Court File No.: 05-CV-303001PD2

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANWEST MEDIAWORKS INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

AFFIDAVIT OF DAVID BUTLER-JONES

I, **DAVID BUTLER-JONES**, of the City of Winnipeg, in the Province of Manitoba, **MAKE OATH AND SAY AS FOLLOWS**:

1. I am currently Canada's Chief Public Health Officer. In this capacity, I lead the Public Health Agency of Canada (PHAC). I have held this position since the creation of PHAC in 2004.

2. PHAC is a separate agency within the federal Health Portfolio that delivers on the federal government's commitment to help protect the health and safety of all Canadians and to increase its focus on public health. PHAC carries out its mandate through leadership, partnership, innovation and action in public health.

3. Attached to this affidavit as Exhibit "A" is a copy of my *curriculum vitae*, which describes the details of my education and experience. For the purpose of this affidavit, I will provide some of the more relevant details of my general background as follows.

4. I hold a medical degree from the University of Toronto, which I obtained in 1978, as well as a Masters of Health Sciences in Community Health and Epidemiology, also from the University of Toronto, obtained in 1982. I hold certifications in Family Medicine, Community Medicine and Epidemiology, and Public Health and Preventive Medicine (both Canadian and American). I am licensed to practise medicine in the provinces of Manitoba, Ontario, and Saskatchewan.

5. In 2006, I received an honorary Doctor of Laws degree from York University's Faculty of Health in recognition of my contributions to the field of public health.

6. I have extensive experience in the field of public health. Prior to my appointment to PHAC, I held a number of positions throughout Canada in the field of public health. These include the following: From 1995 to 2002, I served as Chief Medical Health Officer and Executive Director of the Population Health and Primary Health Services Branches for the Province of Saskatchewan. From 1986 to 1995, I served as the Medical Officer of Health and CEO for Simcoe County Health District in central Ontario, and from 1983 to 1986, I served in this same

capacity for the Algoma District Health Unit. In 1982 and 1983, I was involved in developing an experimental program in preventive medicine in northern Newfoundland (Baie Verte Preventive Medicine Project), comprising public health and preventive medicine, occupational health, epidemiological research, and clinical medicine.

7. I also have experience working internationally as a consultant on public health. For example, I acted as a consultant to WHO Europe relating to immunization programs (2003-2004), I was co-chair of the Technical Advisory Committee, CIDA project with the National School of Public Health in Brazil (1998-2003), and I have participated in a number of projects in Chile, Kosovo, Scotland, the Dominican Republic and Turkey.

8. I have taught at both the undergraduate and graduate levels and have been involved as a researcher in a broad range of public health issues. I am a Professor in the Faculty of Medicine at the University of Manitoba as well as a Clinical Professor with the Department of Community Health and Epidemiology at the University of Saskatchewan's College of Medicine. I teach in several areas relating to public health, including the links between clinical prevention and public health, research interpretation and practical analysis, and occupational epidemiology.

9. I have also served with a number of organizations including: President of the Canadian Public Health Association; Vice President of the

American Public Health Association; Chair of the Canadian Roundtable on Health and Climate Change; International Regent on the board of the American College of Preventive Medicine; Member of the Governing Council for the Canadian Population Health Initiative; Chair of the National Coalition on Enhancing Preventive Practices of Health Professionals; Co-Chair of the Canadian Coalition for Public Health in the 21st Century, and Chair of the Executive Society of Medical Officers of Health for Ontario.

10. Throughout most of my career, until the SARS outbreak in 2003, I maintained a part-time clinical practice. I have practised in a variety of settings and venues, including rural and urban communities. Details of these experiences are further set out in my *curriculum vitae*.

11. My evidence and opinions in this affidavit are based on my own knowledge and experience gained through my education and years of experience in the field of Public Health, and in my role as Chief Public Health Officer and as the Deputy responsible for PHAC. Where I have relied on information from other sources, I believe that information to be true. Where I have referred to the opinions of other authors or results of studies, they are widely accepted as experts in the matters on which they have written, and their statements reflect my own opinion as well.

