

Cannabis Legalization: Don't Fear The Reefer

2018 UPDATE

By Brad Cocke, Associate

Mr. Speaker, the current approach to cannabis is simply not working. We are moving forward to ensure that we keep the profits out of the hands of criminals and cannabis out of the hands of young people. That is why we have moved forward and introduced Bill C-45 to legalize cannabis and strictly regulate and restrict access. We have had the benefit of speaking to many people in this regard, including the task force.

We look forward to moving this piece of legislation forward. Simply decriminalizing will not achieve these objectives.

*House of Commons Debates, 42nd Parl, 1st Sess,
No 167 (1 May 2017) at 1430
(Hon Jody Wilson-Raybould)*

Introduction

On April 13, 2017, Minister of Justice and Attorney General of Canada, the Honourable Jody Wilson-Raybould, introduced Bills C-45 and C-46 to the House of Commons. This began the legislative process to undo 94 years of cannabis prohibition in Canada. A little over a year later, that legislative process culminated in the *Cannabis Act*, SC 2018, c 16, receiving royal assent from Parliament on June 21, 2018. Pursuant to the *Cannabis Act*, the possession, consumption, and production of defined amounts of cannabis is legal as of October 17, 2018.

Despite the fact that it has long been a criminal act to possess and consume cannabis, cannabis was inexpensive, readily accessible, and widely used in British Columbia. This use, despite the legal status of cannabis, was implicitly recognized in the Minister of Justice's statement describing Bill C-45. Our experience suggests that cannabis use in the workplace is not a new issue; it is one employers have been struggling with for years. Nevertheless, the changes to the law have led to considerable fear amongst employers and employer groups - fear that has been propagated in the media. The fact that cannabis was widely used despite prohibition is often overlooked in debates about legalization's impact on the workplace.

In this paper, we consider whether legalization of cannabis will truly be a "game changer" for your workplace. In doing so, we will review the current state of the law and changes resulting from the *Cannabis Act*, and we will consider how and whether these changes will affect how employers approach the issue of cannabis use in the workplace.

There is no question that legalization is a fairly significant change to the criminal laws of Canada. There is also no question that the use of cannabis in the workplace is an issue of concern for many employers. The good news is we anticipate that the legal framework

for approaching cannabis use in the workplace will remain substantially the same after legalization.

State Of The Law

RECREATIONAL VERSUS MEDICINAL VERSUS SUBSTANCE USE DISORDERS

There is an important and often overlooked distinction to be made between the various reasons someone might use cannabis. Whenever you encounter someone using cannabis in your workplace or attending work impaired, the first question you have to determine is why are they using cannabis? Your response as an employer will differ depending on whether the use is for medicinal purposes, is pursuant to a substance use disorder, or is for recreational purposes.

When used recreationally, cannabis is used simply to “get high”. Employers have no obligation to tolerate recreational use in the workplace. In fact, where safety is at issue, employers have a statutory obligation to prevent it. This does not change after legalization, and a disciplinary approach may be applied where use is for recreational purposes.

An entirely different approach applies to the use of medical cannabis. Where cannabis is authorized by a physician and used to treat a medical condition, an employer’s obligations pursuant to the *Human Rights Code*, RSBC 1996, c 210, are engaged. Similarly, the duty to accommodate is also triggered where cannabis use stems from a substance use disorder. In both cases, employers will need to consider whether they can accommodate the employee. That was the case before legalization and it is the case after legalization.

However, legalization of recreational cannabis **does not** create a right to be impaired in the workplace. In that regard, alcohol provides a good case study. Alcohol is a regulated substance that has intoxicating effects that are, for the most part, incompatible with the performance of work. Yet alcohol’s legal status does not provide workers with the right to attend work impaired and few

employees would contest this obvious fact.

