



# *Cannabis in the Workplace: Time to be Blunt*

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## The Basics: Why the fuss?

- Medicinal cannabis use has been legal in Canada for some time.
- The Canadian Government has announced its plan to legalize cannabis for non-medical use.
- Legalization was to be effective July 1, 2018, but it's appearing increasingly likely that it will be delayed until late summer or fall of 2018.
- Cannabis use will now be legal for both medicinal and non-medicinal use.

## The Basics: The *Cannabis Act*

- *Cannabis Act* (aka *Bill C-45*) – federal legislation which was introduced in Spring of 2017.
- The *Cannabis Act* was passed by the House of Commons on November 28, 2017. It is currently being debated in the Senate.
- Once passed, the *Cannabis Act* will permit Canadians over the age of 18 to possess and share up to 30 grams of cannabis, purchase or grow limited quantities of cannabis, and make cannabis infused food and drinks.
  - 5g exception for young persons

## The Basics: *The Cannabis Harm Prevention Act*

- The Manitoba government introduced this legislation as a response to the introduction of the federal *Cannabis Act*.
- Amends the *Highway Traffic Act* and other provincial legislation in order to ensure that the legislation remains relevant, up-to-date and consistent with the federal changes

## The Basics: *The Safe and Responsible Retailing of Cannabis Act*

- Not yet in force.
- Provincial legislation which creates the regulatory framework setting out where and how legal cannabis will be sold.
- Limits retail sales and possession to individuals who are 19 years of age or older (unlike the 18 year age limit in the federal legislation).
  - eliminates young person exception
- Sets standards for packaging, labelling, and selling product.
- Sets maximum quantity of cannabis which can be possessed.

## The Basics: What's Changed?

- For medical use of cannabis – nothing.
  - it remains legal to possess and use where authorized by a physician
- Where there is no medical authorization, cannabis is currently a Schedule II drug under the *Controlled Drug and Substances Act*.
  - currently (i.e. until legalization) it remains illegal to possess, produce and traffic cannabis
- Once legalized, cannabis will no longer be a Schedule II drug
  - possession and use will be legal even without a physician's authorization
  - think of it like alcohol (but with an age requirement of 19 years)

## The Impact: Differentiating between users

- Due to the application of *The Human Rights Code* (the “Code”), employers must be cognizant that some cannabis users may be entitled to legal protections that others are not entitled to.
- While all fact scenarios will be a bit different, most situations involving employee cannabis use will fall into one of three categories:
  - Recreational Users
  - Medicinal Users
  - Addicted Users

## The Impact: Differentiating between users

- As noted, individuals suffering from addiction are protected under the Code, but recreational users are not.
  - Medicinal users may also be protected by the Code
- Substance abuse can present a unique challenge for employers, because addicted employees may deny their addiction.
  - Conversely, recreational users may claim to be suffering from addiction if they believe that their job is at stake.



## The Impact: Differentiating between users

- Employers have a Duty to Inquire if they believe that an employee may be suffering from an addiction (or other disability).
  - But this duty does not mean that Employers are required to take an employee at their word.
- Employers are entitled to review the situation and request additional medical information, if reasonably necessary.

# The Impact: Dealing with Recreational Users

- Use occasionally (or regularly), but are not addicted to cannabis and do not have authorization to use medically
  - These users are not protected under the Code
  - These users are not entitled to receive accommodation
  - These users can be expected to comply with policies regarding possessing or using cannabis in the workplace
- In essence, these employees should be treated in the same fashion that an employer would treat a recreational user of alcohol
  - While alcohol is legal, most employers will not permit employees to use or possess alcohol in the workplace.

# The Impact: Dealing with Recreational Users

- Non-medicinal (recreational) cannabis should be treated in a manner similar to alcohol
  - employers have the right to set rules regarding consumption
  - employers may prohibit use during working hours
  - employers may prohibit off-duty use, if impairments results during working hours
  - policies may be enforced through progressive discipline
  - employers may have lower tolerance for cannabis related misconduct in safety sensitive positions
- Non-medicinal (recreational) cannabis use may still attract the protections of the Code where an employee suffers from an addiction

# The Impact: Dealing with Medicinal Users

- As cannabis has been legal for medicinal purposes for some time, this is not a new category.
  - It is possible, however, that requests will become more frequent if cannabis becomes more common.
- Medicinal users are authorized to use cannabis in order to treat a medical condition.
  - The underlying condition may be a disability under the *Code*.
  - If the individual has a disability, the employer may be required to accommodate the disability to the point of undue hardship.
  - This may include accommodation of the treatment (i.e. medical cannabis use).
- Employees in this situation should be treated in the same fashion that you would treat an employee who has been prescribed painkillers, narcotics or other treatment which causes impairment.

