

**DECISION OF THE CANNABIS LICENSING BOARD (the “Board”)**

October 29, 2019

**IN THE MATTER OF AN APPLICATION BY:**

The Herbarry Inc., o/a The Herbarry

**FOR (NATURE OF APPLICATION AND JURISDICTION OF THE BOARD):**

Sub-class 2 Cannabis Retail License  
Cannabis Control and Regulation Act, SY 2018, c. 4

**PLACE AND DATE OF HEARING:** 9031 Quartz Road, Whitehorse, YT October 7, 2019, 9:00 a.m.

**PRESENT IN PERSON:**

**Board**

**David Sloan – Chair  
James Lindsay – Member  
John Farynowski – Member  
Jennifer Roach – Secretary  
Paul Di Libero- Legal Counsel**

**Yukon Liquor Corporation**

**Paul McConnell, President  
Will Tewnion – Director, Regulatory Services  
Ken Howard – Licensing and Compliance Officer**

**Objectors**

**Sarah Cooke - Dawson City Cannabis  
Jordi Mikeli-Jones - Triple J Canna Space**

**ATTENDING BY PHONE:**

**Applicant(s)**

**Richard Fuller, Managing Director of Cash Shop Inc., (Financial Service Centres in UK)  
Anthony Piet, President of Justenna Enterprises, (Money Mart operations in Canada)**

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**OVERVIEW**

On July 12, 2019, the President of the Yukon Liquor Corporation received an application (the “Application”) from The Herbarry Inc. (the “Applicant”) for a sub-class 2 Cannabis Retail License (the “License”). Pursuant to the Application, the Applicant is requesting the issuance of the License for “The Herbarry”, at Unit E, 2190 2nd Avenue in Whitehorse (the “License Site”).

The Application was deemed complete by the President on August 29, 2019. Accordingly, the President delivered a copy of the Application to the Cannabis Licensing and Review Board (the “Board”) and circulated public notice of the Application by placing ads in the Whitehorse Star on September 3, 13 and 20, 2019. Public notice was also posted on the Yukon Liquor Corporation web page and Yukon Liquor

Corporation Facebook page, and letters were sent to the local municipality, City of Whitehorse, and to the local First Nation governments, Kwanlin Dün First Nation and Ta'an Kwäch'än Council.

Members of the public were given the opportunity to object to the Application during the four-week objection period, which ran until which ran until 3:00p.m. on September 25, 2019.

Within the objection period, the President received 2 objections (the "Objections"). An objection from Sarah Cooke and Anna Radzmirska of Dawson City Cannabis was received by email on September 23, 2019. An objection from Jordi and Jeremy Jones of Triple J's Canna Space was received by email on September 24, 2019 (the "Objectors").

The President delivered a copy of the objections to the Board. Upon receiving a copy of the objections, the Board served a notice to the Applicant, the Objectors, and the President on September 27, 2019, that a hearing would be held on October 7, 2019, to consider the Objections.

A submission was received from the Applicant on October 1, 2019 in response to the Objections.

A submission was received from Objector Sarah Cooke of Dawson City Cannabis on October 2, 2019. This submission consisted of a Globe and Mail article, "Mapping Canada's cannabis stores: From dense supply to zero footprint".

Pursuant to section 32, the hearing proceeded as scheduled on October 7, 2019 at 9:00 a.m. Attending the hearing in person was the President, Director of Regulatory Services, and a Licensing and Compliance Officer of the Yukon Liquor Corporation; and the Objectors, Sarah Cooke and Jordi Mikeli-Jones. Attending the hearing by phone was the Applicants representatives, Richard Fuller and Anthony Piet.

## **ISSUE**

Taking into account the Application, the Objections, the further submissions made by the Applicant and the Objector, Sarah Cooke, prior to the Hearing, the oral submissions made by all parties at the Hearing, the relevant considerations set out in section 2 of the *CCRA*, the public interest, and the conformity of the Application to requirements set out in the *CCRA* and accompanying Regulations, will the Board:

- (a) grant the licence;
- (b) grant the licence subject to conditions; or
- (c) refuse to grant the licence?

## **DECISION**

Having considered the Application, the Objections, the Applicant's response to the Objections, and further submissions made by the Objector Sarah Cooke, the oral submissions made by all parties at the Hearing, and taking into account the relevant considerations enumerated in section 1 of the *CCRA*, the requirements imposed by the *CCRA* and accompanying Regulations, and after determining that a grant of the licence would not meet the statutory requirements, or be in the public interest, the Board has decided not to issue a license to the Applicant for the premises located at 2190 Second Avenue, Whitehorse.

