

Cannabis in Canada: October 2018 Update

And What Employers Need to Know

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- Employment Standards
- Business Immigration
- Workplace Safety and Insurance
- Workplace Policies and Practices

Marijuana:

“Never Heard of it”



Marijuana

- Problematic effects (generally):
 - Dizziness, **drowsiness**, fatigue and lack of motivation
 - Impaired memory
 - Disturbances in attention, **concentration** and ability to think and make decisions
 - **Disorientation**, confusion, feeling drunk, feeling an extreme slowing of time
 - Suspiciousness, nervousness, episodes of anxiety (panic attack), hallucinations
 - **Impairments in motor skills** and perception, altered bodily perceptions, loss of full control of bodily movements, falls
- Timing of effects:
 - Acute impairment
 - 'Carry-over' or 'hangover' effects
 - Chronic effects

Why Do We Care?

Employers have legal obligations to:

- protect the health and safety of workers
- protect the public and the environment
- respect workers' human rights and privacy interests

Why Do We Care?

Occupational Health and Safety Regulations:

4.20 Impairment by alcohol, drug or other substance

[...]

(2) The employer must not knowingly permit a person to remain at any workplace while the person's ability to work is affected by alcohol, a drug or other substance so as to endanger the person or anyone else.

(3) A person must not remain at a workplace if the person's behaviour is affected by alcohol, a drug or other substance so as to create an undue risk to workers, except where such a workplace has as one of its purposes the treatment or confinement of such persons.

Why do we care?

R. v. Metron Construction Corp.

- 2009 Christmas Eve fatalities in Toronto
- Toxicology reports: Three of the four deceased workers, including the site supervisor, “had marijuana in their system at a level consistent with having recently ingested the drug” at the time of the incident



Current Legal Landscape

- **Medical Use: Permitted now**
 - Can be legally prescribed by a doctor or nurse practitioner
 - “Over the counter” availability is coming to your local pharmacy
 - *Access to Cannabis for Medical Purposes Regulations*
- **Recreational Use: Prohibited now**
...until later this week! **October 17, 2018**

Medical Marijuana in the Workplace

- Employers obligated to accommodate disabilities to the point of undue hardship
- Can include accommodation of medical marijuana
- Developing area of law (and science!)



Cameron Wardell

@CWardellEsq



From our [#LGMA2018](#) presentation-only 16% of our attendees had terminated/disciplined employee for marijuana while even fewer (4%) had dealt with accommodation, 50% had policies covering impairment but 65% expected more marijuana issues post-legalization! [#prepare](#) [@MDClaw](#) [@LGMABC](#)

Marijuana in Canada

Where are we headed?



Justin Trudeau ✓

@JustinTrudeau

We're one step closer to legalizing & regulating marijuana. [#BillC45](#) means less money for organized crime and harder access for our kids. Tonight, it passed third reading in the House and it's now headed to the Senate.

4:57 PM - Nov 27, 2017

897 4,157 17,926



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Legalization



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CANNABIS IN CANADA

Get the facts



Cannabis is not legal yet

Legalization

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CANNABIS IN CANADA

Get the facts

Cannabis is not legal yet

Legalization (Federal)

- Legal (assuming you are 18 or older):
 - Possess /share up to 30 grams dried or equivalent (kids get 5 g.)
 - Purchase cannabis/oil from licensed retailer
 - Grow up to four plants (~~100 cm~~)
 - Make cannabis food/drinks (no use of solvents)
- Illegal:
 - Selling or providing to persons under the age of 18
 - Giving/selling/using youth to commit cannabis offence
 - Advertisements/promotion to youth
 - Crossing border with cannabis
 - Cannabis-impaired driving
- Responsibility of Provinces:
 - Licensing distribution/sale
 - Can increase min. age/lower personal possession limit
 - Create rules for growing at home
 - Restrict areas for consumption

Implementation – British Columbia

- Minimum age of possession: 19 years
- BCLDB public / LCLB regulates private
- Permitted where smoking/vaping permitted (but not in areas frequented by children or in vehicles)



Implementation – British Columbia

- Three pieces of legislation introduced on April 26, 2018:
 - *Cannabis Control and Licensing Act*
 - *Cannabis Distribution Act*
 - Amendments to *Motor Vehicle Act*

BC CANNABIS STORES

Implementation – British Columbia

Vicarious liability

68 [...]

