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 Once the offences were no longer in force, Only Parliament Legislates new law, the Ontario Court of Appeal could not revive the prohibitions that had been of no force or effect the previous 2 years.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.