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I S S U E D	FEDERAL COURT COUR FÉDÉRALE February 04, 2022 04 février 2022
	Kadara Thompson
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Court File No.:

FEDERAL COURT

BETWEEN:

11239490 CANADA INC.

Plaintiff

and

THE MINISTER OF NATIONAL REVENUE

Defendant

STATEMENT OF CLAIM
Form 171A

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or a solicitor acting for you are required to prepare a statement of defence in Form 171B prescribed by the Federal Courts Rules, serve it on the plaintiff's solicitor or, if the plaintiff does not have a solicitor, serve it on the plaintiff, and file it, with proof of service, at a local office of this Court

WITHIN 30 DAYS after the day on which this statement of claim is served on you, if you are served in Canada or the United States; or

WITHIN 60 DAYS after the day on which this statement of claim is served on you, if you are served outside Canada and the United States.

TEN ADDITIONAL DAYS are provided for the filing and service of the statement of defence if you or a solicitor acting for you serves and files a notice of intention to respond in Form 204.1 prescribed by the Federal Courts Rules.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO DEFEND THIS PROCEEDING, judgment may be given against you in your absence and without further notice to you.

February 4, 2022

Issued by: _____
(Registry Officer)

Address of local office:

Thomas D'Arcy McGee Building
90 Sparks Street, 5th Floor
Ottawa, Ontario
K1A 0H9

TO: The Minister of National Revenue
555 Mackenzie Avenue, 7th Floor
Ottawa, Ontario
K1A 0L5

CLAIM

A. RELIEF SOUGHT

1. The Plaintiff, pursuant to subsection 276(1) of the *Excise Act, 2001* (the “EA”) appeals the 8 November 2021 decision of the Defendant and seeks an order from this Honourable Court:
 - a. setting aside the Defendant’s 8 November 2021 decision that the Plaintiff contravened subsection 158.02(1) of the EA;
 - b. cancelling the penalty in the amount of \$434,611 (the “Penalty”) imposed by the Defendant pursuant to subsection 254(1) of the EA;
 - c. ordering the Defendant to return to the Plaintiff all money paid on account of the Penalty and all interest that was paid with respect of the Penalty; and
 - d. ordering the Defendant to pay interest thereon as calculated under the EA.
2. In the alternative, if this Honourable Court decides that the Defendant did contravene subsection 158.02(1) of the EA, the Plaintiff seeks an order:
 - a. waiving or reducing the Penalty under the circumstances relating to the contravention;
 - b. ordering the Defendant to return to the Plaintiff all money paid on account of the Penalty and all interest that was paid with respect of the Penalty; and
 - c. ordering the Defendant to pay interest thereon as calculated under the EA.
3. The Plaintiff further seeks an order:
 - a. granting the Plaintiff costs in respect of this action; and
 - b. such further and other relief that this Honourable Court deems just.

B. PARTIES

4. The Plaintiff is 11239490 Canada Inc., which has a mailing address of 555 Legget Drive, Suite 920, Tower A, Kanata, Ontario K2K 2X3.
5. The Defendant is the Minister of National Revenue, which has a mailing address of 555 Mackenzie Avenue, 7th Floor, Ottawa, Ontario K1A 0L5.

C. PENALTY AT ISSUE

6. At issue is a penalty in the amount of \$434,611 imposed by the Defendant upon the Plaintiff pursuant to subsection 254(1) of the EA for the alleged contravention by the Plaintiff of subsection 158.02(1) of the EA.
7. Subsection 158.02(1) of the EA provides that “No person shall, other than in accordance with a cannabis licence issued to the person, produce cannabis products.”
8. The Plaintiff did, at all times, produce cannabis products in accordance with a cannabis licence issued to it and has not, at any time, contravened subsection 158.02(1) of the EA.

D. STATEMENT OF FACTS

Background

9. Canopy Growth Corporation (“Canopy Growth”) was incorporated in 2009 under the *Canada Business Corporations Act* (the “CBCA”).
10. Canopy Growth and its subsidiaries (collectively, the “Canopy Growth Group”)’s principal business activities are the licit production, distribution and sale of cannabis and cannabis products.
11. The Plaintiff was incorporated on February 7, 2019 under the CBCA as a directly, wholly-owned subsidiary of Canopy Growth.

