**CANADA PROVINCE OF QUEBEC**

**DISTRICT OF \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**LOCALITE \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ \_\_\_\_\_\_\_\_ COURT OF QUEBEC**

**NO: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (Criminal Chamber)**

 **Between**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Applicant**

 **-and-**

 **Attorney General for Quebec**

 **Respondent**

 **APPLICATION TO QUASH**

 **AND RETURN OF CONTROLLED SUBSTANCE**

 **(C.C.C S.601 and C.D.S.A S.24, not the Charter)**

**TO ONE OF THE HONOURABLE JUDGES OF THE COURT (CRIMINAL CHAMBER) FOR THE DISTRICT OF \_\_\_\_\_\_\_\_\_\_\_ SITTING IN FIRST INSTANCE AND SEIZED OF THE MOTION, the Applicant states:**

**THE APPLICATION IS FOR AN ORDER declaring that:**

**A.1) the Accused's CDSA charges relating to marijuana be**

**quashed as of no force and effect; and if jurisdiction:**

**A.2) absent a viable medical exemption, the prohibitions on**

**marijuana in the CDSA are of no force and effect; and**

**A.3) the word "marijuana" be struck from CDSA Schedule II;**

**A.4) all convictions registered since Aug 1 2001 until Smith**

**corrected the Bad Exemption be expunged.**

**B) staying any charges under S.5 Trafficking when both**

**Possession and Production of the substance being no longer**

**prohibited brings the administration of justice into disrepute.**

**C) the seized Controlled Substance be returned to Applicant**

**pursuant to S.24 of the CDSA.**

**AND FOR ANY ORDER abridging any time for service or amending**

**any error or omission as to form, color, font, margins,**

**content which the Honourable Justice may allow.**

**1. The grounds of the Application are:**

**1) POLCOA: Parliament Only Legislates, Courts Only Abrogate.**

**Pursuant to Interpretation Act S.32(a), the prohibitions on**

**possession and production of marijuana in the CDSA were not**

**revived by repealing the defects in the MMAR and remain of**

**no force and effect since struck down in Parker [2001] and**

**Krieger [2003]. Once the offences were no longer in force,**

**Only Parliament Legislates new law, the Ontario Court of**

**Appeal could not revive the prohibitions that had been of no**

**force or effect the previous 2 years. Parliament has never**

**re-enacted the prohibitions since they were struck down;**

**2) BENO: Bad Exemption means No Offence. Just as the Hitzig**

**"Bad Exemption" [2003] by regulated Mis-Supply meant there**

**was "No Offence" in force since Aug 1 2001 absent an acceptable**

**medical exemption when J.P. was charged; so too, the**

**prohibitions should have been declared not in force after**

**A) Sfetkopoulos declared the MMAR unconstitutional**

**for the re-imposition of the first Hitzig supply cap;**

**B) Beren declared the MMAR unconstitutional for the re-**

**imposition of the two Hitzig supply caps;**

**C) Smith declared a Worse "Bad Exemption" [2015] by**

**regulated Mis-Use meaning there was "No Offence" in force**

**since Aug 1 2001 absent an acceptable medical exemption;**

**D) Allard declared the MMPR in its entirety unconstitutional**

**from April 1 2014 to Aug 24, 2016; this Court is bound by the Ontario Court of Appeal's J.P. precedent to declare that NO OFFENCE is in force while the BAD EXEMPTION existed.**

**PART I - FACTS**

**R. V. PARKER [2000]**

**3. On July 31 2000, the Ontario Court of Appeal in R. v.**

**Parker declared the prohibition on possession of marijuana**

**in CDSA s.4 to be invalid absent an adequate medical**

**exemption; suspended 1 year for time to set up a viable**

**acceptable constitutional working medical exemption during**

**which time Parker was exempted from the Cultivation and**

**Possession prohibitions in the CDSA. Leave to appeal to the**

**Supreme Court of Canada was not sought.**

**R. V. KRIEGER [2000]**

**4. On Dec 11 2000, Alberta Superior Court Justice Acton**

**adopted the reasons of the Ontario Court of Appeal to strike**

**down the prohibition on cultivation in S.7! suspended 1**

**year.**

**MMAR Marijuana Medical Access Regulations [2001]**

**5. On July 30, 2001, Health Canada issued the Marihuana**

**Medical Access Regulations MMAR to comply with the**

**requirement for an acceptable medical exemption to the**

**prohibitions but with no time for Terry Parker to apply**

**before his one-year exemption expired the next day. The MMAR**

**did not provide Parker with an exemption to replace his**

**expiring court-exemption, it provided him an application**

**form with one day to line up his doctors and get it**

**submitted for an exemption.**

**6. On Aug. 1 2001, Terry Parker's court exemption lapsed**

**without his being exempted in compliance with the Order of**

**the Parker Court despite Health Canada's claim to have**

**instituted a working exemption form on time.**

**R. V. KRIEGER [2003]**

**7. On Mar 18 2003, the Alberta Court of Appeal dismissed the**

**Crown appeal of the Acton decision striking down the S.7**

**prohibition on production. Application for Leave to Appeal**

**to the Supreme Court of Canada #29569 denied.**

**HITZIG V. HMQ [2003]**

**8. On Oct 7 2003 in Hitzig v. HMQ, the Ontario Court of Appeal determined that the MMARs would become constitutional if the following parts were immediately declared of no force and effect:**

