

DAZED AND CONFUSED

Marijuana in the Workplace

By Jennifer Costin

The anticipated legalization of marijuana, as well as the increased use of medical marijuana have caused many employers to become concerned about how this drug impacts and will continue to impact Ontario workplaces.

Is it legal?

Recreational use of the drug is not yet legal in Canada. As of June 12, 2018, the *Cannabis Act* is now undergoing third reading with the Senate. It is expected to come into force in or around August to September of 2018. It would allow anyone over the age of 18 to be able to legally possess up to 30 grams of cannabis.

How to address marijuana in policies?

Many employers may already have policies in place to address the use of a legal, but restricted substance in the workplace, such as alcohol. If legalization of marijuana occurs, employers will be able to restrict the impairment from, possession, sale, distribution and use of it in the workplace.

Further, employers and particularly those in safety sensitive industries, likely also have policies in place to address the use of prescribed medications by health care providers, which medication could impair the employee's abilities. The use of medical marijuana can be treated the same as an employee on pain medication, who may experience drowsiness and is warned not to operate machinery.

How prevalent is it?

According to a September 2016 study by EKOS:

- 58% of Canadians have used cannabis at least once in their lifetime;
- 22% have used it in the past 12 months;
- 5% use it daily; and
- Approximately 48% of Canadians agree that cannabis use is acceptable;
- In 2015, 2/3rds of the Canadian cannabis market is accessed by individuals older than 24 years of age.

How safe is it for safety sensitive positions?

The Canadian Medical Association's Driver's Guide suggests abstaining from driving for at least 5 hours of smoking one joint. However, Health Canada warns that the ability to safely operate equipment and drive safely can be impaired for up to 24 hours after marijuana use. Of concern for employers in safety sensitive

positions, is that “there is currently no evidence to suggest there is an amount of THC that can be consumed such that it remains safe to drive”¹.

How can it be measured?

At this point, no screening device can accurately measure the degree of impairment due to marijuana use. Further, no device can determine with any precision when it was used.

How have the courts, arbitrators and tribunals dealt with it?

In *Aitchison v. L&L Painting and Decorating Ltd.*², the Ontario Human Rights Tribunal dealt with a case where an employee attempted to argue he was discriminated against as a result of his use of medical marijuana. Unfortunately for the employee, he decided to smoke his joint while he carried out his safety sensitive position of operating a swing stage, 37 stories in the air, without safety gear. He was terminated for cause. The employee tried to argue that the employer had not accommodated his disability, as he had a doctor’s note regarding the medication. The employer argued that it did not receive the note and regardless, it had a zero tolerance policy for drugs and alcohol which the employee was aware of. The physician who wrote the note testified that he never would have written the note had he known what the employee’s work fully entailed. The Tribunal agreed with the employer, relying on the drug and alcohol policy, the nature of the position, the lack of proper communication or request for accommodation by the employee and the employee’s decision to self-medicate without authorization.

In *Lower Churchill Transmission Construction Employers’ Association v. IBEW, Local 1620*³, the grievor applied for two unionized labourer positions (utility worker and assembler) with the employer at a hydroelectric power generation facility. He disclosed that in order to treat his Crohn’s disease and osteoarthritis, he used 1.5 grams of cannabis with a high THC content every night before bed. The employer denied employment based on this marijuana use. The grievor had supplied a note from his physician stating that he was capable of working the safety sensitive position within 4 hours after the use of his medication. However, the arbitrator in this case relied on various conflicting alternative sources which suggested impairment could last up to a full 24 hours. Further, the arbitrator noted that there was no effective means for measuring whether the impairment could effectively manage the safety risk. Ultimately, the arbitrator found that the employer would have faced undue hardship if it was required to accommodate the marijuana use. Also of interest in this case, were the concerns voiced by the arbitrator that a family physician may not be the most appropriate individual to assess safety risk at a specific job site.

In *University of Windsor v. Canadian Union of Public Employees, Local 1001*⁴, two night shift custodians were caught by campus police smoking marijuana on campus, during their shifts. The employees denied their possession or use of marijuana (until one handed over her bag of marijuana). The employees were both sent home pending an investigation and they continued to deny they smoked marijuana on campus, despite the ultimate outcome of the investigation. They were both terminated for cause. Post-termination, one of the custodians alleged a substance abuse disability and the other, while not claiming a disability did attend narcotics anonymous. The University argued that the unsupervised custodial night shift was a safety sensitive position and required a high degree of trust given the unsupervised nature of

¹ The Final Report of the Task Force on Cannabis Legalization and Regulation in Canada (“the McLellan Report”).

² 2018 HRTO 238

³ 2018 Nfld. Arbitrator

⁴ CanLII 9594 (ON LA)

it. The Union argued that progressive discipline should have been engaged, taking into account the long work histories and unblemished employment records of the employees. The arbitrator agreed with the University and upheld the terminations, highlighting the dishonesty of the employees and the position of trust and noting that the substance use was unrelated to a disability.

In *Communications, Energy and Paperworkers Union (UNIFOR, Local 2121) v. Terra Nova Employers' Organization*⁵, the decision of an arbitrator who determined an employer was justified in terminating an employee for possession of marijuana on an offshore petroleum production platform in Newfoundland was quashed. The court found the arbitrator's decision was unreasonable in the sense that the appropriate test was applied. The Employer's policy prohibited, "possession of an illegal drug by an employee on a company facility or while performing company business". The employee had been called in, showed up at a helicopter facility to be transported offshore and in passing through security, a small piece of tinfoil containing marijuana was found. The employee denied knowledge of possessing it. The court noted that while the worker had possession of marijuana it was not "possession on a company facility or in the course of performing company business". Further, the court noted that possession requires the act of possessing the drug and the knowledge of the drug's presence, which was not met.

Takeaways for Employers

Ensure you have a policy in place that addresses non-medical marijuana use, possession and distribution in the workplace and the use of medical marijuana which imposes an obligation on the employee to report the use and authorization including dosage, THC concentration and timing of use.

The Policy should include:

- a prohibition on the use, possession, distribution and being under the influence of alcohol and non-medicinal marijuana use;
- a reporting mechanism if a co-worker is under the influence
- a prohibition on unauthorized drugs
- a reporting mechanism for employees to report the use of any authorized drug that may adversely alter their behaviour, physical or mental ability;
- encourage treatment and advice in the case of alcohol or drug dependency
- accommodation provisions for those suffering from addictions;
- a warning that law enforcement may be contacted if there is unlawful drug or alcohol use.

Siskinds L & E Group is pleased to offer a Drug and Alcohol Policy review or creation to ensure you are ready for the changes to the legislation.

⁵ 2016 CanLII 85306 (NL SCTD)