Court File No.: CV-17-570106

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CITY OF TORONTO

Applicant

and

LANOVA OUTSOURCING CORP., PHYTOS APOTHECARY AND WELLNESS CENTRE, 2501615 ONTARIO LTD., NADINE GOURKOW, IVAN NOE GOURKOW-SCHULKOWSKI, TALON TAPES INDUSTRIES LTD., 2431318 ONTARIO LTD., LUES EPSTEIN, NIKOLETA TCHEPILEVA, PETER MINAS, ANASTASIA MINAS AND, SUE YOUNG, MURRAY YOUNG AND JOAN YEE BRANN, 2881 DUNDAS INC.

Respondents

and

ATTORNEY GENERAL OF CANADA

Intervener

Court File No.: CV-17-581329

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

PHYTOS APOTHECARY AND WELLNESS CENTRE and GRASSROOTS NATURAL HEALTH SOCIETY

Applicants

and

CITY OF TORONTO~~,~~ and ATTORNEY GENERAL OF CANADA, ~~TORONTO POLICE SERVICE and TORONTO HYDRO~~

Respondents

FACTUM OF THE ATTORNEY GENERAL OF CANADA

(Re Applications for Interlocutory Injunctions, Returnable September 25-26, 2017)

Dated: September 21, 2017

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PART I – OVERVIEW

1. Recognizing that many Canadians require cannabis for medical purposes, Health Canada (HC) is committed to ensuring that Canadians, with the support of a health care practitioner, have reasonable access to cannabis for medical purposes. Building on lessons learned from previous regulatory regimes, the *Access to Cannabis for Medical Purposes Regulations* (ACMPR) provide patients with three ways to access cannabis. With the approval of a health care practitioner, patients may purchase cannabis from a commercial producer licensed and regulated by HC, register with HC to personally produce cannabis, or register with HC and designate another person to produce cannabis on their behalf.

2. This regime is effective. There are currently 58 commercial Licensed Producers (LPs) of which 23 are already selling more than 300 varieties of dried cannabis, cannabis oil, and other products to serve the more than 200,000 active client registrations. The number of LPs, product offerings, and client registrations also continue to grow. In addition, more than 10,000 patients are registered with HC to personally produce cannabis for their own personal use or have designated another person to produce cannabis for them. In this way, the ACMPR ensure that those with recognized medical need have access to cannabis for medical purposes. The Applicants cite the court in *Allard v Canada* as legitimizing storefront operations.[1] However, the comment is taken out of context, and was made in *obiter* since that case did not deal with storefront operations. Businesses like the Applicants', which make significant profits placing their own employees and the public at risk by selling cannabis illegally, are not at the heart of cannabis access.

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[1] *Allard et al v Her Majesty the Queen in Right of Canada*, 2016 FC 236, paras 296-97 ("*Allard* trial decision") [Book of Authorities of the Attorney General of Canada ("AGC BOA"), Tab 1]

3. Strict production and distribution controls in the ACMPR promote the health of patients by ensuring that cannabis is subject to quality control, and promote public safety by prohibiting dangerous production practices, restricting youth access to cannabis, and limiting opportunities for diversion and organized crime. Governments around the world, international organizations, and drug experts recognize that cannabis is a lucrative commodity in the black market that is traded globally.

4. The Applicants Phytos Apothecary and Wellness Centre and the Grassroots Natural Health Society (Phytos Applicants) are among the corporate operators of the Canna Clinic chain of illegal cannabis storefronts. These stores sell cannabis for profit. In only one of its seven locations in Toronto, the monthly sales are $550,000. The evidence shows that the Canna Clinic has sold cannabis to people without requiring medical authorization, that the Canna Clinic stores have been robbed at gun point, and that the Phytos Applicants have refused to comply with their landlords' requests to stop placing them and their property in jeopardy by selling cannabis illegally.

5. In response to the City of Toronto's application for an injunction to prevent the illegal sale of cannabis by the Canna Clinic, the Phytos Applicants commenced a separate application against Canada alleging that the *Controlled Drugs and Substances Act* (CDSA) and the ACMPR breach the *Canadian Charter of Rights and Freedoms* (Charter). The Phytos Applicants also now seek an interlocutory injunction, which in practical terms would suspend the operation of the CDSA and the ACMPR and would provide them with immunity from the criminal law. The Attorney General of Canada (Canada) supports the City's Application and submits that the order in *City of Hamilton v Floyd*, which was made without any evidence from that particular illegal

storefront entity, without a hearing of the merits, and without notice to Canada, is of no assistance to the Court in this case.

6. The Supreme Court of Canada (SCC) has stated "only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed."[2] This is not such a case. The Phytos Applicants have not met two of the three conjunctive parts of the test required for injunctive relief established in *Manitoba (Attorney General) v Metropolitan Stores* and affirmed in *RJR-MacDonald Inc v Canada (Attorney General).*[3]

7. The Phytos Applicants have not established they will be irreparably harmed without an injunction. Although they speculate that the Canna Clinic locations would lose marketshare and be forced to lay-off employees and default on leases and vendor contracts, they have provided little evidence of these harms and no evidence that these alleged harms are irreparable. Moreover, even if harm were established, it should not be open to an applicant to violate the CDSA and municipal by-laws, and to then seek an exemption from those laws on the premise that its illegally established business would suffer. The Phytos Applicants' argument offends the rule of law and the principle that applicants for interlocutory relief must come to court with clean hands.

8. At the third prong of the test for injunctive relief, the balance of convenience favours allowing validly enacted legislation designed to protect and promote public health to continue

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[2] *Harper v Canada*, 2000 SCC 57 ("*Harper*"), para 9 [AGC BOA, Tab 2]

[3] *Manitoba v Metropolitan Stores, (MTS) Ltd*, [1987] 1 SCR 110 ("*Metropolitan Stores*"), paras 31-35 [AGC BOA, Tab 3]; *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 ("*RJR-MacDonald*"), para 43 [AGC BOA, Tab 4]

to operate. The SCC has stated that at this interlocutory stage, the public interest is presumed to favour the continued enforcement of validly enacted legislation. Further, in this proceeding Canada has produced actual evidence demonstrating that the federal regulatory scheme actually serves the public interest, as well as of the significant harms that would result if the Phytos Applicants' interlocutory injunction were granted. The balance of convenience requires that the interlocutory injunction be denied in these circumstances.

9. The Phytos Applicants argue that the interlocutory immunity from the law which they seek in this Application is only for a limited time because Canada has tabled legislation to allow the sale of cannabis in Bill C-45. This is false. Canada will continue to regulate access to cannabis for medical purposes even if Parliament passes legislation to allow controlled, regulated access to cannabis generally.[4] Moreover, the Province of Ontario has announced the elements of its plan regarding how cannabis will be sold should Bill C-45 become law. A key element of the plan is that the LCBO will oversee the legal retail sale of cannabis in Ontario through stand-alone cannabis stores and an online order service. There will be only one legal retail distributor for cannabis in Ontario.[5] The Applicants operate illegal businesses now and if permitted, will continue to operate illegal businesses even if cannabis becomes legal under Bill C-45.

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[4] Affidavit of Eric Costen, affirmed September 7, 2017 ("Costen Affidavit"), para 6 [Responding Record of the Attorney General of Canada ("AGC Record"), Tab 1, p 3]

[5] Supplementary Affidavit of Eric Costen, affirmed September 8, 2017, para 3 [AGC Record, Tab 2, p 340]

PART II – STATEMENT OF FACTS

A. THE REGULATION OF CANNABIS FOR MEDICAL PURPOSES

1) The *Controlled Drugs and Substances Act* and *Food and Drugs Act*

10. In Canada, controlled substances, including cannabis, are regulated under the CDSA.[6] The overall objective of the CDSA is to protect public health and safety. The CDSA provides a legislative framework for the control of substances that impact mental processes and that, notwithstanding any therapeutic value, can harm health and safety, particularly that of vulnerable individuals, when diverted or misused.[7]

11. The CDSA prohibits the possession (section 4), trafficking (section 5) and importing or exporting (section 6) of cannabis. However, section 56 grants the Minister of Health discretion to exempt from the application of any provision of the Act, any person or controlled substance if, in the Minister's opinion, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

12. In addition to being a controlled substance under the CDSA, cannabis is also a drug under the *Food and Drugs Act* (FDA).[8] The overall objective of the FDA is to prevent injury to the health of consumers of drugs in Canada. The FDA and its regulations accomplish this through strict drug manufacturing, packaging, labelling, storage, importation, distribution, and sale requirements.[9]

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[6] SC 1996, c 19, Schedule II ("CDSA")

[7] Costen Affidavit, para 11 [AGC Record, Tab 1, p 4]

[8] RSC, 1985, c F-27

[9] Costen Affidavit, para 10 [AGC Record, Tab 1, p 4]