12. The purpose of my affidavit is to reply to evidence submitted in CanWest's affidavits, and in particular the affidavits of Dr. Don Fulgosi and Dr.

(b) Carrying out surveillance, monitoring, researching, investigating and reporting on disease, injuries, other preventable health risks and their determinants, and the general state of public health in Canada and internationally;

(c) Using the best available evidence and tools to advise and support public health stakeholders nationally and internationally as they work to enhance the health of their communities;

(d) Providing public health information, advice and leadership to Canadians and stakeholders; and

(e) Building and sustaining a public health network with stakeholders.

Attached as Exhibit "B" to this affidavit is a copy of PHAC's Strategic Plan 2007-2012, which sets out PHAC's history, mandate and priorities for the 2007-2012 period.

15. As part of its mandate, PHAC plays an active role in knowledge creation and translation for the benefit of the broader public health community across Canada. This includes sharing and communicating knowledge within the public health community.

16. PHAC also supports non-government organizations throughout Canada under its Grants and Contribution Programs to provide public health education and community action on a variety of health issues, including HIV/AIDS, early childhood development, diabetes prevention, Aboriginal Head Start, Hepatitis C prevention, pre-natal nutrition and health, and healthy living. This may include information on medications where relevant.

B. PUBLIC HEALTH EDUCATION IN CANADA

24. Health promotion and the provision of public health education and information are also carried out by a variety of other organizations, including:

(a) Federal, provincial, territorial and local governments through their ministries of health (including Health Canada) and local health units;

(b) Professional organizations such as the Canadian Medical Association (CMA), the Association of Obstetricans and Gynaecologists of Canada, the Canadian Psychiatric Association, the Canadian Paediatric Society;

(c) Non-governmental organizations (NGOs) and/or patient organizations such as the Canadian Cancer Society, the Lung Association, Diabetes Association, and the Canadian Mental Health Association;

(d) Private industry.

25. Public health education in Canada is carried through all manner of media. These include the internet, newspapers, television, radio, magazines, public announcements and releases, poster campaigns and pamphlets.

1) Public Health Education Resources

26. The provision of information to the public regarding health is an important tool by which PHAC and other organizations educate Canadians and assist them in making informed decisions in order to improve their health, through, for instance, the prevention and control of chronic disease.

27. Both PHAC and Health Canada deliver public health information to Canadians on a range of issues relating to chronic diseases, including health effects, risk factors and how to minimize them, as well as information on how to

maintain overall good health. PHAC and Health Canada use tools such as their web sites, fact sheets, news releases, social marketing campaigns and publications to deliver their messages relating to public health. For example, Health Canada's website currently contains over 17,000 pages of publicly available information on all manner of health-related issues.

28. The following are some examples of public health education resources that have been developed by PHAC and Health Canada.

2) General Resources on Health

a) It's Your Health

29. Available on the Health Canada website (www.hc-sc.gc.ca/iyh-vsv/index_e.html), "It's Your Health" is a series of articles, or fact sheets, that cover a wide range of health issues. Each "It's Your Health" article is written in consultation with Health Canada and PHAC's scientists and experts, and may also be reviewed by national experts outside the department. These articles also include internet links and references to more sources of information.

30. The materials available on "It's Your Health" also contain a compilation of consumer-friendly fact sheets on chronic diseases. The fact sheets include information on health risks, risk factors, how to minimize risks, and a list of treatment options, which may include medications. The fact sheets are promoted on Health Canada's website and available from the top menu bar on the Health Canada website. Attached as Exhibit "C" to this affidavit are copies of material

from the "It's Your Health" website, including the homepage, the complete alphabetical listing of topics on the site, and specific pages relating to stroke, and the safe use of medicines.

b) General Information on Diseases and Conditions

31. In addition to the material provided in "It's Your Health", Health Canada also provides a number of informational resources on its website relating to diseases and conditions more generally. For each disease or condition, the website provides general information, risk factors and treatment for the particular disease or condition, and links to other reliable resources. Again, the use of medications may be one of a number of options that may be appropriate. Attached as Exhibit "D" to this affidavit are copies of materials from Health Canada's website relating to "Diseases and Conditions" (www.hc-sc.gc.ca/dc-ma/index_e.html), including the homepage, an index of diseases and conditions and specific pages relating to cancer, heart and stroke, and diabetes.

c) General Information on Drugs and Health Products

32. In addition to its role as a regulator, Health Canada is also committed to providing Canadians with timely access to sound, evidence-based information on drugs and other health products. To this end, Health Canada has extensive resources that educate and inform the public on drugs and health products so that they can make healthy choices and informed decisions concerning their health.

