IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Eastside Pharmacy Ltd. v. British Columbia (Minister of Health),* 2017 BCSC 1540

Date: 20170830
Docket: S1510004
Registry: Vancouver

Between:

Eastside Pharmacy Ltd.

Petitioner

And

The Minister of Health of British Columbia

Respondent

Before: The Honourable Mr. Justice Affleck

Reasons for Judgment

Counsel for the Petitioner:	R.W. Grant, Q.C. T. Clarke
Counsel for the Respondent:	E.W. Hughes T. Callan R. Doerksen
Place and Date of Trial/Hearing:	Vancouver, B.C. June 29-30,2017
Place and Date of Judgment:	Vancouver, B.C. August 30, 2017

[1] On September 28, 2016 Eastside Pharmacy Ltd. (“the Pharmacy") filed an amended petition seeking, *inter alia*, judicial review of two decisions of the Ministry of Health. In one the Ministry refused to enroll the Pharmacy as a PharmaCare provider pursuant to the *Pharmaceutical Services Act*, S.B.C. 2012 c. 22 (“PSA”) (the “enrollment decision”) and in the other found the Pharmacy owed $1,135,989.49 to the Province for alleged improper PharmaCare practices (the “audit decision”).

[2] The hearing of the application for judicial review began on November 21 and 22, 2016 and was then adjourned to permit the respondent Ministry to file further affidavit material. On January 10, 2017 Ms. Walman, an Assistant Deputy Minister of Health, made an affidavit in these proceedings. The hearing of the judicial review application then resumed on February 14 to16, 2017 at which time the Pharmacy applied to cross-examine Ms. Walman on her affidavit. In reasons dated March 7, 2017, indexed at 2017 BCSC 370, an order was made for that cross examination. The order has been appealed.

[3] On May 17, 2017 the Pharmacy filed a notice of application seeking the following orders:

> 1. An interlocutory order staying the October 15, 2015 decision of the Minister of Health (the “Minister”), not to enrol the Petitioner (the “Pharmacy”) pursuant to s. 11(4) of the *Pharmaceutical Services Act*, SBC 2012, c. 22 (the “Enrolment Decision”),
> 2. An interlocutory order staying the October 5, 2015 decision of the Minister of Health that the Petitioner must pay $1,135,989.49 to the Province of British Columbia (the “Audit Decision”);
> 3. An interlocutory order restoring the temporary enrolment of the Pharmacy, first granted on May 19, 2015, which expired on December 5, 2015 (the “Temporary Enrolment”);
> 4. In the alternative, an order that the Minister undertake to pay any and all damages caused to the Pharmacy as a result of the Enrolment Decision, if the Enrolment Decision is quashed;

[4] In support of the above application, the Pharmacy relies on an extensive “factual basis" which was set out in part 2 of its amended petition filed on September 28, 2016. I note that the “factual basis” is a mixture of facts and advocacy.

[5] The following is the “factual basis" in its entirety:

OVERVIEW

1. This petition relates to Eastside's enrollment in PharmaCare, and an audit of Eastside conducted by the Ministry in relation to its PharmaCare claims for the period of September 1, 2012 to August 31, 2014.

2. After the audit was conducted, the Ministry provided their draft audit report followed by the final audit report, which alleged that Eastside had committed multiple claims errors valued at $147,914.22, which, when extrapolated by the Ministry, amounts to a total recovery amount of more than $1.1 million.

3. Based solely on the findings in the audit report, the Ministry decided to deny Eastside's enrollment as a provider in PharmaCare because, in the Ministry's view, it would not be in the public interest for Eastside to remain enrolled.

4. In the Enrollment Decision, the Ministry stated that Eastside's enrollment would be terminated as of 12:01 AM on November 7, 2015. The Ministry subsequently extended the termination date to 12:01 AM on December 5, 2015 in order to provide Eastside with more time to transition its patients to other pharmacies.

BACKGROUND OF EASTSIDE PHARMACY

5. Eastside Pharmacy is owned by Alexander Tam, who has been a pharmacist for over 35 years. For more than 25 of those years, Mr. Tam has spent his time providing aid to Vancouver's downtown eastside ("DTES") community through pharmacy and other initiatives.

6. Mr. Tam's career began in the 1980s with the Downtown Community Health Clinic, which is considered to be the "original" DTES clinic. Over time, Mr. Tam became increasingly entrenched in the DTES community. Since the beginning of his career, Mr. Tam's goal as a pharmacist has not simply been to dispense medications; rather, it has been to help make his patients healthier. For this reason, he has always thrived in the DTES setting.

7. As years passed, Mr. Tam began to recognize an acute healthcare service gap for the complex and difficult to reach persons in the DTES. In order to fill that gap, Mr. Tam opened Eastside in the core of the DTES in January 2004.

8. Eastside is a small, family run business with strong ties to the community. Its aim is to provide exemplary, compassionate and respectful services to address the many challenging health needs of the DTES population.

9. The DTES is a community known for its multiple, acute complexities that challenge the patient population as well as the health care providers involved in their care. It is known for its many social challenges struggling with overlapping issues of chronic conditions, mental illnesses, homelessness, poverty, food insecurity and addictions. The area houses a displaced population group who suffers from third world health issues in a first world country.

10. The DTES has a hard-to-reach population where most do not succeed via traditional healthcare avenues. DTES residents often require education and advocacy on multiple fronts, requiring both clinical and social approaches. This results in health care workers having to devise extraordinary and intensive care plans to ensure patient adherence to medication programs, stabilization of health, and positive long term health outcomes. These care plans are complex, often involving many parties and requiring a strong collaborative communicative network.

11. Eastside's patient base is unique in that it is comprised exclusively of DTES residents, being the most vulnerable and high-needs patient population in the city, and likely the country. These individuals often have complex, multiple medical and mental illnesses, coupled with a tenuous relationship with the healthcare system.

12. Virtually every single one of Eastside's patients suffers with some form of drug abuse, and many are HIV and/or Hepatitis C positive. More than half of Eastside's patients are aboriginal, and many are transient and/or living on the street. Many are palliative and/or chronically ill. Many are resistant to getting, and complying with, treatment.

13. At least 70% of Eastside's patients rely on PharmaCare to pay for their prescriptions. In turn, the majority of Eastside's revenue is sourced by PharmaCare. Without enrollment in PharmaCare, Eastside could not survive as a business.

14. The health care practice culture in the DTES is acute and complex. It includes having to continually control acute behavioral situations, dealing with complex social issues which interfere with care, balancing the approach to care with limited resources, and remaining operationally compliant to regulations.

15. In order to provide pharmacy services to this population, Eastside is open to patients seven days per week, and Mr. Tam is always available by telephone to other healthcare professionals who may need him to visit or perform outreach on an urgent basis. Mr. Tam himself is on-site seven days per week, usually in the pharmacy for ten to twelve hours per day on Monday to Friday, and for six to eight hours on Saturdays, Sundays and holidays.

16. In addition to dispensing medications, Mr. Tam and his team provide a number of invaluable health care related services to its patients on a regular basis. For example,

    (a) providing clinical care in limited circumstances (e.g. helping them to check their blood sugar, manage their insulin and bandage up their wounds);

    (b) taking time to educate them about the medications they are taking and the importance of compliance;

    (c) educating non-licensed health care workers about the skills and tools required to deliver better care;

(d) acting as liaison between them and physicians as well as outreach workers, including establishing medication management programs with healthcare partners to enhance treatment adherence, safety and accountability;

(e) delivering life-saving medications on a daily basis to those who are palliative, have mobility issues, and/or do not want to travel to the DTES core for fear of falling back into an unhealthy lifestyle, which often includes tracking the whereabouts of transient patients to effect outreach work;

(f) helping them get to their medical appointments, if necessary; and

(g) checking on those whom they are worried about from time-to-time who previously appeared unwell or unsafe.

17. In its role within the DTES community, Eastside has helped create and service integrated community programs through partnerships with health care professionals with various disciplines. In part, these programs were a product of unconventional approaches in delivering care, with the goal of maximizing patient adherence to medication regimes, resulting in the prevention of disease progression and spread of infectious diseases, and improvement to the well-being of the community.

18. Some of these programs include the following:

(a) BC Centre for Excellence in HIV/AIDS,

(b) Hepatitis C Access Program,

(c) Vancouver Native Health Society and the Positive Outlook Program,

(d) Vancouver Downtown Community Court,

(e) Vivian's Women's Transitional Housing,

(f) Sheway,

(g) Atira Women's Resource Society,

(h) STOP HIV/AIDS Team,

(i) Pender Community Health Centre,

(j) Downtown Community Health Clinic,

(k) DUDES Group, and

(l) Mission Possible.

19. The dedication of Mr. Tam and Eastside to providing exemplary pharmacy services in the DTES has not gone unnoticed. Mr. Tam has been the humble recipient of a number of awards and accolades over the years, including:

(a) In 2008, he was awarded the Commitment to Care & Services Award - Outstanding Owner or Manager by the Pharmacy Practice and Drugstore Canada magazine.

(b) In 2009, he was awarded the Bowl of Hygeia of Canada by the Canadian Pharmacist Association, as well as by the British Columbia Pharmacist Association. This is a very prestigious award given to recognize pharmacists who have provided outstanding community service, as nominated by their associations.

(c) In 2012, he received the AccolAIDS health promotion and harm reduction award as well as the people's choice community award which is voted by the public.

(d) In 2013, he received the Queen Elizabeth II Diamond Jubilee Medal which honors exceptional Canadians for their contributions to their fellow citizens, communities and country.

20. Mr. Tam has been widely acknowledged as an extremely dedicated and professional pharmacist, who has put the interests of his patients and community above all else.

21. Eastside Pharmacy is one of a kind. Mr. Tam and his pharmacy play a very unique and special role in the lives of hundreds of severely disadvantaged and challenged patients. Without Mr. Tam's continued involvement, almost certainly these individuals' health care will be compromised further and there will be a significant and irreversible loss to the community that so desperately requires the type of professional and personal support that Mr. Tam offers.

LEGISLATIVE FRAMEWORK

22. The Ministry is responsible for the administration of the PharmaCare provincial drug program, established by the *Pharmaceutical Services Act* (the *"PSA").* Eligible British Columbians must apply for enrollment as beneficiaries under PharmaCare in order to receive benefits for medications and medical supplies. Similarly, pharmacies must apply for enrollment as providers under PharmaCare in order to provide the medications and supplies to beneficiaries.

23. Prior to the enactment of the *PSA,* which was assented to on May 31, 2012, and continuing until June 1, 2015. the Ministry had contractual relationships with pharmacies governing their enrollment in PharmaCare. Eastside's contractual relationship with the Ministry was set out in a PharmaCare Enrollment Agreement dated October 8, 2010 which set out a number of provisions governing Eastside's participation in PharmaCare (the "PEA").

