

Cannabis in the Workplace

26 September 2018

The *Cannabis Act*

James Wishart, Partner
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Cannabis Act

The basics.

When the smoke clears...

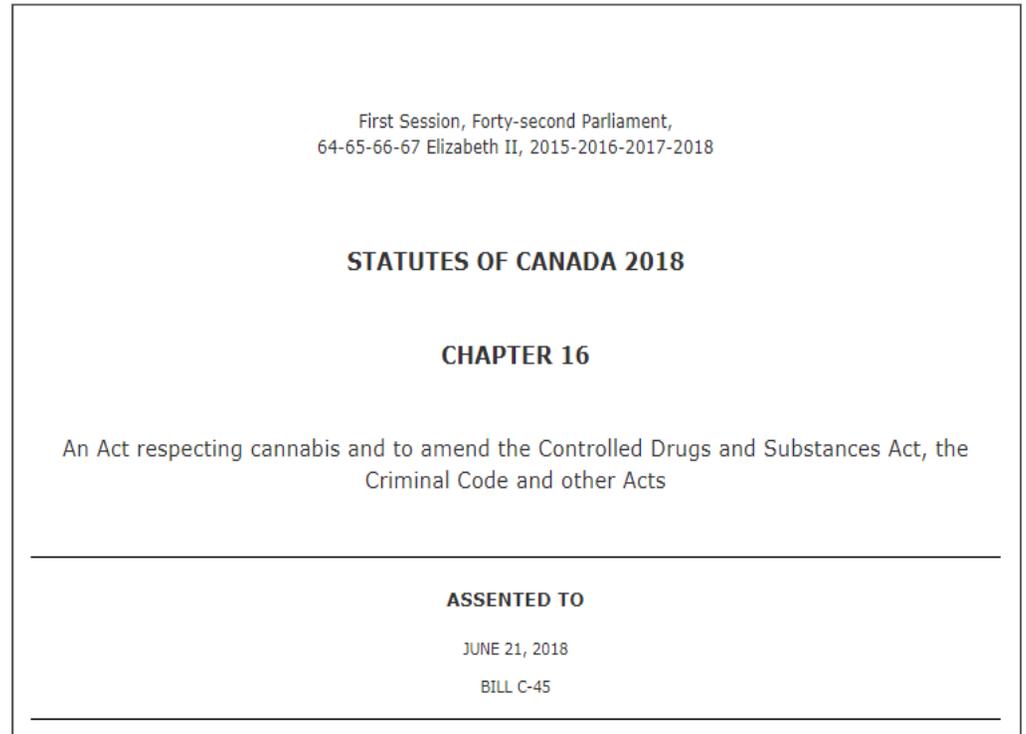
Canada is NOT “legalizing” cannabis.

- ✦ Canada is (significantly) changing how cannabis is regulated.
- ✦ Major restrictions on:
 - Who can use
 - What can be used
 - Where it can be used
 - How you can get it
- ✦ Maybe more cannabis-related offences on the books now than pre-*Cannabis Act*.



But still... it's a historical moment.

- ✦ The big day: October 17, 2018
 - Most of the *Cannabis Act* and the regulations comes into force
- ✦ Stated purposes of the Act
 - “Protect public health and safety”
 - Restrict access by young persons
 - Reduce illicit production
 - Reduce burden on criminal justice system
 - Quality control of consumer products
 - Unstated purpose: **TAX IT!**



Regulatory Precedents – Alcohol and Tobacco

✦ Like Tobacco:

- “Public health” approach – i.e. discouraging use
- Heavy restrictions on branding and promotion – “plain packaging”
- Onerous reporting and inspection requirements for producers
- No fun allowed

✦ Like Alcohol:

- Government-run distribution model, limited outlets, price controls
- Very restricted public consumption
- Limited personal production condoned

What's Legal? Medical Use

Current system for legal medical use is imported into the Act

✦ Who?