The critical difference between cannabis and alcohol as it stands now, is that current testing procedures for alcohol are capable of definitively establishing present impairment, while drug testing procedures are less reliable in that regard. The Federal government has promised a test will be available for law enforcement, but such a test is currently unproven and will result in years of legal challenges. As discussed below in relation to potential opportunities related to legalization, acceptance of cannabis and fears of intoxication while driving may actually spur advancement in this regard.

Overall, when and if cannabis use arises in your workplace, an important threshold question is whether the use is recreational, medicinal, or pursuant to a substance use disorder, as the answer to that question will drive your response.

STATUTORY REGIME PRIOR TO LEGALIZATION

Prior to legalization, cannabis was a Schedule II drug under the *Controlled Drug and Substances Act*, SC 1996, c 19. This meant possession, consumption, production and distribution of cannabis was illegal in Canada, unless authorized for medical purposes. Formerly, if an employee was smoking cannabis recreationally and attending work, they were not only breaching their implied and statutory obligations to attend work fit for duty, they were also breaking the law. While an employee using cannabis after legalization will no longer be breaking the law, the requirement to be safe and fit for work remains, meaning a disciplinary response is appropriate.

For employees using cannabis pursuant to an authorization from their physician, a different approach may be required. Pursuant to the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230, persons in possession of a valid medical document authorizing the use of cannabis are entitled to grow, possess, and consume cannabis for a period of time defined by their physician. This authorization does not include a right to consume cannabis at work or to attend work impaired, but

it may engage an employer's obligations under human rights legislation.

When faced with an employee who claims a right to smoke cannabis for medical purposes, it is important for employers to obtain a copy of the employee's medical document. With the proliferation of cannabis dispensaries that sell cannabis under the guise of medical use, but without proper authorization, employers are likely to encounter employees claiming their use is medicinal, when in fact it is not authorized as such.

A valid medical document authorizing the use of cannabis will set out the daily quantity of use (in effect, the daily prescription) along with the period for which the individual is authorized to possess and consume cannabis medicinally (authorizations can be no longer than 1 year). The fact that illegal dispensaries appear willing to dispense cannabis to persons with expired authorizations highlights the need for a diligent investigation. This is true especially of an employee's claimed right to use cannabis at work if it affects their fitness for duty.

The same analysis that applies to accommodate the use of other prescription drugs, and other medical conditions, applies to the use of (authorized) medical cannabis. Accordingly, where an employee presents a valid authorizing document, employers will need to engage in a diligent investigation of whether the employee's use can be accommodated under human rights law.

Another issue employers must be alive to is the growing belief that medical cannabis is non-impairing because it is high in Cannabidiol ("CBD"). CBD is one of approximately 100 cannabinoids in the cannabis plant. The most famous cannabinoid is Tetrahydrocannabinol ("THC"). CBD is not known to impair (unlike THC), but the notion that medical cannabis is non-impairing is simply wrong. The *Access to Cannabis for Medical Purposes Regulation* does not require a physician to prescribe a particular strain of cannabis, or to define the percentage of CBD versus THC. All a physician is required to do is to state the quantity of the plant in grams. A review of the products for sale on licensed medical producers websites will show you that the vast majority of medical cannabis products for sale

through licensed medical producers is greater than 5% THC, and in many cases, closer to 20% THC. For context, the average THC content of cannabis seized in the 1980's was 3%. We don't buy the argument that cannabis was non-impairing in the 1980's, and as an employer you shouldn't either. Accordingly, until an employee's medical professionals can prove otherwise, employers should proceed on the basis that medical cannabis causes impairment.

WORKPLACE LAW

Beyond the statutory regime governing the use of cannabis generally, the law has developed workplace specific considerations.

In 2016 for our client conference, we prepared a paper titled "*Up In Smoke? Marijuana and the Workplace*". In that paper we reviewed the state of the law surrounding cannabis use in the workplace at some length. While we assume everyone reading this paper still has their copy of "*Up in Smoke?*" and reviews it regularly, we nevertheless believe it is helpful to recap the state of the law on cannabis use in the workplace.

