



MERITAS CAPABILITY WEBINAR - NOT UP IN SMOKE: EMPLOYER RIGHTS IN THE FACE OF LEGALIZED MARIJUANA

PRESENTED BY

TRINA FRASER | BRAZEAU SELLER LAW

MATT LETSON | LAWSON CREAMER

TRACY KAY | MINDEN GROSS LLP

KELLY VANBUSKIRK | LAWSON CREAMER | *MODERATOR*

March 29, 2018

©2018 Meritas. All Rights Reserved.

HOUSEKEEPING ITEMS

- Audio will be broadcasted through your computer speakers

- To listen through your telephone dial:

(US & Canada): +1-866 740-1260

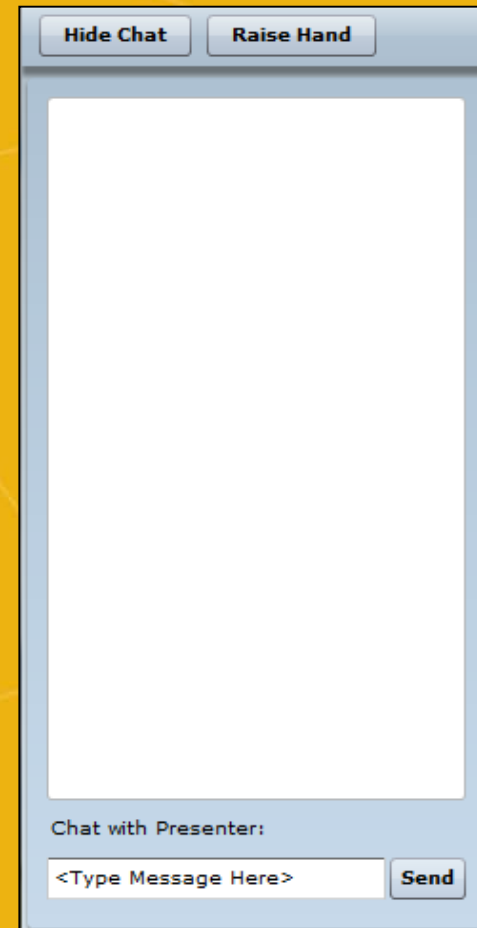
(International): +1-303 248-0285

Enter Participant Code: 6040090

Your phone line will be muted

Dial *0 at any time for technical support

- Questions may be submitted to the presenter via the chat feature on your computer



PRESENTATION OVERVIEW

- History of legal treatment of cannabis in Canada
- Overview of Bill C-45 (Cannabis Act), proposed regulatory framework and provincial responses

THE PAST CENTURY...

- Cannabis has been a controlled substance in Canada since 1923, 14 years before the U.S.
- Was added, along with heroin and codeine, to existing list of controlled drugs (which included opium, morphine and cocaine)
- No parliamentary record of why cannabis was added

CURRENT LEGISLATION

- *Controlled Drugs and Substances Act (CDSA)*
- CDSA, s.4(1) – no person shall possess a substance included in Schedule II, except as authorized by regulation – contravention is an indictable offence
- Schedule II includes “Cannabis, its preparations, derivatives and synthetic preparations”
- Also includes certain cannabinoids including Tetrahydrocannabinol (THC) and Cannabidiol (CBD)

CANNABIS REGULATIONS

MMAR

Medical Marihuana Access Regulations (2001-2014)



MMPR

Marihuana for Medical Purposes Regulations (2014-2016)



