BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION | ASSOCIATION DES LIBERTÉS CIVILES DE LA COLOMBIE-BRITANNIQUE

VIA EMAIL: mayorandcouncil@vancouver.ca; publichearing@vancouver.ca

June 17, 2015

Mayor and Council
City of Vancouver

453 W 12th Ave
Vancouver, BC V5Y 1V4

Re: Public hearing – Text Amendment: Regulation of Retail Dealers – Medical Marijuana-Related Uses

Your Worship, Councillors,

We write in relation to the Policy Report on the Regulation of Retail Dealers – Marijuana-Related Uses that is being considered by Council.

The BCCLA is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963. The objects of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada.

The BCCLA has a longstanding interest in drug policy, and in particular, in medical and non-medical marijuana regulation. The BCCLA has long advocated for the reform of Canada's outdated, and unsuccessful, approach to marijuana use.

The BCCLA has extensive experience in drug policy dating back to submissions before the LeDain Commission in the 1960's and

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longstanding involvement in working to ensure the proper balance and respect for patient's rights in the many difficult legal and ethical issues that arise in the provision of health care.

The BC Civil Liberties Association is heartened that the City of Vancouver is attempting to responsibly regulate medical cannabis dispensaries in the city. We applaud the City for taking such a forward-looking initiative. However, we have concerns about several aspects of the regulatory scheme being proposed. Cannabis is a medicine, and medical cannabis dispensaries should be permitted and regulated in the city in a like fashion to other kinds of medical dispensaries. We are concerned that aspects of the proposed by-law will be unduly onerous, and will restrict access to medical cannabis dispensaries without any compelling rationale. Our concerns are set out below.

Edibles should be regulated, not prohibited

In proposed section 24.5 (12) of the *License Bylaw*, there is a prohibition on the sale of food in a medical-marijuana-related retail business, except for edible oils in sealed containers. The BCCLA disagrees with this provision. Instead, the City should adopt an approach of regulating the sale of these products along the lines of the state of Colorado.

The BC Civil Liberties Association endorses the oral submissions made in relation to the sale of edible cannabis products by Kirk Tousaw at the hearing on June 10, 2015.

If medical cannabis is permitted for sale, it makes no sense that medical cannabis in edible form, other than oils, should be prohibited by City bylaw. The Supreme Court of Canada's

decision of Thursday, June 11, 2015 in *R. v. Smith*, while not directly applicable to the question of who may sell medical cannabis products and in what form, makes a number of important points that provide a legal context for the City's proposed regulation.

At issue in *Smith* was a criminal prohibition on authorized medical marijuana patients possessing non-dried forms of cannabis. The criminal prohibition prevented patients from choosing the method of administration of their medical cannabis.

The Supreme Court of Canada upheld the factual findings of the trial judge at the Supreme Court of BC that non-smoking forms of ingestion of cannabis can be more effective for patients than smoking:

> After a careful review of extensive expert and personal evidence, the trial judge concluded that in some circumstances the use of cannabis derivatives is more effective and less dangerous than smoking or otherwise inhaling dried marihuana. […] The evidence amply supports the trial judge's conclusions on the benefits of alternative forms of marihuana treatment; indeed, even the Health Canada materials filed by the Crown's expert witness indicated that oral ingestion of cannabis may be appropriate or beneficial for certain conditions. […] The evidence demonstrated that the decision to use non-dried forms of marihuana for treatment of some serious health conditions is medically reasonable. To put it another way, there are cases where alternative forms of cannabis will be "reasonably required" for the treatment of serious illnesses (C.A. reasons, at para. 103). In our view, in those circumstances, the criminalization of access to the

> treatment in question infringes liberty and security of the person.
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> *R. v. Smith*, 2015 SCC 34, at paras 19-20.

While the proposed Bylaw allows the sale of edible oils that patients could use to produce edibles at home, we see no reason why the City should ban the sale of other preparations or edible items outright. Regulation short of a ban could allow the City to protect public health, while at the same time facilitating patients in their right to use medical cannabis in the form that is most effective for them. The Supreme Court of Canada's reasons in *Smith*, in the BCCLA's opinion, add force to arguments that the City should not adopt a prohibition on edible products in the Bylaw.