Drug Testing

An employer's ability to test employees for drug and alcohol usage is generally quite limited in Canada.

The Supreme Court of Canada issued an important decision on the issue of drug and alcohol testing in *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 ("*Irving Pulp & Paper*"). *Irving Pulp & Paper* remains the leading case on drug and alcohol testing generally, and random testing, specifically. In *Irving Pulp & Paper*, the Supreme Court confirmed the law that had developed through arbitration, which balances the employer's interest in safety against the employee's interest in privacy, and allows a form of testing where the balance of interest in safety outweighs the individual's privacy interest. This is to be contrasted with the United States, where safety outweighs privacy in nearly all cases.

Utilizing the balancing of interests approach, the Court determined that where a workplace is deemed to be dangerous, employers may test an

employee who occupies a “safety sensitive position” in three circumstances:

1. where there is “reasonable cause” to believe that the employee is impaired while on duty;
2. where the employee has been directly involved in a workplace accident or near-miss; or
3. where the employee is returning to work after treatment for substance abuse.

Importantly, we should emphasize that only employees occupying safety sensitive positions within a dangerous workplace may be subject to testing. The fact that a workplace is “dangerous” will not alone justify testing of all employees in that workplace. Accordingly, the scope of permissible testing is quite limited.

In regard to non-safety sensitive positions, there have been no cases since *Irving Pulp & Paper* to provide guidance on testing employees in, for example “decision critical” positions or where impairment could harm the employer’s interests. However, given the Supreme Courts use of the balancing of interests approach, it is difficult to see how a non-safety sensitive position could be subject to testing, when the counterweight to privacy – safety – is not at issue. Employers should proceed cautiously in this regard.

Random drug and alcohol testing is permissible in Canada only in very limited circumstances. Random testing may be implemented where the employer and the union negotiated such testing into their collective agreement. Otherwise, the only other circumstance in which random testing is permissible is where the employer can establish that a) the employee to be tested holds a safety sensitive position and b) that there is a general problem with drug and alcohol use in the workplace. This is a high burden for the employer to meet.

We anticipate the law in this area will continue to develop and that employers will receive more guidance on when it is appropriate to conduct random testing as cases work their way through courts and arbitrations.

Impairment

One of the most significant issues facing employers is trying to prove that an employee is impaired by cannabis at the workplace. Currently, there is no effective test for present impairment from cannabis usage. Testing can confirm whether cannabis is present in a worker’s system, or whether it was used recently, but cannot establish that the worker was impaired at the workplace. Fortunately, the law appears to be developing in a manner that is favourable to employers. Decisions to date have minimized the significance of impairment where an employer can establish that an employee used cannabis during the workday.

One such decision was the arbitral decision in *Vancouver Shipyards Co Ltd v CMAW Marine and Shipbuilders Local Union 506*, unreported decision dated October 28, 2015 (Foley) (“*Vancouver Shipyards*”). The facts were as follows: two union employees went out for a drive during their lunch break. An off-duty police officer riding his bike observed cannabis smoke emanating from the vehicle. He drove alongside the driver side of the vehicle and observed the driver holding a joint. The driver blew smoke into the officer’s face before driving away. The officer followed the vehicle and found it parked in the employer’s parking lot and notified the employer.

The two employees admitted to having been in the vehicle but denied smoking cannabis. They claimed to have only smoked a cigarette. The employer ultimately concluded that the officer was a credible, uninterested witness and terminated the employment of both employees for breach of the employer’s substance use policy. The driver was a 28-year employee and the passenger an eight year employee, both with unblemished discipline records.

At the arbitration, the only evidence that the two employees had even smoked cannabis was the police officer’s testimony. Fortunately for the employer, this was sufficient to uphold the terminations. The arbitrator found the officer (who happened to be an off-duty member of the drug squad!) to be a credible witness. The fact that cannabis smoke was emanating from the vehicle

was sufficient for the arbitrator to conclude that the two employees were smoking cannabis in the vehicle.

