

District of British Columbia  
Division No. 03 - Vancouver  
Court No. B-230269  
Estate No: 11-2960200

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*  
R.S.C. 1985, c. B-3, AS AMENDED

– AND –

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF  
TANTALUS LABS LTD.

**APPLICATION RESPONSE**

Application response of the Attorney General of Canada on behalf of the Minister of National Revenue (“Minister”).

THIS IS A RESPONSE TO the notice of application of Tantalus Labs Ltd. (“Tantalus”) filed July 7, 2023.

**Part 1: ORDERS CONSENTED TO**

The Respondent consents to the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: N/A

**Part 2: ORDERS OPPOSED**

The Respondent opposes the granting of the orders set out in the following paragraphs of Part 1 of the notice of application: Paragraphs 2 and 3.

**Part 3: ORDERS ON WHICH NO POSITION IS TAKEN**

The Respondent takes no position on the granting of the orders set out in the following paragraph of Part 1 of the notice of application: Paragraph 1

**Part 4: FACTUAL BASIS**

1. Tantalus was issued a cannabis license under the *Excise Act, 2001* (“Excise License”).<sup>1</sup>
2. The Excise License was most recently renewed on June 16, 2023, with an expiry date of July 10, 2023.<sup>2</sup>
3. Tantalus entered into multiple payment plans with Canada Revenue Agency (“CRA”) over the last two years and failed to maintain the conditions of the plans.<sup>3</sup>
4. On June 12, 2023, Tantalus entered into its latest payment plan with CRA.<sup>4</sup>
5. On June 28, 2023, Tantalus filed a Notice of Intention to Make a Proposal (“NOI”).<sup>5</sup> As of the date of the NOI, Tantalus owed over 4 million dollars in duties under the *Excise Act, 2001*.<sup>6</sup>
6. On July 6, 2023, Tantalus’ request to renew the Excise License was rejected.<sup>7</sup>
7. The renewal was rejected because CRA (acting as delegate for the Minister), found that Tantalus had not demonstrated their business has sufficient financial resource to conduct business in a responsible manner as required under the statutory framework to be eligible for a renewal of the Excise License.<sup>8</sup>
8. The reasons provided for this finding noted that (1) Tantalus had failed to uphold multiple payment arrangements with CRA and (2) Tantalus had filed a NOI on June 28, 2023 as an insolvent person.<sup>9</sup>
9. Tantalus now requests an order of the Court to provide, among other things, declaratory and/or injunctive relief against the Minister, in an attempt to extend the Excise License past its expiry on July 10, 2023 and sell its cannabis inventory.<sup>10</sup>

## **Part 5: LEGAL BASIS**

1. In opposing the relief sought by the Applicant, the Respondent relies on:
  - a. The *Federal Courts Act*.<sup>11</sup>

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<sup>1</sup> Affidavit of Lucas Jenkins at para 30; *Excise Act, 2001*, SCC 2022, c 22, s 14(1.1).

<sup>2</sup> Affidavit of Lucas Jenkins at paras 30 and Exhibit E.

<sup>3</sup> Affidavit of Lucas Jenkins at paras 35 to 49.

<sup>4</sup> Affidavit of Lucas Jenkins at para 47.

<sup>5</sup> Affidavit of Lucas Jenkins at para 49.

<sup>6</sup> Affidavit of Lucas Jenkins at para 34.

<sup>7</sup> Affidavit of Lucas Jenkins at para 57 and Exhibit S.

<sup>8</sup> Affidavit of Lucas Jenkins at Exhibit S.

<sup>9</sup> Affidavit of Lucas Jenkins at Exhibit S.

<sup>10</sup> Notice of Application at paragraph 2.

- b. The *Excise Act, 2001*.<sup>12</sup>
- c. *Regulations Respecting Excise Licenses and Registrations*.<sup>13</sup>
- d. Such further and other legal basis as counsel may advise and this Honourable Court may allow

