an exception to this general principle that was established in Big M Drug Mart, supra, where it was held that "[a]ny accused, whether corporate or individual, may defend a criminal charge by arguing that the law under which the charge is brought is constitutionally invalid" (pp. 313-14). Here no penal proceedings are pending and the exception is obviously not applicable.
>
> [Emphasis added]

The Plaintiffs point out that corporations have been permitted to seek declarations of constitutional invalidity by bringing motions before the Court, citing the example of *RJR-MacDonald (1995)*, above. That case dealt with the constitutional division of powers and s. 2(b) of the Charter, from which corporations can benefit in a more direct fashion (see below). Having been referred to no contrary authority, I conclude that the question of whether a corporation can bring a proactive challenge to a law on s. 7 grounds has been settled by *Dywidag Systems*, above, and the corporate Plaintiffs cannot bring such a challenge here. I would note in passing that this conclusion does not necessarily prevent the Plaintiffs from advancing their argument that the impugned provisions are unconstitutionally vague should they choose to do so (see paragraph 16 of the Claim, struck above with leave to amend), since this argument could be relevant under s. 1 of the Charter should they establish a breach of another Charter provision: see *Nova Scotia Pharmaceutical*, above, at paras 39-40.

[173] Moreover, even if *Dywidag Systems*, above, was not conclusive authority on this point, the Plaintiffs have not pleaded a challenge in the nature of *Big M* or *Wholesale Travel*, both

above, arguing that the impugned provisions are invalid because they violate the rights of individuals. Rather, the corporate Plaintiffs appear to be claiming procedural protections under s. 7 in complete abstraction from the question of whether anyone's s. 7 rights are violated. It is clear that such an argument has no chance of success, as the procedural protections under s. 7 come into play only where an infringement of life, liberty or security of the person has been established: see *Main Rehabilitation Co v Canada*, 2004 FCA 403 at paras 4-5.

[174] The situation is quite different with respect to the corporate Plaintiffs' claim that their "right to freedom of expression and communication as guaranteed under s. 2 of the Charter" has been breached. The jurisprudence establishes that commercial speech, including that of corporations, is protected under s. 2(b) of the Charter, though perhaps enjoying weaker protection than other forms of speech that are closer to the core of what the provision was intended to protect: see *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712 at paras 45-60; *Irwin Toy*, above; *Rocket*, above; *RJR-MacDonald (1995)*, above; *Canada (Attorney General) v JTI-Macdonald Corp*, [2007] 2 SCR 610. Since most legislative limitations on protected expression will infringe s. 2(a), the analysis in most cases comes down to whether the limitations in question are reasonable limits that can demonstrably justified under s. 1 of the Charter.

[175] The claim that the corporate Plaintiffs enjoy a "right to equality, as a structural imperative of the underlying principle of the Constitution Act, 1867" amounts to an appeal to unwritten constitutional principles, which have been discussed by the Supreme Court in a number of cases. It is not entirely clear whether the Plaintiffs are advancing "equality" as an independent principle or as a component of the rule of law. They cite Donald MacIntosh, citing

in turn A. V. Dicey, who expressed the view that "equality before the law" is a component of the rule of law: see MacIntosh, above, at p. 7. Whether and in what circumstances such unwritten principles can be used as a basis for invalidating legislation on constitutional grounds remains a debatable point: see *Reference re Secession of Quebec*, [1998] 2 SCR 217; *Reference re Resolution to Amend the Constitution*, [1981] 1 SCR 753 at 845 (Patriation Reference); Hogg, above at 15-53, discussing *Mackin*, above; c.f. *British Columbia v Imperial Tobacco Canada Ltd*, [2005] 2 SCR 473 at paras 59-60. It is not a point that needs to be decided at this stage of these proceedings, in part because it is not clear whether this is the position the Plaintiffs are advancing. They say they are entitled to equality, as a structural imperative of the underlying principle of the *Constitution Act*, 1867, but they do not tell the Court or the Defendants how that right has been breached, or what remedies should flow. Is this part of the challenge to the impugned portions of the Act and Regulations, or specific actions of the executive branch in enforcing them, or both? How exactly have their purported rights to equality been breached? The Plaintiffs don't say.

[176] The same absence of a factual foundation affects the claim under s. 2(b) of the Charter. How exactly have the rights of the corporate Plaintiffs to freedom of expression been infringed? There are glimmers of this earlier in the Claim (see paragraph 16(b), (p), (q), (r) and (w) and paragraph 34 (s)), but in my view, the alleged breaches of the corporate Plaintiffs' s. 2(b) Charter rights have not been pleaded with sufficient detail to allow the Court to adjudicate the matter. As the Supreme Court found in *MacKay v Manitoba*, [1989] 2 SCR 357 the presentation of a factual foundation is essential to the proper adjudication of Charter issues.

Proper Defendants

[177] The Defendants say that Her Majesty the Queen in Right of Canada is the only proper defendant in this action. This is because the Claim discloses no material facts alleging any wrongdoing on the part of the named Ministers. Also, the Minister of National Health and Welfare does not exist, the naming of the Attorney General of Canada is redundant, and the RCMP is not a suable entity (see *Sauvé*, above, at para 44).