- Medical authorization
 - Medical document may be issued by a medical practitioner “**to an individual who is under their professional treatment, and if cannabis is required for the condition for which the individual is receiving treatment**”.
 - Relatively loose controls on issuing medical documents
 - Increasing number of health plans offering limited coverage

✦ How?

- Licensed Producer-Supplied
 - Medical document is registered with a single licensed producer
 - LP delivers authorized amounts by Canada Post

✦ What?

- Dried or fresh flowers, oil only

✦ Where?

- Home
- Public – but not lighted in an enclosed public space
- Work – but not lighted in enclosed workspaces (more on this later)
- NOT
 - Cars
 - Airplanes
- These rules are under continual challenge by advocates

What's Legal? Adult Recreational Use

✦ Who?

- Anyone over 19 (18 in Quebec)

✦ What?

- Dried or fresh flowers, oil
- “Accessories” – items used in the consumption of cannabis
- NOT edibles or drinkables (wait until late 2019)
- 30 gram/1 ounce (or equivalent) limit for possession in public

✦ How?

- Provinces control distribution:
 - Private sale: SK, MB, AB
 - Government store only: QC, NB, NS, PEI, NWT
 - Hybrid: BC, NFLD, YK (for now), ON (wait for it)
 - Online: only provincial government stores
- Retail outlets subject to provincial and municipal restrictions
- Some provinces will allow municipal opt-outs of retail storefronts

✦ When?

- After kids are in bed please

What's Legal? Adult Recreational Use

✦ Where?

- Provincial and municipal rules apply
 - **YES:** Private dwellings
 - **BUT:** Some provinces allow landlords, condo boards, etc. to restrict smoking and vaping.
 - **NO:**
 - **Vehicles (incl. boats)**
 - **Public places***
 - **Workplaces**
 - **Airports, airplanes, luggage**
 - **Vape lounges (TBD)**

* “includes any place to which the public has access as of right or by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.”

I will not use it in a car,
I will not choose it at a bar.

I will not spark it at the park,
Even if it's after dark.

I will not toke in public
places.*
Or blow smoke in people's
faces.

I will not use it at my work,
Even though I need a perk.

I will partake it where I dwell,
Unless my [*landlord/condo
board/parent*] bans the smell.

Still not legal...

- ✦ Giving cannabis to young people (duh)
- ✦ Unlicensed dispensaries
- ✦ Private online sales
- ✦ Inter-provincial sales
- ✦ Cannabis edibles, drinkables, injectables
- ✦ Health products containing cannabis (unless specifically approved)
- ✦ Cosmetics containing cannabis
- ✦ Cannabis products for pets

Home Grow

Medical

- Registered patients can grow enough plants to meet prescription amounts
- Can designate another person to cultivate
- Seeds and plants available from licensed producers

Recreational

- 4 plants per “dwelling house”
- No sales
- Starting materials theoretically available from provincial retailers, but most provinces won’t be selling on day one
- MB and QC ban on home grow (constitutional challenge in the making)
- Unclear whether/when landlords, condo boards, university residences can prohibit

Commercial production

- Federal licensees only
 - Cultivation
 - Macro
 - Micro (“craft”)
 - Nursery (plants and seeds)
 - Processing
 - Macro
 - Micro
 - Medical Sale
 - Testing (e.g. cannabinoid content)
 - Research



Human Rights and the Duty to Accommodate Cannabis Use

Taylor Buckley, Associate
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Duty to accommodate cannabis use

Overview

- What is the duty to accommodate?
- Accommodation and cannabis
 - Duty to accommodate
 - Undue hardship
 - Recent case studies
- How does cannabis legalization impact the duty to accommodate?
- Best practices

Duty to accommodate cannabis use

Duty to accommodate – Overview

- People in Canada have a right to equal treatment in respect of their employment and without discrimination based on protected grounds
 - Every Canadian jurisdiction has its own human rights legislation that sets out the protected grounds
- The relevant protected ground for cannabis use is discrimination based on a disability
 - Dependency as a disability
 - Disability treated with cannabis (e.g., pain relief)
- Employers have a duty to accommodate employee disabilities to the point of “undue hardship”
 - Subject to *bona fide* occupational requirements