## **LAW**

In reaching its decision on the issue, the Board considered the following legislation:

*Cannabis Control and Regulation Act*, SY 2018, c.4., and in particular sections 1, 2, 16, 17, 21, 25, 26, 27, 28, 29, 30, 32, 33, 53, 55, 57, 79, 80;

*Cannabis Control and Regulation General Regulation*, O.I.C. 2018/184., and in particular, sections 4, 7, 11, 12, 14;

*Cannabis Licensing Regulation*, O.I.C. 2019/42., Section 3;

*Cannabis Licensing Regulation*, O.I.C. 2019/43., and in particular sections 2, 3, 4, 5, 6, 7, 8, 10, and 16.

*Cannabis Licensing Regulation*, O.I.C. 2019/45., Section 2.

#### **EVIDENCE BEFORE THE BOARD:**

The Board considered the written Application submitted by the Applicant, the President's Relevant Considerations Analysis, the Objectors' written Objections, and further submissions made by the Objectors and Applicant in writing and orally.

#### **ANALYSIS OF LAW AND EVIDENCE:**

Section 33 of the *CCRA* directs the Board as follows:

##### **Decision of board after hearing**

33(1) After the hearing, the board must make one of the following decisions, taking into account the documents received under subsection 30(1), the relevant considerations and any representations of the persons served with notice of hearing:

- (a) to grant the licence, for the licence period that it determines, that contains no conditions additional to the statutory conditions, if satisfied that
  - (i) the requirements of this Act and the regulations have been complied with,
  - (ii) to grant the licence would be in the public interest,
  - (iii) it is not necessary for the licence to contain additional conditions;
- (b) to grant the licence, for the licence period that it determines, on the conditions additional to the statutory conditions that the board determines to be appropriate, if satisfied that
  - (i) the requirements of this Act and the regulations have been complied with,
  - (ii) to grant the licence would be in the public interest, and
  - (iii) it would be beneficial for the licence to contain those additional condition
- (c) to refuse to grant the licence, if not satisfied that
  - (i) the requirements of this Act and the regulations have been complied with, or
  - (ii) it would be in the public interest to grant the licence. (Emphasis Added)

The "documents received under subsection 30(1)" include:

##### **Consideration of Application**

30(1) Without delay after the service described in subsection 29(2), the president must give the following documents to the board, and a copy of them to the applicant:

- (a) any comments on the application or the applicant that the president may have, including with respect to the licence period of the licence applied for;
- (b) any objection served on the president within the four weeks referred to in subsection 29(1);
- (c) a report of an inspection or investigation arranged for under subsection 27(7);
- (d) any other relevant information of which the president is aware (Emphasis Added).

The “**relevant considerations**” referred to in section 33(1) of the *CCRA* are defined in section 2 of the *CCRA*:

“relevant considerations”, in relation to an application for a licence, means the following:

- (a) the number of licences, and of different types of licences, in the area in which the premises where it is proposed that cannabis would be sold are situated,
- (b) the population of the area, including
  - (i) seasonal variations in the population, and
  - (ii) variations in the population both in the immediate area where the premises are situated and more distant areas capable of being served by the premises,
- (c) any economic benefit in the area that could reasonably be expected to flow from the business of the sale of cannabis,
- (d) the expressed views of the population, both in the immediate area surrounding the premises and more distant areas capable of being served by the premises, of the need for, or desirability of, licensed premises in the area, including the need to serve the projected travelling public in the area,
- (e) the amount of the actual or projected capital expenditure made or to be made by the applicant in relation to the premises,
- (f) whether the premises
  - (i) conform to the requirements of all relevant enactments,
  - (ii) are constructed so as to be sanitary and secure, and
  - (iii) are otherwise suitable for the carrying on of the business of the sale of cannabis in a reputable way,
- (g) the extent to which the applicant is financially responsible and is otherwise of good character and a fit person to keep and operate the premises and to be a licensee,
- (h) whether the applicant is the owner of, or the lessee for a term of at least the proposed licence period of the licence of, the premises,
- (i) the compliance history of the applicant in relation to the conditions of a licence, a licence under the Liquor Act, or a licence under an Act regulating cannabis or liquor in another jurisdiction, held by the applicant before or at the time of the application,
- (j) the sufficiency of the arrangements proposed by the applicant for operating and controlling the premises in accordance with the statutory conditions,
- (k) a matter prescribed to be a relevant consideration.

