Court File No. CV-17-570106
Court File No. CV-17-581329

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, 2501516 ONTARIO LTD., NADINE GOURKOW, IVAN NOE GOURKOW-SCHULKOWSKI, TALON TAPES INDUSTRIES LTD., 2431318 ONTARIO LTD., LUES EPSTEIN, NIKOLETA TCHEPILEVA, PETER MINAS, ANASTASIA MINAS, SUE YOUNG, MURRAY YOUNG, JOAN YEE BRAN AND 2881 DUNDAS INC.

Respondents

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

Respondents

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September 20, 2017

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PART I – OVERVIEW

1. This case is about reasonable access to medical cannabis. It is not about the legalization of cannabis at large, nor is it about the provision of cannabis for recreational use. It is about the ability of individuals suffering from serious health issues to access cannabis for legitimate, constitutionally-recognized medicinal purposes.

2. Phytos Apothecary and Wellness Centre and Grassroots Natural Health Society are not-for-profit corporations that operate seven medical cannabis dispensaries in Toronto ("the "Clinics").[1] They screen their patients to ensure that cannabis is sold only for medical use; they do not sell to anyone under the age of 19; and they monitor their cannabis for quality control purposes.

3. The Clinics resist the City of Toronto's (the "City") application to shut them down and bring their own application for an interlocutory exemption from the City's bylaws and the federal criminal law so that they can continue providing reasonable access to medical cannabis and cannabis derivative products.

4. The courts have repeatedly held that reasonable access to medical cannabis is protected by s. 7 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). In *R v Parker* (decided in 2000), the Ontario Court of Appeal first articulated this right and, as a result, held that the prohibition on the possession of cannabis under s. 4 of the *Controlled Drugs and Substances Act* ("*CDSA*")[2] was unconstitutional.[3] In 2014, the government introduced the *Marihuana for Medical Purposes Regulations* ("*MMPRs*"), which mandated mail-order purchasing from Licensed Producers ("LPs"). In 2015, in *R v Smith*, the Supreme Court of Canada examined the medical

[1] The other parties on whose behalf this factum is filed (Lanova Outsourcing Corp., Nadine Gourkow, Ivan Noe Gourkow-Schulkowski, and 2501516 Ontario Ltd.) adopt and rely on the submissions advanced by the Clinics.
[2] SC 1996, c 19.
[3] (2000), 49 OR (3d) 481, at para 210 (CA), Cannaclinic Book of Authorities ("BOA"), Tab 27.

cannabis exemption scheme and held that it was unconstitutional insofar as it prohibited access to "non-dried" cannabis for medical use.[4] Most recently, in *Allard v Canada* ("*Allard 2016*"), the Federal Court held that the medical exemption scheme was unconstitutional because access was limited to purchasing cannabis by mail-order from LPs. In the course of its reasons, the Court noted that "dispensaries are at the heart of cannabis access".[5]

5. Despite this case law, the City seeks to shut down the Clinics by interpreting its bylaws to effectively prohibit the operation of medical cannabis dispensaries anywhere in the City. If the City is correct in this interpretation, then its bylaws undermine reasonable access to medical cannabis and therefore engage s. 7 of the *Charter* in the same way that the *CDSA* (and its medical exemption scheme) have been held to do. If the City is successful, patients would only be able to access medical cannabis by mail order from LPs or by growing it themselves (an option the government introduced post-*Allard 2016*). No other forms of access would be allowed. Cannabis would be the only type of medicine in Canada that cannot be purchased in person.

6. The City is not alone in these efforts. Just last month, the neighbouring City of Hamilton tried — unsuccessfully — to shut down a dispensary in its jurisdiction by bringing a similar application. In *City of Hamilton v Floyd*,[6] Justice Lofchik refused to grant an order declaring that the dispensary contravened certain city bylaws by using its property to "sell, store and distribute marijuana, and sell food and beverages."[7] The dispensary was permitted to remain open on an interim basis. The same outcome should be reached in this case.

[4] [2015] 2 SCR 602, at para 33, BOA Tab 28.
[5] [2016] 3 FCR 303, at para 162 (CanLII), BOA Tab 2.
[6] See Court File No.: 17-62329. No reasons were given.
[7] Order of Justice Lofchik, dated August 24, 2017, BOA Tab 14.

PART II – SUMMARY OF FACTS

A. Regulatory regime for access to medical cannabis

7. At the core of this case is medical access to cannabis (or marihuana).[8] The Ontario Court of Appeal recognized the medicinal value of cannabis 17 years ago in *R v Parker*.[9]

8. The current regulatory regime is set out in the *Access to Cannabis for Medical Purposes Regulations* ("*AMCPRs*").[10] The *AMPCRs* operate as an exemption scheme to the criminal prohibition on cannabis possession in ss. 4 and 5 of the *CDSA.* Under the *AMCPRs*, patients can access medical cannabis in one of two ways:

(a) Purchasing from LPs, who may offer dried cannabis, cannabis oil and fresh cannabis; and

(b) Following a registration process to grow cannabis at home and make cannabis derivative products.[11]

9. The *AMCPRs* do not authorize the purchase and sale of medical cannabis at storefront dispensaries. Individuals who buy or sell cannabis outside the *AMCPRs* are subject to criminal prosecution under the *CSDA*.

10. Unlike the cities of Vancouver and Victoria, the City has not specifically regulated the operation of cannabis dispensaries in Toronto. Dispensaries are therefore subject to zoning bylaws like any business. The zoning bylaws applicable to each of the Clinics are 569-2013 (since

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[8] "Cannabis", "marihuana", and "marijuana" are used interchangeably: see *Allard (2016)*, *supra*, at para 8.
[9] *Parker*, *supra*, at para 2 (Ont CA), BOA Tab 28.
[10] SOR/2016-230.
[11] Affidavit of Eric Costen dated September 7, 2017, AG Responding Application Record, Tab 1, p 9, at para 30 ("First Costen Affidavit").

September 2016) and bylaw 438-86 (prior to September 2016) (together, the "Bylaws").[12] The Bylaws prohibit City property located in a given zone from being used except in accordance with certain enumerated permitted uses.

11. The Bylaws do not specifically stipulate that "medical cannabis dispensary" is a permitted use, although it provides generally for "retail" as a permitted use. The Bylaws also provide that a "medical marihuana production facility" is a permitted use, although only if it operates pursuant to the *MMPRs*. The *MMPRs* were, however, declared unconstitutional in *Allard 2016* and subsequently replaced by the *AMCPRs*.[13] The City has not changed its definition of "medical marihuana production facility" to refer to the *ACMPRs*.

B. The Clinics operate in a safe and reasonable manner

12. Medical cannabis dispensaries have been operating openly in Toronto since the 1990s.[14] The first of the Clinics began operating openly in Toronto on February 14, 2016.[15] At its peak, there were seven Clinics.[16] Presently, four are in business, two were closed due to lack of power, and one was closed following a rash of police raids in June 2017.[17] There are currently 130 employees working at the Clinics. A further 70 employees have been temporarily laid off. The Clinic employees at the Broadview Clinic are unionized and represented by Unifor.

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[12] Affidavit of Mark Sraga, City Application Record, Vol 1, Tab 2, pp 18-20, at paras 11-24 ("Sraga Affidavit").
[13] Sraga Affidavit, *ibid*, City Application Record, Vol 1, Tab 2, pp 23-26, at paras 34-45.
[14] Affidavit of Samantha Deschamps sworn August 22, 2017, Cannaclinic Application Record, Tab 3, p 50, at para 4 ("Second Deschamps Affidavit"); Affidavit of Professor Neil Boyd, Cannaclinic Responding Application Record, Vol 2, Tab 6, p 412, at para 38; Exhibit B to the Boyd Affidavit, p 444.
[15] Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, p 50, at para 4.
[16] *Ibid*, pp 50-51, at para 7.
[17] *Ibid*.

13. The Clinics' mission is to provide safe, consistent access to medical cannabis for Clinic members, all of whom are medical cannabis patients.[18] The Clinics operate in a compassionate manner, pricing their cannabis to ensure that patients of modest means can afford to access medical cannabis there.[19] Like any legitimate business, they deduct payroll taxes and pay HST to the Canada Revenue Agency.[20]

14. As set out in the following paragraphs, the Clinics employ rigorous health and safety standards for their members, staff, and products. Moreover, the Clinics engage positively with the community and the police.

(i) The Clinics hold their patients to health and safety standards

15. The Clinics take steps to ensure that cannabis will be sold only to *bona fide* patients who will benefit from it as a medicine. They sell cannabis only to persons over the age of 19 who suffer from a qualifying condition as confirmed by a doctor. To purchase cannabis, patients must fill out a Clinic Membership Application that includes a declaration that the following is true:[21]

> I declare that I wish to exercise my constitutional right under S7 of the Charter to choose, on medical advice of my family physician, to use cannabis for the treatment of my condition. As I cannot grow my own medicine, I choose to exercise my right to purchase medical marijuana from Cannaclinic Medicinal Society as they provide me with the necessary quality, strain and quantity needed for my treatment. I attest that my health will be negatively impacted if I am unable to access sufficient amount of my medicine with consuming medical cannabis.

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[18] Affidavit of Samantha Deschamps dated May 19, 2017, Cannaclinic Responding Application Record, Vol 5, Tab 26, p 1729, at para 2 ("First Deschamps Affidavit").
[19] Affidavit of Lucia Marchionatto, Cannaclinic Responding Application Record, Vol 3, Tab 13, p 1207, at para 9 ("Marchionatto Affidavit"); First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, p 1729, at para 2.
[20] *Ibid*, p 1729, at para 2.
[21] Exhibit G to the First Deschamps Affidavit, p 1801.

16. The Clinics take the following precautions to ensure that their members are legitimate medical cannabis patients and use cannabis responsibly:

(a) New patients are met and screened by an administrative clerk trained for that purpose;[22]

(b) Prospective patients are required to produce a piece of valid government issued photo identification, which must be confirmed not to be fraudulent;[23]

(c) Patients must complete a membership application form and sign a Code of Conduct that stipulates, among other things, that the patient will not (i) resell or share prescriptions or medical products, (ii) transport cannabis outside of Canada, or (iii) drive or operate heavy machinery under the effects of cannabis;[24]

(d) Patients who have a member of their household under the age of 19 must complete a second Code of Conduct in which they agreed to abide by safe storage practices and not share medical cannabis with anyone under 19;[25]

(e) Any patient found to have breached one of the Codes of Conduct will be permanently banned from all Clinics in Canada;[26] and

(f) Patients who have not previously used cannabis for a medicinal purpose are required to obtain a doctor's note confirming that their doctor is aware of their use of cannabis.[27]

17. Clinic patients must suffer from one of 36 qualifying conditions. However, even if a patient otherwise qualifies, s/he will not be permitted to purchase cannabis from the Clinics if, among other things, s/he (i) has serious heart or liver disease, schizophrenia, or psychosis; (ii) is pregnant or breastfeeding; (iii) does not have valid identification; (iv) admits to using cannabis recreationally; (v) appears to be providing false information; (vi) is intoxicated; or (vii) suffers from a medical condition that worsens with cannabis use.[28]

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[22] *Ibid*, p 1731, at para 8.
[23] *Ibid*, p 1731, at para 8.
[24] *Ibid*, p 1731, at para 8; Exhibit A to the First Deschamps Affidavit, pp 1745-1746.
[25] *Ibid*, p 1732, at para 11; Exhibit B to the First Deschamps Affidavit, p 1747.
[26] *Ibid*, p 1732, at para 10.
[27] *Ibid*, p 1733, at para 13.
[28] *Ibid*, p 1734, at para 15.