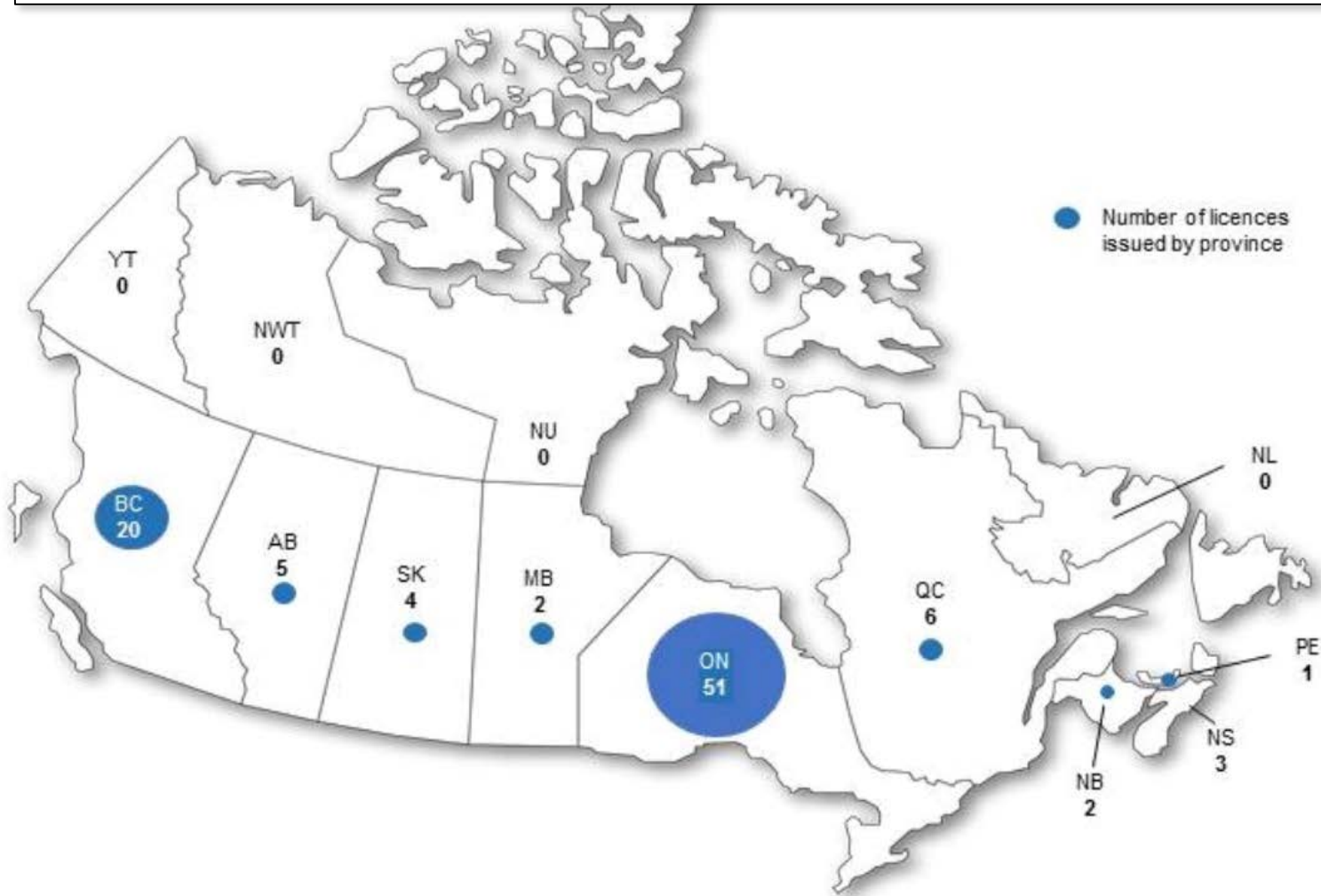
ACMPR

Access to Cannabis for Medical Purposes Regulations (2016-2018?)

CURRENT ACMPR STATUS

- 94 licensed producers across Canada
- >450 applications in progress
- 235,000 registered patients
- >11,000 personal/designated production registrations

LICENSED CANNABIS PRODUCERS (BY PROVINCE/TERRITORY)



Source: www.canada.ca

**BRAZEAU
SELLER
LAW**

MERITAS[®]
LAW FIRMS WORLDWIDE

WHAT'S AT STAKE:

Source: Recreational Marijuana Insights and Opportunities, Deloitte, 2016



BILL C-45 – CANNABIS ACT

- Cannabis removed from CDSA (synthetic cannabinoids remain)
- New, separate act created for regulation of cannabis
- Legal for adult to possess equivalent of up to 30g of (legal) dried cannabis in public
- Legal for adult to grow 4 cannabis plants in dwelling (unless restricted provincially)
- Provision for production licences

CANNABIS ACT OFFENCES (ADULT)

OFFENCE	PENALTY
Public possession of equivalent of more than 30g of dried cannabis Possession of illicit cannabis Possession of more than 4 non-budding/flowering cannabis plants	Indictable offence - up to 5 years imprisonment OR Summary conviction offence - up to 6 months imprisonment + fine up to \$5,000 OR Ticket for \$200 plus victim surcharge (if <50g and <7 plants involved)
Public possession of budding/flowering cannabis plants	Indictable offence - up to 5 years imprisonment OR Summary conviction offence - up to 6 months imprisonment + fine up to \$5,000
Distribution of equivalent of more than 30g of dried cannabis Distribution to an organization Distribution of illicit cannabis Distribution of >4 non-budding/flowering cannabis plants Possession for purpose of distribution to adult Unauthorized sale to adult or organization Possession for purpose of unauthorized sale to adult or organization Unauthorized procurement Cultivation of more than 4 plants at a time in a dwelling-house Cultivation of cannabis plant >100cm in height Cultivation at non-dwelling-house	Indictable offence - up to 14 years imprisonment OR Summary conviction offence - up to 6 months imprisonment + fine up to \$5,000 OR Ticket for \$200 plus victim surcharge (if <50g involved and <7 plants involved and <150cm tall and no use of organic solvents)
Distribution of budding/flowering cannabis plants Unauthorized importing/exporting Possession for purposes of unauthorized import/export Unauthorized extraction with use of organic solvent Unauthorized cultivation from illicit cannabis	Indictable offence - up to 14 years imprisonment OR Summary conviction offence - up to 6 months imprisonment + fine up to \$5,000
Distribution to <18 Possession for purpose of distribution to <18 Sale to <18 Possession for purpose of sale to <18 Use of young person in the commission of an offence	Indictable offence - up to 14 years imprisonment OR Summary conviction offence - up to 18 months imprisonment + fine up to \$15,000
Possession, production, sale, distribution or import of material used to produce, sell or distribute illicit cannabis	Indictable offence - up to 7 years imprisonment OR Summary conviction offence - up to 6 months imprisonment + fine up to \$5,000
Unauthorized promotion False promotion Prohibited publication Prohibited inducements Prohibited packaging/labelling Prohibited display Sale with appearance appealing to young persons Sale of cannabis accessory to young person Sale of non-permitted class of cannabis Sale of cannabis containing nicotine, caffeine or ethyl alcohol Sale of recalled cannabis Sale/distribution via self-serve display or dispensing device Obstructing an inspector Making false or misleading statements to an inspector Interference with seized item Report containing false or misleading statement Other offences created by regulation	Indictable offence - up to 3 years imprisonment OR Summary conviction offence - first offence - up to 6 months imprisonment + fine up to \$250,000 - subsequent offences - up to 18 months imprisonment + fine up to \$500,000 OR Ticket/fine (if provided by regulation) * ALSO ADMINISTRATIVE PENALTIES of up to \$1,000,000 per violation

FOR INFORMATIONAL PURPOSES ONLY. THIS IS NOT LEGAL ADVICE
 Prepared by Trina Fraser, Partner, Brazeau Seller Law. As at April 14, 2017.
 © Brazeau Seller Law, 2017.