Taken together, these sections of the *CCRA* require the Board to grant or refuse a licence, with or without conditions, based on a review of the documents in its possession and representations of persons served with a notice of hearing, after taking into account the relevant considerations, determining whether the

requirements of the *CCRA* and accompanying regulations have been complied with, and deciding whether or not a grant of the licence would be in the public interest.

In accordance with the reasons that follow, and taking into account the relevant considerations prescribed by the *CCRA*, the Board is not satisfied that the Application meets the statutory requirements, and therefore cannot grant the license.

***Relevant Considerations***

**(a) the number of licences, and of different types of licences, in the area in which the premises where it is proposed that cannabis would be sold are situated**

The Board acknowledges the existence of active liquor licenses in the area and three cannabis licenses farther than 100m from the License Site.

**(b) the population of the area, including**

**(i) seasonal variations in the population, and**

**(ii) variations in the population both in the immediate area where the premises are situated and more distant areas capable of being served by the premises**

The Licence Site is located in the downtown area of Whitehorse, Yukon. The Board accepts that the population of Whitehorse is approximately 31,527, and that there are approximately 3,108 residents living in the downtown core. As a popular tourism destination, the Whitehorse population fluctuates considerably year round. Based on a Tourism Yukon assessment of visitor populations in 2012, the Territory receives approximately 317,200 visitors between June 1, and September 1, and 75,700 visitors between October 1, and April 1, of each year.

Although not explicitly required as part of this consideration, the Board takes notice of the fact that the intended location of The Herbarry is not in a residential area. The Licence Site is in proximity to multiple restaurants and cafés, retail stores, and other businesses and offices in the downtown area.

**(c) any economic benefit in the area that could reasonably be expected to flow from the business of the sale of cannabis**

The Applicant has provided indicia in its Application and that the proposed business will confer an economic benefit on the surrounding area.

The Applicant will hire eight employees. The Applicant projects to spend a significant amount in annual salaries for those employees. The Applicant entered a lease agreement for the Licence Site and has projected a robust capital investment for construction and design for the Licence Site. The Applicant also intends to allocate 0.5% of sales to community programs.

The Board accepts these submissions as evidence of anticipated economic benefit. The Board also recognizes that local construction, and communication businesses will benefit from initial capital investments made by the Applicant.

**(d) the expressed views of the population, both in the immediate area surrounding the premises and more distant areas capable of being served by the premises, of the need for, or desirability**

**of, licensed premises in the area, including the need to serve the projected travelling public in the area**

The Board observes that the President circulated public notice of the Application in a manner consistent with the service and notice requirements set out in the *CCRA*. The *CCRA* provides a formal process for receiving the expressed views of the population within the specified time period.

The Board received two objections within the specified time period. The Board notes that the Objectors are proprietors of competitive cannabis retail businesses in Whitehorse and Dawson City.

The Objectors opposed the issuance of further licenses citing supply concerns, the availability of cannabis and market saturation, the proximity of the Yukon liquor store to the License Site and the proximity of the License Site to the Aurora Virtual School and Individual Learning Center (“ILC”), contrary to the minimum distance requirement set out in *CCRA* Regulation O.I.C. 2018/184 (“Reg. 184”), section 11(1).

**(e) the amount of the actual or projected capital expenditure made or to be made by the applicant in relation to the premises**

The Applicant references a substantial capital expenditure in the Application. The Applicant has indicated these funds are required for the renovations, equipment, security, and other costs associated with setting up the premises.

**(f) whether the premises**

- (i) conform to the requirements of all relevant enactments,**
- (ii) are constructed so as to be sanitary and secure, and**
- (iii) are otherwise suitable for the carrying on of the business of the sale of cannabis in a reputable way**

The Board understands that the Applicant’s Licence Site conforms to City of Whitehorse bylaw restrictions that are currently in effect, however, the License Site is not in conformity with site requirements set out in the *CCRA* Regulations. The License Site is approximately 63 meters from the Individual Learning Centre.

The *CCRA* clearly sets out a purpose of the Act in section 1(b) that it is a purpose of the Act to:

- (b) protect young persons and discourage their access to, and consumption of, cannabis.