(ii) The Clinics hold their staff to health and safety standards

18. The Clinics' staff is knowledgeable about their products. Many are patients themselves and are therefore able to relate to patient needs.[29] Staff members are encouraged to communicate with patients about cannabis in an honest and open way with a view to optimizing patient experience.[30] All staff receive ongoing training and are regularly tested on product knowledge.[31]

19. Every employee undergoes a mandatory three-day training program, which includes training on the above procedures and also includes:

(a) Reviewing a document entitled Steps to Service Guide and a Products Knowledge Guide;[32]

(b) Shadowing an employee and training on product selection, weighing and packing techniques, sanitary procedures, and etiquette;[33] and

(c) Supervised interaction with patients, a day of work under observation, and an assessment for further training, if necessary.[34]

20. The Clinics' administrative clerks are responsible for screening patients and receive an additional four days of training that includes:

(a) Multiple reviews of the Administration Training Manua;[35]

(b) Shadowing a current administrative clerk;[36]

(c) Training regarding the proper approach to patient records, patient completion of the Membership Application and Code of Conduct, and inspecting for fraudulent identification;[37] and

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[29] *Ibid*, p 1737, at para 26.
[30] *Ibid*.
[31] *Ibid*, p 1738, at para 29; Exhibit H to the First Deschamps Affidavit, pp 1802-1813.
[32] Exhibit F to the First Deschamps Affidavit, pp 1789-1799.
[33] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, pp 1737-1738, at para 27.
[34] *Ibid*.
[35] Exhibit A to the Frist Deschamps Affidavit, pp 1745-1746.
[36] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, p 1738, at para 28.
[37] *Ibid*.

(d) Supervised interaction with patients, one day of work under observation, and an assessment for further training or re-assignment, if necessary.[38]

21. The Clinics follow responsible business practices by ensuring that those who fail to abide by safety standards are appropriately disciplined.[39] The Clinics document employee policy infractions.[40] Serious infractions result in a written warning, which may be escalated to termination. Trainees who fail to demonstrate a basic level of competence are terminated.[41]

(iii) The Clinics hold their products to health and safety standards

22. The Clinics subject their inventory to several quality control measures to ensure that patients know what concentration of Tetrahydrocannabinol ("THC") they are getting and that products are free of contaminants. The Clinics' practices are analogous to the Good Production Practices cited by the Federal Government that ensure a clean premises and quality assurance through scientific testing.[42]

23. The Clinics test all their cannabis products — which includes dried cannabis, concentrates, topicals, tinctures, salves, and capsules[43] — for toxins such as heavy metals, pesticides, and other contaminants harmful to humans.[44] Staff members also visually inspect the Clinics' products for microbial contaminants.[45]

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[38] *Ibid*.
[39] Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, pp 58-59, at para 46.
[40] *Ibid*, p 58, at para 43.
[41] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, p 1738, at para 28.
[42] First Costen Affidavit, AG Responding Application Record, Tab 1, p 12, at para 38.
[43] Exhibit E to the First Deschamps Affidavit, Cannaclinic Responding Application Record, Vol 5, Tab 26(E), p 1788.
[44] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, p 1736, at paras 21-23.
[45] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, p 1736, para 24.

24. Unlike LPs, the Clinics are not permitted to test their products at authorized laboratories with a dealer's license under the *Narcotics Control Regulations*.[46] Having been denied access to the same product-testing tools that Health Canada uses,[47] the Clinics have (since September 2016) contracted out to have products tested for potency and contaminants by an independent body.[48] In this proceeding, the Clinics seek authority permitting them to test their products at an authorized cannabis-testing laboratory with a dealer's license under the *Narcotics Control Regulations.*[49]

25. The Clinics are responsive to public health developments. For instance, the Clinics no longer sell edibles unless they are in capsule form as a result of an August 2016 statement by the Toronto Police Service warning that edible cannabis products can be attractive to children. Capsulized edibles do not appeal to children.[50]

(iv) The Clinics engage positively with the police and wider community

26. The Clinics employ a dedicated Administrative Compliance Officer ("Compliance Officer") whose duties include ensuring the safety of Clinic employees, patients, and the surrounding neighbourhood. The Clinics voluntarily introduced the Compliance Officer role in response to a spate of robberies at various dispensaries throughout Toronto.[51] The Clinics anticipated that closer cooperation with the police would deter and combat the threat of robbery.[52]

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[46] CRC, c 1041; Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, pp 52-53, at paras 16-20; Affidavit of Scott Van Boeyen, Cannaclinic Responding Application Record, Vol 5, Tab 27, pp 1833-1834, at paras 13-14 ("Van Boeyen Affidavit").
[47] Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, pp 52-53, at paras 16-20; Van Boeyen Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 27, pp 1833-1834, at paras 13-14.
[48] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, pp 1736-1737, at paras 24-25; Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, p 52, at para 15; Van Boeyen Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 27, p 1832, at paras 4-7, 19.
[49] Cannaclinic Notice of Application, Cannaclinic Application Record, Tab 1, p 3, at para 4; Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, pp 52-53, at para 18.
[50] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, p 1736, at para 20.
[51] *Ibid*, p 1739, at para 31.
[52] *Ibid*, p 1739, at para 31.

27. Part of the Compliance Officer's role is to ensure that any complaints from neighbours are addressed. For instance, the Compliance Officer ensures neighbour parking is respected and that there is no cannabis consumption near the Clinics or neighbouring businesses.[53] The Clinics have instigated a program of proactive neighbour engagement whereby each location distributes information to and invites questions from its neighbours.[54]

28. The Compliance Officer's mandate also includes liaising with Toronto Police Service.[55] Since the role was created in March 2017 (and even earlier), the Compliance Officer and other employees have assisted the police with criminal investigations, including by volunteering video footage and providing statements where incidents have occurred.[56] They have also liaised with police to disseminate crime prevention recommendations and address nuisance complaints.[57]

29. Despite the spirit of cooperation between the Clinics and the police, the Clinics have been subjected to a rash of raids since June 22, 2017.[58] The police have become increasingly aggressive, charging 181 employees with criminal offences, seizing the Clinics' products, equipment, and money, and destroying the inside of the Clinics' premises.[59] Due to the frequent raids and closures, the Clinics' patients have been unable to obtain their medicine in a timely fashion and are therefore prevented from using the strains of cannabis they have determined are most effective for them.[60]

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[53] *Ibid*, p 1744, at para 52; Second Deschamps Affidavit, Cannaclinic Application Record, Tab 3, pp 56-58, at paras 33-40.
[54] *Ibid*, pp 57-58, at para 40.
[55] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, pp 1741-1742, at para 41.
[56] *Ibid*, pp 1740-1742, at paras 35-44; Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, p 59, at paras 47-48.
[57] First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26, pp 1740, 1742-1743, at paras 34, 42, 47.
[58] Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, pp 53-54, at para 23.
[59] *Ibid*, pp 54-55, at paras 24-27.
[60] *Ibid*, p 59, at para 49.

C. Problems with the home grow option

30. Before *Allard 2016*, access to medical cannabis was governed by the *MMPRs*, under which individuals could only access medical cannabis by purchasing it directly from a LP by mail order. In *Allard 2016*, the Federal Court found that this did not constitute reasonable access and was therefore unconstitutional.[61] The government responded by replacing the *MMPRs* with the *ACMPRs*, which provide for an additional home-grow option. Beyond that, however, the *ACMPRs* do not meaningfully alter the previous regime.

31. The problems with the home-grow option begin with the registration process. Cannabis patients face three to six month delays in obtaining their grow registration.[62] Health Canada regularly rejects applications for minor issues.[63] On top of this, growing cannabis is an inherently lengthy and time-consuming process that can prove difficult to anyone, let alone individuals who are dreadfully ill. Many patients cannot grow at home due to housing regulations or residential circumstances or are not physically able to cultivate their own cannabis. Other patients simply do not know how to do so.[64]

32. Grow registrations are valid for no longer than 12 months. That 12-month period begins on the date a doctor signs a medical document required for registration, not when the registration is provided.[65] When the patient receives the registration, s/he must then order seeds or a clone from a

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[61] *Allard (2016)*, *supra*, at para 212 (FC), BOA Tab 2.
[62] Affidavit of Dr. John Kristensen, Cannaclinic Responding Application Record, Vol 1, Tab 5, p 355, at para, 36 ("Kristensen Affidavit"); Affidavit of Eric Nash, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 42-43, at paras 91-95 ("Nash Affidavit"); Affidavit of Shawn Davey, Responding Application Record, Vol 4, Tab 19, pp 1470-1474, at paras 3-16; Affidavit of Shawn Wright, Cannaclinic Responding Application Record, Vol 4, Tab 18, pp 1455-1456, at paras 28-33 ("Wright Affidavit"); Affidavit of Jordan Ryczko, Cannaclinic Responding Application Record, Vol 3, Tab 15, p 1236, at para 6 (second para 6) ("Ryczko Affidavit").
[63] Kristensen Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 5, p 355, at para 37.
[64] Nash Affidavit, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 32-23, at paras 51-52.
[65] *ACMPRs*, ss. 8(2), 178(2)(h).

LP and the patient may not always have start up materials.[66] Once a patient obtains cannabis seeds, it takes another three to twelve months to grow cannabis.[67] If cannabis patients are unable to harvest the cannabis during the period covered by the registration, they are obligated to destroy their crop. Cannabis patients risk being charged with criminal offences if their registration renewal arrives late. To say that this causes significant stress for the patient is an understatement.[68]

D. The LP mail order system does not provide reasonable access to cannabis

33. If someone cannot grow their own cannabis, or simply cannot do so in time given the lengthy and cumbersome registration process, the only alternative is to buy cannabis from a LP by mail order. As was true when *Allard 2016* was decided, this remains the only way for someone to *purchase* medical cannabis. This creates a number of access problems, including: (i) no access on demand; (ii) inability of many to access the mail order system; (iii) barriers to finding the right LP; (iv) prohibitive cost; (v) poor quality and variety; and (vi) limited access to cannabis derivatives.