City concern about children accessing edible products can be dealt with through regulation

We understand that the City and officials at Vancouver Coastal Health have suggested that the edibles ban should be retained in order to protect children, who might be attracted to baked goods and candies containing medical marijuana. In support of this, the City has cited examples of children in the United States having been poisoned, and has noted that edibles may be more potent than other forms of marijuana.

The need to keep children away from certain medical products is nothing new, and we would encourage the City to consider the use of regulation, for example restrictions on packaging (including the use of opaque packages), package safety and child-proofing, and labelling guidelines in order to deal with the issue raised in respect of the risk to children.

After incidents involving the accidental ingestion of marijuana by children who ate edible marijuana products, Colorado's response was to introduce strict new packaging requirements, including a requirement to individually wrap edibles in increments of 10 or fewer milligrams of tetrahydrocannabinol, or THC. For example, in Colorado:

> Before sale to a consumer, a retail marijuana store must place any of these products in a container that is child - resistant or place the container in an "exit package" that is child resistant. "Child resistant" packaging must conform to federal consumer product safety regulations and an ASTM standard; be opaque so the product cannot be seen; be closable if not intended for single use; and be properly labeled pursuant to the Retail Code. Proper labeling includes specific warning statements for each of the three product types; Colorado's Universal Symbol indicating the container holds marijuana; a list of all nonorganic pesticides, fungicides and herbicides used to produce the marijuana; and a list of solvents and chemicals used to produce marijuana concentrate. Use of certain pesticides and chemicals is prohibited. Containers for edible marijuana products must be labeled with all ingredients, if refrigeration is required, standard serving limit and expiration date. Other statements are required if testing was performed for potency or contaminants.
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> City of Denver. "Colorado's Packaging and Labeling Requirements for Retail Marijuana for Consumer Protection and Child Safety". Accessed at http://www.denvergov.org/Portals/768/documents/Marijuan%20Packaging.pdf

Critically, the U.S. response after accidental ingestion was not to stop the sale of edibles, but to regulate. While obviously some

aspects of the policy above draw on U.S. federal and Colorado standards, there is no reason why Vancouver could not create a similar policy here.

No minors rule is overbroad

The Bylaw's restriction against minors entering a medical-marijuana-related retail business is overbroad. It would make it difficult for patients who do not have childcare to access the dispensary. Moreover, medical marijuana is prescribed to children for pediatric use. We understand that minor patients currently enter some dispensaries with an adult guardian. We propose that the City permit minors to be present if they are accompanied by an adult. Similar to the rules proposed above, the City could require medical marijuana products in-store to be packaged and displayed in a way that will not be attractive to children.

Distance restrictions should be eliminated or altered

Medical marijuana is medicine. While the City is entitled to regulate the operation and location of medical-marijuana-related businesses, dispensaries should not be viewed as undesirable purveyors of illicit products. Rules on separation of outlets may be good city planning practice, but the distance restrictions in relation to sensitive uses are, in our view, unnecessary. For example, convenience stores that sell tobacco do not have a distance restriction in relation to sensitive uses – it is considered to be enough that they take measures to disallow sales to minors and not advertise to minors – even as minors are permitted in the store to purchase other products, where presumably some of

them might witness tobacco products being sold, if not displayed.

A comparison to liquor stores, made by the City in the Policy Report under consideration, is inapt because alcohol is not being sold as a medicine. The more appropriate comparison is to a small-scale pharmacy. We can see no rationale why medical marijuana establishment, selling medicine to authorized patients, would be subjected to more onerous restrictions. Indeed, compassion clubs have been operating in Vancouver for years without serious public order problems in the community, as recognized by the Vancouver Police Department's measured, non-enforcement approach to dealing with these operations (see Vancouver Police Department Report # 1310C01 to the Vancouver Police Board, "Service and Policy Complaint #2013-94SP on Unlicensed Drug Dispensing Businesses, October 11, 2013).