12. The Plaintiff was incorporated for the purpose of growing cannabis plants at the Canopy Growth Group's only outdoor growing facility – a quarter section of leased farmland located near St. Louis, Saskatchewan (the "Outdoor Farm").
13. The Plaintiff was not incorporated for the purpose of packaging and selling cannabis products.
14. Rather, Plaintiff was incorporated as a "cultivator" – a corporation that would only grow cannabis plants and would transfer and sell its production in bulk to other members of the Canopy Growth Group who were engaged in the production, packaging, stamping, and sale of cannabis products to provincial control boards, retailers, and others.

The Legalization of Cannabis in Canada

15. On October 17, 2018, the federal government legalized adult recreational cannabis in Canada.
16. Since 2019 was the first full production year following the legalization of adult recreational cannabis, significant pressure was being placed on the Canopy Growth Group, including the Plaintiff, to produce sufficient cannabis products to meet the demand of the Canadian market.
17. On average, the growth cycle of a cannabis plant takes between 16 to 18 weeks – the cannabis plant is in a vegetative stage for about 8 to 10 weeks and once it flowers, a cannabis plant requires about 8 additional weeks to produce a mature bud.
18. Flowering differs by strain and depends on the daily hours of sunlight, with daily temperatures between 20 to 30 degrees Celsius.
19. As a consequence, cannabis seedlings should be planted outdoors in Canada by late May or early June and harvested in mid-September to early October to ensure that the temperature and sunlight requirements are met.

20. For the Plaintiff to successfully grow and harvest its initial crop in 2019 at the Outdoor Farm, cannabis seedlings ideally should have been planted by June 1, 2019 in order to be harvested before the first frost in the fall of 2019.

Cannabis License under the *Cannabis Act* and *Cannabis Regulations*

21. Shortly after it was incorporated, on or about February 21, 2019, the Plaintiff applied for a standard cultivation license from Health Canada under the *Cannabis Act* (the “CA”) and the *Cannabis Regulations* made thereunder (the “Regulations”).

22. Despite the Plaintiff’s prompt application, it took four months for Health Canada to issue the Plaintiff a standard cultivation licence under the CA and the Regulations (the “Cannabis Licence”).

23. The Cannabis License had an effective date of June 21, 2019, which was well into the 2019 outdoor growing season.

24. Under the Cannabis Licence, the Plaintiff was authorized to:

- a. possess cannabis;
- b. obtain dried cannabis, fresh cannabis, cannabis plants or cannabis plant seeds by cultivating, propagating and harvesting cannabis; and
- c. sell cannabis to other licence holders and other authorized persons in accordance with subsection 11(5) of the *Cannabis Regulations*

at the Outdoor Farm.

25. The only condition expressly set out in the Cannabis License issued to the Plaintiff was that the Plaintiff had to meet the requirements set out in the document entitled “Mandatory cannabis testing for pesticide active ingredients”.

26. At all times, the Plaintiff cultivated, propagated, and harvested cannabis, and sold cannabis to other license holders in accordance with and under the condition imposed by its Cannabis Licence.

License under the *Excise Act, 2001*

27. Subsection 14(1.2) of the EA provides that “A cannabis licence issued to a person [under the EA] shall not have effect before a licence or permit issued to the person under subsection 62(1) of the *Cannabis Act* comes into effect.”

28. After the Cannabis Licence was issued to the Plaintiff by Health Canada in June 2019, the Plaintiff applied to the CRA for a licence under the EA.

29. On or about July 19, 2019, the Plaintiff received a letter from the CRA (the “CRA Letter”) notifying the Plaintiff that all conditions for license issuance had been met and that the Plaintiff’s application for a cannabis license under the EA had been approved effective July 19, 2019.

30. The CRA Letter did not contain any conditions, restrictions, requirements, or instructions with respect to the cultivating, harvesting, propagating, or producing cannabis.

31. Rather the only obligations set out in the CRA Letter were related to notifying the CRA of changes to information, maintaining books and records, and filing of returns under the EA.

32. At all times, the Plaintiff complied with the requirements set out in the CRA Letter including the obligations to update the CRA of any changes to information, maintaining books and records, and filing returns on a timely basis.

33. Aside from the CRA Letter, no document purporting to be a cannabis licence under the EA was issued by the CRA to the Plaintiff.