Importantly, the employer did not need to prove impairment to uphold the terminations. The arbitrator concluded that it was sufficient that the employees had smoked cannabis during their break. The employer did not need to establish that the employees were impaired when they returned to work.

This decision highlights the fact that a positive drug test is not a pre-requisite for termination. Rather, because a positive drug test does not prove present impairment, it merely operates as circumstantial evidence to support more compelling evidence.

This decision follows a line of cases indicating that employers will not be required to tolerate the self-assessment of impairment, as the consequences of a failure to properly self-assess, could be tragic. It also accords with the medical evidence showing that the use of cannabis diminishes an individual's ability to gauge their own impairment level, much like alcohol.

RECENT CASES ADDRESSING AUTHORIZATIONS

To date, there has been minimal litigation surrounding the mechanics of accommodating medical cannabis use in the workplace.

In *"Up in Smoke?"*, we discussed the BC Human Rights Tribunal decision in *French v Selkin Logging*, 2015 BCHRT 101 (*"Selkin Logging"*). *Selkin Logging* continues to be a key decision regarding the accommodation of medical cannabis use.

In *Selkin Logging*, the complainant was dismissed from his employment as an equipment operator in a logging operation after his employer discovered that he was regularly smoking cannabis at work. The complainant's evidence was that he had battled cancer and used cannabis to manage his pain. However, the complainant did not have a prescription for cannabis use and was not authorized by Health Canada to possess cannabis.

Even though the complainant lacked a proper authorization, the Tribunal nevertheless concluded that the employer had discriminated against him. The complainant had established a *prima facie* case of discrimination. There was a clear nexus between his disability (for which he used cannabis to treat pain) and his dismissal.

However, the Tribunal found that the complainant breached his obligations under the accommodation process by failing to possess a valid prescription or authorization. Specifically, the Tribunal found that the complainant was obliged to inform the employer he was smoking cannabis in compliance with the law, while maintaining personal compliance with Regulation 4.20 of the *Occupational Health and Safety Regulation*, BC Reg. 296/197 (providing that a person must not enter or remain at a workplace while their ability to work is affected by alcohol, a drug, or other substance). This point is critical because it suggests that cannabis use which is not prescribed by a professional need not be accommodated – it is in effect, simply recreational use.

Of course this is not a general rule and every request for accommodation must be assessed on its unique facts. Based on this decision however, there is likely to be a strong presumption in favour of undue hardship being met where the use is not authorized by a medical professional. In all cases, employers should gather as much information as possible from the employee, the union (if applicable), and from the employee's physician to ensure that the individual circumstances of the employee are considered and accommodation is investigated. Regardless of whether accommodation is possible or not, a failure to investigate could lead to a finding of discrimination.

The need to investigate is highlighted in a more recent decision of the Tribunal, *Brown v Bechtel Canada*, 2016 BCHRT 170. In that case, the company brought an application to dismiss the complaint of a construction worker who alleged his employment was terminated for use of medical cannabis to treat chronic back pain. The company did not dispute the fact that it had terminated the worker's employment for cannabis use, but argued it was unaware the worker's use of cannabis was pursuant to a valid

authorization to possess. The worker alleged he had provided the authorization to possess to a third-party conducting pre-employment drug testing, as well as to his supervisor who had observed the worker smoking cannabis on the job site.

Rejecting the company's submission, the Tribunal held the company had failed to establish the worker had no reasonable prospect of proving he had disclosed sufficient information to trigger the company's duty to inquire as to whether the use of cannabis was related to a disability. This decision suggests that employers need to ensure an employee's cannabis use is promptly communicated from front line supervisors to human resources so that the use can be properly investigated to determine whether there is a need to make further inquiries.

Recently, an important decision out of Newfoundland – *Lower Churchill Transmission Construction Employers' Association Inc and the International Brotherhood of Electrical Workers, Local Union 1620*, April 30, 2018 (Roil) – considered whether an employer had to accommodate a job applicant's medically authorized cannabis use where the only positions available for that applicant were safety sensitive. In finding that the applicant's use of cannabis the night before attending work could not be accommodated without undue hardship, the arbitrator stated:

The Employer did not place the Grievor in employment at the Project because of the Grievor's authorized use of medical cannabis as directed by his physician. This use created a risk of the Grievor's impairment on the jobsite. The Employer was unable to readily measure impairment from cannabis, based on currently available technology and resources. Consequently, the inability to measure and manage that risk of harm constitutes undue hardship for the Employer.

In addition, the arbitrator made other critical findings that will be of assistance to employers, including that general practitioner physician's do not have the expertise to determine the impact of cannabis use on workplace safety. The arbitrator also relied on Regulation 28(2) under the *Occupational Health and Safety Act* of Newfoundland, which is equivalent to BC's

Occupational Health and Safety Regulation, section 4.20. While a great case for employers, the law in this area is still developing and should be watched carefully.

- Where an employee provides a valid document authorizing the consumption of cannabis and establishes that the use is linked to a disability, employers should investigate the following:
- Have other forms of medicine with less impairing effects been considered?
- What is the frequency, form, and dosage that is required (i.e., can it be consumed outside working hours)?
- Can the employee's shift length or start and finish times be adjusted to address concerns about impairment at work?
- Is the employee's position safety sensitive and if so, is there another position the employee can safely perform?

While this list is not exhaustive, it does provide a starting point for consideration. Ultimately each workplace will present different considerations based in part on the position performed by the employee and the size of the employer.

These considerations will remain the same under legalization. Where cannabis is being consumed pursuant to a valid prescription or authorization, or where its use is in itself a disability, legalization will neither change an employer's duty to accommodate where appropriate, nor its duty to prevent employees from attending work while impaired by drugs.

Game Changer Or Business As Usual

High employees mean higher costs when marijuana legalized, oil and gas CEOs warn¹

Employers anxious about marijuana in the workplace²

Canadas legalization of marijuana will be a national disaster³

If the above headlines are to be believed, employers face truly challenging times ahead. Fortunately, these headlines are based in large part on a perception that legalization will lead to higher rates of consumption and on the failure to appreciate the distinction between cannabis that is smoked recreationally and cannabis that is smoked medicinally. As we discuss below, we do not view legalization of cannabis as a game changer. Interestingly, it could in fact provide benefits to employers.

THE STATUTORY CHANGES

As discussed above, the *Cannabis Act* will take effect October 17, 2018, and will provide legal access to cannabis with regulation on its production, distribution, and sale. Specifically, the *Cannabis Act* does the following:

- Restricts youth access to cannabis and restricts promoting cannabis to youth;
- Imposes criminal penalties for importing, exporting, or providing cannabis to youth;
- Establishes product safety and quality requirements;
- Provides for the legal production of cannabis to reduce illegal activities;

¹ CP24 Toronto's Breaking News-May 1, 2017 <http://www.cp24.com/news/high-employees-mean-higher-costs-when-marijuana-legalized-oil-and-gas-ceos-warn-1.3392100>

² <http://www.rcinet.ca/en/2017/04/21/employers-anxious-about-marijuana-in-the-workplace/>

³ <http://montrealgazette.com/opinion/opinion-canadas-legalization-of-marijuana-will-be-a-national-disaster>

- Allows adults to produce, possess, and access regulated, quality controlled cannabis; and
- Seeks to enhance public awareness of the health risks associated with cannabis.

Importantly, the *Cannabis Act* does not legalize the possession, consumption, production, or distribution of edible forms of cannabis. Legalization of edibles is expected sometime in 2019. In addition, the current program for accessing medical cannabis, described above, will continue under the *Cannabis Act*.

