

Cannabis in the Workplace: The New Wild West

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Overview

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2. Cannabis Law
3. Statistics
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5. Managing Cannabis in the Workplace
 - Impairment and Testing
 - Duty to Accommodate
 - Policies and Procedures
6. What Next?

Legalization

What is Cannabis?

- Psychoactive drug derived from a cannabis plant.
- Active ingredient is THC (Tetrahydrocannabinol).
- THC produces a “high” sensation in users.



Legalization

What is Cannabis?

- High varies depending on the potency of THC and the strain of Cannabis.



- Can also be consumed in a non-psychoactive form without THC (ex. Cannabidiol (CBD) Oil).
 - Used to treat chronic pain, anxiety & other ailments.
 - REF: Elaine Farrell and the Toronto Transit Commission.

Legalization

Views on Canada's Legalization of Cannabis

- Cannabis legalization is a “national uncontrolled experiment”
 - Dr. Diane Kelsall, Canadian Medical Association Journal
- “Canada’s giant public health ‘experiment’ with legalized cannabis”
 - Nicole Ireland, CBC News



Cannabis Law

Cannabis Act (Bill C-45)

- Purchase and use of recreational cannabis became legal Canada-wide on October 17, 2018 for all individuals over 18.
- In Ontario:
 - legal age is 19.
 - cannot be consumed in public places except where cigarettes can be smoked.
 - cannot be consumed in vehicles.

Statistics

Cannabis in Canada: Who is consuming?

- 2/10 Canadians consume cannabis in some form each year
 - Less than use alcohol and cigarettes
- Canadians who use alcohol and/or cigarettes are more likely to also use cannabis
- 1/10 Canadians will develop some dependency with regular use
- More than 30% of Canadians surveyed pre-legalization said they would consume marijuana if legal.



Managing Cannabis in the Workplace

- Impairment and Testing
 - When can employers test? What is the law?
- Accommodation: disability protected under Human Rights legislation
 - What is accommodation? When is it required? What does it entail?
- Policies
 - How should employers deal with legalization in their policies?

What's happening so far...

- Toronto Police and RCMP – cannot use within 28 days of reporting for duty.
- Calgary Police – zero tolerance policy.
- Air Canada and WestJet – cannot use if in safety sensitive positions.
 - Random drug testing to deter use.
 - Alcohol policy only prohibits drinking within 12 hours of shift.
 - 8 hours from bottle to throttle.

What's happening so far...

- Vancouver and Ottawa Police – “fit for duty” policy
 - Similar to their alcohol policy.
- TTC – cannot use if in safety sensitive, specified management and designated executive positions.
 - Random testing
 - Union is fighting the policy as “arbitrary”.
- Metrolinx – “fit for duty” policy.

Impairment and Testing

- Issues arise with testing for cannabis impairment:
 - How to test?
 - How to determine impairment?
- Tests exist to assess the level of THC in the individual's body, **actual impairment is not ascertainable.**
 - Presence of substance $\neq$ impairment.
 - Unlike alcohol/breathalyzers.
 - Impairment via THC is variable.
 - Different people react very differently to different strains, amounts, etc.
 - Employers will not have access to tests used by police.

Impairment and Testing

- Employee drug and alcohol testing is only permitted under Human Rights Law when:
 - The employees are operating in safety-sensitive employment settings;
- AND**
- A series of additional requirements placed on employers who conduct testing are met.

Impairment and Testing

- We must **balance** employer's need to ensure a safe workplace and employee's right to privacy.
- Testing should not lead to negative consequences for people with addictions or perceived addictions.
- Testing should be implemented to **measure impairment**, not to deter use or to enforce morals.

Impairment and Testing

Random Testing

- No automatic right to random testing.
- Random testing cannot be justified unless:
 - It's a highly dangerous workplace, or safety-sensitive position;
 - Accidents and mistakes have demonstrable consequences;
 - The employer can show there is a problem with addiction in the workplace.
- Likely to be permissible post-incident or post- "near miss".
- Blanket policy for all employees will not be permissible.