Crop Grown at the Outdoor Farm

34. The crop grown in 2019 (the “2019 Crop”) at the Outdoor Farm was harvested and transferred to KeyLeaf, a subsidiary of Canopy Growth.
35. Despite its best efforts, KeyLeaf was not able to process or extract any cannabis from the plants grown in 2019 at the Outdoor Farm.
36. As a result, the cannabis plants were returned to the Plaintiff and subsequently destroyed in a manner approved by the EA and the CRA.
37. In the following year, the crop grown by the Plaintiff at the Outdoor Farm (the “2020 Crop”) was grown for research purposes, with a portion of the 2020 Crop being transferred to Canopy Growth’s licensed research facility.
38. Like the 2019 Crop, the balance of the 2020 Crop was destroyed.
39. Accordingly, no revenue or income was earned on either the 2019 Crop and 2020 Crop as no viable cannabis products could be extracted from these plants.
40. In the latter half of 2020, a decision was made to shut down the Outdoor Farm as part of an effort by Canopy Growth to streamline its operations.
41. As a consequence, the Plaintiff ceased operations on January 29, 2021.

Compliance by the Plaintiff

42. At all times, the Plaintiff complied with the requirements set out in its Cannabis Licence and the CRA Letter.
43. Despite the Plaintiff’s history of compliance and despite the Plaintiff being a licensed, licit cultivator of cannabis plants, the Penalty at issue is
 - a. The maximum penalty that can be imposed under the EA in respect of a contravention of subsection 158.02(1) of the EA,

- b. Was the single largest penalty imposed by the Defendant in 2020 under the EA for contraventions of the cannabis provisions of the EA.

Procedural History

44. By letter dated November 12, 2020, the Defendant's Delegate the Canada Revenue Agency notified the Plaintiff that it had imposed a penalty in the amount of \$434,611 on the Plaintiff pursuant to subsection 254(1) of the EA.
45. Pursuant to section 271 of the EA, on or before February 10, 2021, the Plaintiff made a request in writing to the office of the CRA from which the notice of the Penalty was issued that the Defendant review the imposition of the Penalty (the "Written Request").
46. In its Written Request, the Plaintiff asked the Defendant to (a) review the circumstances giving rise to the imposition of the Penalty, to decide that the contravention on which the Penalty was based did not occur, and to cancel the Penalty and authorize the return of all money paid on account of it and any interest that was paid in respect of it, or in the alternative, (b) if the Defendant decided that the contravention on which the Penalty was based did occur, to waive or reduce the penalty under the circumstances relating to the contravention.
47. In its Written Request, the Plaintiff also requested pursuant to subsection 271(5) of the EA that the Defendant provide it with written reasons for the imposition of the Penalty.
48. In response, on February 15, 2021, the Plaintiff received by fax a letter from the CRA (the "Reasons for Penalty Letter") which alleged that "The receipt and cultivation of vegetative cannabis plants prior to obtaining a cannabis licence under the [EA] is a contravention of the [EA]" and specifically that the Plaintiff had contravened subsection 158.02(1) of the EA.

49. Within 30 days of receiving the Reasons for Penalty Letter, the Plaintiff submitted further submissions and affidavit evidence for the Minister to consider in respect of the Plaintiff's Written Request.
50. By letter dated November 8, 2021 (the "Notice of Decision"), the Plaintiff was notified by the CRA that the Minister had "concluded that there has been a contravention of subsection 158.02(1) of the Excise Act, 2001 (the Act), and the [P]enalty will be confirmed."
51. The Defendant's Notice of Decision was silent with respect to the Plaintiff's request that the Defendant waive or reduce the Penalty and provided no reasons or explanation as to why the Defendant did not waive or reduce the Penalty under the circumstances.
52. The Plaintiff brings an action against the Defendant pursuant to subsection 276(1) of the EA to appeal the Defendant's decision that the Plaintiff contravened subsection 158.02(1) of the EA and the Defendant's decision not to waive or reduce the Penalty under the circumstances.

E. ISSUES

53. The issues to be decided are:
- a. Did the Plaintiff contravene subsection 158.02(1) of the EA?
 - b. If the Plaintiff did contravene subsection 158.02(1) of the EA (which the Plaintiff does not admit but expressly denies), under the circumstances relating to the contravention, should the Penalty be waived or reduced?

F. LEGAL BASIS

No Contravention under subsection 158.02(1) of the EA

54. The Plaintiff submits that at no time has it contravened subsection 158.02(1) of the EA.
55. In its written reasons for the imposition of the Penalty set out in its letter dated February 15, 2021, the CRA alleged that "the receipt and cultivation of vegetative cannabis plants prior to

obtaining a cannabis licence under the [EA] is a contravention of the Act” (the “Alleged Offence”).

