

March 29 2021

To Whom it May Concern at the Government of Canada and Health Canada:

Open Letter Re: Canada's Failing Medical Cannabis Sales Program

This is an open letter to Patty Hajdu (Minister of Health), Stephen Lucas (Deputy Minister of Health), Jacqueline Bogden (Assistant Deputy Minister), as well as Health Canada's Controlled Substances and Cannabis Branch, in particular John Clare (Director General, Strategic Policy), David Pellmann (Director General, Compliance), Frank Cesa (Acting Director, Policy Planning), and Seguin Benoit (Director, Medical Access and Client Services).

My name is Harrison Jordan, and I am a practicing lawyer of almost 3 years based in Toronto, Ontario. Most of my practice involves setting up provincially authorized, privately-run cannabis retail stores across Ontario, but I also have some federally licensed clients as well clients from throughout the cannabis eco-system seeking legal advice and compliance counsel with respect to the country's cannabis laws.

Canada's federally-licensed medical cannabis sales program is in dire straits, and I am sick and tired of seeing Health Canada do nothing or provide apparent far-fetched justifications to retaining the status quo when it comes to the country's crumbling medical cannabis sales program.

The number of patients in the medical cannabis sales program is declining, and that decline abated only recently and only temporarily due to Health Canada lengthening the expiry of medical documents during the pandemic which artificially increased number counts.

The decline in the number of patients registered to the federal medical sales program has decimated Canada's first mover legacy with respect to developing a viable, commercialized medical cannabis sales program. We are going from world leader status to a former shell of the program that risks showing the rest of the world the abdication by Health Canada to the country's medical cannabis patients – and it demonstrates that the development of Canada's medical cannabis sales program was illusionary and simply acted as the stepping stool for corporations to access the proliferating adult use/recreational cannabis sales regimes across Canada.

Many federally-licensed medical sellers are suspending their medical cannabis sales programs in favour of exiting and placing all their eggs in the recreational cannabis basket, leaving their registered patients out of access to the products they spent considerable time to discover were suitable for their conditions.

To sign up for the system in the first place, patients must wait days to get an appointment with a healthcare practitioner, who must then fax a medical document to a federally-licensed medical seller. The federally-licensed medical seller can then take a number of days, even more than a week, to approve the patient's registration with them. Then, the patient must ensure that the seller has in stock suitable cannabis for their purposes and must pay for shipping and wait for the product to arrive at their residence. Healthcare practitioners can "split" up a medical document such that a patient can access more than one federally-licensed medical seller, however that is up to the discretion of the healthcare practitioner and many do not feel comfortable prescribing more than 1 or 2 medical documents at most at any one time, severely restricting access to a particular medical seller.

Some federally-licensed medical sellers operate same-day delivery service for their registered patients, but the availability of that service and the number of cities they service is few and far between, as most times medical sellers (particularly those with "possession on site" designation) also hold processing licences – and as Health Canada is aware, such facilities tend to be located in rural areas much more so than urban areas. Even at that, many same-day services do not operate on weekends or holidays.

When it comes time for patients to purchase the medical cannabis, it is often priced over and above the price for commercially-produced, legally available recreational cannabis, the only prescription medication in Canada that is subject to both an excise tax and sales tax.

Health Canada's apparent position, as has been reported publicly by multiple individuals within industry, including Diplomat Consulting's Cameron Bishop and industry lawyer Trina Fraser, is that provinces and territories can authorize the sale of medical cannabis within their borders through s. 69(1) of the Cannabis Act.

With respect, that position is plain bullocks.

That's because, to my knowledge, there is absolutely zero indication that any of the provinces or territories have *ever* contemplated utilizing s. 69(1) of the Cannabis Act for the purpose of setting up a medical cannabis sales program. Every province and territory have used that authority to set up adult use/recreational programs, and none of them have used the authority to even consider setting up medical cannabis sales programs.

Cameron Bishop, who as part of his work has advocated for broadened medical access for patients to provinces and the offices of their respective Premiers, has said to me that the response back to him has been either that they were not aware that s. 69(1) provided such authority, or their hands were tied/full ensuring the continuing operation and success of their respective adult use/recreational cannabis regimes.