## Overview

2. Until recent years, cannabis was a controlled substance that was illegal to possess or sell in most circumstances. While the sale of cannabis has been legalized in Canada, Parliament has decided to keep it under strict control under various statutes, including the requirements of the *Excise Act, 2001*.<sup>14</sup>
3. The Excise License will expire at the end of the day on July 10, 2023, as that is the period specified in the license.<sup>15</sup> This is the legal status quo in this matter under the *Excise Act, 2001* and what will occur if the Minister does not renew the Excise License.
4. There are no extensions to a cannabis license under the *Excise Act, 2001*, only renewals.<sup>16</sup> Tantalus requested a renewal of the Excise License.<sup>17</sup> CRA (acting as delegate for the Minister) determined whether Tantalus still met the requirements for a cannabis license, which must be determined before it could be eligible for renewal.<sup>18</sup> The determination was no and the renewal was not granted.<sup>19</sup>
5. Tantalus' present request that "CRA's refusal to renew [the] Excise License should be stayed" really means that Tantalus is (1) requesting the administrative decision of the Minister under the *Excise Act, 2001* be overturned *and* (2) a particular result for that administrative decision be mandated.<sup>20</sup> This is extraordinary relief against the Minister that is only available to Tantalus via the exclusive, original jurisdiction of the Federal Court and would be unlikely to succeed in any event.
6. It is expected that Tantalus might seek interlocutory relief from the Court against the Minister until its present application is heard and decided. Such interim relief against the Minister is similarly only available via the Federal Court and is would be unlikely to be granted in any event.

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<sup>11</sup> *Federal Courts Act*, RSC 1985, c F-7.

<sup>12</sup> *Excise Act, 2001*, SCC 2022, c 22.

<sup>13</sup> *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115.

<sup>14</sup> Affidavit of Lucas Jenkins at paras 14-18; *Excise Act, 2001*.

<sup>15</sup> Affidavit of Lucas Jenkins at Exhibit S; *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115, s 4.

<sup>16</sup> *Excise Act, 2001*, s23(2).

<sup>17</sup> Affidavit of Lucas Jenkins at para 54; *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115, s 9; *Excise Act*, s 9.

<sup>18</sup> *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115, ss 2, 9(2).

<sup>19</sup> Affidavit of Lucas Jenkins at Exhibit S

<sup>20</sup> Notice of Application at page 7.

7. The Minister's decision not to renew a license that is already set to expire under the terms of the *Excise Act, 2001* cannot possibly qualify as something that is "stayed" under section 69(1)(a) of the *Bankruptcy and Insolvency Act* ("*BIA*").<sup>21</sup>
8. Any steps taken by CRA or RCMP as officers under the *Excise Act, 2001* in enforcing the statutory provisions of *Excise Act, 2001* against a non-licensee in possession of cannabis stamps and cannabis is not stayed under section 69(1)(a) of the *BIA*. Interim equitable relief with regard to the enforcement of these statutory provisions (whose constitutionality is not under question) should not be ordered by the Court.

### **Exclusive Original Jurisdiction of the Federal Court**

9. The Minister, in making administrative decisions under the *Excise Act, 2001*, including applications for the renewal of licenses, is acting in an administrative capacity subject to judicial review in the Federal Court.<sup>22</sup> The Minister may delegate this administrative decision making to subordinates, including officers at the CRA.<sup>23</sup>
10. Section 18(1) of the *Federal Courts Act* says the following<sup>24</sup>:
  - (1) Subject to section 28, the Federal Court has exclusive original jurisdiction
    - (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
    - (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.
11. The impact of section 18 of the *Federal Courts Act* is to transfer the supervisory jurisdiction of such federal administrative decisions exclusively to the Federal Courts.<sup>25</sup> This Court does not have the jurisdiction to overturn the Minister's refusal

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<sup>21</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 69(1)(a).

<sup>22</sup> *Federal Courts Act*, RSC 1985, c F-7; See for example, a case regarding tobacco license renewal under the *Excise Act, 2001* judicially reviewed in the Federal Court: *Legal v Canada (Attorney General)*, 2010 FC 554.

<sup>23</sup> *Legal v Canada (Attorney General)*, 2010 FC 554 at para 9.

<sup>24</sup> *Federal Courts Act*, RSC 1985, c F-7, s 18.