56. Specifically, the CRA alleged that this is provided for in subsection 158.02(1) of the EA.

57. Subsection 158.02(1) of the EA does not provide that “the receipt and cultivation of vegetative cannabis plants prior to obtaining a cannabis licence under the EA” is a prohibited activity.

58. Rather, subsection 158.02(1) of the EA states that “[n]o person shall, other than in accordance with a cannabis licence issued to the person, produce cannabis products.”

59. Accordingly, the Defendant must establish beyond a reasonable doubt that the Plaintiff committed each element of the offence to impose the Penalty, which are:

- a. the Plaintiff must have produced cannabis products; and
- b. done so otherwise than in accordance with a cannabis licence issued to the Plaintiff.

60. The Plaintiff has, at all times, produced cannabis products in accordance with the Cannabis Licence issued to it, which was issued prior to the production of cannabis at the Outdoor Farm.

61. The term “cannabis licence” is not defined in the EA.

62. On June 21, 2019, the Plaintiff was issued a cannabis licence from Health Canada under the CA and the Regulations.

63. The Cannabis Licence issued to the Plaintiff specifically states the activities permitted as of June 21, 2019, including:

- a. possess cannabis;
- b. obtain dried cannabis, fresh cannabis, cannabis plants or cannabis plant seeds by cultivating, propagating and harvesting cannabis; and

- c. sell cannabis to other licence holders and other authorized persons in accordance with subsection 11(5) of the *Cannabis Regulations*.

64. As such, at all times, the Plaintiff produced cannabis products in accordance with the conditions and restrictions set out in its Cannabis License.

65. Further, subsection 10(2) of the Regulations contemplates that a person may possess cannabis plants and seeds prior to obtaining a cannabis licence.

66. Subsection 14(1.1) of the EA provides that “[s]ubject to the regulations, on application, the Minister may issue to a person a cannabis licence for the purposes of this Act.”

67. Further, and notably, subsection 14(1.2) of the EA provides that “[a] cannabis licence issued to a person shall not have effect before a licence or permit issued to the person under subsection 62(1) of the Cannabis Act comes into effect.”

68. After the Plaintiff received the Cannabis Licence on June 21, 2019, the Plaintiff applied for a licence under the EA.

69. In accordance with the CRA License letter dated July 19, 2019, the CRA notified the Plaintiff that its application for a licence under the EA was approved and issued the Plaintiff a cannabis license number of 71230 2884 RD0001, NW-04-45-25-W2, St. Louis SK S0J2C0.

70. However, no actual licence document under the EA was issued by the CRA to the Plaintiff.

71. The CRA Letter contained no conditions, limitations, or restrictions, with respect to the production of cannabis products.

72. To the extent the CRA Letter did set out obligations, the Plaintiff complied with those obligations at all times, including informing the CRA of changes of information, maintaining books and records, and filing B300 returns.

73. Based on subsection 10(2) of the Regulations and 14(1.2) of the EA, the Alleged Offence that the Defendant has accused the Plaintiff of committing is not an offence under the EA.
74. If it were, subsection 10(2) of the Regulations, which authorizes the possession of cannabis plants and seeds prior to obtaining a cannabis licence, is in direct conflict with 14(1.2) of the EA, which provides that a cannabis licence under the EA shall not have effect before a licence or permit issued to the person under subsection 62(1) of the CA comes into effect.
75. Since the Plaintiff had complied with all the obligations set out by Health Canada and the CRA in the Cannabis License and CRA License Letter respectively and the Alleged Offence is not, in fact, an offence under the EA, the Plaintiff did not contravene subsection 158.02(1) of the EA.
76. As such, the Defendant erred first by imposing the Penalty pursuant to 234.1(1) of the EA upon the Plaintiff and second by deciding to confirm the Penalty pursuant to section 273 of the EA.
77. Pursuant to paragraph 276(1) of the EA, the Plaintiff appeals the Defendant's decision to this Honourable Court, seeking an order setting aside the Defendant's decision that the contravention on which the Penalty did occur, and an order cancelling the Penalty and ordering the return of any money paid on account of it and any interest paid in respect of it and further, ordering that there be paid to the Plaintiff interest computed in accordance with subsection 274(2) of the EA.

