Federal Court Cour fédérale

Date: 20190507

Dockets: T-1765-18
T-1716-18
T-1913-18

Citation: 2019 FC 553

Ottawa, Ontario, May 7, 2019

PRESENT: The Honourable Mr. Justice Brown

Docket: T-1765-18

BETWEEN:

ALLAN J. HARRIS

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Docket: T-1716-18

AND BETWEEN:

RAYMOND LEE HATHAWAY

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

Docket: T-1913-18

AND BETWEEN:

MIKE SPOTTISWOOD

Plaintiff

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

I. Nature of matters

[1] These reasons deal with the Crown's motion to strike the action brought by the Plaintiff Allan J Harris [Harris], and a motion brought by Harris for an order granting him interim relief against the possession and shipping limit of 150 grams of medical cannabis. These reasons also deal with related actions brought by the Plaintiffs Raymond Lee Hathaway [Hathaway], and Mike Spottiswood [Spottiswood], whose actions have been case-managed together with that of Harris. Harris and Hathaway are the lead cases in this group. Each Plaintiff seeks a declaration regarding the unconstitutionality of provisions relating to medical cannabis.

A. *Summary re Harris action*

[2] Harris is authorized to use 100 grams of cannabis for medical purposes each day, which works out to a kilogram every 10 days and approximately three kilograms a month. He seeks a

declaration that various provisions of the *Cannabis Regulations*, SOR/2018-144 [*Cannabis Regulations*] which impose a 150-gram cap on possession and shipment of cannabis in a public place are unconstitutional because they pose a threat of fines or incarceration on him and others with large prescriptions like his. Harris claims the 150-gram cap violates his rights to life, liberty, and security of the person under section 7, and discriminates against him contrary to his equality rights under section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. Harris submits that because of this cap he is unable to travel more than a day and a half away from his home.

[3] In summary, I am dismissing the Crown's motion to strike, save certain phrases in Harris' claim. In addition, I am granting Harris a ten-day exemption to the 150-gram possession and shipping cap, such that he may possess and ship 1,000 grams of medical cannabis.

B. *Summary re Hathaway action*

[4] Hathaway claims he is disabled by an inoperable tumour on the spine and has ACMPR Authorization to use 100 grams of cannabis each day. He seeks a declaration that various provisions of the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 [*ACMPR*] imposing a 150-gram cap on possessing and shipping cannabis are unconstitutional on the ground that they pose a threat of fines or incarceration to patients with larger prescriptions. The regulations Hathaway relies upon were repealed in 2018, he was given an opportunity to amend but did not and therefore his action is dismissed as moot.

C. *Summary re Spottiswood action*

[5] Spottiswood claims he has authorization to use cannabis for a "permanent medical condition" without further detail. He seeks a declaration that subsection 273(2) of the *Cannabis Regulations*, requiring that the period of use of a prescription, or "medical document", must not exceed one year, violates section 7 *Charter* rights to life and security of permanently ill patients such as himself. He claims that patients affected by the *Marihuana Medical Access Regulations*, SOR/2001-227 [*MMAR*] (the regulatory part of the medical marijuana regime in place between 2001 and 2014) whose permits were extended since 2014 have no problems remaining authorized without renewing their permits. In summary, I am striking Spottiswood's action as well without leave to amend.

II. History and basis of right to medical marijuana

[6] I outlined the basis of the right to medical marijuana in *Harris v Canada*, 2018 FC 765 [*Harris I*] at paras 11-12, and in doing so relied on the decision of *Allard v Canada*, 2016 FC 236, per Phelan J [*Allard action*]:

> [11] The right to possess and cultivate marijuana for medical purposes has been litigated in Canada for almost two decades. A brief overview of this history is provided by Phelan J. of this Court in *Allard v Canada*, 2016 FC 236, from which I take the following:
>
> > 1 This is a *Charter* challenge to the current medical marihuana regime under the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 [MMPR] brought by four individuals. It is important to bear in mind what this litigation is about, and equally, what it is not about.
> >
> > 2 This case is not about the legalization of marihuana generally or the liberalization of its

recreational or life-style use. Nor is it about the commercialization of marihuana for such purposes.

3 This case is about the access to marihuana for medical purposes by persons who are ill, including those suffering severe pain, and/or life-threatening neurological conditions. Such persons also encompass those in the very last stages of their life.

4 This is another decision in a line of cases starting with *R v Parker*, (2000) 49 OR (3d) 481, 188 DLR (4th) 385 (ONCA) [*Parker*], and culminating in *R v Smith*, 2015 SCC 34, [2015] 2 SCR 602 [*Smith*], that have examined, often with a critical eye, the efforts of government to regulate the use of marihuana for medical purposes and the various barriers and impediments to accessing this necessary drug.

5 Like other cases, this most recent attempt at restricting access founders on the shoals of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the *Charter*], particularly s 7, and is not saved by s 1.

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d’une société libre et démocratique.

…	…
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

> 6 The Court has concluded that the Plaintiffs' liberty and security interest are engaged by the access restrictions imposed by the MMPR and that the access restrictions have not been proven to be in accordance with the principles of fundamental justice.

> [12] Suffice it to say that the right to access marijuana and cannabis for medical purposes is guaranteed by the *Charter*, an undoubted legal matter having been decided by this Court, the Supreme Court of Canada, and as well, by Superior Courts in the provinces. In addition, the right of access to marijuana and other cannabis products for medical purposes is a right conferred upon individuals, on application, by the Governor in Council in subordinate legislation, i.e., regulations issued pursuant to the relevant legislation.

[7] The following relevant jurisprudence, legislation, and regulations set out the context for the parties' submissions and the Court's analysis:

- *R v Parker* (2000), 49 OR (3d) 481(CA), per Rosenberg JA [*Parker*] declared the marijuana prohibition in section 4 of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [*CDSA*] invalid because it infringed the respondent's section 7 *Charter* rights to security of the person and liberty.

- Canada enacted the *MMAR* in 2001 in response to *Parker*. The 2014 pre-repeal version of the *MMAR* authorized possession of dried marijuana at 30 times the prescribed daily dosage; and provided the Authorization to Possess which expired 12 months after its date of issue: section 11, subsection 13(1). Notably there was no cap at that time.

- Canada introduced the *Marihuana for Medical Purposes Regulations*, SOR/2013-119 [*MMPR*] in 2013, which soon after repealed the *MMAR*. *MMPR* introduced a 150-gram possession cap on dried marijuana to the lesser of 30 times the daily dosage or 150 grams.

- Four *Allard* plaintiffs with daily dosages not exceeding 25 grams commenced actions in this Court to determine whether the then-new *MMPR* regime limited their *Charter* rights. They sought pre-trial relief to preserve their rights under the repealed *MMAR* provisions, including the absence of the cap on possession enacted in the *MMPR* regime. The cases were decided in *Allard v Canada*, 2014 FC 280, per Manson J, aff'd 2014 FCA 298 [*Allard motion*]. Justice Manson granted an interim pre-trial constitutional exemption to the *Allard* plaintiffs, based on section 7 of the *Charter*. Justice Manson allowed them to continue to rely on the Authorizations to Possess issued under the *MMAR*, and to continue to grow their own cannabis under the Personal Use Production Licenses or the licences of other designated persons issued under the repealed *MMAR* regime. However, Justice Manson, on the facts before him, did not relieve the *Allard* plaintiffs from the new 150-gram possession cap created by the *MMPR* because he was unconvinced it would subject the *Allard* plaintiffs to irreparable harm until trial: *Allard* motion at paras 126, 128.

- After Justice Manson's decision in the *Allard motion*, numerous claimants, including Spottiswood and a Plaintiff named in Schedule "A" in this proceeding (Arthur Jackes), brought actions in this Court based on "kits" downloaded from a website, claiming that both the repealed *MMAR* and the then-newly enacted *MMPR* regimes violated their section 7 *Charter* rights. Many of them moved for interim relief seeking constitutional exemptions from the prohibition against marijuana in the *CDSA* for personal use: *In re numerous filings seeking a declaration pursuant to s 52(1) of the Canadian Charter of Rights and Freedoms*, 2014 FC 537, per Phelan J [*Kit Case motion*] at paras 9, 10. Justice Phelan's Order dated June 4, 2014 stayed these actions pending a decision in the trial of the *Allard action*.

