OVERVIEW

1. These claims should be struck without leave to amend. First, the Hathaway claim seeks declarations that the former *Access to Cannabis for Medical Purposes Regulations* ("ACMPR") are unconstitutional. The ACMPR have been repealed. The requested relief is accordingly moot.

2. Second, the claims should be struck as a matter of judicial comity and as an abuse of process. The plaintiffs have previously filed claims concerning the same issues as are raised in the present claims. The prior claims were struck without leave to amend on the grounds that, among other things, they failed to disclose a reasonable cause of action and were frivolous, vexatious and an abuse of process. The plaintiffs did not appeal those orders, but now attempt to circumvent them with "new" claims. There is no reason to depart from this Court's prior decisions and the plaintiffs should not be permitted to abuse this Court's process by repeatedly raising the same issues.

3. Third, this Court has affirmed the constitutionality of the 150 gram possession limit on cannabis for medical purposes. Several courts, including this one, have also affirmed the constitutionality of requirements for annual medical authorization to use cannabis for medical purposes. The claims attempt to re-litigate these issues, but identify no reason why this Court should depart from these prior decisions. Judicial comity again requires that the claims be struck in these circumstances.

4. Fourth, the claims fail to disclose a reasonable cause of action. Although they broadly allege that the current *Cannabis Regulations* infringe sections 7 and 15 of the Charter, the claims contain few if any facts to support the essential elements of these constitutional causes of action. The claims are so lacking in material facts, and are so argumentative and at points unintelligible as to be scandalous, frivolous and vexatious.

PART I – FACTS

A. LEGISLATIVE FRAMEWORK

1) The evolution of the regulation of cannabis for medical purposes

5. The regulation of cannabis for medical purposes in Canada has evolved significantly over the past two decades. In 1999, the Minister of Health began issuing discretionary exemptions under the *Controlled Drugs and Substances Act* ("CDSA") to allow patients to produce and possess cannabis for medical purposes.[1]

a) The MMAR

6. In 2001, in response to the decision of the Ontario Court of Appeal in *R v Parker*, Canada promulgated the *Marihuana Medical Access Regulations* ("MMAR").[2] Although they evolved over time, at the time of their repeal in 2014, the MMAR provided that patients with the support of a physician[3] could obtain authorization from Health Canada to possess up to 30 times the daily quantity of dried cannabis authorized by the physician.[4] The MMAR required that this medical authorization be renewed annually.[5]

7. The MMAR provided that patients could access cannabis by purchasing it from Health Canada, or by producing it themselves or designating someone else to produce it under a Health Canada-issued licence.[6] For those choosing personal or designated production, at the time of repeal, up to four patients or their designated producers could share a production site.[7] This limit was intended to address the increased risks of theft,

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[1] *Controlled Drugs and Substances Act*, SC 1996, c 19, s 56 **[DMR, Tab 8A, p 359-60]**; Regulatory Impact Assessment Statement for the MMAR (2010), p 481 ("MMAR 2010 RIAS") **[DMR, Tab 8A, p 387]**

[2] SOR/2001-227 ("MMAR") **[DMR, Tab 8A, p 391-98]**

[3] In addition to a general practitioner, the MMAR required that patients with prescribed conditions or symptoms also consult with a medical specialist. MMAR, ss 4(2)(b), 6 **[DMR, Tab 8A, p 363-66]**

[4] MMAR, ss 2, 11 **[DMR, Tab 8A, p 363, 367-68]**

[5] MMAR, s 13(1) **[DMR, Tab 8A, p 368]**

[6] MMAR, ss 24-42, 70-70.5 **[DMR, Tab 8A, p 370-83]**

[7] MMAR, ss 32(d), 41(c) **[DMR, Tab 8A, p 375, 380]**

diversion and other public safety risks associated with large-scale cannabis production.[8] The MMAR also provided that patients or designated producers licensed to produce cannabis could store a quantity of cannabis equal to more than 200 times the daily quantity authorized by the patient's medical practitioner.[9]

b) The MMPR

8. Between 2001 and 2013, the number of patients authorized to possess and produce cannabis, and the amount that they were authorized to produce, grew significantly. This led to concerns on the part of physicians, municipalities, and law enforcement about risks to the health, safety and security of patients, their neighbours and the public.[10] In 2013, Canada responded to these concerns by introducing the *Marihuana for Medical Purposes Regulations* ("MMPR").[11]

9. Under the MMPR, patients with the support of a health care practitioner could purchase cannabis from commercial producers licensed by Health Canada to produce and ship cannabis.[12] Like manufacturers of drugs under the *Food and Drugs Act*, these licensed producers were (and remain) subject to strict regulatory controls that are designed to ensure cannabis products do not pose undue risk to the health of users, are not easily diverted to the illicit market, and are not accessed illegally by youth to whom they could pose health risks.[13] The MMPR provided that patients could possess the lesser of 150 grams or 30 times the daily quantity of dried cannabis authorized by their health care practitioner.[14]

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[8] MMAR 2010 RIAS, p 482, 484 ("MMAR 2010 RIAS") **[DMR, Tab 8A, p 388, 390]**

[9] MMAR, s 31 **[DMR, Tab 8A, p 374]**

[10] Regulatory Impact Assessment Statement for the MMPR (2013), p 1720, 1725-27 ("MMPR RIAS") **[DMR, Tab 8A, p 399, 403-05]**

[11] SOR/2013-119 ("MMPR") **[DMR, Tab 8A, p 391-98]**

[12] MMPR, ss 3, 12 **[DMR, Tab 8A, p 392-95]**

[13] MMPR RIAS, p 1721, 1731-40 **[DMR, Tab 8A, p 400, 407-17]**; Regulatory Impact Assessment Statement for the *Cannabis Regulations* (2018), p 2811-2820 ("CR RIAS") **[DMR, Tab 8A, p 471-80]**

[14] MMPR, s 5 **[DMR, Tab 8A, p 393-94]**

10. In *Allard v Canada* ("Allard"), this Court declared the MMPR unconstitutional on the grounds that the licensed production regime in place at the time unduly restricted access to cannabis for medical cannabis. However, as detailed below, the Court affirmed the constitutionality of the 150 gram possession limit.

c) The ACMPR

11. In August 2016, Canada responded to Allard by promulgating the ACMPR.[15] The ACMPR substantively combined the commercial licensed production regime established under the MMPR with a personal and designated production regime similar to the former MMAR.

12. The ACMPR preserved the 150 gram possession limit. However, patients registered with Health Canada for personal or designated production could once again store an additional quantity of cannabis equal to more than 200 times the daily quantity authorized by the patient's medical practitioner.[16] In addition, up to four patients could once again share a production site. The forms of cannabis that patients could possess and store were also expanded under the ACMPR to include not only dried cannabis, but also non-dried forms of cannabis, including fresh cannabis and cannabis oil.[17]

2) The current *Cannabis Act* and *Regulations*

13. Parliament passed the *Cannabis Act* (the "Act") on June 20, 2018, and the new Act took effect on October 17, 2018.[18] The Act establishes a new legal and regulatory framework for the production, distribution, sale and possession of cannabis.