In addition to the above, the passing of the *Cannabis Act* paved the way for each province to regulate the sale and distribution of cannabis, and to place further restrictions on possession and consumption. In British Columbia, the *Cannabis Control and Licensing Act*, SBC 2018, c 29, was assented to on May 31, 2018 and will come into force on October 17, 2018. Among other things, the *Cannabis Control and Licensing Act* provides for a minimum age of 19, sets a personal possession limit of 30 grams, limits use in accordance with smoking regulations in the province, and provides for a distribution and sale model that mirrors alcohol. Critical for schools and the health sector, the Act provides that cannabis cannot be consumed on, or a prescribed distance from, school or health board property.

WHAT TO EXPECT

As we stated in "*Up in Smoke?*", a poll by Forum Research conducted in the fall of 2015 found 20% of Canadians had smoked cannabis in the previous year, and that more than 30% said they would smoke cannabis the following year if it were legalized.⁴ As previous election results and the Brexit vote have highlighted, polls are not always as accurate as we would like. However, the Forum Research poll taps into a fear of many employers: that there are many Canadians who choose not to smoke cannabis simply because of its legality.

We recognize that impairment in the workplace rightly remains a concern for employers. However, we are going to "go out on a limb" and suggest that

⁴ <http://www.cbc.ca/news/business/marijuana-pot-poll-survey-1.3312151>

the person who did not want to smoke cannabis because it was illegal, is not the person who is going to smoke cannabis and show up to work impaired simply because it is legal.

Fortunately, the experiences of jurisdictions that have legalized or decriminalized recreational use of cannabis suggest that fears over increased consumption rates may be overblown.

Following a successful popular initiative ballot in November 2012, Colorado legalized the recreational use of cannabis in January 2014. Officials in Colorado anticipated that this would lead to higher rates of use among both adults and youth, but this has not been borne out. Rather, according to Dr. Larry Wolk, Chief Medical Officer at Colorado's Department of Public Health and Environment, there has been no increase to date among either youth or adults. Specifically, Dr. Wolk stated the following:

What it looks like is folks who may have been using illicitly before are using legally now and teens or youth that were using illicitly before, it's still the same rate of illicit use...⁵

The experience in Portugal, which decriminalized all drugs in July 2001, is similar. In 2001, approximately 7.6% of 15 to 64 year olds had ever tried cannabis, 3.3% had used cannabis in the previous 12 months, and 2.4% had used cannabis in the previous month.⁶ Six years after decriminalization, in 2007, the numbers rose to 11.7%, 3.6% and 2.4% respectively. However, in 2012 while the number of people who had ever tried cannabis remained elevated above pre-decriminalization rates, at 9.4%, the recent use rates dropped below pre-decriminalization levels to 2.7% who had used cannabis in the prior 12 month and 1.7% in the prior month.⁷ Thus while there was an initial uptick in people trying cannabis, the percentages of people who were using the drug fairly regularly declined over time.

While the experiences in Colorado and Portugal are by no means determinative of what we should expect Canada's experience to be, they do suggest that legalization may not materially increase

⁵ <http://thechronicleherald.ca/canada/1464666-five-myths-about-marijuana-legalization-debunked-by-colorados-experience>

⁶ <http://www.emcdda.europa.eu/stats08/gps>

⁷ <http://www.emcdda.europa.eu/countries/Portugal>

consumption. This is not to suggest that cannabis does not present a hazard in the workplace or that employers do not face challenges in ensuring employees are fit for duty. It does, and you do. It is simply to say that those are challenges employers have faced for years and legalization is unlikely to demonstrably exacerbate those challenges.

With that said, while the experiences elsewhere suggest there may not be a significant increase in recreational use, medicinal use of cannabis in this country has been increasing significantly in the last 3-5 years, and the likelihood that you will be faced with an employee seeking accommodation of their medical use of cannabis is likely to rise.

OPPORTUNITIES?