- In British Columbia, four plaintiffs challenged the validity of the *MMPR* as infringing their sections 6, 7, and 15 *Charter* rights. They had been prescribed daily dosages of 36, 60, 100, and 167 grams per day. They brought an application for an interim injunction/exemption to preserve and extend their authorization to produce, transport, store, and possess cannabis: *Garber v Canada (Attorney General)*, 2015 BCSC 1797, per Cullen ACJSC [*Garber*] at paras 1-3. The Associate Chief Justice made an Order on the same terms as had Justice Manson in the *Allard motion*, except that *Garber* went on to exempt the plaintiffs from the 150-gram possession cap imposed by the *MMPR*: *Garber* at para 148. The Associate Chief Justice said that "a determination of irreparable harm is case-specific" and found that the *Garber* plaintiffs are "constrained in their ability to travel for <u>any</u> reason [emphasis in original]" possibly contrary to sections 7 and 15 of the *Charter*: *Garber* at para 127. The *Garber* decision was not appealed.

- In 2016, Justice Phelan made a final determination regarding the *Allard action* plaintiffs' actions (daily dosages not exceeding 25 grams) and found the *MMPR* contrary to section 7 of the *Charter* and unconstitutional. However, Justice Phelan found the 150-gram possession cap to be constitutional: *Allard action* at paras 286-88. *Allard*'s motion

for reconsideration was dismissed in *Davey v Canada*, 2016 FC 492, by Phelan J [*Davey*]. This decision was not appealed.

- In response to the *Allard action*, Canada enacted a new medical cannabis regime in 2016, the *ACMPR*. The *ACMPR* retained the 150-gram possession cap.

- In 2017, Justice Phelan rendered his judgment *In re subsection 52(1) of the Canadian Charter of Rights and Freedoms*, 2017 FC 30 [*Kit Case judgment*]. All 316 actions were dismissed without leave to amend because the claims were moot, in that they relied on the repealed *MMAR* and *MMPR* regulations which by then had been repealed, the pleadings were deficient, the claims disclosed no reasonable cause of action, and were frivolous, vexatious, and an abuse of process.

- In 2018, Parliament enacted the *Cannabis Act*, SC 2018, c 16 [*Cannabis Act*] to generally legalize cannabis possession. However, the *Cannabis Act* continues to provide restrictions on the medical use of cannabis. Under the *Cannabis Act*, adults may possess up to 30 grams of dried cannabis in public.

- Also in 2018, the Governor in Council enacted the *Cannabis Regulations*, which replaced the *ACMPR*. In the result, clients registered on the basis of a "medical document" (which I liken to a prescription) and registered persons, among others, that is, users of cannabis for medical purposes are allowed to possess in public of the lesser of 150 grams or 30 times the daily quantity of dried cannabis authorized by their health care practitioner in a medical document. The *Cannabis Act* and *Cannabis Regulations* place no limits on possession in a non-public place. A health care practitioner is a medical practitioner or a nurse practitioner, as defined by reference to provincial legislation.

III. Issues

[8] The issues of Harris' Amended Statement of Claim [Harris claim] and Spottiswood's Statement of Claim [Spottiswood claim] will be discussed together. This Court will determine:

A. Hathaway
    i. Should Hathaway's Statement of Claim be struck?
B. Harris and Spottiswood
    ii. Should the Harris claim and or the Spottiswood claim be struck?
C. Should Harris be granted interim relief?

IV. Relevant legislation including regulations

[9] Subsection 272(1) of the *Cannabis Regulations* sets out who may authorize a "medical document" (prescription) for medical cannabis:

Authorization — health care practitioner	**Autorisation — praticien de la santé**
272 (1) A health care practitioner is authorized, in respect of an individual who is under their professional treatment and if cannabis is required for the condition for which the individual is receiving treatment,	272 (1) Si le cannabis est nécessaire en raison de l'état de santé d'un individu qui est soumis à ses soins professionnels, le praticien de la santé est autorisé, à l'égard de cet individu :
(a) to provide a medical document;	a) à fournir un document médical;
…	…

[10] A "health care practitioner" is defined as "except as otherwise provided, a medical practitioner or a nurse practitioner." A medical practitioner generally means an individual who is entitled under the laws of a province to practise medicine in that province. A nurse practitioner generally means an individual who is entitled under the laws of a province to practise as a nurse practitioner or an equivalent designation and is practising as a nurse practitioner or an equivalent designation in that province. See: *Cannabis Regulations*, subsection 264(1).

[11] A "medical document" is defined as "a document provided by a health care practitioner to support the use of cannabis for medical purposes": *Cannabis Regulations*, subsection 264(1).

A. *30- and 150-gram possession limits*

[12] Harris claims relief against the possession and shipping limits set out in the *Cannabis Regulations*.

[13] Paragraph 8(1)(a) of the *Cannabis Act* authorizes adults to possess cannabis in the amount equivalent to 30 grams of dried cannabis in a public place:

Possession	**Possession**
8 (1) Unless authorized under this Act, it is prohibited	8 (1) Sauf autorisation prévue sous le régime de la présente loi :
(a) for an individual who is 18 years of age or older to possess, in a public place, cannabis of one or more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 30 g of dried cannabis;	a) il est interdit à tout individu âgé de dix-huit ans ou plus de posséder, dans un lieu public, une quantité totale de cannabis, d'une ou de plusieurs catégories, équivalant, selon l'annexe 3, à plus de trente grammes de cannabis séché;
...	...

[14] Sections 266 and 267 of the *Cannabis Regulations* set out limits on possession in a public place for individuals in different circumstances. The limit is set at 150 grams of dried cannabis: for adults such as Harris: see paragraph 266(2)(b) (Client registered on basis of medical document), (3)(b) (Registered person). Harris also claims relief with reference to subsections 290(e) (Refusal – purchase order), 293(1) (Replacement of returned cannabis), paragraph 297(e)(iii) (Monthly reports), and subparagraph 348(3)(a)(ii) (Requirements – distribution or

sale) of the *Cannabis Regulations*, however in my view his claim falls under paragraph 266(3)(b) as a Registered person. As such he is entitled to possess "150 g of dried cannabis" in public.

[15] The 150-gram limit in the *Cannabis Regulations* referred to above is in addition to the amount authorized in the *Cannabis Act*: see section 268 of the *Cannabis Regulations*:

Cumulative quantities	**Cumul des quantités**
268 Any quantity of cannabis that an individual is authorized to possess under section 266 or 267 is in addition to any other quantity of cannabis that the individual may possess under the Act.	268 La quantité de cannabis qu'un individu est autorisé à avoir en sa possession au titre des articles 266 ou 267 s'ajoute à toute autre quantité de cannabis qu'il peut avoir en sa possession sous le régime de la Loi.

[16] Therefore the total cannabis limit for Harris is 180 grams in a public place. A "public place" is defined as "any place to which the public has access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view": *Cannabis Act*, subsection 2(1).

[17] There is no prescribed limit to possession of cannabis in a non-"public place" such as a home or private dwelling, in either the *Cannabis Act* or the *Cannabis Regulations*.

B. *150-gram limit on shipping*

[18] Harris also claims relief with reference to a 150-gram cap on shipping cannabis. The provisions of the *Cannabis Regulations* that impose this limit in relation to shipping are: paragraph 290(1)(e) (Refusal – purchase order); subsection 293(1) (Replacement of returned

cannabis); and subparagraphs 297(1)(e)(iii) (Monthly reports) and 348(3)(a)(ii) (Requirements – distribution or sale).

C. *Duration of prescription or medical document*

[19] Spottiswood claims relief with reference to subsection 273(2) of the *Cannabis Regulations*, which prescribes the maximum period of use of a medical document:

Maximum period	**Période maximale**
273 (2) The period of use specified in a medical document must not exceed one year.	273 (2) La période d'usage indiquée dans le document médical ne peut excéder un an.