In the alternative, should the City maintain a distance restriction in relation to sensitive use locations, the 300 metre rule is, in our view, unduly onerous and would impose an unjustifiable burden on dispensaries and those they serve.

In our view, no neighbourhood should be denied reasonable access to medical-marijuana-related retail businesses. We submit that where the 300 metre rule would effectively bar these businesses from entire neighbourhoods, the restriction should be modified. The Bylaw would exclude medical-marijuana-related retail businesses in the Downtown Eastside, except for locations on Hastings Street and Main Street. We are opposed to the broad exclusion in the Downtown Eastside. We understand that even with the possibility of sites on Hastings and Main Streets, the

distance rule may make it impossible to operate a dispensary in the Downtown Eastside. This is particularly problematic as there are residents in the DTES neighbourhood with health conditions who could benefit from the use of medical cannabis and who may not easily be able to travel to other parts of the city to access the product.

In addition, while we do not object to the proposed Bylaw having the effect that some operating dispensaries may have to close, if they are unable to meet the licensing standard, we endorse the submission of Mr. Tousaw that the City should be flexible with respect to the application of the distance requirement for existing dispensaries that have an enduring track record of responsible operation. The Bylaw already proposes a point system for evaluating license applications at Stage Two of its licensing process for existing establishments. We propose that, if the distance restriction is retained, existing establishments be entitled to apply for a variance or exemption from the distance restriction in Stage One of the process. In determining whether a variance should be granted, certain of the criteria identified at stage two that are relevant to the question of location might be considered (for example: Is it a problem premises as determined by the VPD? Has it been subject to multiple complaints?).

Patients should be entitled to privacy

We appreciate that the City may have both aesthetic and safety concerns in mind in prohibiting frosted or otherwise obstructed windows and facades. However, we think that medical-marijuana-related retail businesses should be able, if they so choose, to afford their patients a private environment in which to purchase their medical products. Numerous medical

establishments in the City use frosted glass or other techniques to create a more private environment for their patients. Dispensaries should be able to do the same. Security for employees and patients alike can be promoted by means other than requiring a transparent façade.

Licensing fees must be justified

The Policy Report states that revenues from the annual $30,000 business licence fee will "will contribute to cost recovery for the additional time spent by Property Use Inspectors, Licencing staff, development review staff, Police, Fire Inspectors and Communications Coordinators in regulating this sector." We have no objection to the concept of cost recovery. We are concerned, however, that the proposed amount may prove to be an onerous requirement for some operators, particularly for non-profit operators such as compassion clubs.

The City should produce a detailed accounting to justify this amount. Cost recovery should be transparent, and in respect of a medical service, it should not exceed a reasonable estimation of the City's actual ongoing costs of licensing and regulation. In particular, these figures should disclose why the cost of this license is so much greater than other licenses offered by the City.

We note that there has been discussion by the City of the potential for this pool of money to be used, among other things, for educational purposes in relation to drug use. These costs will ultimately be passed on to and borne by medical patients who are authorized to use medical marijuana. It is inappropriate to tax these patients in order to provide a service for the general public benefit. Moreover, educational program costs are not

genuine costs of regulating medical-marijuana-related businesses.

Finally, given the considerable amount of money proposed as a licensing fee, at the very least, medical-marijuana-related retail businesses should be able to pay the fee over the course of a year rather than in a lump sum.

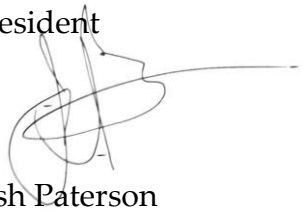
Conclusion

The BCCLA appreciates that, through the proposed Bylaw amendments, the City is attempting to ensure access to medical products for patients in Vancouver. We think that the shortcomings in the proposed approach are remediable with careful thought on the part of Council and staff, and we encourage the City to make the changes suggested.

Thank you for the opportunity to comment on the proposed Bylaw.

Sincerely,

Lindsay M. Lyster
President



Josh Paterson
Executive Director