2) Public health and safety risks associated with cannabis

13. Cannabis is regulated by the CDSA and FDA because it is associated with a variety of public health and safety risks. Cannabis consumption is known to pose serious health risks to vulnerable segments of the population. These include youth, in whom consumption is associated with an elevated risk of addiction and the disruption of normal brain development, including impairments in attention, learning and memory. Cannabis may also exacerbate symptoms or trigger relapse among those with psychotic disorders, trigger heart attack among those with cardio- or cerebro-vascular disease, and interfere with the normal brain development of children whose mothers consumed cannabis while pregnant.[10]

14. The health risks associated with cannabis are not limited to vulnerable groups. Some illegally produced extracts of cannabis contain very high concentrations of tetrahydrocannabinol (THC). Consumption of these extracts can result in blackouts, psychosis, paranoia, hallucinations as well as accidents, especially in situations where the user is unaware of the product's THC content. Edible forms of cannabis also pose a risk of accidental consumption, particularly by children, to whom candy, baked goods, or other similar edible products may be attractive.[11] Cannabis may also contain mould or chemical contaminants including certain pesticides that present health hazards when consumed.[12]

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[10] Costen Affidavit, para 13 [AGC Record, Tab 1, p 4]; "A Framework for the Legalization and Regulation of Cannabis in Canada: Report of the Task Force on Cannabis Legalization and Regulations," Exhibit B to the Affidavit of Neil Boyd, sworn May 16, 2017, p 15-16, 69-70 ("Task Force Report") [Responding Record of Phytos ("Phytos Responding Record"), Vol 2, p 450-51, 504-05]; *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74, paras 3, 61, 135 [AGC BOA, Tab 5]

[11] Costen Affidavit, para 14 [AGC Record, Tab 1, p 5]; Task Force Report, p 17 [Phytos Responding Record, Vol 2, p 452]

[12] Costen Affidavit, para 14 [AGC Record, Tab 1, p 5]; Task Force Report, p 68-69 [Phytos Responding Record, Vol 2, p 503-04]

15. Cannabis is also associated with risks to public safety. Government officials around the world and experts agree that cannabis is a lucrative commodity in the black market. There are dangerous criminal organizations that profit as a result of this trade. These create risks to the employees who work at facilities that sell cannabis illegally, as well as to the Canadian public.[13] Several Canadian municipalities have also recently witnessed the proliferation of illicit cannabis storefronts, whose high value cannabis products make them targets for robbery, which may be violent.[14] Since February 2017, Phytos' own Canna Clinic locations have been subject to at least four robberies. In one of these robberies, the perpetrators pointed handguns at staff and customers, and in another, a gun was fired.[15]

16. While cannabis is typically consumed by smoking, THC and other cannabinoids can be extracted and consumed in other ways, some of which also threaten public safety. These include extraction using highly flammable, explosive or toxic solvents such as butane to produce concentrated oils commonly referred to as "shatter" and "butane hash oil." This extraction process has resulted in explosions and fires that have caused fatalities and life threatening burns.[16]

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[13] Transcript of the September 15, 2017, Cross-Examination of Eric Costen ("Costen Transcript"), Q 138, 143-144 [City Supplementary Responding Record, Tab 3, p 215-19]; Task Force Report, p 68-69 [Phytos Responding Record, Vol 2, p 503-04]

[14] Costen Affidavit, para 21 [AGC Record, Tab 1, p 21]; Affidavit of Cameron Culver, affirmed March 30, 2017 ("Culver Affidavit"), paras 105, 108, 110 [Application Record of the City of Toronto ("City Application Record"), Vol 2, p 307-09]

[15] Affidavit of Samantha Deschamps, affirmed May 17, 2017, paras 36-37, 39 ("Deschamps Affidavit") [Phytos Responding Record, Vol 5, p 1741]; Supplementary Affidavit of Samantha Deschamps, sworn August 21, 2017 ("Deschamps Supplementary Affidavit"), para 47 [Application Record of Phytos, Tab 3, p 59]; Transcript of the September 15, 2017 Cross-Examination of Samantha Deschamps ("Deschamps Transcript"), Q 285-96 [City Supplementary Responding Record, Tab 2, p 121-24]; Deschamps Responses to Undertakings [City Supplementary Responding Record, Tab 2B, p 137]

[16] Costen Affidavit, para 70 [AGC Record, Tab 1, p 21]; Task Force Report, p 36 [Phytos Responding Record, Vol 2, p 471]; Culver Affidavit, para 111 [City Record, Vol 2, p 309]

3) The regulation of cannabis for medical purposes

17. While cannabis consumption poses certain health risks, it has also been shown in some cases to be effective in the treatment of certain medical conditions, including nausea and vomiting in patients undergoing chemotherapy, loss of appetite and weight associated with HIV-AIDS, and pain and spasticity associated with Multiple Sclerosis, among other conditions.[17] Canada has long recognized this, and in 1999, the Minister of Health first began issuing discretionary exemptions from the CDSA to allow patients to produce and possess cannabis for medical purposes.[18]

18. In 2001, in response to the decision of the Court of Appeal for Ontario in *R v Parker*, Canada promulgated the *Marihuana Medical Access Regulations* (MMAR).[19] Although the MMAR evolved over time, at the time of their repeal in 2014, the MMAR provided that patients with the support of an authorized health care practitioner could obtain authorization from HC to possess cannabis, and could access that cannabis by producing it themselves under a HC-issued licence, designating another licensed person to produce it for them, or purchasing dried cannabis or seeds from HC, which would arrange for the purchased product to be sent by mail.[20]

19. Between 2001 and 2013, the number of individuals authorized to possess and produce cannabis, and the amount that they were authorized to produce, often in residential dwellings, grew significantly, leading to concerns on the part of physicians, municipalities, and law enforcement about risks to the health, safety and security of patients, their neighbours and the

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[17] Costen Affidavit, para 2 [AGC Record, Tab 1, p 2]

[18] Costen Affidavit, para 16 [AGC Record, Tab 1, p 6]

[19] Costen Affidavit, para 17 [AGC Record, Tab 1, p 6]; *R v Parker*, 49 OR (3d) 481 [AGC BOA, Tab 6]

[20] Costen Affidavit, para 18 [AGC Record, Tab 1, p 6]

public.[21] In 2013, Canada responded to these concerns by introducing the *Marihuana for Medical Purposes Regulations* (MMPR).[22]

20. Under the MMPR, patients with the support of a health care practitioner could purchase cannabis from commercial producers licensed by HC to produce, distribute, and sell cannabis. Like manufacturers of drugs under the FDA, LPs under the MMPR were subject to strict regulatory requirements designed to protect public health and safety. These included production, shipping, record-keeping, reporting, and distribution requirements designed to ensure that cannabis products did not pose undue risk to the health of individuals, and were not easily diverted or accessed by youth to whom they could pose health risks.[23]

21. The MMPR did not permit the storefront sale of cannabis. LPs instead mailed dried cannabis directly to authorized patients. The reasons for this mail-order model were that it:

a) provided broad national access to cannabis, no matter where patients are located, including in remote rural communities;
b) allowed for effective tracking, tracing and recall of products;
c) provided a secure, reliable and discreet method of distribution, unlike storefront operations which increase the number of access points and, correspondingly, the potential for diversion, violence, and theft; and
d) had relatively low operational costs, which reduced the price paid by patients.[24]

22. The MMPR provided access to cannabis only in its dried form and did not provide access to other cannabis derivatives. In June 2015, the Supreme Court of Canada held in *R v Smith* that this restriction unjustifiably infringed section 7 of the Charter, and declared the

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[21] Costen Affidavit, paras 13, 20 [AGC Record, Tab 1, p 5, 7]

[22] Costen Affidavit, para 21 [AGC Record, Tab 1, p 7]

[23] Costen Affidavit, para 24 [AGC Record, Tab 1, p 7]

[24] Costen Affidavit, para 23 [AGC Record, Tab 1, p 7-8]; Costen Transcript, Q 7 [City Supplementary Responding Record, Tab 3, p 166-67]

CDSA unconstitutional to the extent that it prohibited a person with medical authorization from possessing cannabis derivatives for medical purposes.[25]

23. In addition, the MMPR eliminated the personal and designated production regime that had existed under the MMAR, and required that patients instead obtain cannabis from LPs. In February 2016, the Federal Court in *Allard v Canada* (*Allard*) found that the MMPR regime did not provide sufficient access. The Court declared the MMPR unconstitutional, but suspended its declaration of invalidity for six months to allow the Government to draft new regulations.[26]