V. Law on a motion to strike

[20] I reviewed the law on a motion to strike in *Harris I* referred to above, at paras 14-18:

> [14] In *Lee v Canada*, 2018 FC 504, at para 7, Heneghan J stated the following in respect of the test for motions to strike:
>
> > The test upon a motion to strike a pleading is set out in the decision in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, that is whether it is plain and obvious that the pleading discloses no reasonable cause of action. According to the decision in *Bérubé v. Canada (2009)*, [2009 FC 43] at paragraph 24, a claim must show the following three elements in order to disclose a reasonable cause of action
> >
> > i. Allege facts that are capable of giving rise to a cause of action
> >
> > ii. Indicate the nature of the action which is to be founded on those facts, and

iii. Indicate the relief sought, which must be of a type that the action could produce and that the court has jurisdiction to grant

[15] The moving party bears the onus of meeting the test set out by the Supreme Court of Canada in *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*]: *Al Omani v Canada*, 2017 FC 786 per Roy J. at paras 12-16:

> [12] The test to strike a claim under Rule 221 sets a high bar. First, it is assumed that the facts stated in the statement of claim can be proven. The Court must be satisfied that it is plain and obvious that the pleading discloses no reasonable cause of action assuming the facts pleaded are true: *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 SCR 45 at para 17; *Hunt v Carey Canada Inc*, [1990] 2 SCR 959 [*Hunt*] at p 980. The Defendant bears the onus of meeting this test: *Sivak v Canada*, 2012 FC 272, 406 FTR 115 [*Sivak*] at para 25.
>
> [13] In *Hunt*, the Supreme Court sided with the articulation of the rule in England to the effect that "if there is a chance that the plaintiff may succeed, then the plaintiff should not be "driven from the judgment seat" (p. 980). A high bar indeed to succeed on a motion to strike. Some chance of success will suffice or, as Justice Estey said in *Att. Gen. of Can. v Inuit Tapirisat et al*, [1980] 2 SCR 735, "(o)n a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt" (p.740).
>
> [14] To show a plaintiff has a reasonable cause of action, the statement of claim must plead material facts satisfying every element of the alleged causes of action: *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, 476 NR 219 [*Mancuso*] at para 19; *Benaissa v Canada (Attorney General)*, 2005 FC 1220 [*Benaissa*] at para 15. The plaintiff needs to explain the "who, when, where, how and what" giving rise to the Defendant's liability (*Mancuso*, para 19, *Baird v Canada*, 2006 FC 205 at paras 9-11, affirmed in 2007 FCA 48).

> [15] Thus, there appears to be a balance. On one hand, a chance of success is enough for the matter to proceed. On the other, the material facts must be pleaded in sufficient detail such that the cause of action may exist. The purpose of pleadings is to give notice to the opposing party and define the issues in such a way that it can understand how the facts support the various causes of action. As the Court of Appeal put it in *Mancuso*, "(i)t is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought" (para 16). The Plaintiffs note that pleadings can still proceed despite being "far from models of legal clarity" (*Manuge v Canada*, 2010 SCC 67, [2010] 3 SCR 672 at para 23). But it remains that adequate material facts must be pleaded. Parties cannot make broad allegations in their statement of claim in the hope of later going on a "fishing expedition" to discover the facts: *Kastner v Painblanc* (1994), 176 NR 68, 51 ACWS (3d) 428 (FCA) at p.2.

[16] On motions to strike, no evidence outside the pleadings may be considered (except in limited instances that do not apply here). This is expressly enacted by Rule 221(2) and confirmed by the authorities: *Pelletier v Canada*, 2016 FC 1356 [*Pelletier*] per Leblanc J. at para 6:

> [6] As is well-settled too, no evidence outside the pleadings may be considered on such motions and although allegations that are capable of being proven must be taken as true, the same does not apply to pleadings which are based on assumptions and speculation and to those that are incapable of proof (*Imperial Tobacco*, at para 22; *Operation Dismantle v The Queen*, [1985] 1 SCR 441, at p. 455 [*Operation Dismantle*]; *AstraZeneca Canada Inc. v Novopharm Ltd.*, 2009 FC 1209 at paras 10-12).

[17] In *Pelletier*, Leblanc J. also stated that while a Statement of Claim must be read as generously as possible with a view to accommodating any inadequacies due to drafting deficiencies, the claimant must plead the facts upon which he makes his claim and is not entitled to rely on the possibility of new facts turning up as the case progresses:

> [7] In this regard, while the Statement of Claim must be read as generously as possible with a view to accommodating any inadequacies due to drafting deficiencies (*Operation Dismantle*, at p. 451), it is incumbent on the claimant to clearly plead the facts at the basis of its claim:
>
> > [22] […] It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. <u>But plead them it must</u>. <u>The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted</u>". (*Imperial Tobacco*) *(My emphasis)*

[18] In *Mancuso v Canada (National Health and Welfare)*, 2015 FCA 227, the Federal Court of Appeal said at paras 16-17 that plaintiffs must plead material facts in sufficient detail to support the claim and relief sought:

> [16] It is fundamental to the trial process that a plaintiff plead material facts in sufficient detail to support the claim and relief sought. As the judge noted "pleadings play an important role in providing notice and defining the issues to be tried and that the Court and opposing parties cannot be left to speculate as to how the facts might be variously arranged to support various causes of action."

VI. Parties' positions and analysis

A. *The Hathaway claim*

[21] I will deal with the Hathaway claim first. It is based on statutory and regulatory frameworks that have been repealed. It discloses no cause of action because the requested relief cannot be granted. I allowed Hathaway to amend his claim, so that he could refer to the current *Cannabis Act* and *Cannabis Regulations*. He chose not to do so. Nor did he file any material in support of his claim. I see no point in granting leave to amend again, and decline to do so. The Hathaway claim will be dismissed without leave to amend.

B. *The Harris and Spottiswood claims*

[22] The Defendant submits several bases for striking the Harris and Spottiswood claims. I will review the following issues to determine whether the Harris and/or Spottiswood claims should be struck: (1) Are the Plaintiffs attempting to relitigate their prior claims? (2) Is the Court's previous affirmation of the constitutionality of possession limits and the annual medical authorization requirement binding? (3) Do theses actions fail to disclose a reasonable cause of action? (4) Are the actions scandalous, frivolous, and vexatious?

(1) Are the Plaintiffs attempting to relitigate their prior claims?

Defendant's position

[23] The Defendant submits these Plaintiffs are attempting to relitigate prior claims contrary to judicial comity being an abuse of process. Rule 221(1)(f) of the *Federal Courts Rules*, SOR/98-106 provides:

Motion to strike	**Requête en radiation**
221(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
...	...
(f) is otherwise an abuse of the process of the Court,	f) qu'il constitue autrement un abus de procédure.
…	…

[24] The Defendant submits that the Federal Court of Appeal characterizes judicial comity as an aspect of *stare decisis*, only to be departed from where there are strong/cogent reasons for doing so: *Apotex Inc v Pfizer Canada Inc*, 2013 FC 493, per O'Reilly J, aff'd 2014 FCA 54 [*Apotex*] at paras 11-15. Strong reasons means the Plaintiffs must establish either subsequent decisions have affected its validity; the prior decision failed to address some binding case law or statute; or the prior decision was unconsidered or given in circumstances where trial exigencies did not allow for full argument: *Apotex* at para 14.

[25] Further, the Defendant submits abuse of process bars proceedings where *res judicata* requirements are not met but a party nevertheless attempts to relitigate issues in a manner, potentially undermining the integrity of the administration of justice: *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 [*CUPE*] at para 35. If a matter is relitigated and the same result is reached, relitigation 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: *CUPE* at para 51.

[26] Harris and Spottiswood brought prior kit claims alleging *MMAR* and *MMPR* provisions infringed patients' section 7 *Charter* rights. Like the current claims, their prior claims challenged the constitutionality of the prohibition on the 150-gram possession cap and requirements for the annual medical authorization to use cannabis. The prior claims were adjudicated in the *Kit Case judgment*, which struck the claims because they contained a "dearth of detail" concerning the plaintiffs' personal circumstances, the pleadings were frivolous and vexatious, and raised matters of settled law, and for judicial comity of the *Allard action*.