As discussed above, the *Cannabis Act* will take effect October 17, 2018, and will provide legal access to cannabis with regulation on its production, distribution, and sale. Specifically, the *Cannabis Act* does the following:

While there is no question that there are significant costs associated with drug use in the workplace, the increased acceptance of medicinal cannabis that is likely to coincide with legalization has the potential to create opportunities for employers. One such opportunity is reduced medical costs. The American experience suggests that different drugs may impact such costs in different ways. Between 2010 and 2013, economists W. David Bradford and Ashley C. Bradford looked at prescriptions filled by Medicare enrollees. Their report, which was published in the journal *Health Affairs*, found that national overall reductions in Medicare program and enrollee spending when states implemented medical cannabis laws were estimated to be \$165.2 million in 2013.⁸ Specifically addressing the savings, the authors stated:

At a time when Medicare is under increased fiscal pressure, our research suggests that more widespread state approval of medical marijuana could provide modest budgetary relief...⁹

The study also found that in states where cannabis

⁸ *Health Aff* July 2016 vol. 35 no. 7 (<http://content.healthaffairs.org/content/35/7/1230>)

⁹ *Ibid.*

was legal, doctors prescribed an average of 1,826 fewer doses of painkillers per year.¹⁰

At least one employer in Canada has embraced the use of cannabis in their benefit plan. In March of 2017, Loblaws began covering medical cannabis used to treat the symptoms of multiple sclerosis and the side-effects of chemotherapy.¹¹ While it is unclear whether Loblaws initiated the coverage anticipating savings or not, it nevertheless highlights a growing acceptance of cannabis as a medicine, as opposed to a harmful street drug.

This growing acceptance of cannabis as a legitimate form of medication is highlighted in the recent decision of the Nova Scotia Human Rights Board of Inquiry, *Skinner v Board of Trustees of the Canadian Elevator Industry Welfare Trust Fund*, 2017 CanLII 3240 (NS HRC). In that case, the complainant suffered injuries arising from a motor vehicle accident while he was working. He eventually began using medical cannabis covered by his vehicle insurance plan, but later sought coverage from the trustees of the welfare plan after his motor vehicle insurance coverage reached its limit. The Board of Inquiry found that the complainant was discriminated against when he was denied coverage for medical cannabis by the trustees responsible for making decisions under his benefit plan. Specifically, the Board of Inquiry found that the complainant established a *prima facie* case of discrimination because he was denied coverage of the drug his physician had prescribed after all conventional pain medications had been tried without success. The complaint was upheld after the trustees were unable to provide evidence of the impact extending coverage to the complainant would have had on the plan.

While this decision is a cautionary tale, it does not require that all benefit plans include coverage for medical cannabis. What it does, is highlight the need for the denial of coverage to be based on evidence that the extension of coverage would impact the premiums of beneficiaries, the financial stability of the plan, or some other critical component of the plan.

10 <http://time.com/4419003/can-medical-marijuana-help-end-the-opioid-epidemic/>

11 <http://www.cbc.ca/news/business/loblaw-shoppers-medical-marijuana-coverage-1.4054864>

Supporting the positive effects of medicinal cannabis use as an alternative to other drugs, early scientific research suggests cannabis may assist in the treatment of opioid addiction.¹² In a study published in the journal of *Addiction Biology* in 2012,¹³ the authors stated the following about their findings:

Our results suggest that cannabidiol interferes with brain reward mechanisms responsible for the expression of the acute reinforcing properties of opioids, thus indicating that cannabidiol may be clinically useful in attenuating the rewarding effects of opioids...¹⁴

Given the highly addictive nature of opioids, the use of cannabis as an alternative to opioid prescription has the potential to return workers to the workplace that might otherwise suffer addiction and be incapable of returning. It is also possible that the use of cannabis over opioids, or to treat opioid addiction, could return healthier workers to the workplace reducing the dangerous impacts of addiction on safety in the workplace.

This is important for employers in British Columbia because it has the potential to reduce both benefit costs and WorkSafeBC premiums. WorkSafeBC is uniquely situated to look at the costs of opioid use amongst workers as they fund such use and receive medical documentation related to injuries and the drugs prescribed to treat them. WorkSafeBC identified the opioid crisis early on when looking at the daily doses of prescription opioids.