The leadership at Health Canada, including everyone at the Controlled Substances and Cannabis Branch reading this letter right now, know without a shadow of a doubt that the provinces and territories won't pick up the slack and create medical cannabis programs.

Provinces have their hands full with ensuring the maintenance of their recreational cannabis programs. And why would any Premier want to undertake a pet project to devise a medical cannabis program when it would only be seen as duplicative of the federal program and likely trigger constitutional questions and disputes related to federalism? In a pandemic no less?

It is frankly unconscionable and such a remarkable shame that the Minister of Health and Health Canada and its Controlled Substances and Cannabis Branch stand still and let the country's medical cannabis sales program go to its wayside.

Likely the largest Achilles heel of the Canada's medical cannabis sales program is the fact that all commercially-produced medical cannabis must be delivered to patients via a delivery service, and cannot be accessed by patients or their caregivers physically/via pick-up from the federally-licensed medical seller's facility.

When looking at federally-licensed medical sellers across Canada, this delivery is facilitated a vast majority of the time by Canada Post.

This is problematic because Canada Post has a history of suffering from service delays that place unconscionable delays on deliveries of all types. When patients seek to obtain medical cannabis that is commercially-produced, just like any other pharmaceutical drug in Canada, and this is the system available to them, there are extremely sensitive constructional/Charter concerns, as compared to say couriered traditional pharmaceutical prescription drugs, where access/dispensing is also available to patients through physically-accessible brick and mortar pharmacies across the country.

As a legal articling student under cannabis lawyer Paul Lewin, I drafted an affidavit for the *R v. Howell* case in which an individual charged with trafficking of cannabis argued that sections of the then *Access to Cannabis for Medical Purposes Regulations* breached section 7 of the Charter and could not be saved by Section 1.

In that case, which was heard by the Court of Queen's Bench of Alberta, Justice Robert Graesser [ruled on June 26, 2020](#) that based on expert and affidavit evidence brought forward by the individual charged, including my affidavit of personal knowledge related to problems of the licensed producer/medical seller system, multiple sections of the ACMPRs were unconstitutional, particularly, "to the extent that they prohibit distribution and delivery or pick-up of medical marihuana to places other than the patient's ordinary residence, the office of their medical practitioner, or a shelter."

The decision, however, did not prompt change to the country's medical cannabis sales program, because by the time of the decision the federal government had updated the *Cannabis Regulations* by removing the standalone ACMPR regulations and subsuming them as a Part within the Cannabis Regulations. Even though the text of the regulations and the features of the medical program remained largely unchanged, because they were moved into the Cannabis Regulations it shielded the current medical cannabis sales program from being declared unconstitutional or forcing the federal government's hand on improving the system.

Had the case been heard today with respect to the current regulations in force, there is little doubt the respective provisions would also be declared to be unconstitutional, and the federal government would have to act accordingly to fix the system.

I am now asking you to take the moral imperative, which is to take steps to fix the federally-licensed medical cannabis sales program, if only so as to avoid the voluminous spent funds and crushing defeat I predict awaits the federal government should it find itself having to defend the system again through any further *Howell*-like cases.

In my affidavit, I reported on how Canada Post has had ad-hoc service delays, resulting in packages not being delivered in a timely fashion. I referenced an article in the Toronto Star that identified package delivery delays by Canada Post during the holiday season.

Just by extreme coincidence after I submitted my affidavit, I myself as a registered client placed an order for medical cannabis from an Ontario-based federally-licensed medical seller in July 2020 after which I saw the internet-connected tracking code stating that Canada Post had picked up the package, yet just under 30 more days passed, there was no more movement on the tracking code, and I did not receive my package of medical cannabis.

At that point I called the medical seller to cancel the order, which had already been charged to my credit card the entire time. Yet it's unclear how much longer the package would have been stuck in transit had I waited for it and may have been indefinitely. The seller – and the medical cannabis that I ordered – was located near London, Ontario – I was located in Toronto. Let that sink in.

While I don't have a life-threatening condition or live on reduced economic means such that the wait for my medical cannabis could have contribute to deteriorating condition or death or the dearth of personal cash flow needed to make purchases necessary to survive life, that's a lived reality for most medical cannabis patients.

It's not an isolated incident, and evidence has only got worse since the *Howell* decision. Last year it was reported that an individual received their delivery of (non-cannabis) hair cream from Canada Post..... [8 years after ordering it](#).

Even more recently, in January 2021 it was [reported Canada Post announced](#) that customers should expect delays due to COVID cases at their Mississauga Gateway facility, a major hub for the delivery of letters and parcels/packages.

All of these ad-hoc delivery delays with respect to Canada Post services adds up to systemic delays.

Here's the solution:

Allow federally-licensed medical cannabis sellers (particularly those with a "possession on-site" designation) to establish physical medical cannabis access points, subject to municipal zoning bylaws. Health Canada could limit the

program's extent such that federally licensed medical sellers could only set up access points in the province within which their Health Canada-licensed site is located, or could permit provinces and territories to institute an application process for each proposed site that a federally-licensed medical seller seeks to establish in a province/territory.

Healthcare practitioners could be permitted to establish practices at such access points, enabling on-site medical assessment for medical cannabis prescription suitability as well as on-site pick-up by registered patients.

While the access outlets would not be required to have a pharmacist present and on staff, Health Canada could permit on-site pharmacists, as long as duly authorized by the rules set up by their respective province and their professional regulatory body, to conduct compounding acts with respect to packaged cannabis products that the medical seller duly purchased from a processor, similar to how pharmacists can generally compound medicines at pharmacies using commercially-produced active pharmaceutical ingredients as long as it is authorized by the pharmacist's professional regulatory body and requested by the prescribing healthcare practitioner.

As Health Canada is aware, provinces, territories and pharmacy regulatory bodies across Canada have differing positions and are at different stages of comfortability when it comes to the idea of pharmacists having a role in the dispensing of medical cannabis.

These access points would not be required to have a pharmacist on-site/on-staff but would need to do so if the access point would like to compound cannabis products under the authority of the pharmacist and sell such compounded cannabis products to patients as requested by their prescribing healthcare practitioner.

This provides a way for pharmacists to play an optional yet similar role that they play in compounding/dispensing traditional pharmaceutical prescription drugs while not relying on their participation in order to make the system work.

This solution is also elegant in that it addresses the submission of the Victoria Buyers Club earlier this year to Health Canada of a requested exemption to the Cannabis Act. Hundreds of patients are reported to rely on products from the Victoria Buyer's Club, particularly products that are compounded from dried cannabis into different forms of cannabis. Using that situation as a hypothetical example, a medical sales licence could be granted allowing the entity to purchase packaged cannabis products from processors and sell them to patients via secure in-store pickup or secure vehicular delivery by registered direct employees of the medical seller to their ordinary residence or a shelter within a certain kilometre radius from the access point.

This solution is so bloody simple and rational, that I do apologize if Health Canada is already orchestrating any such similar amelioration to the program.

But if something like this has not been in Health Canada's plans, it's an extreme abdication on the part of Canada's national health agency of its responsibility to provide reasonable access to medical cannabis for those suffering from medical conditions, which is often sought by those that are already most disadvantaged in this country.

Instead of fixing the problem, Health Canada has, amongst other things, introduced two changes that while well-intentioned, may be extremely detrimental to the integrity of the medical cannabis system.

Let me explain:

- (a) medical sellers are now permitted to sell up to 150 grams or its equivalent in one package, despite most patients having a per gram prescription that only allows them to publicly possess ~30 grams and would thus put them in extreme penal/criminal jeopardy upon their pickup of the 150 gram package from a public post office should they not be at home to receive the initial delivery attempt, and
- (b) Instead of sending their medical document to a medical seller to obtain access to commercially-produced medical cannabis or to Health Canada for a personal grow certificate, patients can now send their medical

document to Health Canada for a possession-only registration certificate [evidencing that they are purchasing their medical cannabis from a provincially-authorized](#) seller as opposed to from a federally licensed medical seller or producing it themselves or having an individual designated producer grow it for them. I have no clue why a patient would do this when they can send their medical document to a medical seller or Health Canada for a grow registration and then just walk into a provincially-authorized retailer anyway, and the number of patients who have undertaken this option are likely abysmal due to such. I think we can both agree that an elderly citizen looking for CBD cream for a medical problem is not going to find the best advice from a 18 or 19 year old budtender used to telling people what the best strains to get high are. In addition, from my communications with Health Canada, I understand this cannabis would not be considered “medical cannabis” for the purpose of the medical tax credit that allows patients to obtain tax credit for medical cannabis purchases.