**a) The prohibition against an ATP holder compensating a DPL**

**holder for growing marihuana;**

**b) The provision preventing a DPL holder from growing**

**for more than one ATP holder;**

**c) The prohibition against a DPL holder producing marihuana**

**in common with more than two other DPL holders; and**

**d) The second specialist requirement.**

**9. Parts a) and d) impeded access while Part b) and c) impeded supply.**

**BENO**

**10. In Paragraph 170:**

 **[170] In R. v. Parker, supra, this court declared the**

 **prohibition invalid as of July 31, 2001 if by that date**

 **the Government had not enacted a constitutionally sound**

 **medical exemption. Our decision in this case confirms**

 **that it did not do so. Hence the marihuana prohibition**

 **in s. 4 has been of no force or effect since July 31, 2001.**

**11. Only a few parts, not the entirety of the MMAR regime,**

**was declared of no force, but enough so that the exemption**

**was illusory. A car missing spark plugs is not**

**malfunctioning in its entirety but it's not working. So only**

**those few defective parts of the MMAR rendered the regime**

**constitutionally dysfunctional and had to be struck down.**

**Partly defective still caused the Parker-Krieger**

**declarations of invalidity of the Possession offence to take**

**effect.**

**REVIVAL OF CDSA PROHIBITIONS**

**12. The Hitzig Court went on further to state that their**

**striking down the defective parts of the MMAR has revived**

**the prohibitions in the CDSA that had been of no force since**

**July 31 2001.**

 **[170] First, if we do not suspend our order, there will**

 **immediately be a constitutionally valid exemption in**

 **effect and the marihuana prohibition in s. 4 of the CDSA**

 **will immediately be constitutionally valid and of full**

 **force and effect.**

 **[170].. our order has the result of constitutionalizing**

 **the medical exemption created by the Government. As a**

 **result, the marihuana prohibition in s. 4 is no longer**

 **inconsistent with the provisions of the Constitution.**

 **Although Parliament may subsequently choose to change**

 **it, that prohibition is now no longer invalid, but is of**

 **full force and effect. Those who establish medical need**

 **are simply exempted from it.**

**13. In R. v. Johnny Dupuis, Judge Chevalier accepted his**

**doctor's testimony of his medical need even though Health**

**Canada had disagreed with his diagnosis and rejected his**

**exemption application and found him not guilty. He is simply**

**exempted by establishing medical need and yet so many**

**medically-needy accuseds keep making the news.**

**R. V. J.P (YOUTH) [2003]**

**14. Professor Alan Young had not asked Hitzig Justice**

**Lederman to invoke the Parker and Krieger rulings to deal**

**with the CDSA prohibitions. But R. v. J.P. that same day had**

**asked to strike the CDSA prohibition for absence of**

**exemption!**

**15. On Jan 2 2003, in R. v. J.P. (Youth) Ontario Provincial**

**Court Judge Phillips quashed the charge ruling No S.4**

**Possession Offence on the grounds the exemption was**

**unconstitutional without Parliament re-enacting the section**

**whether the MMAR worked or not. J.P. had no medical need.**

**16. On May 16, 2003, Ontario Superior Court Justice Rogin**

**dismissed the Crown's appeal in J.P. 2,000 remaining**

**marijuana possession charges laid while there was a Bad**

**Exemption and No Offence starting on Terry Parker Day Aug. 1**

**2001 were stayed or withdrawn across Ontario.**

**17. On Oct 7 2003, the Court of Appeal granted the Crown's**

**appeal against the MMAR having been improperly legislated**

**whether the MMAR had worked or not but still sustained the**

**quash of J.P.'s Possession Count because their Hitzig ruling**

**had established that there had not been a valid Exemption:**

 **[14]... The Parker order by its terms took effect one**

 **year after its pronouncement. That order was never**

 **varied. After the MMAR came into effect, the question**

 **was not whether the enactment of the MMAR had any effect**

 **on the Parker order, but rather whether the prohibition**

 **against possession of marihuana in s. 4 of the CDSA, as**

 **modified by the MMAR, was constitutional. If it was, the**

 **offence of possession was in force. Paired with the**

 **suspension of the declaration in Parker, this would have**

 **the effect of keeping the possession prohibition in**

 **force continually. If the MMAR did not create a**

 **constitutionally valid exception, as we have held, then**

 **according to the ratio in Parker, the possession**

 **prohibition in s. 4 was unconstitutional and of no force**

 **and effect. The determination of whether there was an**

 **offence of possession of marihuana in force as of April**

 **2002 depended not on the terms of the Parker order but**

 **on whether the Government had cured the constitutional**

 **defect identified in Parker. It had not.**

 **[15] The order made by Lederman J. in Hitzig in January**

 **2003 did not address the prohibition against possession**

 **in s. 4 of the CDSA. While, according to the ratio in**

 **Parker, supra, Lederman J.'s determination that the MMAR**

 **did not provide an adequate medical exemption meant that**

 **there was no constitutional prohibition against**

 **possession of marihuana in s. 4 of the CDSA, Lederman J.**

 **did not make that declaration...