Duty to accommodate cannabis use

Discrimination and cannabis – Case study: *Skinner* (NS Court of Appeal)*

- Facts

- Skinner's physician prescribed cannabis for chronic pain, because conventional pain medications were not effective and had negative side effects for him
- His benefits plan denied his reimbursement claim because the plan did not cover prescription drugs not approved by Health Canada
- The NS Human Rights Tribunal found discrimination on the basis that his disability required cannabis treatment because his physician ruled out conventional pain medications
- The plan trustees appealed the decision

- Decision

- Appeal allowed – It could not be automatically discriminatory for the plan to impose reasonable limits on covered benefits (i.e., Health Canada approval)
- Adverse impact arose because conventional medications were not effective for Skinner personally—not because he fell within a protected group

**Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSCA 31

Duty to accommodate cannabis use

“Undue hardship”

- Employers must make reasonable efforts to accommodate an employee’s disability
- What does accommodation look like?
 - Modified work schedule
 - Leave of absence
 - Modified duties
 - Alternative treatment options
- But, the duty is not unlimited – If accommodation would cause “undue hardship”, failing to accommodate will not be discriminatory
- Employees must participate in accommodation and cannot expect a perfect result
- What does undue hardship look like?

Duty to accommodate cannabis use

Undue hardship and cannabis – Case study: *Tizzard* (NL Arbitration)*

- Facts

- Tizzard had a medical authorization for cannabis he ingested every evening
- He disclosed his use to a prospective employer, but said he did not feel impairment during the daytime working hours
- He failed pre-employment drug screening and the employer refused to hire him
- The positions applied for were on a major construction project
- Union grieved, claiming the employer failed to accommodate his disability

- Decision

- Accommodating the cannabis use would amount to undue hardship because (1) there is no test to adequately and accurately test for for cannabis impairment and (2) the work was safety-sensitive

**Re Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard)*, 2018 CarswellNfld 198, 136 CLAS 26 (NLL Arb)

Duty to accommodate cannabis use

Impact of cannabis legalization on accommodation

- Business as usual, as far as accommodation is concerned
- The duty to accommodate applies to cases of dependency and underlying disabilities
- Recreational cannabis use is not protected by human rights legislation and therefore does not need to be accommodated

Duty to accommodate cannabis use

Best practices

- When faced with an accommodation request involving cannabis:
 - Explore accommodation in good faith
 - Request evidence of the medical need for cannabis use
 - Assess the safety implications of cannabis use for your workplace
 - Assess the implications of cannabis use on the employee's duties
 - Work with the employee on compromises
 - Monitor the accommodation arrangement on an ongoing basis

Cannabis Policies and Testing

A Practical Approach to Complicated Law

Craig Lawrence, Partner
Toronto

Overview



- Policy creation and revision



- Impairment standards



- Cannabis testing

Policy Creation and Revision

Safety and
Legislative
Compliance

Medical Need
vs
Recreational
Use

Impairment
Standards

Testing
Procedures

Consequences
of Breach

The Duty to Disclose

- All policies should distinguish between **medicinal cannabis** and **recreational cannabis**.
- Include a positive obligation on employees to disclose to the employer that they suffer from a disability, including addiction to illegal or controlled substances.
- State that a failure to disclose such disability prior to an incident at work arising from substance abuse could result in the termination of their employment for cause.

The Duty to Disclose

- BUT... be cautious in relying upon such language
- *Stewart v Elk Valley Coal Corp* (2017 SCC)
 - Co. implemented policy requiring disclosure prior to incident
 - Employee signed off on policy but did not disclose
 - Employee terminated following accident
 - Alberta Human Rights Tribunal determines that termination was result of policy breach, not his addiction.
 - Decision upheld on Judicial Review by SCC
- Judicial Reviews are necessarily narrow in their application...