(3) If a person smokes or vapes cannabis in contravention of section 64 (1) (b) [*enclosed workspaces*] or within a prescribed distance from a doorway, window or air intake of a place to which section 64 (1) (b) applies in contravention of section 64 (3) [*doorways and windows*], the employer is deemed to have contravened section 64 (1) (b) or (3), as the case may be, and is liable for the contravention.

(4) Subsections (1) to (3) apply whether or not the person who consumed or smoked or vaped cannabis is charged with a contravention of the applicable section.

(5) If a person is charged with a contravention of section 61 (a) or 64 (1) or (3) as a result of this section, it is a defence to the charge if the education authority, superintendent, principal, owner, manager, lessee or employer, as the case may be, demonstrates having taken reasonable steps to prevent the contravention.

Marijuana in the Workplace

– Medical Marijuana and Accommodation



Medical Marijuana



- Where employee claims medical need for marijuana, employer must treat like any other request for accommodation
- Regular principles around duty to accommodate apply
- Employer action will vary depending on whether employee is in a safety-sensitive position

Medical Marijuana



- For a ***non-safety sensitive position***, employer should clarify with the employee workplace expectations:
 - No coming to work impaired
 - No using medical marijuana at the workplace, or immediately prior to entering the workplace
 - No sharing prescription with co-workers
 - No unexcused absences or lateness
 - Employee must continue to carry out duties of employment in acceptable fashion

Medical Marijuana



- For a ***safety sensitive position***, employer must make further inquiries of the employee to determine:
 - if the use is necessary at all (alt. treatment?)
 - if the underlying illness affects fitness for duty
 - what accommodation is required (physical restrictions, length of time etc.)
- Employee on leave pending completion of further inquiry, or offer alternate duties that are non-safety sensitive in the interim, if available

Impairment in the Workplace



Lower Churchill Transmission Construction Employers' Association Inc. and IBEW, Local 1620, (April 20, 2018)

- Use of medical marijuana can cause impairment which can last for up to 24 hours
- Residual impairment can impact functions the day after evening medical marijuana use
- A general physician is not in a position to adequately comment on the impact of medical marijuana on workplace safety
- There are no readily available testing resources to allow the Employer to accurately measure impairment arising from regular use.

Impairment in the Workplace



Arbitrator Roil:

“...if the employer cannot measure impairment, it cannot manage risk”

- Time will tell the impact of this decision...

Medical Marijuana



Some key points:

- Medical marijuana must be treated like other prescription drugs – **does not** give employee a **green** light to use marijuana in the workplace
- Employers must have policies in place permitting medical use of marijuana **where supported by medical evidence** now
- Employers continue to have right to prohibit impairment at work, particularly if safety sensitive – medical marijuana is **not a licence for impairment**

Medical Marijuana



Some key points:

- A prescription for medical marijuana does not entitle an employee to unexcused absences or late arrivals
- An employer is required to attempt to find suitable workplace accommodation for disabled employees who have a prescription for medical marijuana use, just as would be required for any other disabled employee

Marijuana in the Workplace

– How Can Employers Prepare for Legalization?