[178] The Plaintiffs disagree and refer the Court to *Liebmann*, above, at paras 51-52 as well as *Apotex*, above, at para 13.

[179] I do not see the relevance of either of these cases. *Liebmann* added Her Majesty the Queen as an additional defendant and decided that the debate about the appropriateness of granting injunctive relief against officers of the Crown "when that injunction operates against them in their representative capacity only as opposed to against them in their personal capacity" was irrelevant in that particular case because "the challenge is a constitutional one" in which "the Court has jurisdiction pursuant to section 24 of the Constitution Act, 1982 to grant whatever remedies are appropriate in the circumstances."

[180] In the present case, there is nothing in the Claim, even before portions of it are struck, that involves the Minister of Public Safety and Emergency Preparedness, or which explains how the Minister of National Health and Welfare (who does not exist) and the RCMP (who cannot be sued) can have any relevance or standing in a constitutional challenge, or why it is necessary to

name the Attorney General of Canada in addition to the Crown in order to obtain relief under s. 24 of the Constitution Act, 1982. Ministers cannot be sued in their representative capacity, and there is no indication that they are being sued in their personal capacity: *Cairns*, above, at para 6; *Merchant Law*, above, at paras 19-21.

[181] *Apotex*, above, merely says that it "is not always appropriate for motions to strike to be the context to make a binding decision on a question of standing, […]," rather "a judge should exercise her discretion as to whether it would be appropriate in the circumstances to render a decision on standing or whether a final disposition of the question should be heard with the merits of the case."

[182] It is my view that Her Majesty the Queen in Right of Canada is the only proper defendant in this action and that the other named defendants must be struck.

The Stay Motion

[183] For obvious reasons, given my decision on the Defendants' strike motion, the Court cannot grant the Plaintiffs a stay of the operation of s. 3(1) and (2) of the Act, and the stipulated sections of the *Natural Health Products Regulations*. The Plaintiffs have yet to disclose a serious issue to be tried and so cannot satisfy the cumulative, tri-partite test established in *RJR-MacDonald (1994)*, above.

[184] However, because the issue of a stay may arise again, following amendments to the Claim, I think it might help if I also point out that, on the present record before me for a stay, I

would not have been able to grant it even had the Plaintiffs established a serious issue to be tried. I say this for the following reasons:

a) There is no convincing, non-speculative evidence of irreversible harm established on a balance or probabilities. See *Information Commissioner*, above, at para 62. As the Defendants point out, Mancuso identifies products eliminated from the market but he also says that he uses these products regularly and commonly. Mancuso also leaves his claims to mental and physical distress unspecified and unsubstantiated. In addition, the harm referred to by Rowland is either vague and speculative or it is quantifiable business losses.

b) The evidence presented by the Plaintiffs (and the weakness of their case for serious issue is inevitably significant here) does not overcome the presumption that the Act and the Regulations serve the public good, so that the balance of convenience favours the Plaintiffs. See *Harper*, above at para 9. As the Defendants point out, even a *prima facie* Charter breach leaves it open to the Crown to justify that breach under s. 1 of the Charter (and it is difficult to see how the Court could assess this issue at an interlocutory stage such as the present), and even a temporary staying of the legislative and regulatory provision in question could impact the well-being of Canadians in general in serious ways and in advance of any finding of constitutionality. The evidentiary record before me provides little to support such a serious interference with the wording of the Act and the Regulations.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Claim is struck in accordance with my reasons pursuant to s. 221 of the *Federal Court Rules*.
2. The Plaintiffs are hereby granted leave to amend their Claim within 30 days of the date of this order, unless otherwise extended by the Court.
3. All Defendants are hereby struck from the style of cause except Her Majesty the Queen in Right of Canada.
4. The Defendants may move to strike any amended Claim.
5. The Plaintiffs' motion for a stay is dismissed.
6. The parties may address the Court on the issue of costs for these two motions, and should do so in writing within 30 days of the date of this order.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1754-12
STYLE OF CAUSE:	NICK MANCUSO, THE RESULTS COMPANY INC., DAVID ROWLAND, LIFE CHOICE LTD (AMALGAMATED FROM, ROLLED INTO, AND CONTINUING ON BUSINESS FOR, AND FROM, E.D. MODERN DESIGN LTD. AND E.G.D. MODERN DESIGN LTD), AND DR. ELDON DAHL, AND AGNESA DAHL v MINISTER OF NATIONAL HEALTH AND WELFARE, ATTORNEY GENERAL OF CANADA, MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, ROYAL CANADIAN MOUNTED POLICE, AND HER MAJESTY THE QUEEN IN RIGHT OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JANUARY 21, 2014
JUDGMENT AND REASONS:	RUSSELL J.
DATED:	JULY 16, 2014

APPEARANCES:

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Sean Gaudet and Andrew Law	FOR THE DEFENDANTS

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