Section 11 (1) of Reg. 184 states that,

*subject to subsections (2) and (3), a cannabis store must be located so that each point of each lot line of the premises of the cannabis retail store is more than 150 metres from each part of a building that is, or is part of, an elementary school or secondary school.*

Subsections (2) and (3) do not apply because the City of Whitehorse has not created a bylaw addressing the proximity of schools to cannabis retail stores, and the Minister has made no related orders.

In this case the proposed location is 63 metres distant from the Individual Learning Center (“ILC”), and approximately the same distance from the Aurora Virtual School, which occupies the same building.

The Board relies on the written and oral submissions made by the Objectors, in addition to taking notice of publicly available information to make the following findings of fact regarding the ILC. The ILC is a drop-in learning center for youth aged 15-21 who are looking for an alternative to the regular secondary school system. The nature of the courses offered allows students with challenges in the regular secondary system to complete their secondary school program. In addition it allows a greater selection of courses than may be offered in the regular secondary schools. The flexible nature of the ILC permits students who have attendance problems to access educational programs to complete their secondary requirements. The Board notes that the ILC operates under the *Education Act*, ILC staff are employees of the Department of Education, and the ILC is administered by the Yukon Department of Education. The 2018 Annual Report of the Department of Education, (page 4) specifically includes both the ILC and the Aurora Virtual School in the enrollment numbers.

The Reg 184 s.11(1) minimum distance requirement applies to “an elementary or secondary school” that is within 150 metres of a proposed cannabis retail store licence site.

Based on the above findings of fact, and not hearing compelling arguments to the contrary from the Applicant, the Board is satisfied that the ILC meets the definition of a “secondary school” for the purposes of Reg 184 s.11(1).

As such, the Board does not find this Application to be in conformity with relevant enactments, and in particular section 11(1) of Reg. 184. In the Board’s opinion, to find otherwise would run contrary to a stated objective of the *CCRA*: “to protect young persons and discourage their access to, and consumption of, cannabis.”

Given this finding the Board does not need to undertake a separate analysis regarding the status of the Aurora Virtual School, because the Licence Site is already in violation of the minimum distance requirement in respect of the ILC.

The Board is satisfied that the Applicant has made provision for a security system, including video monitoring and alarm components that satisfy the requirements set out in the *CCRA* and the Regulations. The Board has reviewed the Applicant’s floor plan, display plan, and other materials associated with the proposed layout of the premises, and finds the plan to be in accordance with statutory requirements.

The Board reviewed the Applicant’s operational plan which discussed inventory control and retail operation management, transport of cannabis, security and surveillance, information management, returns, prevention of onsite consumption, and diversion prevention.

As construction of the Licence Site has not been completed, the Board could not verify whether the site was sanitary. However, the detailed and professional nature of Applicant’s materials

suggest that the Applicant will carry out the business of the sale of cannabis in a reputable way that includes operating a sanitary retail space.

**(g) the extent to which the applicant is financially responsible and is otherwise of good character and a fit person to keep and operate the premises and to be a licensee**

The Applicant's materials, supplemented by the President's Relevant Consideration Analysis, provide sufficient material for the Board to conclude that the Applicant's President David Robertson, and the Applicant Corporation are financially responsible and are otherwise of good character and fit persons to keep and operate the premises and be license holders. The corporate Applicant has 36 years experience operating up to 30 Money Mart franchises, and currently operates 7 Money Mart franchises within Canada. Mr. Robertson's criminal record check was provided and found satisfactory.

**(h) whether the applicant is the owner of, or the lessee for a term of at least the proposed licence period of the licence of, the premises**

The Applicant submitted an executed lease agreement for Unit E, 2190 Second Avenue, Whitehorse, Yukon as part of the Application. This existing lease expires November 30, 2020. The Board understands that the applicant is currently operating a business at the site.

Given that the lease expires on November 30, 2020, the Board would be constrained in its ability to grant a license beyond that date.

**(i) the compliance history of the applicant in relation to the conditions of a licence, a licence under the Liquor Act, or a licence under an Act regulating cannabis or liquor in another jurisdiction, held by the applicant before or at the time of the application**

The Applicant does not have any relevant compliance history to review.

**(j) the sufficiency of the arrangements proposed by the applicant for operating and controlling the premises in accordance with the statutory conditions**

Based on the Application submitted, the Board finds that Applicant has planned for and taken a number of steps to ensure that The Herbarry would be operated in accordance with the statutory conditions.