[27] The Defendant also submits there is no suggestion prior proceedings are tainted by fraud or that it would be unfair to apply the prior findings to this case. Moreover, the claims are an abuse of process because it was open to the Plaintiffs to appeal their prior claims, but they declined to do so. And there is no reason Harris could not have raised his section 15 of the *Charter* claims before, which the Defendant submits is a further abuse of process.

Plaintiffs' position

[28] Harris submits (for himself and others, a point to which I will return) their claims raise sufficient facts. While the Defendant criticizes their alleged "dearth" of facts, the Plaintiffs submit the real issue is whether the facts are "enough" to support the essential elements of the constitutional causes of action. The facts in the Harris claim are the same necessary facts found sufficient in *Garber*: (a) the Plaintiff has a medical authorization for (b) 100 grams per day meaning he cannot carry enough for more than 1.5 days away from home and needs 20 costly couriers a month, 240 per year. These were the same facts relied upon by *Garber* plaintiff Boivin (who likewise had permission to use 100 grams per day) which was sufficient to establish a possible violation of Boivin's section 7 and 15 rights.

[29] As I understand them, the Plaintiffs agree the 150-gram possession cap and one-year medical document renewal requirement (raised by Spottiswood) were raised previously, but they distinguish their cases on the facts. The Court notes that the 150-gram possession cap was upheld by Justice Manson in the *Allard* motion and by Justice Phelan in the *Allard action*. The Court also notes that the one-year medical authorization renewal requirement was upheld in *R v Beren*, 2009 BCSC 429, leave to appeal refused 2009 SCCA No 272 [*Beren*] at paras 33(e), 94-95; see also the *Kit Case judgment* by Justice Phelan at para 36 who held the general requirement for medical authorization is constitutional.

[30] The Plaintiffs submit the *Allard action* did not consider an allegation of "fraudulent scientific evidence leading to genocidal undermedication."

[31] Regarding the necessity of "cogent reasons", the Plaintiffs note that *Garber* granted high-dose users (like Harris) a ten-day supply by way of constitutional exemption in excess of the 150-gram possession cap, resulting in one 167-gram-per-day patient having a possession limit over 1.6 kilograms every ten days. There is a difference the Plaintiffs submit, in the evidence and patient dosage from the motion before Justice Manson, who heard from low-dose users, i.e. those with medical authorizations for 5 to 25 grams per day.

[32] As for not raising section 15 before, the Plaintiffs submit there are more plaintiffs now who were not present then, and that they are raising section 15 equality rights for the first time right now. They submit there is no reason not to allow others to rely on section 15.

Analysis

[33] In my view and based on the facts pleaded in his Statement of Claim, which as required I accept as true, Harris has a medical document entitling him to a very high dose of medical cannabis-100 grams per day. It is clear to me that Harris and others like him are in a very different factual situation from the Plaintiffs before the Court in the *Allard motion* and *Allard action*: they only had permission to use between 5 and 25 grams per day. Harris has permission to use far more medical cannabis—between four and twenty times that amount every day.

[34] Frankly, the amount Harris has been prescribed is extraordinarily high: it is in some months more than 3 kilograms. Harris does not state the nature of his illness, nor why he needs so much medical cannabis. At one point the Defendant suggests such a high dose might only be justified by a terminal medical condition. But the Defendant does not submit that Harris must

plead the nature of his illness or why so much is required, nor am I persuaded Harris or Spottiswood should be required to do so. The determination of what is required to treat Harris' medical condition is for the prescribing health care professional to decide, not the Court, at least for the purposes of a motion to strike or for interim relief.

[35] The 2018 *Cannabis Regulations* enacted by the Governor in Council allow "medical practitioners" and "nurse practitioners" as defined in the province concerned to issue prescriptions for medical cannabis; these prescriptions are called "medical documents." I take it as a given on the motion to strike—as I must—that Harris' medical practitioner or nurse practitioner, whichever signed his medical document, approved his very large prescription. If the Defendant seeks to challenge the amount prescribed, contrary evidence is required. However, the Defendant didn't file contrary evidence to that effect, nor is such evidence generally allowed on a motion to strike.

[36] I conclude the facts pleaded here significantly depart from those before Justices Manson and Phelan in the *Allard* matters.

[37] Another distinguishing factor between the case at bar and the *Allard* matters is that the Harris action is brought within a completely new access to cannabis regime, enacted by Parliament in 2018 to generally legalize possession and use, within limits. Access to medical cannabis is no longer a carve-out from a highly restricted criminal law regime set up by the *CDSA*; the current medical cannabis regime now fits within an entirely new framework and context of generally legalized access to cannabis.

[38] I also note that the *Kit Case* judgment did not deal with or focus upon high dose profile medical cannabis users such as Harris.

[39] The effect of the previous jurisprudence is also attenuated because in the interim, a constitutional exemption from the 150-gram possession cap was granted by the Associate Chief Justice of the Supreme Court of British Columbia in the *Garber* case, albeit on an interim basis (as is sought here on the interim motion). The *Garber* case involved high-dose users with authorization to use between 36 and 167 grams per day for medical purposes, the latter being an even higher dose than prescribed to Harris in the case at bar. *Garber* changed the legal environment; *Garber* does not seem to have been appealed.

[40] Given these factors I am not persuaded the Harris claim involves a relitigation of either the *Allard* or *Kit Case* matters. Thus, and with respect, I have concluded comity does not apply. In addition, I am not satisfied the Defendant has established an abuse of process; with respect there is no merit to that submission.

(2) Is the Court's previous affirmation of the constitutionality of possession limits and the annual medical authorization requirement binding?

Defendant's position

[41] The Defendant says that this Court previously affirmed the constitutionality of the 150-gram possession cap in the *Allard action* and did so again in *Davey*, which dismissed the motion for reconsideration of the *Allard action*: *Davey* at para 28. The Defendant submits the Plaintiffs do not raise a cogent reason why the Court should depart from the *Allard action*.

[42] Further, regarding the Plaintiffs' argument on the high- versus low-dose users of medical cannabis, the Defendant submits that while the four *Allard* plaintiffs were authorized to use 5 to 25 grams per day, there was evidence in *Allard* of patients authorized to use larger quantities, some in excess of 100 grams. Nevertheless this Court deemed the 150-gram possession cap constitutional.

[43] Moreover, the Defendant says no weight should be given to *Garber* on a motion to strike. The Defendant submits 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: *Coca-Cola Ltd v Pardhan* (1999), 172 DLR (4th) 31 (FCA), per Strayer JA at para 30. Even if the interlocutory injunction decisions were relevant, Justice Manson rejected a similar request for interlocutory exemption from the 150-gram possession cap, and the decision was affirmed on appeal.

[44] The requirement for medical authorization to use cannabis has consistently been held constitutional: *Hitzig v Canada* (2003), 231 DLR (4th) 104 (Ont CA) [*Hitzig*] at paras 138-45, leave to appeal refused 2004 SCCA No 5 ("[j]ust as physicians are relied on to determine the need for prescription drugs, it is reasonable for the state to require the medical opinion of physicians here" at para 139); *Beren* ("we conclude that the *MMAR* implicate the right of security of the person of those with the medical need to take marihuana" at para 95); *Kit Case judgment* ("It is settled law ... that the requirement for medical authorization is constitutionally sound" at para 36). *Hitzig* notes its holding may be revisited if physician participation ever declined to a point that a medical exemption was practically unavailable: at para 139. However,

Spottiswood does not raise this, but instead appears to take issue with patients needing to annually visit a health care practitioner. *Beren* rejects a similar argument that the requirement for annual renewal was arbitrary as applied to terminally ill patients and those with prescribed chronic conditions.

Plaintiffs' position

[45] The Plaintiff Harris says that the *Allard action*'s discussion of the 150-gram possession cap considered relatively trivial inconveniences. For a 25-gram patient to not leave home for more than six days and replenish five times a month seems minor. However the 150-gram possession cap is grossly disproportional for a person with approval to use far larger amounts of medical cannabis. This is evidenced where Justice Phelan said in his reasons, "[t]he possession cap still allows one to possess more than their necessary amount of marijuana": *Allard action* at para 288. This is not true of those allowed to use far larger amounts for medical purposes.