24. The PEA defines "Claim" as "a claim for payment or claim reversal, as applicable, that is submitted by the Provider to the Province in respect of an Eligible Drug. Eligible Medical Supply, or Eligible Service provided to a Beneficiary".

25. Section 6.1 of the PEA provides that the Minister "may conduct audits in relation to any issue within the subject matter of [the PEA]."

26. Section 6.5 of the PEA provides that "in the context of an audit if it is found, in the reasonable opinion of the Province, that no records exist

to support a Claim, or that documentation supporting a Claim is incomplete or insufficient, the Claim will be disallowed and any amount associated with the Claim will be owing to the Province."

27. The terms "incomplete" and "insufficient" are not defined in the PEA.

28. Section 11.8 of the PEA provides that those sections of the PEA which by their nature are intended to survive, shall survive the termination or expiry of the PEA.

29. By operation of the *PSA,* the PEA was terminated on June 1, 2015. and Eastside was required to "re-apply" to be enrolled as a PharmaCare provider. Eastside submitted its application on January 20, 2015.

The Pharmaceutical Services Act

30. Sections 11 and 13 of the *PSA* relate to the enrollment of pharmacies as providers. It states:

Enrollment of providers

11 (1) An owner of a pharmacy, facility or other place where drugs, devices, substances or related services are provided to persons, other than on a wholesale basis, may apply to the minister to be enrolled as a provider.

[…]

(4) If satisfied that the applicant meets prescribed criteria, the minister

(a) may enroll the applicant as a provider, unless the minister is of the opinion that it would not be in the public interest to do so,

(b) may designate the provider as a member of a class of providers established by the minister, and

(c) may impose limits and conditions on the provider's enrollment.

Changing or cancelling provider enrolment

13 ... (2) Subject to the regulations and after giving the provider 30 days' notice and an opportunity to be heard, the minister may

(a) change or cancel a designation made under section 11 (4)(b) [enrolment of providers]. or

(b) cancel a provider's enrolment.

(3) The minister may change or add limits and conditions on a provider's enrolment

(a) on giving 30 days' notice but without giving an opportunity to be heard, or

(b) following a hearing in relation to the proposed cancellation of a provider's enrolment.

31. In this case, Eastside met the prescribed criteria, but the Ministry denied their application for enrollment because, in the Ministry's opinion (the assistant deputy health minister's opinion), it was not in the public interest for Eastside to remain enrolled.

32. Section 12 of the *PSA,* regarding the duties of providers, states that providers must comply with the *PSA* and regulations, and must keep prescribed records in the manner required by the Ministry.

33. The Ministry's right to appoint inspectors to perform PharmaCare audits for the purpose of ensuring providers' compliance with the *PSA* is also set out in the *PSA.* Section 35 permits audits to be conducted in respect of claims submitted to PharmaCare and the billing and business practices of a provider. Audits are conducted by a branch of the Ministry called PharmaCare Audit.

34. As per section 41, the Ministry must report the results of an audit to the audited pharmacy, and on receiving an audit report, the pharmacy has 30 days to request that the Ministry reconsider the results. After considering a request for reconsideration, the Ministry may (a) affirm or vary the results of the audit, or (b) send notice to the pharmacy that action will be taken under the *PSA.*

35. Such action includes the ability to recover any amount that the Ministry deems was a "non-entitled" amount on the basis of the audit findings, including payments made to the pharmacy for medication and device claims and dispensing fees.

36. Section 42(1)(c) provides that the Ministry can recover any amount paid to the pharmacy in respect of a claim for payment (i) for a benefit that was not provided or, (ii) that is not supported by the records kept or produced.

37. In accordance with subsections 42(2) and (3) of the *PSA,* the Ministry may require the pharmacy to repay the non-entitled amount, and may deduct any non-entitled amount from subsequent PharmaCare payments owed to the pharmacy.

38. Section 44 allows the Ministry to consider and base a determination or order on "any relevant source of information," including a source created on a statistical basis, including information derived from sampling, or by a comparison between benefits by a pharmacy and corresponding benefits provided by other pharmacies.

39. In this case, the Ministry alleges that Eastside received a non-entitled amount of $1,135,989.49 during the two year audit period, and is taking steps under section 42(3) of the *PSA* to recover that amount. The amount is based primarily on claims that were deemed to be in error because of incomplete documentation and/or imperfect compliance with the PharmaCare Frequency of Dispensing Policy and the College of Pharmacists of British Columbia's (the "College") *Pharmacy Operations and Drug Scheduling Act* bylaw requiring pharmacists to enter prescription information into PharmaNet at the time of dispensing.

40. The primary concerns in Eastside's audit are incomplete documentation and imperfect compliance with strict policies for documentation and submission of

claims. The audit report does not find that Eastside was billing PharmaCare for any benefits that were not provided to beneficiaries.

41. The *PSA* also contains a number of statutory immunities preventing pharmacies from seeking damages for anything done or omitted in the intended or actual exercise of a power under the *PSA,* or a power in relation to the PharmaCare Enrollment Agreement.

42. The *PSA* also includes provisions setting out how pharmacies covered under the previous PharmaCare regime, and parties to PEAs. are to be transitioned into the new PharmaCare regime set out in the *PSA.*

43. By virtue of section 71(2)(c) of the *PSA.* Eastside was deemed a provider under the *PSA.* subject to the terms of the PEA.

PharmaCare Policy Manual

44. PharmaCare policy is set out in an eleven chapter. 341 page manual ("PharmaCare Manual"), which is updated from time to time.

Frequency of Dispensing Policy

45. Pharmacies charge $10 dispensing fees for dispensing prescriptions to beneficiaries, and the Ministry created a policy to limit those fees for prescriptions that are frequently dispensed to patients.

46. Section 8.3 of the PharmaCare Policy Manual 2012 contains the Frequency of Dispensing Policy (the "Frequency Policy"). It defines frequent dispensing as dispensing daily or every 2 to 27 days. The Frequency Policy limits the number of dispensing fees a pharmacy can receive for patients receiving frequent dispenses of their medications.

47. Under the Frequency Policy, a pharmacy can receive up to three dispensing fees per patient for daily dispensed drugs, and up to five dispensing fees per patient for drugs dispensed in a 2 to 27-day supply.

48. The Frequency Policy does not apply when a pharmacy dispenses a single fill for the total quantity of drugs specified in the prescription by the prescriber. This means that if a prescriber writes a prescription for a quantity that is a single days' supply, and authorizes the prescription to be re-filled, neither the first fill nor any subsequent re-fills are subject to the Frequency Policy, because the prescription is not dispensed over time in reduced quantities.

49. Some of the pertinent requirements of the Frequency Policy include the following:

    (a) For daily dispensed medications, the prescribing physician (the "prescriber") must handwrite "dispense daily" or "daily dispensing" on the original prescription. It is insufficient for the prescriber to write the abbreviation "DD."

    (b) For medications dispensed every 2 to 27 days, the prescriber must handwrite "blister packs/packing," "weekly dispensing," or "compliance packaging," "biweekly dispensing" on the original prescription.

    (c) If a pharmacy receives verbal authorization to dispense a prescription frequently, the pharmacy must complete a

Frequent Dispensing Authorization form and fax it to the prescriber.

(d) A new prescription for daily dispensing must be re-authorized in handwriting by the prescriber if the original prescription is dated more than 60 days earlier.

If it is discovered that a pharmacy did not meet these criteria in the strictest manner in respect of every claim, the non-compliant claims and associated dispensing fees will be deemed to be entirely in error and recoverable by the Ministry.

50. The Frequency Policy also specifies that after a pharmacy has reached the maximum number of daily dispensing fees for a particular patient, the pharmacy cannot change a prescriber's order for daily dispensing to every second day or any other frequency in order to obtain extra dispensing fees.

51. The Frequency Policy first came into effect in February 2009. It was revised in November 2012 and again in March 2013. A PharmaCare newsletter from September 2012 indicates that audits were recently performed on pharmacies to assess compliance with the Frequency Policy, and it was found that 93.3% of pharmacies were non-compliant.

52. The PharmaCare Manual Frequency Policy refers to two situations where the fees paid will be recovered:

1) Where the number of fees paid exceeds those allowed under the policy: and

2) Where fees are paid after the date on which the prescriber notifies the pharmacy that the prescriber disagrees with frequent dispensing.

Other Recovery Circumstances

53. The PharmaCare Manual sets out the circumstances when claims are or may be subject to recovery:

1) If the pharmacy calls PharmaNet Help Desk to allow processing of a specific prescription, and the pharmacy processes additional prescriptions while the restrictions are lifted (chapter 3.5);

2) If claims are entered with an inaccurate days' supply (chapter 5.1);

3) If the UF intervention code is used to make a claim without adequate explanation/documentation (chapter 5.2);

4) If a claim adjudicates incorrectly due to an inaccurate dispensed quantity (chapter 5.5);

5) If claims are submitted above the Actual Acquisition Cost resulting in overpayments, overpayments will be recovered (chapter 5.7);

6) If a non-benefit compound is claimed using the PIN of a benefit compound (chapter 5.13);

7) If needles and syringes for non-insulin use are claimed using the PIN for insulin use needles and syringes (chapter 5.15);

8) If Blood Glucose Test Strips are claimed using a different PharmaCare Plan when the beneficiary is covered under Plan B (chapter 5.16);

9) If claims for nicotine replacement therapies are made;

   a. for non-eligible package sizes: or

   b. without a corresponding BC Smoking Cessation Program Declaration (chapter 5.20).

10) If individuals or families receive coverage greater than their income warrants, overpayments will be recovered from the individual or family (chapter 7.2);

11) If a claim is made using another PharmaCare plan for individuals covered under Plan B (chapter 7.3);

12) If a claim is made for clinical service fees but the services are do not fit the description of clinical services (chapter 8.4);

13) If a pharmacy solicits or accepts additional payment from a patient for a clinical service (chapter 8.4);

14) If overpayments are made to a contracted pharmacy under Plan B (chapter 8.7);

15) If a claim is made for a methadone interaction fee but the ingestion of the medication is not witnessed (chapter 8.8);

16) If multiple dispensing fees or interaction fees are claimed for multiple day supplies of methadone dispensed at one time (chapter 8.8);

17) If medication review services are claimed without meeting minimum documentation requirements (chapter 8.9);

18) If clinical services, medication review services, or vaccine services, which are subject to a combined daily reimbursement limit, are claimed on separate days to circumvent the limit (chapter 8.9); and

19) If a medication review service claim associated with a Drug Therapy Form is made and the form is illegible (chapter 8.9).

College of Pharmacists Bylaws

54. PharmaNet is the province-wide network that links all pharmacies to a central set of data systems. It is administered by the Ministry and the College. All claims must be entered into PharmaNet in order to track and regulate the prescription of medications, and adjudicate PharmaCare claims.