14. The Act permits Canadian adults to possess up to 30 grams of dried cannabis (or its non-dried equivalent) while in a public place.[19] Cannabis may be purchased from a provincially regulated online store or where currently available, a provincially regulated

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[15] SOR/2016-230 ("ACMPR") **[DMR, Tab 8A, p 417-27]**

[16] ACMPR, s 191 **[DMR, Tab 8A, p 425-26]**

[17] ACMPR, ss 3-4 **[DMR, Tab 8A, p 418-20]**

[18] SC 2018, c 16 ("Act") **[DMR, Tab 8A, p 430-50]**

[19] Act, s 8(1)(a) **[DMR, Tab 8A, p 437]**

retail outlet.[20] Adults may also produce up to four cannabis plants at home.[21] The Act and its accompanying regulations include strict regulatory controls to provide for the safety and quality of commercially produced cannabis, to restrict youth access, to enhance public awareness of the health risks posed by cannabis, and to limit opportunities for organized crime to profit from the illicit sale of cannabis.[22]

15. In conjunction with the Act, Canada introduced the new *Cannabis Regulations* (the "Regulations").[23] The Regulations establish a medical cannabis regime that operates in parallel with the new non-medical regime. In addition to the 30 grams authorized under the Act, the Regulations (like the MMPR and ACMPR before them) permit the possession in public of the lesser of 150 grams or 30 times the daily quantity of dried cannabis authorized by a patient's health care practitioner.[24] However (unlike the former regulations), the current possession limits encompass public possession only. There is no limit in the Act or Regulations on the quantity of cannabis that a patient or other adult may store in a non-public place such as a residence.

16. Like the ACMPR, the Regulations provide that patients may access cannabis either by purchasing it from a commercial licensed seller, or by registering with Health Canada for personal or designated production.[25] For patients choosing personal or designated production, the Regulations continue to provide that up to four patients or their designated producers may share a production site.[26] These features of the Act and Regulations, and of the previous regulatory regimes, are illustrated in the following table.

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[20] Act, s 69 **[DMR, Tab 8A, p 449-50]**

[21] Act, s 12(4)(b) **[DMR, Tab 8A, p 442]**

[22] Act, s 7 **[DMR, Tab 8A, p 436-37]**

[23] SOR/2018-144 ("Regulations") **[DMR, Tab 8A, p 451-61]**

[24] Regulations, ss 266-68 **[DMR, Tab 8A, p 451-55]**

[25] Regulations, s 266(1) **[DMR, Tab 8A, p 452]**

[26] Regulations, s 317(1)(h) **[DMR, Tab 8A, p 459]**

	MMAR (as of March 31, 2014)	**MMPR**	**ACMPR**	***Cannabis Act*, *Cannabis Regulations***
Max. possession amount (dried marihuana in grams)[†]	30 x daily authorized amount MMAR, s 11(3)	Lesser of 150 g or 30 x daily authorized amount MMPR, s 5	Lesser of 150 g or 30 x daily authorized amount ACMPR, s 6(1)	Non-public place: No limit Public place: 30 g + lesser of 150 g or 30 x daily authorized amount Act, s 8(1)(a); Regs, ss 266-268
Max. storage amount for personal / designated producers (dried marihuana in grams)[†]	218-713 x daily authorized amount[‡] MMAR, s 31	N/A[§]	218-713x daily authorized amount[‡] ACMPR, ss 191-192	No storage limit[§]
Max. period of medical authorization	Annual MMAR, ss 11, 13(1)	Annual MMPR, s 129(2)	Annual ACMPR, s 8(2)	Annual Regs, s 273(2)
Max. patients per production site	4 MMAR, ss 32(d), 41(c)	N/A[‡]	4 ACMPR, s 184(c), 185(b)	4 Regs, s 317(1)(h)

[†] The MMAR and MMPR authorized the possession and storage of dried marihuana only. The forms of cannabis that a patient could possess and store were expanded under the ACMPR to also include non-dried forms of cannabis, such fresh cannabis and cannabis oil. Possession and storage limits for non-dried forms of cannabis were based on an equivalency formula contained in the regulations. These possession limits continue under the current *Cannabis Act* and *Regulations*.

[‡] Approximate storage based on formula contained in regulations. Precise storage amounts varied depending on whether production was indoor, outdoor, or a combination of the two.

[§] The MMPR did not authorize personal or designated production.

B. PRIOR CLAIMS BY THE PLAINTIFFS

17. Between 2014 and 2016, hundreds of self-represented plaintiffs, including the present plaintiffs Allan J. Harris ("Harris"), Mike Spottiswood ("Spottiswood") and Raymond Lee Hathaway ("Hathaway"), brought constitutional challenges in this Court to the MMAR and MMPR.[27] The claims were based on "kits" downloaded from the website of medical cannabis activist John Turmel.[28] As detailed below, each of the claims was struck without leave to amend.

1) Prior claims by Harris and Spottiswood

18. Harris and Spottiswood brought "kit" claims alleging that several provisions of the MMAR and MMPR – including the production site limits in the MMAR, the 150 gram possession limit in the MMPR, and the requirement in both regulations for annual medical authorization – infringe the section 7 rights of medical cannabis patients.[29]

19. The Court initially stayed the claims pending Allard.[30] Following Allard, Canada brought a motion to strike. On January 11, 2017, the Court granted Canada's motion and struck the claims without leave to amend. The claims were struck on the grounds that they were moot, failed to disclose a reasonable cause of action, and were frivolous,

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[27] Statement of Claim in *Allan Jeffery Harris v HMQ* (T-1224-14) (Exhibit B to the Affidavit of Asvini Krishnamoorthy, sworn December 12, 2018 ("Krishnamoorthy affidavit") ("Prior Harris Claim") **[Defendant's Motion Record ("DMR"), Tab 7B]**; Statement of Claim in *Michael K Spottiswood v HMQ* (T-543-14) (Exhibit A to the Krishnamoorthy Affidavit) ("Prior Spottiswood Claim") **[DMR, Tab 7A]**; Statement of Claim in *Raymond Lee Hathaway v HMQ* (T-983-16) (Exhibit D to the Krishnamoorthy Affidavit) ("Prior Hathaway Claim") **[DMR, Tab 7D]**

[28] *In the matter of numerous filings seeking a declaration pursuant to s 52(1) of the Canadian Charter of Rights and Freedoms*, 2017 FC 30, paras 1, 3-4 ("Order and Reasons of Phelan J.") **[Defendant's Book of Authorities ("DBOA"), Tab 15]**

[29] Prior Harris Claim, p 1, 3-4, 6, 24-25, 34, 41-45 **[DMR, Tab 7B, p 116, 118-19, 121, 139-40, 149, 156-60]**; Prior Spottiswood claim, p 1-4, 22-24, 32-33, 39-44 **[DMR, Tab 7A, p 66-69, 87-89, 97-98, 104-09]**; Order and Reasons of Phelan J., paras 4, 8 **[DBOA, Tab 15]**

[30] Order and Reasons of Phelan J., para 11 **[DBOA, Tab 15]**

vexatious and an abuse of process.[31] The plaintiffs did not appeal this decision.[32] However, in the course of his claim, Spottiswood appealed two other interlocutory decisions which resulted in two costs awards against him of $500 each.[33] These costs remain unpaid.[34]

2) Prior claim by Hathaway

20. In June 2016, Hathaway also commenced a claim in this Court. The claim alleged that non-dried forms of cannabis remained unavailable despite the Supreme Court of Canada decision in *R v Smith*,[35] and sought a declaration that the CDSA was accordingly unconstitutional.[36]