**BRAZEAU
SELLER
LAW**



MERITAS[®]
LAW FIRMS WORLDWIDE

SUPPLY CHAIN FOR THE COMMERCIAL PRODUCTION AND SALE OF CANNABIS

Proposed Federal Licences



WHAT LICENCES DO I NEED?



ADDITIONAL NOTES:

ALL FEDERAL LICENCE HOLDERS CAN CONDUCT RELATED ACTIVITIES SUCH AS:
• possession, transportation, storage, destruction, and intra-industry sales.

INDIVIDUALS OR ORGANIZATIONS MAY HOLD ONE OR MULTIPLE CLASSES OF LICENCES, WITH SOME EXCEPTIONS:
• A federal licence is required to obtain an import/export permit (for scientific or medical purposes, or in respect of industrial hemp)



Table 1: Summary of Licensed Activities

ACTIVITIES	CULTIVATION				PROCESSING		SALE	
	Standard	Micro	Nursery	Hemp	Standard	Micro	Medical	Non-medical
CORE ACTIVITIES								
Cultivation								
Cultivate cannabis with more than 0.3% THC	•		•					
Cultivate cannabis with more than 0.3% THC, below a certain threshold (to be established in the regulations)		•						
Cultivate cannabis containing 0.3% or less THC (hemp)	•	•	•	•				
Sell starting material (live plants and seeds) to cultivators or processors	•	•	•	•				
Sell harvested plant material (flower and trim) to processors	•	•		•				
Processing								
Manufacture cannabis products (for example, oil)					•			
Manufacture cannabis products, below a certain threshold (to be established in the regulations)						•		
Package and label products for sale to consumers					•	•		
Sell packaged products to federal or provincially- or territorially-authorized sellers					•	•		
Sell intermediary products (i.e. resin) to other processors					•	•		
Sale to the Public								
Sell products for medical purposes to registered clients							•	
Sell products to adult consumers in provinces and territories without a distribution and retail sale system								•
SUPPLEMENTAL ACTIVITIES								
Transportation	•	•	•	•	•	•	•	•
Storage	•	•	•	•	•	•	•	•
Destruction	•	•	•	•	•	•	•	•
Research and Development (within authorized core activities)	•	•	•	•	•	•	•	•

Table 2: Summary of Licence Requirements by Activity

REQUIREMENTS	CULTIVATION				PROCESSING		SALE (medical and non-medical purposes)	
	Standard	Micro	Nursery	Hemp	Standard	Micro	Cannabis on-site	No cannabis on-site (for example, a call centre)
LOCATION								
Indoor	•	•	•	•	•	•	•	•
Outdoor	•	•	•	•				
PHYSICAL SECURITY								
Perimeter of the site								
Physical barriers (for example, walls or fences) to prevent unauthorized access	•	•	•		•	•	•	
Visual monitoring of the entire perimeter at all times	•				•		•	
Keep visual recordings for 1 year	•				•		•	
Alarm or other intrusion detection system	•				•		•	
Indoor areas on-site where cannabis is present, excluding growing areas								
Physical barriers (for example, walls, doors, locks) to prevent unauthorized access	•	•	•		•	•	•	
Alarm or other intrusion detection system	•				•		•	
Areas must be visually monitored at all times by visual recording devices	•				•		•	
Keep visual recordings for 1 year	•				•		•	
Access restricted to employees whose presence in those areas is required by their work responsibilities	•	•	•		•	•	•	
Additional requirement for areas where cannabis product (for example, dried, oil) is stored								
Identity of every person entering or exiting must be recorded	•				•		•	

REQUIREMENTS	CULTIVATION				PROCESSING		SALE (medical and non-medical purposes)	
	Standard	Micro	Nursery	Hemp	Standard	Micro	Cannabis on-site	No cannabis on-site (for example, a call centre)
PERSONNEL SECURITY CLEARANCE								
Specified employees must hold a valid security clearance issued by the Minister	•	•	•		•	•	•	•
GOOD PRODUCTION PRACTICES								
Clean equipment	•	•	•	•	•	•		
Sanitation of indoor areas	•	•	•		•	•		
Analytical Testing (microbial, contamination, heavy metals, unauthorized pesticides, THC, CBD) (limited requirements for hemp)*				•	•	•		
Quality Assurance Person					•	•		
REPORTING AND RECORD KEEPING								
Maintain records and report information that, for example, demonstrates compliance with good production practices, describes research and development activities, protocols for product recalls and adverse effects. The exact requirements vary per activity.	•	•	•	•	•	•	•	•
CANNABIS TRACKING SYSTEM								
Report information with respect to tracking cannabis, such as production levels, inventory amounts, and sales volume.	•	•	•	•	•	•	•	•

* Note: All cannabis will be tested prior to processing, packaging, and sale.

Source: Health Canada - Proposed Approach to the Regulation of Cannabis, Nov 2017

CANADA'S STANDARDIZED CANNABIS SYMBOL



Source: Health Canada - Proposed Approach to the Regulation of Cannabis: Summary of Comments Received During the Public Consultation – March 2017

**BRAZEAU
SELLER
LAW**


MERITAS[®]
LAW FIRMS WORLDWIDE

PRESCRIBED HEALTH WARNING MESSAGES

WARNING: Do not use if pregnant or breastfeeding.

Using cannabis during pregnancy may harm your baby and result in low birth weight.