4) The *Access to Cannabis for Medical Purposes Regulations*

24. In August 2016, the Government responded to these court decisions by promulgating the ACMPR.[27] Under the ACMPR, patients with the support of an authorized health care practitioner may access cannabis in either of three ways: (1) by purchasing cannabis from an LP; (2) by registering with HC to produce cannabis for the patient's own personal use; or (3) by registering with HC and designating another person to produce cannabis on the patient's behalf.[28] In addition, individuals who think that the ACMPR do not meet their unique needs may continue to apply to the Minister of Health under section 56 of the CDSA for a discretionary exemption to recognize their specific circumstances.[29]

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[25] 2015 SCC 34, para 33 [AGC BOA, Tab 7]

[26] Costen Affidavit, para 26 [AGC Record, Tab 1, p 8]; *Allard* trial decision [AGC BOA, Tab 1]

[27] SOR 2016/230 ("ACMPR")

[28] Costen Affidavit, para 30 [AGC BOA, Tab 1]; ACMPR, s 3

[29] Costen Affidavit, para 12 [AGC Record, Tab 1, p 5]; CDSA, s 56(1)

a) The role of health care practitioners

25. The ACMPR, like the MMAR and MMPR before them, require that patients wishing to use cannabis first obtain the approval of health care practitioner. The ACMPR require that a health care practitioner complete and sign a medical document, or multiple medical documents if the patient wants to obtain cannabis from multiple LPs. The medical document is then provided to the LP or to HC in the case of a patient who wishes to obtain cannabis through personal or designated production.[30]

26. A medical document signifies a health care practitioner's support for access to cannabis for medical purposes. The medical document must indicate, among other information, the quantity of dried cannabis that the patient is authorized to use daily and the period of authorization, which must not exceed one year to allow for ongoing review of the patient's needs.[31] Authorized health care practitioners include physicians and, in Ontario and other provinces and territories where rules permit, nurse practitioners.[32]

27. Many Canadian health care practitioners currently authorize the medical use of cannabis and the number of participating health care practitioners has increased significantly and consistently since the ACMPR were introduced.[33] In June 2017, there were 2,786 health care practitioners who authorized the use of medical cannabis for patients who then used this

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[30] Costen Affidavit, paras 31, 63 [AGC Record, Tab 1, p 9-10, 18]; ACMPR, ss 8, 130, 177

[31] Costen Affidavit, para 31 [AGC Record, Tab 1, p 9-10]; ACMPR, s 8

[32] Costen Affidavit, para 31 [AGC Record, Tab 1, p 9]; ACMPR, ss 1(1) ("health care practitioner," "medical practitioner," "nurse practitioner"; O. Reg, 275/94 (*Nursing Act*), s 17(2)

[33] Costen Affidavit, para 31 and Exhibits F, G [AGC Record, Tabs 1, 1F, 1G, p 10, 213-14]. These data do not include physicians who authorized the use of cannabis under the former MMAR and whose patients continue to access cannabis under the injunction issued by the Federal Court in *Allard v Canada*, 2014 FC 280, varied 2014 FCA 298 ("*Allard* injunction decision") [AGC BOA, Tab 8]. This injunction remains in place, and the number of health care practitioners authorizing the use of cannabis would be even higher were these health practitioners included.

authorization to register with an LP, and 1,296 health care practitioners authorizing the use of cannabis for patients who obtained the cannabis by personal or designated production. The health care practitioner does not authorize any particular mode of access; that remains the patient's choice.

b) Forms and amounts of cannabis available under the ACMPR

28. The ACMPR provide that LPs may, with the appropriate licence, produce and sell dried cannabis, cannabis oil, fresh marihuana, seeds and plants.[34] While the ACMPR do not provide for the commercial sale of other cannabis extracts, both LP customers and personal and designated producers are permitted to alter the chemical or physical properties of cannabis however they wish, including by making extracts, edibles and topical applications, provided that they do not use highly flammable, explosive or toxic organic solvents in doing so.[35] This is unlike the former MMAR and MMPR, which only provided for access to dried cannabis.

29. The ACMPR permit the possession of the lesser of 30 times the daily quantity of dried cannabis authorized by the patient's health care practitioner or 150 grams, or the equivalent of those amounts in the case of non-dried forms of cannabis.[36] This limit, which was upheld as constitutional in *Allard*,[37] is intended to ensure that patients have a sufficient supply of cannabis for medical purposes while at the same time limiting the risk of diversion and of patients becoming targets for theft and violence.[38]

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[34] Costen Affidavit, para 31 [AGC Record, Tab 1, p 9]; ACMPR, s 22

[35] Costen Affidavit, para 30 [AGC Record, Tab 1, p 9]; ACMPR, s 4

[36] Costen Affidavit, para 32 [AGC Record, Tab 1, p 10]; ACMPR, s 6

[37] *Allard* trial decision, paras 287-88 [AGC BOA, Tab 1]

[38] Costen Affidavit, para 32 [AGC Record, Tab 1, p 10]

c) Licensed Producers

30. Licensed producers under the ACMPR are subject to strict regulatory requirements designed to protect public health and safety. These include security, production, testing, labelling, packaging, shipping, record keeping, reporting and distribution requirements. They are also subject to HC inspections and recalls.

31. Before HC will issue a licence, the ACMPR require that the proposed LP notify law enforcement of their licence application, and provide HC with information including detailed descriptions of the security measures and record-keeping activities that the applicant will use; a quality assurance report that shows how the proposed production facility, equipment and sanitation program comply with Good Production Practices (GPPs); floor plans for the site; and the names of key personnel, who must obtain security clearance from HC.[39] In producing cannabis for sale, LPs are also strictly prohibited from using certain pesticides that are known to present health hazards when consumed.[40]

32. Cannabis products must be clearly labelled with information including the net weight, and THC and cannabidiol (CBD) content of the product.[41] These labelling requirements help to ensure that the patient does not exceed the amount of cannabis authorized by the health care practitioner, while also limiting the risk associated with accidental over-intoxication. The ACMPR also include detailed packaging requirements designed to ensure that products are not tampered with or readily accessed by children.[42]

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[39] Costen Affidavit, paras 35-36 [AGC Record, Tab 1, p 11]; ACMPR, ss 33-34

[40] ACMPR, ss 18-19, 66

[41] ACMPR, s 84

[42] ACMPR, s 80; Costen Transcript, Q 15 [City Supplementary Responding Record, Tab 3, p 170-72]

33. LPs are subject to strict compliance and enforcement measures. HC frequently inspects LPs. These inspections are designed to ensure adherence to the ACMPR, CDSA, and GPPs.[43] Inspection findings are used at the time of license renewal to determine the renewal period and the frequency of future inspections. LPs found to be non-compliant are subject to enforcement action which, depending on the seriousness of the non-compliance, may include warning letters, seizing and detaining products, and suspending or revoking licences.[44] LPs are also subject to adverse-reaction reporting requirements, and to HC recalls of products that may pose a risk to human health.[45]

d) Personal and designated production

34. Patients who do not wish to purchase cannabis from an LP may register with HC to personally produce cannabis for their own use, or register with HC and designate another person to produce cannabis on their behalf.[46]

35. Designated production ensures that patients who do not wish to produce cannabis themselves, or who are unable to do so for health or other personal reasons, have access to cannabis for medical purposes. A single designated producer may produce cannabis for up to two patients, and up to four registrations may share a production site.[47] In this way, designated producers may share resources while benefiting from lower production costs associated with a shared production site.

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[43] Costen Affidavit, para 41 [AGC Record, Vol 1, p 13]

[44] Costen Affidavit, paras 43-45 and Exhibit H [AGC Record, Vol 1, Tabs 1, 1H, p 13-14, 216]; ACMPR, ss 36, 43, 44; CDSA, s 31

[45] Costen Affidavit, para 46 [AGC Record, Vol 1, p 14]; ACMPR, s 78

[46] Costen Affidavit, paras 27, 33 [AGC Record, Vol 1, p 8-10]; ACMPR, s 3

[47] ACMPR, s 184

36. Patients wishing to obtain cannabis through personal or designated production must submit an application to HC containing basic information such as the patient's name and date of birth; residential, production and storage site addresses; the consent of the property owner where applicable; and signed declarations that the individual and, if applicable, the designated producer, will take all necessary measures to ensure the security of the cannabis. If the patient intends to produce cannabis outdoors, the application must indicate that the production site is not adjacent to a school, playground, or other public space frequented by persons under 18.[48]

37. Following the enactment of the ACMPR, the processing time for personal and designated production applications was typically between two and four months. However, processing times have declined significantly in recent months because HC has made concerted efforts to improve this process, including hiring new staff and streamlining the application process.[49] HC has seen a marked decrease in the number of registrations which take more than six weeks to process.[50] If there are problems with an application, instead of sending it back to the applicant, HC will call the applicant to get the necessary information. There is also a call centre which applicants can call to get help with the application process.[51] A patient whose application is pending and who has the approval of a health care practitioner, or a patient whose production application is granted but whose cannabis is not yet ready for cultivation, may also obtain an interim supply of cannabis from an LP.[52]

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[48] Costen Affidavit, para 63 [AGC Record, Tab 1, p 18]; ACMPR, s 177

[49] Costen Transcript, Q 123 [City Supplementary Responding Record, Tab 3, p 209-10]

[50] Costen Transcript Q 126-27 [City Supplementary Responding Record, Tab 3, p 211]

[51] Costen Affidavit, para 65 [AGC Record, Tab 1, p 19]; Costen Transcript, Q 92, 128-29 [City Supplementary Responding Record, Tab 3, p 200-01, 211-13]

[52] Costen Affidavit, para 66 [AGC Record, Tab 1, p 19]; ACMPR, s 16(2)(a)

38. A patient whose registration is nearing expiry may also apply early to renew a personal or designated production registration.[53] In this way, patients may ensure that their registration to produce does not expire before their cannabis is ready for cultivation.

