

FORWARD TOGETHER



MILLER THOMSON  
AVOCATS | LAWYERS

WELCOME

VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO VAUGHAN MARKHAM MONTRÉAL



**MILLER THOMSON**  
AVOCATS | LAWYERS

FORWARD TOGETHER

# COFFEE TALK: A HEALTH INDUSTRY SEMINAR SERIES



VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO VAUGHAN MARKHAM MONTRÉAL



**MILLER THOMSON**  
AVOCATS | LAWYERS

FORWARD TOGETHER

# Up In Smoke: Marijuana in the Workplace

**March 21, 2018**

**André Nowakowski**

**[anowakowski@millerthomson.com](mailto:anowakowski@millerthomson.com)**

**416.595.2986**



# Outline

1. Regulatory Framework: Medical vs. Recreational
2. Marijuana and the Duty to Accommodate
3. Balancing Accommodation with Health and Safety Concerns
4. Drug and Alcohol Testing
5. Drug and Alcohol Policies
6. Case Studies

FORWARD TOGETHER



**MILLER THOMSON**  
AVOCATS | LAWYERS

# 1. Regulatory Framework



# 1. Regulatory Framework: Medical Use

- Medical marijuana has been legal since 2001
- The Supreme Court of Canada in *R. v. Smith* confirmed that whether Canadians smoke, eat or imbibe medicinal marijuana, they have a constitutional right to its use
- As of August 2016, the Access to Cannabis for Medical Purposes Regulations (the “Regulations”) govern the legal framework that enables patients to obtain authorization to possess marijuana for medical purposes



# 1. Regulatory Framework: Medical Use

- The Regulations outline:
  - Who may possess cannabis
  - Limits on the amount of cannabis that may be possessed; and
  - The medical documentation required to qualify for cannabis use under the Regulations



# 1. Regulatory Framework: Recreational Use

- Bill C-45: *Cannabis Act* expected Summer 2018
- Aims:
  - Restrict access to cannabis by youths
  - Protect the young from promotions and enticements
  - Impose serious penalties for import/export and selling to youths
  - Create product safety and quality requirements
  - Reduce illegal activity and the burden on the criminal justice system
  - Increase public awareness through education



# 1. Regulatory Framework: Recreational Use

- Once passed, the *Cannabis Act* will permit Canadians who are 18 years of age or older to:
  - Possess up to thirty (30) grams of cannabis;
  - Share up to thirty (30) grams of cannabis with other adults;
  - Purchase dried or fresh cannabis from a provincially licensed retailer;
  - Grow up to four (4) cannabis plants; and
  - Make cannabis-infused food and drinks
- In the meantime, cannabis remains illegal other than for medical purposes



# 1. Regulatory Framework: Recreational Use

## What does this mean for employers?

- Once the recreational use of marijuana is legalized, its use will likely increase
- Recreational use (i.e. non-medical use) can be treated similarly to other drugs under employers' existing drug and alcohol policies
- Employers are still able to prohibit the use of marijuana during work hours, and to further prohibit attendance at work while impaired or under the influence of recreational marijuana (or other substances)



**MILLER THOMSON**  
AVOCATS | LAWYERS

## **2. Marijuana and the Duty to Accommodate**



## 2. Marijuana and the Duty to Accommodate

- Employers cannot discriminate against employees on the basis of a prohibited ground (ex. disability, age, race, sexual orientation, etc.)
- An employee may use medical marijuana to treat an illness or injury that falls under the definition of a “disability” (ex. PTSD, chronic pain)
- An employee’s use of marijuana might also rise to a level of dependence or addiction that constitutes a “disability”



## 2. Marijuana and the Duty to Accommodate

- Employers are required under human rights law to accommodate employees with disabilities
- This means that employers will have to accommodate an employee's need for medical marijuana in the workplace, unless doing so amounts to undue hardship
  - Do employers need to accommodate recreational use?



## 2. Marijuana and the Duty to Accommodate

- The employee is required to:
  - Make their accommodation needs known to the employer
  - Answer questions or provide information about restrictions or limitations, including information from health care professionals
  - Take part in discussions about possible accommodation solutions
  - Work with the employer on an ongoing basis to manage the accommodation process



## 2. Marijuana and the Duty to Accommodate

- The employer is required to:
  - Be alert to the possibility that an employee may need accommodation, even if he or she has not made a formal request
  - Accept the request for accommodation in good faith, unless there are legitimate reasons for acting otherwise
  - Take an active role in ensuring that alternative approaches and possible accommodation solutions are investigated
  - Bear the cost of any required medical information or documentation
  - Bear the cost of the required accommodation



## 2. Marijuana and the Duty to Accommodate

- Employers should limit requests for information to what is reasonably related to the nature of the limitation or restriction, to assess needs and make the accommodation
- Employer will want to know:
  - Do they have proof of their prescription?
  - When, or how often, will they need to take the medication?
  - How much of the medication will they need to take?
  - Where will they be taking the medication?
  - How long do they anticipate needing to take the medication?
  - Will they be able to safely carry out their assigned duties while taking the medication?
  - What is the prescribed method of ingestion?