21. Canada brought a motion to strike the claim. On August 17, 2016, this Court (Zinn J.) granted Canada's motion and struck the claim without leave to amend on the grounds that it failed to disclose a reasonable cause of action.[37] On October 11, 2016,

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[31] Order and Reasons of Phelan J., paras 12, 22-44 **[DBOA, Tab 15]**

[32] Krishnamoorthy Affidavit, para 5 **[DMR, Tab 7, p 61]** Another plaintiff, John C. Turmel, brought a motion for an extension of time to appeal. The Federal Court of Appeal dismissed the motion. In so doing, Rennie J.A. noted that he was not satisfied that there was an arguable case on appeal and that an extension was therefore not in the "interests of justice." March 1, 2017, Order of Rennie J.A. in *John C Turmel v HMQ* (17-A-5) (Exhibit C to the Krishnamoorthy Affidavit) **[DMR, Tab 7C, p 169-70]**

[33] June 6, 2014, Order of the Federal Court of Appeal in *Michael K Spottiswood v HMQ* (A-178-14) (Exhibit L to the Krishnamoorthy Affidavit) **[DMR, Tab 7L, p 315]**; September 9, 2014, Order of Sharlow J.A. in *Michael K Spottiswood v HMQ* (A-329-14) (Exhibit M to the Krishnamoorthy Affidavit) **[DMR, Tab 7M, p 317]**

[34] Krishnamoorthy Affidavit, para 17 **[DMR, Tab 7, p 63]**

[35] 2015 SCC 34 ("*Smith*") **[DBOA, Tab 21]**

[36] Prior Hathaway Claim, paras 1-2, 4, 6-7 **[DMR, Tab 7D, p 172-74]**

[37] August 17, 2018, Order of Zinn J. in *Raymond Lee Hathaway v HMQ* (T-983-16) (Exhibit E to the Krishnamoorthy Affidavit) ("Order of Zinn J.") **[DMR, Tab 7E, p 177-78]**

the Court (Aalto, Proth.) struck several virtually identical claims, including one by Harris, again without leave to amend.[38] Once again, the plaintiffs did not appeal.[39]

B. THE PRESENT CLAIMS

1) The Hathaway and Harris claims

22. On September 24, 2018, Hathaway filed the present claim (the "Hathaway claim"). The claim alleges that the plaintiff has an inoperable tumor on his spine, and is authorized to use 100 grams of cannabis per day.[40] The claim seeks declarations that unspecified "extreme limitations" on non-dried forms of cannabis and the 150 gram possession and shipping limits in the former ACMPR violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* ("Charter"). In addition, the claim seeks a general declaration that limits on the number of patients that may share a production site unduly restrict access to cannabis for medical purposes.[41]

23. On October 3, 2018, Harris filed a claim (the "Harris claim"). The claim alleges that the plaintiff is authorized to possess 100 grams of cannabis per day and is currently registered with Health Canada for personal or designated production.[42] It contains no additional information about his circumstances. Like the Hathaway claim, the Harris claim initially sought a declaration that the 150 gram possession and shipping limits in the former ACMPR violated sections 7 and 15. The Harris claim was later amended to instead reference the current Regulations.[43]

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[38] Statement of Claim in *Allan Jeffery Harris v HMQ* (T-1194-16) (Exhibit F to the Krishnamoorthy Affidavit) **[DMR, Tab 7F]**; October 11, 2016, Order of Aalto, Proth. (Exhibit G to the Krishnamoorthy Affidavit) **[DMR, Tab 7G, p 185-88]**

[39] Krishnamoorthy Affidavit, paras 7, 9 **[DMR, Tab 7, p 62]**

[40] Hathaway Statement of Claim, paras 13-17, 34-35 **[DMR, Tab 2, p 10-11]**

[41] Hathaway Statement of Claim, para 11 **[DMR, Tab 2, p 10]**

[42] Harris Amended Statement of Claim, para 2 **[DMR, Tab 3, p 34-35]**

[43] Harris Amended Statement of Claim, para 1 **[DMR, Tab 3, p 34]**

24. Five other plaintiffs have also filed claims challenging the 150 gram possession and shipping limits in the former ACMPR.[44] By Order dated November 1, 2018, the case-management judge, the Honourable Mr. Justice Brown, designated Hathaway and Harris as lead plaintiffs and ordered them to amend their claims by November 14 to reference the current Regulations rather than the former ACMPR.[45] While Harris filed an amended claim, Hathaway failed to do so.

2) The Spottiswood claim

25. On October 31, 2018, Spottiswood filed a claim (the "Spottiswood claim"). The claim alleges that the plaintiff has an unspecified permanent medical condition and is registered with Health Canada for either personal or designated production.[46] The claim seeks a declaration that s. 273(2) of the Regulations, which requires annual health care practitioner authorization to use cannabis, violates the section 7 rights of permanently ill patients.[47]

26. The Spottiswood claim is being collectively case-managed with the Hathaway and Harris claims. The Court has granted leave for Canada to file a single motion record in support of a motion to strike all three claims.[48]

PART II – ISSUES

27. The issues on this motion are

a) whether the claims should be struck without leave to amend on the grounds that:

i. the Hathaway claims concerning the former ACMPR are moot;

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[44] *Arthur Jackes v HMQ* (T-1784-18), *Colleen M Abbott v HMQ* (T-1822-18), *Robert Dylan McAmmond v HMQ* (T-1878-18); *Scott Stanley McClusky v HMQ* (T-1900-18), *Jeratt Michael Wollner v HMQ* (T-2066-18)

[45] November 1, 2018, Order of Brown J., paras 1-2 **[DMR, Tab 5, p 54]**

[46] Spottiswood Statement of Claim, para 2 **[DMR, Tab 4, p 51]**

[47] Spottiswood Statement of Claim, para 1 **[DMR, Tab 4, p 50]**

[48] November 1, 2018, Order of Brown J., para 6 **[DMR, Tab 5, p 55]**; November 14, 2018, Order of Brown J., paras 1-2 **[DMR, Tab 6, p 59]**

ii. the attempt to re-litigate the plaintiffs' prior claims is contrary to judicial comity or is an abuse of process;

iii. the Harris and Spottiswood claims concerning possession limits and annual medical authorization are contrary to judicial comity;

iv. the claims fail to disclose a reasonable cause of action; or

v. the claims are scandalous, frivolous and vexatious; and

b) if his claim is not struck without leave to amend, whether Spottiswood should be ordered to provide security for costs?

PART III – SUBMISSIONS

A. THE CLAIMS SHOULD BE STRUCK WITHOUT LEAVE TO AMEND

28. The claims should be struck without leave to amend. First, the Hathaway claims concerning the former ACMPR should be struck as moot. Second, the plaintiffs' attempts to re-litigate their previous claims should be struck as a matter of judicial comity and an abuse of process. Third, the Harris and Spottiswood claims should be struck as a matter of judicial comity in that they raise constitutional issues that have already been decided by this and other courts. Fourth, the claims fail to disclose a reasonable cause of action and are scandalous, frivolous and vexatious.

1) The Hathaway claims concerning the former ACMPR are moot

29. The Supreme Court of Canada has set out a two-step test for deciding whether a claim is moot. At the first step, the court must decide whether the case is moot in the sense that a decision will have no practical effect on the rights of the parties. If moot, the court must then consider whether there are any reasons to nevertheless hear the case on its merits.[49]

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[49] Order and Reasons of Phelan J., para 22 **[DBOA, Tab 15]**

30. The Hathaway claim seeks declarations that unspecified limitations on non-dried forms of cannabis and the 150 gram possession and shipping limits in the former ACMPR are unconstitutional.[50] Since the claim was filed, the ACMPR have been repealed. The requests for relief are therefore clearly moot.

