



VANCOUVER POLICE DEPARTMENT

REPORT TO THE VANCOUVER POLICE BOARD

REPORT DATE: September 1, 2015
COMMITTEE MEETING DATE: September 17, 2015
BOARD REPORT # 1509C01
Regular

TO: Vancouver Police Board Service and Policy Complaints Review Committee

FROM: Doug LePard, Deputy Chief Constable
Commanding Investigation Division

SUBJECT: Service and Policy Complaint #2015-112 regarding enforcement against
marihuana dispensaries

RECOMMENDATION:

That the Vancouver Police Board Service and Policy Complaints Review Committee dismiss this complaint with reasons.

SUMMARY:

This report responds to a Service and Policy complaint alleging that the Vancouver Police Department is “failing in their duty to maintain law and order” by not shutting down all marihuana dispensaries in Vancouver. The complaint further alleges that dispensaries have remained open because of the lack of VPD enforcement; that the VPD has directed police officers not to act on “signed warrants”; and that the VPD has no authority to exercise discretion on what it will investigate or how it prioritizes the use of its resources when criminal offences are alleged.

Marihuana dispensaries are illegal; however, the issue of enforcement against marihuana dispensaries is a complicated one because of intersecting legal, social and political factors. The City of Vancouver (“the City”) has decided to regulate rather than close all marihuana dispensaries using its bylaw powers. Using the criminal law to close marihuana dispensaries is generally ineffective, raises concerns about proportionality, and is a significant drain on valuable police resources that is difficult to justify in the absence of overt public safety concerns. When those concerns exist, the VPD has regularly taken action, including the execution of 11 search warrants and multiple charges recommended to Crown since 2013 – these actions have been generally ineffective at closing the dispensaries involved. In fact, some of the dispensaries reopened for business shortly after the police executed search warrants; at one location, search warrants were executed on three separate occasions. Bylaw enforcement, however, is an effective tool to shut down a business that isn’t compliant with municipal bylaws, as has been demonstrated in those Metro Vancouver municipalities without marihuana dispensaries.

Discretion is an essential feature of the criminal justice system. Individual police officers properly use discretion every day in making decisions about whether to arrest and charge individuals or resolve situations in other ways. Further, the Chief Constable has the discretion to make decisions about how police resources are deployed and what crimes will be investigated, as long as this authority is exercised ethically and on justifiable grounds. In the case of dispensaries, the VPD must consider evolving community standards; the City's decision to create a regulatory framework rather than using its bylaws to shut down dispensaries; the prioritization of police resources when weighed against other more serious drug offences occurring in Vancouver; and the costs and benefits of taking enforcement action against marihuana dispensaries. As a result, the Chief Constable has decided that such actions will only be taken when there are overt public safety concerns present.

For the reasons summarized above and described in detail in this report, it is recommended that this Service and Policy complaint be dismissed with reasons.

POLICY:

The applicable policy and procedure (or legislation) is the *Controlled Drugs and Substances Act* as well as City of Vancouver property use bylaws.

DISCUSSION:

Background

The current, somewhat chaotic, state of the law regarding medical marihuana is rooted in a series of appellate court decisions beginning in 2000 involving a constitutional right to access medical marihuana.¹ As a result, in 2001, the Federal Government introduced the Medical Marihuana Access Regulations (MMAR), which allowed those with a Health Canada “authority to possess” to obtain marihuana from a government approved supplier, or approval to grow their own (“Personal Use Production”), or approval to have someone grow marihuana on their behalf (“Designated Person Production Licence”). But this legislation was fraught with challenges (e.g., overproduction, lack of capacity to inspect, inadequate information sharing with police and municipal officials, and unsafe operations that dramatically increased the likelihood of a fire²). There was also considerable confusion over what was legal and what was not; the result was the courts waded in and struck down specific sections of the regulations, which Health Canada then tried to fix, which led to more litigation. In response, in 2013, the Federal Government introduced the Marihuana for Medical Purposes Regulations (MMPR) which became effective in April 2014, but this legislation was also challenged and aspects of the law remain in a state of flux to this day.

At no time, however, has it ever been legal to sell marihuana from a storefront “dispensary” and there is no credible commentary to the contrary (although there is certainly confusion in the public on their legality). Selling marihuana from a storefront dispensary – regardless of whether

¹ See *R. v. Parker*, 2000 CanLII 5762 (ON CA); *Hitzig v. Canada*, 2003 CanLII 30796 (ON CA); *R. v. Beren and Swallow*, 2009 BCSC 429; *Allard v. Canada*, 2014 FC 280, affirmed 2014 FCA 298 and *R. v. Smith*, 2015 SCC 34.

² See, for example, *Eliminating Residential Marijuana Grow Operations – An Alternate Approach* by Surrey Fire Chief Len Garis (<http://www.surrey.ca/files/EliminatingResidentialGrowOperations.pdf>), which found that “a home with a grow operation is 24 times more likely to catch fire than a typical home.”

the buyer is permitted to possess it under the medical marijuana scheme – constitutes the offence of “Trafficking” under the *Controlled Drugs and Substances Act*, which is federal legislation and part of the body of criminal law in Canada, along with the *Criminal Code*.

