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MEDICAL MARIHUANA IN THE WORKPLACE

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I. INTRODUCTION

An increasing amount of people are being prescribed medical marihuana to deal with various medical conditions and disabilities. Given the evolving laws and attitudes towards the use of marihuana for both medicinal and recreational purposes, there is an increasing volume of decisions from both labour arbitrators and human rights tribunals in respect of the use of medical marihuana by employees.

Until recently, marihuana was an illegal substance and its use was prohibited in most workplace drug and alcohol policies. The main concern for employers is ensuring that employees are not impaired at work and that they can perform their job duties safely. Two issues will need to be grappled with in the coming years both with respect to the use of medical marihuana and recreational use, assuming marihuana will be legalized and regulated – the impact on drug and alcohol policies and the duty to accommodate.

In this paper, we will summarize the current state of the law with respect to medical marihuana and the legalization of marihuana generally. We will then discuss recent labour arbitrations and human rights tribunal decisions regarding the use of marihuana in the workplace.

II. LEGAL STATUS OF MEDICAL MARIHUANA

Access to medical marihuana is permitted only under the terms and conditions set out in the *Access to Cannabis for Medical Marihuana Purposes Regulations* (*ACMPR*). Under the *ACMPR,* a person may obtain a medical document from a medical practitioner to obtain cannabis, including 'medical marihuana'. This document contains similar information to a prescription, such as the authorized health care practitioner's licence information, the patient's name and date of birth, a period of use of up to one year, and a daily quantity of dried marihuana expressed in grams. The allowable quantity may be listed in grams of dried marihuana, however, a person with such a medical document is not limited to accessing marihuana in this format.

The *ACMPR* also allows for access and use of cannabis oil, which may be used to make other cannabis products, such as skin creams. There are two ways in which a person can access cannabis to fill their prescription: buying marihuana from a licensed producer, or registering with Health Canada to produce, or have someone else produce, a permitted amount of marihuana. Any individual registered to produce a limited amount of marihuana for themselves may not sell, provide or give marihuana to another person.

III. LEGAL STATUS OF NON-MEDICAL MARIHUANA

Recreational use of marihuana is prohibited, however, in its December 2015 Speech from the Throne, the Government of Canada reaffirmed its commitment to "legalize, regulate, and restrict access to marihuana". A commitment was made to create a new system of strict marihuana sales and distribution, with appropriate federal and provincial sales taxes applied, as well as to punish more severely those who provide marihuana to minors, those who operate a motor vehicle while under its influence, and those who sell it outside of the new regulatory framework.[1]

The federal government has announced that new legislation on the legalization and regulation of access to marihuana will be introduced in the spring of 2017. This is an issue that has generated significant public attention and the federal government is proceeding cautiously. Official details on what this proposed system will look like have not been released.

Currently, the federal government has established a nine-member task force (the "Taskforce") to gather recommendations on how to proceed with the legalization and regulation of marihuana. This Taskforce reports to the Ministers of Justice and Attorney General of Canada, the Minister of Public Safety and Emergency Preparedness and the Minister of Health (the Ministers). The panel is expected to report back to the Ministers in November 2016, and the Ministers will then determine when this report is to be released to the public.

The Taskforce has spoken with provincial, territorial and municipal governments, Indigenous people, youth and addiction and health experts on the legalization and regulation of marihuana. The Taskforce's recent public online consultation generated over 30,000 responses between June 30 and Aug 29, 2016. On the issue of impairment, the federal government has committed to ensuring that "those who drive while impaired by drugs, including marihuana, will be subject to stronger laws." [2] The Taskforce is examining ways to improve the ability to detect and prosecute drug impaired driving. No further information on how impairment will be determined is publicly known at this time.

It is also not known whether marihuana will be decriminalized under the new legislation. The federal government has committed only to the legalization of marihuana and not its decriminalization. Further, Michel Picard, the Parliamentary Secretary to the Minister of Public Safety, has stated that decriminalization does not meet any of the government's objectives.[3]

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[1] Task Force on Marihuana Legalization and Regulation, "Terms of Reference" *Government of Canada*. (30 June 2016). Online: http://healthycanadians.gc.ca/task-force-marihuana-groupe-etude/terms-of-reference-mandat-eng.php

[2] Department of Justice, "Changing Marihuana Laws", *Government of Canada*. (30 June 2016). Online: http://www.justice.gc.ca/eng/cj-jp/marihuana/lawc-loic.html Date Last Accessed: 3 November 2016.