31. There are no reasons to hear the claim in spite of its mootness. Although the current Act and Regulations mirror the former ACMPR in several respects, the current scheme includes features that significantly expand access to cannabis, including the right to possess an additional 30 grams of cannabis, the narrowing of the possession limits to encompass only public possession, and the elimination of storage limits. A judicial pronouncement on the constitutionality of the former scheme would serve little purpose but would consume judicial and public resources that could be better spent assisting the parties to live disputes. The claims concerning the former ACMPR should therefore be struck.

2) <u>The plaintiffs are attempting to re-litigate prior claims</u>

32. The plaintiffs have previously commenced claims concerning the issues raised in these actions. Their claims were struck by this Court without leave to amend, and the plaintiffs did not appeal. The plaintiffs' attempts to re-litigate these issues are contrary to judicial comity and an abuse of this Court's process.

33. The Federal Court of Appeal has characterized judicial comity as an aspect of *stare decisis*. Like *stare decisis*, comity is intended to promote consistency, predictability in the law, and efficient judicial administration. Comity provides that, although not strictly binding, prior decisions of the same Court are deserving of considerable respect and should be departed from only where there are "strong reasons," also sometimes described as "cogent reasons," for doing so.[51]

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[50] Hathaway Statement of Claim, paras 2, 19-33 **[DMR, Tab 2, p 9-11]**

[51] *Apotex Inc v Pfizer Canada Inc*, 2013 FC 493, paras 11-15, aff'd 2014 FCA 54 ("*Apotex*") **[DBOA, Tab 3]**

34. Strong reasons does not simply mean better arguments. Rather, the party requesting a departure from a prior decision must establish either that subsequent decisions have affected its validity, that the prior decision failed to address some binding case law or statute, or that the prior decision was unconsidered or given in circumstances where trial exigencies did not allow for full argument.[52]

35. The Court may also strike a claim on the grounds that it is an abuse of process.[53] Abuse of process operates to bar proceedings where the strict requirements of *res judicata* are not met but where a party nevertheless attempts to re-litigate issues in a manner that has the potential to undermine the integrity of the administration of justice.[54] As the Supreme Court of Canada noted in *Toronto v CUPE*, if a matter is re-litigated and the same result is reached, re-litigation will have been a waste of resources and judicial economy will be undermined. Conversely, if a different result is reached, the inconsistency will undermine the entire judicial process by diminishing its authority, credibility and aim of finality.[55] Both outcomes are to be avoided.

36. The abuse of process rule is not absolute. Courts retain discretion to allow re-litigation where the prior proceeding was tainted by fraud or dishonesty, previously unavailable evidence impeaches the original result, or differences in the two proceedings are such that it would be unfair to apply the prior findings in the new case.[56]

37. The present claims should be struck both as a matter of judicial comity and as an abuse of process. Like the present claims, the prior Harris and Spottiswood claims challenged the constitutionality of the prohibition on more than four patients sharing a production site, the 150 gram possession and shipping limits, and the requirements for

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[52] *Apotex*, para 14 **[DBOA, Tab 3]**

[53] *Federal Courts Rules*, Rule 221(f) **[DMR, Tab 8A, p 485]**; *Toronto (City) v CUPE, Local 79*, 2003 SCC 63, para 35 ("CUPE") **[DBOA, Tab 23]**

[54] *CUPE*, paras 35, 37-38, 42, 51 **[DBOA, Tab 23]**

[55] *CUPE*, para 51 **[DBOA, Tab 23]**

[56] *CUPE*, paras 52-53 **[DBOA, Tab 23]**

annual medical authorization to use cannabis.[57] In striking the claims, Phelan J. noted that they contained a "dearth of detail" concerning the plaintiffs' personal circumstances and held that they failed to disclose a reasonable cause of action.[58] He held that the claims were also frivolous and vexatious both in failing to disclose material facts and in their use of language that was "overblown, insulting and argumentative."[59] Lastly, he found the claims raised matters of "settled law" concerning the medical authorization requirements, which was an abuse of process.[60]

38. Phelan J. refused leave to amend. He noted that the plaintiffs were given opportunities to amend their claims, but had failed to do so. He held that a further opportunity to amend would be "unjust" in these circumstances.[61]

39. The Hathaway claim also raises issues that were raised in his prior claim. The prior claim alleged that, despite the decision in *Smith*, non-dried cannabis derivatives such as juice and oil remained practically unavailable.[62] This claim was struck for failure to disclose a reasonable cause of action and without leave to amend.[63]

40. Judicial comity demands that the claims be struck. The plaintiffs have identified no reasons, cogent or otherwise, why the Court should depart from its prior decisions. Indeed, the new claims barely acknowledge the prior claims at all. It appears the plaintiffs have either forgotten that their prior claims were struck, or that they are hoping this Court will simply ignore its prior decisions.

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[57] Prior Harris Claim, p 1, 3-4, 6, 24-25, 34, 41-45 **[DMR, Tab 7B, p p 116, 118-19, 121, 139-40, 149, 156-60]**; Prior Spottiswood Claim, p 1-4, 22-24, 32-33, 39-44 **[DMR, Tab 7A, p 66-69, 87-89, 97-98, 104-09]**

[58] Order and Reasons of Phelan J., paras 12, 38-39 **[DBOA, Tab 15]**

[59] Order and Reasons of Phelan J., paras 40-41 **[DBOA, Tab 15]**

[60] Order and Reasons of Phelan J., paras 36, 43 **[DBOA, Tab 15]**

[61] Order and Reasons of Phelan J., paras 12, 39, 44 **[DBOA, Tab 15]**

[62] Prior Hathaway Claim, paras 1-2, 4, 6-7 **[DMR, Tab 7D, p 172-74]**

[63] Order of Zinn J. **[DMR, Tab 7E, p 178]**

41. The claims are also a quintessential abuse of process. It was open to the plaintiffs to appeal the orders striking their prior claims. They declined to do so, but now attempt to circumvent those orders with new claims concerning the very same issues. If allowed to proceed, the claims would consume scarce judicial and public resources on matters that have already been decided, and would create a risk of inconsistent outcomes that would undermine finality and consistency.

42. There is no suggestion that the prior proceedings were tainted by fraud, that it would be unfair to apply the prior findings in this case, or that the plaintiffs have previously unavailable evidence. Although the Harris claim alleges that the cannabis possession limits are based on "fraudulent" Health Canada data,[64] his prior claim included similar allegations and Harris acknowledges that the evidence of this alleged fraud was before Phelan J. when he struck the plaintiff's prior claim.[65] Although the Harris claim also includes a new allegation concerning section 15, there is no reason that the plaintiff could not have raised this issue before. It would be a further abuse of process if plaintiffs could re-litigate issues simply by framing them as new causes of action.

3) Courts have previously affirmed the constitutionality of the possession limits and annual medical authorization requirement

43. The Harris and Spottiswood claims are contrary to judicial comity in a second respect. This Court has previously affirmed the constitutionality of a 150 gram possession limit, and several courts, including this one, have consistently affirmed the constitutionality of requirements for physician authorization to use cannabis for medical purposes. The plaintiffs have identified no reason why this Court should depart from these decisions. The claims should be struck on this ground, as well.