[46] Further, the *Allard* plaintiffs sought a declaration to strike the 150 gram per day possession in a public place cap so as to leave no maximum cap; however, the court would not grant such an overbroad remedy. Here, however the Plaintiffs only seek to strike the "150 gram maximum"; but not the "30-day maximum" cap.

[47] Regarding reliance on *Garber*, the Plaintiffs submit the decision's finding that high-dose users would suffer irreparable harm is now in evidence; and there have been no decisions in this Court dealing with high-dose medical cannabis users and dying patients; whereas *Garber* deals

with such and disposes of Justice Manson's limit. Moreover, the "Defendant did not point out the different tests for Applicants herein seeking the same remedy for the same harms."

[48] As for the one-year prescription renewal requirement, which Spottiswood raises, the Plaintiffs submit the Defendant misleads this Court in asserting several courts affirmed the constitutionality of requirements for annual medical authorization to use cannabis for medical purposes, when not one court has affirmed it. While the constitutional requirement for medical authorization to use cannabis is settled law, *annual* medical authorization is not, and neither adjudicated in *Beren* nor the *Allard action*.

Analysis

[49] Regarding the constitutionality of the 150-gram possession cap, the Defendant correctly argues that this Court in the *Allard action* found it constitutionally sound. However, in my view the facts were very different. The permitted medical authorizations in this case are at least double and in many cases many multiples of the maximum amounts allowed to the *Allard* plaintiffs. The *Allard* plaintiffs had permits for 5 to 25 grams while Harris has a prescription or medical document authorizing 100 grams per day which is twenty times the *Allard* low end of 5 grams, and four times the *Allard* high end of 25 grams per day. None of the *Allard* plaintiffs had daily dosages exceeding 25 grams.

[50] For a 25-gram patient to not leave home for more than six days and be required to replenish five times a month does seem relatively minor. Even more minor is the situation for a 5-gram a day patient to have to renew every 30 days, when compared to the impact of a 150-

gram possession cap. The impact of the 150-gram possession cap, in my view, is grossly disproportional for a person with medical approval to use the very large amounts of medical cannabis as in this case. Harris in this context must renew every day and a half if he travels away from his home.

[51] While the Defendant is correct in submitting evidence existed in the *Allard action* that there were individuals with higher permitted uses than 25 grams, the profile of high-dose users was not expressly discussed within paragraphs 286 to 288 where Justice Phelan decided the constitutionality of possession limits.

[52] This submission of the Defendant overlaps with the argument on relitigation and comity. As already noted, the facts are remarkably different between the Harris case and the previous jurisprudence. So too might the ultimate outcome if this matter proceeds to trial as, in my view, it should.

[53] In my view, the Harris action is sufficiently different from the previous litigation such that the previous litigation does not predetermine the result in the case at bar. The Harris action will not be struck on this basis because in my view it cannot be said it has no chance of success; see *Hunt v Carey Canada Inc*, [1990] 2 SCR 959, per Wilson J [*Hunt*] at para 24:

> [24] In England, then, the test that governs an application under R.S.C., O. 18, r. 19, has always been and remains a simple one: assuming that the facts as stated in the statement of claim can be proved, is it “plain and obvious” that the plaintiff's statement of claim discloses no reasonable cause of action? ... But if there is a chance that the plaintiff might succeed, then that plaintiff should not be “driven from the judgment seat”. Neither the length and complexity of the issues of law and fact that might have to be

> addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

[54] I wish to add that compelling arguments supporting a decision to grant an interlocutory injunction may be equally compelling to defeat a motion to strike.

[55] However, the Spottiswood claim that there should be no requirement that medical documents or prescriptions be renewed annually should be struck. I say this for several reasons. While the *Allard action* and the *Kit Case judgment* did not specifically discuss *annual* medical authorizations, the *Kit Case judgment* does affirm the constitutionality of medical authorizations. I accept the Defendant's submission that the requirement for medical authorization to use cannabis has also been consistently held constitutional in *Hitzig* and *Beren* at paras 94-95 ("we conclude that the *MMAR* implicate the right of security of the person of those with the medical need to take marihuana" at para 95). Also relevant is the *Kit Case judgment* ("It is settled law ... that the requirement for medical authorization is constitutionally sound" at para 36). *Beren* rejected a similar argument that the requirement for annual renewal was arbitrary as applied to terminally ill patients and those with prescribed chronic conditions.

[56] In my respectful view, there is no chance Spottiswood may succeed. While the one-year renewal requirement for medical documents may at most be an inconvenience, there have been no facts pleaded to establish it is a violation of section 7. In my view, the requirement to renew the medical document is a reasonable requirement and in general, the medical authorization is constitutional. In addition, Spottiswood's claim does not even indicate he possesses a current

medical authorization to use cannabis. He provides no facts regarding the current annual medical authorization or how it impacts his section 7 *Charter* rights. If he is simply alleging he should not have to visit a health care practitioner once a year, this inconvenience does not engage the *Charter*. I see no purpose in allowing an amendment to his claim.

[57] Spottiswood's action will be dismissed without leave to amend.

[58] The Plaintiffs named in Schedule "B" are case managed with Spottiswood because they also challenge the one-year renewal requirement of medical documents under subsection 273(2) of the *Cannabis Regulations*. While two of the three Plaintiffs in Schedule "B" include in their pleadings the amount they paid for their last annual medical document, I am of the view that these payments do not add materially to the merit of the constitutional issue they raise. The same reasons given in respect of Spottiswood apply to the Schedule "B" Plaintiffs. Therefore the actions of Plaintiffs named in Schedule "B" shall be dismissed without leave to amend.

(3) Does the Harris claim fail to disclose a reasonable cause of action?

[59] Rules 174, 181(1)(a), (b), 221(1)(a), and 221(2) of the *Federal Courts Rules* provide:

Material facts	**Exposé des faits**
174 Every pleading shall contain a concise statement of the material facts on which the party relies, but shall not include evidence by which those facts are to be proved.	174 Tout acte de procédure contient un exposé concis des faits substantiels sur lesquels la partie se fonde; il ne comprend pas les moyens de preuve à l'appui de ces faits.
...	...

Particulars	**Précisions**
181 (1) A pleading shall contain particulars of every allegation contained therein, including	181 (1) L’acte de procédure contient des précisions sur chaque allégation, notamment :
(a) particulars of any alleged misrepresentation, fraud, breach of trust, wilful default or undue influence; and	a) des précisions sur les fausses déclarations, fraudes, abus de confiance, manquements délibérés ou influences indues reprochés;
(b) particulars of any alleged state of mind of a person, including any alleged mental disorder or disability, malice or fraudulent intention.	b) des précisions sur toute allégation portant sur l’état mental d’une personne, tel un déséquilibre mental, une incapacité mentale ou une intention malicieuse ou frauduleuse.
...	...
Motion to strike	**Requête en radiation**
221(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d’un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
(a) discloses no reasonable cause of action or defence, as the case may be,	a) qu’il ne révèle aucune cause d’action ou de défense valable;
...	...
Evidence	**Preuve**
(2) No evidence shall be heard on a motion for an order under paragraph (1)(a).	(2) Aucune preuve n’est admissible dans le cadre d’une requête invoquant le motif visé à l’alinéa (1)a).

[60] In *Hunt* at para 37, the Supreme Court of Canada stated:

> [37] The question therefore ... is whether it is "plain and obvious" that the plaintiff's claims ... disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried" ....