Nevertheless, the changing legal landscape seems to have been the catalyst for a rapid increase in storefront marijuana dispensaries catering to both the medicinal and recreational markets. It is clear there is some genuine demand for marijuana for medical reasons, but it appears Health Canada-authorized suppliers have the capacity to meet the needs of those who have an authority to possess it for medical reasons. As one BC prosecutor wryly noted, “If you look at the amount being sold by dispensaries, Vancouver must be the sickest city in Canada.”³

The reality is that some dispensaries are both part of a movement to push for legalization of marijuana for any purpose, and are supplying what is obviously a large recreational market. As noted by Donald Briere, described by the *National Post* as the “Tim Hortons of cannabis” (and a convicted drug trafficker) with multiple marijuana dispensaries in Vancouver, “We’re setting this up to be recreational, full on recreational.”⁴

Further, the dispensaries can only acquire their marijuana from illegal sources, as they cannot acquire it from an authorized supplier.⁵ This not only supports criminal activity, it damages the interests of authorized growers, who must comply with rigorous Health Canada rules and provide a quality-controlled product. Their multi-million dollar investments have been jeopardized by competition from illegal dispensaries.⁶

ONE TO 80+ Vancouver moves to defuse pot dispensary explosion

More than 80 pot dispensaries are now operating in Vancouver

City could become the first in Canada to regulate the sale of marijuana

JEFF LEE
VANCOUVER SUN

Vancouver is about to become the first city in Canada where the business of selling marijuana will be regulated and permitted.

Although the drug is illegal in Canada and technically only available to people by a mail-order, prescription system set up by the federal government, the city will permit the operation of dispensaries under a proposed framework that selects which businesses can open and imposes rigid operating conditions.

The proposed regulatory framework, which will take months to implement and still needs council approval, reflects a permissive view by the Vision Vancouver majority that supports access to marijuana for medicinal purposes.

Under Mayor Gregor Robertson’s administration, the city has held off enforcement as the number of unlicensed, unregulated and illegal pot dispensaries skyrocketed during the past two years.

The plan will go to city council Tuesday and specifically ignores the question of legalizing the sale and use of marijuana.

“We’re not getting into that argument. We are simply regulating an unregulated business, just as we would any other business,” said Kerry Jang, a city councillor.

As of mid-April, city officials counted more than 80 such shops, a fourfold increase since 2012 when the federal government changed the rules for how medical marijuana users can buy their medicine. In the last four months alone, 20 new shops have opened.

It will not be cheap, however, for anyone to operate a shop. The city will levy a \$30,000 annual administration fee, followed by business licences that will cost up to \$5,000 per year, depending on square footage. Each shop will also have to reapply annually under the city’s official development plan bylaws as a conditional use.

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1997
the first
marijuana-
related business
opened in
Vancouver



³ Confidential conversation with the author, July 17, 2015. Of note, of the 37,884 “Authorizations to Possess” marijuana as at December 31, 2013, almost half of them were held by British Columbians. Information downloaded July 23, 2015 from Health Canada’s website at <http://www.hc-sc.gc.ca/dhp-mps/marihuana/stat/index-eng.php>.

⁴ Brian Hutchinson, “The Tim Hortons of cannabis: 63-year-old ‘king’ seeks franchisees to grow his marijuana empire”, in the *National Post*, February 8, 2015. Downloaded July 20, 2015 from <http://news.nationalpost.com/news/canada/the-tim-hortons-of-cannabis-63-year-old-king-seeks-franchisees-to-grow-his-marijuana-empire>.

⁵ The accompanying image is from p. A1 of *The Vancouver Sun* on April 23, 2015 and is used with permission of *The Vancouver Sun*.

⁶ See, for example, “Pot firm lays off staff, blames dispensaries boom” by Bruce Constantineau in *The Vancouver Sun*, June 27, 2015, p. A4; and “Interest in legal pot sales wanes as illegal dispensaries flourish” by Lori Culbert in *The Vancouver Sun*, August 22, 2015, p. A1 and p. A8.

The City had previously adopted a non-enforcement approach to “compassion clubs,” but with the rapid proliferation of dispensaries beginning in 2013, the VPD and the City had discussions about using the city’s bylaws, complemented by police enforcement where appropriate, to address this growing number of dispensary operators openly flouting the law. In mid-2013, however, the City made a decision not to enforce its bylaws against marijuana dispensaries, and subsequently began developing a regulatory approach. The VPD acknowledged the City’s position but remained committed to continuing to take enforcement action against those dispensaries that generated public safety concerns. The VPD also made clear that the criminal law was not, on its own, a useful tool to shut a business. The City’s bylaw regime (including seeking a court injunction when necessary) is an effective tool to close down a non-compliant business, while the criminal law is generally only useful for enforcement against individuals. The VPD took the position that it could not justify the significant resources that would be necessary to launch major investigations to target the owners of dispensaries, rather than employees.