55. Section 21(1) of the College's *Pharmacy Operations and Drug Scheduling Act* [PODSA] bylaws states, with emphasis added, that,

> A registrant must enter the prescription information and transmit it to PharmaNet at the time of dispensing and keep the PharmaNet patient record current.

56. *PODSA* defines "dispense" as including "the preparation and sale of a drug or device referred to in a prescription and taking steps to ensure the pharmaceutical and therapeutic suitability of a drug or device for its intended use and taking steps to ensure its proper use".

57. Claims are sometimes entered into PharmaNet after the date of dispensing ("Late Filed" claims).

58. The Ministry uses the term "backdating" to describe Late Filed claims, despite the fact that the information recorded in Late Filed claims is accurate in every respect, including the dispensing date and the date of filing the claim. The Ministry also refers to claims that are originally filed on time, but subsequently reversed and re-entered (often to correct a data entry or other error), as Late Filed.

59. Late Filing does not involve the reporting of any misleading information or the improper amending or editing of previously filed claims. Specifically. Late Filing does not involve "backdating" any information in the sense of changing a date or reporting information in a way that could mislead someone about when the medication was dispensed or the claim for payment made.

60. In all cases of Late Filing the medications have actually been dispensed to a patient in accordance with a valid prescription and all of the information reported in the claim is completely accurate. The only difference between a regular claim and a Late Filed claim is that the pharmacy did not enter the information and make a claim for payment on the day that the medication was dispensed.

61. It is not necessary to conduct an on-site audit to assess Late Filing, because all of the information required is already contained in PharmaNet.

62. Neither PharmaCare Manual chapter 3. Claims Submission, nor any other statement of PharmaCare policy, contemplates recovery of claims on the basis of late or corrected filing: rather, data entry error is expressly specified as a reason for reversing and re-entering a corrected claim.

Chronology of Events

The Audit

63. On the afternoon of Friday, October 24, 2014, Tiffany Tam (Mr. Tam's daughter who is Eastside's pharmacy operations manager), received a call from PharmaCare Audit advising that Eastside would be undergoing an audit on the following Monday, October 27, 2014, for the period of September 1, 2012 to August 31, 2014.

64. On October 24. 2014. PharmaCare Audit faxed a notice of the audit to Eastside which stated:

> "Auditing pharmacies is part of the Ministry's normal business process to ensure billing to the PharmaCare program are appropriate and in accordance to PharmaCare policies and procedures as set out the *PharmaCare Enrolment Agreement* between the Ministry and the pharmacy."

65. Three PharmaCare auditors attended Eastside to conduct the audit from October 27 to October 31, 2014. Before they left on October 31, 2014, they advised Eastside that they would provide them with a draft audit report within six to eight weeks.

66. PharmaCare Audit took six months to review the data and issue a draft audit report setting out their findings.

67. On April 24, 2015, the Ministry provided Eastside with the draft report. While Mr. Tam was surprised by the findings, he was shocked by the inference of intentional misbilling.

The Draft Audit Report

68. According to the Draft Audit Report, one of the bases for audit selection was that Eastside had a higher than average level of Late Filed claims in 2013. The Ministry did not state how many of the Late Filed claims were originally filed on time and then reversed and re-entered.

69. The draft report is divided into five objectives, as follows.

    (a) Objective 1: Volume Verification - Top Drugs, *to determine if the claims submitted for quantities dispensed during the audit period were based on the volumes purchased by the pharmacy for each specific drug identification number.*

    (b) Objective 2: Prescription Verification - Top Claims, *to determine if the top claims were for bona fide prescriptions and claimed in accordance with PharmaCare policy and prescribers' instructions.*

    (c) Objective 3: Prescription Verification - General, *to determine if the claims were for bona fide prescriptions and claimed in accordance with PharmaCare policy and prescribers' instructions.*

    (d) *Objective* 4: Methadone Maintenance Claims Verification - General, *to determine if the methadone maintenance claims were for bona fide methadone maintenance prescriptions and claimed in accordance to PharmaCare policy and prescribers' instructions for dispensing and carries.*

    (e) Objective 5: Medical Review Services Verification, *to determine if claims were for bona fide medication review services and were eligible for payment pursuant to PharmaCare policies and procedures.*

70. Regarding Objective 1, the Ministry concluded that Eastside had sufficient invoices to show that they had purchased the quantities of "top drugs" that they dispensed. Top drugs are the most expensive ones, such as Hepatitis C (which costs over $400 for a one week supply) and other injectable medications. Presumptively, Eastside incurred the cost of acquiring these medications.

71. Under Objective 2, the Ministry found that 141 of the 554 "top claims" reviewed were in error. Of those 141 allegedly erroneous claims. 130 were Late Filing errors. Most of the Late Filed claims had been entered into PharmaNet only one or two days after they were dispensed. 34 of the denied claims, totalling $44,111.71. were filed on the day after the claim date.

72. Similar to "top drugs," "top claims" were the highest cost claims submitted by Eastside during the audit period. They were predominately claims for Hepatitis C drugs. According to the Ministry's calculation, the total non-entitled amount under Objective 2 was $133,894.60. Of this amount, $132,486.52 was comprised of Eastside's drug costs and only $1,408.08 related to Eastside's $10 dispensing fees.

73. In other words, the Ministry sought to recover both the drug costs - which had been incurred by Eastside when purchasing the drugs - and the dispensing fees back from Eastside because, in most instances, Eastside had entered the drug claims into PharmaNet one or two days late. The drug costs comprise 99% of the Ministry's recovery claim under Objective 2.

74. The findings under Objective 3 included a total of 205 claims alleged to be in error out of the 383 random claims reviewed. The 205 errors included 60 claims with various errors, including Late Filed claims, several of which were not in fact Late Filed and many of which were filed within one day. and 145 claims that were found to be in error because they did not comply with the Frequency Policy.

75. The Ministry concluded that the frequency errors were committed intentionally in order to maximize dispensing fees:

> PharmaCare Audit found an overwhelming number of claims dispensed by the *Pharmacy* in a manner that circumvented the *Frequency of Dispensing Policy* and resulted in professional fees paid to the Pharmacy that the Pharmacy was not entitled to.
>
> Many of the Pharmacy's patients were authorized for daily dispensing and many were prescribed more than three medications daily; however, the *Frequency of Dispensing Policy* restricts professional fees to three DIN/PINs (Drug Identification Number/Product Identification Number) per patient per day. The dispensing pharmacist regularly dispensed the fourth DIN/PIN and beyond in a quantity other than daily, often weekly, resulting in unjustifiable professional fees paid.

76. In other words, the Ministry drew the inference that, because patients regularly had three of their medications dispensed daily with the remainder being dispensed at different frequencies (which was not always consistent with what was written or not written on the original prescription), and pharmacies are only entitled to three dispensing fees per day for each patient's daily dispenses, Eastside intentionally dispensed the medications in this manner in order to maximize the number of claims for which they could be paid a dispensing fee.

77. The total dollar value for the 205 errors under Objective 3 is $2,047.93. A large portion of this amount was for the drug costs, not just dispensing fees. When the Ministry extrapolated that over the claims population, the total dollar value of the alleged errors is $960,458.05.

78. Relying on samples to determine recovery amounts is not permitted under the PEA, or under the *PSA*.

79. *A*lthough the Ministry purports to use reliable statistical methodologies, they have provided no documents which explain the margin of error in respect of the calculation, despite Eastside's request for this information. The margin of error could be hundreds of thousands of dollars.

80. In respect of Objective 4, the auditors found that 24 of the 381 methadone claims they reviewed were in error largely due to incomplete documentation, such as missing patient signatures or quantities written in the ingestion logs.

81. Lastly, in respect of Objective 5, the auditors state that all 243 claims reviewed under this objective were in error because the medication review reports were either missing, or did not meet the strict documentation requirements. As a result of what the Ministry determined to be incomplete documentation, all 243 claims - worth $14,355 - were found to be in error.

82. On the basis of the preliminary findings, the total amount sought to be recovered from Eastside was $1,153,250.96.

83. Appended to the 21-page draft report were appendices providing some detail regarding the claims that were deemed to be in error; there were 61 pages of appendices regarding over 600 alleged errors.

84. The appendices did not identify the errors in relation to the corresponding patients or personal health numbers (PHNs). Rather, they listed the prescription numbers, dates, drug information and the auditors' brief comments on why the claims were considered in error.

85. Eastside was given only 30 days from the Ministry's April 22, 2015 letter enclosing the draft report to respond to it.

Notice of Enrollment Decision

86. One week after receiving the draft report, Mr. Tam received a letter from the Ministry, sent by the assistant deputy minister, dated May 1, 2015 putting Eastside on notice of the Ministry's intention to deny their

application for enrollment on the basis of the concerns identified in the draft report (the "Notice").

87. The reason for the denial provided in the notice letter was that the Ministry had already,

> [...] formed the opinion that it is not in the public interest to enroll the Pharmacy as a provider, due to the findings of the Draft Audit Report relating to PharmaCare billings by the Pharmacy.

88. In particular, the findings of the draft report that were stated to be most relevant to the consideration were:

> (a) Eastside's engagement in a high level of Late Filed claims and,
>
> (b) Eastside's pattern of, without written prescriber approval as required in the Frequency Policy, dispensing medications in quantities other than what was prescribed, and dividing prescriptions into weekly and bi-weekly billings.

Based upon these "findings", the Ministry inferred an intention on the part of Eastside to maximize the number of claims for dispensing fees, thereby circumventing the Frequency Policy.

89. The Notice stated that "[e]ntering a claim *more than one day* after the medication in question was dispensed is not permitted." (emphasis added)

90. In effect, the Ministry inferred an improper, immoral intent from preliminary findings, without providing Eastside an opportunity to be heard in advance, and relied on those findings and inference in order to decide that it would deny Eastside's enrollment and effectively put them out of business.

91. The Ministry advised Eastside that they had until May 25, 2015 to respond to the notice of denial. The Ministry also advised of its decision that, effective only five business days after Eastside's response to the notice letter was due, their enrollment in PharmaCare would be terminated.

Response to Notice Letter

92. On May 15, 2015, Eastside's counsel wrote to the Ministry submitting in part, that:

> (a) The audit sample spans over two years and contains over 600 alleged errors, making the task of responding substantial and essential, given that the Ministry needed to make a properly informed decision with respect to the enrollment, particularly where the draft report was the only issue raised in support of the denial.
>
> (b) Eastside has not been provided with adequate time to reply to the findings in the draft report, and the

failure to deliver the draft report earlier and/or provide additional time for a response was severely prejudicial to Eastside.

