

A close-up photograph of several vibrant green cannabis leaves with serrated edges, set against a dark, blurred background. The leaves are the central visual element of the top half of the page.

The McMillan Chronicle

Helping your workplace navigate
the legalization of marijuana

The impending legalization of recreational cannabis on October 17, 2018, presents uncharted territory for employers in Canada. Individuals will soon have the ability to buy, use, grow, and possess cannabis. As a result, employers have numerous concerns about what these legislative changes mean for their workplaces.

The McMillan (Chronicle) aims to address these concerns to help your workplace navigate the decriminalization of cannabis.

In addition to being prepared in advance of October 17, 2018, employers should be cognizant of the changing legal landscape and keep apprised of any updates or changes in federal and provincial legislation post-legalization.

SPECIAL REPORT

Topics Covered

Can we implement random drug testing? P2

What about our employees who travel to Canada or the United States for business? P4

If employees are impaired at work, can we terminate them? P6

To what extent must employers accommodate medical marijuana in the workplace? P7

Testing for marijuana: Is it effective? P9

Can we implement random drug testing?



In certain circumstances an individual employee who has an alcohol or drug problem may be tested BUT random testing is not automatic. The courts may permit random testing in dangerous workplaces BUT only when such testing is a proportionate response which considers legitimate safety concerns and privacy issues. Although post-incident testing and testing where there are reasonable grounds to believe an employee is impaired is generally permitted, the courts have not yet ruled that employers can randomly test for marijuana use or other drug and alcohol use.

The current leading authority comes from the Supreme Court of Canada in *Irving Pulp & Paper Ltd.* (“*Irving*”)[1], where the court stated that:

[T]he dangerousness of a workplace – whether described as dangerous, inherently dangerous, or highly safety sensitive – is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of

a general problem with substance abuse in the workplace.

Drug testing an employee, including testing for marijuana use, is dependent on several factors. The Supreme Court of Canada has defined this balancing test in terms of whether there are special safety risks and evidence of a general problem of substance abuse within a workplace. A recent decision of Alberta’s Court of Appeal (“*ABCA*”), *Suncor Energy Inc. v. Unifor Local 707A* considered the ongoing debate between employee privacy and maintaining workplace safety:[2]

Background

In 2012, Suncor Inc. announced the introduction of a random drug and alcohol testing policy at its oil sands sites in northeastern Alberta. Employees at these sites worked 12 hour shifts, and operated some of the largest and most complex mining and industrial equipment in the world (including heavy haul trucks as large as multi-story buildings). All of the sites were located near environmentally sensitive areas and densely populated communities. It was not disputed that accidents at these sites could result in human or environmental disaster.

According to Suncor, the workplace drug and alcohol concerns at these sites were “unparalleled” in Canada. While it had taken extensive measures to address these concerns – including employee education and training, a drug interdiction procedure, and sniffer dogs – these efforts had proved largely ineffective. As such, Suncor asserted random testing of employees in safety-sensitive and executive management positions was necessary.

Unifor, the union which represents more than 3,000 Suncor employees at its sites, alleged there was insufficient evidence of a pervasive problem to justify random testing. Moreover, Unifor complained Suncor’s policy made no distinction between unionized employees, non-union employees and employees of third-party contractors. Consequently, Unifor filed a grievance and referred the matter to a panel of arbitrators.

Lower Level Decisions

The majority of the arbitration panel ruled in favour of Unifor. While the panel agreed that the Suncor sites were dangerous and safety was important, it also opined random testing was not automatically justified in dangerous workplaces. In the majority’s view, Suncor had failed to demonstrate

sufficient safety concerns involving unionized employees specifically to justify random testing. The majority found, Suncor's evidence to be deficient because it concerned the workplace *as a whole*.

Suncor applied to the Alberta Court of Queen's Bench for judicial review of the panel's decision. The Court agreed with Suncor and found that the panel's decision was unreasonable. However, before the matter could be referred back to arbitration, Unifor appealed the Court's decision to the ABCA.

Random Drug & Alcohol Testing: When is it Allowed?

The ABCA's analysis began by looking at the Supreme Court of Canada's decision in *Irving*. In that case, the Supreme Court held a balancing of interests is required to determine whether the rule sought to be

and alcohol use in a dangerous workplace is a question that must be assessed on a case by case basis.

In the present case, the ABCA found, as did the lower Court, that it was unreasonable for the panel to require evidence of safety concerns specific to Suncor's unionized employees. Such a requirement sets the evidentiary bar too high. Even though Suncor's evidence did not distinguish between unionized, non-union, and third-party contractors' employees, it still showed more than 95% of employees who were tested following safety incidents in the workplace had traces of drugs and/or alcohol in their system. Further, there was no evidence to suggest that drug and alcohol use differed in any meaningful way between unionized and non-union employees.