33. On Health Canada's website, there is a portal on "Drugs and Health Products" (www.hc-sc.gc.ca/dhp-mps/index_e.html) that includes materials on drugs and health products in general, the drug regulatory system, and advisories, warnings and recalls. Attached as Exhibit "E" to this affidavit are copies of materials from Health Canada's website on Drugs and Health Products.

34. Another resource is the MedEffect Canada Initiative. The MedEffect program is comprised of a website (www.hc-sc.gc.ca/dhp-mps/medeff/index_e.html), and a partnership initiative involving, for example, professional health care associations and consumer/patient groups. This initiative was developed to provide Canadians with the following:

(a) centralized access to relevant and reliable health product new safety information targeted to consumers/patients, health professionals, and industry, and;

(b) increased awareness about the importance of reporting adverse reactions to Health Canada, and how this information is used to identify and communicate potential risks.

Attached as Exhibit "F" to this affidavit is a copy of the pages from the MedEffect Canada webpages, including the homepage and the page relating to drug advisories, warnings and recalls.

35. Health Canada is currently in the process of completing a new product monograph project, which should be complete in early 2008. The goal of this initiative is to post product monographs for all approved drugs in Health Canada's Drug Products Database. These will then be publicly available through

Health Canada's website. A product monograph is a factual, scientific document on the drug product that, devoid of promotional material, describes the properties, claims, indications, and conditions of use for the drug, and that contains any other information that may be required for optimal, safe, and effective use of the drug.

d) Healthy Canadians Web Portal

36. The Healthy Canadians Web Portal (www.healthycanadians.gc.ca) was launched on February 19, 2007. This portal provides a single website address for all healthy living social marketing campaigns. Healthy living related content can be defined as that which supports making positive health choices that enhance the personal physical, mental, and spiritual health. The portal showcases short features on all current campaigns and links to related sites.

37. The content in the web portal includes consumer information on topics such as healthy eating, healthy pregnancy, physical activity, food and product safety as well as specific resources for First Nations and Inuit populations. Attached as Exhibit "G" to this affidavit is a copy of the home page for the Healthy Canadians Web Portal.

3) <u>Resources on Specific Illnesses</u>

a) Mental Health –The Mental Health Commission of Canada

38. The federal government has made raising awareness and reducing the stigma associated with mental health issues a priority in the area of public health. In this year's budget, the federal government allocated $55 million over the

next five years to establish a new Mental Health Commission of Canada and has named former Senator Michael Kirby as the first Chair of the Commission. The Commission was incorporated as a non-profit corporation in March 2007. Attached as Exhibit "H" to this affidavit are copies of materials from the Mental Health Commission of Canada's website (www.mentalhealthcommission.ca), including pages on the Commission's background and key initiatives, and the message from the Chair.

39. The mandate and structure of the Commission is closely based on the proposals contained in the 2006 final report of the Standing Senate Committee on Social Affairs, Science and Technology, entitled "Out of the Shadows at Last – Transforming Mental Health, Mental Illness and Addiction Services in Canada".

40. Public education on mental health issues is a key part of the Commission's mandate. Its goals are as follows:

(a) **The launch of an anti-stigma campaign** - The Commission will implement a 10-year national anti-stigma campaign aimed at promoting a better understanding of mental illness among the general population and at changing public attitudes towards mental illness;

(b) **The promotion of the development of a national strategy** - The Commission will work with all members of the mental health community to help develop this national strategy; and

(c) **The creation of a Knowledge Exchange Centre** - The Commission will create an internet-based, pan-Canadian Knowledge Exchange Centre to allow governments, service providers, researchers and the general public to access evidence-based information about mental health and mental illness and to enable people across the country to engage in a variety of collaborative activities.

