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CLEARING THE HAZE: MANAGING CANNABIS IN THE WORKPLACE IN ONTARIO

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 <p>CARTERS BARRISTERS SOLICITORS TRADEMARK AGENTS</p>	<p>Carters Charity & NFP Webinar Series 2019 Wednesday, May 15, 2019</p>
<p>Clearing the Haze: Managing Cannabis in the Workplace in Ontario</p> <p>By Barry W. Kwasniewski, B.B.A., LL.B.</p> <p>bwk@carters.ca 1-866-388-9596</p> <p>© 2019 Carters Professional Corporation</p>	
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OVERVIEW

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For more information see *Charity & NFP Law Bulletin #431* at carters.ca

A. INTRODUCTION

- On May 2, 2019, Statistics Canada released its National Cannabis Survey regarding cannabis use during the first quarter of 2019:
 - 646,000 Canadians tried cannabis for the first time, compared to 327,000 in first quarter of 2018
 - Over the past year in Ontario, usage of cannabis jumped from 14% to 20% of people aged 15 years and older
 - An estimated 13% (about 514,000) of Canadian workers who are currently cannabis users consumed cannabis before or during work

- An estimated 27% of daily or almost daily consumers used cannabis before or during work, compared to 7% of other less frequent cannabis users
- See survey report at: www150.statcan.gc.ca/n1/daily-quotidien/190502/dq190502a-eng.htm

B. OVERVIEW OF FEDERAL LEGISLATION

1. General Background

- On October 17, 2018, Federal Bill C-45, the *Cannabis Act* (“Federal Act”), came into force, legalizing the recreational use of cannabis in Canada
 - Each province and territory has its own legislation to regulate the recreational use of cannabis such as where cannabis can be bought and used, as long as their laws comply with the parameters set in the Federal Act
 - Municipalities, within their jurisdiction as authorized by their province or territory, may make bylaws and regulations concerning cannabis

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- The Federal Act permits individuals:
 - Who are 18 years or older to access cannabis recreationally, although the legal age of use may be increased by the province or territory (e.g. the legal age in Ontario is 19 years)
 - To possess up to 30 grams of dried cannabis, or an equivalent amount in a different form (e.g. cannabis oil) from a provincially licensed or approved retailer
 - To grow up to four cannabis plants per residence for personal use
 - To make cannabis edibles at home for personal consumption

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- The Federal Act permits cannabis suppliers to brand their products, however, they are not permitted to:
 - Brand in a way so as to make it appealing to youth
 - Sponsor events
- The topic of permissible branding and marketing is an ongoing issue between private cannabis companies and governments

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2. Federal Act Penalties and Restrictions

- The Federal Act repeals the criminal penalties for cannabis possession, subject to its designated limits,
 - However it establishes a range of penalties for breaching these designated limits, including other regulatory provisions of the Act
- For example, the Federal Act creates two new criminal offences, with a maximum penalty of 14 years in jail for:
 - Giving or selling cannabis to youth, or
 - Using a youth to commit a cannabis related offence
- Directors or officers of a corporation who directed, authorized, assented to, acquiesced in, or participated in the commission of the offence may also be liable for conviction under the Act

- Individuals in Canada are prohibited from taking cannabis across Canadian borders
 - Regardless of the amount of cannabis
 - Even if the individual is authorized to use cannabis for medical purposes
 - Even if the individual is travelling to another area where cannabis has been legalized or decriminalized
- Individuals who do transport cannabis out of Canada will also be subject to the laws of the other country
- Link to *Cannabis Act*, SC 2018, c16:
<https://laws-lois.justice.gc.ca/eng/acts/C-24.5/FullText.html>
- Summary of *Cannabis Act* by the Department of Justice:
<http://www.justice.gc.ca/eng/cj-jp/cannabis/>

C. OVERVIEW OF ONTARIO LEGISLATION

- The recreational cannabis regime is governed in Ontario through several acts (and their regulations) including:
 - *Ontario Cannabis Act, 2017*, SO 2017, Schedule 1
 - *Ontario Cannabis Retail Corporation Act, 2017*, SO 2017, c 26, Schedule 2
 - *Smoke-Free Ontario Act, 2017*, SO 2017, c 26, Schedule 3
- Originally, recreational cannabis would be available in Ontario through a government operated retail model similar to the LCBO

- However, Bill 36, *Cannabis Statute Law Amendment Act, 2018* (“CSLAA”) was introduced on September 27, 2018 and came into force on October 17, 2018
 - The CSLAA replaced the retail model above with a new system whereby cannabis became available through private retail stores on April 1, 2019, subject to licensing and approval by the Ontario government
 - Until April 1, 2019, individuals in Ontario could only access recreational cannabis online, through the Ontario Cannabis Store (“OCS”)
 - The OCS only delivers orders to addresses within Ontario, and requires visitors to verify their age before entering the website