Eastside's counsel requested continued enrollment on an interim basis beyond June 1, 2015 to enable Eastside to, among other things, ensure they had a better opportunity to respond to the draft report. They also requested, as part of Eastside's response to the draft report, an in-person meeting with the appropriate decision makers.

93. On May 19, 2015, the Ministry wrote to Eastside's counsel granting an extension of Eastside's interim enrollment to June 19, 2015 for the sole purpose of allowing her to consider Eastside's response to the notice letter. An in-person opportunity to be heard was not granted.

94. On May 21, 2015, counsel for Eastside wrote to PharmaCare Audit requesting a full and complete disclosure of the Ministry's and auditors' files regarding the audit, including but not limited to,

(a) All file materials regarding all services reviewed by the auditors;

(b) The sampling design; and

(c) A list of associated PHNs and all prescriptions corresponding to those PHNs by date.

This information was necessary to allow Eastside to better understand the audit findings and the concerns in the draft report, as well as to identify precisely which claims were found to be in error.

95. PharmaCare Audit did not respond to this request until after Eastside's response to the notice letter was due.

96. On May 25, 2015, Eastside provided their response to the notice letter, which included:

(a) a cover letter from their counsel, which will be discussed below;

(b) a letter from Mr. Tam outlining his background, the pharmacy's background, philosophy and involvement in the DTES, and his commitment to implementing all necessary changes to be fully compliant with PharmaCare policies;

(c) a letter from Ms. Tam outlining her background, her evolving role as the operations manager, her response to the key issues raised in the draft report, and all of the changes that had been implemented to address the concerns raised in the draft report;

(d) a letter from Mr. Ken Lee, Eastside's independent pharmacy consultant, describing his experiences as a consultant, his interactions with Eastside, his observations of Eastside's pharmacy practices and unprecedented commitment to improvement, and his willingness to

conduct external audits of Eastside to help ensure future compliance; and

(e) 18 letters of support from Eastside's community partners and other DTES health care professionals (primarily physicians), invariably attesting to Eastside's very important, dedicated and professional services to the patient population, and using expressions such as "horrified", "a significant loss", "a disservice" and "a colossal mistake" in response to the news that the Ministry was going to de-enroll such an important, professional and valuable pharmacy. One physician said "It will not be an exaggeration to state that if Mr. Tam and Eastside Pharmacy are not allowed to continue doing what has become an invaluable and essential service unique to our area, patients will destabilize and potentially die."

97. The letter from Eastside's counsel dated May 25, 2015 included legal submissions regarding the role of the Minister as a decision maker, the nature of the decision and the procedural fairness owed to Eastside, and also made the following points:

(a) Public interest considerations dictate that a determination with respect to Eastside's enrollment be informed by a comprehensive assessment of the impact of the particular decision, and not merely a consideration of one particular audit finding which is simply a snapshot of the pharmacy's compliance with PharmaCare criteria at a discrete time.

(b) The closing of Eastside will have a significant adverse impact on continuity of care and thereby potentially cause harm to patients, particularly given the vulnerable patient population.

(c) Eastside's services are unique and unlikely to be immediately replaced, if at all, thereby causing harm to the patient population.

(d) Eastside is prepared to maintain its enrollment subject to additional conditions as contemplated by section 11 of the PSA.

98. Counsel also requested that Eastside be granted continued interim enrollment beyond June 19, 2015 to provide the Ministry with an opportunity to review the submissions further; given the likely dire consequences associated with the Ministry's decision, three weeks would not be enough time for the Ministry to review the materials and make an informed decision regarding enrollment.

99. On June 1, 2015, counsel for the Ministry wrote to Eastside's counsel in response to his request for full and complete document disclosure of the audit files. She stated, in part, that,

The Ministry has instructed me to advise you that it is not prepared to disclose the auditors' full files. However, the

> Ministry is providing you with the following to allow you to better understand the audit findings and the concerns identified in the report and to assist your client in responding to the Draft Audit Report.

100. The letter enclosed some marginally helpful information, including a brief Word document prepared by PharmaCare Audit outlining the method by which sample sizes are calculated, and spreadsheets containing some patients' PHNs, though not in the manner requested.

101. The June 1, 2015 letter also indicated that the due date for Eastside's response to the draft audit report had been extended from what was originally May 24, 2015 to July 3, 2015. This deadline was subsequently extended to July 10, 2015, pursuant to Eastside's counsel's request.

102. In total, the Ministry afforded Eastside less than ten weeks to respond to a report and data that took the Ministry six months to compile, even though they knew that Eastside was already entirely pre-occupied for over a month within that period of time while scrambling to prepare a response to the notice letter.

Response to Draft Audit Report

103. On July 10, 2015, Eastside provided its response to the draft report which was as thorough as possible given the very limited time frame provided for their response. However, on the whole, the response was not nearly as responsive as it could have been if more time had been provided.

104. Faced with these limitations, Eastside focused on responding to the suggestion of intentional misbilling, which was the most serious and concerning allegation from Eastside's perspective. They provided a brief response to each of the five objectives listed in the draft report, but it was not possible for them to respond to all 600+ errors individually within the time provided.

105. The response materials included a cover letter from Eastside's counsel, five Word documents spanning 62 pages containing Eastside's general comments in response to each of the objectives listed in the draft report, and Mr. Lee's Pharmacy Practice Analysis Report from his own audit of Eastside's PharmaCare billings for the period May 1 to 31, 2015.

106. Objectives 2 and 3, which Eastside more or less combined in their response materials, related primarily to the issues of Late Filed claims and changes in frequency of dispensing.

107. In response to the Late Filing issue, Eastside acknowledged that it submitted Late Filed claims, provided the reasons that led to the Late Filing, and explained that they had since rectified the Late Filing issue.

108. Essentially, Eastside explained that it often had to resort to Late Filing claims as a result of prior inefficient operations and lack of administrative organization, which led to claims not being submitted on time. More specific reasons for the Late Filing included,

(a) Software challenges (in November 2013, Eastside switched to a new software program from an impractical and archaic one, which resulted in drastic improvement to their Late Filing problem. Based on the audit data, Eastside averaged 17 Late Filings per month before the software change; after the software change, Late Filings were reduced to less than one per month);

(b) Complicated pharmacy workflow and tracking systems;

(c) Pharmacy assistants with no prior training;

(d) Lack of accountability amongst staff members; and

(e) Broken pharmacy systems, which improved with the new software, new workflow designs and new employees.

109. Eastside also acknowledged the instances when their prescriptions did not meet the strict Frequency Policy requirements. For example, a prescriber would call in a verbal order to change the frequency but it was not confirmed in writing, or the prescriber indicated on the prescription that the medication was to be dispensed and re-filled at one-day intervals instead of handwriting the exact words "daily dispense".

110. Putting aside the issue of unfairness in the Ministry's requirement for such unreasonably strict compliance with the Frequency Policy, Eastside explained some of the circumstances that led to these documentation shortfalls, including:

(a) Complicated pharmacy workflows and tracking systems;

(b) Workarounds created for the old pharmacy software to maintain the demanding operational requirements of the pharmacy;

(c) Weak mentoring and training of existing and new staff on various regulatory and operational requirements which differed among care plan providers;

(d) Complex and unconventional prescriber ordering behaviours which were often verbal and not well documented by the prescriber (by necessity, physicians in the DTES are unconventional, creative and flexible in their patient care; given the fast paced environment, it was not unusual for the physicians to neglect to document their decisions, arrangements or changes on patients' orders);

(e) Weak documentation practices around prescriber-directed changes to prescriptions;

(f) Weak quality assurance practices and processes to detect and mitigate errors; and

(g) Inadequately described sigs placed on PharmaNet.

111. Eastside also responded to the auditors' inference that, because some patients regularly had three of their medications dispensed daily with the remainder being dispensed at different frequencies (which was not always consistent with what was written by the prescriber on the original prescription), and pharmacies are only entitled to dispensing fees for three daily dispenses per patient per day, Eastside must have intentionally dispensed the medications in this manner in order to maximize the number of claims for which they could be paid a dispensing fee.

112. Eastside unequivocally stated that this inference is false, and that in many instances, there were varying frequency of dispenses based on the patients' care plans and "split care" prescriptions.

113. Split care prescriptions were customized for many patients with the intent of maximizing medication adherence. They involved cases where unconventional prescription filling processes were required to ensure the prescription instructions and intent were preserved.

114. For instance, a patient might have five medications that needed to be daily dispensed. Due to the differing types of the medications, three might require the patient to pick them up from the pharmacy every day with ingestion witnessed by the pharmacist, and the other two may be dispensed in a weekly supply and delivered to the patient's residential facility where the health care workers or trained tenant support workers there would dispense the medications to the patient daily.

115. In the summer of 2014, Eastside recognized that while split care prescriptions were not disallowed by PharmaCare, there were inherent difficulties in documenting and dispensing split care prescriptions properly, so they took steps to change that practice. They worked with the patients' respective prescribers to come up with new care plans that were more simplified and streamlined, and eliminated split care prescriptions where possible.

116. Eastside also pointed out that in many instances throughout the audit period, they indeed daily dispensed more than just three daily dispense medications, including some which were covered by PharmaCare and others which were not, for which they did not get dispensing fees.

117. Eastside explained that if a patient required more than three PharmaCare medications to be daily dispensed directly to them by the pharmacy on a given day (i.e. not to be daily dispensed by third parties as part of the care plan), they would daily dispense those medications accordingly. They would not avoid daily dispensing a fourth medication simply because it would not qualify for a dispensing fee.

118. They also pointed out that there were a number of instances where the auditors suggested they only daily dispensed three PharmaCare-covered medications, but the records indicated they had in fact daily dispensed more than three PharmaCare-covered medications to the patients on the dates in question.

119. In that regard, at several points throughout the response materials, Eastside did point out that there appeared to be numerous instances where the auditors incorrectly concluded that certain claims were in error, when they were in fact not in error. However, due to the extremely high number of claims at issue, the difficulty with comprehending the voluminous appendices and data provided, and the limited time frame for responding, Eastside could not identify or respond to all of the errors committed by the auditors.

120. In their cover letter, counsel for Eastside also provided some comments on the disputed inference of intentional misbilling.

121. They noted that while Eastside acknowledges that it encountered great difficulty in meeting all of the PharmaCare documentary requirements, entrances of moral turpitude should not be inferred from this fact alone.

122. In making that observation, counsel also noted that Eastside is a truly unique pharmacy attempting to provide comprehensive health care services to a chaotic patient population and often in chaotic circumstances. Given the clinical challenges, the increased documentation issues should not be surprising.

123. Counsel further noted that other pharmacies, including those that had less complex patient populations and did not face the same challenges as Eastside, have had difficulty meeting PharmaCare requirements, particularly in circumstances where PharmaCare requirements have changed from time to time, such as the Frequency Policy.