**

 **[16]... whether there was a crime of possession of**

 **marihuana in force on the day the respondent was charged**

 **turned on whether s. 4 combined with the MMAR created a**

 **constitutional prohibition against the possession of**

 **marihuana....**

 **[31] The court in Parker, supra, declared that the**

 **marihuana prohibition in s. 4 was inconsistent with the**

 **Charter and consequently of no force or effect absent an**

 **adequate medical exemption...**

 **[32]... After the MMAR came into force, the question**

 **therefore became whether the prohibition against**

 **possession of marihuana as modified by the MMAR was**

 **constitutional. If it was, then the possession**

 **prohibition was in force. If the MMAR did not solve the**

 **constitutional problem, then the possession prohibition,**

 **even as modified by the MMAR, was of no force or effect.**

 **[33] There was no need to amend or re-enact s. 4 of the**

 **CDSA to address the constitutional problem in Parker.**

 **That problem arose from the absence of a**

 **constitutionally adequate medical exemption. As our**

 **order in Hitzig demonstrates, the prohibition against**

 **possession of marihuana in s. 4 is in force when there**

 **is a constitutionally acceptable medical exemption in**

 **force.**

 **[34] We would dismiss the appeal. [of the Crown]**

**18. Though J.P. had no medical need, Absent Exemption means**

**Prohibition invalid is repeated no less than eight times!!**

**twice in paragraph [14], in [15], [16], [31], [32], and**

**twice more in [33]. A Bad Exemption means No Offence. BENO.**

**4,000 MORE POSSESSION CHARGES DROPPED**

**19. On Dec. 3 2003, and after Leave to Appeal the J.P.**

**decision to the Supreme Court of Canada was not sought the**

**Crown stayed all remaining 4,000 charges across the rest of**

**Canada under the section deemed to be repealed during the**

**Hitzig BENO period of exemption invalidity, after July 31**

**2001 up until October 7, 2003, medical need or not, but did**

**not stay any remaining production charges due to the Krieger**

**invalidation of the S.7. prohibition.**

**SEEDS & DRIED MARIJUANA MITIGATE SUPPLY CAPS**

**20. On Dec 10 7 2003, Health Canada re-imposed the same**

**patient-to-grower and growers-to-garden caps that had**

**rendered the MMAR unconstitutionally dysfunctional in**

**Hitzig. The Government sought to address the "supply" defect**

**by authorizing a new government supply for seeds and dried**

**cannabis (marihuana). Sadly, supplying seeds has no effect**

**on patient-grower and growers/site ratios! And selling dried**

**marijuana to non-growers does not affect growers either!**

**SFETKOPOULOS**

**21. On Jan 10 2008, in Sfetkopoulos v. Canada, Alan Young**

**challenged the re-imposed patients-to-grower cap which his**

**Hitzig decision had struck down and had it struck down**

**again. He did not again seek to strike down the re-imposed**

**growers-to-site cap which his Hitzig decision had struck**

**down. And again, no motion was made to follow Parker and**

**Krieger rulings to declare the CDSA prohibitions of no force**

**while the exemption was dysfunctional.**

**22. Once again, the Exemption was found to be**

**unconstitutional but this time but there was no J.P.**

**companion appeal to address the constitutionality of the**

**CDSA while the exemption had been defective as J.P. had been**

**there for Hitzig, so the Parker/Krieger principle was not**

**considered though the judge should have and no charges laid**

**during the period of invalidity back to Dec 3 2003 were**

**stayed.**

**23. But Crown Attorney Sean Gaudet did mention the fear**

**someone else would ask for BENO in their Supreme Court of**

**Canada Memorandum:**

 **"[33] The Court in R. v. J.P. ruled that the combined**

 **effect of Parker and Hitzig meant there was no**

 **constitutionally valid marijuana possession offence**

 **between July 31 2001 and Oct 7 2003, the date the MMAR**

 **were constitutionally rectified by the decision in**

 **Hitzig. Courts may construe the Federal Court of**

 **Appeal's decision as creating a similar period of**

 **retrospective invalidity dating back to December 3 2003,**

 **the date that s.41(b.1) was re-introduced into the**

 **MMAR."**

**BEREN**

**24. On Feb 2 2009, in R. v. Beren, applying the reasoning in**

**Hitzig and Sfetkopoulos, Koenigsberg J. found that s 41(b.1)**

**of the MMAR, which limited DPL holders to a single client,**

**and s 54.1, which prohibited production license holders from**

**operating in common with more than two others, were both**

**contrary to s 7 of the Charter. She struck down these**

**specific provisions of the MMAR.**

 **[134].. these provisions, unduly restricting DPLs from**

 **growing for more than one ATP or growing in concert with**

 **two other DPLs, are hereby severed from the MMAR.**

**25. Exactly the same two supply limits found in Hitzig that**

**caused the exemption to be deficient enough to warrant dropping over 4,000 charges last time but not this time. From Dec 2003 when Health Canada re-imposed the caps up to 2009 when they were struck down again, the exemption had been tainted with the same two supply flaws as the original pre-Hitzig MMAR that had rendered the prohibitions invalid. The Court was not asked to follow J.P.'s Parker/Krieger BENO precedent, did not follow the BENO precedent and convicted the Accused charged while the exemption had been invalid.**

