



PODCAST - Cannabis Legalization in Canada: Employment Challenges

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[Patrick Essiminy](#)

Patrick Essiminy, partner in the Employment Group, discusses the employment challenges surrounding the upcoming legalization of cannabis in Canada. (15 minutes, 57 seconds)

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Transcript

RICHARD: Hello and welcome to Perspectives, a podcast series from Stikeman Elliott where we discuss legal issues that are relevant to Canadian Business.

Today we're discussing cannabis with Patrick Essiminy, a partner in Stikeman Elliott's Employment and Labour Group. He's joining us from his office in Montreal.

PATRICK: Good morning Richard.

R: With the upcoming new law legalizing cannabis in Canada, cannabis not surprisingly is big news. As an employment lawyer, what can you tell us about some changes that employers will face when this becomes legal in Canada in October?

P: Before getting into some of the employers' concerns let's look at some key dates that are relevant to this issue. First of all the federal act, which is the Act respecting cannabis and to amend the Controlled Drugs and Substance Act will come into effect on October 17, 2018. This is the key date at which the Federal Act legalizes cannabis.

However, there are also some other changes which will be made to other laws in various provinces. For example in Quebec, the legislator has taken the initiative to amend other laws which are impacted.

R: Can you tell us specifically how these additional amendments are going to affect the employment landscape in Quebec?

P: Well first of all in June 2018, the province of Quebec enacted the *Act to constitute the Quebec Corporation of Cannabis as well as to enact the Cannabis Regulation Act*. If you look at Article 11 of the Regulation Act, we immediately see that cannabis smoking is prohibited in enclosed spaces, including workplaces, with the exception of a workplace that is located in a private residence.

In addition to that, Article 21 of the Regulation Act specifically provides that employers may prohibit any form of cannabis from the workplace. Finally, and interestingly enough, this law also amends the existing *Occupational Health and Safety Act*. For example, there will be a new section in the Health and Safety Act which will be added, and which provides that a worker must not perform his work if his condition represents a risk to his health, safety or physical well-being, or that of other persons by reason of him being impaired by drugs, including cannabis or any other similar substance. This provision will also apply to construction sites.

While the previous Article imposes obligations on workers, there was also a new Article which imposes the same obligation on the employer. Namely, it says that the employer must see that a worker does not perform his work if his condition represents a risk to his health, safety, or physical well-being, or that of anyone else at or near the workplace by reason of him being impaired by drugs, including cannabis or similar substance.

It is important to note that as it relates to this change in legislation, that the employer's obligation covers not only the worker, his coworkers, but also any other person that has contact with the worker which means that the employers must be sensitive to the risks of their employees being impaired when they come into contact, for example, with clients of a retail operation, or other third parties in the context of their duties.

In a nutshell these amendments express that the province is sensitive to providing employers with specific powers and direction in light of the upcoming legalization of cannabis.

R: From a practical point of view, what would you recommend to employers as October 17th is quickly approaching?

P: Well the first comment I would make is that with cannabis becoming legal it is to be treated on the same basis as other products or toxic agents which have the possibility of impairing workers. The easiest example is that all employers prohibit their employees from coming to work impaired by alcohol or from consuming alcohol at the workplace. Accordingly, the first recommendation is to review all of the existing policies, manuals, or codes of conduct to ensure that they are now updated to include language that is specific to the use of cannabis at the workplace.

A best practice of course is that whenever a document is updated, and there is a significant change in the legal landscape, the implementation of the revised documents should also be accompanied by proper training for all the employees. This is important from a process point of view because it is evidence that the employer has been diligent in ensuring that the employees understand the changes and the employer's expectations.

It should also be noted that the employers have a duty both from a health and safety point of view and from a general point of view according to our Civil Code to provide a workplace that is safe for all employees and therefore this process of updating employment documents and providing proper training is in line with these obligations.

R: I understand your general recommendation to implement revised documents but specifically, what should these documents contain?

P: There is an important component in this process which is education. I recommend that employers make it very clear to their employees that they expect them not to use cannabis at the workplace, not to use cannabis during their regular breaks or lunch breaks, and also to ensure that they do not come to work impaired. This requires some specific education about the effects of cannabis even when it used outside of working hours.

An additional concept would be to ensure that the policy provides a mechanism for the employees to disclose their condition or addiction and failure to disclose an addiction or potential impairment would lead to punitive or administrative consequences.

Finally we have to be mindful of the fact that in addition to the recreational use of cannabis there may be some situations where employees are using cannabis for medical reasons and in the same way that employees need to disclose any risk of impairment resulting from prescription drugs, this should also be reemphasized in any new documents and in any new training.

R:We understand that employers are also concerned about how they should react if they believe someone is impaired when they are at work. This can be a really tough situation. What are some of the options in terms of managing such situations, including testing the employees?

P:This is a very interesting question and a great challenge for employers in that, unlike alcohol testing, testing for cannabis is tricky. The first priority for employers should be to ensure that their workplace is safe and that any employees that are demonstrating signs of impairment be managed accordingly.