124. Eastside's counsel also outlined the many measures Eastside had already implemented to ensure future compliance, and submitted that that information ought to be considered in evaluating the draft report as well as considering Eastside's continued enrollment.

125. The remedial measures taken by Eastside since the audit report included:

    (a) The software change in November 2013,

    (b) Administrative and staff changes,

    (c) Implementation of quarterly staff meetings to discuss claims practices,

    (d) Internal audits and compliance reviews conducted by Ms. Tam as the newly appointed compliance officer at Eastside, and

    (e) External quarterly PharmaCare audits conducted by Eastside's consultant, Mr. Lee.

126. The cover letter indicated Eastside is prepared to work with PharmaCare to ensure strict compliance and adherence to PharmaCare policies, and to have its enrollment maintained subject to additional conditions. They requested a meeting with PharmaCare

Audit representatives to discuss what conditions, if any, would be required to support Eastside's continued enrollment.

127. Counsel for Eastside concluded the cover letter by submitting that, given the very important and irreplaceable service that Eastside provides to the DTES, PharmaCare and Eastside should work together, in the public interest, to find a solution that allows Eastside to continue providing its much needed services to the community.

Final Audit Report

128. On August 24, 2015, the Ministry extended Eastside's interim enrollment to September 30, 2015 to allow time for the final audit report to be issued and reviewed before making the final enrollment decision.

129. On September 24, 2015, when the final audit report still had not been issued, the Ministry extended Eastside's interim enrollment further to October 30, 2015 to allow time for the final report to be issued and reviewed before making the final enrollment decision.

130. On October 5, 2015, the final report was delivered to Eastside, comprised of a 33-page report and 293 pages of appendices. The cover letter from the Ministry's counsel noted that the amount owing from Eastside to the Ministry is $1,135,989.49, and if Eastside did not make full payment within 30 days, the Ministry would begin to set-off the amount owing from future PharmaCare payments to the pharmacy.

131. The Ministry provided no statistical explanation or breakdown to show exactly how it extrapolated the non-entitled amounts and arrived at the final recovery amount, and what the margin of error was.

132. After purporting to review Eastside's response to the draft report, the Ministry only deleted seven out of more than 600 alleged errors/non-entitled amounts. Those seven claims later conceded by PharmaCare as properly entitled amounts were likely based on the very few specific claims that Eastside had a chance to address directly in their response. In total, Eastside was only able to specifically dispute 11 individual errors that they noticed when preparing their general comments for the response. It appears that PharmaCare Audit did not make efforts to verify the accuracy of the remainder of their own findings after these issues were flagged in the response materials, before issuing the final report.

133. For each of the four objectives that had corresponding errors in the final report, the Ministry added a section summarizing Eastside's response and their reply to the response. For the most part, the Ministry's replies generally stated that additional documentation and comments had been reviewed, but they confirmed the alleged errors and rejected Eastside's submissions without explaining why in any detail.

134. One exception to this was the Ministry's reply to the response materials provided in respect of Objective 3 regarding the Ministry's

inference that Eastside was often billing only three daily dispense medications per patient and dispensing the rest weekly or biweekly in order to maximize dispensing fees.

135. The Ministry said in the final report that they were not prepared to accept Eastside's explanation regarding split care prescriptions, "as it is not plausible" and remained convinced that Eastside was intentionally misbilling to circumvent the Frequency Policy and obtain more dispensing fees.

136. Although the Ministry stated in the final report that Eastside provided no evidence to support the "blanket statement" regarding split care prescriptions, PharmaCare did not request follow up documentation or affidavits from Eastside, despite Eastside's commitment in the response to provide further material upon request.

137. The Ministry also rejected the split care explanation without attending at the pharmacy, which they were invited to do, to observe the pharmacy operations and the way Eastside interacts and collaborates with prescribers and patients in a way no other pharmacy does, and to see for themselves that perhaps Eastside's services really are as unique, exceptional and creative as they and their community partners say.

138. The Ministry did not ask any physicians, health care workers, or tenant support workers involved in split care prescriptions about their role in providing split care to patients.

139. The Ministry did not ask any patients about the care they received from Eastside.

140. The Ministry took further auditing steps to bolster the Final Audit Report, including adding an additional 40 appendices to the Final Audit Report.

141. Eastside was given no opportunity to respond to these new auditing steps or additional appendices.

142. The Audit Decision was made by a person or persons other than the Minister without any valid instrument delegating the Minister's statutory powers to that person.

Final Enrollment Decision

143. On October 15, 2015, ten days after the final audit report was issued, the assistant deputy minister, on behalf of the Ministry, made the Enrollment Decision, confirming the denial of Eastside's enrollment in PharmaCare effective November 7, 2015.

144. The Ministry appears to have declined Eastside's enrollment for two types of reasons:

(a) first, questions related to Eastside's billing and financial practices; and,

(b) second, an inference that Eastside was not providing appropriate care to its patients.

145. Ultimately, the Ministry concluded that it was declining to enroll Eastside because such enrollment would not be in the public interest. To Eastside, this seemed a preposterous conclusion given the evidence provided to the Ministry by Eastside and highly respected third parties showing that Eastside's services are essential to the public interest and public safety.

146. The Ministry noted the following considerations to be part of the public interest analysis:

(a) For the Ministry, as the administrator of PharmaCare, to ensure that public funds used for the program do not pay claims for which pharmacies are not entitled to payment;

(b) For the Ministry to ensure that the PharmaCare program is sustainable over the long term, which requires the Ministry to ensure that public funds are not paid to pharmacies that demonstrate a high degree of non-compliance with billing policies and regulatory requirements; and

(c) For health care professionals receiving public funds from the Ministry to consistently demonstrate an ability to comply with their professional obligations.

147. Applying these limited considerations of the public interest to Eastside's case, the Ministry concluded:

> Given the very high error rate found in the Final Audit Report of the Pharmacy, the variety of errors that the audit found the Pharmacy to have committed, and the evidence that the Pharmacy's claims practices circumvented the FOD Policy in order for the Pharmacy to receive professional fees to which it would not otherwise be entitled, I have concluded that it is not in the public interest for the Ministry of Health to continue to permit the Pharmacy to receive PharmaCare payments.

148. The Ministry's applied definition of public interest is entirely focused on the financial integrity of the PharmaCare program, compliance with PharmaCare billing criteria, and the proper use of public funds. The Ministry's focus on the financial aspects of the PharmaCare plan is disproportionately weighed, to the extent that other material criteria have not been properly considered as a component of public interest.

149. Part of the other material criteria is patient care, which is a different matter and involves other public considerations which are not captured by a purely financial administrative model.

150. To properly consider the full spectrum of the public interest, the Ministry was obliged to consider the very important role that Eastside plays in providing medical care to the affected patient population and then ask whether such services can be easily replicated or replaced. On the facts, the evidence is quite clear that Eastside's role within the community is unique and, even more importantly, central to the health and wellbeing of many disadvantaged people within this marginalized community.

151. The Ministry formed several conclusions regarding Eastside's care and its patients' safety; however, these conclusions are not consistent with the balance of evidence. There were two principle (sic) findings:

    (a) Eastside was not providing appropriate patient care on the basis that it was not complying with prescribers' orders to daily dispense medications directly to patients, but was instead distributing the medications on a weekly basis to have other parties dispense them.

    (b) Eastside may have been endangering the health and safety of their patients as a result of not entering claims onto PharmaNet on time, resulting in patients' medication profiles being inaccurate.

152. The Ministry's conclusions in this regard are plainly wrong. The information provided to date in Eastside's response materials, including letters of support from physicians in the community, clearly show the contrary is true: Eastside provides exemplary care to its patients.

153. The medical evidence supports the conclusion that the patients have not been put at risk and that whatever concerns may arise from inaccurate information being imputed into the PharmaNet database, this does not equate to other care providers sharing the Ministry's concerns. It is presumably those other health care providers who would have the need to access the PharmaNet database and not Ministry staff. Accordingly, the conclusion that there is any risk to patients is simply unfounded.

154. While Eastside acknowledges its past operational and administrative shortcomings with respect to some of its claims practices, it cannot be logically concluded that those shortcomings resulted in inappropriate care or risks to the patients' health and safety.

155. On November 5, 2015, the Ministry notified Eastside that it was extending their interim enrollment until December 5, 2015 for the sole purpose of supporting the transition plan that Vancouver Coastal Health was implementing in order to ensure that continuity of care is maintained for vulnerable patients of Eastside that are affiliated with Vancouver Coastal Health programs.

156. The fact that the Ministry provided this extension without Eastside specifically asking for it is indicative of how concerning and difficult it has been for patients and the DTES health care community to implement a transition away from Eastside as a result of their de-enrollment.

157. On November 9, 2015, counsel for the Ministry advised Eastside that the Ministry would begin its offsetting recovery process at the rate of 50% for the period ending November 27, 2015. Thereafter, PhamaCare payments would be deducted in full until the recovery amount of $1,135,989.49 is paid in full.

158. On November 20, 2015, Eastside's counsel wrote to the Ministry's counsel requesting that the Ministry reconsider its decision to deny enrollment. In their letter, counsel outlined some of the issues they saw with the decision letter, highlighted the reasons supporting Eastside's continued enrollment, including references to some of the recent media stories regarding the public upset over the de-enrollment decision, and set out some of the factors that should be considered when conducting a cost/benefit analysis in respect of the services provided by Mr. Tam and Eastside.

159. In their November 20 letter, counsel also suggested that the assistant deputy minister meet with Mr. Tam, with counsel present, so that she can have an opportunity to understand his passion and commitment to the community he serves, thereby supporting the conclusion that the parties can work collaboratively to come up with a solution that allows Eastside to remain enrolled while proving its trustworthiness to PharmaCare.

160. On November 26, 2015, Ministry counsel advised Eastside counsel that the Ministry is not prepared to reconsider its decision to refuse enrollment. The Ministry did not provide any reasons for refusing to reconsider the Enrolment Decision.

161. The power to make the Enrolment Decision under s. 11(4) was purportedly subdelegated in writing to Barbara Walman. Assistant Deputy Minister, by Ministerial Order M 113. dated April 28. 2015.

162. Ms. Walman did not make the Enrolment Decision independently and impartially, based upon her own review and consideration of the record. Instead. Ms. Walman. without lawful authority, delegated her duty to independently and impartially review and consider the record to others, and then adopted their decision as her decision.

163. Since the Enrolment Decision came into effect, the pharmacy services received by Eastside's former patients have been inadequate, and the health of Eastside's former patients has been harmed.

164. The Minister has enrolled, or not cancelled the enrollment of certain other pharmacies when the Minister found that the same or substantially similar concerns were present.

165. The Minister has, after permitting pharmacies to be temporarily enrolled for extended amounts of time, treated those enrolment decisions as a cancellation of an existing enrolment pursuant to s. 13(2)(b) and the *PSA,* and not as a denial of an application for enrolment pursuant to s. 1 l(4)(a).