**MERNAGH [2012]**

**26. In R. v Mernagh [2012], once Ontario Superior Court**

**Justice Taliano had ruled that over 90% of doctors not**

**participating in the MMAR made the exemption**

**unconstitutionally illusory, he was asked to and did follow**

**the Parker and Krieger decisions to declare the S.4**

**Possession and S.7 Production prohibitions of no force while**

**the exemption had been absent.**

**27. The Ontario Court of Appeal overturned Mernagh ruling**

**that the patients had failed to establish any non-medical**

**reasons for 90% of Canada's doctors not participating.**

**Perhaps all those doctors had some contraindications against**

**marijuana use, the patients had not been asked if their**

**doctors had any medical reasons for refusing! The Crown**

**stayed Mernagh's charges so he couldn't ask his patients for**

**the non-medical reasons their doctors had used to refuse.**

**28. But BENO was the correct remedy to declare Parker and**

**Krieger had taken effect upon discovering a dysfunctional**

**exemption regime.**

**R. V. SMITH [2015]**

**29. The Supreme Court of Canada in Owen Smith [2015] ruled:**

 **[33] We would dismiss the appeal, but vary the Court of**

 **Appeal's order by deleting the suspension of its**

 **declaration and instead issue a declaration that ss. 4**

 **and 5 of the CDSA are of no force and effect to the**

 **extent that they prohibit a person with a medical**

 **authorization from possessing cannabis derivatives for**

 **medical purposes.**

**30. Smith argued MMAR restricted consumption to "worst use"**

**smoking. Of all the regulations designed by Health Canada to**

**impede access and maximize mortality, prohibiting the most**

**effective use of a medication and mandating its most**

**dangerous form of ingestion has to be it. Dried bud on a**

**nose cancer won't work, nor will smoking. Topical**

**application takes prohibited oil. All good citizens with**

**cancer who obeyed their exemption regulations could not use**

**it to cure their tumors. Banning best use sure makes the**

**exemption to use the medicine dysfunctional all by itself, a**

**far more genocidal violation of the Right to Life than any**

**caps on gardening ratios found in Hitzig: Mis-Application by**

**prohibiting optimal use and mandating use in its most**

**dangerous form, smoking, violated the right to life of many**

**more corpses than any supply flaw ever did.**

**31. Given a reduction from 5 or even 10 grams of bud down to**

**each gram of oil, prescriptions based on presumed smoking**

**are therefore inordinately insufficient. A patient with the**

**Health-Canada recommended maximum of 5 smokable dried grams**

**per day gets 1/2 a gram of oil to apply to a 3-inch tumor?**

**32. So Smith only struck down the flaw in the MMAR, was not**

**asked to follow Parker-Krieger.**

**MMPR Marijuana for Medical Purposes Regulations [2014]**

**33. By the time Smith declared the the MMAR**

**unconstitutional, it had already been repealed by the new**

**MMPR on April 1 2014. For the whole of the MMAR, it was not**

**a valid medical exemption.**

**ALLARD MANSON GRANDFATHERED HALF OF THE POSSESS PERMITS**

**34. On Mar 18 2014 almost 6 months after the MMPR ordered**

**the shut down of the all patient grows by April 1, 2014, was**

**the Allard motion before Justice Manson to extend patient**

**permits. Robert Roy's possession and production permits were**

**expiring that very day. Justice Manson reserved his decision**

**for three days. On Mar 21, he grandfathered all grow permits**

**but not all possess permits needed to use the grow permits.**

**Only those possession permits still not expired were**

**extended. Robert Roy lost the possession permit he needed to**

**use his production permit. As well did half a year's worth**

**of patients, 18,000 out of 36,000. The devastation of 18,000**

**patient-growers shut down, some now dead, didn't make the**

**news with media focused on the celebrations of the 18,000**

**survivors.**

**ALLARD V CANADA [2016] MMPR**

**35. On Feb 24 2016, the Federal Court of Canada issued the**

**landmark Allard v. HMQ declaring the MMPR to be**

**unconstitutional in its entirety. Justice Phelan ruled:**

 **VIII. Conclusion**

 **[289] For all these reasons, the Court has concluded**

 **that the Plaintiffs have established that their s 7**

 **Charter rights have been infringed by the MMPR and that**

 **such infringement is not in accordance with the**

 **principles of fundamental justice or otherwise justified**

 **under s 1.**

 **IX. Disposition and Remedy Disposition and Remedy**

 **[290] For these reasons, I find that the MMPR regime**

 **infringes the Plaintiffs' s 7 Charter rights and such**

 **infringement is not justified.**

 **[291] In several decisions regarding the MMAR, the**

 **Courts have struck out either certain provisions or**

 **certain words in certain provisions, but otherwise left**

 **the structure of the regulation in place. Most of these**

 **decisions related to criminal charges where such narrow,**

 **feasible and effective excising was appropriate.