<sup>25</sup> *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 34; *Canada Labour Relations Board et al. v. Paul L'Anglais Inc. et al.*, 1983 CanLII 121 (SCC), [1983] 1 SCR 147 ("It is well established that the effect of s. 18 was to transfer all superintending and reforming power over federal agencies from the superior courts to the Federal Court"). Exceptions exist for

to renew the Excise License or to require a particular result for Tantalus' renewal application under the *Excise Act, 2001*. To seek such declaratory or injunctive relief, Tantalus must seek recourse in the Federal Court.<sup>26</sup> It is not permissible to seek this relief via insolvency proceedings in this Court, even if the alleged consequences are sympathetic or dire, because there is no sound legal basis for providing that relief.<sup>27</sup>

### **Tantalus Would Be Unlikely to Succeed in Judicial Review**

12. Even if Tantalus filed an application for judicial review in the Federal Court, as required, it would be unlikely to succeed. It would have to establish, per *Vavilov*, the decision that the requirements of the *Excise Act, 2001* were not met for renewal is unreasonable.<sup>28</sup> This is a robust but deferential standard of review, where the reviewing court does not conduct its own legislative interpretation but rather determines if the administrative decision is reasonable as being transparent, intelligible, and justified in the applicable facts and law.<sup>29</sup>
13. Tantalus must continue to meet the statutory requirements for a cannabis license for the Excise License to be eligible for renewal by the Minister.<sup>30</sup> One of those requirements is to demonstrate they have sufficient financial resources to conduct their business in a responsible manner.<sup>31</sup> Tantalus' application to renew was rejected for failure to establish his point, based on their history of failing to comply with multiple payment plants (to pay substantial amounts owing under the *Excise Act, 2001*) and their filing

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constitutional law challenges, which cannot be removed from the concurrent jurisdiction of the superior courts.

<sup>26</sup> *McKinnon v Canada (Attorney General of)*, 2002 BCSC 1765 at paras 7-8 (No jurisdiction to order that the Plaintiffs are entitled to a federally issued permit, which is in the exclusive jurisdiction of the Federal Court); *861808 Ontario Inc v Canada Revenue Agency*, 2013 ONCA 604 at paras 1-8 (The Federal Court has exclusive original jurisdiction to grant injunctions and other transferred relief when CRA is acting as a federal board, commission, or other tribunal as defined under the *Federal Courts Act*), leave to appeal to SCC refused; *Arrangement relative a Rising Phoenix International Inc*, 2022 QCCS 1670 at para 20 ("Moreover, another legal impediment exists: the Superior Court of Québec has no jurisdiction to make an order of mandamus, or other injunctive order, against the federal minister, since this prerogative is reserved exclusively to the Federal Court of Canada under s. 18 (1) of the *Federal Courts Act*." Paragraphs 13-16 are also apt with regard to the Court not using the powers of section 11 of the CCAA to usurp the role of the ministers in question and substitute its decision.)

<sup>27</sup> *Arrangement relative a Rising Phoenix International Inc*, 2022 QCCS 1670 at para 12.

<sup>28</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

<sup>29</sup> *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 15, 83.

<sup>30</sup> *Excise Act, 2001*, 23(2); *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115, ss 2, 9(2).

<sup>31</sup> *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115, ss 2(c)(ii) and 2(c)(e).

of the NOI as an insolvent person.<sup>32</sup> Tantalus is on one hand asking for the protections of the *BIA* under its NOI (which can only be granted to an insolvent person as defined under the *BIA*) after accumulating over 4 million dollars of debt under the *Excise Act, 2001*, while on the other hand it says it meets the above financial requirement.<sup>33</sup>

14. Even if there would be comparatively greater proceeds in the *BIA* proceedings under a renewed license, that is not a basis for the Minister to grant the renewal of a license when the requirements of the *Excise Act, 2001* are not met. For the Minister to renew an expiring license when the requirements are not met, because it would generate more proceeds in the NOI proceedings, would be to contrary to the requirements of the statutory regime and the restrictions on cannabis possession and sale imposed by the *Excise Act, 2001*.<sup>34</sup>
15. Ultimately, it is for the administrative decision maker to interpret the requirements of the *Excise Act, 2001* and for the Federal Court to intervene only if that reading is unreasonable. It is unlikely that the Minister's interpretation of the requirements for renewal under the *Excise Act, 2001* would be found to be outside the permissible range of reasonable results available within the applicable facts and law.

#### **Federal Court Has Exclusive Jurisdiction for Interlocutory Relief Against the Minister**

16. Tantalus will likely seek interlocutory relief until its present application is heard and decided by this Court. However, any interim relief with regard to challenging the Minister's refusal to renew is also within the exclusive jurisdiction of the Federal Court. The jurisdiction transferred to the Federal Court under section 18 of the *Federal Courts Act* catches all injunctions, including interim, interlocutory and permanent.<sup>35</sup> The language employed in section 18 is not ambiguous with regard to injunctions nor with regard to declaratory relief.

