Now it's 420 every day!

Workplace Implications of Legalized Cannabis

Path to Legalization – Part 1

- Cannabis has been illegal to grow, possess or sell in Canada since 1923
- As of today simple possession of under 30g is still punishable by up to a $1000 fine and 6 months in jail
- Despite this, one telephone call will have as much pot as you want delivered right to this hotel before dinner – no questions asked

Path to Legalization – Part 2

- Prohibitions on cannabis began to break down in 2000 with the Ontario Court of Appeal decision in *R. v. Parker*
- In *Parker* the Court found that it was unconstitutional to press criminal charges against an epileptic for whom only cannabis controlled his life threatening seizures

Path to Legalization – Part 3

- In the wake of *Parker*, the government introduced the concept of regulated, government controlled, medicinal cannabis
- Later Court cases successfully challenged restrictions on edible pot and then established the right of individuals to grow their own pot instead of buying it from government licenced producers

Legalization!

- On June 21, 2018 the Governor General gave Royal Assent to Bill C-45 – *The Cannabis Act*
- Recreational use of cannabis became legal in Canada as of October 17, 2018 00h01.

Workplace Implications of Legal Cannabis

- Cannabis use within the workplace post October 17 will be governed both by federal and provincial law as well as by workplace policies
- It is important to understand whether a rule regarding cannabis and the workplace is based on legislation or an employer policy.
- Only the Employer Policy can be challenged by the Union

Provincial Laws Impacting Workplace Cannabis Use – Part 1

- Under Ontario law, **recreational** cannabis **cannot** be used within any workplace.
- Provincial law provides cannabis can be used in any public space where cigarette smoking is permitted.
- **Recreational** cannabis can only be used within a private home, backyard, public place where smoking is allowed, or on a private balcony.

Provincial Laws Impacting Workplace Cannabis Use – Part 2

- Recent amendments to the *Highway Traffic Act* establish zero tolerance for the presence of drugs (or alcohol) in the system of a driver of a commercial vehicle – this includes an ambulance

- Any commercial driver who's saliva tests positive for the presence of cannabis will be subject to an immediate 3 day license suspension and a $250 fine.
- A second offense results in a 7 day suspension and a $350 fine

Provincial Laws Impacting Workplace Cannabis Use – Part 3

- Medicinal users of cannabis who have with them their federal authorization forms are not subject to the *HTA's* zero tolerance rules, nor does the restriction that they can only smoke in a private home apply to them
- Medicinal users and recreational users are however, both subject to **impaired driving laws** that apply equally to cannabis and alcohol

Problems with the Oral Fluid Test

- The new *HTA* rules for zero tolerance for drugs for commercial drivers rely on saliva tests conducted using a federally approved testing device
- Only one testing device has so far been approved – the Dräger Drug Test 5000 - and it has been found to have huge reliability issues
- One study found that it was falsely positive for cannabis 14.5% of the time. It also doesn't work well in temperatures below 4 degrees Celsius
- Ottawa Police have decided not to buy the machines and will instead test for drug impairment using specially trained officers. These officers cannot make findings that trigger the zero tolerance rules of the *HTA*

What About Health and Safety Issues?

- The *Occupational Health and Safety Act* will continue to apply and it impacts the use of both medicinal and recreational cannabis within the workplace
- Employers continue to have a duty to take every precaution reasonable for the protection of a worker – which can include ensuring no one is impaired within the workplace
- Employees will still have an obligation to report any workplace hazard that they become aware of – this can include their own or another employee's use of cannabis

Can Employers Impose Harsher Drug Policies than Required by Law?

- Most collective agreements contain a management rights clause that allows the employer to run their operation as they choose so long as they doesn't violate the collective agreement
- These types of clauses have generally been interpreted to allow employers to develop and implement unilateral policies – including policies on drug and alcohol use by employees

Employer Policies – Including Drug Policies - Must be Reasonable

- Unilateral policies must however, be objectively reasonable

- This is generally known as the *KVP* principle named after the 1965 decision of Arbitrator Robinson in *Re Lumber & Sawmill Workers' Union Local 2537 and KVP Co.*

- Later decisions including *Metro Toronto v. CUPE* found the authority to strike down unreasonable rules from the just cause discipline provisions of the collective agreement
- That case held that discipline imposed on the basis of an unreasonable rule would be regarded as discipline without reasonable cause
- Arbitrators are pretty much unanimous now in agreeing that they have the ability to strike down unreasonable management created rules

What Would be a Reasonable Drug Policy?

- Policies that attempt to govern what an employee does on their time off are subject to a very high standard of review and the employer will need to show that their policy reasonably balances the privacy interests of employees against the legitimate needs of the Employer
- Arbitrators and Courts have recognized that it is legitimate for employers to expect workers to be fit for duty and free from any drug impairment while they are at work
- Employers can likely implement a policy that sets out minimum time periods between **recreational** cannabis use and attendance at work so long as it can demonstrate that the chosen time period reasonably reflects the amount of time required for the body to metabolize the cannabis

Jewitt McLuckie & Associates LLP barristers/solicitors

POLICY

- **There are wide variations of workplace policy on recreational marijuana use. Some of them are:**
  - **28 day prohibition of use (police/pilots)**
  - **24 hours (soldiers)**
  - **"Fit for Duty" (most reasonable)**

What Would be a Reasonable Drug Policy?