Irving Pulp and Paper

Dangerous workplace + workplace problem

“a unilaterally imposed policy of mandatory, random and unannounced testing for all employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees **unless there is reasonable cause, such as a general problem of substance abuse in the workplace**” – *Irving* at para. 48

“an employer must justify the intrusion on privacy resulting from random testing by reference to the **particular risks in a particular workplace.**”- *Irving* at para.20

Irving Pulp and Paper

Dangerous workplace + workplace problem

Drug and alcohol testing in inherently dangerous work environments is permitted in two sets of circumstances:

1. **“for cause” testing** of individual employees where there are reasonable grounds, post-incident, or as part of a return to work agreement .
2. if an employer can demonstrate that there is a **generalized problem of drug or alcohol abuse in a particular workplace that is an inherently dangerous working environment.**

****Every case is different and must be evaluated on its own facts****

Duty to Accommodate

Ontario Human Rights Code

- Does the employee have a disability under the Human Rights Code?
- Is the employer able to provide accommodation to the employee?
- Can the workplace or duties be modified so that the employee can do his or her work safely and effectively?
- Threshold - undue hardship
 - Cost;
 - Outside sources of funding (if any);
 - Health and safety requirements (if any).



Duty to Accommodate

Ontario Human Rights Code

- If accommodation is required, employers should confirm:
 - Use is necessary as part of the accommodation;
 - The employee can safely continue to perform his or her duties.
- If there is impairment, than the employer may not be required to accommodate especially if the position is safety sensitive.

Duty to Accommodate

Ontario Human Rights Code

- **Employers do not act alone in accommodation.**
- Employees have a duty to cooperate and assist the employer.
- The employee must:
 - Obtain appropriate authorization;
 - Inform the employer that they require accommodation;
 - Be reasonable - cannot expect or demand a perfect solution.
- There is no right to be impaired at work, or to compromise their own safety or that of others.

Accommodation – Terms

Employers can add terms and/or conditions to employee accommodations.

For example, an employer could add terms:

- Clearly prohibiting impaired employees from appearing in the workplace.
- Setting limitations for the employee's use (ex. stop consumption ____ hours before work, only consume in certain areas/private, etc.)
- Requiring continuous evaluation of whether an employee could/should be moved to less safety sensitive position or removed from duty temporarily.



High Times – Cannabis and the Workplace

Stewart v. Elk Valley, SCC at para. 39

Facts

- Mr. Stewart was an employee at Elk Valley.
- After he tested positive for drugs he disclosed a drug dependency.
- Mr. Stewart had not disclosed any dependency before the positive test, and disclosure was specifically required under the employer's policies.
- He was terminated for cause and later alleged that his termination was discriminatory as a result of his disability.
- The Human Rights Tribunal (BC) upheld the termination.
- The majority of the SCC affirmed Tribunal's decision.

High Times – Cannabis and the Workplace

Stewart v. Elk Valley, SCC at para. 39

“It cannot be assumed that Mr. Stewart’s addiction diminished his ability to comply with the terms of the Policy. In some cases, a person with addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. **The connection between an addiction and adverse treatment cannot be assumed and must be based in evidence.”** [emphasis added]

Policies and Procedures

- Standard element of employment policies:
 - **Employees cannot be impaired while at work and performing the duties of their employment.**
- Employers should establish techniques and procedures for assessing impairment of employees.
- Focus should be shifted from testing impairment levels to assessing employee conduct.

Policies and Procedures

- Employers and staff need to be **familiar with signs of behaviour** in the workplace caused by cannabis use.
 - Important: consider who is authorized or qualified to make these assessments
- Set policies that recognize medicinal cannabis use
 - Ex. CBD oil
 - Non-impairing, non-psychoactive.
 - Employers should not discriminate against employees who (1) benefit from those treatments, and (2) are not impaired by their use.

High Times – Cannabis and the Workplace

THK Rhythm Automotive Canada Ltd. And TPEA (Rodwell), Re, 2016 CarswellOnt 9433

Facts

- THK Rhythm Automotive Canada Ltd. was an automotive components manufacturer.
- An incident occurred in which two employees were caught exchanging pot plants on company property. Both employees were discharged after the incident was investigated.
- THK's Code of Conduct prohibited the possession of any illegal substances on company property.
- The union conceded that the grievors had violated the policy, but argued that termination was too harsh a penalty.
- After termination, one of the grievors received approval for the use and possession of medical marijuana (retrospective).

High Times – Cannabis and the Workplace

THK Rhythm Automotive Canada Ltd. And TPEA (Rodwell), Re, 2016 CarswellOnt 9433

Arbitral Decision

- Any violation of health and safety rules puts the employee, and employer at risk that something unanticipated may occur.
- It was ordered that the employees be reinstated without compensation for time lost.
 - A condition was attached to their reinstatement-
 - Any further violations to THK's Code of Conduct as it related to drug use and/or possession within 24 months means immediate and automatic termination.
- If the grievor with the approval for medical use intended to consume cannabis before reporting to work, he was required to have the employer's knowledge and consent.

****At this time, cannabis was an illegal drug and the drugs involved were not (at the time of termination) prescribed to either party****

High Times – Cannabis and the Workplace

THK Rhythm Automotive Canada Ltd. And TPEA (Rodwell), Re, 2016 CarswellOnt 9433

- **“A rule which prohibits an employee from reporting to work in an unfit condition, or possession of any mind altering substance at work (with the exception of prescription drugs) is manifestly reasonable, and strict enforcement of that rule is in the best interests of all parties.** The potential health and safety consequences of a breach to all employees are too drastic to underestimate and I cannot fault any employer from imposing severe consequences upon an employee who violates the rule.”

What's Next?

- Remains to be seen how cannabis legalization will impact use in the workplace.
- Policies and procedures should be amended to include prohibition of recreational cannabis use in the workplace.
- Accommodation policies should be reviewed and amended to deal with recreational cannabis addiction.
- Set out limits for impairment.
- Set out clear guidelines for when the employees are required to notify the employer of their use of prescription and non-prescription medication.

What's Next?

- Training of supervisors and management to recognize signs of impairment.
- Identification of “safety sensitive” positions within the workplace and implementation of more stringent policies on impairment as required.
- Consider terms to be applied to accommodations for cannabis use to ensure safety of all employees.
- Prohibit coming to work impaired.
- Set out clear disciplinary consequences for breaches of policy.



Questions?

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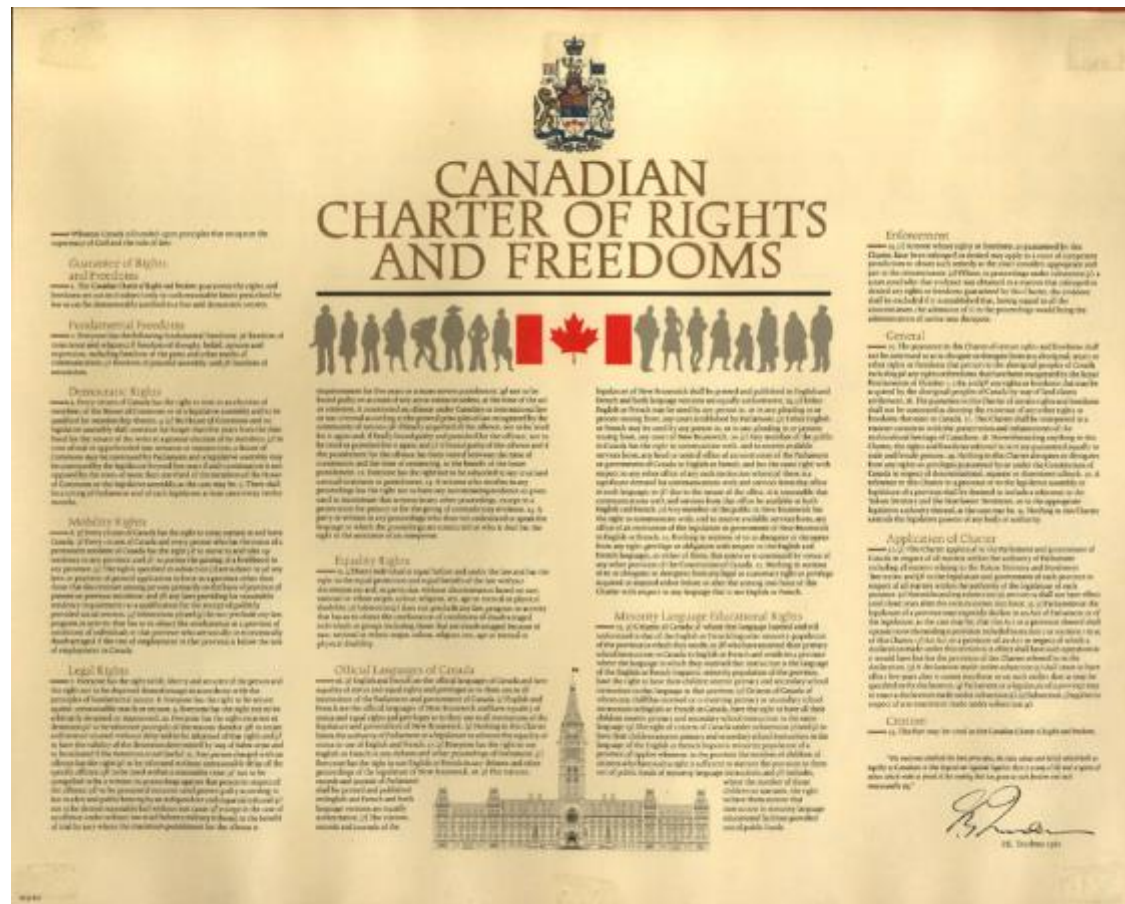