Alternative Position: Waiver or Reduction of Penalty Under the Circumstances

78. The Plaintiff does not admit and expressly denies that it contravened subsection 158.02(1) of the EA.

79. If this Honourable Court decides that the Plaintiff did contravene subsection 158.02(1) of the EA, the Plaintiff respectfully requests that this Honourable Court pursuant to subsection 276(1) of the EA waive or reduce the Penalty under the circumstances relating to the contravention.
80. First, the Plaintiff is a fully licensed and legal producer of cannabis and is a member of a corporate group of numerous other licence holders owned by Canopy Growth, all of whom are licit producers or distributors of cannabis products; the Plaintiff is not and was not at any time a producer of illicit cannabis products.
81. As a leading participant in the legalized cannabis industry, Canopy Growth and its licensed affiliates have not only cooperated with, but consulted and worked in conjunction with, the Government of Canada in bringing legal cannabis products to the Canadian market and in promoting a culture of compliance with the complex regulatory regime governing this industry.
82. Canopy Growth and its affiliates have also worked closely and diligently with the CRA to achieve compliance with the new cannabis provisions under the EA.
83. Notwithstanding this context, the CRA chose to impose the same penalty under the EA that would have been imposed upon a criminal enterprise operating an illegal cannabis operation.
84. Second, the Plaintiff was exclusively engaged in cultivating and producing cannabis, with all of its production being sold to its affiliates who were engaged in the stamping, packaging, and sale of cannabis products. As such, the Plaintiff was not liable to pay or remit any excise duties under the EA at any time.

85. The CRA was also aware of this fact as evidenced by the Plaintiff's accurate B300 filings and the CRA's acceptance of the minimum security of \$5,000 in respect of the Plaintiff's license under the EA.
86. Third, the cannabis plants grown by the Plaintiff at the Outdoor Farm did not produce any viable cannabis products for sale.
87. A portion of the 2019 Crop produced at the Outdoor Farm was transferred to the Plaintiff's affiliate KeyLeaf, who was not able to process and extract any cannabis from the portion of the crop they received. The balance of the 2019 Crop was therefore destroyed.
88. The 2020 Crop was grown for research purposes only. While some of the genetics from the 2020 Crop were transferred to another affiliate of the Plaintiff for research and development purposes, the balance of the 2020 Crop was destroyed.
89. Subsequently, the Plaintiff ceased operations by January 2021.
90. The quantum of the penalty in the amount of \$434,611 represents two thirds of the CRA's estimated fair market value of the 2019 Crop.
91. However, in reality, the fair market value of the 2019 Crop was nil, as evidenced by the fact that the crop was destroyed, and no viable cannabis product was ever produced from the crop.
92. Despite the fact that the Plaintiff was issued a Cannabis License authorizing it to possess and produce cannabis in accordance with the terms and conditions of the license and the Plaintiff was never liable to pay or remit duties under the EA, the CRA was imposed a penalty of almost half-a-million dollars – the maximum amount of the penalty under the EA -- which would be the same amount that would be imposed on a criminal enterprise operating an illegal cannabis facility.

93. Lastly, there is legal precedent for the elimination of penalties in circumstances where a new statutory scheme is introduced.
94. The licensing regime found in the CA, the Regulations, and the EA in respect of cannabis, were all newly implemented.
95. The Plaintiff and the Canopy Growth have consistently put forward their best effort to comply with these complicated new legislative schemes.
96. The Canopy Growth Group is a leading participant in the legalized cannabis industry and has consistently worked in conjunction with the Government of Canada in bringing legal cannabis products to the Canadian market and promoted a culture of compliance with the complex regulatory regime governing this industry.
97. As evidence of the Plaintiff's compliance, it had complied with all requirements as set out in the Cannabis License and the CRA License Letter, including:
- a. maintaining adequate books and records;
 - b. informing the CRA of any changes including when the Plaintiff discontinued its operations; and
 - c. filing B300 Cannabis Duty and Information Returns on a timely basis for every calendar month irrespective of whether or not any duty was payable.
98. As such, should the Court uphold the Defendant's decision that there was a contravention pursuant to subsection 158.02(1), the Plaintiff submits that the \$434,611 penalty imposed under section 234.1 of the EA should be waived or reduced under the circumstances.

G. VENUE

99. The Plaintiff proposes that this action be tried in the City of Ottawa.

DATED at the City of Toronto, in the Province of Ontario this 4th day of February 2022.

EY Law LLP
Counsel for the Plaintiff



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