
MANAGING CANNABIS IN THE WORKPLACE IN ONTARIO

*By Barry W. Kwasniewski**

A. INTRODUCTION

On October 17, 2018, federal Bill C-45, the *Cannabis Act* (the “Federal Act”),¹ came into force as proclaimed by Order in Council,² after having received Royal Assent on June 21, 2018. Each province and territory has its own legislation to regulate the recreational use of cannabis in their respective jurisdiction, similar to each province’s authority to regulate the sale of alcohol. This *Charity & NFP Law Bulletin* provides a brief overview of the relevant federal and Ontario legislation with a focus on its impact on the workplace. Charities and not-for-profits, as employers, need to be aware of their legal rights, as well as obligations under the new legislative regime and develop or modify their workplace policies accordingly.

B. BACKGROUND

While the legalization of recreational use of cannabis is new to Canada, employers, including charities and not-for-profits, have been dealing with medicinal cannabis since 2001, when such usage was first legalized in the country. The consumption of cannabis for medical purposes has been regulated pursuant to federal regulations, being the *Access to Cannabis for Medical Purposes Regulations* (“Regulations”)³ under the *Controlled Drugs and Substances Act*.⁴ Since its legalization, medical cannabis has been

* Barry W. Kwasniewski, B.B.A., LL.B., a partner, practices employment and risk management law with Carters’ Ottawa office. The author would like to thank Christina Shum, B.M.T., J.D., Student-at-Law, for her assistance in preparing this Bulletin.

¹ SC 2018, c 16.

² Government of Canada, “Order Fixing October 17, 2018 as the Day on which Certain Provisions of the Act Come into Force: SI/2018-52” (26 June 2018), online: <<http://www.gazette.gc.ca/rp-pr/p2/2018/2018-07-11/html/si-tr52-eng.html>>.

³ SOR/2016-230.

⁴ SC 1996, c 19.

prescribed for a variety of medical conditions. While the medical cannabis regime continues to operate separately from the recreational cannabis regime, the Regulations governing the consumption of medical cannabis were replaced by the new *Cannabis Regulations*⁵ since the coming into force date of the Federal Act on October 17, 2018.

On June 30, 2016, the Government of Canada announced the creation of the Task Force on Cannabis Legalization and Regulation (the “Task Force”) with respect to the consumption of cannabis outside of the medical framework.⁶ The purpose of the Task Force was to provide advice with respect to a legislative and regulatory regime governing access to cannabis. On December 13, 2016, the Task Force released its final report which was based on extensive consultation with Canadians, provincial, territorial and municipal governments, Indigenous governments and representative organizations, youth, patients, and experts in relevant fields including employers.⁷ Based on the recommendations made by the Task Force, on April 13, 2017, the Federal Act was introduced to the House of Commons.

C. FEDERAL CANNABIS ACT

The Federal Government has stated that the Federal Act was created to regulate recreational cannabis with the purposes of keeping cannabis out of the hands of youth; keeping profits of cannabis out of the hands of criminals, and protecting public health and safety by allowing adults access to legal cannabis.⁸ The Federal Act allows adults who are 18 years or older to legally:⁹

- Possess up to 30 grams of dried cannabis, or an equivalent amount in a different form;
- Buy dried or fresh cannabis and cannabis oil from a provincially-licensed or approved retailer;

⁵ SOR/2018-144.

⁶ Government of Canada, “A Framework for the Legalization and Regulation of Cannabis in Canada (13 December 2016), online: <<https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/laws-regulations/task-force-cannabis-legalization-regulation/framework-legalization-regulation-cannabis-in-canada.html>>.

⁷ *Ibid.*

⁸ Government of Canada, “Cannabis Legalization and Regulation” (as updated 17 October 2018), online: <<http://www.justice.gc.ca/eng/cj-jp/cannabis/>>.

⁹ *Ibid.*

- Grow up to four cannabis plants per residence for personal use; and
- Make cannabis products, including food and drinks, at home.