[Underline in original.]

[6] For the purposes of the notice of application filed on May 17, 2017 the Pharmacy does not rely on para. 162 of the amended petition.

[7] In an application response filed on June 27, 2017, the respondent opposes the orders sought by the Pharmacy in its May 17, 2017 notice of application. It also filed an application for document disclosure.

[8] In its application response filed on June 27, 2017 the respondent sets out the following "factual basis" in part 4 (citations to affidavits are omitted):

> **A. The PharmaCare Program**
>
> 1. The Ministry of Health operates PharmaCare, the provincial drug program, consisting of benefits for which full or partial payment may be made by the Minister of Health (the "Minister"). PharmaCare operates under the *Pharmaceutical Services Act*, S.B.C. 2012, c. 22 (the "*PSA*").
>
> 2. The total PharmaCare budget for the 2014/2015 fiscal year was approximately $1.08 billion. The majority of that total budget consisted of PharmaCare payments to community pharmacies in British Columbia, such as the Applicant [i.e. the Pharmacy].
>
> …
>
> **B. The Statutory Scheme**
>
> 3. The PSA was brought into force on May 31, 2012. Prior to 2012, PharmaCare operated under the *Continuing Care Act*, R.S.B.C. 1996, c. 70 and any contracts made under that legislation. Pharmacy contracts were in a standard form called PharmaCare Enrolment Agreements ("PEAs").
>
> …
>
> 4. To participate in PharmaCare, now under the *PSA*, a pharmacy must be a "provider".
>
> 5. A transitional provision of the *PSA*, s. 71(2), provides that, as party to a PEA, the Applicant was "deemed to be [a provider]" under the PSA. Pursuant to s. 71(4), PEAs were terminated 180 days after the *Provider Regulation*, B.C. Reg. 222/2014 (the "Regulation") came into force. In addition, subsection 11(4) provides that a deemed provider's "deemed enrolment" under s. 11(2) is terminated on that date. The *Regulation* came into force on December 1, 2014. All PEAs were terminated in accordance with the *Regulation* on May 31, 2105.
>
> 6. As a result, by operation of the legislation, the Applicant had no rights under the PEA or the *PSA*, except as granted by the Respondent.
>
> 7. Since the *Regulation* came into force, an owner or manager of a pharmacy wishing to participate in PharmaCare must apply to the Minister to be enrolled as a provider. Under s. 11(4)(a) of the *PSA*, if the Minister is satisfied that an applicant meets prescribed criteria, the Minister may enroll the applicant as a provider, unless the Minister is of the opinion that it would not be in the public interest to do so.
>
> **C. The Audit and Application to Enrol**

8. In order for PharmaCare to pay for a particular pharmaceutical product, PharmaCare requires a patient to obtain a prescription and present it to a participating pharmacy. The pharmacy then dispenses the product in accordance with plan rules and eligibility. Once a claim is submitted, PharmaCare reimburses the pharmacy directly for all or part of the cost of the product and an associated dispensing fee.

…

9. To process claims for payment, PharmaCare uses a computer system called PharmaNet. Those pharmacies that participate in PharmaCare must use PharmaNet. PharmaNet processes about 65 million transactions a year. These transactions are entered by pharmacies participating in PharmaCare.

10. Once entered, PharmaCare adjudicates claims using set rules built into the system that relies on the accuracy of information entered by pharmacists. The system automatically credits payment for that claim to the pharmacy's account. The only process whereby PharmaCare reviews a pharmacy's claims is a post-payment PharmaCare audit. In an audit, PharmaCare auditors review the PharmaNet data and compare it to the pharmacy's supporting documentation (prescriptions, ingestion logs, invoices, etc). The overall purpose of an audit is to ensure that the pharmacy is complying with proper claim practices required by the *PSA*.

…

11. On October 27, 2014, the PharmaCare audit team began its audit of the Applicant's PharmaCare claims for the period of September 1, 2012 to August 31, 2014.

…

12. On January 27, 2015, the Applicant applied for enrolment under the new statutory scheme created by the *PSA*.

…

13. PharmaCare sent a Draft Audit Report ("DAR") to the Applicant on April 23, 2015. The Applicant was given thirty (30) days to provide submissions and evidence in response to the DAR in accordance with s. 41(2).

…

14. The *PSA*, s. 44(2) permits PharmaCare to conduct the audit by sampling the claims. The auditors calculate the sample size based on established statistical formulae. The precision of the audit is set at a 95% confidence level with a 5% margin of error and an expected error rate of .50.

15. By ministerial order signed April 28, 2015, the Minister delegated his enrolment powers under ss. 11(4) of the *PSA* to the Assistant Deputy Minister, Medical Beneficiary & Pharmaceutical Services, Barbara Walman.

…

16. By letter dated May 1, 2015, Ms. Walman notified the Applicant that she intended to deny its enrolment application and invited the Applicant to respond ("the Notice"). Ms. Walman advised the Applicant the submissions in

> response to the DAR would be considered in the enrolment process. The Regulation provided that the Applicant had 21 days to respond, that is, until May 25, 2015.
>
> …
>
> 17. PharmaCare provided the Applicant a number of extensions, so that it could provide its response to the Draft Audit Report as well as the Notice.
>
> …
>
> 18. PharmaCare also enrolled the Applicant for a fixed term until December 5, 2015.
>
> …
>
> 19. On September 24, 2015, Mitch Moneo, the Executive Director, Policy Branch, exercising the Minister's authority under s. 41(3), approved the Final Audit Report and concurrently determined under s. 42 that PharmaCare would recover the amounts under the Final Audit Report. This is the Audit Decision.
>
> …
>
> 20. On October 15, 2015, Ms. Walman denied the Pharmacy's application for enrolment.
>
> …
>
> 21. The Applicant's location was in the Downtown Eastside, and it is common ground that its patients include some of the most vulnerable patients within the Vancouver Coastal Health Authority region. Ensuring continuity of care is important when transitioning the patients to another pharmacy. At the request of an employee of Vancouver Coastal Health Authority, Ms. Walman granted the Applicant a further fixed term enrolment, expiring on December 5, 2015, to allow the transition of its patients to another pharmacy.
>
> …
>
> 22. As Mr. Buchner describes in his affidavit, there was considerable confusion during the transfer to which the Applicant contributed in the transition.

[9] In part 1 of a notice of application filed on June 15, 2017 the respondent seeks the following orders:

> 1. Eastside Pharmacy Ltd. ("Eastside Pharmacy") be directed to produce copies of the following documents to the Minister of Health (the "Minister") pursuant to Rule 22-1(4)(c) 30 days before the hearing of the Petitioner's Application for Preliminary Relief:
>
> **From Eastside Pharmacy**
>
> a. Financial statements for the years 2012 to date;
>
> b. Monthly financial statements for January 2012 to date;

c. Full corporate income tax returns, including schedules, for the years 2012 to date;

d. General ledger reports from January 1, 2012 to date; and

e. Documentation for (or a breakdown of) revenue by source, including PharmaCare, for the years 2012 to 2016 and for the months to March 2017.

From Alexander and Betty Tam

a. The personal income tax returns of Mr. Tam and Mrs. Tam, for the years 2012 to date; and

b. Documents regarding any other companies Mr. Tam or Mrs. Tam owns, any other businesses Mr. Tam or Mrs. Tam operates which can fund Eastside Pharmacy as needed, and any other sources from which Mr. Tam derives income.

From Miracle Management Inc.

a. Incorporation documents;

b. Register of shareholders and directors since incorporation;

c. Financial statements for the years 2012 to date;

d. Full corporate income tax returns, including schedules, for the years 2012 to date;

e. Notice of assessments for the years 2012 to date; and

f. General ledger reports from January 1, 2012 to date.

From Tam Family Trust

a. Copy of the trust agreement;

b. Full tax returns for the years 2012 to date; and

c. Notice of assessments for the years 2012 to date.

Other

a. Bank information identifying financial transactions between Eastside Pharmacy Ltd., Miracle Management Inc., and/or the Tam Family Trust for the years 2012 to date.

2. If Mr. Tam is the sole proprietor of Cedar Hill Goods, Mr. Tam be directed to produce the following documents of Cedar Hill Goods to the Minister pursuant to Rule 22-1(4)(c):

a. Financial statements for the years 2014 to date;

b. Full tax returns, including schedules for the years 2014 to date;

c. Notice of Assessments for the years 2014 to date;

d. General ledgers for the years 2014 to date; and

e. Bank information identifying financial transactions between Eastside Pharmacy Ltd., Cedar Hill Goods, and/or the Tam Family Trust for the years 2014 to date.

3. If Mr. Tam is one of the partners of Penta Services, Mr. Tam be directed to produce the following documents of Penta Services to the Minister pursuant to Rule 22-1(4)(c):

a. Financial statements for the years 2012 to date;

b. Full tax returns, including schedules for the years 2012 to date;

c. Notice of Assessments for the years 2012 to date;

d. General ledgers for the years 2012 to date; and

e. Bank information identifying financial transactions between Eastside Pharmacy Ltd., Penta Services, and/or the Tam Family Trust for the years 2012 to date.

4. Eastside Pharmacy's application filed 17/MAY/2017 and set for hearing on 29/JUN/2017 be adjourned until 30 business days after it has provided the documents as directed.

[10] In part 2 of its notice of application seeking document disclosure the respondent sets out the following "factual basis":

Part 2: FACTUAL BASIS

5. The documents sought in the order are relevant and necessary to the issue raised in Eastside Pharmacy's application for interim relief, that is, whether Eastside Pharmacy will suffer irreparable harm if interim relief is not granted.

Background

6. On 03/DEC/2015, Eastside filed a petition for judicial review of the decision to deny Eastside Pharmacy's enrolment in PharmaCare.

7. Eastside Pharmacy filed a Notice of Application, for an interlocutory injunction, on 03/DEC/2015.

8. On 09/DEC/2015, counsel for the Minister requested additional disclosure of documents in order to assess whether Eastside Pharmacy and Mr. Tam would suffer serious financial hardship if an interim injunction was not granted. Counsel for the Minister advised that it would seek an order for disclosure if the request was not met.

…

9. By consent, Eastside Pharmacy's application was adjourned generally on 11/DEC/2015.

…

10. On 09/FEB/2016, counsel for Eastside Pharmacy informed counsel for the Minister that it would not seek injunctive relief but reserved its right to do so in the future should there be delay in the hearing or disposition of its petition.

…

11. On 15/FEB/2017, counsel for Eastside Pharmacy advised counsel for the Minister, it would seek interim relief.

…

12. In its application, Eastside Pharmacy is seeking interim relief including an order staying the Minister's decision not to enrol Eastside Pharmacy in PharmaCare; an order staying the decision to collect a debt due to the Province resulting from an audit; and an order in the nature of mandamus compelling the Minister to restore its temporary enrolment in PharmaCare. In the alternative, Eastside Pharmacy seeks damages if the decision not to enrol it in PharmaCare is quashed.