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- There was a lottery for the initial award of 25 retail licenses for the entire province of Ontario
 - A number of these lottery winners are now in business in various locations across the province
 - There are now only 15 stores open in Ontario, with two in Ottawa and four in Toronto
- Link to Ontario Cannabis Store:
<https://ocs.ca/>
- Link to CSLAA:
<https://www.ontario.ca/laws/statute/s18012>

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D. MEDICAL USE OF CANNABIS IN CANADA

- The medical use of cannabis was legalized in 2001
- Since April 1, 2014, individuals could access cannabis for medical purposes using only a doctor's prescription, as opposed to a license from Health Canada
- Access to medical cannabis is regulated by the federal *Cannabis Regulations*, SOR/2018-144, which replaced the previous *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230 on October 17, 2018
- Employers have been dealing with matters of medical cannabis with respect to the duty to accommodate under the Ontario *Human Rights Code* ("HRC")

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- On March 1, 2019, the Ontario Workplace Safety and Insurance Board (“WSIB”) published a policy document, *Cannabis for Medical Purposes* (OM 17-01-10)
 - Provides rules and regulations for WSIB claimants seeking reimbursement for using medical cannabis in treatment of workplace injury
 - Applies only to Ontario employers with WSIB coverage for their workers
 - Short list of conditions that may be eligible for coverage
 - Worker must have exhausted conventional treatments
 - Link to WSIB Policy: www.wsib.ca/en/operational-policy-manual/cannabis-medical-purposes

E. RECREATIONAL CANNABIS IN THE WORKPLACE IN ONTARIO

1. Smoke-Free Ontario Act, 2017

- The Ontario *Cannabis Act, 2017* approaches the use of cannabis similarly to tobacco in that the permitted places of cannabis consumption are governed by *Smoke-Free Ontario Act, 2017* (“SFOA”)
- SFOA places certain obligations on employers regarding the use of recreational cannabis, including:
 - Requiring employers to ensure compliance with the Act with respect to the prohibition of cannabis in an “enclosed workplace”
 - Giving notice to employees of such prohibition
 - Posting signs of such prohibition in the enclosed workplace
- Link to SFOA: <https://www.ontario.ca/laws/statute/17s26>

- Regarding workplaces, SFOA only prohibits use of cannabis in “enclosed workplaces”, defined under s.1(1):
 - 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
- SFOA does not prohibit the ingestion of cannabis (i.e. cannabis edibles) in the workplace, as the limitation on the use of cannabis in enclosed workplaces applies only to smoking or holding lighted cannabis
- While employers may still prohibit these activities, the activities are not in and of themselves, illegal

2. Ontario *Occupational Health and Safety Act*

- Section 25 of the Ontario *Occupational Health and Safety Act*, RSO 1990, c O.1 (“OHSA”) requires employers to take “every precaution reasonable in the circumstances for the protection of the worker”
 - Employers and managers can be charged and prosecuted for health and safety violations under the OHSA, and face substantial fines and penalties
 - Even with the legalization of cannabis, employees do not have the right to be impaired in the workplace
- Link to OHSA: <https://www.ontario.ca/laws/statute/90o01>

3. Employer Rights Regarding Performance of Duties

- Employers have the right to require that employees report to work in a condition in which they are fit to perform their duties
 - Cannabis can be considered in the context of other substances that cause impairment, regardless of whether it is legal or not
- Employees do not have an unfettered right to smoke cannabis at work, even if they are authorized to use cannabis for medical reasons
 - Confirmed by the Human Rights Tribunal of Ontario in *Aitchison v L&L Painting and Decorating Ltd*, 2018 HRTO 238 (February 28, 2018)

4. Challenges of Employers Regarding Cannabis Impairment

- A person who is under the influence of cannabis may not show obvious traits of impairment
- There is no generally accepted observational testing that untrained individuals can carry out to determine cannabis-related impairment
- Employee showing signs of impairment should be advised to cease work immediately, and interviewed by management as to signs of impairment
- Management should interview others who interacted with impaired employee
- Prior to re-attendance at work, employee should be asked about impairment at work and provide an explanation. If no explanation is offered, employee could be subject to discipline

- Signs of cannabis impairment can include:
 - Dizziness, drowsiness, fatigue
 - Confusion, impaired focus and memory
 - Altered emotional states such as paranoia, suspiciousness, nervousness, and anxiety
 - Impairment of motor function and perception
- The acute effects of cannabis impairment generally last between 2 to 4 hours. However, these effects can linger for up to 24 hours after consumption or even longer
- Cannabis impairment can significantly impact an individual's ability to work effectively, respectfully, and in many cases, safely
- Some organizations are offering courses for managers on identifying cannabis impairment

F. WORKPLACE CANNABIS POLICIES

- The use of recreational cannabis by employees does not trigger any duties under the HRC, subject to issues of addiction
- Employers have the right to set rules and policies for the recreational use of cannabis in the workplace
 - Employers may prohibit the use of recreational cannabis at work in any form during working hours
 - Employers may prohibit employees from attending work while impaired, whether from use of cannabis or any other substance causing the impairment

- Workplace rules may be enforced through employee discipline, including a progressive discipline policy
- Employers should update or establish a workplace drug and alcohol policy or a more general “fitness to work” policy to include references to recreational cannabis
- There is debate over how detailed a policy regarding the use of recreational cannabis should be

- The Canadian Armed Forces (“CAF”) has a highly detailed policy regarding the use of cannabis by CAF members (see: <http://www.forces.gc.ca/en/about-policies-standards-defence-admin-orders-directives-9000/9004-1.page>)
- The University of Toronto has guidelines clarifying employee obligations relating to impairment in the workplace, defining ‘fitness to work’ as when:
 - “An employee is able to safely and acceptably perform assigned duties without limitation resulting from the use or after effects of intoxicants (whether a medication or otherwise).”