B. THE ACMPR ARE EFFECTIVE

39. The ACMPR have proven to be effective in providing reasonable access to cannabis for medical purposes. To date, HC has licensed 58 LPs. Of these, 23 are already selling dried cannabis, 12 are currently selling cannabis oil, and 5 are currently selling other cannabis products such as cannabis oil capsules and seeds.[54]

40. These LP offer a variety of products. As of July 2017, LPs listed the following products on their websites:

- 220 varieties of dried cannabis products;
- 57 varieties of cannabis oil; and
- 39 varieties of other cannabis products, including cannabis oil capsules and cannabis seeds.[55]

By contrast, the Canna Clinic storefronts typically have just 15-20 varieties of cannabis available for sale.[56]

41. LP products are also available in a variety of strengths. The principal active chemical ingredients in cannabis are THC and CBD. In July 2017, THC levels ranged from 1% to 26% among dried cannabis products, and from less than 1 mg/ml to 28 mg/ml among cannabis oils. CBD levels also ranged from less than 1% to 14% among dried cannabis products, and

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[53] ACMPR, ss 179-80

[54] Costen Affidavit, paras 56, 69 [AGC Record, Tab 1, p 16-17, 20]

[55] Costen Affidavit, para 56 and Exhibit M [AGC Record, Tabs 1, 1M, p 16-17, 230-36]

[56] Deschamps Affidavit, para 19 and Exhibit E [Phytos Responding Record, Vol 5, p 1736, 1788]

from less than 1mg/ml to 28.6 mg/ml among cannabis oils.[57]LPs have also demonstrated an ability to meet increasing demand for medical cannabis.[58] Since the first LPs began producing dried cannabis in 2013, production, shipments, and inventories of cannabis have risen steadily. In the first three months of 2017 alone, LPs produced 15,836 kg of dried cannabis, made 292,291 shipments of dried cannabis, and had a remaining inventory of 24,826 kg of dried cannabis. In the same period, LPs made 85,352 shipments of cannabis oil, and had 6,713 kg of oil remaining in inventory.[59] The Phytos Applicants allege that, despite these volumes, LPs are frequently subject to shortages of specific cannabis products. However, cannabis storefronts are similarly subject to these shortages.[60]

42. Cannabis from LPs is also affordable, due in part to the fact that LPs are not required to maintain costly storefront operations.[61] The average price of dried cannabis products from LPs is $9.17 per gram, although multiple LPs offer products for as little as $4 per gram.[62] By comparison, dried cannabis at the Canna Clinic locations sells for $10 per gram.[63] Contrary to

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[57] Costen Affidavit, paras 54, 57-58 and Exhibits L, N, O [AGC Record, Tabs 1, 1L, 1N, 1O, p 16-17, 229, 237-38]

[58] Costen Affidavit, para 50 [AGC Record, Tab 1, p 15]; Costen Transcript, Q 36 [City Supplementary Responding Record, Tab 3, p 180]

[59] Costen Affidavit, paras 54, 57-58, Exhibits N, O [AGC Record, Tab 1, p 16-17, 229, 237-38]

[60] Culver Affidavit, Exhibits 18, 23, 28, 40, 50 [City Application Record, Vols 2-3, p 481, 522-23, 530, 565, 652, 746]

[61] Costen Affidavit, para 23 [AGC Record, Tab 1, p 8]; Nash Affidavit, para 57 [Phytos Responding Record, Vol 1, p 34]

[62] Costen Affidavit, para 59 and Exhibit Q [AGC Record, Tabs 1, 1Q, p 17, 316]

[63] Deschamps Affidavit, Exhibit E [Phytos Responding Record, Vol 5, p 1788]; Deschamps Transcript, Q 131-33 [City Supplementary Responding Record, Tab 2, p 89-90]

what the Applicants suggest, the ACMPR do not require a minimum purchase, although some LPs do require a minimum purchase to qualify for free shipping.[64]

43. Several LPs also offer discounted pricing to patients with low incomes or on government assistance.[65] This discounted pricing includes lower flat-rate pricing at some LPs, and discounts of between 15-31% at other LPs. While some LPs restrict these discounts to certain products, others offer discounts on all products, and at least one LP guarantees that there is at least one low price strain of cannabis available at all times.[66] Several LPs also offer flat-rate shipping for as little as $5, and free shipping on orders over a certain size, which is as low as 5 grams in the case of one LP.[67]

44. Cannabis from LPs is accessible. Cannabis may be purchased on-line via websites that display and describe product offerings, or via 1-800 telephone numbers where patients can consult with client service agents.[68] While some LPs require patients to pay with a credit card, others permit payment by email money transfer, debit card, certified cheque or money order.[69] LPs may ship cannabis to a patient's residence, to a caregiver or health care practitioner who consents to receive the cannabis on the patient's behalf, or to a shelter or similar facility in the case of a homeless patient.[70] While shipping times vary depending on the LP, some offer same-

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[64] Costen Affidavit, Exhibit K [AGC Record, Tab K, p 228]

[65] Costen Affidavit, para 60 [AGC Record, Tab 1, p 17-18]

[66] Costen Affidavit, para 60 and Exhibit R [AGC Record, Tabs 1, 1Q, p 17-18, 317]

[67] Costen Affidavit, para 53 and Exhibit K [AGC Record, Tabs 1, 1K, p 16, 228]

[68] Costen Affidavit, paras 22, 51 [AGC Record, Tab 1, p 7, 15]

[69] Costen Affidavit, para 52 and Exhibit J [AGC Record, Tabs 1, 1J, p 16, 227]

[70] Costen Affidavit, para 55 [AGC Record, Tab 1, p 16]; ACMPR, ss 130-31

day shipping and several offer delivery within 72 hours.[71] While the Phytos Applicants allege shipments may go missing or be stolen, the evidence is that delivery to patients is successful in greater than 99% of cases.[72]

45. As noted above, patients not wishing to purchase cannabis from an LP may register with HC to obtain cannabis by personal or designated production. In this way, patients may grow and ensure a consistent supply of their preferred strain of cannabis. This option is affordable. In *Allard*, for example, the Federal Court found that a small personal production facility could be constructed for as little as $2,000, while monthly production costs for the Allard plaintiffs were $1-2 per gram for one plaintiff and significantly lower in the case of the other plaintiffs.[73]

46. Canadians are accessing cannabis under the ACMPR in significant numbers. The number of LP client registrations has grown steadily since the first LPs began producing and selling cannabis in 2013.[74] As of June 2017, LPs had 201,398 active client registrations, and the number of active client registrations had increased by more than 30,000 per fiscal quarter in each of the last three quarters.[75]

47. The number of patients registered with HC to produce or obtain cannabis from a designated person has also risen steadily and significantly. As of August 2017, 10,547 patients

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[71] Costen Affidavit, para 53 and Exhibit K [AGC Record, Tabs 1, 1K, p 16, 228] Costen Transcript, Q 81-82, 89 [City Supplementary Responding Record, Tab 3, p 195-96, 199]

[72] Costen Transcript, Q 74-77 [City Supplementary Responding Record, Tab 3, p 193-95]

[73] *Allard* trial decision, paras 98, 166-67, 169-70 [AGC BOA, Tab 1]. The Court found that Mr. Allard consumed 600 grams per month at a production cost of $230, and that Mr. Hebert produced 130 grams per month at a production cost of $110.