The ABCA dismissed Unifor's appeal and affirmed the lower Court's decision to remit

either a fresh arbitration hearing or a successful application for leave to appeal to the Supreme Court. Unifor's application to the Supreme Court was dismissed on June 14, 2018 with no reasons provided.

It will be up to a fresh arbitration panel to consider the proportionality of the drug and alcohol testing policy in light of the privacy concerns raised by the Union.

What Employers Should Know

Maintaining health and safety in the workplace is of paramount importance. However, random drug and alcohol testing is not automatically justified by the presence of danger in a workplace. Rather, random testing must be a proportional response to evidence of a problem of substance abuse within a workplace generally (as opposed to evidence unique to the workers who will be directly affected).

At present, a "reasonable cause" or a "post-incident" drug testing policy is permissible where there are reasonable grounds to believe the employee is impaired. Conversely, a policy unilaterally imposing random drug testing, without reasonable cause and where there is no broader substance abuse problem in the workplace, is unlikely to survive a challenge.

Therefore employers need to know:

1. Random drug testing is not automatically justified in dangerous workplaces; and
2. Random drug testing must be a proportional response to evidence of a substance abuse problem within a workplace generally and not evidence unique only to the workers who will be directly affected. ■

Random testing must be a proportional response to evidence of a problem of substance abuse within a workplace generally as opposed to evidence unique to the workers who will be directly affected

imposed by the employer is proportionate to the concern it seeks to address.

The ABCA agreed with the panel that a dangerous worksite is not, in itself, enough to justify the imposition of random testing. Whether or not there is a problem with drug

this matter back to arbitration before a new panel of arbitrators.

Following the release of the ABCA decision, Unifor obtained an interim injunction prohibiting Suncor from implementing the drug and alcohol testing policy pending

[1] Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34.

[2] Suncor Energy Inc. v. Unifor Local 707A, 2017 ABCA 313.



What about our employees who travel to Canada or the United States for business?

Employers who require employees to travel to Canada or the United States for business can contribute to smooth border crossings by ensuring their employees understand and comply with their obligations at Canadian and American border crossings.

Don't bring it in! Don't bring it out!

Despite cannabis legalization in Canada, it is and will continue to be illegal for travellers to bring cannabis or any product containing cannabis into Canada. Likewise, although the possession of cannabis is legal in some American states, it is and will continue to be illegal under US federal law. Officers at American border crossings are federal employees, making it illegal to bring cannabis or products containing cannabis into the United States.

This prohibition applies regardless of the amount of cannabis a traveller has with them, whether the traveller holds a medical document authorizing the use of cannabis for medical purposes, and whether the traveller is travelling from or to an area with legalized or decriminalized cannabis.

Travellers who bring cannabis with them into Canada or the United States also have

an obligation to declare it to immigration authorities at the port of entry. The failure to declare cannabis is a further offense. Violation of these import and export laws can result in serious criminal penalties, including fines, arrest, prosecution, imprisonment, and future inadmissibility. In short, don't bring it in and don't bring it out!

Be aware of the risks of personal use!

Both Canadian and American immigration authorities at the ports of entry are required to make assessments about a traveller's admissibility for entry, which includes assessing whether a traveller is criminally inadmissible. Immigration authorities on both sides of the border have broad discretion to question travellers to assess their admissibility. Typically, a traveller who is inadmissible will not be permitted to enter unless they undertake measures to overcome their inadmissibility (which may not be an easy task).

Generally, a traveller is considered to be criminally inadmissible to Canada if the person was convicted of an offence in Canada, or was convicted of an offense outside of Canada that is considered a crime in Canada, or committed an act outside of

Canada that is considered a crime in the country where it occurred and would be punishable under Canadian law.

A traveller is considered to be criminally inadmissible to the United States if the person violated any law or regulation of any state, the federal government, or a foreign country relating to a controlled substance, which includes cannabis and cannabis related products. As in Canada, an actual conviction for a crime is not required for a traveller to be found inadmissible. Admitting to the essential elements of an American crime will render a person criminally inadmissible to the United States even if that conduct is legal in Canada.

Some persons who were previously criminally inadmissible to Canada for reasons related to past or present personal cannabis use may be admissible post legalization. However, Canada will continue to enforce many laws related to cannabis use, possession, production, and sale post legalization. Accordingly, business travellers would be prudent to consult with Canadian immigration lawyers prior to entering Canada about their past or present cannabis-related practices to ensure they are admissible to Canada post legalization and adequately prepared for related port of entry questioning.