**

 **[292] In the present case, the attack has been on the**

 **structure of the new regulation. It would not be**

 **feasible or effective to strike certain words or**

 **provisions. That exercise would eviscerate the**

 **regulation and leave nothing practical in place. The**

 **Defendant has recognized the integrated nature of the**

 **MMPR provisions.**

 **[293] It is neither feasible nor appropriate to order**

 **the Defendant to reinstate the MMAR (as amended by**

 **current jurisprudence). It is not the role of the Court**

 **to impose regulations. The MMAR may be a useful model**

 **for subsequent consideration; however, it is not the**

 **only model, nor is a MMAR-type regime the only medical**

 **marihuana regime, as experience from other countries has**

 **shown.**

 **[294] The remedy considerations are further complicated**

 **by the fact that there is no attack on the underlying**

 **legislation. Striking down the MMPR merely leaves a**

 **legislative gap where possession of marihuana continues**

 **as a criminal offence. Absent a replacement regulation**

 **or exemption, those in need of medical marihuana - and**

 **access to a Charter compliant medical marihuana regime**

 **is legally required - face potential criminal charges.**

 **[295] It would be possible for the Court to suspend the**

 **operation of the provisions which make it an offence to**

 **possess, use, grow and/or distribute marihuana for those**

 **persons holding a medical prescription or medical**

 **authorization. However, this is a blunt instrument which**

 **may not be necessary if a Charter compliant regime were**

 **put in place or different legislation were passed.**

 **[296] The appropriate resolution, following the**

 **declaration of invalidity of the MMPR, is to suspend the**

 **operation of the declaration of invalidity to permit**

 **Canada to enact a new or parallel medical marihuana**

 **regime. As this regime was created by regulation, the**

 **legislative process is simpler than the requirement for**

 **Parliament to pass a new law.**

 **[297] The declaration will be suspended for six (6)**

 **months to allow the government to respond to the**

 **declaration of invalidity.**

 **[298] The Plaintiffs have been successful and have**

 **brought a case that benefits the public at large. They**

 **shall have their costs on a substantial indemnity basis**

 **in an amount to be fixed by the Court.**

 **"Michael L. Phelan" Judge F.C.C.**

 **Vancouver, British Columbia February 24, 2016**

**36. With the regime repaired, it was not necessary to**

**consider exemptions to the CDSA. Striking down the**

**prohibitions for patients, as the Supreme Court had just**

**struck down the prohibitions on derivatives for patients in**

**Smith, was not be necessary with an amended exemption**

**regime.**

**37. On Aug 24 2016, the declaration of invalidity of the**

**MMPR from April 1 2014 to Aug 24 2016 took effect but Allard**

**counsel John Conroy had not moved and no foundation was laid**

**to follow Parker/Krieger and declare the prohibitions**

**invalid while the exemption was unconstitutional for all**

**like the last BENO with J.P.**

**38. The Courts in Sfetkopoulos, Beren, Smith, and Allard**

**were not moved to declare the prohibitions against marijuana**

**in the CDSA of no force while the exemption was**

**dysfunctional and none did.**

**PART II - ISSUE**

**39. A) Are the prohibitions on marijuana in S.4 and S.7 of**

**the CDSA that were declared of no force and effect during**

**the period of July 31 2001 to Oct 7 2003**

**A1) still deemed to be repealed without re-enactment by**

**Parliament pursuant to S.32(a) of the Interpretation Act?**

**A2) newly deemed to be repealed since the exemption in**

**existence at the time of the charge was ruled**

**unconstitutional in Sfetkopoulos, Beren and Smith; or in**

**Allard.**

**B) would prosecuting a trafficking charge in an era when**

**both Possession and Production are no longer prohibited**

**bring the administration of justice into disrepute?**

**C) If the prohibitions are invalid, should the seized**

**controlled Substance be returned to the Applicant.**

**PART III - ARGUMENT**

**A1) POLCOA: Parliament Only Legislates, Courts Only Abrogate**

**R V. MCCRADY**

**40. In R. v McCrady, et al [2011], the Ontario Court of**

**Appeal again explained its revival ending the death of the**

**provisions:**

 **The Beno Argument**

 **[28].. These appeals are some of many cases that have**

 **recently found their way to this court either as**

 **conviction appeals or attempts at prerogative remedies.**

 **They all turn on an argument referred to by the**

 **appellants as BENO (Bad Exemption = No Offence)...**

 **It was only in Hitzig that the effect of the Bad**

 **Exemption was to retroactively render of no force and**

 **effect the s. 4 CDSA possession prohibition as it**

 **related to marihuana. That order gave effect to the**

 **order of this court in Parker (2000). In Parker (2000),**

 **this court gave Parliament a year to fix the problem**

 **identified in that case. The effect of Hitzig was to**

 **find that Parliament had not succeeded. Hence the order**

 **in Parker (2000) declaring s. 4 as related to marihuana**

 **of no force and effect, took effect, but only until**

 **October 7, 2003. Put another way, the BENO argument only**

 **applied to the period from July 31, 2001 to October 7,**

 **2003.