41. In addition to the establishment of the Mental Health Commission of Canada, PHAC and Health Canada also have a number of resources and publications aimed at educating and informing the public on mental health issues. These include:

(a) Web pages on PHAC's and Health Canada's website, including a section on "It's Your Health" with fact sheets on various mental health problems and issues. Attached to this affidavit as Exhibit "I" are copies of materials relating to mental health from PHAC's and Health Canada's websites, including "It's Your Health";

(b) Various publications on mental health issues, including the report *The Face of Mental Health and Illness in Canada*, to make people aware of the signs of depression and what to do about it; all of these publications can be found on Health Canada's and PHAC's website and are also available in hard copy.

b) Diabetes – The National Diabetes Fact Sheet

42. This product, found on PHAC's website (www.phac-aspc.gc.ca/ccdpc-cpcmc/diabetes-diabete/english/pubs/ndfs-fnrd07-eng.html), provides information for Canadians on risk factors, living with diabetes, reducing the risk of diabetes and reducing the risk of its complications. The fact sheet was launched in November 2007 and is the result of a partnership between PHAC and the following diabetes stakeholders: the Canadian Institutes of Health Research, Canadian Diabetes Association, Diabète Québec, CNIB, Juvenile Diabetes Research Foundation Canada and the Kidney Foundation of Canada. The aim of this communication tool is to streamline public information on diabetes, by developing one product that can be used by the Government of Canada and all NGO stakeholders when developing diabetes information tools. In addition, this information has been made available on PHAC's website in order to allow

Canadians to educate themselves about the disease. Attached as Exhibit "J" to this affidavit is a copy of the National Diabetes Fact Sheet.

c) Heart Disease – The Healthy Heart Kit

43. The Healthy Heart Kit (www.phac-aspc.gc.ca/ccdpc-cpcmc/hhk-tcs/index.html) is a risk management and patient education kit for the prevention of cardiovascular disease and the promotion of cardiovascular health. The online version of the Healthy Heart Kit offers a checklist that can help a person identify where they could improve their cardiovascular health and offers suggestions on how to accomplish health goals, such as quitting smoking or leading a more active lifestyle. An added feature available online is the physicians' guide, which explains how to effectively use the kit in promoting cardiovascular health to patients. Attached as Exhibit "K" is a copy of the homepage from the online version of the Healthy Heart Kit.

d) Chronic Diseases - PHAC's Centre for Chronic Disease Prevention and Control (CCDPC)

44. This website (www.phac-aspc.gc.ca/ccdpc-cpcmc/topics/index.html) offers information organized by topic to Canadians on a range of diseases, including cardiovascular disease and stroke, arthritis, asthma and chronic respiratory disease and cancer. Each topic contains a description of the disease, information on its associated risk factors, other available publications and links to related sites which provide further information. Attached as Exhibit "L" are copies of materials from the CCDPC's website on chronic diseases, including the list of

chronic diseases for which information is provided and specific pages on cardiovascular disease and arthritis.

4) Social Marketing Campaigns for Public Health

45. In line with their respective mandates of health promotion, another tool that PHAC and Health Canada employ is social marketing. Social marketing can be defined as "the application of marketing technologies developed in the commercial sector to the solution of social problems where the bottom line is behaviour change." It involves "the analysis, planning, execution and evaluation of programs designed to influence the voluntary behaviour of target audiences to improve their personal welfare and that of society."[4]

46. The following are examples of recent social marketing campaigns delivered by PHAC and Health Canada, and their partners.

a) Physical Activity and Healthy Eating Tools

47. The federal Health Portfolio supports a number of key public information initiatives that promote both physical activity and healthy eating. These initiatives use various forms of media and are developed with many partners, including the provinces and territories and Aboriginal organizations. These include ParticipACTION, social marketing campaigns to promote tools such as Canada's Physical Activity Guides, Canada's Food Guides, and other web resources.

