CITATION: Toronto (City) v. Lanova Outsourcing Corp., 2017 ONSC 5743
COURT FILE NO.: CV-17-570106
CV-17-581329
DATE: 20171016

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: City of Toronto, Applicant

AND:

Lanova Outsourcing Corp., Phytos Apothecary and Wellness Centre, 2501615 Ontario Ltd., Nadine Gourkow, Ivan Noe Gourkow-Schulkowski, Talon Tapes Industries Ltd., 2431318 Ontario Ltd., Lues Epstein, Nikoleta Tchepileva, Peter Minas, Anastasia Minas and Sue Young, Murray Young and Joan Yee Brann, 2881 Dundas Inc., Respondents

AND:

Attorney General of Canada, Intervener

AND RE: Phytos Apothecary and Wellness Centre and Grassroots Natural Health Society, Applicants

AND:

City of Toronto, Attorney General of Canada, Toronto Police Service and Toronto Hydro, Respondents

AND:

Attorney General of Canada, Intervener

BEFORE: Pollak J.

COUNSEL: *Tim Carre, Diana Dimmer and Jared Wehrle*, for the Applicant/Respondent City of Toronto

Paul Lewin, for the Respondent/Applicant, Phytos Apothecary and Wellness Centre, and the Respondents, Grassroots Natural Health Society, Lanova Outsourcing Corp., Nadine Gourkow

Falguni Debnath and Jon Bricker, for the Intervener/Respondent Attorney General of Canada

Jack Lloyd, Aaron Harnett, Jeremy Lum-Danson, Gerald Chan and Ben Kates, for the Proposed Interveners

HEARD: September 25, 26, 2017

REASONS FOR DECISION

Background

[1] There are two Applications before the court which are scheduled to be heard on December 10, 11 and 12, 2018. In judicial case conferences, the parties have agreed to a timetable for the preparation of all required materials for these Applications. The procedural history of these Applications is set out in the Amended Notice of Application of the Applicants Phytos Apothecary and Wellness Centre and Grassroots Natural Health Society (collectively, the "Operators") as follows:

> The City brought an injunction ("the City injunction") in the Ontario Superior Court of Justice (court file #CV-17-57016) seeking an interlocutory and permanent injunction to shut down the Clinics. The parties appeared on a first appearance on April 3, 2017 and set dates of September 25 and 26 for the hearing of the injunction. A Timetable was agreed to. On April 28, 2017 Phytos and other parties to the City's injunction served a Notice of Application and Constitutional Question. Phytos challenged the constitutionality of the *CDSA*, the *ACMPRs* and the Regulatory Scheme. On May 19, 2017 Phytos and other Respondents to the City's injunction served their evidentiary record. It was a large record containing 26 affidavits and almost 2,000 pages of affidavit evidence. On June 13, 2017 the AG Canada advised that they would be intervening and adducing evidence. On June 30, 2017 the AG Canada advised they would need until December to serve their evidentiary record. On July 18, 2017 the City advised they would seek interlocutory order that the Clinics shut down. On July 31, 2017 Phytos and other Respondents to the City's injunction advised that they wanted to bring a motion seeking interlocutory relief on September 25-26. This interlocutory relief should be heard along with the City injunction (court file # CV-17-57016) in the Ontario Superior Court of Justice on September 25-26, 2017 as the applications concern all the same issues. The Applicants seek to have this injunction application for interlocutory relief consolidated with the City's injunction application for interlocutory relief.

[2] The City of Toronto's ("Toronto's") Application is for an order restraining the Respondents, Lanova Outsourcing Corp., Phytos Apothecary and Wellness Centre, 2501615 Ontario Ltd., Nadine Gourkow, Ivan Noe Gourkow-Schulkowski, Talon Tapes Industries Ltd., 2431318 Ontario Ltd., Lues Epstein, Nikoleta Tchepileva, Peter Minas, Anastasia Minas and Sue Young, Murray Young and Joan Yee Brann, and 2881 Dundas Inc., from operating marijuana dispensaries at the Subject Properties in Toronto in violation of Toronto's zoning By-law 569-2013 (the "By-law"). The Subject Properties are: 213 Ossington Avenue, 350 Broadview Avenue, 2352 Yonge Street, 1556 Queen Street West, 44 Kensington Avenue, 527 Eglinton Avenue West and 2887 Dundas Street West, all located in the City of Toronto.