(see: <http://www.hrandequity.utoronto.ca/wp-content/uploads/sites/15/2018/06/Human-Resource-Guideline-on-Fitness-for-Work.pdf>)
- Each organization needs to consider how they will manage cannabis, and make those known to employees

G. REGULATING OFF-DUTY EMPLOYEE CONDUCT

- Generally, employers cannot regulate an employee's off-duty conduct that is legal, unless it is tied to workplace performance issues
 - However, an employer who is a religious ministry may establish conduct requirements regulating 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 faith

- For example, the Trinity Western University (“TWU”) cases involving its code of conduct show that policies based on social morality can be problematic
- Link to 2018 TWU decision (2018 SCC 32): <http://canlii.ca/t/hsjpr>
- Therefore it is important to obtain legal advice before prohibiting cannabis use based on such standards

H. ACCOMMODATING MEDICAL USE OF CANNABIS

- The medical cannabis regime operates independently from the recreational cannabis regime
- A legal duty to accommodate is triggered when an employee claims to be suffering a disability within the meaning of the HRC
 - This duty extends to the use of medical cannabis
 - Employees who have been prescribed medical cannabis are to be accommodated the same as any other disabled employee who has been prescribed medication

- The HRC has a broad definition of “disability, meaning that there may be many medical conditions for which cannabis may be prescribed, which trigger employer duties to accommodate under the HRC
- There is a mutual duty on both employee and employer with respect to the workplace accommodation process when an employee is prescribed medical cannabis
- Obtaining and assessing the necessary medical information is a necessary part of the workplace accommodation process

- If an employee wishes to use medical cannabis and attend work, the employer should require the following information from the employee's prescribing physician:
 1. When and how the product needs to be used;
 2. Whether the product needs to be used at work;
 3. In what form the product must be consumed;
 4. Where the employee will consume the product if it needs to be taken at work;
 5. The period of time the employee is anticipated to take the product; and
 6. The side effects and restrictions when using the product, and the length of these effects.

- This information helps employers assess whether the medical cannabis will affect the employee's ability to perform his or her duties, and how such duties can be modified to accommodate the employee's needs
- Some group health benefit plans now offer coverage for medical cannabis for certain ailments, *e.g.*
 - Green Shield – offers coverage for: chronic neuropathic pain; spasticity due to MS; and nausea due to chemotherapy
 - Sunlife offers similar coverage as well
- Whether or not an employee has coverage under the group plan does not change the information that managers require in the context of permitting the employee to work

- However, a prescription for medical cannabis does not entitle the employee:
 - To be impaired at work
 - To compromise his or her safety, or the safety of others
 - To smoke in the workplace
 - To unexcused absences or late arrivals
- Accommodation of medical cannabis requires an objective assessment of
 - Any factors that limit the employee’s ability to perform his or her work duties
 - Potential reasonable accommodations that could be made available to the employee
- It may be advisable for employers to seek the assistance of an independent medical examiner regarding these matters of assessment

I. EMPLOYEE ADDICTION TO CANNABIS

- With the expected increase in prevalence of recreational cannabis use, there is also a risk of increased rates of cannabis addiction
- The Human Rights Tribunal of Ontario has ruled on numerous occasions that drug or alcohol addiction can constitute a “disability”
- Employers should have policies stating how they will respond to potential cases of employee substance addiction issues
 - These policies should encourage or even require employees to come forward if they feel that they have a substance addiction problem, without risk of reprisal

- As part of the accommodation process, employees who come forward may need to be granted time off work to deal with addiction issues
- Any immediate termination of an employee who comes forward with substance addiction issues could result in a human rights complaint against the employer
- However, an employer that has and implements policies properly addressing potential addiction issues will decrease the risk of being faced with human rights complaints

J. CONCLUSION

- Changes to the legal status of cannabis in Canada have created new challenges for employers
- It is important for employers to have workplace policies which address recreational cannabis use
 - Employers who currently do not have drug and alcohol policies should seriously consider adopting them
- Managers should be trained to identify signs of cannabis impairment
- Workers should be able to report safety and other concerns with respect to cannabis use

- Policies should clearly articulate and reinforce the requirement that the employees
 - Must be fit for work
 - Understand the consequences of failing to comply with such policies
- However, policies should also provide for reasonable accommodation of employees who may be suffering from addiction issues or who have been prescribed cannabis for legitimate medical reasons

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