Beginning in 1989, WorkSafeBC instituted WorkSafeBC Policy 77.30 which identified it was the Board's responsibility to limit narcotic use, and limited post-injury or post-surgery use of such drugs, to a period of eight weeks unless there were special or extenuating circumstances.¹⁵ In January 2015, the eight week policy was amended to four weeks. In 2008, WorkSafeBC issued Practice Directive #C10-1, which had as one of its purposes, the reduction of opioid addiction and related

12 <http://www.medscape.com/viewarticle/875431> Role for Cannabis in Treatment for Opioid Addiction?

13 <http://onlinelibrary.wiley.com/doi/10.1111/j.1369-1600.2012.00483.x/abstract>

14 <http://www.medscape.com/viewarticle/875431>

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consequences.¹⁶ These initiatives, along with general education for physicians prescribing opioids has led to just over a 50% reduction in opioid daily use amongst injured workers from 2011 to 2016.¹⁷ Given the experience thus far in the United States, if cannabis has the potential to reduce opioid use further, it could have an impact on WorkSafeBC assessments.

With Canadians remaining in the workforce longer, employers may also be interested in research that provides the potential for cannabis to stimulate the brains of older workers. As described in a recent article appearing in *Scientific American*, German researchers testing the cognitive performance of young and elderly mice found that instead of impairing learning and memory as it does in young people, delta 9-tetrahydrocannabinol (or THC – the psychoactive compound in cannabis) appears to reverse age-related declines in the cognitive performance of elderly mice.¹⁸ Specifically, the researchers found that the performance of the elderly mice that received THC improved to the point that their performance resembled that of young, untreated mice.¹⁹

Finally, a significant amount of the dialogue in relation to legalization has centered on the impairing effects of cannabis on driving. Legalization may have the spin off effect of spurring better forms of testing to establish impairment to improve public safety generally, which has the potential to significantly benefit employers and improve safety in the workplace.

Practical Tips And Takeaways

Although we do not anticipate that legalization will significantly change how we approach recreational cannabis use in the workplace, we want to leave you with some practical tips and steps you can take to ensure you are prepared to address these issues:

- Review and update your policies to reflect legal recreational use. Focus on impairment rather than legality or a particular substance (a policy restricting “illicit drug use” may no longer restrict cannabis);
- Train employees on your drug and alcohol policy. Educate them on the effects of use both on them and their coworkers;
- Safety first! Remind employees of their obligation to attend work fit for duty and of the employer’s obligations to ensure the workplace is safe;
- Train employees to recognize impairment and to identify and gather evidence on cannabis use;
- Communicate to your employees that legalization is not a license to show up to work impaired;
- Where an issue arises with respect to an employee using cannabis in the workplace, or attending work after using cannabis, gather all of the evidence before deciding whether a disciplinary approach (recreational) or accommodation (medical or pursuant to a substance use disorder) approach is required;
- Anticipate requests for benefits coverage. Consult with your benefits carrier regarding coverage for medicinal cannabis.

¹⁶ Ibid

¹⁷ Ibid

¹⁸ <https://www.scientificamerican.com/article/marijuana-may-boost-rather-than-dull-the-elderly-brain/>

¹⁹ Ibid

Conclusion

Cannabis has the potential to decrease productivity and increase the risk of accidents and death in the workplace. These are significant concerns for employers and it is not our intention to downplay those serious concerns. However, such concerns have existed for years – indeed, many of you have dealt with issues regarding cannabis in your workplace in the past. These are not new issues that will arise because of legalization though the likelihood that you will be faced with this issue in your workplace is likely to increase. Based on the experiences elsewhere, we believe the fear that legalization will significantly impact the workplace is overblown. Through diligence, preparation, and thorough investigation, employers already have the tools to deal with cannabis in the workplace. Legalization does not change that and, if anything, could provide opportunities that improve productivity and health in the workplace.

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