

Addressing the Impacts of Cannabis Legalization on Workplace Safety

Issue

The use of cannabis for recreational purposes became legal across Canada on October 17, 2018 under the *Cannabis Act*. Cannabis edibles, topicals, and extracts became legal on October 17, 2019.

Background

Cannabis is a substance with complicated effects on the body, and legal substances like alcohol do not provide useful comparisons. Testing for alcohol impairment is straightforward—the quantity of alcohol in the bloodstream is a reliable indication of how intoxicated an individual is at the moment of testing. Tetrahydrocannabinol, or THC for short, is the primary psychoactive component of cannabis and can remain in the blood stream of users for days or weeks after the intoxicating effects have worn off.

The limits of testing technology have significant impacts on Canadian workplaces. A breathalyzer can reliably prove current alcohol impairment, but existing cannabis testing techniques cannot. There is no “breathalyzer” equivalent for cannabis, which would provide a clear indication of current intoxication and impairment. A major step in innovation is needed—we recommend accelerated research and development regarding legal impairment limits and roadside testing protocols.

Current Jurisprudence

While the legalization of recreational cannabis is a relatively recent development, Canadians have had legal access to medicinal cannabis for 20 years. As a result, employers are well versed in balancing their duty to protect worker health and safety under applicable occupational health and safety legislation with the duty to accommodate under applicable human rights legislation. This balancing act becomes even more relevant when an employee occupies a safety-sensitive position. The legal framework on workplace impairment policies is shaped by case law, namely *Everitt v. Homewood Health, IBEW Local 1620 v. Lower Churchill Transmission Construction Employers Association*, and *Stewart v. Elk Valley Coal Corp.*

In *Everitt v Homewood Health Inc*, the complainant, Brad Everitt, alleged that the respondent discriminated against him when it refused to register him in the Rapid Site Access Program (RSAP), a voluntary program that provides pre-qualification to workers for access to safety-sensitive workplaces.¹ In Everitt’s situation, he had been a heavy recreational cannabis user for about 25 years and had used cannabis for medical purposes for more than ten of those years to manage pain related to arthritis. He applied to participate in the RSAP administered by Homewood and failed the pre-enrolment test when his test results measured 1,200 nanograms per milliliter for THC when the permissible threshold level was 50 nanograms per milliliter. As a result, Homewood did not permit Everitt to participate in the RSAP. He was still eligible to be dispatched to safety-sensitive worksites but would need to go through the standard pre-access testing protocol. He filed a human rights complaint that he had been denied a

¹ <https://www.canlii.org/en/ab/abhrc/doc/2019/2019ahrc36/2019ahrc36.html>

service customarily available to the public on the basis of a disability. Ultimately, Everitt's complaint was dismissed because Everitt posed an unacceptable safety risk and Homewood could not have accommodated him without incurring undue hardship.

In the 2018 arbitration decision *IBEW Local 1620 v. Lower Churchill Transmission Construction Employers Association*, the grievor, Scott Tizzard, failed a pre-employment drug and alcohol screening test due to a medical cannabis authorization to treat chronic pain arising from Crohn's disease and osteoarthritis.² Tizzard disclosed his medical cannabis use before the testing and to the sample collection technician at the time of testing. The union subsequently grieved when the employer ultimately refused to hire Tizzard for the position, alleging the employer failed to accommodate Tizzard's disability contrary to both the collective agreement and human rights legislation. The arbitration found that there was a lack of reliable resources to allow an employer to accurately, effectively, and practically measure impairment and that the inability to manage risk of harm due to residual impairment in the performance of safety-sensitive duties arising from medical cannabis use created hazard and undue hardship. The arbitration also found that the employer carried out the necessary assessment of accommodation possibilities on the basis of Tizzard's disability; Tizzard's disability required cannabis to effectively treat and there were no non-safety-sensitive positions available. The grievance was therefore dismissed. In its judicial review application, the union argued that the arbitration decision was unreasonable, but the Court disagreed and dismissed the union's application.

In *Stewart v. Elk Valley Coal Corp*, the appellant, Ian Stewart, filed a complaint claiming that his employer discriminated against him on the basis of a physical disability after he was involved in an accident and was subsequently terminated after failing a drug test.³ He admitted to having a crack cocaine addiction after the incident. The workplace policy required that employees disclose any dependency or addiction issues *before* a significant drug-related incident occurred; and if they did, employees would be offered treatment without fear of discipline or reprisal. The policy also stated that employees who did not disclose dependency or addiction issues in accordance with the policy, or sought assistance *after* an accident occurred, could be terminated from their employment if involved in an incident and testing positive for drugs. Stewart attended a training session with respect to the policy and confirmed in writing that he had received and understood the policy. The Supreme Court upheld earlier decisions that an employee was not wrongfully terminated due to his drug addiction but rather terminated due to his breach of a workplace drug policy. The Court relied on the fact that Stewart had the capacity to comply with the company policy.

These cases demonstrate the importance of a workplace drug and alcohol policy that is reasonable, clearly sets out expectations to employees, and is consistently enforced. The Edmonton Chamber strongly encourages adoption of workplace drug and alcohol policies.

The Alberta Chambers of Commerce recommends the Government of Alberta and Canada:

1. Create a standard testing protocol to detect cannabis intoxication and impairment, with legal limits for both traffic safety and workplace safety;
2. Require the adoption of workplace drug and alcohol policies in safety-sensitive workplaces and encourage the adoption of workplace drug and alcohol policies in all workplaces; and

² <https://www.canlii.org/en/nl/nla/doc/2017/2017canlii59779/2017canlii59779.html?resultIndex=1>

³ <https://www.canlii.org/en/ca/scc/doc/2017/2017scc30/2017scc30.html>

3. Ensure the appropriate agencies are sufficiently staffed and resourced by increasing the funding allocated to Health Canada and the Alberta Ministry of Health for the purposes of coordinating, improving, expanding, and extending the reach of public education campaigns and awareness activities which communicate facts about the health and safety effects, risks, and harms associated with cannabis use in an effort to support Canadians in making informed choices.