

MARIJUANA AND SAFETY

Presented by
Ryan J. Conlin and Frank B. Portman

STRINGER LLP
MANAGEMENT LAWYERS

Present Overview

- 2001 Canada introduces prescription + license for medical marijuana (2014 only need prescription)
- Health Canada estimated that by 2024, 450,000 Canadians would be using medical marijuana
- Federal Liberals ran on legalization platform. Initially announced July 1, 2018 as target.
 - Currently pushed back for at least a month due to parliamentary procedures

Present Overview

- Historically illegal drug use treated differently
- Employers' experience to date:
 - Medical marijuana and human rights
 - Challenges to OHS testing programs
 - OHS prosecutions in which drugs and alcohol were a factor

Occupational Health and Safety

- Operating equipment
 - If work cannot be done safely, then undue hardship is met
 - No significant case law
 - Unless no other work available, may need to shift positions to accommodate
- Driving company vehicles
 - Fed. Gov't – crackdown on drug impaired driving, including marijuana, as part of legalization push

Occupational Health and Safety

- Straightforward? Not so fast

- Two major issues
 - 1) Testing
 - 2) Accommodation/human rights

Brief History of Testing

- No legislation deals explicitly with workplace drug and alcohol testing
- Courts and arbitrators have historically restricted the right of employers to implement random drug and alcohol testing
- Unions and employees have argued that random drug and alcohol testing violates both the privacy and human rights of employees

Brief History of Drug and Alcohol Testing

- Cannot yet measure “present impairment”, only toxicity levels. THC works differently on the body and mind than alcohol (evidence mounting of physical/cognitive impact long after use)
- Presence of THC/metabolites ~~≠~~ Impairment
“...a quantitative threshold for *per se* laws for THC following cannabis use cannot be scientifically supported” – AAA study, 2016

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Irving SCC Decision

- Irving implemented a policy which included a plan to randomly test 10% of employees in safety-sensitive positions for alcohol each year. No dispute that the workplace is inherently dangerous
- The Union filed a grievance and the arbitrator determined that there were no past incidents which would justify the level of privacy compromised by the random testing

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Irving SCC Decision

- Severe invasion of employee privacy outweighed the “uncertain to minimal” safety benefits gained through random testing
- Failing to consult union a serious breach of the collective agreement
- Just because workplace is highly safety sensitive does not, without evidence of a “demonstrated past problem,” justify random testing

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Suncor Decision

- 224 positive alcohol and drug tests of Suncor employees at the worksites
- 20 fatalities at the impugned worksites, and alcohol or drugs were factors in three of them
- 2,276 security incidents involving alcohol and drugs, including the discovery of devices used to defeat urine drug tests
- 2009-2012: 115 positive tests compared to only five at all of Suncor's other operations in Canada

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Suncor Decision

- Arbitration decision overturned on judicial review.
 - ✓ Pre-access Testing → Random Testing
 - ✓ Test did not measure "present impairment"
 - ✗ Erred in excluding and evaluating evidence of problem
 - ✗ Unreasonably raised *Irving* standard to "serious problem"
 - ✗ Ordered matter returned to arbitration panel
- ABCA (September 2017): "...it is impossible to determine how the majority's unreasonable assessment of the substance abuse evidence may have influenced its other conclusions..." (upholds JR)

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Suncor Decision

- Battle isn't over
 - December 2017 - ABQB issued injunction preventing testing policy from coming into place before new arbitration decision is reached
 - Privacy rights of employees are "as important" as safety concerns
 - Suncor's other testing policies should be sufficient to protect safety concerns until final arbitration is decided

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TTC decision

- "...culture of drug and alcohol use"
- workplace "is literally the City of Toronto"
- Within days, two employees tested positive (drugs/alcohol)
- Injunction denied at ONSC, leave denied at Div. Ct.
- Difference with Suncor?
 - Residual policies?

When Employers Can Test

Employers are generally entitled to test employees in safety sensitive positions where:

- there is reasonable grounds to believe that the employee is impaired on the job
- the employee has been directly involved in a workplace accident or high risk near miss
- employee is returning to work after treatment for substance abuse.

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Pre-Employment Testing

- Pre-employment testing for safety sensitive positions is likely permissible provided that individuals who test positive are not automatically denied employment (*Entrop*)
- Pre-employment screening is very common in Alberta
- The legality of pre-employment screening is an open question after *Irving*

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Non-Union?

- *Irving* decision likely applies to non-union workplaces
- Random drug testing could be challenged by non-union employees at a human rights tribunal or in the context of wrongful dismissal litigation
- Common law right of privacy? Tort?

Medical Marijuana Use – Human Rights Ground?

- Does it engage the human rights code?
- *Skinner v Board of Trustees*, 2017 CanLII 3240 (NS HRC)
 - Benefit plan did not include coverage for medical marijuana
 - If medically necessary, then falls under human rights protection
 - Medically necessary = justified on clinical evidence and consistent with federal regulations
 - If medical marijuana treated differently than other medically necessary drugs, that is discriminatory

Duty to Accommodate

- Only applies where disability, not to purely recreational users – **even after legalization**
- Employers must take all requests for accommodation seriously
- Onus on employee – information and documentation
- “Point of undue hardship” v BFOR

Duty to Accommodate

- What is “undue hardship”?
 - High standard
 - May consider serious financial burden, health and safety risks (ie. second hand smoke, safety sensitive positions), and impact on the viability of the operation
 - Inconvenience to business/customers/staff, or complaints, are not sufficient

Required Accommodation

- Employees are entitled to reasonable accommodation, not the accommodation they want
- Consumption may be policed
 - Edible (non-impact on others) vs smoking
 - *Francisco v Ontario* – HRTO allows breaks but not smoking in hearing
 - Use off-site?
 - Careful about stigmatizing
- Need to get medical info
 - Federal certificate/prescription not sufficient

Stewart v Elk Valley Coal Corporation

- Employee at a mine
- If addicted, treatment offered if disclosed, but if not disclosed and discovered, termination
- Tested positive for cocaine after workplace accident
- Dismissal upheld
 - Failure to disclose addiction was the problem
 - Addiction = compulsion, without compulsion no human rights protection

City of Calgary

- Safety sensitive equipment operator Reported medical marijuana to supervisors
- Worked > 1 year without incident
- No evidence his use away from work impacted performance
- Reinstated with condition that he submit to testing for impairment (not simply presence of toxins)
- Highly unlikely result in Ontario

Looking forward?

- Legalization may lead to more recreational use. But the applicable legal tests and standards continue to apply
- Appropriate mindset → treat in like manner to alcohol use (slight variation because of testing differences)
- Zero tolerance...but...
- *Elk Valley?*

Looking forward?

- Supreme Court has made it clear that privacy trumps OH&S in the absence of a history of problems
- Almost no caselaw re non-safety sensitive positions
- Safety sensitive workplaces should have a compliant testing policy → OH&S due diligence
- Important to remember that drug use was a significant aspect of the recent Metron OH&S criminal prosecution

Beyond Testing

- Don't become completely pre-occupied about the testing issue
- Arbitrators have confirmed the right of employers to remove employees from the workplace who appear impaired
- Debate in the case-law about whether discipline can be imposed without proof of actual impairment

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Beyond Testing

- Consider having a policy which prohibits employees from showing up at work exhibiting signs of intoxication/impairment
- Primary purpose of such a policy must be to meet OH&S due diligence obligations
- Human rights considerations will apply to any action taken/discipline imposed
- Legal advice should be sought in the development and enforcement of the policy

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THANK YOU