A major factor in this decision was the availability of bylaw enforcement to efficiently and effectively accomplish this goal if the City desired. This could include the use of police evidence, as has been the practice in the past when businesses operated in such a way as to create public safety concerns (e.g., businesses in the Downtown Eastside selling drugs “under the counter” or buying and selling stolen property). In these circumstances, the VPD would gather evidence through various investigative strategies, then present it at a “show cause” hearing by Council into whether the proprietors’ business licences should be suspended or cancelled.

Since those discussions, the number of marijuana dispensaries has increased from approximately 27 in July 2013 to approximately 100 currently. None of the dispensaries had a business licence to operate a marijuana dispensary – which could not be issued to a business selling an illegal product – although some had business licences to sell other, legal, products. The dispensaries have been the catalyst for many complaints from the public, as well as formal Service and Policy complaints to the Vancouver Police Board, including the one that is the subject of this report.⁷

Are city neighbourhoods going to pot?



On June 24, 2015, the City’s regulatory scheme to manage marijuana dispensaries was approved by Council and Vancouver became the first city in Canada to regulate the sale of marijuana from storefront operations. If these new regulations operate as anticipated, they will eventually reduce the number of dispensaries, provide tools to the City to impose restrictions on where and how they operate, and reduce the so-called “wild west” situation that currently exists because of a lack of regulation and bylaw enforcement.

⁷ The accompanying image is from page A1 of *The Vancouver Sun* on June 9, 2015 and is used with permission of *The Vancouver Sun*.

It is within this complex social and legal environment that the VPD operates. It must strive to find the right balance between addressing complaints about marihuana dispensaries, recognizing that community sentiments about marihuana (medical or otherwise) are evolving, and using expensive police resources in a proportional and efficient manner to achieve public safety objectives.

The Complaint

The complainant is part of an organization called “Smart Approaches to Marijuana Canada,” which could fairly be characterized as being pro-enforcement and anti-liberalization of the marihuana legislation in Canada. Her complaint to the Office of the Police Complaint Commissioner was forwarded to the Vancouver Police Board on June 12, 2015 and is reproduced below:

On behalf of the citizens of Vancouver who have expressed concern for their safety and the safety of their personal property we are registering a complaint for the lack of enforcement by the Vancouver Police Department in upholdmaing [sic] federal laws that would have the illegal medical marijuana dispensaries closed and these investigations brought to either the Office of Civil Forfeiture or the Federal Prosecutors. The VPD has told the media that they know organized crime is involved in these operations, they know that marijuana coming into these stores is coming from the licensees under Health Canada's Marijuana Program and they are aware that minors are accessing these stores. They are aware that these operations are advertising narcotics which is against the law in Canada. They are aware that parties, including landlords are also breaking laws, by aiding and abetting, and participating in money laundering as are all other suppliers to these illegal operations. We have had communication with the VPD and we have been told that this is not a priority issue or that they do not have the resources to deal with the 93 dispensaries that are now operating in Vancouver. Given the magnitude of the problem we do not accept that these dispensaries should be allowed to continue to operate. Our organization has been approached by police officers who have told us that they are being told not to act on signed warrants to raid these illegal operations and we are being told that they have approached the RCMP for assistance in enforcing the laws of Canada in Vancouver. The risk to our personal safety is such that many individuals do not feel safe attending City Hall to speak to the matter on June 10th. before Mayor and Council - this is very sad comment on the state of law enforcement in this country. When citizens feel too afraid to voice their opinion because of the pot lobby who have been allowed to flourish due to a lack of willingness of the police to enforce the law. The VPD may have discretion to lay charges but they can not outright disregard the laws of Canada or ignore complaints from the public or requests that they investigate crimes.

On June 24, 2015 the complainant also submitted follow-up information directly to the VPD as follows:

I am writing to complain about the lack of enforcement of the illegal medical marijuana dispensaries. It has been brought to my attention that the Police Act does not make provision for “prioritizing” enforcement of criminal statures [sic]. There is some latitude for enforcement of municipal bylaws. My complaint would be that the Vancouver Police Department did not uphold the criminal statures [sic] pertaining to illegal distribution of narcotics and in doing so have failed in their duty to maintain law and order.

Accompanying this information, the complainant provided sections 15(1) and 17 of the *Police Act*, which she purported were supportive of her allegation that the police do not have the authority to prioritize the use of resources. She then continued her complaint:

The reason Vancouver has 98+ illegal medical marijuana dispensaries is because the police have not done their job. They have stated that it has not been a priority to enforce the criminal code and force the closure of the pot stores. It is questioned if the police can prioritize to the extend [sic] of non-enforcement of the criminal code of Canada. It maybe [sic] that they are able to do this with municipal bylaws but the wording of the police act would suggest that they can not outright not enforce the criminal code. All the marijuana dispensaries are conducting illegal business, they are illegally advertising narcotics with a penalty of \$5 million dollars and or a 2 year jail sentence.

By not upholding the laws of Canada the VPD have allowed these operations to flourish, profit from crime, and pose a threat to public safety. They are selling untested product, from unknown sources, they are making false claims of benefit to the sick and they are involved in money laundering. They are illegal and they should be shut down. It is a mute [sic] point if the city of Vancouver wants to offer licenses - which they should not be doing as the Vancouver Charter says all business [sic] operators applying for licenses must be compliant with Federal and Provincial laws. None of these operations meet that criteria. In other regions of the country police enforcement have [sic] protected citizens by closing such dispensaries.