MISE EN GARDE : Ne consommez pas si vous êtes enceinte ou allaitez. Consommer du cannabis pendant la grossesse pourrait être dangereux pour le bébé et réduire son poids à la naissance.

Health Canada/Santé Canada

PACKAGING EXAMPLE:



Source: Health Canada - Proposed Approach to the Regulation of Cannabis: Summary of Comments Received During the Public Consultation – March 2017

**BRAZEAU
SELLER
LAW**

MERITAS®
LAW FIRMS WORLDWIDE

CANADIAN CANNABIS LEGALIZATION HIGHLIGHTS (BY PROVINCE / TERRITORY)
(as of March 16, 2018)

Note: All jurisdictions will maintain the federal 30g possession limit (non-medical)

	British Columbia*	Alberta	Saskatchewan	Manitoba	Ontario	Quebec	Newfoundland & Labrador	New Brunswick	Nova Scotia*	Prince Edward Island*	Yukon	Northwest Territories	Nunavut*
Name of Provincial Bill/Act (or link to released framework)	https://news.gov.bc.ca/releases/2018PSSG0006-000151	An Act to Control & Reg. Cannabis – Royal Assent Dec.15/17 (no proclamation date yet)	Bill 121 – <i>The Cannabis Control (Saskatchewan) Act</i> – 1 st Reading Mar.14/18	Bill 11 (<i>Safe & Responsible Retailing of Cannabis Act</i>) (2 nd reading) and <i>Cannabis Harm Prevention Act</i>	<i>Cannabis Act, 2017</i> and <i>Ontario Cannabis Retail Corporation Act, 2017</i> (no proclamation dates yet)	Bill 157 (<i>Cannabis Regulation Act</i>) - Hearings before Committee on Health & Social Services	Bill 23 (Act to Amend the Liquor Corporation Act) – Royal Assent on Dec.7/17	Bill 16 (<i>Cannabis Control Act</i>) & Bill 17 (<i>Cannabis Mgmt Corp Act</i>) 3 rd readings on Feb.2/18	https://novascotia.ca/cannabis/	https://www.princeedwardisland.ca/en/service/cannabis-legislation	Bill 15, <i>Cannabis Control and Regulation Act</i> , 1 st reading on March 8/18	Bill 6, <i>Cannabis Legalization and Regulation Implementation Act</i> –2 nd reading Mar.1/18 –now before standing committee	https://www.gov.nu.ca/sites/default/files/final_modified_text_rpt_regulating_cannabis_in_nunavut-eng.pdf
Min. Age	19	18	19	19	19	18	19	19	19	19	19	19	19
Transport Restrictions	Must be in a sealed package, or inaccessible to vehicle occupants	Closed package out of reach of driver & occupants	Possession in vehicle solely for transport to place of lawful use or storage	In trunk or behind last seat of van/wagon/SUV/hatchback	Must be packed in closed baggage or as per regulations			Restriction only on consumption within a vehicle		Packages must be secured & inaccessible to anyone in vehicle	Must be in closed container & inaccessible to occupants	Must be unopened or resealed & inaccessible to occupants	Must be in closed packaging and inaccessible to occupants
Recreational Consumption Restrictions	Permitted where tobacco smoking is permitted but not where children are present (beaches, parks, playgrounds) or in vehicles	Not at hospital, school, daycare, etc. or wherever smoking is prohibited	No public consumption – consumption of lighted cannabis in private places may be limited by regulation	No consumption in vehicle or enclosed public spaces	No consumption in public, at workplace or in vehicle or boat	Prohibition at enumerated enclosed and public spaces	Private residences only	Private dwelling w consent of occupant or vacant land w consent of owner or occupant only		Private residences only (with potential for designated spaces)	For now, restricted to privately owned residences and adjoining property, where owner consents	Permitted on private property (with LL permission) and in restricted public areas	Same as tobacco -also restricted in vehicles, school grounds, hospitals, playgrounds
Provincial Distributor	BC Liquor Distribution Branch	Alberta Gaming and Liquor Commission	Private, regulated by Sask Liquor & Gaming Auth.	Liquor, Gaming and Cannabis Authority (with private distr's)	Ontario Cannabis Retail Corporation	Soci�t� des alcools du Qu�bec	Newfoundland and Labrador Liquor Commission	Cannabis Management Corporation	Nova Scotia Liquor Corp (NSLC)	PEI Liquor Control Commission (PEILCC)	Government of Yukon	NWT Liquor Commission	Nunavut Liquor Commission (NULC)
Permitted Retailer(s)	Public and Private	Private. Applications open March 6	Private, regulated by Sask Liquor & Gaming Auth.	Delta9/Canopy NAC Hiku/BOBHQ 10552763 Can.Corp.	Ontario Cannabis Retail Corporation	Soci�t� Qu�b�coise du Cannabis	Private (public only where no private retailer) -Tweed to have 4 locations	New subsidiary of NB Liquor under name "CannabisNB"	NSLC	PEILCC	Private (but govt to start)	NWT Liquor Commission	Public and Private
Number of Retail Locations	No cap on licences, but municipalities must approve locations	250 retail licences anticipated in Yr. 1	Up to 51 permits in 32 communities		40 stores by July 2018; 80 by July 2019; 150 by 2020	15 physical stores at outset	RFP for retailers closes March 29/18 41 stores expected	11 locations by July/18; 20 locations by September/18	9 locations	Four in 2018 (Charlottetown, Summerside, Montague, West Prince)	One government-owned location to start	Initially, within existing liquor stores	No physical locations in 2018
Retail Location Restrictions	No co-location with alcohol or tobacco. Cannabis & accessories only in urban areas	No co-location with anything other than cannabis accessories	Co-location w access./ ancill. items only – communities can opt out -no minors	Municipalities can prohibit retail sales – no co-location with alcohol	Unclear whether municipalities can delay or prohibit retail	Restrictions may be imposed by regulation	No co-location/ shared access with pharmacy - no adjacent lounge where alcohol served	>300m from schools	Co-location with existing liquor stores, but in separate area	Stand-alone government-owned locations – No advertising	No co-location with alcohol sales	Municipalities can prohibit retail sales / est. restrictions via plebiscite	Proposed that 'dry' communities will not be permitted
Online Sales	Yes, by govt	Yes, by govt	Yes, by private retailers	Yes, by private retailers	Yes, by govt	Yes, by govt	By govt for now www.ShopCannabisNL.com	Yes, by govt	Yes, by govt	Yes, by govt	Yes, by govt	Yes by govt but only where no liquor store	Yes, by govt asap after legalization
Announced LP Supply Deals	RFI published March 13 th – closes March 27 th	Expression of interest process closed Feb.12		Tilray to supply NAC		MedReleaf Hydropharmacy Canopy, Aurora Aphria, Tilray	Canopy Growth	Organigram, Canopy, Zenabis, Nuuvera	RFI closed February 23rd	Organigram, Canopy, Canada's Island Garden			
Home Grow Restrictions	No visible plants from public space. No growing in daycare homes. Landlords and strata councils may restrict	Expected to be permitted in regulations	Permitted as per <i>Cannabis Act</i> . Proposed that landlords may set & enforce cannabis rules	No home growing permitted	Permitted as per <i>Cannabis Act</i>	No home growing permitted. Private possession of >150g prohibited		Indoors in separate locked space. Outdoors in locked encl. at least 1.52m high	Permitted as per <i>Cannabis Act</i>		Permitted as per <i>Cannabis Act</i>	Permitted as per <i>Cannabis Act</i>	Ability for landlords and condo corps to restrict home growing are being considered