**

 **As we have pointed out, the Parker (2000) state of**

 **invalidity, as regards the possession offence, ended on**

 **October 7, 2003.**

**41. The Parker state of invalidity could not end without**

**Parliament ending it. Who else claims power to end the death**

**of a struck down law rendered of no force and effect for**

**over 2 years?**

**42. The Order took effect only once but once is enough. The**

**Interpretation Act Section 5(3) states:**

 **"For the purposes of this Act, an enactment that has**

 **been replaced is repealed and an enactment that has**

 **expired, lapsed or otherwise ceased to have effect is**

 **deemed to have been repealed."**

**43. And Interpretation Act Section 32(a) states:**

 **Where an enactment is repealed in whole or in part, the**

 **repeal does not (a) revive any enactment or anything not**

 **in force or existing at the time when the repeal takes**

 **effect.**

**44. Whether the MMAR was repealed in whole or in part,**

**striking down parts of the MMAR does not revive the**

**prohibitions not in force at the time in the CDSA!! The**

**Ontario Court of Appeal could not revive the 2-year-dead**

**prohibition in the CDSA by repealing the flaws in the MMAR**

**when the Interpretation Act S.32(a) says striking down something**

**cannot revive anything not alive at the time.**

**45. It is elementary constitutional law that Parliament puts**

**up the laws and the courts strike the bad ones down. Courts**

**re-enacting penal sanctions that have been struck down is**

**acting above their jurisdiction. No court is bound by court**

**dicta with usurp the role of Parliament. No laws deemed to**

**be be repealed were resurrected by the Courts without**

**Parliament. The actual CDSA Possession and Production**

**prohibitions which underpin all other marijuana prohibitions**

**that were struck down in Parker and Krieger during the**

**Hitzig period of MMAR invalidity have never been re-enacted**

**by Parliament.**

**Yet this Hitzig court-ordered revival of the prohibitions**

**out-of-force the previous 2 years has been followed by the**

**courts since then. Many Accused have since urged courts not**

**to disobey the Interpretation Act by obeying the Hitzig**

**Revival Order and this Accused is looking for the first**

**judge to admit the big Oops, that the Ontario Court of**

**Appeal could not revive the CDSA prohibitions when it**

**amended the MMAR.**

**A2) BENO Bad Exemption No Offence**

**VOSS**

**47. The Court in Voss also expressly rejected the BENO argument:**

 **[6] The appellants' second argument they call BENO - Bad**

 **Exemption = No Offence. This argument builds on the**

 **decisions in Sfetkopoulos v Canada (Attorney General),**

 **2008 FCA 328 (Canlll), 382 NR 71 and R. v Beren, 2009**

 **BCSC 429 (Canlll), 192 CRR (2d) 79 which held one**

 **specific provision of the Regulations to be**

 **unconstitutional. The offending provision authorized**

 **only one licensed supplier of medical marihuana in**

 **Canada. The Courts in Sfetkopoulos and Beren ruled this**

 **one provision was unconstitutional, but otherwise upheld**

 **the provisions of the Regulations.**

 **The appellants argue, however, that if one aspect of the**

 **regulatory regime is constitutionally inadequate, the**

 **entire regime fails because the Charter requires a**

 **"workable exemption".**

**48. Mernagh struck down the exemption for only one flaw,**

**failure of doctors to participate. Hitzig for only 4 flaws.**

**Doesn't matter how much works when something doesn't.**

 **There being no effective medical exemption, they argue**

 **the entire offence is unenforceable against them. This**

 **argument too is without merit, as it depends on a**

 **misunderstanding of the limited effect of the decisions**

 **of Sfetkopoulos and Beren. Severing offending provisions**

 **does not affect the validity of the entire regulatory**

 **regime: MacDonald at para. 28; R. v Parker, 2011 ONCA**

 **819 (Canlll) at paras. 31-2, 283 CCC (3d) 43, leave**

 **refused Sept. 27, 2012 sec #34756.**

**49. Yet, Hitzig severing only some offending parts DID**

**affect the validity of the entire regulatory regime such**

**that the Parker and Krieger orders did take effect, said the**

**Hitzig and J.P. courts.**

**50. Only after J.P. did the Hitzig declaration result in**

**charges being dropped across Canada. Most other declarations**

**were then ignored and even laughed at. In Hitzig, caps on 1**

**patient per grower and 3 growers per garden were struck**

**down. Two months later, they were re-imposed. Then, in**

**Sfetkopoulos, the 1 patient per grower cap was struck down**

**again. Health Canada upped it to 2. In Beren, the 3 growers**

**per garden cap was struck down again. Health Canada upped it**

**to 4! After another round of winning constitutional**

**challenges, they can up them to 3 and 5.