



TOUSAW LAW CORPORATION

April 7, 2017

Without Prejudice

Island Health
201 – 771 Vernon Avenue
Victoria BC V8X 5A7

Via fax: 250-519-3402 and via email gateway_office@viha.ca

ATTENTION: Richard Stanwick, CMHO

Dear Mr. Stanwick:

RE: Cannabis Edibles

I am counsel to several medical cannabis dispensaries operating in Island Health's service delivery area. Many of my clients have received a form letter from Island Health regarding "Marijuana Edibles". This letter indicates that Island Health takes the position that:

- Any sale of cannabis edibles contravenes the *BC Food Premises Regulation*;
- Section 11(b) of the *Food Premises Regulation* which requires that all ingredients be obtained from "a source approved by the Government of Canada...";
- Island Health intends to advise local government that "distribution of marijuana edibles is not permitted"; and,
- "Noncompliance...may impede the issuance of a business license."

In response to the specific allegations in your letter that the use of cannabis as an ingredient violates section 11(b) of the *Food Premises Regulation* I can advise that my clients' position is that it does not. The use of medical cannabis edibles has been approved by the Government of Canada.

First, the *Access to Cannabis for Medical Purposes Regulation* allows the use of cannabis derivative medicines including the consumption of edible cannabis products.

Second, the Federal Court of Canada ruled, in *Allard v Canada*, 2016 FC 238, that a ban on cannabis derivative production including edibles was arbitrary, unconstitutional and a violation of section 7 of the *Canadian Charter of Rights and Freedoms*.

Third, the Supreme Court of Canada determined in a unanimous per curiam decision in *R v Smith*, 2015 SCC 34, that restricting medical cannabis patients to dried cannabis only was a violation of section 7 of the *Charter of Rights and Freedoms* and declared those restrictions to be constitutionally invalid. The Smith case was largely about access to cannabis edible products produced for and sold in dispensaries. Indeed, the case arose in Victoria, BC, in relation to a Victoria, BC dispensary working with Mr. Smith, who produced cannabis edibles for that dispensary. In coming to its conclusion, the Court was very clear that restricting patient access to these products was arbitrary and unconstitutional. The Court did not limit its declaration to any one set of regulations (the case arose under the *MMAR* but was decided when the successor regulations, the *MMPR*, were in effect). The Court concluded:

[28] We conclude that the prohibition of non-dried forms of medical marihuana limits liberty and security of the person in a manner that is arbitrary and hence is not in accord with the principles of fundamental justice. It therefore violates s. 7 of the *Charter*.

[30] A law is “of no force or effect” to the extent it is inconsistent with the guarantees in the *Charter*: s. 52 of the *Constitution Act, 1982*. We have concluded that restricting medical access to marihuana to its dried form is inconsistent with the *Charter*. It follows that to this extent the restriction is null and void.

[31] The precise form the order should take is complicated by the fact that it is the combination of the offence provisions and the exemption that creates the unconstitutionality. The offence provisions in the *CDSA* should not be struck down in their entirety. Nor is the exemption, insofar as it goes, problematic — the problem is that it is too narrow, or under-inclusive. We conclude that the appropriate remedy is a declaration that ss. 4 and 5 of the *CDSA* are of no force and effect, to the extent that they prohibit a person with a medical authorization from possessing cannabis derivatives for medical purposes.

Accordingly, it is my clients’ position that (a) to the extent that the *Food Premises Regulation* operates to prohibit patient access to non-dried forms of cannabis medicine it, too, violates section 7 of the *Charter*; (b) to the extent that Island Health suggests that it is unlawful for dispensaries to carry cannabis edibles the Supreme Court of Canada has ruled otherwise; and (c) to the extent that Island Health suggests that no level of government has approved the use of cannabis edibles it is legally and factually incorrect.

In response to your implicit threat to interfere and harm the business licensing prospects of dispensaries that continue to service their patients by providing access to cannabis edibles, I can advise that any such action may cause my clients, and their patients, damages for which Island Health could be found liable.

Preventing medical cannabis patients who access edible products from dispensaries from doing so will cause harm to health. This, too, was part of the basis of the *Smith* decision. Island Health's actions in this regard are contrary to its own "Vision, Purpose and Values."

According to Island Health's website, its "Vision" is "Excellent health and care for everyone, everywhere, every time." Many patients rely on access to cannabis edibles in dispensaries (which are, despite government-created obstacles, regularly tested and of known potency and quality) as a critical component of their overall health. Attempting to remove that access by threats of impeding business licensing ensures that these patients will not have "excellent health and care...everywhere, every time." Indeed it will create the opposite effect.

Island Health's "Purpose" is "[t]o provide superior health care through innovation, teaching and research and a commitment to quality and safety – creating healthier, stronger communities and a better quality of life for those we touch." This purpose is directly contradicted and undermined by Island Health's actions with respect to cannabis edibles. Island Health's position is not innovative – it is regressive. Island Health's actions do not demonstrate a commitment to quality and safety – quite the opposite. Forcing critically and chronically ill patients to attempt to make their own edible products rather than obtaining those of known quality and potency undermines their health, detracts from their quality of life and creates safety risks that do not currently exist or manifest.

Island Health's "Values" are "Courage – To do the right thing, to change, innovate and grow", "Aspire – To the highest degree of quality and safety", "Respect – To Value each individual and bring trust to every relationship" and "Empath – To give the kind of care we would want for our loved ones." Again, its actions in relation to cannabis edibles run contrary to each one of these values.

Island Health is not demonstrating courage. It is not acting innovatively. It is not changing or growing. Indeed, the best descriptors of its entire approach to this issue is fear, regression and a refusal to grow. Fear because despite cannabis edibles being available in Victoria in dispensaries for twenty years, there is essentially no evidence of any harm being caused to any individual as a result. In fact all the evidence is to the contrary. Regression because banning access to edibles is a tactic from the past – one that was unanimously condemned by the Supreme Court of Canada because it ran counter to the goals of enhancing public health and safety. Refusal to grow because the future is quite clearly going to include access to edibles

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for both medical and recreational purposes and the time to work with instead of against the dispensary community is now.

Island Health is not demonstrating respect, trust or valuing each individual. The patients that access edibles from dispensaries need that access for their health and quality of life. Dispensaries need to trust that Island Health is committed to working progressively toward appropriate and fact-based access to cannabis edibles, not to be threatened with possible business licensing sanctions by Island Health. Respect is earned and issuing a form letter in which Island Health seeks to impede patient access and harm their health, and includes threats to harm dispensary business licensing, does not engender respect. Quite the contrary.

Finally, Island Health is certainly not demonstrating empathy. I have spoken to hundreds of sick and suffering citizens that have benefitted in indescribable ways from the use of cannabis edibles obtained from dispensaries. Many of these people are dealing with serious health conditions that are almost unimaginable. I will never forget the testimony of the patient witnesses in the *Smith* case, all of whom accessed cannabis edibles from a Victoria dispensary and all of whom were given their lives back as a result. Their pain, their courage, their tears and their individual struggles for health and quality of life deserve empathy. Empathy comes from compassion and understanding, not slavish adherence to outdated, regressive, harmful and unconstitutional policies.

My clients wish to work with Island Health to find a way to satisfy any legitimate health concerns without interrupting patient access and harming their health. I urge you, in the strongest possible terms, to reflect on Island Health's Vision, Purpose and Values and to take steps to bring Island Health's actions into congruity with those core beliefs.

Thank you for your attention to this matter.



Kirk Tousaw
Tousaw Law Corporation