[61] The Defendant submits it is "plain and obvious" the Harris claim fails to disclose a reasonable cause of action. The requirement to plead material facts is heightened in *Charter* cases; the Supreme Court of Canada cautions that *Charter* decisions must not be made in a "factual vacuum": *MacKay v Manitoba*, [1989] 2 SCR 356 at para 9. The Defendant submits the Plaintiffs fail to disclose a reasonable cause of action under section 7 of the *Charter*, because they fail to demonstrate both a deprivation of life, liberty, or security of the person that is attributed to legislation or state action, and that such deprivation is inconsistent with a principle of fundamental justice, as required by *Carter v Canada*, 2015 SCC 5 [*Carter*]. As to the right to life, the Plaintiffs do not allege any terminal medical condition or provisions that restrict access to cannabis in a manner that risks their lives. As to liberty and security of the person, the Defendant "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": *Cannabis Act*, subsection 8(2) and section 51. However, the Defendant submits the Plaintiffs do not plead facts to show these rights are otherwise engaged. While provisions may make it less convenient to use cannabis, there is no suggestion they substantially restrict the Plaintiffs' medical decisions by preventing them from lawfully accessing adequate treatment.

[62] With respect, I disagree. In my view, sufficient facts are pleaded to establish a section 7 violation—Harris has a prescription for 100 grams of medical cannabis a day, yet he cannot carry even two days' worth outside his home. Unlike other Canadians he is unable to travel anywhere more than a day and a half from home. If he does so he is liable to prosecution punishable by fine and or imprisonment for breach of the *Cannabis Act* and/or the *Cannabis Regulations* depending on the charge.

[63] In effect Harris is under a form of home arrest brought about solely because of the inadequately low cumulative total possession limit manifesting itself in the circumstances of his particular case. With respect, this is an injustice, and more to the point on the motion to strike, this fact likely establishes a material breach of Harris' rights to liberty guaranteed by section 7 of the *Charter*. I say this having regard to the law that an individual's liberty interest, according to the Supreme Court of Canada, is engaged where state compulsions or prohibitions affect important and fundamental life choices: see *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 49:

> [49] The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. ...

[64] The restrictions imposed on Harris' right to travel outside his home town affect important and fundamental life choices.

[65] I note the Defendant does not argue section 1 of the *Charter*.

[66] That said, the Defendant suggests Harris may travel away from home if he directs shippers to send small amounts to different addresses every day or so along his way. I need not discuss this issue given my conclusion. However in my respectful view, the cost and great impracticality of shipping many additional supplies of cannabis every day and a half, while Harris attempts to travel outside his home city for a week or two, for example, puts paid to this submission.

[67] In the context of shipping, I note in addition that Harris requests and in my view needs an exemption from the 150-gram shipping limit as well, or he will be no further ahead with an exemption from the 150-gram possession limit under the *Cannabis Regulations*. The results on the motion to strike the claim for an increased possession limit therefore will apply to the claim for an increase in the shipping limit.

[68] I find no merit in the Defendant's submission that Harris does not in detail explain how shipping costs infringe his section 7 rights. In fact, Harris pleads in his Amended Statement of Claim:

> [44] The shipping costs for a 150-gram package by Priority Post is about $35. A 50 gram per day patient needs a shipment every 3 days, a minimum 10 shipments a month. A 100-gram per day patient needs 20 shipments a month, every day and a half. A 200-gram per day patient needs 40 shipments a month, one every every [*sic*] 18 hours. A 300-gram per day patient needs 60 shipments a month, every 12 hours.
>
> [45] Canada Post does not deliver on week-ends. A 50-gram patient would need 150 grams delivered on Friday to last 3 days until Monday. A new 100 grams delivered on Monday to last until Wednesday, and 100 grams delivered on Wednesday to last to Friday. Three Priority Posts a week, 156 a year! At $35 per delivery, that's over $5,000 a year in shipping costs. With over 50 grams per day, it is impossible not to run short over a weekend.

[69] The fact the treatment afforded to Harris arises because he suffers from a medical condition leads me to strongly suggest that the cumulative cap also offends his rights under section 15 of the *Charter*: there is in this case what appears to be a distinction based on a specific enumerated ground, namely "disability." It may be found discriminatory in the sense that it fails to respond to the claimant's actual capacities or reinforces or perpetuates existing disadvantage, namely his disability: *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30, at paras 19-20.

[70] Respectfully, I disagree with the Defendant that the Harris claim fails to disclose a reasonable cause of action under either sections 7 or 15 of the *Charter*. In my respectful view, there is a possibility that Harris' claim may succeed on both. I am certainly unable to say his pleadings fail to disclose a reasonable cause of action, that is, his claim has no chance of success. Therefore the Harris claim will not be struck on these grounds. Moreover, in my respectful view, some of the suggested alternatives put forward by the Defendant are unreasonable and impractical.

[71] Harris also pleads and relies upon his rights to life and security of the person. I am not satisfied Harris has established in his pleadings that the law in question imposes death or an increased risk of death on him either directly or indirectly: *Carter* at para 62; and see *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 123. Therefore his pleadings respecting right to life under section 7 of the *Charter* will be struck, which is set out in paragraph 1of his Amended Statement of Claim.

[72] In terms of security of the person, Harris has pleaded sufficient facts to permit the Court to find the 150-gram possession and shipping caps give rise to a likely infringement of his right to security of the person, in that without an exemption should he exercise his *Charter*-protected right to travel more than a day and a half from his home, he is subject to prosecution for violation of the *Cannabis Regulations*. The law provides that if a prosecution is successful, Harris might be subject to both fines and imprisonment. In terms of imprisonment, I note that breach of paragraph 8(1)(a) of the *Cannabis Act* carries a maximum term of imprisonment of five years less a day if prosecuted by indictment: *Cannabis Act*, subparagraph 8(2)(a)(i). In my respectful view, the imposition of a term of imprisonment would in the circumstances in which Harris finds himself, for medical reasons, would likely constitute an infringement of Harris' right to security of the person contrary to section 7 of the *Charter*.

(4) Are the claims scandalous, frivolous, and vexatious?

[73] Rule 221(1)(c) of the *Federal Courts Rules* provides:

Motion to strike	**Requête en radiation**
221(1) On motion, the Court may, at any time, order that a pleading, or anything contained therein, be struck out, with or without leave to amend, on the ground that it	221 (1) À tout moment, la Cour peut, sur requête, ordonner la radiation de tout ou partie d'un acte de procédure, avec ou sans autorisation de le modifier, au motif, selon le cas :
...	...
(c) is scandalous, frivolous or vexatious,	c) qu'il est scandaleux, frivole ou vexatoire;
…	…

[74] Common hallmarks of scandalous, frivolous or vexatious proceedings include the relitigation 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: *Sivak v Canada*, 2012 FC 272 at para 92 [*Sivak*]. There is no merit to this suggestion in this case given the findings I have already made.

[75] A pleading is frivolous and vexatious if it is argumentative or includes statements that are irrelevant, incomprehensible, or inserted for colour: *Sivak* at paras 5, 77-78, 88-89. Here, for example, Harris repeatedly claims possession limits are based on "fraudulent" Health Canada survey data. The Harris claim compares Canada's reliance on this data to an act of criminal genocide; claims a Health Canada official "[c]an't even do basic division right"; and employs mocking language to refer to Health Canada's evidence in the *Allard action*: Harris claim at paras 37, 11, 26.

[76] I agree some of Harris' language goes too far, and will strike all references to genocide, criminality, fraud and fraudulent conduct, as well as statements employing mocking language, as frivolous and vexatious: see for example paragraphs 9 ("To further that aim, on Feb 7 2014, Health Canada provided false and misleading data to Judge Manson."); 11 ("Can't even do basic division right."); 26 ("(Hey Izzy, suggest a number!)"); 31 ("statistical fraud"); 35 ("Not a statistician, Judge Manson did not catch the fraud in the statistical evidence he heard nor did Counsel for the Allard Plaintiffs ..."); 37 ("fraudulent"); and 37 ("in violation of s. 318(2) of the Criminal Code of Canada" —reference to genocide). Harris is to serve and file a further

Amended Statement of Claim conforming with this determination within 15 days of the date of this decision.

C. *Should Harris be granted interim relief?*

[77] As noted, Harris seeks interim relief by way of a personal constitutional exemption from paragraph 266(3)(b) of the *Cannabis Regulations*' 150-gram possession limit, and the 150-gram shipping limits in paragraph 290(1)(e), subsection 293(1), and subparagraph 297(1)(e)(iii) of the *Cannabis Regulations* such that he may possess and ship a 10-day supply of cannabis. In this connection, Harris repeats submissions already referred to.