The End of The Charter? Recent Developments in Canada

Presented by: Gavin J. Tighe / Stephen Thiele
November 15, 2018



The Charter of Rights and Freedoms



Prime Minister Pierre Elliott Trudeau

Explaining the Charter to Canadians

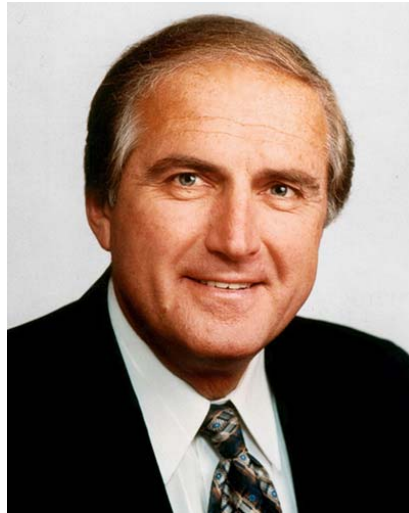


<https://youtu.be/QLrbaP6yQnM>



Section 33 of The Charter

Reasons for the section



<https://youtu.be/4rToB20LRDw>



Historical Use of Section 33

When, where and why

- Quebec: on every piece of legislation between 1982 and 1985 and to maintain unilingual French only business signs
- Saskatchewan: to protect back-to-work legislation
- Alberta: to define marriage as exclusively heterosexual
- Saskatchewan again: passed legislation in 2018 to protect funding for non-Catholic students attending Catholic school

The Turning Point

A dubious court decision



Bill 5 Held to Breach Charter

Freedom of Expression Denied

- Justice Belobaba found that the province had clearly crossed the line with Bill 5
- Breached s. 2(b) of the Charter in two ways:
- Interfered with candidates' freedom of expression
- Doubled population in each Ward so as to deny effective representation to voters

Bill 31 Invokes Override Clause

The Scope of Section 33

Provincial government introduces Bill 31 to reduce size of City Council and invokes s. 33

“Section 33 lays down requirements of form only, and there is no warrant for importing into it grounds for substantive review of the legislative policy in exercising the override authority in a particular case.”

(Ford v. Quebec (A.G.), [1988] 2 S.C.R. 712)

2018 Quebec Provincial Election

A New Premier



Proposed use of the Override

Imagine No Religion

Quebec Premier Francois Legault proposes to ban public officials from wearing religious symbols

Plan would prevent public servants, including teachers, police officers and judges, from wearing religious garments while performing public functions



Questions?

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