(i) Patients are denied access on demand

34. Where cannabis is available for purchase only by mail, there is an inevitable delay between immediate need and available supply. For some cannabis patients, not obtaining cannabis in a timely manner can mean severe pain, hospitalization, and long-term health issues.[69]

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[66] Kristensen Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 5, p 356, at para 39.
[67] Wright Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 4, Tab 18, pp 1456-1457, at paras 35, 37; Affidavit of Kenneth Webber, Cannaclinic Responding Application Record, Vol 4, Tab 17, pp 1258-1259, at para 35 ("Webber Affidavit").
[68] *Ibid*, pp 1259-1260, at paras 38-41.
[69] Webber Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 4, Tab 17, pp 1264-1266, at paras 54-61; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 41, at paras 88-90; Affidavit of Jean Scranton, Cannaclinic Responding Application Record, Vol 5, Tab 22, p 1706, at para 14 ("Scranton Affidavit"); Affidavit of Marcell Wilson, Cannaclinic Responding Application Record, Vol 3, Tab 10, pp 1045-1046, at paras 9-12 ("Wilson Affidavit"); Affidavit of Jesse Beardsworth, Cannaclinic Responding Application Record, Vol 3, Tab 12, p 1124, at para 15 ("Beardsworth Affidavit"); Affidavit of Glenda Biladeau, Cannaclinic Responding Application Record, Vol 3, Tab 16, p 1241, at para 6 ("Biladeau Affidavit").

(ii) Many patients cannot use the mail order system

35. The LP mail order system assumes that patients have the ability and understanding to navigate an online order and payment system and the stability of a mailing address. Medical cannabis patients, however, are often physically and economically vulnerable people.[70]

36. Patients who are homeless or live in community housing or assisted living facilities cannot grow their own cannabis or have it delivered to them via mail.[71] They can appoint someone to receive it for them, but finding a person they trust who is also willing to receive cannabis on their behalf is challenging, if not impossible. Although shipments to the homeless may be delivered to a caretaker, health practitioner, or shelter, many vulnerable patients do not have these supports.[72]

37. Medical cannabis patients who do not have bank accounts or credit cards cannot make purchases online or by phone.[73] Patients who are computer illiterate or without computer access have difficulty navigating the mail order system.[74] Some LPs offer payment by money order or pre-paid credit card,[75] but the availability of and fees related to these options are not known.[76] Also, they are inaccessible for many patients, especially the elderly and those of modest means.[77]

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[70] Affidavit of Carolina Landolt, Cannaclinic Responding Application Record, Vol 1, Tab 4, p 319, at para 10 ("Landolt Affidavit").
[71] Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 31, at para 55; Marchionatto Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, Tab 13, p 1208, at para 18; Affidavit of Wendy Lou Durst, Cannaclinic Responding Application Record, Vol 5, Tab 23, pp 1713-1714, at para 7.
[72] First Costen Affidavit, *supra*, AG Responding Application Record, Tab 1, p 16, at para 55.
[73] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, pp 321-322, at paras 21-22; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 32-33, at paras 49, 53-54; Affidavit of Ronald Tokarz, Cannaclinic Responding Application Record, Vol 3, Tab 11, p 1118, at para 8 ("Tokarz Affidavit"); Biladeau Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, Tab 16, pp 1241-1242, at paras 6, 8.
[74] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, p 322, at paras 23-25; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 32, at para 49.
[75] First Costen Affidavit, *supra*, AG Responding Application Record, Tab 1, p 16, at para 52.
[76] Transcript of Cross-Examination of Eric Costen, September 15, 2017, p 43, ln 22-p44, ln 18.
[77] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, pp 321-322, at para 21; Tokarz Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, Tab 11, p 1118, at para 8; Transcript of Cross

38. Even those who can use the mail order system end up confronting a variety of problems: mail deliveries go missing with no explanation and no refund;[78] are stolen from mailboxes or front porches;[79] are sometimes not sent; [80] and are delayed.[81]

(iii) Barriers to finding the right LP

39. Patients have a lot of difficulty addressing mail order problems with the LPs. LPs have been known to exclude patients for modest wrongs. Patients can face phone wait times of one to two hours to speak with a LP representative, and representatives often do not return messages. This is untenable for patients suffering from chronic pain, who often have only a few good hours per day.[82] Moreover, returning poor quality cannabis to LPs for a refund is expensive, difficult, and sometimes impossible.[83]

40. Patients must register with a LP to make purchases. It is costly and time-consuming to switch to another LP in the event of quality or strain variety concerns. To change LP registrations, the patient must make an appointment with a doctor, meet the doctor, and have the doctor sign and send a new document to the LP. Most doctors charge a fee to register a patient.[84] Once this is

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Examination of Eric Costen September 15, 2017, p43, ln 22-p 45, ln 3. Transcript of Cross Examination of Eric Costen, September 15, 2017, p 43, ln 22 – p 45, ln 3.

[78] Wilson Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, Tab 10, p 1046, at para 10.

[79] Affidavit of Mathew Perkins, Cannaclinic Responding Application Record, Vol 3, Tab 9, p 1017, at para 14 ("Perkins Affidavit").

[80] Wright Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 4, Tab 18, p 1453, at para 21.

[81] Beardsworth Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, p 1124, at para 15; Webber Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 4, Tab 17, pp 1256-1257, at para 23-24.

[82] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, pp 323-324, at paras 26-31; Affidavit of Greg Thornton, Cannaclinic Responding Application Record, Vol 5, Tab 20, pp 1694-1695, at paras 8-10 ("Thornton Affidavit"); Beardsworth Affidavit, Cannaclinic Responding Application Record, Vol 3, pp 1123-1124, at paras 13-14; Perkins Affidavit, Responding Application Record, Vol 3, Tab 9, pp 1016-1017, at paras 11-15.

[83] Thornton Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 20, pp 1694-1695, at paras 8-9; Beardsworth Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, pp 1123-1124, at paras 13-14.

[84] Kristensen Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 5, p 354, para 26; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 29, para 32.

complete, it takes on average one week to register the patient. It is not uncommon for there to be delays in the registration process, which can take another two to three weeks.[85]

(iv) Prohibitive cost

41. LPs require minimum purchases: typically between 5-10 grams of dried cannabis or $100-150 for a bottle of cannabis oil, plus tax and shipping. The average LP charge is $7-10 per gram of dried cannabis. The cost of shipping varies. The cost of one shipment is $18.51 with Canada Post or $21.23 with Purolator for a delivery from the LP Aurora.[86] Although some LPs waive their shipping fee in some circumstances, usually when a large order is made,[87] others do not, and some patients do not qualify for a waiver.[88]

42. For patients of modest means, the minimum purchase requirements impose significant hurdles to accessing medical cannabis.[89] These patients can only afford to purchase small amounts of cannabis, such as one gram increments, on an as-needed basis.[90]

(v) Poor quality and lack of strain variety

43. Cannabis patients consistently report issues with the quality of the cannabis they receive from LPs. Because of the nature of the mail order system, patients do not have the opportunity to inspect products before receiving them. Poor quality is not restricted to a single LP. In any event, LP registration is such that "shopping around" can only be done at considerable time, cost, and

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[85] Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 35-36, at paras 65-66; Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, pp 321, 323, at paras 17-19, 28.
[86] Webber Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 4, Tab 17, p 1255, at para 18.
[87] First Costen Affidavit, *supra*, AG Responding Application Record, Tab 1, p 16, at para 53.
[88] Exhibit K to the First Costen Affidavit, AG Responding Application Record, Tab 1K, p 228.
[89] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, pp 319-320, at paras 11-12.
[90] Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 31, 34, at paras 46-48, 57; Webber Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 4, Tab 17, pp 1255, at paras 16-19; Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, p 319, at para 9; Thornton Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 20, pp 1694-1985, at paras 8-9; Beardsworth Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, pp 1122-1123, at para 10.

energy. Some patients never find a LP that satisfies them. Poor quality is also health and safety concern. Despite government regulation, LPs are known to use prohibited and illegal substances to control pests, moulds, and mildews, which then contaminate the products mailed to patients.[91]

44. In addition, not all cannabis is created equal. Different cannabis strains have different medicinal benefits for different patients, and the benefits of a given strain depend on factors such as a patient's medical condition or physiology.[92] LPs carry only a limited number of strains. Strain supply is often unpredictable. It is common for strains to sell out quickly, and for patients to be left with no effective strain. Patients must then wait or risk buying something that is unfamiliar and potentially less effective.[93]

(vi) Limited access to cannabis derivative products (despite R v Smith)

45. Cannabis comes in many forms, such as standardized edibles, topical ointments, creams, concentrates of varying strength, tinctures, and other related cannabis-based medical compounds. Different cannabis products are more clinically appropriate or effective for different patients.[94]

46. For example, cannabis concentrates are a purer form of cannabis. Concentrates are easily absorbed, which means patients can consume less cannabis oil and/or plant matter and still receive the same medicinal benefit.[95] Tetrahydrocannabinolic acid ("THCA") or distillate is a concentrate that is a fast acting anti-inflammatory and pain killer. With a higher potency THCA extract, patients only need a small amount to experience relief and it is effective within 10 to 15 seconds of

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[91] Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 36, at paras 67-68.
[92] Affidavit of Jokubas Ziburkus, Cannaclinic Responding Application Record, Vol 1, Tab 3, pp 264-266, 278, at paras 18-24, 52 ("Ziburkus Affidavit").
[93] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, p 320, at para 14.
[94] *Ibid*, p 319, at para 11; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 39, at para 80; Thomas-Anderson Affidavit, *supra*, p 1698, at para 12.
[95] Ziburkus Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 3, pp 267-269, 270-271, at paras 27-31, 36, 39-41.

exhalation.[96] Topicals provide another example. Topicals need not be inhaled and can be applied externally to provide unique medicinal benefits.[97]

47. The mail order LP system prevents patients from accessing a wide range of medical cannabis derivative products that patients need and use daily. Health Canada only permits the sale of dried medical cannabis and diluted oils containing 1-3% THC.[98] It is illegal for LPs to manufacture, distribute, or sell any other standardized or tested cannabis-based medical product such as an edible, tincture, concentrate, topical ointment, or cream.[99]

E. The Clinics provide reasonable access to medical cannabis

48. The Clinics provide reasonable access to medical cannabis that cannot be obtained through either the mail order system or by growing cannabis at home. In particular, the Clinics provide reasonable access in a way that the LPs are incapable of doing by allowing patients to:

(a) Purchase cannabis in person. Doing so is important because it allows patients to see and smell their medical cannabis before they purchase it.[100] Patients can detect familiar scents indicative of therapeutic properties that have been effective for them in the past.[101] Storefronts allow patients to speak in person with knowledgeable staff who can answer questions and provide examples of different products, strains, and methods of administration.[102]

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[96] Ryczko Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, Tab 15, pp 1235-1237, at paras 5-7; Ziburkus Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 3, pp 268-270, at paras 34-38; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 39, at para 78.
[97] Tokarz Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, Tab 11, p 1119, at para 12; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 38-39, at paras 77-79; Ziburkus Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 3, pp 278-279, at paras 55-58.
[98] Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 38-39, at paras 77-81; Ziburkus Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 3, pp 270-271, at paras 39-40.
[99] Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, p 39, at para 78.
[100] *Ibid*, pp 38, at paras 75 and 76; Scranton Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 22, p 1706, at paras 13-15; Thornton Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 20, p 1695, at para 10.
[101] Ziburkus Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 3, pp 279-280, 282, at paras 59, 64.
[102] Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 38, at paras 75 and 76; Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, p 324, at paras 31-32; Kristensen

(b) Engage in trial and error. Given the many varieties of cannabis, choosing the right medication for a given patient is an individualized and iterative process. Trial and error plays a significant role in determining the appropriate cannabis strain and product for a patient.[103] Patients will more easily find the right medicine if they have access to a readily accessible local supply that sells in small doses.