* Based on announced framework only – no bill introduced yet

FOR INFORMATIONAL PURPOSES ONLY. THIS DOES NOT CONSTITUTE LEGAL ADVICE.

© Brazeau Seller Law, 2018. Prepared by Trina Fraser, Partner and CannaLaw® group leader.



ONTARIO CANNABIS STORE



CANNABIS CONSUMPTION IN THE WORKPLACE

To be addressed on a province-by-province basis

Ontario Approach

Cannabis Act, 2017

“No person shall consume cannabis in a workplace”

- Medical cannabis users are exempt, subject to *Smoke-Free Ontario Act, 2017*

Smoke-Free Ontario Act, 2017

No person shall smoke or vaporize cannabis in an “enclosed workplace” (or consume in a “prescribed manner”).

- qualified exceptions for long-term care homes, supportive housing, psychiatric and veterans facilities, but no employees shall be required to enter the designated consumption room
- employers are responsible for ensuring compliance and face fines of up to \$300,000 for non-compliance
- unless/until restricted by regulation, workplace consumption of edible cannabis products will be legal

CANNABIS ACT DISCUSSION PAPER

- Marijuana impairs a number of brain functions needed for safe driving such as coordination, judgement of distances, reaction time, and ability to pay attention. Marijuana is second to alcohol as the drug most frequently found among drivers involved in crashes and drivers charged with impaired driving, and among seriously injured drivers. Marijuana and alcohol are also among the most frequently occurring alcohol-drug combinations.
- In contrast to alcohol, there is currently no roadside "breathalyzer"-type test to detect impairment with marijuana. However, roadside oral fluid tests are being used in other jurisdictions that can detect the presence of marijuana in oral fluid which can be suggestive of recent use. This is an active area of Canadian and international research.

Toward the Legalization, Regulation and Restriction of Access to Marijuana - Discussion Paper

<http://healthycanadians.gc.ca/health-system-systeme-sante/consultations/legalization-marijuana-legislation/public-safety-protection-securite-public-eng.php>

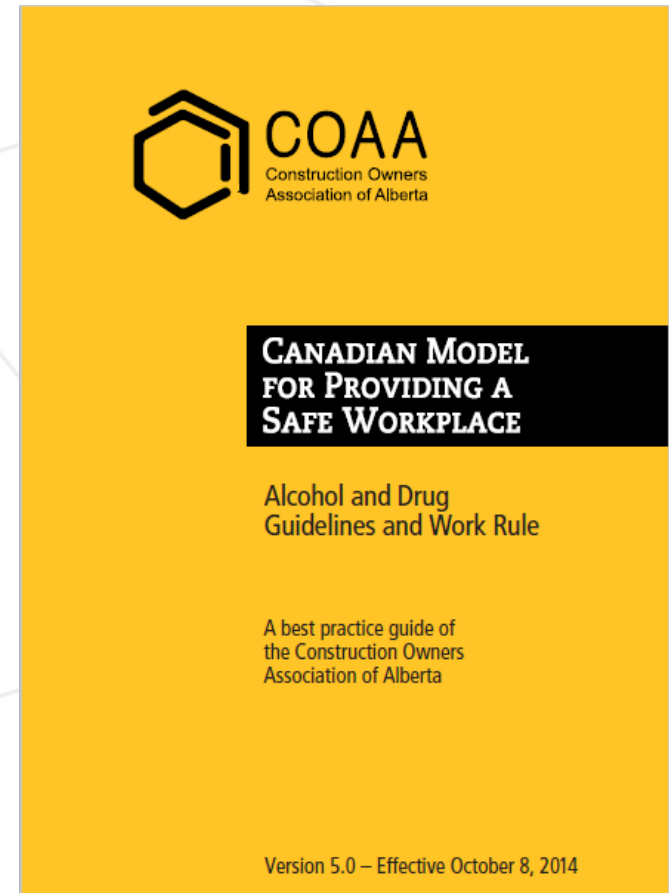
CANNABIS ACT – TASK FORCE

Problems with marijuana testing

- THC impairs driving performance, the level of THC in bodily fluids does not reliably indicate the degree of impairment;
- No equivalent to Blood Alcohol Concentration (BAC);
- Problem of chronic, heavy users of cannabis;
- testing tools: oral fluid screening devices are the most advanced today (and have the added advantage of signalling recent use);