In particular, the Board observes that the Applicant has developed a detailed organizational plan that address a number of items including:

- preventing sales of cannabis products to minors and intoxicated individuals and providing customer education concerning the legal and illegal consumption of cannabis;
- providing a plan for mandatory service and online training (as provided by Yukon Liquor Corporation) for its staff;
- implementing a compliant point of sale inventory management system;
- installing a surveillance and security system that will be properly advertised to visitors;
- providing a plan detailing transportation of cannabis;



- providing a detailed plan for the return of defective cannabis;
- submitting a floor plan consistent with the dedicated cannabis area required by the Regulations;
- committing to displaying and selling cannabis in conformity with the CCRA and Regulations;
- committing to diversion prevention, including regular auditing, video surveillance, movement of cannabis within the license site, and plan to impose quick departure post-purchase; and
- setting in place hours of operation that fall within regulatory requirements (10:00 am to 10:00 pm six days per week and 11:00 am to 4:00 pm on Sunday).

### ***Statutory Requirements***

With the exception of the issue raised by the proposed Licence Site’s proximity to the ILC, the Board is otherwise satisfied that the Applicant has sufficiently arranged for operation of the business in a manner consistent with statutory requirements.

### ***The Objections***

The President received two written objections in the form of letters from the Objectors, Jordi and Jeremy Jones of Triple J Cannaspace and Sarah Cooke and Anna Radzmirska of Dawson City Cannabis.

### ***Issues Raised by the Objectors***

The principal concerns expressed dealt with issues of cannabis supply and commercial viability of existing stores if more licenses are granted by the Board.

The Cannabis Licensing Board is a creature of statute. It receives its powers from the CCRA, and those powers are prescribed and limited by the CCRA. Just as the Board’s powers to issue licenses are limited, so too are the factors and information it can consider in choosing to grant or withhold a license.

The Board’s assessment of an application must take into account the enumerated factors provided in the “relevant considerations” section of the CCRA. Having considered these factors, the Board must also ensure that the Application itself is compliant with any additional rules in the CCRA or Regulations, such as the minimum distance requirements. And lastly, the Application must conform with the stated purposes of the Act and generally be in the public interest.

The CCRA and Regulations do not direct the Board to consider market factors, competition, and the viability of existing businesses.

Accordingly, the Board finds the objections related to these issues to be outside of its jurisdiction.

In addition to highlighting supply and market competition concerns, the Objection by Jordi and Jeremy Jones references the proximity issue of the proposed premises to the ILC and the Yukon Liquor Store.

Their objection letter contains the following statements:

“The Herbery is located less than 150 meters from the Independent Learning Center located in NVD building (old Canadian Tire). The Independent Learning Centre is recognized as a school under the Department of Education. It caters to at-risk youth who require a tailored approach to learning.”

and...

“We are completely dumbfounded that the Yukon Liquor Corporation would allow an application to pass through screening for a location directly attached to the Liquor Store. This flies in the face of your mandate to reduce harm. There is a sizeable population of vulnerable people who congregate at the Liquor Store. By approving a cannabis retail operation beside the liquor store, you are sending a clear message to our community that you do not care about the current substance use issues faced in this city, by the community and its citizens.”

### ***Analysis of the Objections***

In the opinion of the Board, and as analyzed in treatment of the relevant consideration (f)(i) above, the ILC meets the definition of a secondary school within the meaning of Reg. 184 11(1). On this basis, the Board cannot grant the license sought by the Applicant.

There may indeed be an issue with the colocation of proposed cannabis retail locations and existing liquor retail outlets worth considering in future applications.

Protecting health and safety is a stated purpose of the *CCRA* alongside protecting young persons and preventing their access to cannabis. The Board takes this mandate seriously. At the same time, it is not a foregone conclusion that the colocation of cannabis and liquor licensed or retail locations would put public safety at risk.

In this particular case, further analysis is not required on this point given the proximity of the License Site to the ILC.

### ***Public Interest***

The Board is satisfied that, on balance, and taking into consideration all of the evidence before it, including the Objections reviewed in this Decision, public interest would not be served by granting the licence to the Applicant. Section 1(b) of the *CCRA* specifically notes the protection of young persons as a primary goal of the Act. It would not be in the public interest to issue a license within close proximity to the ILC.

### **CONCLUSION**

The Board has decided to not issue a license for the premises located at Unit E, 2190 2<sup>nd</sup> Avenue, Whitehorse, based on the License Site’s proximity to the ILC.

*Signed on behalf of the Board:*



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**David Sloan**  
Chair, Cannabis Licencing Board