In the world of law enforcement officers rely on the Standardized Field Sobriety Test, also called the SFST. Drug recognition experts are highly trained under the Drug Evaluation and Classification Program and employers can certainly decide to implement testing based on these sophisticated programs. However for now, we can talk about the standard signs of impairment which by the way can be the result of cannabis use, but also in other cases it can be when someone is simply fatigued or overworked.

Given that random testing or testing without proper justification is difficult in Canada, we recommend that employers manage situations of potential impairment by properly training their managers to recognize signs of impairment, whatever the cause is, and to act upon these signs by meeting with the employees, and if necessary removing the employees from the workplace in order to protect both the affected employee and any other people that may come into contact with that employee.

Some of the signs that employers need to be sensitive to in assessing whether someone is impaired include the following: glossy or red eyes; slurred speech; poor coordination; lack of focus or concentration; someone who is easily irritable or demonstrates inappropriate or emotional responses. Other signs may include an unsteady posture, someone whose personal hygiene or appearance is getting worse, someone who has a delayed reaction or appears to have an increased appetite while at work.

I want to emphasize that all of these signs should make an employer proactively react, but it does not mean that the employer can conclude automatically that an employee is impaired as a result of the use of cannabis. That said, the obligation of an employer is to ensure health and safety at the workplace and therefore the cause of the impairment is not the relevant immediate concern in this case. There may be other situations where an employer may be reacting to a near miss, an incident, or a serious accident, which will warrant specific testing and that is a whole different topic.

R:You mentioned testing earlier. What can you tell us about drug and alcohol testing in Canada?

P:Basically we can say generally that in Canada random drug and alcohol testing is prohibited. Specific testing in exceptional circumstances may be warranted. For example, testing following a serious accident may be permitted in a safety-sensitive environment. We also see testing requirements in cases where employees have signed a final return to work agreement following a serious situation.

R:Are there any recent cases that you can share with us that you think would be of interest on this topic?

P: There has not been anything specific on the issue of cannabis as of yet. However there are some interesting cases which I would like to discuss with you. The first example is a case rendered in 2015 in the pulp and paper industry. In this case an employee with 35 years of service who was a forklift operator had an accident on the job. Because of that accident he was tested for drugs and alcohol.

The testing revealed that his blood-alcohol level was more than twice the legal limit. The employer chose not to dismiss this employee, but instead offered him a final return to work agreement which included an obligation to attend a 21-day closed drug addiction therapy. The employee signed the agreement but abandoned his therapy and instead joined therapy as an outpatient. The employer dismissed him for breach of the return to work agreement.

Following a grievance, the arbitrator decided that he would grant this grievance because his termination was not the appropriate measure. On review of this case the Superior Court set aside the arbitral decision given that the gravity of the conduct warranted a termination. Finally the Court of Appeal restored the decision of the arbitrator because they felt that the employee had 35 years of service and that therefore the arbitral decision was reasonable. The Court of Appeal also decided that the final return to work agreement that was signed did not neutralize the arbitrator's powers to reinstate the employee.

R: It's interesting that opinion was divided. Can you think of any other cases that are relevant to this topic?

P: Yes actually more recently the Supreme Court of Canada, our highest tribunal, rendered a decision in June 2017 on a case coming from the province of Alberta. In this case the employee was a truck driver in a mine, a safety-sensitive environment, where health and safety are of great importance. In this specific instance the employer had the policy which required an employee to disclose in advance any addiction to drug and alcohol. The policy further provided that if this disclosure was in fact made, the employee would be eligible to receive treatment and would not be terminated. If, however, the employee failed to disclose his addiction and the employer found out, the employee would be automatically terminated.

In this case the employee used cocaine during his day off and was tested during a drug test that followed an accident at work. I will remind you that in this case the drug test was following an accident for someone holding a safety-sensitive position. As a result of that positive drug test the employee was terminated. He filed a complaint with the Human Rights Commission of Alberta and this case was heard by the Human Rights Tribunal of Alberta which concluded that he was not terminated because of his drug addiction, but rather because he violated the policy of disclosure of his employer.

On appeal the Supreme Court of Canada agreed with the Human Rights Tribunal and concluded that the evidence demonstrated that the real cause of the termination was not the addiction but rather the non-compliance with the policy of disclosure. The Supreme Court indicated that the employee had the ability to respect the policy and had he respected the policy he would not have been terminated. Therefore it was reasonable for the Human Rights Tribunal in this case, to reject the employee's complaint.

In an environment where education will be important, this recent decision opens an interesting avenue for employers that wish to encourage employees to come forward in order to receive the required assistance that they may need given their specific situation before a serious situation occurs.

R: Before we close, any last comments that you would like to add?

P: I was reading a recent publication of the Canadian Centre for Substance Abuse and Addiction, dated June 26, 2018. This publication tells us that substance abuse costs the Canadian society \$38.4 billion dollars per year. Interestingly the costs related directly to loss of productivity, which include disabling injuries at the workplace amount to \$15.7 billion dollars per year; about 40% of the total cost. As such the legalization of cannabis is the beginning of interesting developments not only for employers and

workplaces, but also for the society in general. We also expect a surge in the evolution of legal questions which will arise as a result of this development. It is for sure going to be very interesting to keep an eye out on what will happen next.

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