#### **Tantalus Would Be Unlikely to Succeed In Seeking Such Relief**

17. Even if such interlocutory relief were requested as required in the Federal Court, it would be unlikely to be granted.
18. The Federal Court has granted an interim injunction with regard to a tobacco license under the *Excise Act, 2001*, but this was in a case where the Minister sought to cancel

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<sup>32</sup> Affidavit of Lucas Jenkins at Exhibit S.

<sup>33</sup> *Bankruptcy and Insolvency Act*, ss 2, 50.4(1).

<sup>34</sup> *Excise Act, 2001*, s 8 ("Minister's duty – The Minister shall administer and enforce this Act ...").

<sup>35</sup> *861808 Ontario Inc v Canada Revenue Agency*, 2013 ONCA 604 at paras 6-8, leave to appeal to SCC refused.

an active license ahead of its expiry, not a license that was expiring because it was reaching the end of its term.<sup>36</sup> The Court specifically noted that it was preserving the status quo, because the license would still be in existence until it naturally expired at a subsequent date (i.e. it was not being asked to renew an expiring license).<sup>37</sup>

19. In another Federal Court decision involving a tobacco license that was expiring due to the Minister's refusal to renew, which is directly on point to this case with regard to the facts and relief sought by Tantalus, the Federal Court specifically refused to grant the sought interlocutory relief.<sup>38</sup> The Court noted what was being sought was for the license to remain in effect until a final decision on the application for judicial review, despite its expiry under the terms of the *Excise Act, 2001*, which would be tantamount to making an order that is expressly contrary to a provision of an Act of Parliament.<sup>39</sup> The Court also referenced the principle that injunctions are meant to preserve the status quo, which would not be the case if it granted the relief.<sup>40</sup> Instead, it would be altering the status quo, giving the plaintiff his ultimate remedy in the interim period without an actual determination of the merits.<sup>41</sup>

#### **BIA Section 69(1)(a) Does Not Assist Tantalus with Regard to the Minister's Decision**

20. There is simply no basis to find that the Minister's refusal to renew the license qualifies as an "action, execution, or other proceedings, for the recovery of a claim provable in bankruptcy" barred by the stay provided by 69(1)(a) of the BIA. The license will automatically expire on July 10, 2023 under the terms of the *Excise Act, 2001*.<sup>42</sup> If the Minister does nothing, it will expire. It can only be extended if the Minister actively

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<sup>36</sup> 9101-9380 *Quebec Inc. (Les Tabacs Galaxy) v Canada (Customs and Revenue Agency)*, 2005 FC 309 at para 3.

<sup>37</sup> 9101-9380 *Quebec Inc. (Les Tabacs Galaxy) v Canada (Customs and Revenue Agency)*, 2005 FC 309 at paras 7-9.

<sup>38</sup> 9101-9380 *Quebec Inc v Canada (Canada Customs and Revenue Agency)*, 2005 FC 929 at paras 2-3, 10.

<sup>39</sup> 9101-9380 *Quebec Inc v Canada (Canada Customs and Revenue Agency)*, 2005 FC 929 at paras 12-14, citing *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115, s 4.

<sup>40</sup> 9101-9380 *Quebec Inc v Canada (Canada Customs and Revenue Agency)*, 2005 FC 929 at paras 22.

<sup>41</sup> 9101-9380 *Quebec Inc v Canada (Canada Customs and Revenue Agency)*, 2005 FC 929 at paras 22; see also *Re A.G. Canada v Gould*, 1984 CanLII 5301 (FCA) ("The proper purpose of an interlocutory injunction is to preserve or restore the status quo, not to give the plaintiff his remedy, until trial), affirmed by the SCC.

<sup>42</sup> *Regulations Respecting Excise Licenses and Registrations*, SOR/2003-115, s 4 ("A license is valid for the period specified in the license ..."); 9101-9380 *Quebec Inc v Canada (Canada Customs and Revenue Agency)*, 2005 FC 929 at para 12.

does something, i.e. determines the statutory requirements for renewal are met and renews the license under the *Excise Act, 2001*.