[78] The Defendant submits the motion for interim relief should be dismissed for several reasons. First, while this Court has undoubted jurisdiction to issue interlocutory injunctions to preserve existing rights pending the outcome of ongoing proceedings, pursuant to rule 373 of the *Federal Courts Rules*, Harris neither has an existing right to possess in public or ship cannabis in amounts exceeding 180 grams (*Cannabis Regulations*' 150 grams plus the *Cannabis Act*'s 30 grams) nor a *Charter* right to do so. The requested relief is therefore tantamount to an interlocutory declaration that Harris may possess in public and ship over 180 grams of cannabis. The Defendant submits declaratory remedies are not available on an interlocutory basis: *Sawridge Band v Canada* [2003] 4 FC 748 at para 6, aff'd 2004 FCA 16 ("[a]n interim declaration of right is a contradiction in terms"). Harris is effectively asking this Court to rule on the central, constitutional issue on an interlocutory basis without benefit of a full evidentiary record or trial.

[79] In my view, there is little merit in the Defendant's submission.

[80] In the first place, similar exemptions have been sought and granted both by this by Justice Manson in the *Allard motion*, and by Associate Chief Justice Cullen in *Garber*. As will be seen, I propose to follow this jurisprudence.

[81] Secondly, the Defendant submits that even if the interlocutory injunction test is applied, Harris fails to meet the test in *RJR MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR MacDonald*] at p 334. With respect, this is the proper starting place of the analysis of this issue. And, also with respect, I disagree with the Defendant's submission that the tripartite test for interim relief has not been met. I will look separately at the serious issue, irreparable harm and balance of convenience branches of the tripartite test.

[82] In the normal case the serious issue test requires an applicant to raise a serious issue, that is, an issue that is not frivolous or vexatious (*RJR MacDonald* at pp 314-15). More recently the Supreme Court of Canada in *R v Canadian Broadcasting Corp*, 2018 SCC 5 [*Canadian Broadcasting*] at para 15 elevated the test where the applicant is seeking an interim order that would give the same result as sought on a final determination, from *RJR MacDonald*'s "serious issue" to the higher test of "whether the applicant has shown a strong *prima facie* case."

[83] In my respectful view, Harris has met both variants of the serious issue test. Moreover, in my respectful view, the fact Harris cannot leave his home for more than a day and a half is amply supported by the record. In my view the restraints imposed on Harris by operation of the

Cannabis Regulations' 150-gram possession and shipping cap may constitute a breach of his section 7 *Charter* rights at the present time, which breach will certainly continue to the date of trial judgment and thereafter if left unrelieved. In other words I am unable to envisage a trial judgment that differs from my determination on this interim motion.

[84] I need not find a breach of Harris' sections 15 *Charter* rights. That said, it appears likely those rights are currently being breached and will continue to be breached unless and until a *Charter* remedy is granted.

[85] In my view, Harris has established irreparable harm occurring to him now and until such time as his legal rights are determined. To repeat, Harris is not able to travel for more than a day and a half from his home. This is likely an ongoing and present infringement of his rights under section 7 of the *Charter*. He has also established a strong case of unlawful discrimination contrary to section 15 of the *Charter*. Both derive from the operation against him of the prohibition set out in paragraph 266(3)(b) of the *Cannabis Regulations*, against possessing more than 150 grams of cannabis in public. This cap applies to Harris even though he requires a far higher amount if he is to travel more than a day and a half from his home. I take it as a given that this level of need for medical cannabis has been assessed by a qualified health care provider.

[86] In my view Harris has not simply made a general assertion of harm, as suggested by the Defendant. Further, there is "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable harm will result": *Gateway City Church v Canada (Minister of National Revenue)*, 2013 FCA 126 at paras 16.

[87] The third part of the test for interim relief is the balance of convenience. In my view, the balance of convenience favours granting an interim exemption. I appreciate the Defendant's submission that the public interest generally favours the continued application and enforcement of validly enacted federal law: *RJR Macdonald* at para 71; *Harper v Canada (Attorney General)*, 2000 SCC 57 at para 9. However, in my view Harris has demonstrated that relief from the *Cannabis Regulations* would itself provide a public benefit: *RJR MacDonald* at para 80, because the relief requested flows from the likely ongoing breach of his *Charter* rights. With respect, the public interest favours Harris' *Charter*-protected right to travel more than a day and a half from his home: every Canadian has or should have that right unless justifiably limited by state action which does not appear to be established in this case.

[88] Harris does not ask to possess any amount "over 150 grams", but seeks only enough for ten days' worth of use. In other words, he seeks substantially the same exemption granted to the plaintiff Boivin in *Garber* who was granted the right to possess 1,000 grams. Another plaintiff in the Garber case, with a prescription for 167 grams a day, was granted an exemption entitling him to possess up to 1,670 grams. Both exemptions were based on a ten-day supply. Associate Chief Justice Cullen in *Garber* found these figures would "strike a balance between the public interest in limiting the risks to public safety and public health by avoiding the right to possess an overabundance of marihuana, and it will limit the number of medical cannabis users who would benefit from a challenge to the 150-gram possession cap, while at the same time ameliorating the restrictions on the applicants' ability to travel with their medications. It will also avoid the need for frequent replenishments of supply": *Garber* at para 138. I respectfully agree with these comments.

[89] I will mention one further factor in assessing the balance of convenience. At present, Harris pleads and I therefore must accept that he needs to travel to pick up his medical cannabis 20 times a month; priority post cost of $35 per 150 grams is $700 per month. An interim exemption for a ten-day supply would allow Harris to cut back to three shipments a month. Annualized, it would reduce shipping costs from $700 a month to $105 a month, and the number of shipments would drop from 240 times a year to three dozen. These economic realities factor into the Court's assessment of the balance of convenience.

[90] Overall, in my view the balance of convenience favours Harris.

[91] Having satisfied the tripartite test set out in *RJR MacDonald* at p 334 and elevated in *Canadian Broadcasting Corp* at para 15, the Court will grant Harris an exemption from the 150-gram possession limit imposed by paragraph 266(3)(b) of the *Cannabis Regulations* and the 150-gram shipping limits in paragraph 290(1)(e), subsection 293(1), and subparagraph 297(1)(e)(iii) of the *Cannabis Regulations* such that he may possess and ship a ten-day supply.

(1) Other Parties

[92] Harris seeks similar Orders for the other high-use Plaintiffs shown on Schedule "A" hereto, whose actions are stayed pending determination of this Harris action and in particular the Defendant's motion to strike. The Defendant opposes.

[93] To inform this discussion I have attached to these Reasons as Schedules “C” and “D” respectively the order-related parts of the decisions of Justice Manson in the *Allard motion*, and Associate Chief Justice Cullen in *Garber*.

[94] While Harris is one of the lead Plaintiffs on this motion to strike, in accordance with Rules 119 and 121 of the *Federal Courts Rules*, it would be not be appropriate to allow Harris to seek this relief on behalf of the other Plaintiffs, because Harris is not a solicitor.

[95] However, in my view fairness requires the Court to afford the same relief to Plaintiffs who are similarly situated to Harris. It appears the other Plaintiffs in this group, namely, the Schedule “A” Plaintiffs, are authorized to possess medical cannabis in amounts ranging from 50 to 200 grams per day. I would like to hear from the Defendant how these other claims should be treated, and will allow 20 days for such input. I propose to review the other files thereafter, with a view to granting similar exemptions from the 150-gram possession limit imposed by paragraph 266(3)(b) of the *Cannabis Regulations* such that each of the others may possess a ten-day supply, which seems appropriate; however I will hear from the Defendant before coming to a conclusion in that respect.

VII. Conclusion

[96] I am respectfully of the view Harris' Amended Statement of Claim should be preserved, except for the specific sentences found to be scandalous, frivolous, and vexatious, as mentioned above. I am of the view the Defendant's motion to strike Hathaway and Spottiswood's Statements of Claim should be granted on the bases of mootness and disclosing no reasonable cause of action, respectively; without leave to amend. The actions of the Plaintiffs named in Schedule "B" shall also be dismissed without leave to amend given my decision in the Spottiswood action.