[3] The Operator's Application, which the Respondents to Toronto's Application adopt, alleges the By-law, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (the "CDSA"), and the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 (the "ACMPR"), violate ss. 2(b), 7 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c. 11 (the "*Charter*"). The Operators request a permanent injunction restraining enforcement of the By-law and the legislation prohibiting their operation of clinics at the Subject Properties. The Respondents submit Toronto's Application should be denied.

[4] The Attorney General of Canada (the "AG"), as intervener in both Applications, opposes the Application brought by the Operators and opposes the submissions of the Respondents in the above noted Application brought by Toronto.

[5] With the consent of the parties, 14 persons with medical authorization for possession and use of cannabis as medicine (the "Patients") are granted intervener status as friends of the court. They are: Jesse Beardsworth, Glenda Biladeau, Shawn Davey, Lucia Marchionatto, Alison Mydren, Mathew Perkins, Jordan Ryczko, Jean Scranton, Eva Thomas-Anderson, Gregory Thornton, Ronald Tokarz, Kenneth Webber, Marcell Wilson and Shawn Wright.

[6] As the Applications will be heard in December of 2018, Toronto and the Operators bring motions for an interlocutory injunction granting the interlocutory relief they request as permanent relief in their Applications.

[7] The interlocutory relief requested is as follows:

By the Operators, an order for the following:

(i) an interlocutory injunction suspending, staying, exempting from and restraining the enforcement of the by-laws against the clinics at the Subject Properties and their servants, agents and employees;

(ii) an interlocutory injunction suspending, staying, exempting from and restraining the enforcement of the CDSA against the clinics at the Subject Properties and their servants, agents, employees and patients;

(iii) an interlocutory order allowing the clinics at the Subject Properties to test their cannabis at laboratories authorized with a dealer's license under the *Narcotic Control Regulations*.

By Toronto, an order for the following:

(i) an interlocutory order, pending a further order of this court, that the Respondents Lanova Outsourcing Corp., Grassroots Natural Health Society, Phytos Apothecary and Wellness Centre, 2501615 Ontario Ltd., Nadine Gourkow, and Ivan Noe Gourkow-Schulkowski, as well as any related companies, directors, officers, employees, agents or assigns shall not use the Subject Properties or any other properties in the City of Toronto to sell, store or distribute marijuana in

contravention of By-law 569-2013 of Toronto or any other zoning by-law passed by Toronto pursuant to s. 34 of the *Planning Act*;

(ii) an interlocutory order, pending a further order of this court, that the Respondents Talon Tapes Industries Ltd., 241318 Ontario Ltd., Lues Epstein, Nikoleta Tchepileva, Peter Minas, Anastasia Minas, Sue Young, Murray Young, Joan Yee Brann and 2881 Dundas Inc. shall abide by the Order mentioned in paragraph (1) including that they shall comply with the requirement of that Order prohibiting the use of any of the Subject Properties owned by them to sell, store or distribute marijuana contrary to Toronto zoning by-laws including By-law 569-2013;

(iii) An order permitting Toronto, its servants or its agents to effect the closure of the Subject Properties in the event the orders in paragraphs (1) and/or (2) above are not complied with;

(iv) An order requiring the Sheriff of Toronto and the Chief of Police of the Toronto Police Service to provide whatever assistance the Applicant, its servant and agents may require to effect the closure of the Subject Properties in accordance with paragraph (3).

[8] The Operators and Patients frame the issues to be determined in these Applications as whether patients in Canada have reasonable access to medical cannabis. They submit that the Licensed Producers ("LPs") do not currently provide such access. They emphasize that the Applications are not about the legalization of cannabis generally. The Operators submit that they are not-for-profit corporations that operate the seven medical cannabis dispensaries which Toronto seeks to shut down.

[9] Toronto opposes the Application brought by the Operators to allow them to continue their operations.

[10] The Operators oppose Toronto's Application to shut them down and bring their own Application for an interlocutory exemption from Toronto's by-laws and the CDSA so that they can continue providing reasonable access to medical cannabis and cannabis derivative products.

[11] All of the parties agree that the issue of providing reasonable access for patients needing cannabis for medical purposes is an important one.

[12] The court, by hearing these motions for interlocutory relief, is neither hearing nor deciding the Applications which will be heard in December of 2018. Nonetheless, the parties have already worked very hard to provide this court with a large volume of evidence on these motions, in particular, extensive evidence of how the existing legislative scheme governing the supply and distribution of medical cannabis works and personal affidavit evidence from the Patients, who have had difficulty or have not been able to obtain the cannabis they require for medical relief, as well as expert evidence regarding the issue of "reasonable access" to medical cannabis.

[13] On these motions, the parties and interveners filed affidavits as follows:

(a) Toronto has filed affidavits of Mark Sraga, Director of Investigation Services in the Municipal Licensing and Standards Division of the City of Toronto, and Cameron Culver, Municipal Standards Officer and Provincial Offences Officer in the Municipal Licensing and Standards Division of the City of Toronto. In their affidavits, they describe the relevant by-laws and the alleged violation of those by-laws.

(b) The Operators have filed affidavits of Samantha Deschamps, Administrative Compliance Officer and Manager for Canna Clinic, and Scott Van Boeyen, a contractor for Canna Clinic who tests cannabis products. Ms. Deschamps' affidavit describes Canna Clinic's policies and procedures, products and employee training, as well as her position as Administrative Compliance Officer. Mr. Van Boeyen's affidavit describes his process of testing Canna Clinic products.

(c) The Operators have also filed affidavits and expert reports of several experts: namely, Prof. Neil Boyd, Prof. Andrew Hathaway, Dr. John Kristensen, Dr. Carolina Landolt, Eric Nash, Prof. Zachary Walsh and Dr. Jokūbas Žiburkus.

(d) The Patients have filed the affidavits of Jesse Beardsworth, Glenda Biladeau, Shawn Davey, Lucia Marchionatto, Alison Mydren, Mathew Perkins, Jordan Ryczko, Jean Scranton, Eva Thomas-Anderson, Gregory Thornton, Ronald Tokarz, Kenneth Webber, Marcell Wilson and Shawn Wright.

(e) A summary of the Patients' affidavit evidence is as follows:

(i) Many of the Patients suffer from serious medical conditions, which they seek to manage, often in the face of economic hardships, through the use of medical cannabis. Each of them has used an LP and, generally speaking, they are dissatisfied with the quality of the product and service they have received. In particular, they have complaints in relation to the following: pricing, restrictions on accepting cash, delay in delivery, lack of client interaction with the product, inconsistency between LPs, limited stock and strain availability, product recall issues and complications due to the LP mail-order system. These restrictions have had a great impact on their lives, and in many cases they have been the cause of significant and understandable frustration. For a variety of reasons, but particularly in light of the above complaints, they prefer to use dispensaries to address their medical problems.

(ii) For example, the affiant Mathew Perkins is 43 years old, and is currently on the Ontario Disability Support Program. He has been diagnosed with depression, general anxiety disorder, chronic pain and insomnia. To address his symptoms, he was prescribed medical cannabis. He has

registered with a number of LPs, but encountered a variety a problems. In particular, he states that he often received a different strain of medical cannabis then what he ordered. Other times, the LP would not have the strain he requires in stock. Also, on one occasion, an LP delivered a package to Mr. Perkins that was left on his doorstep, and the package was subsequently stolen. He was not given a refund, and the LP refused to re-send his medical cannabis. With limited economic means, Mr. Perkins found these barriers to receiving the medical cannabis that he requested and paid for nearly impossible to overcome while dealing exclusively with the LP.

(f) Affidavits by the following dispensary users, who were not originally proposed as interveners, were also filed: Wendy Lou Durst, Jessica May and Maxine McKenzie.

(g) The AG has filed affidavits of Eric Costen, Director General of the Cannabis Legalization and Regulation Secretariat within the Cannabis Legalization and Regulation Branch of Health Canada. Mr. Costen's affidavits outline the regulatory scheme in Canada for access to cannabis for medical purposes, as well as the government's continuing response to the proposed legalization of cannabis. Mr. Costen also indicates that the Subject Properties operate outside the regulatory regime.

[14] The AG submits that the evidence in response to all of the issues to be heard in the Applications on December of 2018 will include the following additional evidence:

(a) from senior Health Canada ("HC") officials regarding the ACMPR, their rationale and operation, and the history of HC's interactions with the individual patient affiants;

(b) from the LP industry describing the production, testing, distribution and security standards followed by the industry, as well as product, pricing, shipping and customer service information;

(c) of expert medical evidence describing the health benefits and risks associated with cannabis use, and responding to the allegations concerning the alleged need for different cannabis strains and products, and to be able to "see and smell" cannabis products; and

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

Law

[15] All parties agree that the test for the interlocutory injunctive relief requested is set out in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 S.C.R. 311, and provides that the moving party seeking the injunction must prove that:

(a) there is a serious question to be tried;

(b) irreparable harm to the Applicant would result if the injunction was not granted; and

(c) the balance of convenience, considering all of the circumstances, favours granting the order.

[16] All parties also agree that on motions for interlocutory relief pending the determination of complex and factual legal issues the court's analysis will focus on the third branch of the test – whether the balance of convenience favours granting an injunction: see *Canadian Civil Liberties Assn. v. Toronto Police Service*, 2010 ONSC 3525, 224 C.R.R. (2d) 244. The third branch of the test considers the public interest, which is a predominant factor on these motions.

[17] The moving parties did not focus on submissions that the opposing party has not been able to meet the first branch of the test – whether there is a serious question to be tried. However, they have each submitted that the opposing party has not been able to meet the second branch of the test proving irreparable harm. Toronto has also submitted that the Operators do not have standing to request relief under ss. 7 and 15 of the *Charter*. They have rather focused their submissions on the issue of determining where the balance of convenience lies. I will therefore first consider the issue of where the balance of convenience lies with respect to the motions for interlocutory relief.

Application of the Law

Balance of Convenience

[18] Toronto and the AG submit that the jurisprudence establishes that there is a high burden of proof on the Respondents and the Operators as it is not possible, on this interlocutory motion, for the court to properly consider the merits of the Application which will be heard in December of 2018. The burden is high because there is a presumption that a validly enacted law produces a public good.

[19] All parties rely on the case of *RJR-MacDonald* wherein the Supreme Court of Canada stated as follows, at pp. 348, 349:

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

> *the suspension of the legislation would itself provide a public benefit.* [Emphasis added.]

[20] This presumption of a public good was repeated by the Supreme Court of Canada in the case of *Harper v. Canada (Attorney General)*, 2000 SCC 57, [2000] 2 S.C.R. 764, wherein the court stated at para. 9:

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

[21] Toronto and the AG submit that in addition to the CDSA and ACMPR being presumed to serve a public good, there is clear evidence before the court in this proceeding that the laws serve the public interest.

[22] Toronto and the AG rely on evidence which they submit shows that the ACMPR protects patients by providing access to cannabis for medical purposes that has been produced under strict quality-controlled conditions, and protects the Canadian public by reducing the public dangers posed by youth access, dangerous extraction methods and the diversion of drugs.

[23] The Operators submit that the objective of the ACMPR is to "provide Canadians with a greater range of options to access cannabis for medical purposes in order to address the issue of reasonable access", as indicated in the Regulatory Impact Analysis Statement for the ACMPR. In this regard, they also rely on the Federal Court's characterization of the legislation which the ACMPR replaced. In *Allard v. Canada*, 2016 FC 236, 394 D.L.R. (4th) 694, at paras. 218—220, the court described that objective as follows: "to reduce the risks to public health, security and safety of Canadians, while significantly improving the way in which individuals access marijuana for medical purposes". Toronto and the AG agree and submit that the legislative scheme has many safeguards and controls that are specifically designed to protect patients and the public.

[24] Toronto and the AG also rely on evidence regarding armed robberies and robberies at the Operators' stores which have put their employees and the public at risk.

[25] Toronto and the AG also submit that the evidence before the court on these motions shows that the existing regime governing the issues with respect to medical cannabis is in the public interest because there are controls which provide a quality-controlled product as well as the appropriate security measures to ensure that the products are not distributed to the black market.

[26] Further, they argue that denying Toronto's motion for interlocutory relief would have the effect of permitting the Operators to continue operating, which would harm the public interest. They emphasize that there is no evidence of the following:

- that the cannabis sold by the Operators is produced in sanitary conditions;

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

[27] They also submit that, in contrast to the evidence referred to above, refusal of Toronto's request, resulting in continued operation by the Operators, would risk public health and safety by permitting the following:

- the distribution of cannabis products that have been produced without any transparency or regulatory oversight, both of which are crucial to ensuring product safety;
- the distribution of cannabis products that have not undergone quality-control measures, such as testing by a HC-licensed lab, rigorous inspections, and reliance on well-established standard operating procedures designed and executed by a quality assurance person with suitable training, experience and technical knowledge;
- the sale or provision of cannabis products that are unlabeled, or that do not conform to standardized labelling requirements for information including weight, quantity, and THC and CBD content;
- the distribution of cannabis products that are not tamper-proof and are attractive to children, and the potency of which may be unclear;
- the sale or provision of highly concentrated cannabis extracts, the production of which may involve the use of highly flammable solvents, and the potency of which is not made clear to customers;
- the absence of meaningful post-market controls, such as the ability to conduct a recall and adverse-reaction reporting requirements;
- increased ease of access to cannabis by adolescents;
- the potential safety and security risks to staff, customers and by-standers posed by the increased prevalence of armed robberies; and
- potentially providing revenue for criminal organizations.

[28] Toronto and the AG also submit that the evidence on these motions is that the clinics do not provide safety and quality-control measures and that the provisions of the existing legislation

have the effect of providing better service to patients than that offered by the Operators. A summary of the evidence relied on in this regard is as follows:

- Canna Clinic relies predominantly on its customers own assertions that they have used cannabis for medical purposes before. It does not require those who so claim to produce authorization from a health care practitioner. Neither does it track the expiry of medical authorizations even from those whom they claim require a medical authorization. The Operators were asked but refused to provide medical authorizations for a sample week;

- Canna Clinic claims that their production practices are analogous to the Good Production Practices followed by LPs, but they have provided no evidence to this effect. The only affiant who works at a Canna Clinic knew nothing whatsoever about where they obtain their cannabis, nor the conditions under which cannabis is produced;

- the alleged testing done by the Canna Clinic is not equivalent to what is required by the ACMPR. Eric Costen stated on cross-examination that testing is a part of an overall process, all of which works in concert to ensure a quality-controlled product;

- Eric Costen on cross-examination stated that HC tracks the time for approving a licence for personal production closely and that due to additional staff, the fact that HC phones people whose applications require clarification or additional information and streamlined processes, the number of applications which take more than six weeks has decreased significantly;

- Eric Costen's evidence is that LP shipments go missing less than a fraction of a percent of shipments;

- it is not only the Canna Clinic that allows the purchase of small amounts; this is also possible through the LP mail-order system, which, it is submitted, is highly competitive and seeks to accommodate the interests of the patient;

- Contrary to the allegation that Canada's position on quality control cannot be reconciled with the absence of a requirement that home grown cannabis be tested, Eric Costen explained the two different regimes as follows: "In the case of commercial industry, commercial production, it's a commercial entity that is producing for consumption by a large number of people and it is typical, typical certainly in Canada that these types of entities are regulated by governments. Governments regulate companies much more frequently than they regulate people."

[29] With respect to the balance of convenience issue, the position of the Respondents and the Operators in opposition to the relief requested by Toronto and in support of the Operators' motion for interlocutory relief is that they can rebut the presumption in favour of the legislation being in the public interest. They submit that the evidence on these motions shows that "the

injunctive relief they have requested would serve a public interest greater than that served by maintaining the challenged legislation" as requested by Toronto and the AG.

[30] They submit that this argument is supported by the Federal Court's decision in *Allard* wherein, it is argued, the court endorsed the operation of storefront clinics as providing reasonable access to medical cannabis and, the Operators submit, the Federal Court had exempted the Applicant from the legislative scheme, pending the trial of the constitutional challenge to that regulatory scheme.

[31] However, the issue of the legality of storefront clinics was not considered in *Allard*, and Toronto and the AG argue that that case is factually very different and distinguishable and therefore inapplicable to the present dispute. In that case, the court held that the Applicants should be permitted to continue to rely on rights they already had under the existing legislation. Such relief is very different than awarding new rights to the Operators which do not presently exist.

[32] I agree that the *Allard* decision does not assist the court in the manner that is suggested by the Operators to establish that the continued operation of the clinics would serve a public interest greater than that which is served by maintaining the existing regulatory scheme.

[33] The clinics further argue that the evidence before the court establishes that they have a "track record of operating safely" – operating for over 18 months in accordance with good business practices and stringent safety standards. It is therefore submitted that their continued operation will not harm the public interest.

[34] Toronto and the AG dispute this submission. In particular, they emphasize the absence of significant evidence (and of refusals to produce documents) with respect to how these clinics are operated. They rely on the evidence to which I have referred above with respect to the potential harm that would be caused by the clinics continued operation.

[35] When the court considers all of the evidence and submissions by the parties, this court cannot find, on the basis of the evidence before it, that the public interest would be greater served by the continued operation of the clinics than maintaining the existing regulatory scheme. Rather, I find that the balance of convenience lies with Toronto as the public interest would be greater served by granting interlocutory relief to Toronto.

Irreparable Harm

[36] As I have found that the public interest is in favour of maintaining the existing legislation during the period of time in which the parties are preparing the required evidence and materials for their Applications to be heard, the court must now consider the Operators' submissions that Toronto has not been able to establish the second criteria of the test, irreparable harm, and should therefore not be awarded the relief sought.