# The Impact: Dealing with Addicted Users

- Addiction is a disability and is therefore, protected under the *Code*.
- As a result, an employer is required to accommodate an addicted employee to the point of undue hardship.
  - Accommodation of an addicted employee does not mean that the employer is required to permit the employee to be impaired in the workplace!
- Among other things, accommodation may require: tolerating some absences; taking time to address issues rather than moving straight to discipline; providing resources (medical, referral to Employee Assistance Programs; etc.); and allowing the employee to take time off to attend rehabilitation or treatment programs.
  - Relapses are to be expected!

# Accommodating Medicinal and Addicted Users

- *The Human Rights Code*
  - permeates every aspect of the employment relationship
  - from hiring to firing
  - prohibits discrimination in employment
    - except where the discriminatory practice or standard is based upon a *bona fide occupational requirement*
  - requires an employer to accommodate an employee to the point of undue hardship
  - it's a balancing act
    - Right of an employee with to equal treatment; and the
    - Right of an employer to a productive workplace and to hire the right employee for the job

# Accommodating Medicinal and Addicted Users

- No discrimination means:
  - can't make decisions based on a protected characteristic
  - can't treat employees or individuals differently based on a protected characteristic
- unless the treatment or standard are related to a *bona fide occupational requirement*
- or the employee cannot be accommodated without the employer suffering undue hardship

# Accommodating Medicinal and Addicted Users

- What is a protected characteristic?
  - in this case it's a disability or the treatment of that disability
- What is a *bona fide occupational requirement*? It's a standard which:
  - is rationally connected to the job;
  - was adopted in an honest and good faith believe it was reasonably necessary; and
  - was actually reasonably necessary
    - impossible to accommodate without suffering undue hardship
- What is undue hardship?
  - that accommodation would excessively hamper the operation of the business;
  - that accommodation would place the business under undue hardship from a financial perspective; or
  - the employee would remain unable to work for the reasonably foreseeable future, even with the accommodation.



# Accommodating Medicinal and Addicted Users

- What happens when an employee is authorized to use medicinal cannabis or is an addict?
- Step 1: Get Informed
  - be prepared to get medical information from the employee's physician regarding:
    - what the treatment requires
    - what the impact of the treatment/use will be on the employee, including a consideration of their position, productivity and safety
    - whether any accommodations are needed
- Step 2: Assess the Medical
  - does the medical answer the necessary questions?
  - if not, seek further medical
- Step 3: Engage in the Accommodation Process (where needed)

## Additional Issues

- Discrimination based on perception/bias
- Is there an acceptable level of impairment?
- Questionable prescriptions and claims of addiction
- Potential increase in claims of addiction
- Potential increase in claims that misconduct was related to addiction
- Balancing accommodation with workplace safety

## Additional Issues: Workplace Safety

- In addition to the potential Human Rights issues, employers must also be mindful of their obligations under *The Workplace Safety and Health Act*.
  - Employers are required to demonstrate “due diligence” – that they took all measures to create a safe workplace, so far as reasonably practicable.
  - Failure to comply with *The Workplace Safety and Health Act* can lead to significant fines and (in rare cases) jail time for a person convicted under the legislation.
  - Employers must take reasonable steps to ensure that employees are not permitted to work while under the influence of any substance where a potential hazard may be created.
    - This is especially important in safety sensitive environments!

## Additional Issues: Workplace Safety – *R. v. Metron*

- The most well known example of the potential consequences of the failure to take reasonable steps to address impairment in the workplace is an Ontario Court of Appeal decision from 2013 – *R. v. Metron Construction Corp.*
  - In this case, four workers were killed when the swing stage they were working on collapsed.
  - Among a number of other safety issues, several of the deceased employees had cannabis in their system – including the site supervisor
  - The employer was fined \$750,000, and the project manager was sentenced to 3.5 years in prison.
- While we emphasize that these facts were unusual and there were a number of other contributing factors, this case is a prime example of the increasing severity of penalties for breaches of health and safety legislation.

## Additional Issues: Testing

- Testing is only permitted in limited circumstances
  - balancing of privacy rights, collective agreement rights and safety obligations
- Safety sensitive environments only
  - Reasonable Cause
    - physiological evidence (bloodshot eyes, slurred speech, unsteady gait, etc.) or other evidence (smell of cannabis smoke or presence of paraphernalia).
  - Accident/Near Miss
  - Return to work (which may include random testing if part of the treatment plan)
- Random testing *may also be* allowed where the environment is safety sensitive and there is demonstrated evidence of an ongoing problem in the workplace.
  - incredibly difficult to establish

## Additional Issues: Testing

- Random Testing – the *Suncor* decisions
  - demonstrate how difficult it is to establish that random testing is justified.
- In the *Suncor* line of decisions, the employer is an energy company operating in the oil sands.
  - Suncor introduced a policy which imposed random drug and alcohol testing on all union members working in safety sensitive positions (which was most of the employees).
  - The Union grieved the policy and took the position that it was an unreasonable violation of the employees' privacy.