CANADIAN MODEL

- In 1999, Construction Owners Association of Alberta developed model policy
- Updated 4 times since then (most recent 2014)
- Available at:
<http://www.coaa.ab.ca/safety/CanadianModel.aspx>



CANADIAN MODEL

3.0 ALCOHOL AND DRUG WORK RULE

3.1 An employee shall not

- (a) use, possess or offer for sale alcohol and drugs or any product or device that may be used to attempt to tamper with any sample for a drug and alcohol test while on company property or at a company workplace,
- (b) report to work or work
 - (i) with an alcohol level equal to or in excess of 0.040 grams per 210 litres of breath,
 - (ii) with a drug level for the drugs set out below equal to or in excess of the concentrations set out below:

or

- (iii) while unfit for work on account of the use of a prescription or non-prescription drug,
- (c) refuse to
 - (i) comply with a request made by a representative of the company under 4.3, or
 - (ii) comply with a request to submit to an alcohol and drug test made under 4.4, 4.5, 4.6 or 4.7, or
 - (iii) provide a sample for an alcohol and drug test under 4.8,
- (d) tamper with a sample for an alcohol and drug test given under 4.8.

CANADIAN MODEL

5.1 Company responses to violations

The company may discipline, or terminate for cause, the employment of an employee who fails to comply with the alcohol and drug work rule. The appropriate consequence depends on the facts of the case, including the nature of violation, the existence of prior violations, the response to prior corrective programs and the seriousness of the violation.

CANADIAN MODEL

Upheld in:

- *Fluor Constructors Canada Ltd. and I.B.E.W., Loc. 424 (Chornyj) (Re)*, (2001) 100 LAC (4th) 391
- *Clearwater Fabrication GP Inc. v. United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union 488 (Johnston Grievance)*, (2013) 234 L.A.C. (4th) 132
- Good Construction Industry standard
- In unionized context, will be largely respected IF incorporated by Employers and Unions into the Collective Agreement or otherwise agreed to by both
- Must be applied reasonably
- No cases dealing with non-union context
- No reason to think it would not be considered applicable if incorporated by non-union employers into the terms of employment
- Random testing and other aspects MAY be at odds with the Human Rights Act

CANADIAN MODEL

Urine drug concentration limits:

Drugs or classes of drugs	Screening concentration equal to or in excess of ng/ml	Confirmation concentration equal to or in excess of ng/ml
Marijuana metabolite	50	15
Cocaine metabolite	150	100
Opiates	2000	—
• Codeine	—	2000
• Morphine	—	2000
6-Acetylmorphine	10	10
Phencyclidine	25	25
Amphetamines	500	—
• Amphetamine	—	250
• Methamphetamine	—	250
MDMA ¹	500	—
• MDMA	—	250
• MDA ²	—	250
• MDEA ³	—	250

Oral fluid drug concentration limits:

Drugs or classes of drugs	Screening concentration equal to or in excess of ng/mL	Confirmation concentration equal to or in excess of ng/mL
Marijuana (THC)	4	2
Cocaine metabolite	20	—
• Cocaine or Benzoyllecgonine	—	8
Opiates	40	—
• Codeine	—	40
• Morphine	—	40
• 6-Acetylmorphine	—	4
Phencyclidine	10	10
Amphetamines	50	—
• Amphetamine	—	50
• Methamphetamine	—	50
• MDMA ¹	—	50
• MDA ²	—	50
• MDEA ³	—	50



PROPOSED US FEDERAL GUIDELINES

Mandatory Guidelines for Federal Workplace Drug Testing Programs by the U.S. Substance Abuse and Mental Health Services Administration

- Currently proposed amendments to 1988 guidelines
- Oral testing standard same as Canadian Standard for Marijuana
 - 4ng/ml initial
 - 2ng/ml confirmatory

TESTING

Significant difference between unionized and non-unionized workplaces

Unionized workplace

- Extraordinary circumstances
 - history of drug abuse in workplace
 - safety sensitive workplace
- Reasonable Cause/Post-incident testing more justifiable

Non-unionized workplace

- No explicit restriction on random/post-incident testing
- Main consideration in human rights (addiction and medical marijuana)

Human Rights

- Most testing is *prima facie* discriminatory

TESTING – UNIONIZED EMPLOYMENT

“The jurisprudence has evolved to the point that reasonable cause, non-random evidence based post-incident, and return to work monitoring post-treatment alcohol and drug testing are no longer controversial. There is no longer any question that an employer can unilaterally implement these sorts of non-arbitrary testing so long as it is a component of a broader approach and assessment of workplace related alcohol and drug use. The debate in that respect is closed.”