Legalization of Recreational Marijuana



- How can employers prepare?
- Separate issues:
 - Medical use
 - You are dealing with this now
 - Recreational use
 - “New”
- Nothing in the *Cannabis Act* restricts employer policy creation

Legalization of Recreational Marijuana



- **Recreational Use:** Once legal, marijuana can continue to be treated in substantially same way as alcohol under employer's drug and alcohol policies
- Employers must still consider accommodation issues
- Violations of policy can be subject to progressive discipline, up to and including termination for just cause

Employee Responsibility

- Recognize that they play an important part in workplace safety
- Know and understand obligations under fitness for duty/drug and alcohol policy
- Complying with policy requirements (including self-disclosure and reporting fellow workers where impairment reasonably suspected)
- Cooperating in accommodation process

Legalization: *How can employers prepare?*

- **Be proactive**
- **Implement/update** a fitness for duty or drug & alcohol policy to address recreational marijuana
 - **Remember:** no one size fits all
- **Educate** employees on being fit for duty
 - whether position is safety-sensitive or not
- **Train** supervisors and workers on policy requirements
 - provide tools and support to report concerns safely and confidentially
 - Employee assistance program (**EAP**)

Legalization: *How can employers prepare?*

- **Fitness for Duty** program must appropriately balance employer's **safety** concerns with employee's right to **privacy** in sensitive personal and health information

“Privacy and safety are highly sensitive and significant workplace interests. They are also occasionally in conflict. This is particularly the case when the workplace is a dangerous one.”

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., [2013] 2 SCR 458, per Justice Abella

What can a Policy Accomplish?



- Employee termination for violation of a drug and alcohol policy upheld by Newfoundland Court of Appeal.
- Employee had small amount of marijuana in his pocket when he went through security for helicopter transport to his offshore petroleum drilling workplace.
- Termination was upheld – because of the policy breach, NOT because of the intrinsic issues surrounding marijuana usage.

What can a Policy Accomplish?



“The fact that the employee had [marijuana] in that circumstance is sufficient to establish a breach of the Policy unless the employee can demonstrate that he took all reasonable care to ensure he did not have possession ...”

- *Terra Nova Employers’ Organization v. Communications, Energy and Paperworkers Union, Local 2121 2018 NLCA 7*

Legalization of Recreational Marijuana



- **Employers can prohibit:**
 - Attending work with alcohol/drugs in possession
 - Attending work under the influence of drugs/alcohol
 - Using drugs/alcohol while at work
 - Use that creates a risk of impairment at work
 - Any/all use or possession of marijuana on your property



Legalization of Recreational Marijuana



Tougher issues:

- Staff gatherings outside of work
 - Holiday parties
- Weekends
- Hangover and chronic effects
- Worksite specific considerations

Use your policies:

- Educate
- Train
- Enforce



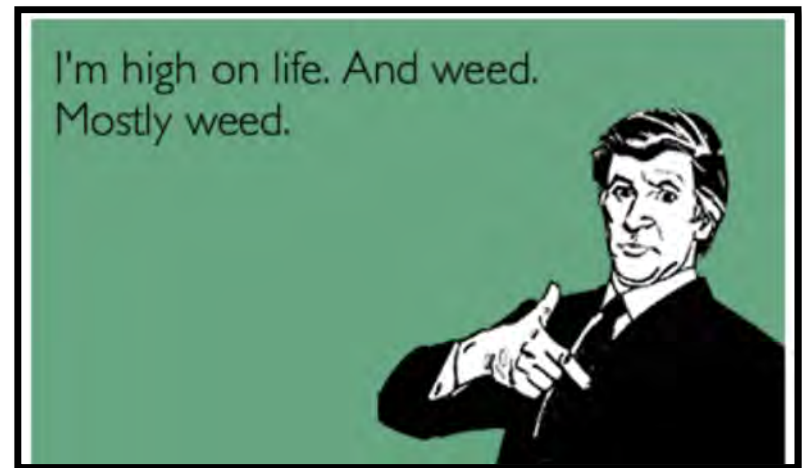
Marijuana:

Ascertaining and Addressing Impairment in the Workplace



Impairment in the Workplace

- No reliable test for impairment
- Impacts people differently
- No metric for impairment (unlike alcohol)
- Level of THC in blood \neq impairment



Impairment in the Workplace

Drug testing difficult to justify in Canada

- Privacy v. Safety
- Safety sensitive positions only

Potential mechanisms for testing :