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[64] Harris Amended Statement of Claim, paras 35, 37 **[DMR, Tab 3, p 45]**

[65] Prior Harris Claim, p 41-45 **[DMR, Tab 7B, p 156-60]**; Harris Amended Statement of Claim, para 38 **[DMR, Tab 3, p 45]**

a) The 150 gram possession limit

44. In Allard, this Court considered the constitutionality of the 150 gram possession limit in the MMPR. The Court held that the limit was constitutional. In so doing, Phelan J. noted:

> [286] ... Specifically, the Plaintiffs argue that the 150 gram possession restriction limits their freedom of movement and ability to travel; that the state does not have a legitimate interest in this prohibition; and that it does not acknowledge those who possess it safely without endangering others.
>
> [287] I agree with the Defendant, in the section 7 analysis, that the burden is on the Plaintiffs to establish that the 150 gram possession limit impacts them in a significant way. Although the Plaintiffs may have to purchase their marihuana more frequently and restrict the number of days they travel or transport the drug because of this restriction, the cap is not overbroad or grossly disproportionate because it bears a connection to the objective – it reduces the implied risk of theft, violence and diversion for which there has been no substantial or persuasive evidence.
>
> [288] Overall, this restriction is significantly different than the restriction on cultivation as the cultivation restriction is a complete ban without minimal impairment that affects individuals adversely to the legislation's objective. The possession cap still allows one to possess more than their necessary amount of marihuana. ...[66]

45. Harris now attempts to re-litigate this issue but has identified no cogent reason why this Court should depart from its decision in Allard. There is no suggestion that Allard failed to address some binding case or legislation, or that subsequent cases or legislation have undermined its validity. Indeed, as detailed at paragraph 31 above, subsequent legislation has significantly expanded patients' ability to possess cannabis. Any impact on Charter rights is even less now than at the time of Allard.

46. The Allard decision followed a lengthy trial and was based on a large volume of evidence, including evidence and submissions specifically concerning the 150 gram possession limit and its impact on patients.[67] Following the trial decision, the Allard plaintiffs brought a motion for reconsideration of several aspects of the decision,

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[66] *Allard v Canada*, 2016 FC 236 ("*Allard* Trial Decision") **[DBOA, Tab 2]**

[67] *Allard* Trial Decision, para 9 **[DBOA, Tab 2]**; Allard Amended Statement of Claim, paras 37, 65-66 (Exhibit H to the Krishnamoorthy Affidavit) **[DMR, Tab 7H, p 202-03, 208-10]**; See *e.g.* Affidavit of Danielle Lukiv in Allard, para 5 and Exhibit E (Exhibit J to the Krishnamoorthy Affidavit) **[DMR, Tab 7J, p 229, 232]** and Affidavit of Jason Wilcox in Allard, p 4-9, 21, 23-24, 62 (Exhibit I to the Krishnamoorthy Affidavit) **[DMR, Tab 7I, p 217-26]**

including the 150 gram limit. The Court dismissed the motion, noting that the 150 gram limit was "not accidentally omitted or overlooked" in the trial decision but expressly considered and determined to be constitutionally sound.[68]

47. The claim notes that the plaintiff uses 100 grams of dried cannabis per day, and alleges that the Court in Allard failed to consider the impact of the possession limits on patients with high daily dosages.[69] This allegation is clearly unsupported. While the four Allard plaintiffs were authorized to use between 5 and 25 grams per day, there was evidence in Allard of patients authorized to use much larger quantities, including some well in excess of 100 grams.[70] The Court nevertheless deemed the possession limit constitutional.

48. The Harris claim also cites *Garber v Canada*, in which the Supreme Court of British Columbia granted four plaintiffs an injunction to possess more than 150 grams in accordance with their existing MMAR authorizations, pending their constitutional challenge to the MMPR.[71] *Garber* is entitled to no weight. The Federal Court of Appeal has held that decisions granting interlocutory injunctions have no bearing on subsequent motions to strike for no reasonable cause of action, given the significantly different tests involved in the two motions.[72]

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[68] *Davey v Canada*, 2016 FC 492, paras 28, 31-32 ("*Allard* Reconsideration Decision") **[DBOA, Tab 9]**

[69] Harris Amended Statement of Claim, paras 2, 40, 48 **[DMR, Tab 3, p 34-35, 45, 48]**

[70] *Allard* Trial Decision, paras 132, 137, 143 **[DBOA, Tab 2]**; Allard Amended Statement of Claim, para 37 **[DMR, Tab 7H, p 202-03]**; Affidavit of Jeannine Ritchot in Allard, para 53 (Exhibit K to the Krishnamoorthy Affidavit) **[DMR, Tab 7K, p 250--51]**;Affidavit of Jason Wilcox in Allard, p 62 (Exhibit I to the Krishnamoorthy Affidavit) **[DMR, Tab 7I, p 226]**

[71] Harris Amended Statement of Claim, para 41 **[DMR, Tab 3, p 46]**; *Garber v Canada*, 2015 BCSC 1797, para 148

[72] *Coca-Cola Ltd v Pardhan*, [1999] FCJ No 484, para 30 (CA) **[DBOA, Tab 7]**

49. Moreover, even if interlocutory injunction decisions were relevant, this Court rejected a similar request for an interlocutory exemption from the 150 gram possession limit in Allard.[73] This decision was affirmed on appeal, and the possession limit was ultimately upheld at trial in Allard.[74] The decisions by this Court and the Federal Court of Appeal in Allard are authoritative in this case, and Harris has identified no reason why this Court should depart from them.

b) The annual medical authorization requirement

50. Canadian courts have also consistently affirmed the constitutionality of requirements for medical authorization to use cannabis. In *Hitzig v Canada*, the Ontario Court of Appeal upheld the requirement in the former MMAR for physician authorization to use cannabis. In so doing, the Court observed that whether cannabis would assist a patient was "fundamentally a medical question."[75] Subsequent courts have confirmed this conclusion,[76] and this Court has recently described it as "settled law" that medical authorization requirements are constitutional.[77]

51. Once again, there is no reason to depart from these decisions in this case. The Court noted in *Hitzig* that its decision might have to be revisited if physician participation ever declined to a point that a medical exemption was practically unavailable. However, Spottiswood does not allege that this is the case, and instead appears to take issue only with the fact patients must visit a health care practitioner

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[73] *Allard v Canada*, 2014 FC 280, paras 91, 128, varied on other grounds 2014 FCA 298 ("*Allard* Injunction Decision") **[DBOA, Tab 1]**

[74] *Allard v Canada*, 2014 FCA 298, para 22 **[DBOA, Tab 1]**; *Allard* Trial Decision, paras 286-88 **[DBOA, Tab 2]**; see also *Allard* Reconsideration Decision, paras 28, 31-32 **[DBOA, Tab 9]**

[75] *Hitzig v Canada* (2003), 231 DLR (4th) 104, paras 138-45, leave to appeal refused 2004 SCCA No 5 ("*Hitzig*") **[DBOA, Tab 13]** In addition to a general practitioner, MMAR required that patients with prescribed medical conditions and symptoms obtain the support of one, and in some cases, two medical specialists. The Court in *Hitzig* declared the second specialist requirement unconstitutional, but affirmed the constitutionality of the general practitioner and first specialist requirements.