## Additional Issues: Testing

- At arbitration, the arbitrator accepted that it was a dangerous workplace.
  - He also noted that, since 2000, there had been **three employee fatalities involving workers who were under the influence of alcohol or drugs.**
- Despite this evidence, it was held that random drug testing was not justified.
  - This decision is still in flux – it has been appealed (successfully), and leave has been sought to appeal to the Supreme Court.
  - While we await the outcome – and, hopefully, clarification from the SCC – this line of authority is a good illustration of how difficult it can be to establish that random drug testing is justified.

## Additional Issues: Testing

- One of the primary concerns for many employers is the fact that it is difficult (or impossible) to test for cannabis impairment.
  - It is important that policies distinguish between usage and impairment.
  - Testing can conclusively prove that an individual has used cannabis, but that does not mean that the user is impaired.
- Urine testing is most common, but can test positive for days or weeks after using cannabis
  - so doesn't tell an employer if the employee is impaired when they were at work.
- Saliva based testing is being developed and tested, but these tests only indicate recent use and *likely* impairment.



## Pro Tips: Policies

- Employers should be proactive in revising and updating workplace policies on drug and alcohol use
  - cannabis ought not be treated as an illegal substance
  - but you can restrict possession and use in the workplace
    - should there be exceptions?
  - consider mandatory dry times
  - consider mandatory disclosure
  - address impairment and fitness for duty
  - include disciplinary consequences for breaching the policies

## Pro Tips: Policies

- Ensure the policy is not in conflict with the Code, employment contracts or collective agreements
- Reasonableness is the key to any policy
- Communicate policies to the employees
- Maintain records of having provided the policy to employees

## Pro Tips: Policies

- Ensure the new/updated policy is properly introduced into the workplace
  - adequate notice
  - signoff sheets
- Make sure your policy is being consistently enforced
  - avoid automatic penalties for an infraction
- Accommodate medical users and/or addiction issues
- Don't be afraid to seek further medical information if required

## Pro Tips: Mandatory Disclosure Provisions

- Requires an employee to disclose substance use and/or addiction
- Breach of the mandatory disclosure provision may provide just cause for termination
  - the termination is based on failure to be forthcoming
  - rather than the use itself
- Even with a provision, employer's must still be live to discrimination/accommodation issues
  - denial is often a hallmark of addiction

## Pro Tips: Mandatory Disclosure Provisions

- *Stewart v. Elk Valley Coal*
- Supreme Court of Canada decision from 2017
- Company policy required employees to disclose addiction issues, and stated that treatment would be offered if disclosure was made.
  - BUT policy also stated that if no disclosure and an employee tested positive after an incident, employment would be terminated.
- Employee had an accident while operating machinery and had not disclosed addiction or substance use.
  - Tested positive after the accident and was terminated from employment.
  - Union challenged the termination as discriminatory.

## Pro Tips: Mandatory Disclosure Provisions

- Supreme Court held that the termination of the employee was *not* discriminatory.
- The Court held that the employee was not terminated because of their disability, but rather because of their breach of the disclosure policy.
- The employee had the capacity to comply with the policy, but chose not to do so.

## Pro Tips: Mandatory Disclosure Provisions

- This decision highlights the value of well drafted policies regarding substance use in the workplaces.
- Employers are entitled to create and enforce policies which address impairment and disciplinary responses, provided that those policies are not discriminatory.
- The Court emphasized the fact that it was a safety sensitive environment, that the policies were clear and well known, and that the termination letter was clear and accurate.

## Pro Tips: Training

- Ensure that managers and supervisors:
  - Are trained to identify signs of impairment
  - Understand the applicable policies
  - Are equipped to recognize where accommodation is required, and are encouraged to be creative and flexible in evaluating potential accommodation
  - Understand the duty to inquire
  - Are prepared to apply the policies and protocols
    - i.e. What should they do when impairment is suspected? Who should investigate? What are the steps in an investigation?



## Pro Tips: Continuing Education

- The science and the law in this area are both likely to evolve rapidly.
- Staying on top of new developments will allow employers to keep policies up to date and to knowledgeably assess risks and requests for accommodation as they arise.

# QUESTIONS?



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