13. Eastside Pharmacy seeks this relief, in part, on the basis that it will go out of business if it is not enrolled in PharmaCare.

14. With respect to its claim that it will go out of business, Eastside Pharmacy adduced the following assertion in the affidavit of Mr. Tam, who is the owner of Eastside Pharmacy:

    Approximately 70% of my patients at Eastside rely on PharmaCare to cover the cost of their prescriptions. In turn, approximately 70% of Eastside's revenue is sourced by PharmaCare. If Eastside is de-enrolled from PharmaCare, it will ultimately have no choice but to close down as it will no longer be viable without the ability to participate in PharmaCare.

…

15. Mr. Tam's affidavit did not attach any financial documents to support this assertion. The company has remained in business to date and appears to still be posting a profit according to its income tax return of 2016.

…

16. In the affidavit of Ms. T. Tam, she asserts that the Pharmacy's expenses currently exceed its revenue, making the Pharmacy not financially viable in the long-term. However, Ms. T. Tam's affidavit does not attach documents to demonstrate Eastside Pharmacy's expenses so that they may be compared to Eastside Pharmacy's revenue in order to support her assertion. Several corporate tax returns are attached to her affidavit, but they are incomplete.

…

17. Ms. T. Tam also asserts in her affidavit that since Eastside Pharmacy's loss of enrolment in PharmaCare, the Pharmacy has received loans from Miracle Management Inc. to make up for the difference between revenue and expenses. However, no documents

about the asserted loans were attached to the affidavit. Further, this assertion directly puts in issue the finances of Miracle Management Inc.

…

18. Ms. T. Tam also asserts that she, her father (Mr. Tam) and her mother (Mrs. Tam), continue to work at Eastside Pharmacy without pay, putting the Tam Family's finances at issue.

…

19. From information the Minister was able to obtain, it appears Mr. and Mrs. Tam have considerable resources, including being registered owners of a property assessed at $3,023,000; Mr. Tam being a registered owner of another two properties, assessed at $550,000 and $544,000; and Mrs. Tam being a register owner of a fourth property, assessed at $548,000.

…

20. As well, Mr. Tam is currently a director of another corporation named Miracle Management Inc. Mr. Tam may also be the proprietor of a sole proprietorship named Cedar Hill Goods, and a partner in a general partnership named Penta Services.

…

Request for Documents

21. In a letter dated 09/DEC/2015, counsel for the Minister asked counsel for Eastside Pharmacy to provide several of the documents outlined in the orders sought above. As of 15/MAR/2015, the materials had not been provided.

…

22. After being made aware that interim relief was once again being pursued, on 15/MAR/2017, counsel for the Minister requested documents from Eastside Pharmacy in order to assess its financial health. Counsel for the Minister referenced the request made on 09/DEC/2015, and requested additional documents, indicating that all of the documents would be required well in advance of an application seeking injunctive relief.

…

23. On 12/MAY/2017, counsel for the Minister repeated its request for documents made on 15/MAR/2017, noting that an injunction application had been set but the requested documents had not been provided.

…

24. On 15/MAY/2017, counsel for Eastside Pharmacy stated that Eastside Pharmacy's general ledgers and financial statements were privileged as they contained privileged information about Eastside Pharmacy's legal advisors and expenses. Eastside Pharmacy agreed to provide these documents on a confidential basis and to only be shared with

an expert for the purposes of providing an opinion. Counsel for Eastside Pharmacy clarified that it was not waiving privilege and that if these documents were disclosed, they could not be entered into evidence.

…

25. On 29/MAY/2017, counsel for the Minister asserted its position that these documents were not subject to solicitor-client privilege and that she may want to tender some of the documents into evidence during the injunction hearing as they are relevant. However, to address Eastside Pharmacy's concerns, counsel for the Minister offered that any affidavits that referred to the financial records would be subject to a sealing order and subject to an implied undertaking.

…

26. On 31/MAY/2017, counsel for the Minister again wrote to counsel for Eastside Pharmacy, noting that while some requested documents had been provided, other requests for documents remained outstanding. Counsel for the Minister also requested further documentation based on the review of the Affidavit #1 of Ms. T. Tam.

…

27. Counsel for Eastside Pharmacy indicated that he would not provide any of Mr. or Mrs. Tam's personal information or any information about Miracle Management Inc. or the Tam Family Trust as none of the entities were parties to the proceeding, and Eastside Pharmacy's shareholders' financial "wherewithal" was not relevant to the question of irreparable harm. Further, counsel for Eastside Pharmacy continued to assert privilege and stated he would only provide certain documents subject to the condition that they not be admitted in court.

…

28. Counsel for the Minister provided Eastside Pharmacy's materials to Rosanne Walters, a Charted Professional Accountant, and asked her to assess Eastside Pharmacy's financial health and whether Eastside Pharmacy will suffer serious, or any, financial hardship if it is not enrolled with PharmaCare pending the outcome of judicial review. However, due to the lack of necessary financial documents from Eastside Pharmacy, Ms. Walters was not able to make this assessment.

…

29. Ms. Walters details the additional documentation she requires at paragraph 5 of her affidavit. These are the documents the Minister seeks on this application.

30. Once Ms. Walters has the documents, she estimates that she will be able to review the materials and prepare a report of her opinion regarding Eastside Pharmacy's financial health in about three to four weeks.

[11] The Pharmacy filed an application response on June 23, 2017 opposing the granting of the orders for document disclosure sought by the respondent. Its opposition has several bases. The first is that the respondent's application ought to have been filed months ago so that it could have been heard and decided well before the stay applications of the Pharmacy were scheduled to be heard, thereby avoiding prejudice to the Pharmacy caused by delay in the hearing of the stay applications. Second, the Pharmacy points out that apart from the Pharmacy none of the persons or entities from whom the respondent seeks document disclosure has been given notice of the respondent's application. Third, the Pharmacy submits there is no right to document discovery on a petition proceeding. Fourth, the Pharmacy submits that there are only two parties to this proceeding but the respondent nevertheless adopts the illegitimate approach of treating the Pharmacy and the non-parties from whom documents are sought as if they are coterminous legal entities. Last, the Pharmacy submits that the position of the respondent that the documents sought from non-parties are relevant to the issue of irreparable harm has no merit.

[12] On the hearing of the Pharmacy's application for injunctive relief the respondent did not urge that its application for documents ought to be heard first. The respondent made no oral submissions to supplement those in its notice of application for documents and that matter was left on the basis that in deciding the Pharmacy's application I will also address the respondent's documents application.

The Pharmacy's submissions on its Injunction Application

[13] The Pharmacy describes the first two orders that it seeks as doing no more than staying the enrollment decision and the audit decision. The practical effect of those orders would be that until the judicial review application has been heard the Province would not be entitled to enforce its claim for $1,135,289.49. The third order would temporarily restore the Pharmacy's enrollment as a PharmaCare provider pending the outcome of the judicial review application but the Pharmacy emphasizes its re-enrollment would require it to comply with all PharmaCare rules and practices that apply to other enrolled pharmacies. It does not seek prospective relief.

[14] The Pharmacy relies on *Community Outreach Pharmacy Ltd. v. British Columbia (Minister of Health)*, [2015] B.C.J. No. 2919, in which a similar circumstance to that which is before me arose. The petitioner in that case made similar complaints to those made by the Pharmacy regarding the enrollment and audit decisions of the Ministry of Health, and it too sought judicial review. In that case it was agreed by the Ministry that enrollment would continue until an interlocutory injunction application could be heard.

[15] Sewell, J. in *Community Outreach* referred to the injunction test in *RJR-McDonald v. Canada (AG)*, 1994 1 S.C.R. 311 and found the petitioner would suffer irreparable harm if its enrollment in PharmaCare was terminated before its judicial review application could be decided and if a claim by the Province for almost $1,400,000 arising out of the audit decision in that case was enforced against it.

[16] At para. 21-30 in *Community Outreach* Sewell, J. wrote the following:

> 21 *RJR-MacDonald* makes it clear that at the interlocutory injunction stage the court should not engage in a detailed analysis of the petitioner's claims except in certain exceptional circumstances, which are not applicable in this case.
>
> 22 In this case I am satisfied that the petitioner has raised a fair question to be decided. *RJR-MacDonald* makes it clear that in considering whether a fair question has been raised the court should impose only a very low threshold on an applicant.
>
> 23 It seems apparent to me that the focus of the petitioner's complaint in this case is the process, conclusions and fairness of the audit process. The petitioner says that the Minister acted unreasonably in basing his decision not to enroll on the basis of a fundamentally flawed audit. I find that this is a fair question based on the evidence before me. It seems to me that the petitioner has presented sufficient evidence to raise issues worthy of determination, both with respect to the audit process and the reliance of the minister upon that audit.
>
> 24 I am also satisfied that the petitioner will suffer irreparable harm if its enrollment in PharmaCare is terminated and the audit is enforced before the petition is heard.
>
> 25 Irreparable harm describes the type of harm rather than the magnitude of harm established by an applicant. Irreparable harm is harm that cannot be compensated by an award of damages.
>
> 26 Pursuant to the *PSA* the petitioner is not entitled to claim any damages for any action taken pursuant to the authority granted by the *PSA*, including in this particular case the act of terminating the enrollment or

enforcing the audit. Therefore, if it is deprived of revenue and the ability to carry on business throughout the period of time between now and the hearing of the petition, and it is ultimately successful on its petition, it will have no ability to recover any losses it suffers.

27 I am satisfied that the enforcement of the audit alone could very well deprive the petitioner of the ability to meet its financial obligations generally as they fall due. While the petitioner could recover any amounts collected pursuant to the audit that should not have been assessed, it would have no recourse if the deprivation of cash flow causes it to go out of business.

28 I am therefore satisfied that the petition has established irreparable harm as that term has been explained in the jurisprudence.

29 The real contest between the parties in this case is over whether the balance of convenience lies in favour of the petitioner or of the respondent. The petitioner submits that the harm it will suffer from being denied relief outweighs any harm the respondent will suffer from continuing to provide PharmaCare benefits to the petitioner's clients pending the hearing of the petition.

30 The petitioner also asserts that it has a unique business model, it provides services to clients who might otherwise be unable to readily access its services, not only of home delivery of prescriptions and pharmaceuticals, but also of assistance in administering those prescriptions.

[17] At paras. 37-39 Sewell, J. wrote:

37 I also note that in *RJR-MacDonald* the relief sought by the applicant, who had been unsuccessful in the lower courts, was an order staying the enforcement in its entirety of a law imposing requirements on cigarette packaging. The effect of the order sought would therefore have been to delay the pursuit of what the legislature had determined to be measures designed to protect public health. No such general disruption of a statutory scheme will occur as a result of any order I make in this case.

38 In this case I have concluded that the balance of convenience does favour the granting of the relief sought to the petitioner. I do not think that temporarily maintaining the petitioner's enrollment in PharmaCare and staying enforcement of the decision based on the audit report will have any material effect on the proper functioning of the PharmaCare program.

39 The respondent has argued that the services provided by the petitioner, which the petitioner says are unique, are available elsewhere. Implicit in the respondent's submission is a recognition that the amounts which heretofore have been paid to the petitioner will be paid to other providers if the petitioner's enrollment is terminated and there is therefore little risk that the injunction will require the expenditure of public funds that would not otherwise have been spent by the Ministry. Without in any way commenting on the merits of the petition, I do not find any significant risk to patients, or of defalcation if the petitioner continues to be registered pending the hearing of the petition.

[18] The Pharmacy submits that the reasons of Sewell J. apply with equal force to its circumstances and to those of the Ministry in the present matter.

[19] The respondent takes the position that the Pharmacy has been guilty of an unreasonable delay in seeking interlocutory injunctive relief. The Pharmacy denies it has been guilty of delay and provides the following chronology:

- December 3, 2015 the Pharmacy filed its petition for judicial review and for injunctive relief. It was scheduled to be heard on December 11, 2015.
- December 5, 2015 the Pharmacy's enrollment in PharmaCare expired.
- December 7, 2015 the respondent refused to continue enrollment until the hearing of the petition.
- December 9, 2015 the respondent requested further disclosure from the Pharmacy.
- December 11, 2015 the application for injunctive relief was adjourned generally by consent.
- January 12, 2016 the Pharmacy's petition was scheduled for hearing on March 23, 2016.
- February 9, 2016 the Pharmacy advised it would not seek injunctive relief while reserving its right to do so in the event the hearing of its petition was delayed.
- March 4, 2016 counsel for the Pharmacy inquired of the status of the Minister's response materials and was told they would be provided on March 18.
- March 15, 2016 the hearing of the petition was adjourned to June 20, 2016.

- March 31, 2016 the Pharmacy again inquired about the status of response materials.

- May 19, 2016 the Pharmacy again inquired about the status of response materials and on May 25 was told that a further two weeks were needed to provide them.

- June 13, 2016 the Pharmacy again inquired about the status of response materials.

- June 15, 2016 the hearing of the petition was adjourned to August 8, 2016.

- July 7, 2016 the Pharmacy's new counsel requested response material be filed by July 15.

- July 15, 2016 the respondent filed its original response to the petition.

- July 18, 2016 the Pharmacy requested additional documents from the respondent without which it asserted it would not be possible to proceed with the hearing on August 8, 2016.

- August 4, 2016 the hearing of the petition was adjourned by consent to November 21, 2016 on condition the Pharmacy would not seek an interlocutory injunction before the hearing of the petition.

- September 28, 2016 the Pharmacy filed its amended petition.

- October 28, 2016 the respondent filed an amended response to petition.

- November 21, 2016 the hearing of the amended petition commenced.

- November 22, 2016 at the request of the respondent an adjournment to adduce further evidence was granted until February 14, 2017 for a hearing to take three days.

- January 11, 2017 the respondent filed an affidavit of Ms. Walman.

- January 23, 2017 the Pharmacy filed a notice of application to cross-examine Ms. Walman on her affidavit prior to the resumption of the petition hearing.

- February 1, 2017 the respondent filed a response to the application to cross-examine Ms. Walman.

- February 14, 15 and 16, 2017 the application to cross-examine Ms. Walman was heard and judgment was reserved.

- February 15, 2017 the Pharmacy advised the respondent that in light of the delay in hearing its application for judicial review it would seek injunctive relief.

- March 7, 2017 Ms. Walman was ordered to attend for cross-examination.

- March 10, 2017 the respondent filed a notice of appeal from that order.

[20] The Pharmacy relies on the principles discussed in *National Commercial Bank Jamaica Limited v. Olint Corp. Ltd. (Jamaica)*, [2009] UKPC 16, in particular the following passages:

> 16. … It is often said that the purpose of an interlocutory injunction is to preserve the status quo, but it is of course impossible to stop the world pending trial. The court may order a defendant to do something or not to do something else, but such restrictions on the defendant's freedom of action will have consequences, for him and for others, which a court has to take into account. The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v. Ethicon Ltd. [1995] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> 17. …The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the

> other. This is an assessment in which, as Lord Diplock said in the *American Cyanamid* case [1975] AC 396, 408:
>
> > "It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."
>
> …
>
> 19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases, the underlying principle is the same, namely, that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other: see Lord Jauncey in *R v Secretary of State for Transport, ex parte Factortame Ltd (No 2)* [1991] 1 AC 603, 682-683. What is true is that the features which ordinarily justify describing an injunction as mandatory are often more likely to cause irremediable prejudice than in cases in which a defendant is merely prevented from taking or continuing with some course of action: see *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670, 680. But this is no more than a generalisation. What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in *Shepherd Homes Ltd v Sandham* [1971] Ch 340, 351, "a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."
>
> 20. For these reasons, arguments over whether the injunction should be classified as prohibitive or mandatory are barren: see the *Films Rover* case, *ibid.* What matters is what the practical consequences of the actual injunction are likely to be. It seems to me that both Jones J and the Court of Appeal proceeded by first deciding how the injunction should be classified and then applying a rule that if it was mandatory, a "high degree of assurance" was required, while if it was prohibitory, all that was needed was a "serious issue to be tried." Jones J thought it was mandatory and refused the injunction while the Court of Appeal thought it was prohibitory and granted it.
>
> 21. Their Lordships consider that this type of box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction. …
>
> [Emphasis added.]

Submissions of the Respondent on the Issue of Injunctive Relief

[21] The respondent's opposition to the injunctive relief sought by the Pharmacy is primarily based on an assertion that the Pharmacy has not demonstrated irreparable harm and that it has delayed in seeking that relief.

[22] On the issue of irreparable harm the respondent points to the evidence of the substantial sums of money paid to the Pharmacy through PharmaCare since the beginning of 2004 when it was enrolled. Those sums exceed $15 million. The respondent also refers to other income enjoyed over the years by the Pharmacy and submits "it is beyond belief [the Pharmacy] cannot sustain itself in the short term while this judicial review is running to completion".

[23] Further the respondent describes the Pharmacy as a "joint enterprise" among a series of related companies operated by the Tam family. One of the joint companies known as Miracle Management Inc. is described on income tax filings as a "related" company with a "taxable capital" in excess of $5 million and "real estate holdings" of "at least" $4 million.

[24] The respondent submits the irreparable harm that must be demonstrated by the Pharmacy is harm that cannot be quantified in monetary terms and therefore cannot be compensated by an award of damages.

[25] The respondent accepts that s. 72 of the *PSA* precludes a damage claim against "the minister or an employee of the Government because of anything done or omitted" in the exercise or intended exercise or performance of a duty under sections 69 or 71, which sections address enrolment in the PharmaCare program. Nevertheless, the respondent submits s. 33(1) does not "completely render the province immune from any and all claims for monetary damages".

[26] The respondent observes that the financial disclosure of the Pharmacy has been limited and it has refused "to disclose the financial resources of the shareholders and related companies".

[27] The respondent further submits it has had a professional evaluation undertaken of the "financial health" of the Pharmacy from which it draws the conclusion that it "will [not] in fact go out of business or otherwise suffer irreparable harm".

[28] The Pharmacy's answer to the submissions of the respondent on irreparable harm (apart from its reliance on the reasons of Sewell J. reproduced at paras. 16 and 17 above) is the following:

(a) it is not necessary for the Pharmacy to demonstrate it will go out of business if the injunction is not granted;

(b) irreparable harm has been demonstrated by the Pharmacy's substantial loss of income since it lost its enrollment in the PharmaCare program in December 2015, and there is no realistic prospect of recovering any of that financial loss through a tort claim. The respondent is effectively immunized from liability. See *Holland v. Saskatchewan*, 2008 SCC 42 at para. 9; and

(c) It is trite that a company is a different legal entity from its shareholders and also from "related" companies in most circumstances. It is "unimaginable" that a company which alleges irreparable harm is obliged to provide evidence of the financial means of its shareholders and of other companies to which it is "related".

My Conclusions

[29] I agree with the submissions of the Pharmacy.

[30] The Pharmacy has not delayed unreasonably in seeking injunctive relief. There has been some delay but the bulk of it must be laid at the feet of the respondent.

[31] I am satisfied that the Pharmacy has a serious judicial review application to be heard.

[32] I accept that the Pharmacy has suffered and will continue to suffer irreparable harm if injunctive relief is refused.

[33] The balance of convenience favours the Pharmacy. Without injunctive relief its financial circumstances will continue to deteriorate and it risks insolvency. On the other hand the respondent will suffer little if any inconvenience. It must enrol the Pharmacy but the cost of PharmaCare services will not likely be appreciably different from what they would have been if the Pharmacy had not been enrolled. Importantly, at least pending the outcome of the judicial review application the Pharmacy will be subject to the same oversight and controls as are other enrolled pharmacies.

[34] It is significant that there is nothing in the record to suggest the Pharmacy has cheated the public purse. The audit has not revealed dishonest conduct. The problems unearthed come from multiple sources such as mistakes made by inadequately trained staff responsible for administering a complex system for making PharmaCare claims; the irregular manner in which many customers of the Pharmacy on the DTES, who are often in fragile physical and mental health, seek prescription medications, and the "innovative" approach taken by some physicians when prescribing medications for their patients who often live in exceptionally challenging circumstances.

[35] *Community Outreach* can be distinguished on its facts from the present matter but the distinctions are slight and of no legal consequence. Like cases ought to be treated alike.

[36] There will be an interlocutory order until the petitioner's judicial review application is heard :

(a) staying the October 15, 2015 Enrollment decision;

(b) staying the October 5, 2015 Audit decision; and

(c) restoring the Pharmacy's enrolment in the PharmaCare program until its judicial review application has been heard.

[37] I understand the Pharmacy has paid a portion of the debt arising from the Audit decision. A refund, if appropriate, will await the outcome of the judicial review application.

The respondent's document disclosure application

[38] The respondent's application for financial disclosure from the Pharmacy "before the hearing of the Petitioner's Application for Preliminary Relief" has become moot. Its applications for document disclosure from others are dismissed. The respondent has not served any legal person other than the Pharmacy with its notice of application and, in any event, the documents requested are irrelevant to the application for "Preliminary Relief".

[39] The costs of these applications may be addressed when the hearing of the judicial review application concludes.

"The Honourable Mr. Justice Affleck"