(c) Purchase cannabis in small unit sizes. This increases access for patients of modest means and allows for sampling at relatively low financial risk. A 40 millilitre bottle of oil at a LP can cost $90.[104] In comparison, a similar, more potent tincture at the Clinics sells for $40. The latter product lasts much longer and is therefore a more economically viable manner of treatment for patients with modest means.[105]

(d) Access to a broader ranger of cannabis strains and derivative products: the Clinics have a significantly wider strain selection than LPs, which offer limited strain variety that frequently sells out.[106] The Clinics also sell a range of cannabis products, including dried cannabis, concentrates, topicals, tinctures, salves, and capsules that are otherwise unavailable through LPs.[107]

49. Medical cannabis is the only medication that patients cannot purchase in person.[108] Dispensaries resolve this issue and allow patients to make and act on decisions about their health in a manner consistent with more traditional forms of treatment.

PART III – LAW AND ARGUMENT

50. The City has brought an application for an interlocutory injunction to shut down the Clinics. The Clinics have brought their own application for an interlocutory injunction to restrain,

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Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 5, pp 357-359, at paras 45(e)-47, 52-53; Scranton Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 22, p 1706, at para 12.

[103] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, p 320, at para 13; Scranton Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 22, p 1705, at para 12; Transcript of the Cross-Examination of Eric Costen dated September 15, 2017, p 24, ln 23-25.

[104] Exhibit B to the Affidavit of Maxine MacKenzie, Cannaclinic Responding Application Record, Vol 3, Tab 14(B), p 1223 ("MacKenzie Affidavit").

[105] Exhibit C to the First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26(C), p 1775.

[106] Landolt Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 4, pp 320-321, at paras 14-15 and 19; Nash Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 2, pp 34-35, at paras 60-63; Wright Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 4, Tab 18, pp 1451-1452, at paras 12-13; MacKenzie Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 3, Tab 14, pp 1213-1214, at paras 13-21.

[107] Exhibit E to the First Deschamps Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 5, Tab 26(C), p 1788.

[108] Kristensen Affidavit, *supra*, Cannaclinic Responding Application Record, Vol 1, Tab 5, p 359, at para 53.

suspend, exempt from, and stay the enforcement of the Bylaws and the *CSDA* against them on the basis that those laws are unconstitutional. The Clinics seek an interlocutory *exemption* from those laws pending the hearing of its application for permanent relief. This is a narrow remedy. The Clinics do not seek to prevent the Bylaws and the *CDSA* from being enforced against other cannabis dispensaries, which may not operate with the same safeguards and may not restrict their sales to adult patients with legitimate medical needs.

51. For the reasons given below, the Clinics submit that the applicable test on both the City's application and their own application is the three-step test from *RJR-MacDonald Inc v Canada (Attorney General)* (the "*RJR* test"). [109] Properly applied, the *RJR* test should result in a dismissal of the City's application and a granting of the Clinics' application. The analysis boils down to a balancing of harms. The harms that medical cannabis patients would suffer from an interlocutory order closing the Clinics outweigh the harms that the government would suffer from not being able to enforce the Bylaws and *CDSA* against the Clinics between now and the final hearing of these applications. The public interest favours the relief sought by the Clinics.

A. *RJR* test should govern the analysis

52. The Clinics submit that the three-step *RJR* test governs both the City's application and their own application for interlocutory relief. The *RJR* test asks three questions: (i) whether there is a serious issue to be tried; (ii) whether the applicant will suffer irreparable harm if the relief is not granted; and (iii) whether the balance of convenience favours granting the relief. [110]

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[109] *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 (CanLII), at paras 77-80, BOA Tab 33. See also *Allard v HMTQ*, 2014 FC 280 (CanLII), at para 68, aff'd 2014 FCA 298 (CanLII), BOA Tab 3.
[110] *RJR-MacDonald*, *supra* (SCC), BOA Tab 33; *Allard (2014)*, *ibid* (FC), BOA Tab 3.

53. The *RJR* test applies to the Clinics' application because they seek to restrain government action on the basis of *Charter* concerns. The Supreme Court's decision in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd* ("*Metropolitan Stores*") is directly on point. There, the Court first articulated the *RJR* test and applied it to an application to stay the labour board's power to impose a collective agreement under its statute on the basis that the statute was unconstitutional.[111] More recently, in *Canadian Civil Liberties Association v Toronto Police Service*, Justice Brown (as he then was) confirmed that the *RJR* test applies in such circumstances.[112]

54. The *RJR* test also applies to the City's application notwithstanding that the City is seeking a statutory injunction under s. 380 of the *City of Toronto Act, 2006.*[113] The Clinics concede that the test that ordinarily applies to statutory injunctions is the "Clear Breach" test: so long as the public authority can establish a clear breach of its bylaws, an injunction will issue unless the respondent can show exceptional circumstances.[114] Enforcement of a valid law is presumed to be in the public interest; therefore, the irreparable harm and balance of convenience factors are pre-emptively satisfied where a public authority seeks to ensure compliance with the law.[115]

55. The "Clear Breach" test, however, falls away when the respondent raises a meaningful *Charter* argument about the constitutionality of the bylaws as the Clinics do in this case. This makes sense because, as the Supreme Court made clear in *Metropolitan Stores*, laws are not

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[111] [1987] 1 SCR 110 (CanLII), at paras 33-35, BOA Tab 21.
[112] 2010 ONSC 3525 (CanLII), at para 81, BOA Tab 10. See also *Batty v Toronto (City)*, 2011 ONSC 6785, BOA Tab 4, and *Harper v Canada (Attorney General)*, [2000] 2 SCR 764 (CanLII), BOA Tab 17.
[113] SO 2006, c 11, Sched A.
[114] *Maple Ridge (District) v Thornhill Aggregates Ltd* (1998), 54 BCLR (3d) 155 (CA) (CanLII), at para 9, BOA Tab 22; *Newcastle Recycling Ltd v Clarington (Municipality)* (2005), 204 OAC 389 (CA) (CanLII), at paras 31-33, BOA Tab 23; *Ontario (Minister of Agriculture & Food) v Georgian Bay Milk Co*, [2008] OJ No 485 (SCJ) (CanLII), at paras 34-35, BOA Tab 24.
[115] *Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647 (CanLII), at paras 27-28, BOA Tab 37; *Georgian Bay Milk Co*, *supra*, at para 34, BOA Tab 24, citing *Canada v IPSCO Recycling Inc*, [2004] 2 FCR 530 (FCTD) (CanLII), at paras 50 and 51, BOA Tab 9.

presumed to be constitutionally valid at the interlocutory stage when a meaningful *Charter* argument has been raised.[116] If the constitutionality of a bylaw is in doubt, then it may not be in the public interest to enforce that bylaw. Therefore, the irreparable harm and balance of convenience factors cannot be treated as being pre-emptively satisfied.

56. The British Columbia Supreme Court squarely addressed this issue in *Vancouver Board of Parks & Recreation v Mickelson* ("*Mickelson*").[117] There, the City of Vancouver sought to enforce its bylaw by evicting a "tent city". The defendants argued that the bylaw was of no force and effect because it offended the *Charter.* In considering the test for injunctive relief, the Court held that the "Clear Breach" test (named the "*Thornhill* test"[118] in British Columbia) does not apply when the constitutionality of a bylaw is in play.[119] In these circumstances, the Court should have regard to "the usual conditions for the granting of an injunction…with due consideration for the nature of the public interest engaged in the assessment of the balance of convenience."[120] In other words, the Court should apply the *RJR* test.

57. The British Columbia Supreme Court has followed *Mickelson* on several occasions and the issue is settled law in that province.[121] While we have been unable to find any direct authority on this point in Ontario, the reasoning in *Mickelson* and its progeny is persuasive. This reasoning should be followed in this case, and the *RJR* test should therefore be applied here.

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[116] *Metropolitan Stores Ltd*, *supra*, at para 15 (SCC), BOA Tab 21. See also *Allard (2014)*, *supra*, at para 68 (FC), BOA Tab 3.
[117] *Vancouver Board of Parks & Recreation v Mickelson*, 2003 BCSC 1271 (CanLII), BOA Tab 39.
[118] *Thornhill*, *supra* (BCCA), BOA Tab 22.
[119] *Mickelson*, *supra*, at paras 18-19 (BCSC), BOA Tab 39.
[120] *Ibid*, at para 20.
[121] See *Victoria (City) v Thompson*, 2011 BCSC 1810 (CanLII), at paras 35-56, BOA Tab 41; *Abbotsford (City) v Shantz*, December 20, 2013 (Unreported), at paras 14-24, BOA Tab 1; *Vancouver Board of Parks and Recreation v Williams*, 2014 BCSC 1926 (CanLII), at paras 58-60, BOA Tab 40; *British Columbia v Adamson*, 2016 BCSC 584 (CanLII), at paras 23-35, BOA Tab 6; *Vancouver (City) v Wallstam*, 2017 BCSC 937, at para 35, BOA Tab 38.

58. The "Clear Breach" test should also be rejected in this case because it is not clear that the Clinics are breaching the Bylaws.[122] More specifically, it is not clear that the Clinics are operating a non-permitted use.

59. The Clinics acknowledge that they are not a "medical marihuana production facility" because they are customer facing storefronts that *distribute* rather than *produce* cannabis for medical purposes. It is not clear, however, that the Clinics do not fall within one of two other permitted uses: "Retail Store" and "Wellness Centre". The Bylaws list "Retail Store" as a permitted use for the zone, in which all seven locations of the Clinics are located. [123] "Retail Store" is defined as a "premises in which goods or commodities are sold, rented or leased."[124] "Wellness Centre" is also a permitted use in the Clinics' zone.[125] "Wellness Centre" is defined as a "premises providing services for therapeutic and wellness purposes."[126] Interestingly, the definition of "Wellness Centre" expressly excludes massage therapy, medical offices, and body rub services. It does not, however, exclude "cannabis dispensaries".

60. The City appears to rely on the proposition that uses that are prohibited by federal statute (in this case, the *CSDA* and the *ACMPRs*) are necessarily *not* permitted uses under municipal zoning bylaws. But this is by no means clear. The City of Vancouver, for instance, has specifically zoned for cannabis dispensaries by explicitly providing that "Retail Uses" includes "Medical

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[122] *Peachland (District) v Peachland Self Storage Ltd*, 2011 BCCA 466 (CanLII), at para 30, BOA Tab 25; *York (Regional Municipality) v DiBlasi*, 2014 ONSC 3259 (CanLII), at para 63, BOA Tab 42.
[123] Sraga Affidavit, *supra*, City Application Record, Vol 1, Tab 2, pp 19 and 21, at paras 15 and 26; Bylaw 569-2013, s. 40.10.20.10(1), Exhibit B to the Sraga Affidavit, *supra*, p 41; Bylaw 438-86, s. 8(1)6, Exhibit H to the Sraga Affidavit, *supra*, City Application Record, Vol 1, Tab 2(H), at p 166.
[124] Bylaw 569-2013, Chapter 800 Definitions, s (720), Schedule "B". A similar definition is found in Bylaw 438-86, s. 2(1)55, Schedule "B".
[125] Bylaw 569-2013, s 40.10.20.10(1); Exhibit B to the Sraga Affidavit, *supra*, City Application Record, Vol 1, Tab 2, p 41.
[126] Bylaw 569-2013, Chapter 800 Definitions, s (937), Schedule "B".

Marijuana-Related Use".[127] If it is open to Vancouver to do so specifically, then it is arguably open to the City to do so generally under the permitted use categories of "Retail Store" and/or "Wellness Centre". In the absence of any provision that excludes cannabis dispensaries from these categories, the question of whether they can be included as a "Retail Store" and/or "Wellness Centre" will likely require expert evidence to be adduced from a planner at a full hearing on the merits.[128] On its face, it is arguable that at least one of these permitted uses would apply. Therefore, the "Clear Breach" test is unavailing for the City.

B. *RJR-MacDonald* should allow the Clinics to operate

61. The Clinics' primary submission is that the *RJR* test should be applied to both the City's application and the Clinics' application for interlocutory relief. Each stage of this test is reviewed below as it concerns both applications. The results of both analyses ultimately lead to the same destination: the Clinics should be allowed to operate and provide reasonable access to medical cannabis pending a final hearing in these applications.

(i) Serious Issue to be Tried

62. The first step under *RJR-MacDonald* is to ask whether the applicant has established a serious issue to be tried. The threshold for establishing a serious issue is low, and a "prolonged examination of the merits is generally neither necessary nor desirable."[129]

63. In its application, the City must satisfy the Court that it raises a serious issue regarding the Clinics' purported infringements of the Bylaws. As explained in paras. 58-60, *supra*, it is by no

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[127] City of Vancouver Zoning and Development Bylaw, s. 2, "retail use", Schedule B; See also Regulations for medical marijuana related businesses, ss. 2, 4, "Explanation", Exhibit B to the Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, at pp 70, 75-80.
[128] See, e.g., *Re Avila Investments Ltd et al*, OMB Decision No. 2151, July 28, 2006, at p 8, BOA Tab 31.
[129] *RJR-MacDonald*, *supra*, at paras 54-55 (SCC), BOA Tab 33.

means clear that the Clinics have breached the Bylaws. But since the threshold for "serious issue" is low, the Clinics concede that the City has cleared this hurdle.

64. With respect to the Clinics' application, the question is whether they have raised a serious issue as to the unconstitutionality of the City's bylaws and the federal criminal law. The answer is "yes". The Courts have held that this stage of the *RJR* test is typically easily met by an applicant raising a *Charter* claim,[130] in part because the complex nature of a constitutional claim makes it difficult for an application judge to conduct a detailed analysis at the interlocutory stage.[131] Given the strength of the Clinics' *Charter* arguments (outlined in detail below), they easily clear this bar. The Clinics have raised serious questions regarding the constitutionality of the Bylaws (in the event that the City's interpretation is right that they prohibit cannabis dispensaries) and the *ACMPRs* (and therefore the *CDSA*, to which the *ACMPRs* are an exemption scheme[132]) under ss. 7, 2(b), and 15(1) of the *Charter*. Although they intend to rely on all three *Charter* provisions in seeking final relief in this case, they will focus on s. 7 of the *Charter* at this interlocutory stage.

65. Section 7 of the *Charter* provides: "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." In deciding whether there is a s. 7 *Charter* breach, the Courts proceed in two stages: (i) whether there has been a deprivation of the right to life, liberty or security of the person; and (ii) if so, whether the deprivation is in accordance with the principles of fundamental justice.

66. In this case, the Bylaws and the *ACMPRs* violate the rights to liberty and security of the person belonging to the patients who purchase medical cannabis from the Clinics. They do so in a

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[130] See, for example, *Allard (2014)*, *supra*, at paras 70-74 (FC), BOA Tab 3.
[131] *RJR-MacDonald*, *supra*, at para 53 (SCC), BOA Tab 33.
[132] As the Supreme Court confirmed in *Smith*, *supra*, at para 13 (SCC), BOA Tab 29, the constitutionality of the *CDSA* prohibition directly depends on the constitutionality of the exemption scheme.

manner that is contrary to three principles of fundamental justice: laws must not be arbitrary; laws must not be overbroad; and laws must not be grossly disproportionate.

67. Before each stage of the s. 7 analysis is examined, it is worth noting that this case is just the latest chapter in a large volume of cannabis-related s. 7 litigation against the federal criminal law regime that includes *R v Parker*,[133] *Hitzig v Canada*,[134] *Stefkopoulos v Canada (Attorney General)*,[135] *R v Beren*,[136] *R v Smith*,[137] and *Allard 2016*.[138]

68. *Parker* was the first significant case to constitutionalize the right of reasonable access to medical cannabis. At that time, the *CDSA* imposed a blanket prohibition on cannabis possession. The Ontario Court of Appeal held that this violated s. 7 of the *Charter* and that the government must provide "reasonable access" to cannabis for medically qualified patients.

69. After *Parker*, the government promulgated the *Medical Marihuana Access Regulations* ("*MMARs*"). The *MMARs* restricted medical cannabis to "dried" cannabis, and denied patients access to cannabis in non-dried form (*e.g.*, edibles and other derivative medicines). This was eventually challenged in *Smith*. The Supreme Court of Canada ultimately held that the restriction to "dried" cannabis was an arbitrary limitation on the rights to liberty and security of the person under s. 7 of the *Charter*.[139]

70. In 2014, the government replaced the *MMARs* with the *MMPRs*. The *MMPRs* differed from the *MMARs* in a significant respect: they removed from patients the option of producing

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[133] *Supra* (Ont CA), BOA Tab 28.
[134] [2003] OJ No 12 (SCJ), varied on other grounds (2000), 49 OR (3d) 481 (CA) (CanLII), BOA Tab 18.
[135] 2008 FC 33, BOA Tab 36.
[136] 2009 BCSC 429, leave to appeal refused [2009] SCCA No 272, BOA Tab 26.
[137] [2015] 2 SCR 602, BOA Tab 29.
[138] *Supra*, BOA Tab 2.
[139] *Smith*, *supra*, at paras 28, 33 (SCC), BOA Tab 29.

cannabis for themselves and required them, instead, to purchase from mail-order commercial producers. This restriction was challenged in *Allard 2016*, which the parties agreed would serve as the national test case on whether the *MMPRs* complied with the *Charter*. The Federal Court held that the restriction was unconstitutional under s. 7 of the *Charter* and suspended the declaration of invalidity for six months.[140] The government did not appeal *Allard*. Instead, it replaced the *MMPRs* with the *ACMPRs*, which are now at issue in this case.

71. This is the backdrop against which the Clinics now raise their *Charter* arguments against the Bylaws and the current federal regime.

a. Rights to Liberty and Security of the Person of Medical Cannabis Patients

72. As corporations, the Clinics do not enjoy the right to life, liberty, or security of the person in their own capacity. They do, however, have standing to challenge the constitutionality of any laws that the City or federal government seeks to apply to them by arguing the s. 7 rights of others. This follows from the rule in *Big M Drug Mart*: no one shall be convicted of an offence under an unconstitutional law[141] (or be subject to coercive proceedings and sanctions authorized by an unconstitutional law).[142] Thus, in *Smith*, the Supreme Court allowed a dispensary employee to challenge the constitutionality of the *MMARs* on the basis that they did not allow medical cannabis users to access "non-dried" cannabis even though the accused himself did not use medical cannabis.[143] Similarly, it is open to the Clinics to rely on the s. 7 rights of medical cannabis patients

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[140] *Allard 2016*, *supra*, at para 162, BOA Tab 2.
[141] *Smith*, *supra*, at para 11 (SCC), BOA Tab 29.
[142] *Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 (CanLII), at para 34, BOA Tab 11.
[143] *Smith*, *supra*, at paras 11-13 (SCC), BOA Tab 29. See also *R v Morgentaler*, [1988] 1 SCR 30 (CanLII), BOA Tab 27, in which the Supreme Court of Canada allowed male doctors to challenge the constitutionality of an abortion law on the basis that it violated the s. 7 rights of female patients; and *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 (CanLII), BOA Tab 30 in which the Supreme Court allowed a corporation to argue that absolute and strict liability offences violate s. 7 of the *Charter* even though corporations do not hold s. 7 rights.

in resisting the City's injunction and in seeking an exemption from the enforcement of the Bylaws and *ACMPRs* against their operations.

73. The Clinics contend that the Bylaw and the *ACMPRs* violate the s. 7 rights of individuals in need of cannabis for medical purposes in two respects: their right to liberty and their right to security of the person.

74. The right to liberty is engaged in two distinct ways. First, the right to liberty "grants the individual a degree of autonomy in making decisions of fundamental importance".[144] This includes decisions regarding medical care.[145] More specifically, the decision to take medical cannabis to treat symptoms of a serious medical condition has been held to be a decision of fundamental importance.[146] As the Federal Court said in *Allard 2016*, "dispensaries are at the heart of cannabis access."[147] By prohibiting dispensaries, the Bylaws and the *ACMPRs* restrict access to medical care and therefore infringe the right to liberty. When a patient is presented with a means of access, "the simple interference with making a decision about bodily integrity and medical care has been held to trench on liberty."[148]

75. Second, the right to liberty is engaged because the *ACMPRs* operate as an exemption to the criminal law prohibition on possession of cannabis under the *CDSA*. If a patient does not comply with the *ACMPRs*, and instead obtains cannabis outside of the regulatory regime (*e.g.*, from one of the Clinics), then s/he is committing a criminal offence under s. 4 of the *CDSA* and is liable to

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[144] *Morgentaler*, *supra*, at para 230 (SCC), BOA Tab 27; *Allard 2016*, *supra*, at paras 187, 189 (FC), BOA Tab 2.
[145] *Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII), at para 67, BOA Tab 13 ("The law has long protected patient autonomy in medical decision making.")
[146] *Allard 2016*, *supra*, at para 192 (FC), BOA Tab 2; *Parker*, *supra*, at para 92 (Ont CA), BOA Tab 28; *Smith*, *supra*, at para 18 (SCC), BOA Tab 29.
[147] *Allard 2016*, *supra*, at para 162 (FC), BOA Tab 2.
[148] *Ibid*, at para 191.

imprisonment. The possibility of imprisonment infringes the right to (physical) liberty.[149] One should not have to choose between going to jail and accessing medicine.

76. The Bylaws and *ACMPRs* also violate the right to security of the person under s. 7 of the *Charter*. In *Canada (Attorney General) v PHS Community Services Society*, the Supreme Court of Canada held that "[w]here a law creates a risk to health by preventing access to health care, a deprivation of the right to security of the person is made out."[150] This has been specifically applied to the access to cannabis context, and is true even where the impugned law is a regulatory regime and not a criminal law.[151] By prohibiting dispensaries, the Bylaws and the *ACMPRs* impede access to cannabis by those who need it for medical reasons. This violates their security of the person.

b. Principles of Fundamental Justice: Arbitrariness, Overbreadth, and Gross Disproportionality

77. Once a *Charter* claimant has established a deprivation of the right to life, liberty, or security of the person, the question is whether the deprivation is in accordance with the principles of fundamental justice. Three principles of fundamental justice are at issue here are: (i) laws must not be arbitrary; (ii) laws must not be overbroad; and (iii) laws must not be grossly disproportionate.

78. First, arbitrariness exists where there is "no connection" between the effect and the objective of the law.[152] This standard can be met where the effect of the law is "inconsistent" with the objective because it undermines it. Second, overbreadth exists where a law "goes too far and

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[149] *Ibid*, at para 188; *Smith*, *supra*, at para 17 (SCC), BOA Tab 29; *Parker*, *supra*, at para 92 (Ont CA), BOA Tab 28.
[150] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII), at para 93, BOA Tab 8. See also *Morgentaler*, *supra*, at para 78 (SCC), BOA Tab 27; *Parker*, *supra*, at paras 92, 97 (Ont CA), BOA Tab 28; *Allard (2014)*, *supra*, at para 74 (FC), BOA Tab 3.
[151] *Allard (2016)*, *supra*, at para 199 (FC), BOA Tab 2; *Smith*, *supra*, at para 18 (SCC), BOA Tab 29.
[152] *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII), at para 98, BOA Tab 5.

interferes with some conduct that bears no connection to its objective."[153] Such a law will be "arbitrary *in part*".[154] In other words, there is no rational connection between the purposes of the law and *some* of its impacts.[155] The focus is not on broad social impacts, but on the impact of the measure on the individual whose life, liberty, or security of the person is trammelled.[156] Finally, gross disproportionality targets a different evil from that targeted by arbitrariness and overbreadth. The latter principles look for the absence of a connection between the means and the end.[157] Gross disproportionality assumes a connection, but looks at the severity of the impact of the means as measured against the importance of the end.[158] Gross disproportionality will be found "where the seriousness of the deprivation is totally out of sync with the objective of the measure."[159]

79. Each of these principles requires that the objective of the impugned law be identified in order to examine the relationship (if any) between the objective of the law and its effects. The objective of the *CDSA* has already been identified by the Supreme Court: it is to protect health and public safety.[160] The *ACMPRs*, as an exemption scheme promulgated under the *CDSA*, has the same general objective. It can also be said to have a more specific objective: to provide Canadians with a greater range of options to access for cannabis for medical use to address the issue of reasonable access as identified by the Court in *Allard (2016).*[161]

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[153] *Ibid*, at para 101.
[154] *Ibid*, at para 112.
[155] *Ibid*, at para 112.
[156] *Carter*, *supra*, at para 85 (SCC), BOA Tab 13.
[157] *Ibid*, at para 108.
[158] *Ibid*, at para 109.
[159] *Ibid*, at para 120.
[160] *PHS Community Services Society*, *supra*, at para 129 (SCC); *Smith*, *supra*, at para 24 (SCC), BOA Tab 8.
[161] Regulatory Impact Analysis Statement, Exhibit E to the Affidavit of Eric Costen, affirmed September 7, 2017, AG Responding Application Record, Tab 1(E), p 83, at p 3385. See also *Allard (2016), supra*, at paras 219-220 (FC), where the objective of the *MMPRs* was described as to improve the way in which a person who needs access to medical cannabis gains such access .

80. Given these objectives, the Clinics submit that the *CDSA* and *ACMPRs* are arbitrary and overbroad. The blanket prohibition on cannabis dispensaries frustrates rather than promotes the objectives of public safety and health. As discussed in paras. 95 to 98, *infra*, the public benefits of banning dispensaries are speculative at best. On the contrary, as set out in paras. 88 to 92, *infra*, the harms to those in need of cannabis for medical purposes are severe. Thus, the effects of the federal regime are inconsistent with its objective of promoting public health and safety.

81. It is worth remembering that since *Parker*, the Courts have repeatedly held that restrictions on access to medical cannabis violate s. 7 of the *Charter* on the basis of arbitrariness (*i.e.*, by unreasonably restricting access to medicine, they frustrate the objectives of their own legislation to promote public safety and health). Throughout this litigation, the Courts have adverted to dispensaries as a way of providing the public with a safe and legal supply of medical cannabis.[162] In *Hitzig*, the Court of Appeal urged the government to, in effect, regulate dispensaries:

> …a central component of the Government's case is that there is an established part of the black market, which has historically provided a safe source of marihuana to those with the medical need for it, and that there is therefore no supply issue. The Government says that these "unlicensed suppliers" should continue to serve as the source of supply for those with a medical exemption. Since our remedy in effect simply clears the way for a licensing of these suppliers, the Government cannot be heard to argue that our remedy is unworkable.[163]

82. This state of affairs has persisted for 16 years, with the Courts making *Charter* rulings and the government responding to those decisions in such minimal fashion as to ensure further litigation and further declarations of invalidity. All the while patients are suffering. The *ACMPRs* continues this pattern of attempting to restrict lawful access to a safe, effective supply of medical

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[162] *Sfetkopoulos*, *supra*, at para 19 (FC), BOA Tab 36; *Allard 2016*, *supra*, at paras 162-163 (FC), BOA Tab 2.
[163] *Hitzig*, *supra*, at paras 162, 174 (Ont CA), BOA Tab 18.

cannabis as much as possible. By maintaining a complete ban on dispensaries, the *ACMPRs* (and therefore the *CDSA)* are arbitrary and in violation of s. 7 of the *Charter*.

83. Even if the Court were inclined to hold that the *CDSA* and *ACMPRs* are not arbitrary, it should nevertheless find that they are overbroad. The Court should reach this outcome if it finds that there is *some* rational connection between the objective of promoting public health and safety and the complete ban on dispensaries — for instance, because the complete ban on dispensaries eliminates all risk associated with that activity.[164] This would still leave open the question of whether it goes too far to ban all dispensaries. The Clinics submit that it does. Even if the scanty evidence of harms associated with dispensaries is accepted, the blanket prohibition catches people outside of the class of persons who are causing such harms. The law prohibits everyone who operates a dispensary and obtains cannabis from a dispensary without distinguishing between those who do so safely and securely without any risk to public safety, and those who do not.

84. Beyond the *CDSA* and *ACMPRs*, there remains the question of the constitutionality of the Bylaws. They are part of a zoning and planning regime, and their purpose is therefore to provide fair planning processes, encourage co-operation among various interests, and promote sustainable development.[165] In relation to these objectives, the Clinics submit that the Bylaws are overbroad and grossly disproportionate insofar as they prohibit dispensaries. No one disputes the City's need to organize the activities within its boundaries in a practical and sensible manner. The question is whether it goes too far for the City to simply refuse to zone for dispensaries of any sort (if that is in fact what they have done), and thereby impose a *de facto* ban on the provision of a constitutionally-protected medical product. It does. A blanket prohibition on dispensaries deprives

[164] *Allard (2016), supra*, at para 267 (FC), BOA Tab 2.
[165] See, for example, *Planning Act*, RSO 1990, c P13, s 1.1, "Purposes".

patients of medical relief. This goes far beyond what is necessary to achieve the City's zoning and planning objectives. It is also grossly disproportionate to the City's objectives given the severe harms caused to those who are suffering from serious illnesses.

c. Section 1: Rational Connection, Minimal Impairment, and Balancing of Salutary vs Deleterious Effects

85. Where the Court finds a violation of a *Charter* right, the onus shifts to the Crown to show whether the law is reasonably and demonstrably justified under s. 1. A law found to violate s. 7 will rarely be justifiable under s. 1.[166]

86. The principles of arbitrariness, overbreadth, and gross disproportionality that form the basis of the fundamental justice analysis largely resemble two of the factors under the *Oakes* test for s. 1: (i) rational connection; and (ii) minimal impairment. Where a law is found to be "arbitrary" in violation of s. 7, it will almost certainly fail the "rational connection" stage because an arbitrary law will typically not be rationally connected to the relevant state objective.[167] Similarly, where a law is found to be "overbroad", it will almost certainly fail the "minimal impairment" analysis because a law that goes farther than required to achieve a state objective necessarily fails to impair a s. 7 right as little as possible.[168]

87. Should this Court accept that the *ACMPRs* and the Bylaws are arbitrary and overbroad such that they are not in accordance with principles of fundamental justice, it should have little trouble accepting that the s. 7 violations cannot be justified under s. 1. Indeed, in *Allard (2016)*, the Federal Court held that the arbitrary access prohibitions of the *MMPR* scheme were not rationally

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[166] *Re BC Motor Vehicle Act*, [1985] 2 S.C.R. 486 (CanLII), at para 93, BOA Tab 32.
[167] See, for example, *PHS Community Services Society*, *supra*, at para 137 (SCC), BOA Tab 8.
[168] See, for example, *Bedford*, *supra*, at paras 139-140, 162 (SCC), BOA Tab 5.

connected to the government objective of promoting health and safety.[169] It also held that the overbroad scheme failed to minimally impair the claimants' s. 7 rights.[170]

(ii) Irreparable Harm

88. Moving to the second stage of the *RJR* test, the question is whether the refusal to grant interlocutory relief will cause harm that cannot be remedied should the ultimate decision on the merits result in a finding in favour of the moving party.[171] Irreparable harm is harm that cannot be quantified in monetary terms or which cannot be cured,[172] and can include harm to those who are not the moving parties in the case.[173]

89. If the Clinics' injunctive relief is not granted in this case, irreparable harm will be caused to those who rely on them for reasonable access to medical cannabis. At the interlocutory stage in the *Allard* case, the Federal Court recognized that an inability to afford medical cannabis under the *MMARs* constitutes irreparable harm.[174] The same conclusion should be reached in this case.

90. In the absence of medical cannabis dispensaries, patients can access medical cannabis only by purchasing it from LPs by mail-order or by obtaining a licence to grow it themselves at home. Both methods are highly problematic and render medical cannabis inaccessible for many. The problems with the mail-order restriction have been addressed at length at paras 33 to 47, *supra*. It bears repeating however, that the mail order system denies patients regular access to cannabis by: (i) denying patients access on demand; (ii) excluding those who cannot use the mail order system;

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[169] *Allard 2016*, *supra*, at paras 253, 279, BOA Tab 2.
[170] *Ibid*, at paras 281-283.
[171] *RJR-MacDonald*, *supra*, at para 63 (SCC), BOA Tab 33.
[172] *Ibid*, at p 64.
[173] Kent Roach, *Constitutional Remedies in Canada*, 2d ed (Toronto: Thomson Reuters, 2016), at 7.360, BOA Tab 19. In *Morgentaler*, *supra*, BOA Tab 27the Supreme Court struck down abortion laws after finding they violated women's rights despite the case involving the prosecution of Dr. Morgentaler and his abortion clinic.
[174] *Allard (2014)*, *supra*, at para 92-96 (FC), BOA Tab 3.

(iii) imposing barriers to finding the right LP; (iv) rendering medical cannabis unaffordable for many with shipping charges and minimum purchase requirements; (v) failing to guarantee quality and variety; and (vi) limiting availability of derivative products. Collectively, this amounts to a substantial interference with an individual's *Charter* right to access medicine.

91. The shortcomings of the mail order system have not been resolved by the addition of a home grow option. As set out above at paras 30 to 32, *supra*, growing cannabis at home is a complex, lengthy process that demands time, dexterity, and energy. Many cannabis patients are incapable of growing medical grade cannabis — and even those who can have difficulty doing so within the limited time frame permitted by a grow registration.

92. In *Allard 2016*, the Federal Court determined that the mail-order model failed to provide Canadians with reasonable access to medical cannabis. Even at this interlocutory stage, it is clear from the evidence that the home grow option has not done enough to bridge this gap identified in *Allard 2016*. If mail-order does not provide reasonable access to cannabis, it is difficult to see how this is accomplished by a complex process that requires patients — some of whom are dreadfully ill — to harvest their own medicine. Autonomy in medical decision-making hardly exists when one's access to one's medicine of choice is burdened with this many restrictions.

93. Of course, the Clinics, as operators, will also suffer their own harms. They would suffer monetary loss and market loss if they were shut down on an interlocutory basis and then later permitted to reopen. Their employees would all lose their jobs, including the 130 people they

currently employ and the 70 who have been temporarily laid off. They would also default on their leases[175] and have to terminate their financial relationships with various third parties.[176]

94. While these losses are quantifiable, they are in all likelihood not recoverable. Even if the Clinics' *Charter* claim later proves to be successful, they will probably not be able to sue the Attorney General and the City for damages because one cannot sue for damages caused by unconstitutional legislation unless the government was clearly wrong, acted in bad faith, or committed an abuse of process.[177] These are very high thresholds that are rarely, if ever, met. Thus, the totality of the harm that will be caused to the Clinics and medical cannabis patients if the Clinics are shut down is irreparable and substantial.

95. By contrast, the City cannot demonstrate that it will suffer irreparable harm should its application for interlocutory injunctive relief be denied. There is a dearth of evidence in the record to support the harms that the City has asserted in support of its application. For instance, the City suggests that the Clinics pose a risk to public safety because they are at risk of being robbed.[178] But as set out in paras 26 to 29 *supra*, the record demonstrates the Clinics' sustained efforts to work with police, through its Compliance Officer, to reduce any risks to public safety. The Clinic even contracted with a security firm, Onyx Security, until police put a stop to it.[179]

96. The City also relies on an article that anecdotally refers to an explosion that took place at a Toronto dispensary, and which speculates that the damage was caused in the course of cannabis production. The subject dispensary does not belong to the Clinics, and the evidence does not

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[175] Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, p 52 at paras 12-14.
[176] *Ibid*, pp 51-52, at para 11.
[177] *Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 (CanLII), BOA Tab 20.
[178] Affidavit of Cameron Calver dated March 30, 2017, City Application Record, Vol 2, Tab A, pp 307-309, at paras 103-112.
[179] Second Deschamps Affidavit, *supra*, Cannaclinic Application Record, Tab 3, pp 51-52, at para 11; Transcript of the Cross-Examination of Cameron Culver, September 15, 2017, p 18, ln 16 – p 19, ln 24.

explain what contributed to this explosion. There is also no evidence that the Clinics extract cannabis products on site.[180] Even if they did, it is not clear why dispensaries would pose a greater risk than the cannabis production that is currently permitted under the home grow option.[181]

97. The Attorney General of Canada also cites a number of speculative harms in its materials, including concerns about the quality control of cannabis offered at dispensaries, its accessibility to adolescents, and the distribution of edibles that may be attractive to children.[182] The Attorney General does not, however, provide any evidence to support these general assertions, let alone link them specifically to the Clinics. Indeed, the government's witness admitted on cross-examination, "I do not have specific experience with these particular applicants or this particular dispensary."[183] Contrary to the Attorney General's position, the evidence on this application (summarized in paras 12 to 25 *supra*) is that the Clinics have safeguards in place to address all of these concerns. Moreover, the government's position on quality control cannot be reconciled with the absence of a requirement that home grown cannabis be tested.[184]

98. In summary, the City (even with the assistance of the Attorney General) has failed to establish irreparable harm. On that basis alone, its application for interlocutory relief should be denied, as was the City of Hamilton's application in *City of Hamilton v Floyd*.[185] In any event, for the reasons given below, the balance of convenience ultimately favours the Clinics in this case.

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[180] Transcript of the Cross-Examination of Cameron Culver, September 15, 2017, p 20 ln, 10-23.
[181] To the extent that the City relies on unproven *Fire Code* violations, these allegations are relate to a single facility and there is nothing to suggest that they concern problems inherent to the Clinics or to dispensaries more generally.
[182] First Costen Affidavit, *supra*, AG Responding Application Record, Tab 1, pp 20-21, at para 70.
[183] Transcript of the Cross-Examination of Eric Costen dated September 15, 2017, p 9, ln 17-19; p 16, ln 24; p 17, ln 2.
[184] Transcript of the Cross-Examination of Eric Costen dated September 15, 2017, p 16, ln 28-12.
[185] See Court File No.: 17-62329.

(iii) Balance of Convenience

99. In *Charter* litigation, the *RJR* test will generally be determined at the balance of convenience stage.[186] In *RJR-MacDonald,* Sopinka and Cory JJ. explained the analysis as follows:

> On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.
>
> On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.[187]

100. The presumption in favour of legislation being in the public interest is rebuttable where an applicant "can show its injunctive relief would serve a public interest greater than that served by maintaining the challenged legislation."[188]

101. The circumstances in *Allard 2014* are similar to this case. There, the Federal Court held that the irreparable harm the applicants would suffer under the relevant legislative schemed clearly outweighed the public interest in maintaining that legislation.[189] The Court thus exempted the applicants from the *MMPRs* pending the trial of the constitutional challenge to that regulatory scheme. The same outcome should be reached in this case for the following three reasons (in addition to those already set out in paras 88-98, *supra*, on "irreparable harm").

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[186] *Canadian Civil Liberties Association v Toronto Police Service*, *supra*, at paras 82-83 (ONSC), BOA Tab 10; *RJR-MacDonald*, *supra*, at para 80 (SCC), BOA Tab 33. To the extent that the City raises the "doctrine of clean hands", it has no application where the result would be a refusal to enforce a claim in which the public had a direct and substantial interest: see *City of Toronto v Polai*, [1970] 1 OR 483, BOA Tab 15. The question is whether there is any wrongdoing that taints the appropriateness of the remedy sought: see *Sherwood Dash Inc v Woodview Products Inc*, 2005 CanLII 45978 (ONSC), BOA Tab 35. This cannot be the case where the public interest weighs in favour of the injunction requested.

[187] *RJR-MacDonald*, *supra*, at paras 38-39 (SCC), BOA Tab 33.

[188] *Allard (2014)*, *supra*, at para 100 (FC), BOA Tab 3.

[189] *Ibid*, at para 119.

102. First, the relief the Clinics are seeking is narrow in scope. The Clinics do not seek relief that will impact dispensaries at large. They ask, rather, for an exemption to the Bylaws and *CDSA*, applicable to only their seven locations. Indeed, the order sought in this case is more limited than that granted in *Allard*, which extended beyond the plaintiffs to all individuals authorized to possess cannabis at certain relevant dates.[190] An order of such limited scope should be more readily granted. As the Supreme Court held in *Metropolitan Stores*, while it may be appropriate for interlocutory orders *suspending* legislation to issue only in "exceptional" or "rare" circumstances, the test for *exemptions* is less onerous.[191]

103. Second, the relief the Clinics are seeking is limited in duration. In *Allard 2014*, the Federal Court considered that the limited duration of the relief granted weighed in favour of granting injunctive relief. In that case, a trial was agreed to be set within nine to twelve months.[192] In this case, the duration of the interlocutory relief will be brief for an additional reason: the federal and provincial governments have committed to implementing a new legislative scheme to govern the production and distribution of cannabis by July 1, 2018. The current scheme is therefore subject to change in less than a year. Any harms that might be caused to the public from the inability of the government to enforce this regime — and we submit there will be none based on the evidence — will be short in duration.

104. Third, the Clinics already have a track record of operating safely. Unlike other cases that have applied the *RJR* test,[193] this Court is not being asked to speculate what might happen in a regulatory void. The Clinics have been operating for over 18 months in accordance with good

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[190] *Ibid*, at para 126.
[191] *Metropolitan Stores*, *supra*, at para 84 (SCC), BOA Tab 21.
[192] *Allard 2014*, *supra*, at paras 121, 129 (FC), BOA Tab 3.
[193] *Bedford v Canada (Attorney General)*, 2010 ONCA 814, at para 83, BOA Tab 5.

business practices and stringent safety standards (see paras 12 to 25, *supra*). The Clinics' track record should reassure this Court that their continued operation will not harm the public interest. An order that the Clinics be allowed to operate will not open the floodgates. Other dispensaries which do not operate with the same standards and safeguards may not obtain the same relief.

105. In summary, the balance of convenience favours the Clinics in this case, both on their response to the City's application and on their application for an exemption from the enforcement of the Bylaws and the *CSDA*. The *ACMPRs* are not working, just as its predecessor regulations did not work. Sick people are able to access medical cannabis in large part because of the Clinics. They should be allowed to continue operating as dispensaries have been operating for 20 years. [194]

C. This Court Should Dispense with the Undertaking Requirement for the Clinics

106. As the Clinics have moved for an interlocutory injunction, Rule 40.03 provides that the Clinics must undertake to abide by any order concerning damages that the Court may make if it ultimately appears that the granting of the injunction has caused damage to the Responding parties (the City and the Attorney General of Canada) for which the Clinics ought to compensate them — subject to the Court's discretion to dispense with this requirement.

107. This requirement is intended to "protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined."[195] It arises primarily in the commercial context where the determination of rights has direct monetary consequences.[196] The undertaking is typically inappropriate, however, where interlocutory relief is sought on *Charter*

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[194] *Gould v Canada (Attorney General)*, [1984] 1 FC 1133 (CA) (CanLII), at para 18, aff'd [1984] 2 SCR 124, BOA Tab 16.
[195] *Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONCA 300 (CanLII), at para 25, BOA Tab 7, citing Robert J Sharpe, *Injunctions and Specific Performance*, loose-leaf (2015-Rel 24), 4th ed (Toronto: Canada Law Book, 2012), at para 2.470, BOA Tab 34.
[196] *Cardinal v Cleveland Indians Baseball Company Limited Partnership*, 2016 ONSC 6920 (CanLII), at para 28, BOA Tab 12.

grounds.[197] For instance, what would the financial harm be to the City and Attorney General in this case if the exemption is granted and the Court eventually upholds the laws as constitutional? It cannot be quantified. An undertaking as to damages therefore makes little sense in this context.

PART IV – ORDERS REQUESTED

108. For the foregoing reasons, the Clinics seek an order:

(a) Dismissing the City's application for interlocutory relief;

(b) Granting the Clinics' application for:

a) an interlocutory injunction suspending, staying, exempting from and restraining the enforcement of the Bylaws against the Clinics and their servants, agents, and employees;

b) an interlocutory injunction suspending, staying, exempting from and restraining the enforcement of the *CDSA* against the Clinics and their servants, agents, employees, and patients;

c) an interlocutory order allowing the Clinics to test its cannabis at laboratories authorized with a dealer's license under the *Narcotic Control Regulations*;

(c) Granting costs on a partial indemnity basis; and

(d) Such further and other relief as counsel may request and this Honourable Court may permit.