However, while the Federal Government exercises its head of power over criminal law matters with regard to the framework for recreational cannabis, provinces and territories have authority over the distribution and sale of cannabis and may impose additional rules, including where cannabis can be consumed.

While the Federal Act repeals the criminal penalties for cannabis possession and use within the designated limits, it also sets out a range of penalties for breaching those limits and other provisions of the Federal Act. In particular, the Federal Act creates two new criminal offenses, with maximum sentences of 14 years in jail for giving or selling cannabis to youth,¹⁰ or using a youth to commit a cannabis related offence.¹¹ Further, any director or officer of a corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence may also be liable to a conviction under the Federal Act.¹²

D. ONTARIO LAWS REGULATING RECREATIONAL CANNABIS

On December 12, 2017, Ontario's *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017* (Bill 174)¹³ received Royal Assent and enacted the *Cannabis Act, 2017* ("Ontario Act"),¹⁴ *Smoke-Free Ontario Act, 2017* ("SFOA"),¹⁵ and *Ontario Cannabis Retail Corporation Act, 2017*,¹⁶ and also introduced other legislative changes in preparation of the legalization of recreational cannabis. More recently, Bill 36, *Cannabis Statute Law Amendment Act, 2018* ("CSLAA")¹⁷ was introduced in the Ontario Legislative Assembly on September 27, 2018 and received Royal Assent on October 17, 2018. Further, the Ontario Act came into force on the same day as the Federal Act, on October 17, 2018. Similarly, most of the SFOA also came into effect on October 17, 2018 by proclamation of the

¹⁰ *Supra* note 1, ss 9(5)(a)(i), 10(5)(a).

¹¹ *Ibid*, ss 14(1), 14(2)(a).

¹² *Ibid*, s 121.

¹³ SO 2017, c 26.

¹⁴ *Ibid*, Sched 1.

¹⁵ *Ibid*, Sched 3.

¹⁶ *Ibid*, Sched 2.

¹⁷ Bill 36, *Cannabis Statute Law Amendment Act, 2018*, 1st Sess, 41st Parliament, Ontario, 2018 (assented to 17 October 2018), SO 2018, c.12.

Lieutenant Governor.¹⁸ In Ontario, the recreational cannabis regime is regulated by the Ontario Act, as amended under the CSLAA. Under the Ontario Act, the legal age to possess, use, grow, and purchase recreational cannabis is 19 years.¹⁹ Further, recreational cannabis can be purchased only through the online Ontario Cannabis Store. Starting April 1, 2019, the market to purchase recreational cannabis in Ontario will expand to private retailers that are licensed and approved by the Ontario government.

E. RECREATIONAL CANNABIS AND IMPLICATIONS ON THE WORKPLACE

In an earlier version of the Ontario Act, as passed by the former Ontario Liberal government, there was a wide prohibition on the consumption of cannabis in various areas, including workplaces. However, that prohibition has been repealed. Instead, places where cannabis can be consumed will generally be treated like tobacco and governed by the SFOA. The SFOA only prohibits the use of cannabis in “enclosed workplaces,” as defined:²⁰

“enclosed workplace” means,

- (a) the inside of any place, building or structure or vehicle or conveyance, or a part of any of them,
 - (i) that is covered by a roof,
 - (ii) that employees work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time, and
 - (iii) that is not primarily a private dwelling, or
- (b) a prescribed place;

Importantly, the limitation on the use of cannabis in enclosed workplaces speaks only to smoking or holding lighted cannabis. Hence, the SFOA does not prohibit the ingestion of cannabis (*i.e.* cannabis edibles) in the workplace and will only prohibit the smoking and use of lighted cannabis in enclosed workplace areas. For example, the law will not make it illegal for employees in an office environment to

¹⁸ Sections 4(1), para 3, and 6(2) have yet to be proclaimed into force.