[3] Michel Picard, "Legalization of Marihuana" *Michel Picard, MP, Liberal Party* (15 June 2016) Online: https://mpicard.liberal.ca/en/news-nouvelles/legalization-of-marihuana/ Date Last Accessed: 3 November 2016.

Any legislation to decriminalize marihuana is likely to be influenced by the recommendations compiled by the Taskforce.

IV. IMPACT ON THE WORKPLACE

While the changes in the laws regarding marihuana will require changes to drug and alcohol policies, the basic principles regarding impairment in the workplace apply. For example, employees are not permitted to be impaired at work or pose a safety risk to themselves, their co-workers, or the public, regardless of whether they have a prescription for medical marihuana. This will remain the case even if/when recreational use of marihuana is legal. Policies prohibiting the consumption of alcohol in the workplace and during work hours, will apply in the same manner to the use of recreational marihuana once it is legal. Anti-smoking laws apply to smoking marihuana in the same way as regular cigarettes. Any smoking will need to be done in designated smoking areas.

V. DRUG AND ALCOHOL POLICIES

Given that medical marihuana is currently legal and an employer has a duty to accommodate employees with disabilities (which will be discussed further below), employers cannot include a blanket prohibition on use of medical marihuana in their drug and alcohol policies. This includes safety sensitive workplaces. Medical marihuana is being legally prescribed to treat a whole host of medical conditions. Legal use of medical marihuana to treat medical conditions must be treated in a similar manner to other legal prescription drugs that can cause impairment. Therefore, drug and alcohol policies should focus on impairment (no matter the cause) and what it means to be fit for duty.

Employers may be able to require that employees disclose that they use medical marihuana in the same manner as other prescription drugs that cause impairment. Depending on the employee's position, the employer may also be able to request medical information about the amount and type of marihuana that has been prescribed along with the frequency of use. If there are reasonable concerns about impairment, employers may also be able to request confirmation from the doctor that the prescribed marihuana usage does not impair an employee's ability to safely perform their job duties. The more safety-sensitive the workplace or particular job position, the more medical information an employer will be able to justify requesting. For example, local governments will be able to justify the provision of this type of information for those positions that are safety-sensitive (ie, equipment operators).

Drug and alcohol policies should be updated to include guidelines for medical marihuana usage, including the circumstances when an employee should report the use of medical marihuana and the requirement to provide appropriate medical information. The amount of medical information that can be requested will depend on the circumstances and must be assessed on a case by case basis. Policies need to incorporate flexibility and focus on impairment and safety, not the actual use of medical marihuana. For unionized workplaces, we recommend consulting with the Union in regards to any proposed changes to current drug and alcohol policies.

As recreational use of marihuana has been (and is currently) illegal, a stigma remains around its use. Traditionally, recreational use of marihuana in most drug and alcohol policies is lumped together with the prohibition of the use of other illegal and illicit drugs. However, it is also clear that societal and governmental attitudes regarding the recreational use of marihuana have changed and it may only be a matter of time before it is legalized. When that occurs, the legal use of marihuana for recreational purposes will need to be treated in a similar manner to the rules around the consumption of alcohol and impairment.

VI. DUTY TO ACCOMMODATE

Arguably, the most difficult issues will arise with respect to the use of medical marihuana to treat disabilities and the duty to accommodate. This is particularly so in safety-sensitive workplaces. This is because employers have two competing obligations:

- Employers have a duty to accommodate employees with disabilities who have been legally prescribed medical marihuana; and
- Employers have an obligation to make sure its employees can perform their job duties safely.

Under section 13 of the *Human Rights Code*, employers are required to accommodate employees with disabilities. This accommodation can arise in two ways in the workplace:

- An employee is addicted to marihuana, which is a disability in and of itself; and
- An employee is not addicted to marihuana but uses medical marihuana to treat a disability.

The laws with respect to employees who are addicted to marihuana will not necessarily change when it is legalized, as employers already have the duty to accommodate employees addicted to drugs and alcohol.