- Pre-employment
- Reasonable Cause
- Accident or near miss
- Return to work
- Random?
- AND – Must be tied to safety considerations
- Random rarely (if ever) allowed



Impairment in the Workplace

Suncor Energy Inc. v. Unifor Local 707A, 2017 ABCA 313

- Facts: Suncor begins randomly testing bargaining unit employees in 2012 (3K of 10K on site). Suncor says that random drug testing justified by serious problem with drugs and alcohol in the workplace:
 - 2,276 documented on-site drug and alcohol incidents
 - 1,250 employees banned from site for drug/alcohol use
 - Three fatalities involving alcohol
- Held: Entire workplace can be considered in the context of justifying random testing.
- Take-away: The law in Canada may be shifting .

Impairment in the Workplace

Basis for investigation:

- Reasonable suspicion?
- Near miss?
- Accident?
- Whistleblower/Tip line?



Investigation meetings:

- Be upfront – state purpose at outset
- Confront with issues
- Be clear about expectations
- Observe

Document observations!

Impairment in the Workplace

Signs of impairment:

- Quality of work
- Performance
- Missed deadlines
- Odor
- Red eyes
- Droopy eyelids
- Dilated pupils
- Motivation
- Attendance
- Memory
- Increased risk taking
- Decreased concentration
- Accidents / near misses



- Attitude
- Mood
- Speech patterns
- Aggression
- Judgment

Impairment in the Workplace

Determine type of use:

- 1) **Medical**
- 2) **Addiction**
- 3) **Recreational**

Discipline (typically) only appropriate for recreational user

- Termination?
- Progressive discipline?
- Policy?

Case-by-case analysis

Impairment in the Workplace

- Medical use
 - Must accommodate to point of undue hardship
- Workplace standards / BFOR
 - Rationally connected to performance of job
 - Adopted in honest and good faith
 - Reasonably necessary to work-related purpose
- Gather evidence
- Make decision only with benefit of evidence
- Document process!

Impairment in the Workplace

Employer may have to:

- Put employee on a paid administrative/medical leave pending completion of further inquiry, or
- Seek more robust (specific) medical information
- Consider requesting IME (independent medical examination)
- Offer alternate duties that are non-safety sensitive in the interim (if available)

Impairment in the Workplace

- **Addiction**
 - Duty to accommodate triggered
 - Doesn't mean you have to tolerate use/impairment at work!!
- **Measures**
 - Treatment
 - Suspension
 - GRTW
 - Abstinence?

Impairment in the Workplace

Stewart v. Elk Valley Coal Corporation, 2017 SCC 30

- Facts: Employee in safety-sensitive position did not disclose cocaine use, contrary to employer policy – tested positive following accident. He said “in denial” due to his addiction.
- Held: Complaint dismissed. Employee had the ability to decide not take drugs before working and had the capacity to disclose his drug use to his employer.
- Take-away: Importance of having a policy in place that addresses expectations for employees and is clearly communicated to employees. Still must consider individual circumstances of employee.



Worksite Specific Considerations

- On site employee residence
- Residential tenancy laws
 - Smoking banned in common areas (tobacco)
 - Smoking banned in buffer zones (tobacco)
 - Can ban smoking in rental units and balconies
 - BUT – maybe not in existing tenancy agreements that allow smoking (tobacco)
- Situation will evolve with regulation
 - Provincial / Municipal



Worksite Specific Considerations

- Remote and unsupervised work
 - Difficulty of enforcement
 - Justify zero-tolerance?
- Employee responsible for customer safety
 - Importance of enforcement
- Assess actions on a case-by-case basis
 - Site visits / inspections?
 - Zero tolerance?
 - Progressive discipline?
- The more you emphasize/enforce policies, the more you will be able to rely on them

Marijuana: What Does the Future Look Like?

Marijuana: What Does the Future Look Like?



Questions?

Thank You!

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