At this time, it is uncertain what effect the legalization of cannabis in Canada will have on the approach to admissibility for personal use applied by American immigration authorities. Unless there is a directive from the federal government, travellers' experiences may vary significantly depending on the particular officer responsible for reviewing their status at the port of entry. Business travellers could be asked whether they have

American immigration authorities if they work in Canada's legal cannabis industry or do business with companies engaged in Canada's legal cannabis industry.

At the port of entry, immigration authorities can question business travellers about the purpose of their proposed entry, the business conducted by their employers, and whether the travellers have aided anyone in the

traveler attempts to cross the border in the future. The note may impact that subsequent officer's line of questioning, and ultimate assessment of the traveller's admissibility for entry.

Best practices for cross-border business travellers

Employers whose businesses rely on cross border travel are well advised to consider undertaking the following measures:

- Draft clear employment policies that address requirements around personal cannabis use, possession, and cultivation for employees who must travel internationally on company business;
- Be proactive in ensuring employees are adequately prepared for port of entry questioning, which may include conducting training on port of entry best practices and ensuring employees obtain legal advice in appropriate circumstances;
- Include contractual provisions in employment agreements concerning termination where international travel is a requirement for the position and the employee is found inadmissible to the United States (or another country);
- Conduct training for all employees required to travel for business on the potential consequences of personal cannabis use, possession, cultivation, and conducting cannabis-related business; and
- Stay apprised of the developments in laws related to cannabis and cross border travel and ensure that employees who are required to travel for business are up to date on such developments. ■

Some persons who were previously criminally inadmissible to Canada for reasons related to past or present personal cannabis use may be admissible post legalization.

used cannabis either prior to or following its legalization in Canada. If travellers admit to either, the admission could be used as the basis for a determination that they are inadmissible for entry. While such a determination can be appealed, it will stand for any future crossings unless and until the finding is waived in the appeal process.

Be aware of the risks of employment in the cannabis industry!

Until there is a directive to the contrary from the federal government of the United States, business travellers who do not personally use cannabis or related products may be found criminally inadmissible by

production or sale of cannabis as part of their employment. If asked these questions, the answers given could be viewed by some officers as providing a basis for a finding of inadmissibility.

If business travellers are asked questions by immigration authorities on either side of the border about themselves or their employers that they are not prepared to answer, they can advise the authorities that they are not prepared to answer the questions asked and politely not pursue entry at that time. In those circumstances, no finding of inadmissibility can be made. However the officer may make a note of the event. If a note is made, it is possible that the note will be observed by another officer when the

If employees are impaired at work, can we terminate them?



The short answer is: it depends. On the face of it, an employee who is impaired at work has likely violated their employment contract in some fashion (for example, a requirement to be fit to perform their job duties). Depending on the circumstances, such as the severity of the incident or the nature of the workplace, an employer may have just cause to terminate based on even one instance of impairment. At the same time, employers can face obstacles in these situations, particularly if the employee is prescribed cannabis by a doctor and/or has a disability related to their cannabis use. Each case will turn on its own circumstances.

The law is clear that there is no absolute right to use cannabis at work, even with a prescription. However, the issue gets complicated by a few other key factors. One main consideration is whether the impairment at issue is somehow connected to a disability, which is a protected status under human rights legislation. For example, does the employee have a disability such as chronic pain that they treat with cannabis? Is the person addicted to cannabis? These considerations will impact an employer's duty to accommodate under human rights legislation. (For more

information, see the article titled "To what extent must employers accommodate medical marijuana in the workplace".)

Human rights obligations notwithstanding, decision-makers in termination cases are live to the issues surrounding work-related impairment, specifically in safety-sensitive workplaces. As such, requiring employees to agree to "zero tolerance" policies, or, in the case of addictions, pre-incident addiction disclosure policies, has proven to be an effective way of policing drug use on the worksite. Having these types of policies in place has allowed some decision-makers to refute allegations of discrimination by finding that the employee was terminated for violating a workplace policy, rather than because of a disability. Despite their name, however, "zero tolerance" policies generally should not prescribe automatic termination in the event of a breach. Human rights law still requires that the policy provide some flexibility for the employer to consider requests from employees who require accommodation.

In other words, such policies will still be scrutinized if challenged. The focus will be on whether the duty to accommodate has been discharged appropriately. Safety will

always be a big consideration here. For example, accommodating an employee's disability by allowing them to be impaired at work in a safety-sensitive workplace has been found to cause an employer "undue hardship".

