

THE COMMON LAWYER

Marijuana is now legal – Is the sky going to fall?



By Justin M. Jakubiak and Sheryl Johnson

This article is being completed in the final days before the legalization of recreational marijuana. On October 17, 2018 Bill C-45, *the Cannabis Act*, and its regulations took effect.

BUSINESS OWNERS ACROSS CANADA are discussing, and in some cases fretting

over, the legalization of marijuana and what it means to their business. As with most changes in the law, preparation is key. My clients and I have been working with my law Partner, Sheryl Johnson, to update internal policies and to ensure preparedness for the legislative changes.

Under the *Cannabis Act*, Canadians are entitled to possess and share up to 30 grams of legal dried marijuana. What does this mean to employers, particularly car dealerships and other employers in the auto industry who have employees frequently driving vehicles (and their customers' vehicles) throughout a workday? Should the legalization of marijuana be causing you to lose sleep at night?

Various studies concerning the legalization of marijuana in the American States of Colorado, Washington and Oregon to assess whether rising marijuana use is causing an increase in car accidents provide some insight into the issues we may

see in Canada. One such study was conducted by the Insurance Institute for Highway Safety (IIHS) to analyze insurance claims for automotive collisions filed between January 2012 and October 2016 in states that had recently legalized marijuana, versus claims in similar neighbouring states that hadn't.

The IIHS researchers found that during this timeframe, collision claim frequencies in the states that had legalized marijuana were about 3 percent higher.

Another study published in the American Journal of Public Health (AJPH) found: (i) no increase in car accident fatalities in Colorado and Washington after legalization occurred, relative to similar states, based on its analysis of federal data on fatal car accidents from 2009 to 2015; and (ii) no significant association between recreational marijuana legalization in Washington and Colorado and



subsequent changes in car accident fatality rates in the first 3 years after recreational marijuana legalization.

A third study by the U.S. National Institute on Drug Abuse agency cautioned that directly linking marijuana with car accidents can be difficult because marijuana is often used while drinking alcohol, which alters statistical results. In short, there is no clear evidence which has established that the legalization of recreational marijuana in and of itself will lead to more collisions.

What does legalisation mean to employers? Do employers need to reinvent the wheel when it comes to workplace rules, policies and procedures?

The clear answer is "no". The same rules generally apply and will apply post-October 17, 2018 as they always have in relation to intoxicants in the workplace. That is, nothing has really changed concerning workplace intoxication. That being said, societal norms driving such changes have.

What hasn't changed:

- Employers are still entitled to expect that their employees will not be intoxicated on the job. To this end employers can still prohibit the use of intoxicants at work (i.e., alcohol, prescription medications, marijuana and all other intoxicants) that could pose a hazard or undermine an employee's ability to meet or maintain acceptable performance standards. The right to use marijuana will never override the right to maintain a safe workplace environment.
- Employers as a general rule are still prohibited from pre-employment testing or screening of applicants for drug or alcohol use or impairment.
- Zero-tolerance policies as a general rule still violate employees' human rights as sobriety will not likely be provable as a genuine occupational requirement for most positions; and to improperly make



it one could result in a breach of an employer's duty to accommodate.

- Smoking in the workplace is still prohibited. Smoke-free laws apply to smoking marijuana in the same way they do to smoking regular cigarettes, whether the marijuana is prescribed or recreational.
- Smoking marijuana where tobacco smoking is not permitted is still illegal.
- Drug and alcohol testing during the employment relationship that has no demonstrated relationship to job safety and performance still violates employees' privacy and human rights.
- Random testing for any kind of impairment during employment is prohibited except on a case-by-case basis where reasonable cause is established.
- There are still a very limited number of fact specific circumstances where reasonable cause can be established to permit an employer to engage in drug testing and/or to discipline an employee for impairment at work.

These include where there is a health and safety concern and the employee works in a safety sensitive position, upon an employee's return to work after a substantial absence due to an addiction problem where the employee poses a potential danger to themselves or their co-workers if intoxicated at work, and where the employer has reasonable grounds to believe that the

employee is intoxicated at work and poses a potential danger to themselves, their co-workers or others.

"Smoking marijuana where tobacco is not permitted is still illegal."

Reasonable cause in such circumstances may be gleaned from physical indicators such as slurred speech, erratic or abnormal behavior, blood-shot or watery eyes, identifiable odours, a deterioration in judgment, attention, concentration, comprehension or reaction time, drowsiness, a loss of motor co-ordination or control, and/or involvement in a serious workplace accident or "near-miss" incident.

The difficulty is there is no consensus on the signs or indicators of marijuana impairment.

What needs to change:

Workplace rules, policies and programs should be updated to ensure that employers are in line with the latest legislated changes as well as the evolving societal norms that are driving them.

The latter is important to take into consideration where an employer wishes to attract and retain valuable employees. Particularly, employers should:

- Not implement workplace policies that equate use with abuse. While recreational use of marijuana is not

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protected under Canadian human rights legislation as it does not constitute a disability, assumed abuse, addiction or treating recreational drug and alcohol use as a perceived disability that impairs employees' ability to perform their essential duties will expose employers to liability where previously there was none.

- Update anti-intoxicant policies to include a definition of "impairment" that covers marijuana use and that establishes clear expectations on: (i) what and where is acceptable and unacceptable use of intoxicants; (ii) the consequences for noncompliance; and (iii) the duty on employees to: (a) disclose any use of an intoxicant in the workplace; and (b) provide supporting medical documentation confirming need to take prescription medication that may cause impairment while at work. Such expectations should be reflected in the employer's workplace policies and complaint procedures.
- Update health and safety policies and related training so that supervisors and co-workers are trained on identifying behavioural symptoms of both: (i) problematic use and dependence on marijuana; and (ii) intoxication, in order to prevent health issues as well as workplace accidents.
- Continue to make it clear that they continue to have the right to: (i) take

every reasonable precaution to ensure the safety of their workplaces; and (ii) prohibit impairment on the job, including by applying progressive discipline up to termination for just cause without notice or payment in lieu, subject to accommodation considerations on such grounds as breaches of employer policies, the *Cannabis Act* and its regulations, the *Smoke Free Ontario Act* and the *Occupational Health and Safety Act*.

- Update codes of conduct and expense policies as to whether limited use of recreational marijuana is permissible and/or reimbursable if consumed during work-related social events or networking functions.
- Update smoking policies to underscore that just because recreational marijuana is legal this doesn't suddenly

permit workers to smoke marijuana or tobacco in the workplace or otherwise in public in violation of the *Smoke Free Ontario Act* or Ontario's regulations under the *Cannabis Act*.

Employers will also need to consider whether it is appropriate to update their health benefits and wellness plans to cover medical marijuana to align with current employee and societal expectations.

To date, many benefit plans do not cover prescription marijuana.

Additionally, where the organization is one with high risk factors for alcohol and drug addictions, employers should assess its benefits coverage to consider including rehabilitation programs, employee assistance programs and other wellness and support programs.

In conclusion, the coming year will require dealers throughout Canada to take time to understand the legislated changes and the societal norms driving them - along with their workplace implications.

Working with your HR and legal advisors will assist your dealership and staff in staying on top of the latest trends impacting the workplace environment and its overall safety and comfort. ■