Mechanical Contractors Association Sarnia, 2013 Carswell Ont. 18985 (Surdykowski)

POST-INCIDENT/REASONABLE CAUSE TESTING

Post-Incident Testing - Seriousness of Incident

United Steelworkers, Local 5890 v Ervaz Regina Steel, (Holtskog Grievance) [2014] SLAA No. 9

- Employee backing truck up in parking lot rubbed a guardrail
- Arbitrator held incident was not serious enough to meet just cause threshold for testing

Application of post-incident testing still subject to balancing – evidence to suggest possible impairment is a reasonable line of inquiry

Policy has to be narrowly crafted to not capture every possible incident or accident: *Airport Terminal Services Canadian Company v Unifor, Local 2002*, 2018 CanLII 14518 at para. 45

POST-INCIDENT/REASONABLE CAUSE TESTING

Reasonable Cause Testing

United Steel Workers, Local 7552 v Agrium Vanscoy Potash Operations, [2015] SLAA No. 1 (Sask.)

- Drug sniffer dogs employed at guardhouse at entrance of mine on random occasions each month
- E'ees stop for 2-3 seconds - If dog 'alerts' to presence of drugs, dog sits down
- E'ee then taken to private area and asked to justify 'alert' and give urine sample

Resources Development Trades Council of Nfld v Hebron Project Employers' Assn, [2014] NLLAA No. 4

- Employee behaviour 'erratic' - ordering to take drug and alcohol test
- Employee refused to take the test and was terminated (based on Canadian model – deemed positive)
- Arbitrator upheld the grievance as there were no reasonable grounds to administer the test
- 'Erratic' behaviour due to depression over terminally ill relative, which was a fact known to supervisor at time

RANDOM TESTING – UNIONIZED WORKPLACE

KVP Test if unilateral

1. Not inconsistent with Collective Agreement
2. Not unreasonable
3. Clear and unequivocal
4. Brought to attention of affected employees
5. Affected Employees must be notified of consequence of breach up to discharge
6. Consistent enforcement

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34

“delicate, case-by-case balancing required to preserve public safety concerns while protecting privacy”: *Irving* at para 19

RANDOM TESTING – UNIONIZED WORKPLACE

Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 (“Irving Pulp”)

“...an employer can impose a rule with disciplinary consequences only if the need for the rule outweighs the harmful impact on employees’ privacy rights. The dangerousness of a workplace is clearly relevant, but this does not shut down the inquiry, it begins the proportionality exercise.”

“In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measures have been exhausted if there is “reasonable cause” to believe that the employee is impaired while on duty, where the employee has been directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse. “

PRIVACY – BIOGRAPHICAL CORE

R. v Cole, 2012 SCC 53 - Defined reasonable expectation of privacy:

Privacy geared at protecting “biographical core” of identity:

Our concern is thus with informational privacy: “[T]he claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others” (Tessling, at para. 23, quoting A. F. Westin, Privacy and Freedom (1970), at p. 7).

As Sopinka J. explained in R. v. Plant, [1993] 3 S.C.R. 281, at p. 293:

In fostering the underlying values of dignity, integrity and autonomy, it is fitting that s. 8 of the Charter should seek to protect a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state. This would include information which tends to reveal intimate details of the lifestyle and personal choices of the individual.

PRIVACY – BIOGRAPHICAL CORE

These can be difficult judgment calls in the moment in real life:

US Steel – Hamilton v United Steel Workers, Local 1005 (Chapman Grievance), [2014] OLAA No. 248 – Vodka Bottle in the Trunk

TESTING – UNIONIZED EMPLOYMENT

Teck Coal Ltd. v United Steelworkers, Locals 7884 and 9346, 2018 CanLII 2386

- Random Testing under Drug and Alcohol Policy – challenged
- *Irving Pulp & Paper* did not lay down the law, but reflects arbitral consensus
- Need for testing not established
- Effectiveness of random testing not supported by the literature

Airport Terminal Services Canadian Company v Unifor, Local 2002, 2018 CanLII 14518

- No prior disclosure of medicinal cannabis
- Post-incident Testing – positive for THC metabolites
- No objective evidence of impairment – Testing not reasonable except prior possession of marijuana meant test not to be thrown out in this case

TESTING – NON-UNIONIZED EMPLOYMENT

- In order to terminate an employee, employer must have “just cause”
- All elements of employment relationship are contractual
 - Written contractual terms
 - Implied contractual terms
 - Employer policies
- Unilateral change in policies MAY be constructive dismissal
- Whether “just cause” exists is contextual

TESTING – NON-UNIONIZED EMPLOYMENT

Morin v Gulf Operators Ltd, 2015 NBQB 189

- E'er had a random alcohol and drug testing policy – no challenge to right to test randomly
- E'ee had been tested on several occasions and been clean
- On cold morning, after E'ee had worked outside and had snow on his clothes, taken for a random drug test
- First sample was cold, so asked for second – both came back clean
- E'ee was terminated for tampering with first sample
- Court held E'er failed to prove just cause for termination

TESTING – NON-UNIONIZED EMPLOYMENT

Walker v. Imperial Oil Limited, 1998 ABQB 785

- E'er had an alcohol and drug policy that:
 - allowed scheduled drug testing:
 - termination for breach of the policy (inc. intoxication during work hours)
 - required disclosure of previous addiction treatment or convictions
- Long-term E'ee tested positive for alcohol (0.089 on breathalyzer) at 8:00am on morning of scheduled test
- E'ee denied alcoholism – claimed his wife had received upsetting news the night before and they overdid it
- After termination, E'er discovered E'ee had not disclosed previous conviction for impaired driving and participation in alcohol dependence treatment, contrary to policy
- Termination upheld as just cause

TESTING – HUMAN RIGHTS

Discrimination – Prima Facie Case

- Employee who is not addicted/dependent on drugs or alcohol
 - Threshold question
 - **Milazzo v. Autocar Connaisseur Inc. et al., 2003 CHRT 37**
 - **Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company, 2007 ABCA 426**
- Most testing policies will be *prima facie* discriminatory
 - ***Entrop v. Imperial Oil*, [2000] 50 O.R. (3d) 18 C.A.**