## 2. Marijuana and the Duty to Accommodate

- An employee's prescription for medical marijuana should outline:
  - The practitioner's name, profession, business address and telephone number, the province in which they are authorized to practice and the number assigned by the province to that authorization;
  - The patient's name and date of birth;
  - The address of the location at which the patient consulted the practitioner;
  - The daily quantity of dried marijuana, expressed in grams, that the practitioner authorizes for the patient; and
  - The period of use (specified as a number of days, weeks, or months, beginning on the day on which the medical document is signed by the practitioner)



## 2. Marijuana and the Duty to Accommodate

- Where there is a reasonable basis to question the legitimacy of a person's request for accommodation or the adequacy of the information provided, the employer may request confirmation or additional information from a qualified health care professional to get the information needed



**MILLER THOMSON**  
AVOCATS | LAWYERS

# **3. Balancing Accommodation with Health and Safety Concerns**



## 3. Balancing Accommodation with Health and Safety Concerns

- A prescription for medical marijuana does not give employees a free pass to be impaired while at work, especially in safety sensitive positions
- Employers and employees have responsibilities under the *Occupational Health and Safety Act* to maintain a safe work environment
- Employers are required to “take every precaution reasonable in the circumstances for the protection of a worker”
- Employers must therefore balance the duty to accommodate with their health and safety obligations



## 3. Balancing Accommodation with Health and Safety Concerns

- Employers should make inquiries of the employee to ensure that he or she can safely perform the job
- If the medical documentation discloses a meaningful impairment of any abilities that are central to the employee fulfilling the job in a safe and effective fashion, the request for accommodation should be denied
- That said, employers are not precluded from considering other forms of accommodation, such as providing a leave of absence while the employee undergoes treatment/rehabilitation or providing a modified work schedule

FORWARD TOGETHER



**MILLER THOMSON**  
AVOCATS | LAWYERS

# 4. Drug and Alcohol Testing



## 4. Drug and Alcohol Testing

- Workplace testing for marijuana use is difficult – there is no medical test that accurately or reliably indicates the level of a person’s impairment
  - Marijuana can be detected in the bloodstream days after ingestion
  - Levels of THC do not necessarily correspond with levels of impairment
- The Supreme Court of Canada has held that any workplace testing requires a balance between ensuring a safe work environment and employees’ privacy interest



## 4. Drug and Alcohol Testing

- Drug and alcohol testing policies and programs may also be discriminatory based on addictions or perceived addictions
- Human rights concerns arise where failing a test leads to negative consequences for an employee based on an addiction or perceived addiction, such as:
  - Automatic discipline or inflexible terms and conditions on a person's job;
  - Not accommodating people to the point of undue hardship; or
  - Not respecting people's dignity and confidentiality through the testing process



## 4. Drug and Alcohol Testing

- Any workplace policies, standards or tests regarding the use of medical marijuana should be:
  - Rationally connected to the performance of the job;
  - Adopted in an honest and good faith belief that they are necessary to the fulfilment of a legitimate work-related purpose; and
  - Reasonably necessary to accomplish the legitimate work-related purpose



## 4. Drug and Alcohol Testing

- Courts have generally held that random drug testing of an employee is not permitted, unless the testing is in a safety sensitive workplace and there is a demonstrated problem of ongoing drug use in the workplace
- The Alberta Court of Appeal in *Suncor Energy Inc. v. Unifor Local 707A*, 2017 ABCA 313 confirmed that the analysis should focus on evidence of substance abuse problems throughout the workplace, rather than substance abuse problems only within the bargaining unit
  - Employers can therefore rely on broader evidence pertaining to the entire workplace to help justify random testing



## 4. Drug and Alcohol Testing

- Courts have held that testing can occur in the following circumstances:
  1. Where an employer has reasonable cause to believe an employee is under the influence of marijuana
  2. Post-incident or “near-miss” testing, where an incident has occurred and there is evidence to suggest that impairment may have been a factor
  3. Testing as part of a rehabilitation or return-to-work program for employees in safety sensitive positions who have shown a pattern of behaviour where use of marijuana is central to the problem

FORWARD TOGETHER



**MILLER THOMSON**

AVOCATS | LAWYERS

# 5. Drug and Alcohol Policies



## 5. Drug and Alcohol Policies

- Employers can develop workplace policies regarding the use of medical marijuana as long as the policies do not breach human rights legislation
- The policies can be modelled after existing policies dealing with other prescription medication
- The policies should:
  - Communicate employee entitlements and acceptable uses at the workplace;
  - Define “impairment” and “under the influence”; and
  - Outline disciplinary procedures for breaches of the policy