The bottom line: a clear policy on workplace impairment – acknowledged and signed by every employee at the outset – is a must-have for any employer. It sets out parameters and shows that employees knew or ought to have known that their behavior was in violation of the rules. Although disabilities complicate things, such policies have helped employers navigate and control workplace impairment. ■

To what extent must employers accommodate medical marijuana in the workplace?

To the same extent as always: To the point of undue hardship. Although the obligation to address medical marijuana use by employees has added to the scope of concerns faced by Canadian employers, employers' broad obligations have not changed. Employers have long had a duty to accommodate an employee's disability, including the need to use prescribed medications in or around the workplace. The following discussion is intended to help employers better understand how medical marijuana fits in to the broader duty to accommodate.

Is accommodation required?

An employer's first question in assessing the duty to accommodate medical marijuana use is whether the employee seeking or requiring accommodation is disabled. Any individual seeking medical marijuana must obtain a medical certificate from a prescribed medical practitioner, in accordance with the *Access to Cannabis for Medical Purposes* regulation (SOR/2016-230) under the *Controlled Drugs and Substances Act*. Employers should remain mindful, however, to limit requests for medical documentation to only what is needed to accomplish their accommodation needs. Moreover, employers cannot request medical information until accommodation

is sought by the employee. Where in doubt, employers should ask an employee if accommodation is needed and proceed accordingly.

Given all of the focus on recreational marijuana, employers should bear in mind that their duty to accommodate extends only to medical marijuana. There is no obligation to accommodate recreational marijuana use, which should be treated in much the same way as any other non-prescription drug or alcohol.

Extent of the duty: Undue hardship

Once an employer confirms that accommodation is required, the inquiry turns to the extent of the duty to accommodate. Employers must accommodate an employee's disability, and corresponding need for medical marijuana, to the point of undue hardship. Undue hardship, in the medical marijuana context, often means balancing safety interests with obligations to the accommodated employee. Any safety standard (including any zero tolerance policy) must satisfy the following test:

1. The standard must be rationally connected to the performance of the job in question;

2. The standard must be adopted in an honest and good faith belief that it is necessary; and

3. The standard must be reasonably necessary to accomplish the work-related purpose (i.e. keeping at-risk employees safe).

In setting a safety standard, employers are required, therefore, to consider the severity of the safety risk, the probability of an accident, and the employees that are at risk from any medical marijuana use. These considerations arose in *Calgary v. CUPE 37* (2015 CanLii 61756) ("*Hanmore*"), where an employee known to be using medical marijuana caused a safety incident and injured himself. After the accident, the employer transferred the employee to a non-safety sensitive position, which the employee challenged. The arbitrator found that the employer's belief in the need for the transfer was not honest, since there was no evidence suggesting that the employee was dependent on marijuana. Instead, the employee was reinstated in his former position and agreed to lower his marijuana dosage.

Similarly, in *French v. Selkin Logging* (2015 BCHRT 101), a driver was involved in an accident and marijuana was found

in his truck. The driver was a known marijuana user, but did not have a medical certificate. Nevertheless, when the employer demanded that he return to work “drug-free”, it was found to have terminated his employment. The tribunal deemed the termination inappropriate and, instead, required the employee to obtain a medical certificate before returning to work.

the employee’s own doctor testified that he would have prescribed a lower dosage had he known about the employee’s occupation.

What appears to distinguish *Aitchison* from *Hanmore* and *French* is the employee’s lack of good faith. The employer had a known zero tolerance policy, yet the employee did not seek accommodation.

When it comes to accommodating a disability, including one which requires the use of medical marijuana, there will always be cases on the margins. However, employers that understand their duty to accommodate and that take appropriate steps to identify and mitigate workplace risks before an incident arises will be able to substantially reduce the “grey area” associated not just with the emerging issue of marijuana in the workplace, but with their broader duty to accommodate as well. ■

Employers should know that there is no absolute right to use medical marijuana in the workplace

Overall, *Hanmore* and *French* show us that employers must be very careful in balancing safety needs with the accommodation needs of the employee in question. An abrupt reaction, such as moving the employee to a non-safety sensitive position or implementing a “zero tolerance” rule, may not be appropriate.

Despite these cases, however, employers should know that there is no absolute right to use medical marijuana in the workplace. In *Aitchison v. L&L Painting* (2018 HRTO 238), the Human Rights Tribunal of Ontario recently upheld a termination resulting from an employee found using medical marijuana while working as a high-rise painter. Although the employee had a medical certificate, he had not disclosed the certificate to his employer. Moreover,

As a result, employers should bear the following lessons in mind:

1. There is no absolute right to use medical marijuana in or around the workplace – accommodation remains a two-way street;
2. Employers should establish clear policies on both prescription drug use (including medical marijuana) and workplace accommodation; and
3. Employers wishing to limit the potential risks of medical marijuana should make their policies clear and known, including through workplace training where appropriate, thus putting the onus on employees to seek appropriate accommodation.