[97] I note that the Statements of Claim of the Plaintiffs named in Schedule "A" rely on the repealed *ACMPR*, as did Hathaway. However, the Order of November 1, 2018 only permitted Harris and Hathaway to amend their Statements of Claim. Respectfully, I am of the view that the Schedule "A" Plaintiffs should not be affected by this, and that their case should 'piggy-back' on Harris' Amended Statement of Claim as if it had been amended as in the Harris case (Hathaway didn't amend though he could have). For the purposes of the trial of their actions, they shall have leave to amend their pleadings to plead and rely upon the current *Cannabis Act* and *Cannabis Regulations*.

VIII. Costs

[98] In my discretion I make no order as to costs.

ORDER IN T-1765-18, T-1716-18 and T-1913-18

THEREFORE THIS COURT ORDERS that:

1. The Defendant's motions to strike the Hathaway and Spottiswood actions are granted without leave to amend.

2. In accordance with the Spottiswood action, actions in Schedule "B" are dismissed without leave to amend.

3. The Defendant's motion to strike the Harris action is dismissed.

4. All references to genocide, criminality, fraud and fraudulent conduct are to be removed from the Harris Amended Statement of Claim and Harris is to serve and file a further Amended Statement of Claim conforming with this Order within 15 days of the date of this Order to delete the following references: in para 1 ("Life,"); para 9 ("To further that aim, on Feb 7 2014, Health Canada provided false and misleading data to Judge Manson."); para 11 ("Can't even do basic division right."); para 26 ("(Hey Izzy, suggest a number!)"); para 31 ("statistical fraud"); para 35 ("Not a statistician, Judge Manson did not catch the fraud in the statistical evidence he heard nor did Counsel for the Allard Plaintiffs ..."); para 37 ("fraudulent"); and para 37 ("in violation of s. 318(2) of the Criminal Code of Canada").

5. The Harris motion for interim relief for possession is granted such that the Plaintiff Allan J. Harris is hereby exempted from paragraph 266(3)(b) of the *Cannabis Regulations* and the said Allan J. Harris may possess 1,000 grams of

dried cannabis in addition to the 30 grams of dried cannabis he may possess under the *Cannabis Act*, until such time as a decision in this action is rendered.

6. Allan J. Harris is also hereby exempted from the 150-gram shipping limits in paragraph 290(1)(e), subsection 293(1), and subparagraph 297(1)(e)(iii) of the *Cannabis Regulations*, such that the said Allan J. Harris may be shipped 1,000 grams of dried cannabis until such time as a decision in this action is rendered.

7. The Defendant shall have 20 days from the date of this Order to make submissions on how the Court should treat the other Plaintiffs in this group, save Hathaway and Spottiswood, as set out in paragraph 95 of these Reasons.

8. The Plaintiffs named in Schedule "A" shall have leave to amend their pleadings to plead the *Cannabis Act* and *Cannabis Regulations* to refer to the current *Cannabis Act* and *Cannabis Regulations* for the purposes of trial, and shall amend their pleadings to delete references similar to those referred to in Part 2 of this Order, namely: "Life," or other references to right to life under section 7 of the *Charter*; "To further that aim, on Feb 7 2014, Health Canada provided false and misleading data to Judge Manson."; "Can't even do basic division right."; "(Hey Izzy, suggest a number!)"; "statistical fraud"; "Not a statistician, Judge Manson did not catch the fraud in the statistical evidence he heard nor did Counsel for the Allard Plaintiffs ..."; "fraudulent"; and "in violation of s. 318(2) of the Criminal Code of Canada".

9. There is no order as to costs.

10. A copy of these Order and Reasons shall be placed in all files concerned namely T-1765-18; T-1716-18; and T-1913-18 and those shown in Schedules “A” and “B” attached hereto.

“Henry S. Brown”
Judge

Schedule "A"

T-1784-18	T-1822-18	T-1878-18
T-1900-18		

Schedule "B"

T-217-19	T-369-19	T-399-19

Schedule "C"

ORDER

THIS COURT ORDERS that:

1. The Applicants who, as of the date of this Order, hold a valid Authorization to Possess pursuant to section 11 of the *Marihuana Medical Access Regulations*, are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which are inconsistent with the operation of the *Marihuana Medical Access Regulations*, to the extent that such an Authorization to Possess shall remain valid until such time as a decision in this case is rendered and subject to the terms in paragraph 2 of this Order;

2. The terms of the exemption for the Applicants holding a valid Authorization to Possess pursuant to section 11 of the *Marihuana Medical Access Regulations* shall be in accordance with the terms of the valid Authorization to Possess held by that Applicant as of the date of this Order, notwithstanding the expiry date stated on that Authorization to Possess, except that the maximum quantity of dried marihuana authorized for possession shall be that which is specified by their licence or 150 grams, whichever is less;

3. The Applicants who held, as of September 30, 2013, or were issued thereafter a valid Personal-use Production Licence pursuant to section 24 of the *Marihuana Medical Access Regulations*, or a Designated-person Production Licence pursuant to section 34 of the *Marihuana Medical Access Regulations*, are exempt from the repeal of the *Marihuana Medical Access Regulations* and any other operation of the *Marihuana for Medical Purposes Regulations* which is inconsistent with the operation of the *Marihuana Medical Access Regulations*, to the extent that the Designated-person Production Licence or Personal-use Production Licence held by the Applicant shall remain valid until such time as a decision in this case is rendered at trial and subject to the terms of paragraph 4 of this Order;

4. The terms of the exemption for an Applicant who held, as of September 30, 2013, or was issued thereafter a valid Personal-use Production Licence pursuant to section 24 of the *Marihuana Medical Access Regulations* or a Designated-person Production Licence pursuant to section 34 of the *Marihuana Medical Access Regulations*, shall be in accordance with the terms of their licence, notwithstanding the expiry date stated on that licence;

5. Scheduling directions shall be issued after consultation with counsel for the parties with the view of fixing a trial date as soon as practicable;

6. The Applicants are not bound by an undertaking pursuant to r 373(2) of the *Federal Courts Rules*; and

7. The parties shall bear their own costs.

Schedule "D"

(v) Summary of Orders Made

[148] The order will be made in the same terms as the *Allard* order except that the plaintiffs in the present case will be exempt from the 150 gram personal possession limit imposed by s. 5(c) of the *MMPR* to the following extent:

a) Kevin Garber will be entitled to possess up to 600 grams of cannabis on his person;

b) Philip Newmarch will be entitled to possess up to 1,670 grams of cannabis on his person;

c) Timothy Sproule will be entitled to possess up to 360 grams of cannabis on his person; and

d) Marc Boivin will be entitled to possess up to 1,000 grams of cannabis on his person.

[149] Additionally, Marc Boivin will be permitted to produce 486 plants and store 21,870 grams of cannabis at the address set out in his *MMAR* licences.

[150] The application for an order for a constitutional exemption from ss. 4, 5 and 7 of the *CDSA* is dismissed.

[151] The application by Timothy Sproule to store 7,920 grams of cannabis at his current residential address in Vancouver and to transport 7,920 grams from his production site to his storage site is dismissed.

[152] The application to permit the plaintiffs to produce and store medical cannabis at any address where they reside if such address is different from those set out in their *MMAR* licences is dismissed.

[153] The parties shall bear their own costs.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1765-18
STYLE OF CAUSE:	ALLAN J. HARRIS v HER MAJESTY THE QUEEN
AND DOCKET:	T-1716-18
STYLE OF CAUSE:	RAYMOND LEE HATHAWAY v HER MAJESTY THE QUEEN
AND DOCKET:	T-1913-18
STYLE OF CAUSE:	MIKE SPOTTISWOOD v HER MAJESTY THE QUEEN

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO

ORDER AND REASONS:	BROWN J.
DATED:	MAY 7, 2019

WRITTEN REPRESENTATIONS BY:

Allan J Harris	ON HIS OWN BEHALF IN T-1765-18
Raymond Lee Hathaway	ON HIS OWN BEHALF IN T-1716-18
Jon Bricker Wendy Wright	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT