

**ropergreyell**

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Council on Northern Interior Forest Employment  
Relations CONIFER  
Drug & Alcohol Policy and Workplace  
Drug Testing Update

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The purpose of this presentation is to provide an overview of this area of the law. This does not by any means constitute a full analysis of the law or an opinion of Roper Greyell LLP or any member of the firm on the points of law discussed.

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**rg Introduction**

- Legalization expected to increase number of medical marijuana users to 450,000
- Legalization of non-medical use of cannabis expected by Spring 2017
- Cannabis is currently the most commonly used illegal drug
- Alcohol is the most commonly used legal drug

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**rg Introduction**

- New set of challenges for employers
- This presentation will address:
  1. Law on accommodating medical marijuana in the workplace
  2. Law on workplace drug testing
  3. Implications of recreational marijuana legalization for employers

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**rg Background**

- Currently marijuana is subject to a criminal prohibition
- *Controlled Drugs and Substances Act*
- Courts have recognized exemptions for medical marijuana under the *Charter*
  - *R v Parker*, 2000 OJ 2787 (OntCA)
  - *R v Smith*, 2015 SCC 34
  - *Allard v Canada*, 2016 FC 236

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**rg Background**

- Regulations exempt medical marijuana from criminal prohibition:
  - *Marihuana Medical Access Regulations*, repealed and replaced by *Marihuana for Medical Purposes Regulations* in 2013
  - *Marihuana for Medical Purposes Regulation* repealed and replaced by *Access to Cannabis for Medical Purposes Regulations* in 2016

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**rg Employer's Competing Duties**

- Medical marijuana is treated like any other prescription drug
- **Human rights legislation** mandates employers must take steps to accommodate medical marijuana use, even in safety sensitive environments
- **Occupational health and safety legislation** requires that employers provide a safe work environment

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**rg** **Medical Marijuana Use**

- Employers must accommodate disability to the point of undue hardship
- Employer entitled to credible medical information to determine appropriate accommodation
- Medical information should address the employee's ability to safely and effectively perform job duties

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**rg** **Worst Case Accommodation**

- **Calgary and CUPE, 2015 AGAA 43 (Hodges)**
- Heavy equipment operator had medical marijuana prescription for chronic pain
- Advised employer of disability and prescription
- No work problems for 2 years

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**rg** **Worst Case Accommodation**

- **Calgary v CUPE**
- Transferred to non-safety sensitive role
- IME recommended reinstatement
- Employer refused
- Grievance allowed
- Reinstated to safety-sensitive position

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### Knowledge of Disability

- ***Burton v Tugboat Annie's Pub, 2016 BCHRT 78***
- Complainant was dismissed for smoking marijuana at work
- Claimed discrimination on basis of disability
- Smoked marijuana for chronic pain

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### Knowledge of Disability

- ***Burton v Tugboat Annie's***
- Employer had no knowledge of disability
- Complaint dismissed
- No chance of success where employer not aware of disability
- No discrimination

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### Duty to Inquire

- ***Wilson v. Transparent Glazing Systems Ltd., 2008 BCHRT 50***
- Employee smoked marijuana to relieve chronic back pain and migraine headaches
- Customer complained that employee was unable to properly perform his duties

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**Duty to Inquire**

- ***Wilson v Transparent Glazing***
- Employee terminated
- Employer knew or ought to have known of the employee's disability
- Employer had a duty to inquire
- Award for injury to dignity

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**Actively Concealed**

- ***IBEW v Lower Churchill Transmission Construction Employers Assoc, 2016 NLLAA 5 (Oakley QC)***
- Grievor terminated for possessing and using medical marijuana on site
- Zero tolerance policy

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**Actively Concealed**

- ***IBEW v Lower Churchill Transmission***
- Grievor failed to disclose prescription on job application
- Concealed marijuana off site
- Terminated for using and possessing marijuana in camp
- Grievance denied

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### Actively Concealed

- **IBEW v Lower Churchill Transmission**
- Employer had just cause
- Grievor violated zero tolerance policy by failing to disclose
- Deliberate concealment a factor
- Policy constituted good faith occupational requirement