Testing for Marijuana: Is it effective?



Yes and no. Marijuana impairment can be detected through visible signs and confirmed by a biological test; however, the more useful metric of functional impairment cannot be reliably measured.

Visible signs of marijuana impairment include: fatigue, impaired memory and concentration, general disorientation, spontaneous laughter, dilated pupils, bloodshot eyes, nervousness, impaired motor skills, dry mouth, coughing, nausea, and increased appetite.^{1,2} But these are common symptoms with multiple possible causes and therefore cannot be relied upon as definitive proof of marijuana impairment.

Biological testing is the only way to confirm the presence of tetrahydrocannabinol, or THC – the primary psychoactive compound in marijuana – in an individual's body. Saliva and blood tests are the most accurate testing options and saliva is the best at indicating recent use.^{3,4} Unfortunately, THC remains in the body anywhere from four days to two months after last use,⁵ while typical impairment lasts only 2 – 24 hours.^{6,7} As such, a positive THC test does not necessarily indicate current impairment.⁸

Although reliable functional impairment testing is not yet possible, employers should develop a clear marijuana impairment policy

based on fitness-to-work.⁹ This is consistent with workers' legal obligations to advise their employer if their ability to safely perform work is impaired.¹⁰

Employers should also consider impairment training for supervisory staff, and how to satisfy the need to have reasonable grounds if considering testing. It will be important for supervisors to not rely on stereotypes or personal belief if determining an employee is impaired. ■

¹ Canadian Centre for Occupational Health and Safety, "Workplace Strategies: Risk of Impairment from Cannabis – 2nd edition," January/February 2018, ISBN: 978-0-660-24755-7 [Workplace Strategies].

² Wayne K. Jeffery, BSc, MSc (Pharm), "Marijuana Interpretation: Biological Testing or Psychophysical Testing?" presentation slides [Marijuana Interpretation].

³ Workplace Strategies, supra note 1.

⁴ Marijuana Interpretation, supra note 2.

⁵ Workplace Strategies, supra note 1.

⁶ Workplace Strategies, supra note 1.

⁷ Marijuana Interpretation, supra note 2.

⁸ Canadian Human Rights Commission, "Impaired at Work: a guide to accommodating substance dependence - Frequently Asked Questions." Minister of Public Works and Government Services 2017. Retrieved from:

<http://www.chrc-ccdp.gc.ca/eng/content/impaired-work-guide-accommodating-substance-dependence>

⁹ WorkSafeBC, "Workplace impairment: A primer on preparing for cannabis legalization," May 2018.

¹⁰ See, for example, sections 4.19 and 4.20 of the Occupational Health and Safety Regulation, BC Reg. 143/2017.

Contact Our Experts



Paul Boshyk

Partner | Toronto, Calgary

t: 416.865.7298 (Toronto)

t: 403.231.8389 (Calgary)

paul.boshyk@mcmillan.ca



Kyle Lambert

Associate | Ottawa

t: 613.691.6117

kyle.lambert@mcmillan.ca



Natalie Cuthill

Associate | Vancouver

t: 236.826.3260

natalie.cuthill@mcmillan.ca



Dave McKechnie

Co-Chair, Employment & Labour Relations | Toronto

t: 416.865.7051

dave.mckechnie@mcmillan.ca



Patrick Groom

Partner | Toronto

t: 416.865.7921

patrick.groom@mcmillan.ca



Shari Munk-Manel

Partner | Montréal

t: 514.987.5004

shari.munk-manel@mcmillan.ca



Hilary D. Henley

Associate | Vancouver

t: 604.893.7640

hilary.henley@mcmillan.ca



Martin J. Thompson

Partner | Ottawa

t: 613.691.6104

martin.thompson@mcmillan.ca

Pre-Recorded Webinar

Puff, Puff, Pass-ed:
What employers Need
To Know About Cannabis
Legalization

Click here to view
the webinar



Firm Profile

McMillan is a modern and ambitious business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally. With recognized expertise and acknowledged leadership in major business sectors, we provide solutions-oriented legal advice through our offices in Vancouver, Calgary, Toronto, Ottawa, Montréal and Hong Kong. Our firm values – respect, teamwork, commitment, client service and professional excellence – are at the heart of McMillan's commitment to serve our clients, our local communities and the legal profession.

For more information,
please visit our website at
www.mcmillan.ca