- The period of time a person is impaired from smoking or eating cannabis can vary based on the person, his or her tolerance level, their pattern of cannabis use as well as the potency of the cannabis itself
- As a general rule, the Canadian Public Health Agency recommends not driving for six hours after smoking cannabis and for eight hours after eating cannabis
- The Canadian Forces' new cannabis policy for example prohibits cannabis use 8 hours before regular duties and 24 hours before "higher risk duties" including firing weapons, operating a vehicle or being a medical technician assigned to first response duties. Pilots and flight crew must abstain for 28 days before duty

What Would be a Reasonable Drug Policy?

- It would be open to an employer to create a policy banning the use of **recreational** cannabis or even the possession of cannabis by employees while they are on duty

- This would match the current policy that many employers have that bans the use or possession of alcohol within the workplace

- Employees that use **recreational** cannabis at work can be fired. See for example the 2017 decision of Arbitrator Gedalof in *University of Windsor v. CUPE 1001*

Can a Drug Policy Include Random Testing?

- Canadian employers have not been permitted to implement random drug or alcohol testing
- The issue of random drug testing has gone all the way up to the Supreme Court and the Court's 2013 decision in *CEP Local 30 v. Irving Pulp and Paper* stands as the law of the land on this issue
- In its decision, the Court essentially adopted the 2006 decision of Arbitrator Picher in *Imperial Oil and CEP Local 900 ("Nanticoke")*

Some Reasons for Employee Drug Testing

- Under the rules set out by the Supreme Court, employers can only force employees to participate in drug tests when:

1. There are reasonable grounds to suspect the employee in question is impaired while at work;

2. There has been a serious near miss or accident involving the employee;

3. There is compelling evidence of "out of control" drug use within the workplace;

4. Where random testing is a part of the rehabilitation plan for an employee with a substance abuse problem that is agreed to by the employee and the Union. Usually this is limited to two years (sunset clause duration).

So How Come the TTC can Random Test?

- In October of 2011 the TTC implemented a new "Fitness for Duty Policy" that set limits for the presence of various drugs in an employee's system
- The limit for cannabis was set at 10 nanograms per milliliter to be analyzed using an oral fluid test
- 20% of employees would be randomly selected for drug and alcohol testing each year
- Any refusal to take a drug test could result in discipline

- The policy was promptly grieved by ATU Local 113 and initially the TTC held off on implementing the part of the policy that implemented random testing.

- When the TTC finally started random testing in 2016 the Union went to court seeking an injunction to prevent the testing from being implemented

- **Shockingly, in a decision released in April of 2017 the ATU lost**

- In my opinion, the loss was due to the high test for granting an injunction – the party asking for it to show that they would be irreparably harmed and that the balance of convenience favours granting the injunction

Is Medicinal Cannabis Treated Differently?

- The short answer is yes, it is
- Medicinal cannabis users – who must still get their cannabis in compliance with the medical cannabis program – are not covered by the zero tolerance rules of the *HTA* for commercial vehicles
- Medicinal users are allowed to smoke up anywhere it is legal to smoke tobacco
- Where an individual needs to take medical cannabis the duty to accommodate them under the *Human Rights* Code applies

Is There a Duty to Disclose Medicinal Cannabis Use? Part 1

- Where the employer operates a safety sensitive workplace (like an ambulance service), they can likely implement a policy mandating that employees disclose the use of any medication that could possibly impair their judgement
- The "Canadian Model" for employer drug testing that was upheld by the Supreme Court in *Irving* includes requirements that the use of medicinal cannabis (or any other potentially impairing drug) be revealed by employees who work in safety sensitive jobs.
- Failure to do so can result in discipline – see *IBEW Local 1620 v. Lower Churchill Transmission*
- Where an individual needs to take medical cannabis the duty to accommodate them under the *Human Rights* Code applies

Is There a Duty to Disclose Medicinal Cannabis Use? – Part 2

- Disclosure of medicinal cannabis use does not automatically preclude an employee from working in a safety sensitive job
- In his decision in *City of Calgary v. CUPE Local 37* Arbitrator Hodges overturned a decision removing a heavy equipment operator from his job after Human Resources managers learned of his cannabis use
- The Arbitrator found that the grievor's use of cannabis was limited and that he had been operating equipment while using cannabis for more than a year – with the full knowledge of his supervisors - without any incidents or safety concerns
- The City was ordered to return him to his equipment operator job as it had not presented any evidence that his use of cannabis "had any impact on his ability to perform his safety sensitive duties in a safe manner."

How Would the Duty to Accommodate Work for Medicinal Cannabis Users?

- The duty to accommodate an employee who takes medicinal cannabis where it has been established that the use of cannabis impacts their ability to perform the essential duties of their job safely would follow the traditional test established by *Meiorin*

- If there is a safety impact look to see if the impact can be mitigated within the employees' own job up to the point of undue hardship

- If that is not possible, look to see if there is another position that they could do either with or without modification that would not result in an undue hardship

Is There a Duty to Accommodate Recreational Users?

- The duty to accommodate only applies to the grounds set out in the *Human Rights Code* which includes disabilities

- It has long been recognized that drug addiction is a disability so therefore an individual addicted to recreational cannabis would have to accommodated by their employer even in a health case setting. See *Windsor Regional Hospital and ONA*

- ***An individual who is not an addict has no protection under the Code.*** If they were caught violating a reasonable policy that prohibited or restricted cannabis use they could be disciplined. See *French v Selkin Logging*

Any Questions?