[76] See *e.g. R v Beren*, 2009 BCSC 429, paras 94-95 ("*Beren*"), leave to appeal refused 2009 SCCA No 272 **[DBOA, Tab 20]**

[77] Order and Reasons of Phelan J., para 36 **[DBOA, Tab 15]**

annually, even if permanently ill.[78] In *R v Beren*, a British Columbia court considered and rejected a similar argument that the requirement for annual renewal was arbitrary as applied to terminally ill patients and those with prescribed chronic conditions.[79] Once again, the plaintiff has identified no reason why this Court should depart from these decisions here. The claim should accordingly be struck.

4) <u>The claims fail to disclose a reasonable cause of action</u>

52. The claims should also be struck on the grounds that it is "plain and obvious"[80] that they fail to disclose a reasonable cause of action.

53. A claim discloses a reasonable cause of action if it contains facts capable of supporting each element of the cause of action.[81] The general requirement to plead facts in support of each element is also supplemented in the *Federal Courts Rules* by the requirement to plead all material facts on which the pleading party relies.[82] The reason for these rules is clear. Pleadings are intended to provide the other party with notice of the case to meet, and to clearly define for the Court the issues in dispute between the parties.[83] Neither goal is achieved in the absence of material facts.

54. The Court is generally required on a motion to strike to accept the facts as pleaded.[84] However, it is not required to accept bald allegations, conclusory statements, or "submissions of law dressed up as factual allegations."[85] Nor can claimants make broad allegations in hopes of later discovering facts to support them.[86] The requirement

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[78] *Hitzig*, para 139 **[DBOA, Tab 13]**

[79] *Beren*, paras 33(c), 94-95 **[DBOA, Tab 20]**; MMAR, s 1(1) ("category 1 symptom"), Schedule **[DMR, Tab 8A, p 361, 384]**

[80] *Harris v Canada*, 2018 FC 765, paras 14-15 (under appeal) ("*Harris*") **[DBOA, Tab 12]**

[81] *Sivak v Canada*, 2012 FC 272, para 91 ("*Sivak*") **[DBOA, Tab 22]**;

[82] *Federal Courts Rules*, Rules 174, 181 **[DMR, Tab 8A, p 482-83]**

[83] *Sivak*, paras 11, 42 **[DBOA, Tab 22]**; *Harris*, paras 15, 17-18 **[DBOA, Tab 12]**

[84] *Harris*, para 15-16 **[DBOA, Tab 12]**

[85] *Sivak*, paras 5, 16, 19, 43, 62, 73 **[DBOA, Tab 22]**; *Harris*, para 16 **[DBOA, Tab 12]**

[86] *Harris*, paras 15, 17 **[DBOA, Tab 12]**

to plead material facts is heightened in *Charter* cases. The Supreme Court of Canada has cautioned that *Charter* decisions must not be made in a "factual vacuum."[87]

55. No evidence is admissible on a motion to strike for no reasonable cause of action.[88] However, where the motion to strike is on other grounds, there is no prohibition on evidence.

a) No reasonable cause of action under section 7

56. The plaintiffs allege that the public possession and shipping limits, the requirement for annual medical authorization, and the production site limits in the Regulations infringe section 7.

57. To establish an infringement of section 7, a claimant must demonstrate both a deprivation of life, liberty or security of the person that is attributed to legislation or state action, and that this deprivation is inconsistent with a principle of fundamental justice.[89] The plaintiffs fail to meet this test.

i) Life, liberty and security of the person

58. Although the plaintiffs allege that their right to life is engaged, they do not allege that they have a terminal medical condition or that the impugned provisions restrict access to cannabis in a manner that places their lives at risk.

59. With respect to liberty and security of the person, Canada acknowledges that the former right is engaged in the limited sense that individuals possessing or producing cannabis outside the scope of the Act and Regulations are guilty of an offence potentially punishable by imprisonment.[90]

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[87] *MacKay v Manitoba*, [1989] 2 SCR 356, para 9 **[DBOA, Tab 18]**

[88] *Federal Courts Rules*, Rule 221(2) **[DMR, Tab 8A, p 485]**

[89] *Carter v Canada*, 2015 SCC 5, para 55 ("*Carter*") **[DBOA, Tab 6]**;

[90] Act, ss 8(2), 51 **[DMR, Tab 8A, p 438, 445-47]**

60. However, the plaintiffs have pleaded no facts to show that these rights are otherwise engaged. While in past cases, interference with medical decisions of fundamental personal importance has been found to engage liberty and security of the person,[91] the present claims do not support such a finding. The plaintiffs acknowledge that they have legal access to cannabis,[92] and allege only that the impugned provisions limit their ability to possess larger quantities (Harris), require regular visits to a health care practitioner (Spottiswood), or limit their ability to engage in large-scale production together with other patients (Hathaway). While the provisions may make it less convenient to use cannabis, there is no suggestion that they substantially restrict the plaintiffs' medical decisions by preventing them from lawfully accessing adequate medical treatment.

ii) The principles of fundamental justice

61. The plaintiff bears the burden of establishing that a deprivation is inconsistent with the principles of fundamental justice.[93] On a motion to strike, the failure to plead facts concerning this element is fatal to a section 7 claim.[94]

62. The Harris and Spottiswood claims allege that the impugned provisions are "arbitrary, grossly disproportional, conscience-shocking, incompetent," and Harris adds that the public possession and shipping limits are "malevolent."[95] The Hathaway claim does not identify a principle of fundamental justice allegedly engaged by the production site limits.

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[91] *Smith*, para 18 **[DBOA, Tab 21]**

[92] Harris Amended Statement of Claim, para 2 **[DMR, Tab 3, p 34-35]**; Spottiswood Statement of Claim, para 2 **[DMR, Tab 4, p 51]**; Hathaway Statement of Claim, paras 34-35 **[DMR, Tab 2, p 11]**

[93] *Grant v Canada*, [2005] OJ No 3796, paras 56, 58 (Sup Ct J) **[DBOA, Tab 11]**

[94] *Benaissa v Canada*, 2005 FC 1220, para 26 **[DBOA, Tab 5]**

[95] Harris Amended Statement of Claim, para 1 **[DMR, Tab 3, p 34]**; Spottiswood Statement of Claim, para 1 **[DMR, Tab 4, p 50]**

63. Incompetence and malevolence are not recognized principles of fundamental justice. While courts in extradition and deportation proceedings have recognized a principle against removals that would "shock the conscience" of Canadians, the plaintiffs have pleaded no facts to support the application of this principle here.

64. While arbitrariness and gross disproportionality are recognized principles of fundamental justice, the plaintiffs have once again pleaded no facts to support them. A law is arbitrary if it bears "no rational connection" to the law's purpose.[96] A law is grossly disproportional if it is rationally connected to the objective but its impact on section 7 interests are so extreme as to be "completely out of sync with" the objective.[97] Both principles require that the court carefully consider the objective of the impugned law.[98]

65. The claims fail entirely to address the legislative objectives underlying the impugned provisions in this case, and contain virtually no facts to show that the provisions are not connected to or are out of sync with these objectives. Absent these material facts, the claims cannot succeed.

b) Specific issues with the individual claims

i) The public possession and shipping limits (Harris)

66. The Harris claim alleges that the public possession and shipping limits in the Regulations restrict patients' ability to go on holiday, prohibits those with large daily dosages from possessing more than a short supply, forces patients to destroy unused cannabis before receiving a new supply and results in significant shipping costs.[99] He alleges that the limits also infringe his right under section 15 "to carry the same 30-day supply as smaller dosers."[100] However, the current Act and Regulations plainly do not

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[96] *Carter*, para 83 **[DBOA, Tab 6]**

[97] *Carter*, para 89 **[DBOA, Tab 6]**

[98] *Smith*, para 23 **[DBOA, Tab 21]**

[99] Harris Amended Statement of Claim, paras 1, 42-48 **[DMR, Tab 3, p 34, 46-48]**

[100] Harris Amended Statement of Claim, paras 1, 50 **[DMR, Tab 3, p 34, 49]**

support these allegations. Moreover, even if made out, the allegations clearly do not amount to infringements of either sections 7 or 15.

