

Cannabis in the workplace

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Presented by:
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Agenda

- Legal landscape
- The duty to accommodate
- High times? Examples of medical marijuana in the workplace
- Lessons for employers and ethical obligations

Where we've come from

Where we're headed?!

Legal landscape

- *Controlled Drugs and Substances Act*
 - Prohibits possession, trafficking, import and export, and production of controlled substances, including marijuana, unless authorized by regulations
- *Access to Cannabis for Medical Purposes Regulations*
 - Individuals with a medical need, and who have the authorization of their health care practitioner, can access cannabis in three ways:
 - they can continue to access quality-controlled cannabis by registering with licensed producers;
 - they can register with Health Canada to produce a limited amount for their own medical purposes; or
 - they can designate someone else to produce it for them
- Bill C-45 an Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts (the *Cannabis Act*)
- Legalization puts marijuana on equal footing with alcohol

Legal landscape

Total Number of Clients Registered for Medicinal Marijuana (as of September 30, 2014)	Total Number of Clients Registered for Medicinal Marijuana (as of September 30, 2015)	Total Number of Clients Registered for Medicinal Marijuana (as of September 30, 2016)	Total Number of Clients Registered for Medicinal Marijuana (as of March 31, 2017)
12,409	30,537	98,460	167,754

- Health Canada estimates 500,000 Canadians will be legally using marijuana for medical purposes by 2024.

Legal landscape

- Privacy vs. Human Rights vs. Occupational Health and Safety
- Triggers Duty to Accommodate

The duty to accommodate

- Does the employee have a disability?

The Duty to accommodate

The purpose of the duty to accommodate is to ensure that persons who are otherwise fit to work are not unfairly excluded where working conditions can be adjusted without undue hardship.

[...]

The test is not whether it [is] impossible for the employer to accommodate the employee's characteristics. The employer does not have a duty to change working conditions in a fundamental way, but does have a duty, if it can do so without undue hardship, to arrange the employee's workplace or duties to enable the employee to do his or her work.

Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (2008), 294 D.L.R. (4th) 407

Medical marijuana in the workplace

French v. Selkin Logging, 2015 BCHRT 101.

Facts:

- Employer was logging contractor; French was a heavy equipment operator
- French diagnosed with cancer; was smoking marijuana for pain management – he did not have legal authorization to possess marijuana but doctor had told him he could use it at work
- French smoked marijuana regularly in the workplace
- French struck a moose while driving a company truck; marijuana was found in truck
- Employer alleged that French quit and that it had invited him to return to work drug free
- French refused offer to return to work and commenced a human rights application

Medical marijuana in the workplace

French v. Selkin Logging, 2015 BCHRT 101.

Decision:

- Tribunal was satisfied that French was disabled and used marijuana to manage pain resulting from his disability
- Problem was that French did not have the required authorization permitting him to lawfully possess and use marijuana for medical purposes and therefore he was engaging in an illegal act at the workplace
- Also no evidence to support French's claim that the marijuana that he was using did not cause impairment
- French was required to inform his employer that he would be legitimately using marijuana and only as medically allowed and authorized
- Accommodating French's smoking of marijuana at work without legal/medical authorization would have amounted to undue hardship

Medical marijuana in the workplace

M. v. V. Gymnastics Club, 2016 BCHRT 169.

Facts:

- Gymnastics coach with a medical condition used prescribed marijuana to deal with her symptoms
- Co-workers alleged the coach was intoxicated at work
- Employer suspended the coach and gave her a medical questionnaire for her doctor to complete
- Upon receiving the completed medical documentation, the Employer held that the coach's use of marijuana was not medically supported and violated the Employer's drug policy. The coach was suspended without pay and placed involuntarily on medical leave
- The coach filed a human rights complaint and the Employer sought to have the case dismissed without a hearing

Medical marijuana in the workplace

M. v. V. Gymnastics Club, 2016 BCHRT 169.

Decision:

- The medical documentation did not appear to conclude that the coach's work was compromised by her use of medical marijuana
- There was no evidence of impairment at work
- The coach had presented a *prima facie* case of discrimination based on not being able to work due to her method of treatment of her disabling medical conditions
- The matter is to proceed to a hearing

Medical marijuana in the workplace

THK Rhythm Automotive Canada Ltd. and TPEA (Rodwell), Re, 2016 CarswellOnt 9433.