Therefore, we will focus on an employer's obligation to accommodate employees with disabilities who have a legal prescription for medical marihuana. There are three requirements to trigger a duty to accommodate in this context:

- The employee must have a disability;
- The employee has been legally prescribed marihuana by a doctor in accordance with the above rules and regulations to treat the disability; and
- The employee is using marihuana in accordance with the prescription.

Accommodations for the use of medical marihuana will need to be treated in the same manner as for other employees who have been prescribed medication that could cause impairment. The fact that the prescribed medication is marihuana as opposed to another type of

prescription medication does not change the employer's obligations in the consideration of whether an employee can be accommodated. This is the case even for employees in safety-sensitive positions, though the duty to accommodate may be different than for employees who are not in safety-sensitive positions.

One of the most important considerations in the accommodation of employees who use medical marihuana is to not make decisions based on assumptions about the use of marihuana and its impact on an employee's ability to do their job duties. There is still a stigma around the use of medical marihuana and an employer must be careful to approach the process of accommodation of an employee in the same manner as for other employees with disabilities. The focus should be on whether the use of the medical marihuana impairs the ability of the employee to perform their job duties. If so, the employer will need to consider whether it can accommodate the employee to the point of undue hardship.

Decisions should be based on the nature of the job duties and appropriate medical evidence. At this time, difficult issues arise with respect to accurately assessing impairment of employees who use medical marihuana. If an employer has reasonable concerns that an employee who uses medical marihuana is impaired while at work, or that the use of medical marihuana is negatively affecting the employee's ability to perform their job duties, it is likely that the employer will be able to require the employee to provide further medical information.

An arbitration case involving the City of Calgary is a good example of the issues that arise of accommodating employees with disabilities who use medicinal marihuana.[4] In this case, an employee of the City operated heavy equipment and worked in a safety sensitive position. This employee suffered from a degenerative neck disease that caused chronic pain. The employee's doctor provided the employee with the medical declaration necessary to obtain a medical marihuana permit from Health Canada authorizing him to possess marihuana for a medical purpose.

The employee advised his two supervisors of his medical marihuana use and continued to operate heavy equipment without incident for over a year. After this time, other management personnel became aware of the employee's marihuana use and became concerned. The employee was then removed from his position and placed in a non-safety sensitive position pending the outcome of an investigation and assessment.

The employee ultimately agreed to attend an independent medical examination with an expert on addiction and substance abuse. Unfortunately, this expert was given some mis-information by the City that the employee had regularly used marihuana for 15 years and was not provided with any information from the employee's own doctor. Because of this mis-information, the expert did not provide clear direction to the City about whether the employee could return to work in a safety-sensitive position.

[4] *Calgary v Canadian Union of Public Employees (CUPE 37) (Hanmore Grievance)* , 2015 CanLII 61756 (AB GAA).

The employee's doctor later provided information to the City confirming that the employee had not been a regular user of marihuana, only ingested a few puffs at night for pain control and that the doctor had never witnessed any cognitive impairment by the employee.

A majority of the Arbitration Board determined that the employee was fit to return to his former safety sensitive position because of the flawed investigation by the City, and the fact that no evidence was presented during the arbitration that the employee's use of marihuana for medical purposes had any impact on his ability to perform his safety sensitive duties in a safe manner. As well, there was no evidence the employee had ever exhibited signs of impairment while on duty.

It is important to note, however, that the majority of the Board was mindful of the serious consequences of operating equipment while under the influence of drugs. The majority also confirmed that an employer is entitled to conduct a fair and proper investigation which may require obtaining and considering medical information from an employee's doctor or an independent medical exam. Although the employee was reinstated to his former position, conditions were placed on that including random substance testing and arranging for the reduction of his monthly medical marihuana as recommended by the doctor who performed the independent medical exam.

The Arbitrator in *Lower Churchill Transmission Construction Employers' Association Inc.*, came to a very different conclusion with respect to an employee who was dismissed for just cause because of his usage of medical marihuana on the job site.[5] The employee had a prescription for medical marihuana but did not disclose his usage of marihuana to his employer prior to his employment or during his employment. Instead, he had actively tried to conceal his usage including leaving blank a question on a medical questionnaire of whether he was taking any medications that may have side effects the employer should be aware of. He also concealed the marihuana he brought to the camp and used it outside the camp with the knowledge that there was zero tolerance for drugs at the camp. The employer eventually discovered the employee was using marihuana during his work rotation, contrary to the employer's policies.