Section 7 is not infringed

67. Harris is authorized under the Act and Regulations to possess up to 180 grams of cannabis while in public.[101] However, unlike the former MMAR, MMPR and ACMPR, the current scheme does not limit the quantity of cannabis that he may possess in a non-public place such as a residence, and do not require that he destroy cannabis if it would result in the possession of more than his authorized possession amounts.

68. With respect to shipping costs, Harris alleges that he is registered with Health Canada for personal or designated production.[102] As they may produce cannabis for themselves, personal or designated producers are not required to ship cannabis at all. Moreover, the claim fails to explain how any shipping costs infringe the plaintiff's rights under section 7. While in Allard, the cost of commercially produced cannabis was deemed relevant to the extent it precluded patients from accessing their medicine,[103] there is no suggestion in the present case that the higher shipping costs associated with more frequent small shipments of cannabis pose such a barrier for the plaintiff.

69. Finally, with respect to his ability to go on holiday, Harris alleges that the public possession limits restrict the number of days he can spend travelling. However, the Act and Regulations permit a patient or designated producer to ship a limited supply of cannabis to another location in Canada.[104] In addition, patients registered to obtain cannabis from a licensed producer may request a change to the shipping address on their registration certificate. Cannabis can also be purchased at a provincially or territorially

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[101] Harris Amended Statement of Claim, para 2 **[DMR, Tab 3, p 34-35]**; Act, s 8(1)(a) **[DMR, Tab 8A, p 437]**; Regulations, ss 266(3), 268 **[DMR, Tab 8A, p 452-55]**

[102] Harris Amended Statement of Claim, para 2 **[DMR, Tab 3, p 34-35]**

[103] *Allard* Trial Decision, para 171 **[DBOA, Tab 2]**

[104] Regulations, s 322(1)(c) **[DMR, Tab 8A, p 460]**; Act, s 2(1)("distribute"), 9(1)(a) **[DMR, Tab 8A, p 439]**

regulated online store or, where available, a retail outlet.[105] Patients may also store cannabis anywhere in Canada, including while on holiday, provided it is not in a place open to the public.[106]

70. Even if the allegations were supported on the facts, the ability to go on holiday is not, in and of itself, a right protected by the Charter.[107] Moreover, as this Court held in Allard, the possession limit is rationally connected to the legislative objectives of reducing the risks of theft, violence and diversion, and any impact on patients' ability to travel is not so great as to be grossly disproportionate to these objectives.[108] The public possession limit is accordingly consistent with the principles of fundamental justice.

Section 15 is not infringed

71. To succeed under section 15, a claimant must establish (1) that a law or state action creates a distinction based on an enumerated or analogous ground, and (2) that this distinction is discriminatory in the sense that it fails to respond to the claimant's actual capacities or reinforces or perpetuates existing disadvantage.[109] The Harris claim does not meet either part of this test.

72. First, high cannabis dosage is not among the grounds of discrimination enumerated in section 15. The plaintiff also does not allege that his dosage is an "immutable or constructively immutable" personal characteristic or that high dosage has historically been a basis for stereotyping or discrimination, which would be required for recognition as an analogous ground.[110]

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[105] Act, s 69 **[DMR, Tab 8A, p 449]**

[106] Act, s 2 ("public place") **[DMR, Tab 8A, p 435]**

[107] *Kamel v Canada*, 2011 FC 1061, paras 81, 83, aff'd 2013 FCA 103 **[DBOA, Tab 17]**

[108] *Allard* Trial Decision, para 287 **[DBOA, Tab 2]**

[109] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, paras 19-20 **[DBOA, Tab 16]**

[110] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, para 13 **[DBOA, Tab 8]**

73. Second, even if high dosage qualified as analogous, the claim contains no facts to show that the possession limits are discriminatory. The Regulations permit the public possession of 30 times a patient's daily authorized quantity of cannabis, to a maximum of 150 grams (in addition to a further 30 grams under the Act). While the practical effect of these public possession limits is that patients using larger daily quantities may possess a shorter supply while in public, the claim does not allege that this public possession limit fails to respond to the plaintiff's capacities or perpetuates existing disadvantage relative to so-called "small dosers." The section 15 claim should therefore be dismissed.

ii) The requirement for annual medical authorization (Spottiswood)

74. The Spottiswood claim comprises three short paragraphs. The sum total of the factual allegations are that the plaintiff has a permanent medical condition for which he was authorized to use cannabis under the former MMAR.[111] However, the plaintiff does not allege that he has a current medical authorization to use cannabis, and provides no facts concerning the requirement for annual medical authorization or how it impacts his section 7 rights.

75. If he is simply alleging that he should not have to visit a health care practitioner once a year, this inconvenience does not engage the Charter. In *Harris v Canada*, the plaintiff alleged that Health Canada's former practice of "back-dating" registration certificates for personal and designated production to the date of a patient's medical document resulted in patients having to visit their doctors more often. In striking this aspect of the claim, the Court noted that government permits are often time-limited, and

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[111] Spottiswood Statement of Claim, para 2 **[DMR, Tab 4, p 51]** The claim notes that the plaintiff has authorization number APPL-MKS-06-S17471115-58-13-B. This is a Personal Use Production Licence Number under the former MMAR. In the course of Allard, this Court issued an injunction, which remains in place and preserves MMAR authorizations to possess and licences to produce that were valid on the dates specified in the injunction order (Allard Injunction Decision **[DBOA, Tab 1]**). This Court has confirmed that Spottiswood meets the criteria of the Allard injunction order (July 9, 2014, Amended Order of Phelan J., para 1 and Schedule **[DBOA, Tab 14]**). The plaintiff is therefore currently authorized to possess and produce cannabis in accordance with his prior MMAR authorization and licence, and without further medical authorization. His section 7 rights are thus not engaged by the requirement for annual medical authorization.

that the requirement to renew them more often was at most a "trivial" limitation on Charter rights.[112] Similarly, the requirement to visit a health care practitioner annually is at most an inconvenience which does not attract Charter protection.