[74] Costen Transcript, Q 38 [City Supplementary Responding Record, Tab 3, p 180-81]

[75] Costen Affidavit, para 61 and Exhibit S [AGC Record, Tabs 1, 1S, p 18, 318]

had registered with HC to produce cannabis or to obtain cannabis from a designated person, with more than 1,500 new patients registering per month in each of the last three months.[76]

C. THE PRESENT APPLICATIONS

1) The Phytos Applicants

48. The Phytos Applicants are among the corporate operators of the Canna Clinic chain of cannabis storefronts. The Applicants openly contravene the CDSA and FDA by obtaining cannabis and its derivatives from unlawful sources, and by selling them to members of the public through the Canna Clinic.[77]

49. The Phytos Applicants' characterize the Canna Clinic storefronts as "dispensaries," which connotes a medical focus, but applicants for membership are not required to prove a medical condition, and membership is permanent such that a member with a temporary medical condition may continue to purchase cannabis even after that condition has been treated.[78]

50. The source of the products sold by the Canna Clinic is unknown. Phytos has filed no evidence concerning its supply arrangements, and on cross-examination of its affiant, Phytos refused to identify its suppliers or to provide supply contracts, policies and other material necessary to determine whether the cannabis sold at the Canna Clinic is produced in safe, sanitary, and secure facilities.[79] However, while the source of the Canna Clinic products is unknown, the menu of products is known to include so-called "shatter" or "butane hash oil" the

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[76] Costen Affidavit, para 68 and Exhibit U [AGC Record, Tabs 1, 1U, p 19, 337]. These data do not include personal and designated production licences that were issued under the former MMAR and that remain valid by virtue of the *Allard* injunction decision [AGC BOA, Tab 8]

[77] Costen Affidavit, para 9 [AGC Record, Tab 1, p 4]

[78] Deschamps Transcript, Q 236-37, 283 [City Supplementary Responding Record, Tab 2, p 110-11, 121]

[79] Deschamps Transcript, Q 2, 263-72 and Exhibit 1 [City Supplementary Responding Record, Tabs 2, 2A , p 56-57, 117-19, 132-33]

production of which, when it involves the use of explosive organic solvents, is prohibited under the ACMPR.[80]

51. The Phytos Applicants claim that they operate on a not-for-profit basis, and allege that their continued operation is in the public interest. However, the named applicants are part of a larger network that also includes multiple for-profit businesses.[81] The Toronto locations of the Canna Clinic are a source of significant revenues. The Broadview Avenue location alone has revenues of up to $25,000 per day, while according to counsel for one of the related corporations, the Queen Street West location had revenues of $550,000 per month as of November 2016.[82]

2) <u>The present applications</u>

52. In February 2017, the City of Toronto filed the application with Court File No. CV-17-570106. The application seeks a declaration that the Toronto locations of the Canna Clinic contravene zoning by-laws, and interlocutory and permanent injunctions restraining them from operating.[83] Phytos has responded to this application with a "Notice of Application and Constitutional Question," which alleges that the municipal zoning by-laws and federal CDSA and ACMPR infringe sections 2(b), 7, and 15 of the *Charter*.[84] Canada is an intervener in response to this Notice.

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[80] Deschamps Affidavit, Exhibit E [Phytos Responding Record, Vol 5, p 1788]; ACMPR, s 4; Costen Affidavit, paras 30, 70 [AGC Record, Tab 1, p 9, 21]

[81] Culver Affidavit, paras 19-42 [City Application Record, Vol 2, p 289-94]

[82] Deschamps Transcript, Q 100-07 [City Supplementary Responding Record, Tab 2, p 83-83]; Culver Affidavit, Exhibit 5 [City Application Record, Vol 2, p 329]

[83] Notice of Application in the matter with Court File No CV-17-570106, para 1 [City Application Record, Vol 1, p 4-6]

[84] "Notice of Application and Constitutional Question" in the matter with Court File No CV-17-581329, p 1

53. In August 2017, Phytos also filed the separate application with Court File No. CV-17-5812329. This application again alleges that the City of Toronto's municipal zoning by-laws and the federal CDSA and ACMPR are inconsistent with sections 2(b), 7 and 15 of the Charter. The application seeks declarations that these laws are unconstitutional, in addition to interlocutory and permanent injunctions suspending, staying, or exempting Phytos from the CDSA and ACMPR, permitting its employees to possess and sell cannabis to "medically qualified patients," and permitting the Phytos Applicants to test products at HC-authorized laboratories.[85]

54. The City of Toronto and Phytos have both filed evidence for use in the applications. The City of Toronto has filed five affidavits. Phytos has filed 27 affidavits, including several by experts and cannabis users who have yet to be cross-examined.

55. Canada has filed two affidavits in response to the requests by the City and Phytos for interlocutory injunctions.[86] However, as it was only advised of the Lanova proceedings in May 2017 and the Phytos proceedings in September 2017, Canada has yet to file evidence in response to the main applications. Canada is currently preparing this evidence, and anticipates that it will include the following, among other evidence:

a) evidence from senior HC officials regarding the ACMPR, their rationale and operation, and the history of HC's interactions with the individual patient affiants;
b) evidence from the LP industry describing the production, testing, distribution and security standards followed by the industry, as well as product, pricing, shipping and customer service information;
c) expert medical evidence describing the health benefits and risks associated with cannabis use, and responding to the allegations concerning the alleged need for

[85] Notice of Application in the matter with Court File No CV-17-581329 [Phytos Application Record, Tab 1, p 3-4]

[86] AGC Record, Tabs 1, 2]

different cannabis strains and products, and to be able to "see and smell" cannabis products; and

d) evidence from law enforcement concerning the public safety risks associated with illegal cannabis storefronts, including robberies and risks associated with the production of certain cannabis extracts.

PART III – POINTS IN ISSUE

56. Has the City of Toronto met the test for an interlocutory injunction requiring the Respondents in the Lanova Application to cease selling cannabis illegally? Canada submits that the City has met the test for such an interlocutory injunction.

57. Have the Applicants in the Phytos Application satisfied their burden of establishing the tri-partite test for an interlocutory injunction by:

a) proving that there is a serious issue to be tried;
b) proving that they will suffer irreparable harm if the injunction is not granted; and
c) proving that the balance of convenience favours granting an injunction?

PART IV – SUBMISSIONS

58. Injunctions are extraordinary remedies to be granted sparingly.[87] In constitutional cases, in particular, the SCC has held that a court should not lightly order that that laws enacted for the public good are inoperable in advance of a complete constitutional review. Injunctions against the enforcement of legislation should only be issued in clear cases.[88]

59. The test for interlocutory injunctive relief is set out in *RJR-MacDonald v Canada (Attorney General)*, and provides that the party seeking the injunction must prove that: a) there is a serious issue to be tried; b) irreparable harm to the applicant would result if the injunction

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[87] *Osiris Inc v 1444797 Ontario Ltd*, [2004] OJ No 989, para 7 [AGC BOA, Tab 9]

[88] *Harper*, para 9 [AGC BOA, Tab 2]

was not granted; and c) the balance of convenience, considering all of the circumstances, favours granting the order.[89]

60. The Phytos Applicants have not met this test. The allegations that the Canna Clinic, its employees, and vendors would be irreparably harmed are speculative and unsupported by the evidence. Moreover, even if harm were established, the Applicants are currently operating illegally and should not be permitted to rely on harm to their existing, illegal business to establish irreparable harm. The Applicants' argument offends the rule of law and is contrary to the principle that applicants for injunctive relief must come to court with clean hands. In contrast, the applicants in *RJR-MacDonald* sought an exemption from legislation before violating such law.

61. With respect to the balance of convenience, the SCC has stated that a challenged law is presumed at the interlocutory stage to serve the public good and that the government need not produce evidence to demonstrate such public good. In addition to this presumption, Canada has produced cogent evidence to demonstrate that the ACMPR serve the public interest.

62. Moreover, there is evidence that the Canna Clinic storefronts have been the subject of armed robbery, that they have sold cannabis without requiring medical authorization, and that they refuse their landlords' request to stop selling cannabis illegally, even threatening them with lawsuits for loss of profits. In short, the Phytos Applicants have demonstrated that their interest is not in serving the public good, but in making profit.

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[89] *RJR-MacDonald*, para 43 [AGC BOA, Tab 4]

A. SERIOUS ISSUE

63. For the purposes of the interlocutory injunction, Canada does not dispute that the issue of whether Canadians who require cannabis for medical purposes have reasonable access is an important issue. However, Canada will defend this aspect of the test for injunctive relief at the hearing of the final application for a permanent injunction.

B. NO IRREPARABLE HARM

64. The Phytos Applicants have failed to show that they will be irreparably harmed by the denial of interlocutory relief. Although they allege that their business, its employees, landlords and vendors would be harmed, they have provided little evidence of this, nor any evidence that this harm is irreparable. Moreover, even if irreparable harm were established, the Applicants' argument should be rejected. It should not be open to an applicant to operate an illegal business, and to then obtain an interlocutory exemption from the law on the premise that their existing business would suffer. The Phytos Applicants' argument offends the rule of law and the principle that applicants for interlocutory relief must come to court with clean hands.

1) The Phytos Applicants have not demonstrated irreparable harm

65. The mere possibility of harm is not sufficient at this stage of the interlocutory injunction test. Rather, the party seeking interlocutory relief must show that there is a high degree of probability that the harm will in fact occur, and that this harm is irreparable.[90] The evidence of this harm must be clear and not speculative.[91]

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[90] *Operation Dismantle v Canada*, [1985] 1 SCR 441, para 35 [AGC BOA, Tab 10]

[91] *Anderson v Hunking*, 2010 ONSC 4008, para 15(e)(ii) [AGC BOA, Tab 11]

66. The Supreme Court of Canada has held that the focus at this stage is solely on harm to the applicant. While the court may also consider harm to the general public, these harms are appropriately considered at the balance of convenience stage.[92]Although the Phytos Applicants note that irreparable harm to patients was considered in Allard, this is because the applicants in Allard were patients.

67. Although they allege that their business would suffer, the Phytos Applicants have failed to provide even basic financial information about their business, such as current revenues and financial statements. Indeed, although the Applicants were asked for this information on cross-examination, they refused to provide it.[93]

68. The Phytos Applicants have provided no evidence either, of their current marketshare nor any evidence that they could not regain this marketshare if ultimately permitted to re-open at the conclusion of the application. This omission is significant. Allegations that marketshare will be lost without an interlocutory injunction are typically accompanied by detailed market data and expert analysis of that data.[94] Absent such evidence, the allegation that the Canna Clinic would lose marketshare amounts to pure speculation.

69. The Phytos Applicants also allege that without an interlocutory injunction, the Canna Clinic would lose its current employees, leases and contracts with third-party vendors. However, they have failed to demonstrate that any of these harms are irreparable. The

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[92] *RJR-MacDonald*, paras 57-58 [AGC BOA, Tab 4]

[93] Deschamps Transcript, Q 2 and Exhibit 1 [City Supplementary Responding Record, Tabs 2, 2A, p 56-57, 132-33]

[94] See *e.g. Paul Sadlon Motors Inc v General Motors of Canada Ltd*, 2011 ONSC 2628, paras 40-51 [AGC BOA, Tab 12]

Applicants have filed no evidence, for example, that they could not re-hire existing employees or train new ones, or find new premises and vendors if ultimately permitted to re-open at the conclusion of this application.

70. The balance of the Phytos Applicants' irreparable harm argument is concerned with harms to the Canna Clinic's employees, landlords and vendors themselves. These harms to third parties are not appropriately considered at the irreparable harm stage of the interlocutory injunction analysis.[95] However, even if relevant, these allegations fail for the same reasons as the allegations concerning harm to the Applicants. The Applicants have provided no evidence that its employees could not find new employment, that its landlords and vendors could not find new tenants and clients to replace the Canna Clinic, or that any of these third parties would suffer a material financial harm if Canna Clinic were closed. Absent this evidence, these allegations are once again entirely speculative and the evidence falls far short of establishing with the required high degree of probability that irreparable harm will follow if an interlocutory injunction is denied.

71. In assessing irreparable harm, the court may also have regard whether the Applicant has contributed to the alleged harm by its own delay.[96] In the present case, if the Phytos Applicants were concerned about the impact of law enforcement on their business, it was open to them to bring a constitutional challenge before opening the Canna Clinic storefronts. Had they done so, and had their application succeeded, the Applicants could have entirely avoided the business harms now alleged. They instead waited until the City of Toronto brought an

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[95] *Bombardier Transportation Canada Inc v Metrolinx*, 2017 ONSC 2372, para 70 [AGC BOA, Tab 13]; *Cash Converters Pty. Ltd v Amrstrong*, [1997] OJ No 2659, para 13 [AGC BOA, Tab 14]

[96] *Mahmoud Lebanese Palace Inc et al v City of Ottawa*, 2017 ONSC 5138, para 24 [AGC BOA, Tab 15]

application to enforce its zoning by-laws to bring the present application for permission to operate. The alleged harms, even if established, are thus attributable to the Applicants' own delay in bringing an application. An interlocutory injunction is inappropriate in these circumstances.

2) <u>The Phytos Applicants' "irreparable harm" argument offends the rule of law</u>

72. The Phytos Applicants have openly sold cannabis in clear violation of both the CDSA and municipal zoning by-laws since February 2016. Having already operated illegally for more than a year, they now seek an interlocutory exemption from the law on the premise that their existing business could suffer if the Canna Clinic were forced to close pending their application. This argument offends the rule of law, and if accepted, would effectively reward the Applicants for their decision to operate illegally.

73. Applicants for interlocutory relief must also come to court with clean hands. While interlocutory relief should not generally be denied solely on the basis that the party seeking it is a villain or wrongdoer, it may be denied where the wrongdoing relates to the very relief being sought.[97] In this case, the Phytos Applicants ask this court for an interlocutory exemption from laws that they already violating, on the premise that their existing, illegal business could be harmed without an exemption. The wrongdoing relates directly to the relief being sought, and the clean-hands principle favours the denial of an injunction in these circumstances.

74. The Phytos Applicants suggest that the interlocutory injunction is necessary to preserve the status quo. This argument is misleading. While interlocutory injunctions may be granted to

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[97] *Sherwood Dash Inc. v Woodview Products Inc.*, [2005] OJ No 5298 (Sup Ct J), paras 51-53 [AGC BOA, Tab 16]

preserve existing rights, the Applicants have never had a right to traffic cannabis or to operate a cannabis business. Instead, they have operated at all times outside the law and been subject to law enforcement. Far from preserving existing rights, the proposed interlocutory injunction would in fact give the Applicants sweeping new immunity from law enforcement that neither they nor any other cannabis storefront currently enjoys.

75. The Phytos Applicants' injunction request bears no resemblance to the injunction issued in Allard. Indeed, the Federal Court in Allard expressly rejected the plaintiffs' request for a broad interlocutory exemption from the CDSA similar to the one now sought by the Phytos Applicants, and instead opted for a limited injunction which preserved certain existing, Health Canada-issued authorizations to possess and licences to produce cannabis pending a constitutional challenge to the MMPR. In declining to grant a broader exemption, Manson J. observed that such relief was inappropriate and inconsistent with the purposes of the MMPR.[98] Similarly in the present case, the requested interlocutory exemptions from the CDSA and ACMPR are inappropriate and should be denied.

C. THE BALANCE OF CONVENIENCE FAVOURS THE PUBLIC INTEREST IN UPHOLDING THE LAW

76. At this final step of the test for injunctive relief, the courts in constitutional cases focus their analysis of balance of convenience on what is in the public interest. When validly enacted legislation is being challenged, "it is wrong to insist on proof that the law will produce a public good. Rather, at this stage of the proceeding, this is presumed."[99]

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[98] *Allard* injunction decision, paras 122, 124 [AGC BOA, Tab 8]

[99] *Harper*, para 9 [AGC BOA, Tab 2]

77. Further, in addition to the SCC's mandatory presumption, there is clear evidence in this proceeding to demonstrate that Canada's medical cannabis regime serves the public interest by providing a quality-controlled product to those who need it while at the same time ensuring that there are security measures to prevent diversion to the illicit market.

78. Finally, the Phytos Applicants have not met their burden of proving that suspension of the legislation would itself provide a public benefit.[100] They have provided no evidence regarding where they obtain their supply of cannabis, nor the conditions under which the cannabis is produced. Moreover, they have sold cannabis without requiring medical authorization, placed their employees at risk as victims of armed robberies, and have refused to comply with their landlords' requests to discontinue the illegal use of their premises. As such, they do not fall within the category of "clear cases" which warrant an interlocutory injunction against the enforcement of valid law. On the contrary, the evidence shows that if the injunction sought by the Applicants is granted, it will hurt the public interest.

1) **Presumption that the law produces a public good**

79. It is well established that when deciding whether to grant an interlocutory injunction suspending the operation of a validly enacted law, the court must presume that the law produces a public good. As the SCC stated in *RJR-MacDonald*:

> When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relied on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.[101]

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[100] *RJR-MacDonald*, para 80 [AGC BOA, Tab 4]

[101] *RJR-MacDonald*, para 80 [AGC BOA, Tab 4]

80. Accordingly, in this motion in which the Phytos Applicants seek to suspend the operation of the CDSA and the ACMPR, the Court is required to presume that the legislative scheme operates to the public's benefit. The overall objective of the CDSA is to protect public health and safety. The CDSA provides a legislative framework for the control of substances that impact mental processes and that, notwithstanding any therapeutic value, can harm health and safety, particularly that of vulnerable individuals, when diverted or misused. The ACMPR allows for reasonable access to cannabis for medical purposes within a comprehensive scheme which places conditions on production, labelling, shipping, tracking, security, and documenting the entire process from beginning to end to protect the patient and the public.

81. At this stage of the proceeding, the Court is required to recognize that there is a public interest in enforcing the law. This public interest "weighs heavily in the balance."[102] As the SCC stated in *Harper v Canada*:

> Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter. It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed.[103]

82. The SCC in *Harper* overturned the trial judge's decision to grant an injunction to suspend the operation of the law, and rejected the trial judge's reasoning which was based on the fact that the Canada had adduced no evidence to illustrate the public benefits of the impugned law. In contrast, and in addition to the CDSA and ACMPR being presumed to serve

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[102] *Harper*, para 9 [AGC BOA, Tab 2]

[103] *Harper*, para 9 [AGC BOA, Tab 2]

a public good, there is clear evidence in this proceeding that the ACMPR serve the public interest.

2) Evidence that the ACMPR protect the public

83. Canada's evidence demonstrates that the ACMPR in fact protects patients by providing access to cannabis for medical purposes that has been produced under strict quality-controlled conditions, and protects the Canadian public by reducing the public dangers posed by youth access, dangerous extraction methods, and the diversion of drugs.[104]

a) Reasonable Access

84. As set out in the Regulatory Impact Analysis Statement for the ACMPR, its objective is to "provide Canadians with a greater range of options to access cannabis for medical purposes in order to address the issue of reasonable access as identified" by the Federal Court in *Allard*.[105]

85. Under the ACMPR, a patient with the approval of a health care practitioner can access cannabis for medical purposes in three ways:

1. by producing cannabis for themselves;
2. by designating another person to produce cannabis for them; or
3. by registering with one of the LPs who are authorized by HC to produce and sell dried cannabis, cannabis oil, and fresh cannabis.[106]

86. While the LP industry is a nascent one having emerged only three years ago, the data compiled by HC on a monthly basis illustrate that the LP system is functioning well. According to Eric Costen, the current Director General of the Cannabis Legalization and Regulation Branch of HC, and the former Executive Director of the Office of Medical Cannabis, "in terms

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[104] Costen Affidavit, para 4 [AGC Record, Tab 1, p 3]

[105] Costen Affidavit, Exhibit E [AGC Record, Tab 1E, p 190]

[106] Costen Affidavit, para 30 [AGC Record, Tab 1, p 9]; ACMPR, s 3

of key indicators, such as pricing, the number of strains available, and ease of shipment, the industry has shown itself to be agile, and is growing exponentially to address the increased demand" and is a competitive industry which works to meet varying client needs.[107]

87. Some of these key indicators show:

- As of July 2017, there were 220 offerings of dried cannabis from 23 LPs, 57 offerings of cannabis oil from 12 different LPs and 39 of other offerings such as capsules and clones from 5 LPs;
- LPs offer products with a wide range of THC and CBD content;
- LPs increased their shipments from 335 shipments of dried cannabis in the third quarter of 2013-14 to 292,291 shipments in the first quarter of 2017-18;
- LPs increased their shipments of cannabis oil from 84 shipments in the third quarter of 2015-16 to 83,352 shipments in the first quarter of 2017-18;
- LPs ship cannabis to a patient's residence, to a person responsible for the patient, to the patient's health care practitioner, a shelter, or other institution that provides social services to the patient;
- The prices charged by LPs are comparable to that of the illicit market with an average of $9.17/g for dried cannabis. This is cheaper than the $10/g charged by the Phytos Applicants;
- Many LPs provide compassionate pricing to low-income patients and patients on government assistance programs;
- Some LPs have same-day shipment;
- Many LPs waive shipping fees in certain circumstances; and
- LPs provide extensive services to support their registered patients throughout the entire process and many have call centres with toll free lines in both English and French where patients can consult with staff as well as websites which display and describe product offerings.[108]

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[107] Costen Affidavit, paras 48, 50 [AGC Record, Tab 1, p 15]; Costen Transcript, Q 39, 46-47 [City Supplementary Responding Record, Tab 3, p 181-83, 185-86]

[108] Costen Affidavit, paras 51, 53-60 and Exhibits K-O, Q [AGC Record, Tabs 1, 1K-10, 1Q, p 15-17, 228-38, 316]; ACMPR, ss 130-31; Deschamps Affidavit, Exhibit E [Phytos Responding Record, Vol 5, p 1788]; Deschamps Transcript, Q 131-33 [City Supplementary Responding Record, Tab 2, p 89-90]; Costen Transcript, Q 81-82, 89 [City Supplementary Responding Record, Tab 3, p 195-96, 199]

88. The evidence shows that the ACMPR has lead to the growth of a viable, thriving, and competitive industry which is highly compliant with regulatory requirements but which sells cannabis for a lower price than the Phytos Applicants.

b) Quality Control

89. In order to obtain a licence to produce and sell cannabis, an LP must provide information that allows HC to assess whether the applicant has key measures in place such as:

- a detailed description of the physical security measures that will be put in place at the site;
- a detailed description of how the LP will keep records of activities with cannabis;
- a quality assurance report that shows that the building, equipment, and proposed sanitation program to be used comply with GPP requirements;
- a copy of the notices provided to the local police force, local fire authority, and local government; and
- floor plans of the site.[109]

90. The Minister is required to refuse to issue, renew, or amend a licence in certain circumstances including where:

- there are reasonable grounds to believe that false or misleading information has been provided with the application;
- information is received from a peace officer or other authority that gives the Minister reasonable grounds to believe that the applicant has been involved in the diversion of a controlled substance;
- the issuance or continuation of the licence will likely create a risk to public health, safety, or security, including diversion; or
- key personnel do not hold a valid security licence.[110]

91. The ACMPR require that the cannabis offered for sale by LPs be produced in compliance with GPPs. Among other requirements, LPs are required to:

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[109] Costen Affidavit, paras 35-36 [AGC Record, Tab 1, p 11]; ACMPR, ss 33-34

[110] Costen Affidavit, para 37 [AGC Record, Tab 1, p 11-12]; ACMPR, ss 33-34

- maintain the cleanliness of the premises and equipment;
- employ a quality assurance person with appropriate training, experience and technical knowledge to approve the quality of fresh and dried cannabis, cannabis oil, and cannabis seeds and plants prior to making them available for sale;
- test fresh and dried cannabis and cannabis oil for microbial and chemical contaminants to ensure that they are below generally accepted tolerance limits for human consumption;
- use validated testing methods; and
- ensure that cannabis oils do not contain residues of solvents other than those specified, and that any residues are under acceptable limits.[111]

92. HC conducts frequent inspections throughout the year to verify that LPs are meeting the requirements of the ACMPR, CDSA and the FDA. These inspections demonstrate that LPs are highly compliant with their regulatory obligations. Since April 2014, 830 inspections have been conducted at LP sites with compliance rates above 95%. LPs have worked co-operatively to deal with any observations by HC and have taken corrective measures to address the non-compliance and to prevent future problems. Product recalls have been undertaken voluntarily.[112]

93. A key component of monitoring compliance is the fact that the LPs keep detailed records of their production practices. This allows for subsequent recall of a product after it has been sold. In addition to strict production controls including testing the products, it is a key component of ensuring safety for patients that products can be recalled.[113]

3) **Suspension of the Legislation would not provide a public benefit**

94. In recognition of the principle that validly enacted legislation is presumed to produce a public good, the Phytos Applicants have to prove that the suspension of the legislation would

[111] Costen Affidavit, para 38 [AGC Record, Tab 1, p 12]

[112] Costen Affidavit, para 47 [AGC Record, Tab 1, p 14-15]

[113] Costen Transcript, Q 19 [City Supplementary Responding Record, Tab 3, p 169-70]

itself provide a public benefit.[114] The Applicants have not met this burden and to the contrary, the evidence shows that to suspend the legislation and allow the Applicants to continue their illicit businesses would continue to hurt the public interest.

95. The Phytos Applicants adduced no evidence to demonstrate:

- that the cannabis which they sell is produced in sanitary conditions;
- that the cannabis is produced in safe conditions;
- that a system is in place documenting the entire production process;
- that there are records regarding production practices;
- that products are capable of being recalled;
- that any conditions at all are placed on the cultivation and production of cannabis.

96. In fact, in contrast to the requirements of the ACMPR which LPs must meet, the public knows nothing of the methods used by these illegal businesses. There is no evidence regarding security, production, testing, labelling, packaging, shipping, record keeping, inspecting and monitoring.