21. Tantalus relies on several CCAA cases where regulatory bodies were stayed from suspending or cancelling active licenses during insolvency proceedings.<sup>43</sup> They all involved the CCAA, whose stay granting section (11.02) is written more broadly than 69(1)(a) of the *BIA*.<sup>44</sup>
22. As noted in the above review of Federal Court jurisprudence, acting to suspend or terminate a license ahead of its expiry date is different from not renewing a license that is going to expire at the end of its defined period. Tantalus has not provided any cases dealing where a regulatory body was required by the “stay” under the *BIA* (or even under the CCAA) to renew an expiring statutory license.
23. With regard to section 69.6 of the *BIA*, it is essentially a shield provided to regulatory bodies against the full impact of 69(1)(a), unless that shield is removed pursuant the terms of section 69.6. In other words, 69.6, including 69.6(4), does not expand the *scope* of the stay provided for under 69(1)(a).
24. The Minister does not agree that the requirements of removing the shield provided by 69.6 are met (including the public interest requirement), but even if they were, it would not matter because the stay under 69(1)(a) of the *BIA* does not and cannot require the Minister’s renewal of the expiring Excise License.

**Tantalus’ Best Case Scenario Under *BIA* Section 69(1)(a) Is Bleak and Interim Relief Against Officers Enforcing the *Excise Act, 2001* Should Not Be Provided**

25. The best case that Tantalus could hope for under the *BIA*, which is unlikely, is that Tantalus is able to retain temporary possession of the stamps and cannabis without a cannabis license, contrary to the terms of the *Excise Act, 2001*, only because any steps to enforce their removal or destruction are ultimately found to fall under the stay provided by 69(1)(a).
26. CRA will not force entry into Tantalus’ premises. If Tantalus does not proceed to return the cannabis stamps to CRA and destroy the cannabis after the expiry of the Excise License, CRA’s responsibility under the *Excise Act, 2001* is to the refer the matter to the RCMP, who qualify as officers under the *Excise Act, 2001*.<sup>45</sup> The RCMP in turn

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<sup>43</sup> Notice of Application at page 11.

<sup>44</sup> *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36, s 11.02. For example, 11.02 does not contain the limiting word of “creditor” as compared to 69(1)(a), focusses on the debtor company rather than the party taking an action, and allows the Court to set the terms of the stay order, as compared to the automatic stay imposed by 69(1)(a).

<sup>45</sup> *Excise Act, 2001*, ss 2 (definition of officer).



have the ability to pursue enforcement against offences under the *Excise Act, 2001*.<sup>46</sup> It is unclear how steps taken by the RCMP against offences under the *Excise Act, 2001* could be stayed under section 69(1)(a) of the *BIA*. Even if CRA were somehow prevented by 69(1)(a) from notifying the RCMP about the expiry of the Excise License or from doing anything further on this matter, if the RCMP became aware of the situation, they would still have a responsibility under the *Excise Act, 2001* to enforce the terms of the Act.

27. Even if the RCMP were somehow temporarily stayed from acting, any contraventions of the *Excise Act, 2001* that occur during that stay period that constitute offences under Part 6 of the Act would remain punishable at a later date.
28. Section 69(1)(a) and 69.6 do not provide a basis under the *BIA* to provide interlocutory relief against the enforcement of the *Excise Act, 2001*.<sup>47</sup> Any interlocutory relief to prevent officers under the *Excise Act, 2001* from enforcing the provisions of the Act based on the assumption that 69(1)(a) might be found to apply after a final determination would have to rely on the Court's general equitable powers. Such relief, if it is even available, would be extraordinary and inappropriate in the circumstances.

## **Part 6: MATERIAL TO BE RELIED ON**

1. Affidavit #1 of Lucas Jenkins made July 7, 2023.
2. The pleadings and proceedings herein and such further materials as counsel may advise and this Honourable Court may permit.

The application respondent estimates that the application will take 1 hour.

☐ The application respondent has filed in this proceeding a document that contains the application respondent's address for service.

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<sup>46</sup> *Excise Act, 2001*, 214, 218.1.

<sup>47</sup> *BIA* 69.6(4) only refers to a declaration after the actual determination is made that the regulatory body is seeking to enforce its rights as a creditor (i.e. it is not an interim measure, a final determination of that application must be made that goes hand in hand with the second part of the declaration that enforcement of those rights is stayed).

- ☒ The application respondent has not filed in this proceeding a document that contains an address for service. The application respondent's ADDRESS FOR SERVICE is:

Mailing address: Department of Justice Canada  
900 – 840 Howe Street  
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***Aminollah Sabzevari***

Dated: July 9, 2023

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