The fact that Canada has the highest use of marijuana by youth in the industrialized world and the established fact that marijuana use for youth is 2.5 x the rate for adults, and the fact that marijuana use is a harmful substance to the developing adolescent brain - this is a priority issue for the number of young lives involved and due to the severity of the risks associated with use - some of them that could compromise an individuals [sic] permanently. This is a priority given between 30-53% of grade 12 students in this country are regular users. It should be enforced as should all criminal statures [sic] to maintain law and order and to uphold the credibility of law enforcement. What the city of Vancouver has just done today in voting for licenses is make a laughing stock of the medical profession, and law enforcement.

Analysis

The complaint boils down to the complainant's beliefs that:

1. The VPD should take active enforcement action against all marihuana dispensaries;
2. Police officers "are being told not to act on signed warrants to raid these illegal operations";
3. The dispensaries have been able to remain open because of a lack of VPD enforcement;
4. The VPD cannot disregard requests that it investigate crime; and
5. The *Police Act* has no provision to allow police to use discretion in prioritizing how it deploys its resources regarding criminal investigations, therefore no such authority exists, and thus the VPD has "failed in their duty to maintain law and order."

Each aspect of the complaint is responded to below:

1. The VPD should take active enforcement action against all marihuana dispensaries.

The complainant's first assertion is premised in part on her belief set out in point number 3, i.e., that police enforcement action will shut down a marijuana dispensary. This is incorrect. In fact, since 2013 the VPD has executed 11 search warrants against marijuana dispensaries. The most recent warrant was executed on August 12, 2015. These were dispensaries in which the circumstances were such that they allegedly rose to a threshold the VPD has been open and transparent about being unacceptable. Included are public safety concerns such as selling to minors, violence, or the involvement of other criminal activity. In such cases, the VPD will take enforcement action. In fact, the VPD has recommended 23 charges against 11 suspects to the Public Prosecution Service of Canada (PPSC) arising from these 11 search warrant executions. Sixteen charges have been approved and charges are pending for several additional cases. What is important to understand, however, is that the criminal law is generally not impactful in shutting down an illegal business.

Further, while the VPD can recommend charges, it is the PPSC which makes the final decision. There is often a delay in charges being approved while PPSC considers the evidence, and also because Health Canada's capacity to provide the analysis of such items as "edibles," which is necessary for charges to be approved, is extremely limited. This causes significant delays in the charge approval process.

It is important to note that a charge being approved only means that an individual working in the dispensary is charged (with the likely result upon conviction being a fine); this will not close a dispensary. Further, the use of the criminal law against a dispensary employee raises concerns about the proportionality in the circumstances, given the significant impact of a criminal conviction. The reality is that the multiple search warrants executed and charges recommended have generally not resulted in dispensaries shutting down. For this to happen, the City would need to have enforced its bylaws following the police enforcement action, and this has not occurred. In fact, at one location, search warrants were executed on three separate occasions and the dispensary simply reopened after each enforcement action. Now that the City has approved a regulatory scheme, it is expected that dispensaries that operate in a manner which generates police enforcement action will also not be in compliance with the City's new regulations, which can be used to shut them.

2. Police officers "are being told not to act on signed warrants to raid these illegal operations."

On one occasion in 2015, several Patrol officers obtained a search warrant but did not follow established, written VPD policy on obtaining search warrants for marijuana dispensaries. This policy includes a requirement to consult with the Organized Crime Section, which has the expertise necessary to ensure such investigations are conducted appropriately. As a result, the warrant was not executed. Every other search warrant obtained by the VPD since 2013 to search a marijuana dispensary has been executed.

3. The dispensaries have been able to remain open because of a lack of VPD enforcement.

As described earlier, enforcement of the criminal law is not an effective tool to close a marijuana dispensary. The complainant and others are misinformed in their belief that VPD enforcement alone will effectively shut down marijuana dispensaries; this has not been the experience in Vancouver. And several municipalities in the Lower Mainland that do not have dispensaries, or which have shut down dispensaries, have achieved this result through

enforcement of municipal bylaws, not police actions alone, according to a canvas of jurisdictional police agencies conducted by the VPD.⁸

For example, the City of Abbotsford does not support dispensaries. The one dispensary that opened was issued a cease and desist letter from the municipality and if it does not comply the bylaw enforcement process will begin. The Corporation of Delta does not support dispensaries and does not currently have any. One store attempted to open and Delta denied it a business licence and informed the store it would enforce licencing bylaws if they sold marihuana. In New Westminster, there are currently no marihuana dispensaries and the city is prepared to enforce its bylaws to shut stores down. Surrey currently has no dispensaries and has purportedly taken the position it will actively enforce licencing bylaws to close any that might open.

The Vancouver Sun has reported that “Both North Vancouver District and Surrey have passed zoning bylaws to prohibit the marijuana dispensaries.”⁹ North Vancouver District’s bylaw – an amendment to an existing bylaw – was enacted on May 26, 2014.¹⁰ Surrey has had a bylaw regarding production and distribution of marihuana since 2011, along with related amendments to other bylaws; however, while there are currently no dispensaries in Surrey, their bylaws would, in fact, hypothetically permit them in one “zone” of Surrey.



However, the proponent would need Council approval, and the zone is in fact a single lot owned by the City of Surrey and in use as a parking lot; dispensaries are banned anywhere else in Surrey.¹¹

In contrast, in Victoria, the city has chosen not to enforce its bylaws and, according to various media reports, there are currently approximately 20 marihuana dispensaries there. The mayor of Victoria has spoken in favour of emulating the regulatory approach taken by Vancouver.¹²

⁸ Canvas conducted by Inspector Mike Serr, VPD Organized Crime Section, and concluded July 6, 2015.

⁹ Kelly Sinoski, “British Columbia a ‘no man’s land’ in terms of pot,” *The Vancouver Sun*, May 14, 2015, p. A1 and A14. The accompanying image is from page A1 of *The Vancouver Sun* on May 14, 2015 and is used with permission of *The Vancouver Sun*.

¹⁰ The District of North Vancouver Rezoning Bylaw 1308 (Bylaw 8047), Document 2276707.

¹¹ See Surrey Medical Marijuana Production and Licensing Regulation By-law, 2011, No. 17410. Also see Surrey Zoning By-law, 1993, No. 12000, which, as reported In Council minutes of June 13, 2011, was amended “to include a marihuana dispensary as a permitted use under Part 36B Community Commercial B Zone.” Surrey Corporate Reports 2011-R104 and 2011-R105 provide a full discussion of the matter. Zoning Bylaw 12000, Part 36B, p. 409 sets out that the only zone a dispensary could be approved in is the C-8B Zone at 13535 King George Boulevard.

4. The VPD cannot disregard requests that it investigate crime.

The VPD does not “disregard” any requests that it investigate crime, but it does not necessarily follow that there will be an investigation. When it comes to marihuana dispensaries, the Chief Constable must decide how to prioritize the use of expensive resources so as to achieve the best results regarding public safety and has the discretion to decide what is investigated.

To understand the resource implications of conducting an investigation into a marihuana dispensary, the following example is illustrative. It summarizes a 2014 investigation which resulted in four charges against two accused parties:

- Information was received that a new business with a permit to sell food was allegedly selling dried marihuana and edibles, and also had marihuana plants growing in the premises.
- Four Organized Crime Section detectives conducted the investigation leading to a search warrant.
- The detective who prepared the “Information to Obtain” a search warrant (known as the “affiant”) required 30 hours to complete this document.
- Executing the search warrant required a full day from ten detectives and one Forensic Identification Unit member (110 hours total).
- After the search warrant had been executed, follow up warrants and investigation were required to gather additional evidence, adding another 30 hours of police time.
- Two exhibit officers required a combined total of 160 hours to process for evidence over 250 seized exhibits.
- It took three months for Health Canada to provide the necessary “Certificates of Analysis” required for charge approval by Crown counsel. (Health Canada has the capacity to analyze 30 marihuana plant samples per day on average, but only one marihuana edible sample per day.)
- The detective who authored the Report to Crown Counsel recommending charges required 120 hours to complete it. (This report wasn’t submitted until eight months after the search warrant execution because of investigative priority given to projects focused on Fentanyl trafficking, which had been associated with several overdose deaths).
- A civilian investigative assistant required another 40 hours to complete the disclosure package for the Public Prosecution Service of Canada.

In total, 560 hours of police time was required for a single investigation, with a value of over \$34,000 in pay and benefits. Or stated another way, the investigation required the equivalent of one officer working full-time for approximately three months.

Given the significant resource commitment and other factors considered, Chief Constable Palmer (and before him, Chief Constable Chu) has been open and transparent in stating the

¹² Bill Cleverley, “Victoria likely to follow Vancouver’s lead on marijuana, mayor says”, *Times Colonist*, June 25, 2015, p. B8.

VPD's position that marihuana dispensaries are not a high priority for drug enforcement in the absence of overt public safety concerns, considering the much higher risk to public safety posed by violent and predatory drug traffickers, and by highly toxic drugs such as Fentanyl.

As summarized earlier, the VPD considers several factors before taking enforcement action against marihuana dispensaries, such as whether children are being sold to and whether there is violence associated with a particular dispensary. For example the last three enforcement actions taken in April, July and August 2015 were because of public safety concerns brought to the attention of police. In the first incident, a 15-year-old was hospitalized after allegedly purchasing edible marihuana products from the store. In the second, marihuana was allegedly traded by the proprietor for stolen property, contributing to property crime. In the third, a warrant was executed because of information that the dispensary had allegedly been selling to youths and was associated to the Hells Angels.

The VPD's drug enforcement priority remains focused on violent drug traffickers and those who prey on youth and the marginalized in our community. The VPD will continue to respond to concerns and take incremental steps to decide if further investigation or enforcement action is required. Officers have the ability to use their discretion and ensure that any police response is proportionate to the circumstances. (The VPD has responded in the past to a Service and Policy Complaint and set out its position on enforcement against marihuana dispensaries.¹³)

5. The *Police Act* has no provision to allow police to use discretion in prioritizing how it deploys its resources regarding criminal investigations, therefore no such authority exists, and thus the VPD has "failed in their duty to maintain law and order."

This assertion is misinformed and completely incorrect. That the *Police Act* does not include a clause setting out the police authority to use discretion in prioritizing resources is not evidence that no such discretion exists. The authority of police officers, generally, to use discretion, and specifically the authority of the Chief Constable to make overarching policy decisions about the deployment of police resources, is derived from both statutes (e.g., the *Criminal Code*, the *Police Act*) and a significant body of law. Briefly, the authority to arrest on reasonable grounds to believe a criminal offence has occurred does not create a *requirement* to arrest; it provides that a police officer *may* arrest. The importance of the exercise of discretion in policing cannot be overstated. The objectives of responding proportionately cannot be achieved without the use of discretion, which would otherwise mean charging every person with every offence for which evidence existed.¹⁴

In terms of the common law and the authority of the Chief Constable, the Courts have recognized for many years that the Chief Constable has considerable authority to decide what will be investigated and who will be charged¹⁵ in making decisions on how to prioritize the use of

¹³ Available at <http://vancouver.ca/police/policeboard/agenda/2013/1015/SPAgenda.pdf>.

¹⁴ In some cases, however, police are subject to policies that specifically direct that discretion NOT be exercised. For example, the Provincial Violence Against Women in Relationships (VAWIR) Policy directs that where evidence to arrest exists, police officers should not use their discretion to not arrest, given the importance of a pro-arrest approach to domestic violence.

¹⁵ In B.C., it would be more accurate to say "who will be recommended to be charged," since B.C. is a "charge approval" jurisdiction in which Crown counsel decides which recommended charges will be approved for prosecution.

resources. Further, contrary to a misapprehension held by many, municipal police departments neither report to the municipality's city manager nor are they accountable to its Council.¹⁶ Municipal police departments in B.C. are creatures of the *Police Act* and are governed and accountable to civilian police boards. Among other duties, the Police Board exists to "act as a buffer to ensure that the police are not subject to political interference."¹⁷ The municipality's duty is to provide adequate funding, not direct police operations, although ideally there is a collaborative relationship with senior municipal staff. (This is certainly the case in Vancouver; notwithstanding that neither Vancouver Council nor city staff may direct the police, the VPD recognizes the importance of carefully considering the views and policies of democratically elected Councils which represent the public and bear the significant costs of policing.)

The seminal case on the operational independence of the Chief Constable is the 1968 case known as *Blackburn*.¹⁸ A relevant portion of Lord Denning's judgment (at p. 769) is as follows:

I have no hesitation, however, in holding that, like every constable in the land, he [the Commissioner of Police] should be, and is, independent of the executive...I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.

There has been a long line of cases and reports since *Blackburn* that discuss police discretion, and more recently the role of civilian oversight bodies in setting a policy framework for the manner in which enforcement will occur;¹⁹ invariably the Lord Denning quote above is cited.²⁰ In 2007 the Supreme Court of Canada, in *Beaudry*,²¹ discussed police discretion extensively, noting at p. 196:

¹⁶ See, for example: Kevin Griffin, "Downtown Vancouver building to lose insurance when pot dispensary moves in," *The Vancouver Sun*, April 4, 2015, downloaded July 29, 2015 from <http://www.vancouversun.com/health/Downtown+Vancouver+building+lose+insurance+when+dispensary+moves/10942201/story.html>. Some might draw the inference from comments in this article that the City was directing police to take action following complaints, but municipal police departments are not directed by or accountable to municipal councils or staff.

¹⁷ Ministry of Public Safety and Solicitor General Policing and Community Safety Branch Police Services Division, "BC Police Board Resource Document on Roles and Responsibilities Under the Police Act".

¹⁸ *R. v. Metropolitan Police Commissioner*, [1968] 1 All E.R. 763 (C.A.)

¹⁹ For a helpful analysis, see the chapters on Independence of the Constabulary and Independence of Individual Constables in: Paul Ceyssens, "Legal Aspects of Policing", EarlsCourt Legal Press, Inc. (March 2011 update).

²⁰ See, for example, the section on "The independence of the police force" at pp. 56-58 of *The Independent Civilian Review into Matters Relating to the G20 Summit* (commonly referred to as the "Morden Report"). The Morden Report refers to the "very important common law principle relating to police independence" and cites the 1999 Supreme Court of Canada decision *R. v. Campbell*, which in turn cites the Lord Denning quote above. Report available at www.tpsb.ca/g20/ICRG20Mordenreport.pdf.

²¹ *R. v. Beaudry*, [2007] 1 S.C.R.

The fact that police discretion is an essential component of both our criminal justice system and the work of a police officer is not in issue. This discretion makes it possible to apply the law more fairly in real-life situations faced by the police.

At p. 208, the Court noted that while police officers have a duty to enforce the law and investigate crimes:

Nevertheless, it should not be concluded automatically, or without distinction, that this duty is applicable in every situation. Applying the letter of the law to the practical, real-life situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and part of the very essence of the proper administration of the criminal justice system...The ability – indeed the duty – to use one’s judgment to adapt the process of law enforcement to individual circumstances and to the real-life demands of justice is in fact the basis of police discretion. What La Forest J. said in *R. v. Beare*...is directly on point here: “Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.”

The governing principles discussed above have also arisen for consideration in the police complaint process. In the course of dismissing a complaint that a police officer failed to discharge his duty to enforce the law by declining to lay a criminal charge after an assault, the Alberta Law Enforcement Review Board confirmed that room for discretion remains even where a police officer has reasonable grounds to believe that an offence has occurred.²²

[I]f an officer is satisfied that grounds are present to charge he/she may exercise officer discretion to lay such charges as are warranted. An officer may also be satisfied that grounds to charge are present, but for *bona fide* reasons no charges will be laid. In this respect a police officer exercises a wide authority and is entitled to consider alternatives to charging when such alternatives serve the public interest and those of good order. In this context an officer who declines to lay charges, when grounds are present, is not in violation of [the] duty to enforce the law (see, *R. v. Beare* ...). It is clear, however, that the seriousness of an incident is a relevant consideration in the context of charging. The more serious the matter the less room there exists to exercise discretion. By way of example, a very trivial shoplifting permits far more opportunity for the application of discretion than an armed robbery with violence.

The limit on the operational authority of a Chief Constable to deploy resources as he or she sees fit, or an individual constable to make an arrest, is that the exercise of this discretion must be conducted honestly and on the basis of objective factors. In other words, discretion cannot be exercised as a mechanism to provide preferential treatment (as was the allegation in *Beaudry*) or without a logical rationale, such as the need to prioritize resources so as to have the greatest impact on providing public safety. It is the *duty* of the Chief Constable to deploy resources so as to best achieve public safety in an efficient manner. Further, in making this determination, the Chief Constable must consider the policing environment, which includes community standards and whether enforcement will create more harm than good.

For example, the VPD has taken a position on the enforcement of prostitution laws which emphasizes a problem-solving approach with criminal charges against sex workers only as a last resort; this is a dramatic shift from previous decades when the VPD made hundreds of

²² *Rolls v Matsune* (1998) 7 ALERBJ 190 at 199-200.

arrests for prostitution offences. The VPD's position on the importance of discretion in the enforcement of prostitution laws is set out in formal guidelines,²³ which were described by the Missing Women Commission of Inquiry as "...a model of community policing at its best."²⁴

Another example is the VPD's position on managing public demonstrations. Again, the VPD has clear guidelines rooted in the law, practicality, and the VPD's principles, including proportionality.²⁵ As was discussed during a presentation on managing public demonstrations at the Police Board's June meeting, there are a range of options available from rigid and aggressive enforcement of the law, to a patient, problem-solving approach that reduces the likelihood of violent conflict.

Discretion is also an important element in policing in communities where there is a high level of criminality among a marginalized population. For example, in the Downtown Eastside, in 2003, the VPD made a decision to treat simple possession of narcotics as primarily a health issue, rather than a criminal matter, especially given the police time consumed writing reports and tagging exhibits but resulting in little impact on the overall problem. Instead, the VPD decided to focus its resources on predatory traffickers and to direct addicts openly using narcotics to the (then) new Insite Supervised Injection Site. Police officers in the Downtown Eastside (and elsewhere) must use discretion every day in finding the right balance between enforcement of laws and other methods to provide public safety. Notably, in commenting on policing in the Downtown Eastside, the Missing Women Commission of Inquiry recommended that the VPD develop "guidelines to facilitate greater and more consistent use of police discretion not to lay charges".²⁶

A final example is the VPD's response to young people engaged in consensual "sexting" of intimate photos of other young people. Technically, this could constitute the criminal offence of distribution of child pornography. Rather than unnecessarily criminalizing such behaviour, the VPD's Youth Services Section has recently developed an award-winning diversion program that is focused on education rather than punishment.²⁷

Each of these approaches takes into consideration the environment in which the VPD polices; community standards; and consideration of what is the best approach to achieve public safety goals in a manner consistent with the VPD's written principles around justification, proportionality, and intrusiveness.

In the case of marijuana dispensaries, the VPD's approach is consistent with its principles and responsibility to use expensive police resources wisely. With respect to community standards, it is notable that in a recent survey conducted by Insights West, there was strong community

²³ Available at <http://vancouver.ca/police/assets/pdf/reports-policies/sex-enforcement-guidelines.pdf>.

²⁴ British Columbia. Missing Women Commission of Inquiry. Forsaken: the report of the Missing Women Commission of Inquiry / Wally T. Oppal, Commissioner. Volume III, p. 102.

²⁵ Available at <http://vancouver.ca/police/assets/pdf/reports-policies/public-demonstration-guidelines.pdf>.

²⁶ British Columbia. Missing Women Commission of Inquiry. Forsaken: the report of the Missing Women Commission of Inquiry / Wally T. Oppal, Commissioner. Volume III, p. 106.

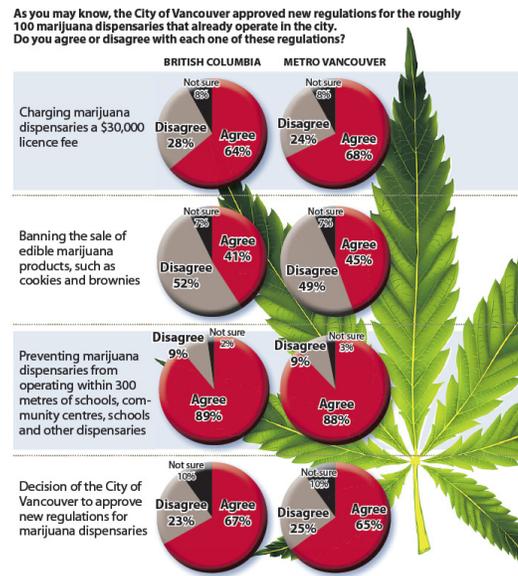
²⁷ In August 2015, this program was awarded the 2015 Federal Minister of Justice National Youth Justice Policing Award.

support in BC (67%) and Metro Vancouver (65%), respectively, for the regulatory approach taken by the City.²⁸

Further, notable public health figures such as Vancouver’s Chief Medical Officer, Dr. Patricia Daly,²⁹ provincial Health Minister Terry Lake,³⁰ renowned HIV/AIDS researcher Dr. Julio Montaner,³¹ and drug policy expert and criminologist Professor Neil Boyd³² have each spoken in support of the City’s regulatory approach to marijuana.³³

CONCLUSION:

Marijuana dispensaries are illegal. Those engaged in selling marijuana from a dispensary are committing criminal offences under the *Controlled Drugs and Substances Act*. This is true whether the marijuana is being sold for medicinal or recreational purposes, and whether or not the buyer has an authorization to possess. As a police agency, the VPD cannot condone criminal conduct. However, Vancouver Council’s approval of a regulatory scheme to manage marijuana dispensaries, rather than using its bylaws to seek to close them outright, is the policy goal it has pursued, with considerable support from the public and health officials. The VPD must consider the City’s policy objectives, as well as community standards, public safety concerns, other policing priorities, and impacts on police resources in making decisions about enforcement of criminal laws.



The results of the online study, conducted from June 28 to July 1 among 846 adult residents of B.C., “certainly shows they’re on the right track in trying to find a way to make sense for the rest of the people of the province”, said Mario Canseco, vice-president of Insights West, which conducted the survey.

²⁸ Kevin Griffin, “Most support city’s pot shop regulations, survey finds,” in *The Vancouver Sun*, Wednesday July 8, 2003, p. A3.

²⁹ Jeff Lee and Peter O’Neil, “Marijuana showdown deepens as Vancouver sends regulation proposal to public hearing” in *The Vancouver Sun*, June 18, 2015. Downloaded July 20, 2015 from <http://www.vancouversun.com/health/Marijuana+showdown+deepens+Vancouver+sends+regulation+proposal+public+hearing+with+video/11010952/story.html>.

³⁰ Ian Bailey and Justine Hunter, “B.C. Health Minister backs Vancouver’s pot dispensary changes” in *The Globe and Mail*, April 30, 2015. Downloaded July 21, 2015 from <http://www.theglobeandmail.com/news/british-columbia/bc-health-backs-vancouver-pot-dispensary-changes/article24178906/>

³¹ Thomas Kerr and Julio Montaner, Special to the Sun, “Ottawa out of step with Canadians on cannabis prohibition” in *The Vancouver Sun*, April 28, 2015. Downloaded July 20, 2015 from <http://www.vancouversun.com/health/Opinion+Ottawa+step+with+Canadians+cannabis+prohibition/11008959/story.html>.

³² Peter O’Neil and Jeff Lee, “Ottawa blasts Vancouver’s pot shop plans – Health Minister Rona Ambrose sends letter to mayor, warning dispensaries are illegal” in *The Vancouver Sun*, April 24, 2015. Downloaded July 20, 2015 from <http://www.vancouversun.com/news/Ottawa+blasts+Vancouver+shop+plans/10998127/story.html>.

³³ The accompanying image is from p. A3 of *The Vancouver Sun* on July 8, 2015 and is used with permission of *The Vancouver Sun*.

Deploying police resources to criminal enforcement against marihuana dispensaries where there is no overt public safety issue, in the current circumstances in Vancouver, is generally not an effective, efficient or proportional use of police resources. If the City's regulatory framework is successful, the number of dispensaries should be reduced and the more problematic ones eliminated. However, where there are public safety concerns that rise to the thresholds the VPD has set, enforcement action has been taken: since 2013, the VPD has executed 11 search warrants and has recommended charges against multiple individuals, which are currently at various stages of the charge approval and/or court process. This approach will continue, and demonstrates an appropriate, lawful, harm-based approach to prioritizing the deployment of police resources to address public safety concerns.

Therefore, for the reasons described in this report, I recommend this service and policy complaint be dismissed with reasons.

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Submitting Executive Member:



Date: 2015-09-01