97. Consequently, they pose a number of risks to public health and safety including:

- the distribution of cannabis products that have been produced without any transparency or regulatory oversight, both of which are crucial to ensuring product safety;
- the distribution of cannabis products that have not undergone quality-control measures, such as testing by a HC-licensed lab, rigorous inspections, and reliance on well-established standard operating procedures designed and executed by a quality assurance person with suitable training, experience and technical knowledge;
- the sale or provision of cannabis products that are unlabelled, or that do not conform to standardized labelling requirements for information including weight, quantity, and THC and CBD content;
- the distribution of cannabis products that are not tamper-proof and are attractive to children, and the potency of which may be unclear;

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[114] *Harper*, para 9 [AGC BOA, Tab 2]

- the sale or provision of highly concentrated cannabis extracts, the production of which may involve the use of highly flammable solvents, and the potency of which is not made clear to customers;
- the absence of meaningful post-market controls, such as the ability to conduct a recall and adverse-reaction reporting requirements;
- increased ease of access to cannabis by adolescents;
- the potential safety and security risks to staff, customers, and by-standers posed by the increased prevalence of armed robberies; and
- potentially providing revenue for criminal organizations.[115]

98. There have been numerous robberies including armed robberies at the Canna Clinic stores placing their employees and the public at risk.[116] Moreover, the Phytos Applicants have refused to comply with their landlords' requests to discontinue the illegal use of the properties. This places their landlords in further jeopardy of having their properties become the subject of a request for forfeiture of offence-related property. When the owners of 1556 Queen Street, Peter and Anastasia Minas, both of whom are named respondents in the City's application, asked Phytos to discontinue its illegal operations on their property, counsel for Phytos threatened them with a law suit for $26 million based on alleged revenues of more than $550,000 per month.[117]

99. Contrary to many of the statements made by the Phytos Applicants in their Factum, the evidence does not support their contention that the Applicants provide similar safety and

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[115] Costen Affidavit, para 70 [AGC Record, Tab 1, p 21]

[116] Affidavit of Samantha Deschamps, affirmed May 17, 2017, paras 36-37, 39 ("Deschamps Affidavit") [Phytos Responding Record, Vol 5, p 1741]; Supplementary Affidavit of Samantha Deschamps, sworn August 21, 2017 ("Deschamps Supplementary Affidavit"), para 47 [Application Record of Phytos, Tab 3, p 59]; Transcript of the September 15, 2017 Cross-Examination of Samantha Deschamps ("Deschamps Transcript"), Q 285-96 [City Supplementary Responding Record, Tab 2, p 121-24]; Deschamps Responses to Undertakings [City Supplementary Responding Record, Tab 2B, p 137]

[117] Affidavit of Cameron Culver, affirmed September 11, 2017, paras 9-10 [Responding Record of the City of Toronto, Tab 1, p 3]

quality-control measures as the LPs and that their clinics provide better services to patients.

Examples include the following:

- Contrary to paragraph 15 of the Applicants' Factum, Canna Clinic relies predominantly on its customers own assertions that they have used cannabis for medical purposes before. It does not require those who so claim to produce authorization from a health care practitioner. Neither does it track the expiry of medical authorizations even from those whom they claim require a medical authorization. The Applicants were asked but refused to provide medical authorizations for a sample week;[118]
- Contrary to paragraph 22 of their Factum where they claim that their production practices are analogous to the GPPs followed by LPs, they have provided no evidence to this effect. The only affiant who works at a Canna Clinic knew nothing whatsoever about where they obtain their cannabis, nor the conditions under which cannabis is produced;[119]
- Contrary to paragraph 23 of their Factum, the alleged testing done by the Canna Clinic is not equivalent to what is required by the ACMPR, Eric Costen stated on cross-examination that testing is a part of an overall process, all of which works in concert to ensure a quality-controlled product;[120]
- Contrary to paragraph 31 of their Factum, Eric Costen on cross-examination stated that HC tracks the time for approving a licence for personal production closely and that due to additional staff, the fact that HC phones people whose applications require clarification or additional information, and streamlined processes, the number of applications which take more than six weeks has decreased significantly.[121]
- Contrary to paragraph 38 of their Factum, Eric Costen's evidence is that LP shipments go missing less than a fraction of a percent of shipments;[122]
- Contrary to paragraph 48 of their Factum, it is not only the Canna Clinic that allows the purchase of small amounts, this is also possible through the LP mail-order system which is highly competitive and seeks to accommodate the interests of the patient;[123]
- Contrary to the allegation in paragraph 97 that Canada's position on quality control cannot be reconciled with the absence of a requirement that home grown cannabis

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[118] Deschamps Transcript, Q 72, 77, 236-37, 283 and Exhibit 1 [City Supplementary Responding Record, Tabs 2, 2A, p 74-77, 1109, 121, 132]

[119] Deschamps Transcript, Q 121-22, 263-72 [City Supplementary Responding Record, Tab 2, p 87, 117-19]

[120] Costen Transcript, Q 14-19 [City Supplementary Responding Record, Tab 3, p 87, 169-74]

[121] Costen Transcript, Q 92, 123, 126-29 [City Supplementary Responding Record, Tab 3, p 200-01, 209-13]

[122] Costen Transcript, Q 74-77 [City Supplementary Responding Record, Tab 3, p 193-95]

[123] Costen Transcript, Q 43-47 [City Supplementary Responding Record, Tab 3, p 184-86]

> be tested, Eric Costen explained the two different regimes as, "In the case of commercial industry, commercial production, it's a commercial entity that is producing for consumption by a large number of people and it is typical, typical certainly in Canada that these types of entities are regulated by governments. Governments regulate companies much more frequently than they regulate people."[124]

100. The Applicants claim at paragraphs 50 and 102 of their Factum that they only seek an exemption and are not seeking suspension of the legislation against other dispensaries. This is not a viable position. It would make the CDSA scheme regarding cannabis effectively unenforceable. Law enforcement agencies would face significant legal challenges if they sought to enforce the CDSA when some illegal businesses selling cannabis could continue to operate because of a court order. Moreover, as the SCC observed in *Metropolitan Stores*, granting an exemption to one litigant will often lead to exemption requests by others, the "sum of which make them tantamount to a suspension case."[125] If an exemption is granted in this case, there is a significant risk that other illegal cannabis storefronts will seek the same relief, and the enforcement of CDSA will be undermined as a result.

101. Further, it would put HC in an anomalous position where it would continue to hold LPs to follow the strict regulatory standards, yet the Canna Clinic would be allowed to operate without having to comply with any such standards.

102. Settled law and the evidence places the balance of convenience squarely in favour of refusing the Phytos Applicants' request for interlocutory injunction pending a full hearing on the merits of their constitutional challenge. In addition to a presumption that the ACMPR produces a public good, there is actual evidence establishing such good. Moreover, there is

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[124] Costen Transcript, Q 149 [City Supplementary Responding Record, Tab 3, p 220-21]

[125] *Metropolitan Stores*, para 80 [AGC BOA, Tab 3]

actual evidence that to grant the injunction to these illegal and dangerous businesses, would harm the public good.

PART V – ORDER SOUGHT

103. Canada requests that the Phytos Applicants' request for an interlocutory injunction be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 21st day of September, 2017.

per Falguni Debnath

Jon Bricker

Of Counsel for the Respondent the
Attorney General of Canada

SCHEDULE A – LIST OF AUTHORITIES

1. *Allard et al v Her Majesty the Queen in Right of Canada*, 2016 FC 236
2. *Harper v Canada*, 2000 SCC 57
3. *Manitoba v Metropolitan Stores, (MTS) Ltd*, [1987] 1 SCR 110
4. *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311
5. *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74
6. *R v Parker*, 49 OR (3d) 481
7. *R v Smith*, 2015 SCC 34
8. *Allard v Canada*, 2014 FC 280, varied 2014 FCA 298
9. *Osiris Inc v 1444797 Ontario Ltd*, [2004] OJ No 989
10. *Operation Dismantle v Canada*, [1985] 1 SCR 441
11. *Anderson v Hunking*, 2010 ONSC 4008
12. *Paul Sadlon Motors Inc v General Motors of Canada Ltd*, 2011 ONSC 2628
13. *Bombardier Transportation Canada Inc v Metrolinx*, 2017 ONSC 2372
14. *Cash Converters Pty. Ltd v Amrstrong*, [1997] OJ No 2659
15. *Mahmoud Lebanese Palace Inc et al v City of Ottawa*, 2017 ONSC 5138
16. *Sherwood Dash Inc. v Woodview Products Inc.*, [2005] OJ No 5298 (Sup Ct J)

SCHEDULE B – STATUTES AND REGULATIONS

Controlled Drugs and Substances Act, SC 1996, c 19, ss 2, 4-7, 31, 56, Schedule II

Food and Drugs Act, RSC, 1985, c F-27

Access to Cannabis for Medical Purposes Regulations, SOR 2016/230, ss 1, 3, 4, 6, 8, 16, 18-19, 22, 33-34, 36, 43-44, 66, 78, 80, 84, 130-31, 174, 176, 177, 179-80, 184

O. Reg, 275/94 (*Nursing Act*), s 17