

Member's Quarterly

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Feature

Dealing with Marijuana Use and Safety Concerns

Verify that you have expert evidence

As cannabis is now legal in Canada, many employers have been working to update their drug and alcohol policies, anticipate the kind of issues they will have in dealing with drug use (whether for medical or recreational purposes) and minimize safety risks and concerns. Here are a couple of developments relevant to these issues.

Relevant Arbitration Award

The Newfoundland arbitration decision in *Lower Churchill Transmission Construction Employers' Association v. IBEW, Local 1620* provides helpful arguments for employers faced with the possibility of having to accommodate into safety-sensitive workplaces employees who use cannabis for medical purposes. In that case, Arbitrator Roil dismissed a grievance challenging a refusal to hire on the basis that there would be undue hardship to the employer from the inadequacy of existing drug testing technology to determine impairment caused by cannabis use.

The grievor was authorized to use "medical cannabis", which he vapourized and inhaled. He was authorized to consume approximately 1.5 grams of cannabis with a high THC potency every evening. The grievor applied for two general labourer positions, which were both determined to be safety-sensitive. The grievor was not accepted for either position because of his admitted "medical" cannabis use. The employer took the position that the grievor's use of cannabis created a risk of impairment which was not acceptable for someone in a safety-sensitive role.

The grievor's physician gave evidence that the grievor would be capable of working in a safety-sensitive position 4 hours after ingestion. The employer challenged this evidence and led evidence supporting its concerns about residual impairment of the grievor. Contrary to the opinion of the grievor's physician, Health Canada and the College of Physicians and Surgeons of Newfoundland and Labrador had previously issued professional advice that, due to the long half-life of THC, impairment could last up to 24 hours after use. Furthermore, the arbitrator concluded that the grievor's general practitioner was not an expert on the subject at hand.

The arbitrator concluded that if safety risk is to be managed, the employer needs to be able to measure the impact of the "medical cannabis" on the performance of the worker. The evidence supported a general lack of effective or practical means to accurately test impairment in the workplace caused by evening cannabis use. The arbitrator concluded that remedial or monitoring processes would not help offset this safety risk. As such, it was determined that accommodating the grievor would be an undue hardship for the employer. Without sufficient means for impairment testing, the employer was not required to compromise safety and assume the risk associated with cannabis impairment.

This is an important case for employers. Due to the complexity of the drug, it is generally accepted that current testing technology is unable to accurately measure impairment from cannabis use. It is also generally accepted by most physicians that THC impairs performance. However, not all "medical marijuana" contains high levels of THC.



Tom Ross
LL.B.

Partner, McLennan
Ross LLP



Dave Foster
J.D.

Associate, McLennan
Ross LLP



**Maurice
Dransfeld**
LL.B.

Partner, McLennan
Ross LLP

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Some have less than 1% THC while being high in CBD (another chemical that is not impairing and tends to counter the effects of THC). In this case, the arbitrator accepted that in respect of this grievor, the lack of reliable testing for impairment was a safety concern that the employer should not have to bear. That is of course a conclusion based on the medical evidence presented in the specific case, but it is hard to question the overall logic of its reasoning.

If an employee is ingesting cannabinoids, employers should attempt to ascertain usage, dosage and potency, and obtain expert evaluation of the ability to work safely. At least two Alberta arbitrators have determined that use of authorized cannabinoids is not necessarily inconsistent with work in a safety-sensitive position. One critical factor is the relative concentration of THC versus CBD. The individual's circumstances have to be evaluated. Each case will depend on the particular expert evidence presented. However, this case now provides a sensible answer to the question: "What if there is a doubt?" As one would hope, safety should come first in weighing the competing factors.



Drug Testing in the Oil Sands

Drug testing is another way to address the risks created by marijuana use.

In Alberta, Suncor and its union, Unifor, have been litigating over the application of Suncor's random alcohol and drug testing program. Suncor had gathered substantial evidence showing a problem with alcohol and drug use at its workplaces — that has been considered by the courts to be a necessary precondition before an owner can implement random testing programs.

In an announcement released on November 29, 2018, Suncor confirmed Unifor's recent agreement to random drug and alcohol testing for all safety-sensitive positions. Suncor implemented this program in the first quarter of 2019 at all of its work sites in the Regional Municipality of Wood Buffalo, and its suppliers (e.g., contractors) will be expected to do the same. Other oil sands operators and employers in other industries may be encouraged to do the same.

The interaction between marijuana use and safety will continue to be an evolving issue in workplaces and the law.

Tom Ross (Partner), Dave Foster (Associate) and Maurice Dransfeld (Partner) practice Employment Law at McLennan Ross LLP. Tom Ross can be reached via email at tross@mross.com.