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### Benefits Coverage

- **Hamilton and Hamilton Prof Fire Fighters' Assn, [2016] OLAA 129 (Sheehan)**
- Grievor claimed denial of drug benefit for spouse's medical marijuana
- Prescription drugs covered 100%
- Policy required DIN
- No DIN for medical marijuana
- Grievance denied

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### Accommodation Tips

- Ensure your drug and alcohol policy:
  - Addresses impairment from all prescription medication, including medical marijuana
  - Requires employees to disclose information about any prescription drug that may impair employee's ability to perform work safely and outline consequences of not doing so

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## Workplace Drug Testing

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### Background

- Employers may establish policies requiring employees to be tested for drug or alcohol use or impairment where
  - there are reasonable grounds to believe an employee is impaired;
  - an employee returned to work after a substance abuse treatment program;
  - an employee was involved in an accident or near-miss at work; or
  - an employee is entering a safety sensitive position for the first time.

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### Alcohol v Drug Testing

- **Alcohol test** demonstrates present impairment levels
  - ➡ Indicates current fitness level to perform job safely
- **Drug test** demonstrates that person has used drugs at some point in the recent past
  - ➡ Does NOT indicate current fitness level to perform job safely

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### Alcohol v Drug Testing

- Limitations of current technology in determining the level of impairment due to marijuana use will likely continue to present challenges
- Advances are being made in oral fluid testing for marijuana and these will be important for employers to monitor going forward

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### Random Testing – General Principles

- In general, courts view random testing as unreasonable, even in dangerous or safety-sensitive environments
- *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd*, 2013 SCC 34: An employer must provide evidence that the employer has a “general problem in the workplace” to implement a random testing program

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### Good News for Employers: *Suncor Energy Inc. v. Unifor Local 707A*, 2016 ABQB 269

- Employers are not required to show a “significant” or “serious” problem in the workplace to implement a random testing program
- Employers may take into account evidence from the entire workplace rather than just the bargaining unit
- The court held that a strict standard “forecloses virtually any possibility of random testing, regardless of circumstances”

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### Random Testing – What’s Next?

- The court in *Suncor Energy Inc. v. Unifor Local 707A*, 2016 ABQB 269 returned the threshold for random testing programs back to the standard set out in *Irving*
- Unifor announced it will appeal the decision to the Alberta Court of Appeal
- Technological limitations will likely continue to pose problems for employers in determining the level of impairment due to marijuana use

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### Implications of recreational marijuana legalization for employers

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### Legalization

- The Federal Government announced on April 20, 2016 (ironically “4-20”) that it will introduce legislation to legalize marijuana by the Spring of 2017
- The Government committed to legalize, strictly regulate and restrict access to marijuana

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### **rg** Implications on the Workplace

- Legalization will not give employees unrestricted right to possess and use marijuana in the workplace
- Recreational or non-prescription marijuana can be treated just like alcohol
- With a clear policy, a recreational marijuana user who does not suffer from an addiction can be disciplined for consuming, possessing or being impaired by marijuana at work

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### **rg** Use vs. Disability

- Marijuana use (even frequent use) not necessarily a disability:
  - "... irresponsible drug use without more does not prove addiction" (*Vale (Manitoba Operations) and United Steel Workers, Local 6166*, [2013] MGAD No 11)

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### **rg** Off-Duty Marijuana Use

- Employers can only discipline employees for off-duty drug or alcohol related activity if there is a direct negative effect on the employer's legitimate business interests
- *Millhaven Fibres* test for off-duty conduct unlikely to be met

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### Off-Duty Marijuana Use

- *Millhaven Fibres* test:
- The conduct harms the Company's reputation or product
- The conduct renders the employee unable to perform his duties satisfactorily
- Other employees refuse to work with the grievor

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### Off-Duty Marijuana Use

- *Millhaven Fibres* test, cont'd:
- the conduct is a breach of the Criminal Code and would injure the reputation of the Company and its employees
- the conduct inhibits the Company from efficiently managing production and directing its working forces

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### Off-Duty Marijuana Use

- Employers should treat marijuana like off-duty alcohol use
- After legalization, violation of restrictions e.g., sale or DUI, may have sufficient nexus to workplace in certain circumstances

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**rg Questions?**

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