

Cannabis in the Workplace

Too high for duty?

Cannabis will soon be legal in Canada. For many Canadians, including the nearly 50% of British Columbians who report using the drug, the right to purchase and consume cannabis recreationally without fear of reprisal may bring relief. For many lawyers and policy-makers, however, the *Cannabis Act* (“the Act”) will likely lead to new complex issues. Notably, the Act gives rise to legal and technical questions about the ability of police to effectively measure impairment given the lack of a reliable correlation between the level of THC (*i.e.* the principal psychoactive constituent of cannabis) and impairment. In the labour and employment context, courts and arbitrators have grappled with this same issue.

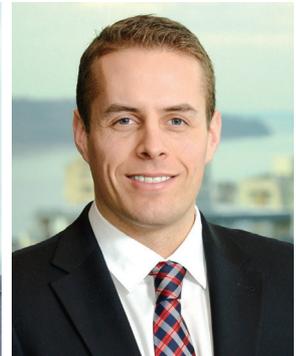
Workplace alcohol and drug testing has long been a legal minefield for employers in both union and non-union settings in Canada; policies often run afoul of privacy and human rights interests. However, testing is permissible in a safety-sensitive workplace in some circumstances, such as where reasonable cause exists to believe an employee is impaired at work, an employee is involved in a workplace accident, or a test is used as a condition of employment for a safety-sensitive position. Courts and arbitrators in many cases

have recognized the distinction between alcohol and drug testing, and often set a higher bar for justifying the latter.

In contrast to alcohol consumption, there is little consensus on how to measure impairment arising from cannabis use. Indeed, the federal Task Force on Cannabis Legalization and Regulation notes that “the current scientific understanding of cannabis impairment has gaps and that more research and evidence, investments in law enforcement capacity, technology and tools, and comprehensive public education are needed urgently.” To some extent this problem has been mitigated by technical advances (*e.g.* oral fluid tests) that provide a better indicator of recent cannabis consumption. Recent case law reflects some of the issues that arise from this reliance on correlation, rather than proof of impairment.

In *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078, the court dismissed an injunction application to restrain random drug and alcohol testing of employees of the Toronto Transit Commission. Despite acknowledging the unsettled debate over the correlation between positive THC test results and impairment,

the court was satisfied that oral fluid testing for cannabis using a high cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing. In BC, a union recently raised this point as well, arguing that THC levels only indicate past use rather than impairment, and therefore termination for a positive THC test result was improper. The issue is not yet decided (*Tolko Industries Ltd. v. United Steel Workers*, [2017] BCCAAA No. 60).



It remains to be seen whether the implementation of the *Cannabis Act* will increase the number of Canadians showing up for work too high for duty. It is reasonable to anticipate, however, that the law on workplace alcohol and drug testing will evolve as courts consider the relationship between THC levels and impairment. Employers in safety-sensitive industries would be well-advised to stay up to date on this area of law in the coming years.

This article is for information purposes only and may not be relied upon for legal advice. Paul Heisler and Alexander Bjornson are lawyers at Hunter Litigation Chambers, practising employment law on behalf of both employers and employees, and also maintain civil litigation practices.