Facts:

- Employer operated a production facility, manufacturing automotive components
- Two grievors were seen in the company parking lot exchanging marijuana plants
- Employer investigated and discharged both grievors
- Employer relied on its Code of Conduct which prohibited possession of illegal substances on company property or during working hours or break periods
- Union conceded the grievors violated the Employer's rule but argued a lesser penalty should be imposed
- One of the grievors had applied for the right to use medical marijuana – his application had been approved (post-discharge)

Medical marijuana in the workplace

THK Rhythm Automotive Canada Ltd. and TPEA (Rodwell), Re, 2016 CarswellOnt 9433.

Decision:

- “A rule which prohibits an employee from reporting to work in an unfit condition, or possession of any mind altering substance at work (with the exception of prescription drugs) is manifestly reasonable, and strict enforcement of that rule is in the best interests of all parties. The potential health and safety consequences of a breach to all employees are too drastic to underestimate and I cannot fault any employer from imposing severe consequences upon an employee who violates the rule.”

Medical marijuana in the workplace

THK Rhythm Automotive Canada Ltd. and TPEA (Rodwell), Re, 2016 CarswellOnt 9433.

Decision:

- The Arbitrator did not consider possible legalization to create any confusion here – marijuana remained an illegal drug
 - Even if it were legal – workplace use or possession of intoxicants or mind altering substances should be prohibited
- The Arbitrator was not swayed by the suggestion the plants were not in a consumable state
 - Could not blame the employer for prohibiting all forms
- The Arbitrator accepted there was no intention to consume the marijuana at the workplace but he was unimpressed by the Union's suggestion that there were no consequences to the Employer as a result
- An employee who violates a health and safety rule risks that something unanticipated may occur

Medical marijuana in the workplace

THK Rhythm Automotive Canada Ltd. and TPEA (Rodwell), Re, 2016 CarswellOnt 9433.

Decision:

- The grievors were given one more chance:
 - Ordered reinstatement without compensation
 - Further violations of the rule in next 24 months would result in automatic termination
 - If the grievor intended to consume medical marijuana before reporting to work, it had to be with the Employer's knowledge and consent

Medical marijuana in the workplace

International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP.

Facts:

- Employee failed to disclose his prescription for, and use of medicinal marijuana, at a remote worksite

Medical marijuana in the workplace

International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP.

Decision:

- Given the employer's numerous policy statements on this point, the Court ruled that the Arbitrator's decision that the employee had a duty to disclose his prescription use was within the range of reasonable outcomes and did not constitute a breach of his privacy
- Still, the Court was not convinced that termination was the appropriate penalty
- Employee had a clean disciplinary record, had been working safely on the project and had used the prescription only for the purpose intended
- Arbitrator had not assessed whether the employer could accommodate the employee's use of medical marijuana at the workplace or whether there was some lesser penalty that was more appropriate

Lessons for employers and ethical obligations

- Employers have a duty to accommodate employees who are legally using medicinal marijuana to the point of undue hardship
- If approached by an employee seeking accommodation relating to the use of medicinal marijuana, the employer should first confirm it is medically and legally authorized
 - If so, then employer should seek out medical information to determine if employee can safely continue performing his or her duties (from employee's doctor or independent medical examination)
 - If the information reveals that employee would be impaired, then the employer is likely not required to accommodate the employee's request, especially if the employee is in a safety sensitive position

Lessons for employers and ethical obligations

- If accommodation is required, some things to consider:
 - Should the employee be allowed to smoke in the workplace?
 - Could the employee ingest the marijuana in a different form?
 - Who at the company must know of the employee's use of medical marijuana?
 - Are there other suitable options to medical marijuana?
- Employees have a corresponding duty to cooperate in the accommodation process:
 - Obtain appropriate authorization
 - Inform the employer
 - Cannot expect or demand a perfect solution
- Employees are not entitled to be impaired at work, to compromise their safety or the safety of others

Lessons for employers and ethical obligations

- Employers should update their policies:
 - Set out the terms of acceptable use of prescription and non-prescription medication, including medical marijuana
 - Set out when employees are required to notify the employer of their use of prescription and non-prescription medication, including medical marijuana
 - Set out the limits for impairment
 - Prohibit coming to work impaired
 - Set out the disciplinary consequences for breaches of the policy

Thank you

The logo for Dentons, featuring the Chinese characters "大成" followed by the word "DENTONS" in a bold, sans-serif font, all contained within a purple arrow-shaped graphic pointing to the right.

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