Impairment Standards

Zero
Tolerance

Safety
Sensitive
Positions

Statutory
Regulations

Per Se
Thresholds

$> 2 \text{ ng/ml}$

$\geq 5 \text{ ng/ml}$

Testing Impairment

- Police approaches for testing impaired driving:
 - Standard Field Sobriety Test
 - Drug Recognition Expert
 - Saliva or Blood Tests

Testing Impairment

Physical

- Odor
- Glassy or red eyes
- Unsteady gait
- Slurred speech
- Poor coordination

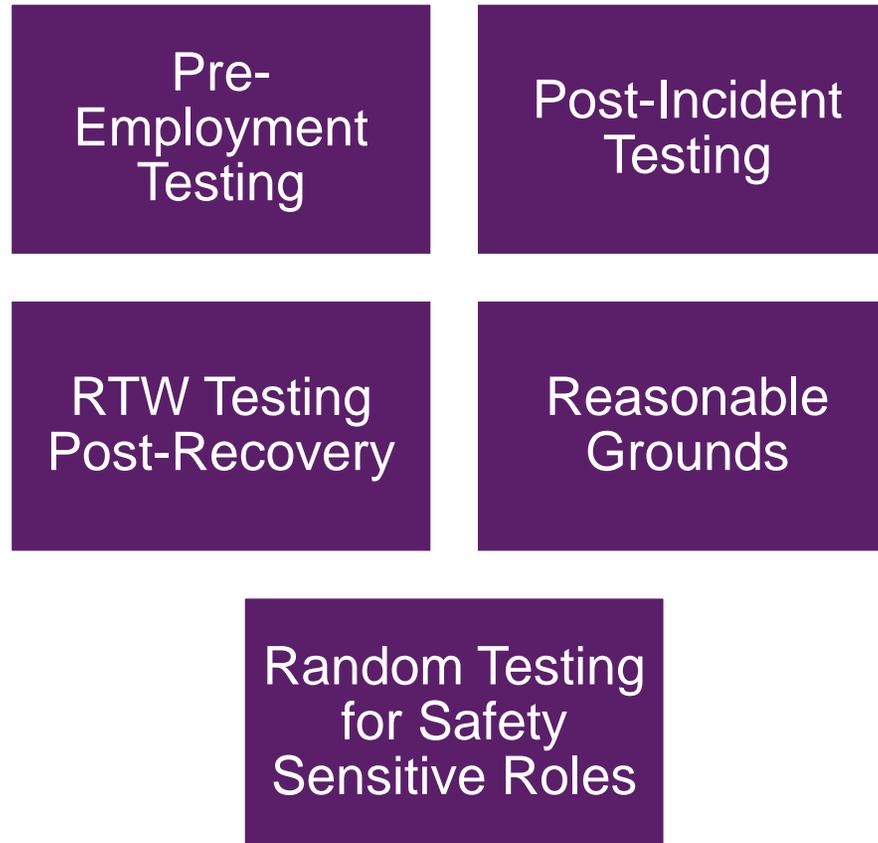
Psychosocial

- Mood fluctuations
- Inappropriate verbal or emotional response
- Memory lapses
- Irritability

Performance

- Absenteeism
- Excessive errors
- Significant deterioration in performance

Legal Framework for Drug Testing



Legal Framework for Drug Testing

- *CEP v Irving Pulp & Paper Ltd.* (2013 SCC)

Unilaterally imposed universal random testing policies are unreasonable unless there has been a workplace problem with substance abuse and the employer has exhausted alternative means of dealing with the abuse.

Legal Framework for Drug Testing

The dangerousness of a workplace –whether described as dangerous, inherently dangerous, or highly safety sensitive – is only the beginning of the inquiry.

It is not automatic justification for the unilateral introduction of unfettered random testing with disciplinary consequences.

Require additional evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.

Random Drug Testing

- Safety-sensitive environment
- Evidence of a “general problem”
 - Timely
 - Credible
 - Sufficiently serious to tip the scale from preserving employee privacy to protecting the safety of workers

Other Approaches

- Drug Dogs
- Drug Recognition Expert Training
- Annual Review

Thank you

For more information, please feel free to contact:

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