[37] In *RJR-MacDonald*, the court set out a lower threshold for public authorities to prove irreparable harm, stating as follows, at p. 346:

> In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

[38] Toronto and the AG submit that the fact that a validly enacted by-law is not being upheld as well as the evidence I have referred to above with respect to the potential harm to the public interest supports a finding by this court that Toronto has established the second requirement of "irreparable harm". Further, in support of this submission, Toronto also argues that it has had to use a considerable number of resources to pursue the compliance of the By-law in accordance with its obligation to protect the public interest of the residents of Toronto. This approach with respect to Toronto's rights to insist on compliance with its by-laws has been approved by our courts in the jurisprudence relied on by Toronto in this regard.

[39] I agree with these submissions and find that, on the basis of the evidence and the argument made, Toronto has been able to satisfy the second branch of the relevant test.

Serious Question to be Tried

[40] As I have indicated above, the parties have conceded that they do meet the first branch of the test on the merits of the Applications. In any event, the court agrees that, on the basis of the evidence and the submissions made, the Moving Parties have met the first branch of the test.

Conclusion

Toronto's Request for Interlocutory Relief

[41] As the court finds that Toronto has met all branches of the test for the interlocutory injunctive relief requested, I order as follows:

(1) an interlocutory order, pending a further order of this court, that the Respondents Lanova Outsourcing Corp., Grassroots Natural Health Society, Phytos Apothecary and Wellness Centre, 2501615 Ontario Ltd., Nadine Gourkow, and Ivan Noe Gourkow-Schulkowski, as well as any related companies, directors, officers, employees, agents or assigns shall not use the Subject Properties or any other properties in the City of Toronto to sell, store or distribute marijuana in contravention of By-law 569-2013 of Toronto or any other zoning by-law passed by Toronto pursuant to s. 34 of the *Planning Act*; and

(2) an interlocutory order, pending a further order of this court, that the Respondents Talon Tapes Industries Ltd., 241318 Ontario Ltd., Lues Epstein, Nikoleta Tchepileva, Peter Minas, Anastasia Minas, Sue Young, Murray Young, Joan Yee

Brann and 2881 Dundas Inc. shall abide by the Order mentioned in paragraph (1) including that they shall comply with the requirement of that Order prohibiting the use of any of the Subject Properties owned by them to sell, store or distribute marijuana contrary to Toronto zoning by-laws including By-law 569-2013.

[42] Toronto has requested a further Order to effect the closure of the Subject Properties if the Respondents do not comply with the above interlocutory injunctions, as well as an Order directing the police to enforce said closure.

[43] I decline to grant these Orders for the following reasons.

[44] Neither party made submissions with respect to this relief requested. Toronto brought its motion under s. 380 of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sched. A, which does not address or provide for the closure of properties in contravention of a by-law. Rather, it provides that "in addition to any other remedy and to any penalty imposed by the by-law, the contravention may be restrained". While other provisions of the *Act* provide for the closure of properties, as well as police assistance in effecting such closure, those provisions were not relied on by Toronto and are not before the court on these motions.

[45] Furthermore, in *Ogden Entertainment Services v. Retail, Wholesale/Canada Canadian Service Sector, U.S.W.A., Local 440*, 38 O.R. (3d) 448, at para. 10, the Court of Appeal for Ontario stated as follows:

> We are of the opinion that there is no basis for directing the OPP to enforce an order arising out of a civil proceeding. Unless a statute directs the contrary, such an order should be directed to a sheriff for enforcement. In the present circumstances, there is no statute directing the contrary. Where the enforcement of an order may give rise to a breach of the peace, the sheriff may require a police officer to assist in the execution. No order is required to gain this assistance. Reference may be had to s. 141 of the *Courts of Justice Act*.

The general enforcement provisions of the *City of Toronto Act, 2006*, under which Toronto brought its Application, do not provide for an order directing the police to enforce an interlocutory order arising from a civil proceeding. Therefore, I decline to grant such an order.

The Operators Request for Interlocutory Relief

[46] I have found that the Operators have not established that the balance of convenience is in their favour. They cannot meet the requirements of the test for interlocutory relief in this case. It is not necessary for the court to consider whether the Operators have been able to meet the requirement for the second breach of the test – irreparable harm. On this basis, their request for interlocutory relief is denied.

Pollak J.

Date: October 16, 2017