The Arbitrator upheld the dismissal of the employee. The Arbitrator determined that the policies relied on by the employer (ie, the drug and alcohol and safety policies) were reasonable and a good faith occupational requirement given the safety sensitive nature of the workplace. Furthermore, the policies did not preclude an accommodation of an employee who has a prescription for medical marihuana. From the perspective of the Arbitrator, the determinative issue in this case was not the failure of the employer to accommodate the employee, rather the employee's failure to disclose his prescription and use to his employer.

[5] *International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Transmission Construction Employers' Assn. Inc. (Uprichard Grievance),* [2016] N.L.L.A.A. No. 5.

The Arbitrator noted that the circumstances were different from that in the above *City of Calgary* case:

> In this case, because the Grievor failed to disclose his medical marihuana use, the Contractor did not have an opportunity to obtain a medical opinion or other expert opinion to assess the issue of what work the Grievor could safely perform. Therefore, the *City of Calgary* case is distinguishable from this case.

Based on the employee's failure to disclose his use of medical marihuana prior to his employment and for possession of marihuana at the work camp, both of which were serious breaches of the employer's policies, the Arbitrator agreed the employer had just cause.

In the past two years, the BC Human Rights Tribunal has also issued decisions in which employees claimed discrimination in relation to the use of medical marihuana. In *French v. Selkin Logging*, an employee was dismissed for smoking marihuana in the workplace.[6] The employee claimed he was discriminated against because his dismissal was for using medical marihuana on the job. The employee was a cancer survivor who gave evidence that he used medical marihuana for pain management and admitted to smoking marihuana at work. Given the safety-sensitive nature of the workplace, this was in prohibition of the employer's zero tolerance policy regarding marihuana usage in the workplace.

The complaint was dismissed, in part, because the employee was not prescribed medical marihuana by his doctors. As the Tribunal noted at para. 107:

> Mr. French was not told by his doctors to smoke marihuana, nor was he prescribed it. He did not smoke marihuana because of "doctor's orders", nor did he have authorization to possess marihuana for medical reasons. His physicians, in their role as health-care providers, simply condoned his using marihuana for pain if it works. There is no evidence that any doctor condoned his smoking marihuana at work – particularly at a job as an equipment operator in the logging industry.

As of the date of the hearing, the employee still did not have the legal authorization permitting him to lawfully use medical marihuana. The Tribunal did conclude that the employee was able to establish a *prima facie* case of discrimination because he was disabled, used marihuana to manage pain resulting from his disability, and was expressly terminated for using marihuana. However, the Tribunal found that the employer was not required to accommodate the employee in circumstances in which the employee was smoking marihuana at work, without legal authorization, and without medical authorization confirming that it was safe for him to do so. The Tribunal further concluded that the application of a zero tolerance policy in respect of

[6] 2015 BCHRT 101.

the use of marihuana was a *bona fide* occupational requirement in the circumstances of this case and that the employer had not breached the *Human Rights Code*.

The Tribunal also found no breach of the *Human Rights Code* in *Burton v. Tugboat Annie's Pub*.[7] In this case, a bartender was dismissed for various performance concerns including being caught smoking marihuana during his shift in violation of the employer's policies. The employee filed a human rights complaint alleging that he smoked medical marihuana to treat a chronic pain condition.

In order to trigger the duty to accommodate, the employer must be aware (or be reasonably aware) of an employee's disability. In this case, the employer was not aware of the employee's disability at the time it made the decision to terminate his employment. Therefore, the duty to accommodate was not triggered and the Tribunal dismissed the complaint.

Most recently, the Tribunal has issued two decisions in which it denied applications to dismiss complaints filed by employers. In *M v. V. Gymnastics Club*, an employee, a coach at a gymnastics club, used medical marihuana to deal with symptoms caused by various medical conditions.[8] The employer began receiving complaints from the employee's co-workers that she was "stoned" at work. The employee was never given details about these complaints. She advised the employer of her use of medical marihuana and stated she did not use it at work and never came to work impaired.