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[4] Attributed to Alan Andreasan, www.hc-sc.gc.ca/ahc-asc/activit/marketsoc/index_e.html.

b) West Nile Virus

48. This campaign was carried out from 2003-06 during mosquito season, with the objectives of raising awareness of West Nile Virus and motivating Canadians to take preventive measures. PHAC collaborated with nine national retailers who sell products attractive to the target audience (camping gear, gardening tools, sunscreen, etc.). PHAC produced and distributed posters, counter-top displays and information pamphlets to over 3,200 stores across Canada. The stores set up the posters and counter top displays with information pamphlets in high traffic areas. In all, 3,700 displays and 3,800 posters were set up and more than 950,000 pamphlets were distributed to Canadians.

c) Sudden Infant Death Syndrome (SIDS)

49. The SIDS program was launched in February 1999, in collaboration with the Canadian Foundation for the Study of Infant Deaths, the Canadian Paediatric Society and the Canadian Institute for Child Health. The objectives of the campaign were to raise awareness and reduce the risk of SIDS. The program consisted of several components including a joint statement on SIDS, a poster, a brochure and a partnership with Pampers Canada. As part of the campaign, Pampers printed the message "Back to Sleep" on the waistbands of all newborn and size 1 diapers and distributed the “Back to Sleep” brochure in their prenatal and hospital pack to over 500,000 Canadian parents.

d) Pandemic Citizen Readiness Campaign

50. PHAC developed a Citizen Readiness Information Strategy that presented key activities and tactics that were implemented in response to the call for federal action on pandemic influenza. PHAC created a Pandemic Web Portal for all interested health professionals and the general public to consult for information surrounding pandemic/avian influenza related issues.

51. Also as part of the strategy, PHAC developed information kits that were mailed out to health professionals in collaboration with the Canadian Medical Association (CMA) and the Canadian Pharmacists Association (CPA). The kits included two fact sheet pads for pharmacists and medical doctors to distribute to their patients: 1) a broad pandemic influenza checklist for prevention and 2) the differences between annual flu, avian flu, and pandemic flu. Through this campaign, the kit was delivered to approximately 8,600 pharmacies and 55,000 Canadian physicians, with the fact sheets reaching upwards of 3 million Canadians.

C. THE ROLE OF OTHER ORGANIZATIONS IN DELIVERING PUBLIC HEALTH EDUCATION

52. Outside of PHAC and Health Canada, there are numerous other organizations that play an important role in delivering public health promotion and specifically, public health education. As noted above, such organizations include professional associations such as the Canadian Medical Association, and non-governmental organizations, such as the Canadian Cancer Society, the Lung

Association, the Heart and Stroke Foundation, the Canadian Diabetes Association, the Kidney Foundation, or the Arthritis Society of Canada.

53. Such organizations are important as they are able to reach different audiences and have ways of getting to the target audience that PHAC cannot. Also, because of their history and their built-in expertise, such groups often have a high level of credibility with the Canadian public. In the context of health promotion and education, PHAC often partners with such organizations as a doorway to promoting public health at a community level. Through partnerships with various organizations, PHAC increases its capacity to carry out its overall mandate.

54. Private industry can also play a role in health promotion and public health education. For example, they can assist in raising awareness of diseases and conditions, either through the provision of unrestricted educational grants to non-governmental organizations and can contribute their scientific expertise to non-governmental or public health led health promotion initiatives. Public health information provided by the private sector can be valuable from a public health perspective, when it is unbiased, based on credible, evidence-based research, and is not linked to a specific product.

55. For example, multiple drug companies work together with NGO's (Canadian Public Health Association, the Lung Association, the Heart and Stroke Foundation and others) on an annual influenza awareness campaign to deliver key

messages to the public regarding influenza and the importance of immunization, without any reference to specific products.

D. CONCLUSIONS ON THE EDUCATIONAL VALUE OF DTCA

56. In preparing this affidavit, I have reviewed the affidavits filed by CanWest in this proceeding. In several of the affidavits, particularly the Affidavits of Richard Dolinar and Don Fulgosi, the affiants suggest that "DTCA fulfills a vital educational function that is not generally met by any other means".[5]

57. I disagree. Based on my experiences both as Chief Public Health Officer and as a practicing physician, it is my opinion that DTCA does not fulfill an important educational function. In particular, it is my opinion that DTCA does not meet the objectives of providing reliable and informative public health education.