## 5. Drug and Alcohol Policies

- Updated drug and alcohol policies should also make specific mention of how recreational marijuana use will be addressed in the workplace
- Updated policies should include the following:
  - A duty to disclose any use of marijuana in the workplace;
  - Consequences of non-compliance, including appropriate progressive disciplinary procedures;
  - Modifications to human rights and accommodation policies to specifically deal with issues relating to marijuana dependency;
  - Establishing a framework for testing for impairment, including triggering circumstances and testing methods; and
  - Proper training of management and supervisory staff on the application of all policies relating to medical and non-medical use of marijuana in the workplace

FORWARD TOGETHER



**MILLER THOMSON**  
AVOCATS | LAWYERS

# 6. Case Studies



## 6. Case Study #1

*Calgary (City)* (2015), 261 L.A.C. (4<sup>th</sup>) 1

- Employee operated heavy equipment in a safety-sensitive position
- He had a prescription for medical marijuana to address chronic pain
- He told his supervisors about his use of medical marijuana and worked without incident for over a year
- New management came in and placed him in a non-safety-sensitive position pending the outcome of an investigation and assessment



## 6. Case Study #1

*Calgary (City)* (2015), 261 L.A.C. (4<sup>th</sup>) 1

- The employee grieved his removal from his position
- He agreed to an independent medical examination, but the expert could not provide clear direction to the City about whether he could return to his safety-sensitive position due to conflicting information given from the employer



## 6. Case Study #1

*Calgary (City)* (2015), 261 L.A.C. (4<sup>th</sup>) 1

- The majority determined that he was fit to return to his former safety-sensitive position
- The board was critical of the employer's investigation
- The board found there was no evidence that the employee's marijuana use for medical purposes had any impact on his ability to perform his safety sensitive duties, or that the employee exhibited signs of impairment while on duty



## 6. Case Study #1

*Calgary (City)* (2015), 261 L.A.C. (4<sup>th</sup>) 1

- However, the board noted the serious consequences of operating equipment under the influence
- It ordered that the grievor be reinstated with conditions including, among others:
  - He was to submit to random substance testing; and
  - The employer was permitted to conduct random work performance monitoring



## 6. Case Study #2

*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30

- Employee worked as a loader in the company's mine operations – safety-sensitive position
- Employer had drug and alcohol policy in place
- Employees were expected to disclose dependence or addiction
- If the employee failed to disclose, was involved in an accident, and tested positive for drugs, they would be terminated
- Employees were trained on policy



## 6. Case Study #2

*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30

- Employee used cocaine on his days off
- He did not tell the employer he was using drugs
- Involved in an accident and tested positive for drugs
- Told employer he thought he was addicted
- Terminated in accordance with the policy nine days later



## 6. Case Study #2

*Stewart v. Elk Valley Coal Corp.*, 2017 SCC 30

- Main question for Supreme Court:
  - Was he terminated because of his addiction or because of his breach of the policy?
- Majority found that the Tribunal's finding that he was terminated for breach of the policy was reasonable
- The mere existence of addiction does not establish prima facie discrimination
- The addiction must be one of the reasons for the adverse treatment



## 6. Case Study #3

*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017 ONSC 2078*

- The TTC announced the implementation of random drug and alcohol testing for employees in safety sensitive, specified management and designated executive positions
- The union filed a grievance that was referred to arbitration
- The union brought an application for an injunction to restrain the policy pending the outcome of the arbitration
- The court refused to grant the injunction



## 6. Case Study #3

*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017 ONSC 2078*

- The Court reviewed the evidence led by the TTC of substance abuse issues in the workplace, including that:
  - There existed a “culture of drug and alcohol use” in the workplace
  - Several TTC employees advised management that they did not want to work with individuals that they believed were impaired
  - There were 116 positive or refused alcohol or drug tests for employees in violation of the policy in the past 6 years
  - Random testing effectively reduced the risk of impaired persons causing an accident



## 6. Case Study #3

*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017  
ONSC 2078*

- The Court ultimately found that random testing would increase public safety, and that any breach of privacy was compensable by damages if the union was ultimately successful at arbitration



# Questions?

**André Nowakowski**

[anowakowski@millerthomson.com](mailto:anowakowski@millerthomson.com)

416.595.2986

FORWARD TOGETHER



MILLER THOMSON  
AVOCATS | LAWYERS

MILLERTHOMSON.COM



© 2016 Miller Thomson LLP. All Rights Reserved. All Intellectual Property Rights including copyright in this presentation are owned by Miller Thomson LLP. This presentation may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from the presenter(s).

This presentation is provided as an information service and is a summary of current legal issues. This information is not meant as legal opinion and viewers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.

VANCOUVER    CALGARY    EDMONTON    SASKATOON    REGINA    LONDON    KITCHENER-WATERLOO    GUELPH    TORONTO    VAUGHAN    MARKHAM    MONTRÉAL