The employee passed probation and continued to perform her job duties without incident. The issue of the complaints of the employee being "stoned" at work were again discussed with the employee at her annual review. Again, the employee was not given specifics about these complaints. The employee gave the employer further details about her medical conditions and her use of medical marihuana.

The employee was then suspended and given a medical questionnaire about her marihuana use for her doctor to fill out. After receiving the requested information from the employee's doctor, the employer refused to allow the employee to return to work if she continued to use medical marihuana. The Tribunal concluded that the information provided by the employee's doctor did not appear to suggest that the employee's work was compromised by her use of medical marihuana.

The employer had filed an application to dismiss the complaint on the basis it had no reasonable prospect of success. The Tribunal denied this preliminary application as the employer had not provided any evidence that it had considered whether it could accommodate the employee's disabilities, other than requiring her to completely abstain from using medical marihuana. The employer had also provided no evidence that complete abstention was required. Therefore, the Tribunal concluded that a full hearing on the merits was required.

[7] 2016 BCHRT 78.
[8] *M obo another v. V Gymnastics Club*, 2016 BCHRT 169.

The Tribunal came to the same conclusion with respect to an employer's application to dismiss a complaint in *Brown v. Bechtel Canada*.[9] The employee in this case had chronic pain and a prescription for medical marihuana, which he consumed on a daily basis before bed. The employee was hired to work on the replacement of the Rio Tinto Alcan smelter in Kitimat.

The employee underwent mandatory pre-access drug and alcohol testing with a third party provider and tested negative. The employee also gave evidence that he provided his authorization to possess medical marihuana to this provider and assumed it was reported to his employer. However, the employee did not directly disclose his consumption of medical marihuana to his employer.

During his employment, the employee smoked marihuana in designated smoking areas prior to going to bed, did not hide this use and discussed his prescription with his co-workers. After about a month, the employee was consuming medical marihuana when a crew supervisor approached him and asked what the employee was doing. The employee gave evidence that he produced his identification badge and his authorization to produce and explained he was consuming medical marihuana. His employment was terminated soon after on the grounds of consumption of marihuana at the work camp and failing to discuss it to his employer.

In denying the employer's preliminary application to dismiss, the Tribunal noted that the employee was dismissed for reasons related to his use of medical marihuana. Again, the Tribunal concluded that the employer had not provided any evidence that it took steps to accommodate the employee. Therefore, this complaint also required a full hearing on its merits.

VII. CONCLUSION

There is no doubt that the evolving law on the use of marihuana creates new challenges for employers. Employers cannot treat the use of medical marihuana as an illegal or illicit drug. However, employers will not have to drastically change their approach in dealing with these challenges. Employees are required to attend at work not impaired by prescription drugs, except to the extent required by a duty to accommodate.

Employers must recognize that they have a duty to accommodate employees who are legally using medical marihuana in the same way as employees using other legal prescription drugs that can cause impairment. As noted above, local governments also have an obligation to ensure safety in the workplace. It is clear from the above cases that an employer has a duty to accommodate employees who use medical marihuana to treat symptoms related to disabilities, even in safety sensitive positions. This accommodation will need to be considered on a case by case basis. Employers will not be able to solely rely on zero-tolerance policies in disciplining, dismissing, transferring employees from safety-sensitive positions, or otherwise making

[9] *Brown v. Bechtel Canada and another*, 2016 BCHRT 170.

decisions that negatively impact an employee because they are legally using medical marihuana. It is also clear that employees must show that they have a disability and a legal prescription for medical marihuana and must cooperate with the employer in providing appropriate and reasonable medical information.

If an employee is taking medical marihuana and performing safety-sensitive duties, and the local government has concerns that the employee is not safe to perform the duties, we recommend following up with the employee. This can include requesting information from the employee's doctor or an independent medical exam. However, employers must ensure that any investigation of the impact of medical marihuana use on an employee's ability to perform safety-sensitive duties is fair and unbiased. Particularly where the employer takes the position that the employee could not be accommodated in their position, the employer must also show that it seriously explored options for accommodation and that it was reasonable in its assessment of whether it could accommodate an employee.

We will be providing further updates to clients as the law evolves with respect to both medical and recreational use of marihuana.

NOTES