¹⁹ *Supra* note 13, Sched 1, s 10. While Ontario has determined that the minimum age is 19 years old, the minimum age in other jurisdictions may vary. Each province or territory, under its own legislation, determines the minimum age at which a person may access recreational cannabis as long as it complies with the Federal Act. The Federal Act prohibits anyone under 18 years from accessing the drug.

²⁰ *Supra* note 13, Sched 3, ss 1(1), 12.

consume cannabis edibles or food prepared with cannabis indoors or smoke cannabis in uncovered open spaces outdoors. While employers can still prohibit these activities, these activities will not be illegal.

However, even with the legalization of recreational cannabis, employees do not have the right to be impaired in the workplace where that impairment may endanger their own safety or that of their coworkers, or where that impairment negatively affects their ability to perform work. Employers are within their rights to require that their employees report to work in a condition in which they are fit to perform their duties, whether or not the employee's position is one that is "safety sensitive". Recently, the Human Rights Tribunal of Ontario confirmed in the decision of *Aitchison v L&L Painting and Decorating Ltd.*²¹ that employees do not have an unfettered right to smoke or use cannabis at work, even if they are authorized to legally use cannabis for medical reasons. In that case, the employer was held to be justified in dismissing the employee, who held a safety sensitive position, for smoking cannabis at work, contrary to company policies.

Furthermore, employers must consider the *Occupational Health and Safety Act* ("OHSA").²² Under section 25 of the OHSA, employers must take "every precaution reasonable in the circumstances for the protection of a worker."²³ Therefore, if employers and managers permit the use of cannabis, or any other substance which causes worker impairment and resulting injuries, the Ontario Ministry of Labour could launch an investigation under the OHSA, which could lead to a prosecution.

A challenge that employers will face in light of the legalization of recreational cannabis is in dealing with cannabis impairment. Because a person who is impaired by cannabis may not exhibit the obvious signs of impairment as in the case of an inebriated person, it is more difficult to detect whether an employee is under the influence of cannabis. Further, there is no generally accepted observational testing that non-trained people can carry out to determine cannabis related impairment.²⁴

²¹ 2018 HRTO 238.

²² RSO 1990, c O.1.

²³ *Ibid*, s 25.

²⁴ For more information, see: Canadian Centre for Occupational Health and Safety, "Workplace Strategies: Risk of Impairment from Cannabis" (September 2018) at 11, online (pdf): *Canadian Centre for Occupational Health and Safety* <www.ccohs.ca/products/publications/cannabis_whitepaper.pdf>.

Nevertheless, there are several indicators of cannabis impairment, such as diminished cognitive function, confusion and difficulty concentrating, reduced reaction time, diminished motor function, and feelings of euphoria, paranoia, or other altered emotional states.²⁵ While the acute effect of cannabis consumption generally lasts between two to four hours, studies have shown that the impairment caused by the drug may linger up to twenty four hours after consumption, or even longer.²⁶ These effects can significantly impact an individual's ability to work effectively, respectfully, and in many cases, safely. However, in the absence of reliable objective tests, managers will need to assess health and safety issues as best they can, and learn to identify the signs of cannabis impairment.

F. WORKPLACE POLICIES ADDRESSING CANNABIS USE

An important way for employers to deal with the issue of cannabis in the workplace is to implement appropriate policies. With the expected increase in legal cannabis use, employers need to consider how to deal with what will most likely become a workplace issue. Importantly, the use of recreational cannabis by employees does not trigger any duties to accommodate under the Ontario *Human Rights Code* (the "Code"),²⁷ subject to any potential addiction issues. Therefore, employers may prohibit the use of cannabis at work in any form during working hours, and may also prohibit employees from attending work while impaired as a result of using cannabis or any other substance which may cause impairment. Workplace rules regarding recreational use of cannabis may be enforced through employee discipline, including a progressive discipline policy.