**

**51. The Parker and J.P. Courts did not say Prohibition**

**Invalid Absent Exemption only once, it said "absent." Not**

**one time only. Since Smith, we know the exemption was absent**

**from inception to repeal. Since Allard, we know the next**

**exemption was absent from inception to repeal.**

**52: The McCrady Court continues:**

 **The appellants have continuing concerns about the MMAR**

 **regime. In their view, the regime is inadequate and**

 **fatally flawed. But their views about the regime cannot**

 **change the fact that since October 7, 2003, with the**

 **exception of the 2011 decision Mernagh, no court has**

 **held that the marihuana prohibitions are invalid.**

 **Since Parker (2000) and Krieger, 2011 ONCA 820 (Canlll)**

 **courts have dealt with defects in the MMAR by striking**

 **down the provisions or reading out offending parts of**

 **the regulations. The orders made in those cases,**

 **including Hitzig, Sfetkopoulos and Beren, have left**

 **intact the prohibitions in the CDSA.**

**53. J.P. did not leave intact the prohibitions in the CDSA**

**with 4,000 resulting stays. Even though the exemption was**

**absent, all those courts did not follow Parker and Krieger**

**and left the prohibitions not declared unintact while the**

**exemption was unconstitutional because they were not moved**

**to.**

**54. Numerous courts have made declarations of invalidity of**

**the medical exemption regimes but only the J.P. judges**

**Phillips, Rogin, Doherty, Goudge, Simmons and Mernagh judge**

**Taliano declared CDSA prohibitions invalid after striking**

**down the exemption. Many other courts have not followed**

**Parker and Krieger. Applicant seeks a judge to obey**

**Parliament and not the Ontario Court of Appeal.**

**A2) SFETKOPOULOS, BEREN, SMITH, ALLARD PERIODS OF INVALIDITY**

**55. Should the Court rule that the Parker-Hitzig period of**

**invalidity of the prohibitions ended, Applicant submits the**

**Sfetkopoulos, Beren, Smith and Allard decisions have created**

**new periods of Parker-Krieger invalidity of the CDSA**

**prohibitions.**

**B) SECTION 5 TRAFFICKING**

**56. Failure of the legislation to reflect the invalidation**

**of the prohibition on marijuana cultivation in S.7(1) by the**

**Alberta Court of Appeal in R. v. Krieger in 2003 added to**

**the already invalidated prohibition on marijuana possession**

**in the S.4(1) by the Ontario Court of Appeal in R. v. Parker**

**in 2001 should have also invalidated the prohibitions in all**

**other related sections. Only their dead corpses are hanging**

**there in the Code now.**

**57. S.4(1) says it is an offence to possess anything on**

**"Schedule II of banned substances." S.7(1) says it is an**

**offence to cultivate anything on "Schedule II of banned**

**substances." S.5(2) says it is an offence to possess for the**

**purpose of trafficking anything on the "Schedule II of**

**banned**

**substances."**

**58. If the prohibitions on the possession and production of**

**marijuana became invalid in 2001 and 2003, how was that**

**reflected in the Criminal Code when the government didn't**

**change anything? Since the Government did not enact the**

**words "except for marijuana" in S.4's prohibition of**

**possession or S.7's prohibition of production, the only way**

**left to effect the repeal of the prohibition would have been**

**to delete "marijuana" from Schedule II of banned substances.**

**Such deletion would make S.5 Possession for a Purpose as**

**invalid as S.4 Possession and S.7 Production.**

**59. Applicant submits that prohibiting trafficking in an era**

**when Possession and Production are not prohibited brings the**

**administration of justice into disrepute.**

**C) S.24 RETURN OF CONTROLLED SUBSTANCE**

**60. Should this Court deem the prohibitions on marijuana in**

**S.4 and S.7 of the CDSA remain repealed after July 31 2001,**

**or are newly repealed, Applicant moves that the Accused's**

**marijuana be returned under S.24 of the CDSA.**

**ORDER SOUGHT:**

**61. Applicant seeks an order that**

**A.1) the Accused's CDSA charges relating to marijuana be**

**quashed as of no force and effect; and if there be**

**jurisdiction:**

**A.2) absent a viable medical exemption, the prohibitions on**

**marijuana in the CDSA are of no force and effect; and**

**A.3) the word "marijuana" be struck from CDSA Schedule II;**

**A.4) all convictions registered since Aug 1 2001 until Aug**

**24 2016 Allard decision corrected the Bad Exemption be**

**expunged.**

**B) any charges under S.5 Trafficking are stayed in an era**

**when both Possession and Production of the substance being**

**no longer prohibited brings the administration of justice**

**into disrepute.**

**C) the seized Controlled Substance be returned to Applicant**

**pursuant to S.24 of the CDSA.**

**Dated at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on \_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_.**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Applicant Signature**