76. Moreover, courts have consistently held that requirements for medical authorization are rationally connected to the legislative objective of ensuring medical oversight and that any limitation on section 7 interests associated with these requirements is therefore in accordance with the principles of fundamental justice.[113] Spottiswood has pleaded no facts to support a departure from that conclusion.

iii) The production site limits (Hathaway)

77. The Hathaway claim is similarly lacking in material facts. In a single paragraph, Hathaway seeks a declaration that "any limitation" on the number of patients that may share a production site, violates patients' right to produce cannabis as part of a co-op, and to share the "excessive costs and work load" associated with cultivation.[114]

78. If Hathaway is simply alleging that production on a larger scale would be less expensive and involve less work, it is plain and obvious that the claim does not engage the Charter. The Charter does not include a right to inexpensive cannabis, nor does it protect against workload.[115]

79. While the Charter may be engaged where the costs and workload associated with personal production effectively limit a patient's access to cannabis, the claim contains no facts to support such a finding. Although Hathaway alleges that he is registered with Health Canada for personal or designated production,[116] the claim provides no details concerning any attempts by the plaintiff to produce cannabis, the cost and workload

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[112] *Harris*, paras 54-55 **[DBOA, Tab 12]**

[113] *Smith*, para 33 **[DBOA, Tab 21]**; *Hitzig*, para 139 **[DBOA, Tab 13]**; *Beren*, para 94-95 **[DBOA, Tab 20]**; Order and Reasons of Phelan J., para 36 **[DBOA, Tab 15]**

[114] Hathaway Statement of Claim, para 11 **[DMR, Tab 2, p 10]**

[115] *Association of Justice Counsel v Canada*, 2017 SCC 55, paras 50-51 **[DBOA, Tab 4]**

[116] Hathaway Statement of Claim, paras 34-35 **[DMR, Tab 2, p 11]**

associated with that production, or the impact on his personal ability to access cannabis. The claim also fails to explain why Hathaway must produce cannabis for himself and cannot instead access it from a commercial licensed seller.

80. Finally, the claim contains no facts whatsoever to show that the production site limits are inconsistent with their legislative objective, which is to reduce the increased public safety risks associated with large-scale cannabis production.[117] While in past cases, courts have struck-down limits on the number of patients that may share a production site,[118] those limits were more restrictive than the current limits. Hathaway has pleaded no facts to show that the current, more generous limits infringe his rights under section 7. Absent these material facts, the Hathaway claim cannot succeed.

5) <u>The claims are scandalous, frivolous and vexatious</u>

81. In addition to the power to strike for no reasonable cause of action, the Court may strike a claim on the basis that it is scandalous, frivolous or vexatious.[119]

82. Common hallmarks of scandalous, frivolous or vexatious proceedings include the re-litigation of issues that have already been determined and the bringing of claims that are so bereft of material facts that the defendant cannot know how to answer.[120] A pleading is also frivolous and vexatious if it is argumentative or includes statements that are irrelevant, incomprehensible or inserted for colour. [121] The plaintiffs' claims bear several of these indicia.

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[117] MMAR 2010 RIAS, p 482, 484 **[DMR, Tab 8A, p 388, 390]**; see also Regulatory Impact Assessment statement for the ACMPR (2016), p 3381 and CR RIAS, 2802-03 (noting ACMPR and *Cannabis Regulations* substantively incorporated the personal and designated production regime established under the MMAR) **[DMR, Tab 8A, p 428, 462-63]**

[118] The MMAR originally provided that up to three patients could share a production site. This limit was increased to four following *Hitzig* and *Beren* **[DBOA, Tabs 13, 20]**

[119] *Federal Courts Rules*, s 221(1)(c) **[DMR, Tab 8A, p 485]**

[120] *Sivak*, para 92 **[DBOA, Tab 22]**

[121] *Sivak*, paras 5, 77-78, 88-89 **[DBOA, Tab 22]**

83. Canada repeats and relies here on its submissions concerning the plaintiffs' attempts to re-litigate issues and failure to plead material facts. The Hathaway claim is also rife with incomplete and occasionally incomprehensible sentences and paragraphs, while the Harris claim is at several points argumentative and overblown. For example, Harris repeatedly alleges that the possession limits are based on "fraudulent" Health Canada survey data. He compares Canada's reliance on this data to an act of criminal genocide.[122] He also alleges that a Health Canada official "Can't even do basic division right"[123] and employs mocking language to refer to Health Canada's evidence in Allard.[124] This is an inappropriate use of pleadings and the claims should struck accordingly.

6) Leave to amend should be refused

84. The claims should be struck without leave to amend. This Court has previously struck similar claims by the plaintiffs without leave to amend. The attempt to re-litigate those decisions is an abuse of this Court's process which cannot be cured by amendment. Hathaway has also already had an opportunity to amend his claim to address the mootness issue. In all of these circumstances, a further opportunity to amend would be inappropriate.

B. THE PLAINTIFF SPOTTISWOOD SHOULD PROVIDE SECURITY FOR COSTS

85. If his claim is not struck without leave to amend, Spottiswood should be ordered to provide security for Canada's costs prior to taking any further steps in his action.

86. Rule 416 provides that the Court may order security for costs if the defendant has a costs order against the plaintiff that remains unpaid.[125] This Court has also held that unpaid costs orders in fact give rise to a *prima facie* entitlement to security, and that

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[122] Harris Amended Statement of Claim, para 37 **[DMR, Tab 3, p 45]**; *Criminal Code*, RSC 1985, c C-46, s 318(2) **[DMR, Tab 8A, p 490]**

[123] Harris Amended Statement of Claim, para 11 **[DMR, Tab 3, p 37]**

[124] Harris Amended Statement of Claim, para 26 **[DMR, Tab 3, p 41]**

[125] *Federal Courts Rules*, Rule 416(1)(f) **[DMR, Tab 8A, p 486-87]**

the only question where costs remain unpaid is whether the Court should exercise its discretion to refuse security under Rule 417.[126]

87. Canada has two costs awards against Spottiswood, which total $1,000 ($1,115.68 with post-judgment interest). These costs remain unpaid.[127] Canada is thus *prima facie* entitled to security for its costs of the present proceeding.

88. Rule 417 provides that the Court may refuse to order security if a plaintiff demonstrates impecuniosity and the Court is of the opinion that the case has merit. With respect to the merits, Canada relies on its submissions above that the Spottiswood claim lacks merit. With respect to impecuniosity, given the onus on the plaintiff, Canada will reserve its submissions for reply. However, Canada notes generally that the Federal Court of Appeal has distinguished impecuniosity from merely having insufficient assets. The plaintiff seeking to establish impecuniosity must demonstrate not only that his own assets are insufficient, but also that he is unable to raise the money elsewhere, for example, by borrowing from family or others. The impracticality of accessing money from other sources must be supported by material evidence and established by the plaintiff with robust particularity.[128]

C. THE MOTION SHOULD BE GRANTED WITH COSTS

89. Canada requests that its motion be granted with costs. The plaintiffs declined to appeal the orders striking their prior claims, but now attempt to circumvent those orders with new claims concerning the very same issues. Their claims suffer from many of the same shortcomings as the prior claims, including a lack of material facts, raising issues of settled law, and comments that are argumentative and overblown. This suggests that the plaintiffs have not heeded the lessons of this Court's prior orders. An award of costs is appropriate in these circumstances.

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[126] *Mapara v Canada*, 2014 FC 538, para 24, aff'd 2016 FCA 305, para 5 ("Mapara FCA Decision") **[DBOA, Tab 19]**

[127] Krishnamoorthy Affidavit, paras 15-17 and Exhibits L, M **[DMR, Tabs 7L, 7M, p 63, 315, 317]**

[128] *Mapara* FCA Decision, paras 8, 13-14 **[DBOA, Tab 19]**

PART IV – ORDER SOUGHT

90. Canada requests:

a) an order striking these claims without leave to amend;

b) in the alternative, an order that Spottiswood provide security for costs in the amount of $6,650; and

c) costs of this motion and of the proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this December 13, 2018.

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