Employers should review their alcohol and drug policies or fitness to work policies in light of the legalization of recreational cannabis. Employers who have a current workplace drug and alcohol policy, or a more general "fitness to work" policy, should update these policies to include references to recreational cannabis. Further, any employer policy, the breach of which may lead to discipline or even termination of employment, needs to be carefully considered.

These policies must be considered with certain caveats. For instance, policies that take a "zero tolerance approach" to all cannabis, including medical cannabis, can be problematic because they do not recognize

²⁵ *Ibid*, at 4.

²⁶ *Ibid*, at 5-6.

²⁷ RSO 1990, c.H.19.

potential human rights issues. Also, employers cannot generally regulate an employee's off-duty legal conduct. This means that employers largely cannot regulate an employee's consumption of cannabis when the employee is off-duty, unless the policy is tied to workplace performance issues. An employer that is a religious ministry may be able to establish conduct requirements which regulate the use of drugs or alcohol through lifestyle and morality standards or similar documents. However, regulating off-duty employee conduct is complex and dependent on the nature of the ministry and its interpretation of the essential precepts of the relevant faith. Therefore, employers should obtain legal advice first before prohibiting cannabis use based on religious or morality standards.

G. MEDICAL CANNABIS, THE WORKPLACE, AND THE DUTY TO ACCOMMODATE

The medical cannabis regime is independent of the legislation regarding recreational cannabis. However, with the legalization of recreational cannabis, it is possible that the use of prescribed medical cannabis will increase as well, as the product becomes more ubiquitous in Canadian society. The legal duty to accommodate, as required by provincial and federal human rights legislation, extends to "disabled" employees, as defined within the Code,²⁸ who use medical cannabis. These employees are to be accommodated in the same way as an employer accommodates any other disabled employee who has been prescribed medication.

Code obligations are triggered if the employee claims to be suffering from a disability within the meaning of the Code. Essentially, accommodation of medical cannabis requires an objective assessment of any factors limiting the employee's ability to perform his or her job duties and potential reasonable accommodations that could be made available to the employee. In certain cases, it may be advisable for employers to seek the assistance of an independent medical examiner where there are questions about the employee's fitness for duty, and what will be appropriate accommodation. There are occasions where unresolved disputes as to accommodation for medical cannabis use may result in human rights complaints. However, given the costs and legal risks involved in such complaints, it is much better to attempt to resolve them prior to them reaching the stage of formal legal proceedings.

²⁸ *Ibid*, s 10(1).

H. CONCLUSION

The changes to the legal status of cannabis in Canada have created new challenges for employers. It will be important for employers to have workplace policies which address recreational cannabis use, which means that employers who do not have any policies now with respect to alcohol and drug use by employees should seriously consider adopting them. These policies should clearly articulate and reinforce the requirement that employees must be fit for work and ensure there is an understanding of the consequences for failing to comply. Managers and supervisors should be trained to identify signs of cannabis impairment, and workers should be able to report safety and other concerns with respect to cannabis use in the workplace. Finally, policies should provide for reasonable accommodation of employees who may be suffering from addiction issues, or who have been prescribed cannabis for legitimate medical reasons.



Carters Professional Corporation / Société professionnelle Carters
Barristers · Solicitors · Trade-mark Agents / Avocats et agents de marques de commerce
www.carters.ca www.charitylaw.ca www.antiterrorismlaw.ca

Ottawa · Toronto
Orangeville
Toll Free: 1-877-942-0001

DISCLAIMER: This is a summary of current legal issues provided as an information service by Carters Professional Corporation. It is current only as of the date of the summary and does not reflect subsequent changes in the law. The summary is distributed with the understanding that it does not constitute legal advice or establish a solicitor/client relationship by way of any information contained herein. The contents are intended for general information purposes only and under no circumstances can be relied upon for legal decision-making. Readers are advised to consult with a qualified lawyer and obtain a written opinion concerning the specifics of their particular situation.

© 2018 Carters Professional Corporation

00328312.DOCX