[197] Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf (2015-Rel. 24), 4th ed (Toronto: Canada Law Book, 2012), at para 2.502, BOA Tab 34. See e.g. *Cardinal*, *supra*, at para 28 (ONSC); *Batty v Toronto (City)*, 2011 ONSC 6785, at para 17, BOA Tab 12.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of September, 2017.

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SCHEDULE "A"

LIST OF AUTHORITIES

TAB	AUTHORITY
1.	*Abbotsford (City) v Shantz*, December 20, 2013 (Unreported)
2.	*Allard v Canada*, [2016] 3 FCR 303 (CanLII)
3.	*Allard v HMTQ*, 2014 FC 280 (CanLII), at para 68, aff'd 2014 FCA 298 (CanLII)
4.	*Batty v Toronto (City)*, 2011 ONSC 6785
5.	*Bedford v Canada (Attorney General)*, 2010 ONCA 814, aff'd *Canada (Attorney General) v Bedford*, 2013 SCC 72 (CanLII)
6.	*British Columbia v Adamson*, 2016 BCSC 584 (CanLII)
7.	*Business Development Bank of Canada v Aventura II Properties Inc*, 2016 ONCA 300 (CanLII)
8.	*Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII)
9.	*Canada v IPSCO Recycling Inc*, [2004] 2 FCR 530 (FCTD) (CanLII)
10.	*Canadian Civil Liberties Association v Toronto Police Service*, 2010 ONSC 3525 (CanLII)
11.	*Canadian Egg Marketing Agency v Richardson*, [1998] 3 SCR 157 (CanLII)
12.	*Cardinal v Cleveland Indians Baseball Company Limited Partnership*, 2016 ONSC 6920 (CanLII)
13.	*Carter v Canada (Attorney General)*, 2015 SCC 5 (CanLII)
14.	*City of Hamilton v Floyd*, Court File No: 17-62329, Order of Lofchik J
15.	*City of Toronto v Polai*, [1970] 1 OR 483
16.	*Gould v Canada (Attorney General)*, [1984] 1 FC 1133 (CA) (CanLII), aff'd [1984] 2 SCR 124
17.	*Harper v Canada (Attorney General)*, [2000] 2 SCR 764 (CanLII)
18.	Roach, *Constitutional Remedies in Canada*, 2d ed (Toronto: Thomson Reuters, 2016)

19.	*Mackin v New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 (CanLII)
20.	*Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110 (CanLII)
21.	*Maple Ridge (District) v Thornhill Aggregates Ltd* (1998), 54 BCLR (3d) 155 (CA) (CanLII)
22.	*Newcastle Recycling Ltd v Clarington (Municipality)* (2005), 204 OAC 389 (CA) (CanLII)
23.	*Ontario (Minister of Agriculture & Food) v Georgian Bay Milk Co*, [2008] OJ No 485 (SCJ) (CanLII)
24.	*Peachland (District) v Peachland Self Storage Ltd*, 2011 BCCA 466 (CanLII)
25.	*R v Beren*, 2009 BCSC 429, leave to appeal refused [2009] SCCA No 272
26.	*R v Morgentaler*, [1988] 1 SCR 30 (CanLII)
27.	*R v Parker* (1997), 12 CR (5th) 251 (Ont Ct J), varied on other grounds (2000), 49 OR (3d) 481 (CA) (CanLII)
28.	*R v Smith*, 2015 SCC 34
29.	*R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 (CanLII)
30.	*Re Avila Investments Ltd et al*, OMB Decision No 2151, July 28, 2006
31.	*Re BC Motor Vehicle Act*, [1985] 2 SCR 486 (CanLII)
32.	*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311
33.	Robert J Sharpe, *Injunctions and Specific Performance*, loose-leaf (2015-Rel 24), 4th ed (Toronto: Canada Law Book, 2012)
34.	*Sherwood* Dash *Inc. v Woodview Products Inc*, 2005 CanLII 45978
35.	*Stefkopoulos et al v Canada (Attorney General)*, 2008 FC 33
36.	*Vancouver (City) v O'Flynn-Magee*, 2011 BCSC 1647 (CanLII)
37.	*Vancouver (City) v Wallstam*, 2017 BCSC 937
38.	*Vancouver Board of Parks & Recreation v Mickelson*, 2003 BCSC 1271 (CanLII)
39.	*Vancouver Board of Parks and Recreation v Williams*, 2014 BCSC 1926 (CanLII)

40.	*Victoria (City) v Thompson*, 2011 BCSC 1810 (CanLII)
41.	*York (Regional Municipality) v DiBlasi*, 2014 ONSC 3259 (CanLII)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. ***Access to Cannabis for Medical Purposes Regulations,*** **SOR/2016-230**

Medical document

8 (1) A medical document provided by a health care practitioner to a person who is under their professional treatment must indicate

(a) the practitioner's given name, surname, profession, business address and telephone number, the province in which they are authorized to practise their profession and the number assigned by the province to that authorization and, if applicable, their facsimile number and email address;

(b) the person's given name, surname and date of birth;

(c) the address of the location at which the person consulted with the practitioner;

(d) the daily quantity of dried marihuana, expressed in grams, that the practitioner authorizes for the person; and

(e) the period of use.

Period of use

(2) The period of use referred to in paragraph (1)(e)

(a) must be specified as a number of days, weeks or months, which must not exceed one year; and

(b) begins on the day on which the medical document is signed by the practitioner.

Registration

178 (1) Subject to sections 183 to 185, if the requirements of section 177 are met, the Minister must register the applicant.

Content

(2) The registration must include

…

(h) the expiry date of the registration, which must correspond to the end of the period of validity of the medical document supporting the registration, as determined in accordance with subsection 8(3);

2. ***Canadian Charter of Rights and Freedoms*, Sched B, Pt I, *Constitution Act, 1982***

Rights and freedoms in Canada

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.

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(d) freedom of association.

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Life, liberty and security of person

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.

3. ***Rules of Civil Procedure*, RRO 1990, Reg 194**

UNDERTAKING

40.03 On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party. R.R.O. 1990, Reg. 194, r. 40.03.

4. ***Planning A*ct, RSO 1990, c P13**

Purposes

1.1 The purposes of this Act are,

(a) to promote sustainable economic development in a healthy natural environment within the policy and by the means provided under this Act;

(b) to provide for a land use planning system led by provincial policy;

(c) to integrate matters of provincial interest in provincial and municipal planning decisions;

(d) to provide for planning processes that are fair by making them open, accessible, timely and efficient;

(e) to encourage co-operation and co-ordination among various interests;

(f) to recognize the decision-making authority and accountability of municipal councils in planning. 1994, c. 23, s. 4.

5. **City of Toronto Zoning Bylaw 569-2013**

40.10.20 Permitted Uses

40.10.20.10 Permitted Use

(1) Use – CR Zone

(A) In the CR zone, the following uses are permitted under the letter "c" in the zone label referred to in regulation 40.5.1.10(3)(A)(i):

…

Retail Store

…

Wellness Centre

Chapter 800 Definitions

800.50 Defined Terms

(720) Retail Store means premises in which goods or commodities are sold, rented or leased

(937) Wellness Centre means premises providing services for therapeutic and wellness purposes. A massage therapy, medical office or body rub service is not a wellness centre.

6. **City of Toronto Bylaw 438-86**

SECTION 2 – DEFINITIONS AND INTERPRETATION

In this by-law, unless a contrary intention appears: …

"*retail store*" means a building where goods, wares, merchandise, substances, articles or things are stored, offered or kept for sale at retail and includes storage on or about the store premises of limited quantities of the goods, wares, merchandise, substances, articles or things sufficient only to service the store but does not include a retail outlet otherwise classified or defined in this by-law or a mechanical or electronic game machine to be used for the purpose of gambling

SECTION 8 – MIXED-USE DISTRICTS (CR, MCR and Q) (425-93)

(1) PERMITTED USES

(a) No person shall, within a CR, MCR, or Q district, use a lot or erect or use a building or structure for any purpose except one or more of the uses where permitted by the chart in paragraph (f) and subject to qualifications where indicated. (425-93) (1994-0178)

(b) Each use permitted by the chart is subject to:

(i) the qualifications, if any, in subsection (2) to be complied with before the use is permitted;

(ii) the regulations in section 4;

(iii) the regulations in subsection (3);

(iv) the exceptions in section 11; and

(v) the exceptions in section 12;

(vi) any provision of a by-law referred to in section 13 that conflicts with a provision of this by-law; and

(vii) the exceptions (including the exceptions in section 12 and the by-laws referred to in section 13) referred to in Section 15 - the Index of Exceptions - and identified as to municipal addresses.

(c) A use is permitted by the chart when the letter "P" is set in the line opposite the designation of the use but only in the use district or districts designated at the top of the column or columns intersecting the line where the letter "P" is set.

(d) A use is permitted by the chart when the letter "q" followed by a number or numbers is set in the line opposite the designation of the use but only:

(i) in the use district or districts designated at the top of the column or columns intersecting the line where the letter "q" followed by a number or numbers is set; and

(ii) subject to the qualification or qualifications in subsection (2) bearing the number or numbers that follow the letter “q”.

(e) (i) Uses accessory to a use that is permitted by the chart are themselves permitted by the chart as accessory uses when an asterisk is set in the line opposite the designation of the use and in the column under the heading “Acc.” but only in the use district or districts designated at the top of the column or columns intersecting the line where the letter “P” or the letter “q” is set; and (425-93)

(ii) Notwithstanding subparagraph (i), motor vehicle parking spaces, whether required by this bylaw or not, shall only be provided in a parking facility that is permitted in the zoning district where it is located. (425-93)

(f) Following is the chart:

(b) NON-RESIDENTIAL USES	Acc	CR	MCR	Q
…				
Retail store	*	P	P	q5

7. **City of Vancouver Zoning and Development By-Law**

Section 2

Retail Uses means and includes all of the following uses, and any one of them, but no other:

…

Medical Marijuana-related Use, means a retail use in which the use of marijuana for medicinal purposes is advocated, and includes a Compassion Club as defined in the License By-law;
…

Retail Store, which means the use of premises to retail merchandise, including merchandise manufactured on the premises, if the total floor area used for manufacturing does not exceed 300 m^2, but which excludes any other Retail Uses listed in this section 2 or included in a Lumber and Building Materials Establishment;

8. ***City of Toronto Act, 2006,* SO 2006, c 11, Sched A**

Power to restrain

380 If any city by-law or by-law of a local board of the City under this or any other Act is contravened, in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained by application at the instance of a taxpayer or the City or local board. 2006, c. 11, Sched. A, s. 380; 2006, c. 32, Sched. B, s. 78.

PHYTOS APOTHECARY et al. Applicants/Respondents	and	CITY OF TORONTO et al. Respondents/Applicant	**Court File Nos. CV-17-57106; CV-17-581329**

ONTARIO
SUPERIOR COURT OF JUSTICE
Proceeding commenced at TORONTO

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