 **NOTICE OF MOTION**

**TAKE NOTICE that on \_\_\_\_\_\_\_ 201\_\_ at \_\_\_\_\_m or as soon**

**hereafter as can be heard the application made to any judge**

**of this Court, not a Justice of the Peace, with leave if the**

**Accused has already pleaded, at the Courthouse in \_\_\_\_\_\_\_\_\_\_\_\_\_.**

**JURISDICTION**

**1. S.601 states:**

**"Amending defective indictment or count**

**(1) An objection to an indictment preferred under this Part**

**or to a count in an indictment, for a defect apparent on its**

**face, shall be taken by motion to quash the indictment or**

**count before the accused enters a plea...**

**Question of law**

**(6) The question whether an order to amend an indictment or**

**a count thereof should be granted or refused is a question**

**of law.**

**Definition of "court"**

**(10) In this section, "court" means a court, judge, justice**

**or provincial court judge acting in summary conviction**

**proceedings or in proceedings on indictment.**

**2. S.601 says an objection to amend a defective indictment**

**must be made pre-plea to "a court" of first instance with**

**power to amend the defective indictment so later judges only**

**deal with valid counts. The indictment must be amended**

**before being sent to the Trial Court for plea and certainly**

**before any evidence presented at a Preliminary Inquiry.**

**Though it would be Simply procedurally convenient to have**

**the Trial Judge also rule on the S.601 amendments to the**

**indictment, a Trial Judge is not even appointed until the**

**Preliminary Inquiry judge has sent it further. Specific**

**jurisdiction is only conferred upon one judge of the court**

**once the Accused has pleaded before him. Until then, any**

**other judge of the court may amend the indictment.**

**NO CONSTITUTIONAL QUESTION**

**3. In R. v. J.P. (2003), Ontario Superior Court Justice**

**Rogin noted that for that S.601 Quash Motion:**

 **"[5] The Crown appeals to this court from this ruling.**

 **The Crown complains that notwithstanding that J.P.'s**

 **original application was not a Canadian Charter of**

 **Rights and Freedoms application... the factum**

 **specifically states that J.P. did not challenge the**

 **constitutionality of the regulations which Phillips J.**

 **found not to contain an offence."**

**4. The Parker Charter Challenge ruled there was no**

**prohibition absent a viable medical exemption. The Hitzig**

**Charter Challenge ruled defects made the MMAR an unacceptably Bad Exemption. The J.P. non-Charter S.601 Quash Challenge ruled that the Hitzig Bad Exemption gave effect to the Parker invalidation of the Offence: Bad Exemption No Offence. The J.P. motion to quash was not a constitutional challenge all over again and neither is the Motion of the Accused herein.**

**5. In R. v. Marie-Eve Turmel [2016], Judge Desaulniers ruled**

**her S.601 Motion to Quash was a constitutional question**

**needing Notice to the provincial Attorneys General. A Notice**

**of NO Constitutional question was served. On Nov 11 2016,**

**Crown Attorney Moreau informed Judge Rosemarie Millar:**

 **MS MOREAU: ... what was notified to the Attorney General**

 **is a Notice of no Constitutional question, in the sense**

 **from what I understand from the motion, is that Ms.**

 **Turmel isn't contesting the constitutionality. She's**

 **stating that it already is unconstitutional and of no**

 **force and effect, and therefore, the indictment should**

 **be quashed. So it's a motion by virtue of 601 of the**

 **Criminal Code, is what I understand, to quash the**

 **indictment on the basis that it's already**

 **unconstitutional. And it's been declared**

 **unconstitutional in other decisions, is what I**

 **understand. The Attorney General won't intervene because**

 **they don't understand it as a Constitutional question,**

 **and I'm prepared to proceed on the basis that it isn't.**

 **COURT: Okay.**

**6. Under S.601, a typo in a wrong address may be amended by**

**a judge of first instance. A defective count in the indictment may be quashed. It is not a question for the trial judge.**

**FOR THESE REASONS, MAY IT PLEASE THE COURT OF FIRST INSTANCE**

**GRANT the present Application.**

**Dated at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on \_\_\_\_\_\_\_\_\_\_\_\_, 201\_\_.**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Applicant Signature**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Print Applicant Name**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Address**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Tel/fax (if)**

 **\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **Email (if)**

**TO: Ministry of Justice**

**TO: The Registrar of the Court**

**Documentation to be used:**

**R. v. Krieger Ab.C.A. [2003] canlii.ca/t/5ck1**

**R. v. J.P. Ont.C.A [2003] canlii.ca/t/5290**

**R. v. McCrady Ont.C.A. [2012] canlii.ca/t/fpfkg**

**R. v. Smith S.C.C. [2015] canlii.ca/t/gjgtl**

**Allard v. Canada F.C.C. [2016] canlii.ca/t/gngc5**

**R. v. Marie-Eve Turmel [2016]**

**Interpretation Act Section 5(3), 32(a) http://canlii.ca/t/8dcs**

**AFFIDAVIT**

**I, \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, residing at
\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ in \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
make oath that all the information herein is true and that there are no personal facts relating to me in this question of pure law other than I have been charged with a cannabis offence unknown to law.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Name: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Sworn before me at \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ on \_\_\_\_\_\_\_\_. 20\_\_\_.**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
A COMMISSIONER, ETC.**