I understand that Health Canada and everyone at the Controlled Drugs and Cannabis Branch work day and night to come up with a continuing framework that addresses a wide variety of stakeholder concerns. I think we can both agree, however, that the lack of movement on the medical cannabis sales program is a failure of epic proportions.

And what does Health Canada do to propose to ameliorate the medical cannabis sales program? Absolutely nothing, which combined with its draft guidance released two weeks ago proposing [to place a set of eligibility criteria](#) on its personal/designated grow program will result in even lessened patient access.

The amendments to the medical sales program that I outlined are desperately needed and can and should be implemented, notwithstanding the fact that no decisions have been made by Health Canada yet with respect to the Cannabis Health Products framework it has proposed for the distribution of products that contain cannabis and may contain medical claims for certain low-risk uses.

Health Canada has proposed that CHPs be permitted to be sold by federally-licensed medical sellers and provincially-authorized cannabis sellers, and then tasked a Scientific Advisory Board to meet and consider the extent of a proposed CHP regime and report back to Health Canada with their recommendations.

One of the options available to the Scientific Advisory Board is to decide whether to also allow CHPs to be sold inside general health and food stores, similar to how Natural Health Products are currently permitted to be sold in Canada.

While the Scientific Advisory Board could advise that provincially-authorized sellers should not be permitted to sell CHPs, it would be very, very unlikely for them to recommend against CHPs being permitted to be sold at the very least by federally-licensed medical sellers.

CHPs are intended to be used without physician oversight, similar to Natural Health Products. However, we know that phytocannabinoids including CBD and THC can interact with enzymes engaged when taking other pharmaceutical drugs, such as SSRIs. That becomes a concern particularly if Health Canada permits CHPs to be sold by provincially-authorized sellers where 18 or 19 year old budtenders do not have medical training on such interactions. Thus, as a middle ground, whatever type of entities Health Canada permits to sell CHPs to the public, it should require them to permit the customer access to a pharmacist or healthcare practitioner to consult with if they so choose about potential interactions, either at the time of purchase or sometime prior to consumption, and regardless of whether such consultation is facilitated physically at the point of sale or via video/tele-communication.

The system of medical cannabis access points established by federally-licensed medical cannabis sellers that I propose could thus facilitate the purchase of packaged cannabis from a variety of processors, in-person patient medical assessments for medical cannabis (should the medical seller have a prescribing healthcare practitioner on-site), as well as permit the compounding of the packaged cannabis products to further forms as specifically requested on a case by case by a patient’s prescribing healthcare practitioner (should the medical seller have a prescribing pharmacist on-site), and distribute medical cannabis products at their operated access point(s) on-site to patients whose medical document is

registered to them. They would also be able to sell CHPs to the general public and the on-site healthcare practitioner or pharmacist would facilitate the in-person option of the point of sales/pre-consumption CHP consultation requirement I propose as a condition of the sale of CHPs.

I want to leave you with one last thing. I hate to pull this card, but if you have any children, think about whether you want to be able to look back and feel proud and tell your child that you played a role in ensuring equitable access to medical cannabis for Canadians who have serious medical conditions. It could be any of our children, parents, or grandparents who may fall ill in the near future and find medical cannabis to be the only palatable or efficacious medication.

Sure, we all want to stop the bad guys from abusing the system, and that's hardly an unlaudable goal, but as a baseline ask yourself this: Health Canada has made certain progressive changes over the past years, particularly with respect to regulatory burdens on cannabis producers and I wouldn't want to detract from that - yet beyond that - do we want to stand proud of our country's medical cannabis sales program, or cower behind the apparent reality of doing just the bare minimum for the skeleton of the existing program to continue to drudge along?

I am available to speak to any representative of any level of government at any time to work together to ensure that Canada continues to have the best regulatory framework for legal cannabis production and sales in the world – not just for adult use/recreational cannabis but also for medical cannabis. My direct number is 647 371 0032 and my email is harjord@gmail.com.

PS: In July 2020 I developed a list of ten recommendations to amend the Cannabis Act and Cannabis Regulations to ensure converting and retaining as broad a swath of the consumer and patient base from the illegal market as possible, while still ensuring the framework achieves the core objectives contained within the Cannabis Act. I am proud that all ten of these recommendations were unanimously endorsed unmodified by the board of NORML Canada, and later published in their August 2020 newsletter. If you have not already read the recommendations, I urge you to do so [here](#) as you undertake public consultations and prepare for the upcoming Cannabis Act review. I insist it will not be a waste of your time.

P.P.S: I have been waiting more than three months now for a response from Health Canada in respect of numerous email correspondence I have written to the Cannabis Branch's Compliance & Promotions Department about a troubling [July 2020 bulletin](#) that explicitly states that Health Canada's position is that "temporary reduction in price, discount or rebate are likely to be considered as an inducement for the purchase of cannabis contrary to the Act."

I only discovered the bulletin in the first place late last year when I was searching an unrelated matter on Google and saw the PDF of the bulletin in the results, which was hosted on the BC Government website. At no time before was I aware of this bulletin, and I can tell you none of my cannabis retail clients were of aware of this position. I would think that if Health Canada intended to impose penal / criminal jeopardy of up to 3 years imprisonment on otherwise law-abiding cannabis sellers, you would think they would make every single effort to get this bulletin into the hands of those sellers, no?

There have been no further statements from Health Canada clarifying the scope of this far-reaching interpretation despite my correspondence.

As I have explained in more detail in my correspondence, this position is not supported by a plain reading of the legislation nor any principles of statutory interpretation. In addition, it is based on a reading of the federal *Tobacco and Vaping Products Act*, which contains differing legislative objectives than the *Cannabis Act*, and critically explicitly prohibits inducements in the form of "cash rebates" which the Cannabis Act does not explicitly state.

Most troubling, the bulletin states without justification that, "a person that sells cannabis or a cannabis accessory must not provide inducements that might encourage non-users to begin using cannabis or that might encourage excessive or heavy consumption."

Where the heck does that assertion come from? Well, it appears to be lifted from [a 2007 Supreme Court decision](#) (see para 111) on the then-*Tobacco Act* which reasoned that Parliament's intent with the lifestyle advertising prohibition was concerned with emotions and images "that may induce users to use or to increase their use of tobacco."

Thus, this rationale comes from a Supreme Court decision's reasoning on a completely different provision (lifestyle advertising) in a completely different legislation with different objectives than the *Cannabis Act* (*Tobacco Act / Tobacco and Vaping Products Act*).

Finally, the provincial cannabis regulators in Ontario, BC, Alberta and Saskatchewan all stated in responses to my enquiries on this matter that the provincially-authorized stores they regulate may offer discounts of differing temporal natures, subject to any particular rules each regulator or the province has established via legislation, regulation, or standards/rules.

I have since almost the start of my correspondence proposed an alternative, let me call it another bloody simple solution if I may, in which Health Canada revises its July 2020 bulletin position and states that cannabis sellers selling cannabis products or accessories "significantly under fair market value may be considered selling the product without monetary consideration in violation of s. 24(1)(a) of the Act."

This will put cannabis sellers on notice without kneecapping the industry's ability to provide any sort of product discounts beyond permanent price drops. And Lord knows cannabis sellers will need all the lawful discounting tools at their disposal to get products into the hands of patients and consumers, what with [the billion grams of unsold cannabis](#).

This would not only put Health Canada in line with the four provinces I mentioned who interpret the Cannabis Act as permitting discounts (whether "temporary" or "permanent"), but would also avoid the unfortunate reality that if enforced, such position would result in the arrest and imprisonment of up to 3 years of otherwise law-abiding sellers of adult-use/recreational and medical cannabis products across the country.

Best, and here to do whatever I can do to ensure burgeoning adult use *and* medical cannabis systems while keeping Canadians safe and upholding the objectives of the Cannabis Act,

Harrison Jordan
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