58. My opinion is based on the following reasons. First, as the availability of all prescription drugs is controlled by statute and regulations and they are not directly available to the patient, but only available through a physician or other licensed health care professional, it follows that rules regarding their advertisement should differ from other consumer products. Prescription drugs are not like typical consumer goods. Unquestionably, such drugs can be of benefit to patients when used properly under the care of a licensed health care professional. At the same time, we recognize that prescription drugs can also pose significant risks and dangers. For that reason, such drugs are not readily available to

[5] Affidavit of Richard Dolinar, para. 27.

consumers, but require the prescription of a licensed health care professional, who has the requisite expertise and knowledge to determine whether and under what circumstances a patient should be taking them.

59. Secondly, DTCA does not meet the goal of good public health education because it is not unbiased in its content or its presentation. The primary goal of DTCA is to sell a particular product and not to educate. Research suggests that prescription drug ads exaggerate benefits and downplay risks. Manufacturers often appeal to emotions, rather than using evidence-based information to promote drugs. In many cases, DTCA does not provide a balanced view of the risks and benefits inherent in taking a particular drug, and thus does not assist the viewer in making informed decisions concerning his or her health.

60. Unlike public health education, DTCA information has not necessarily been "filtered" though the lens of health experts, who can weigh and evaluate the perhaps competing, contradictory, and overwhelming amount of information on an issue for the public's consumption and use. A public health perspective can be seen as providing an impartial evaluation from an unbiased viewpoint, that has the interest of the public in mind as the chief priority.

61. In my opinion, there are far better ways of educating the public on health-related issues than DTCA. In its focus on a particular drug, DTCA often presents an imbalanced picture of the health care process. Instead of beginning with an assessment of an individual's medical situation and history, identifying any

medical problems, and canvassing all potential solutions (eg. diet and exercise) and not just medications, drugs are presented as a "one size fits all solution" to a particular health issue or problem. This can often create the expectation of a "quick fix", as opposed to generating a proper understanding or discussion of the complexities of a particular health problem or issue. Permitting DTCA of prescription drugs would increase the promotion of drugs as "fix-its", contravening the public health approach that supports a balanced lifestyle and illness prevention.

62. Researchers have also found that some ads promote unnecessary medicalization of normal life. DTCA has the potential of creating a cadre of the "worried well" – persons who become unnecessarily anxious based on incomplete information about symptoms or signs of diseases that have been suggested to them by such advertising. These include persons who may be experiencing symptoms of a minor condition, but become anxious that they may have a more serious condition based on suggestions from advertising. These may also include persons who have not experienced any real symptoms but for a variety of reasons, may become concerned for their health.

63. Additionally, DTCA stimulates the sale of new drugs that are generally more expensive than older treatments. In many cases, such new drugs are either no more effective, or only marginally more effective than their older counterparts.

64. From a public health perspective, DTCA is not desirable because it does not meet the aims of health promotion. As I have indicated above, public health focuses on the health of communities and individuals. Underlying the concept of public health is the concept of providing the optimum level of health care for the least amount of cost, with the least side effects and in the least intrusive manner. Good public health education provides accurate information, provided by unbiased and credible sources, which support the target audiences to make appropriate decisions given their circumstances. This involves the provision of balanced information regarding all appropriate treatment options, in some cases, and not simply information focused on one possible option.

65. The fact that governments must allocate scarce health care resources is and always will be a reality. The risk in permitting DTCA is the increased possibility that the allocation of these resources will be negatively affected. Ad campaigns will likely encourage unnecessary visits to doctors, from which further unnecessary investigations may result, thereby placing unnecessary strains upon the health care system and deviating or delaying services for those who are truly in need or who are in the most need, as well as deviating resources from the health care system as a whole.

66. I make this affidavit in response to CanWest's application herein and for no other or improper purpose.

SWORN before me at the City of Ottawa, in the Province of Ontario, this 5th day of December, 2007.

(Commissioner for Taking Affidavits)

DAVID BUTLER-JONES