TESTING – HUMAN RIGHTS

- Justifiable as a BFOR – Factors:
 - Safety sensitive position
 - Post-incident/Reasonable cause cases
 - Post return to work after accommodation
 - Testing able to detect impairment, not just presence
 - Alcohol more likely upheld
 - Saliva swabs for drugs MAY be upheld
 - Urine/blood tests for drugs held unreasonable in *Entrop*
 - No automatic dismissal
 - Treatment program available for addicts
 - Accommodation of disabilities built into policy
 - Policy provides for individualized/case by case handling

TESTING

“The balancing of interests approach has not kept employers from enacting comprehensive drug and alcohol policies, which can include rules about drugs and alcohol in the workplace, discipline for employees who break those rules, education and awareness training for employees and supervisors, access to treatment for substance dependence, and after-care programs for employees returning to work following treatment.”

From Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., 2013 SCC 34 at para 36

- Recent article in the Globe and Mail on March 4, 2018 cited a Human Resources Professional Association survey that found that 71% of human resource professional did not feel that their workplaces were ready for the legalization of marijuana this summer.
- My goal for the next 18 minutes is to help you focus on how to get ready.

- Remember that employers already have many of the tools needed to manage these issues eg. alcohol abuse and prescription drugs that cause impairment.
- In the past employers have had to assess an employee's ability to work, if impaired, and how to accommodate, if necessary.

Recommended Best Next Steps Before Legalization

1. Spend time now to determine what your culture is regarding cannabis in the workplace.

- This requires leadership from the top.
- Once marijuana is a legal substance, employers cannot assume that employees will know the rules or expectations.

- Employer's responsibility to ensure that the expectations of the workplace are clearly outlined just as it does for a whole host of other workplace issues e.g. call in procedure and approving overtime.
- Questions to consider: Can employees have cannabis in their possession at work? Can they smoke it at work? Can they smoke it at lunch? Can they smoke it at client events? Company sponsored social events? While on business trips? What about edible products? What happens if an employee does this? What are the safety implications for your work environment?

- If it is now a legal substance, like alcohol, and alcohol is permitted and even supplied by the employer at certain events, how do you distinguish the use of cannabis?
- When developing the employer's approach to these issues, consider how the approach may vary for alcohol, recreational marijuana, prescription marijuana, prescription drugs, over-the-counter drugs that impair ability to work and illegal drugs.

2. Incorporate that culture into your written policy about drugs and alcohol in the workplace. This list focuses on the cannabis aspects of the policy, which should include:

- Clearly sets out your expectations based on your company culture. In most companies, this will start with an absolute prohibition against use, possession or impairment in the workplace.
- However, the policy must recognize the obligation to accommodate medical marijuana, other prescription drugs and employees suffering from addictions.

- Firmly state obligation and commitment to provide a safe environment and refer to your separate safety policy where all employees, including management, have obligations to follow safety rules and report unsafe work conditions.
- Place onus on employees to self disclose impairment.
- Place onus on employees to provide medical evidence of required use of medical marijuana at work.
- Reserve the right to remove from workplace and/ or modify duties to address impairment issues.

- Outline steps if breach of policy and refer to separate progressive discipline Policy.
- Reference the employee's right to privacy will be balanced with other obligations such as safety in the workplace.
- Confirm commitment to assistance and counselling.
- Testing process may be part of policy

- Reference an Accommodation Policy – where an employee has an obligation to disclose any disability which impacts their ability to perform their work and where the employer agrees on a modified plan for performing work.

3. If there is an existing policy check to ensure that updated. Old policies often refer to legal vs. illegal substances. This will no longer be an applicable distinction for cannabis.

4. Revisit all Job Descriptions and classify safety sensitive positions or duties.

5. Train Management:

- Update skills through further training on signs of impairment – e.g. physical signs, performance of work, overall behavior, comparing the employee’s mannerism to other days when no performance issues.
- Advise of obligation to act on any information obtained or perception of an employee’s impairment.

- Stress importance of privacy re: medical information and disclosure of disabilities;
- Train in the use of a centralized source for the collection and retention of medical or disability information e.g. Human resources so that the left hand and the right hand are working together
- Provide managers tools/ procedures for managing a breach. Walk through the steps to be taken in the event of various scenarios
- Ensure any evidence of a breach is preserved.

6. Train Staff:

- Ensure the expectations in the policy are explained.
- Zero tolerance / prohibition clear.
- Outline resources available to assist EAP etc.
- Consider making a commitment of no reprisals for self disclosure whether recreational or otherwise.
- Ensure health and safety obligations are revisited regularly.

7. Consider retaining counselling / EAP program.

8. Plan your course of action if an employee was to self disclose an addiction or produce a doctor's note

- Understand what accommodations are needed
- Obtain specific medical direction
- Determine details of the use. May be flexibility to medicate at other hours or in other places. Etc.
- Consider sending the job description for the doctor's review
- Review job description with employee to determine modifications required.

9. Balancing interests:

- Other workers – concerns about second hand smoke and odours in the workplace.

10. Ensure that policy is enforced consistently - all aspects against all employees all the time

11. Know your rights – where there is a zero tolerance policy, impairment from recreational use at work (if not an addiction and not prescribed for a disability), employers can discipline (and possibly fire) for breach of policy. If no disability and not prescribed, will not be a breach of the human rights laws.

- Good resource for policy development – [www. Coaa.ab.ca](http://www.Coaa.ab.ca)
- Consequence of failing to address this: 2012 *Crown v. Metron Construction. Ontario* decision where company and individuals charged after the death of 4 employees and the serious injury of a 5th employee where it was found that 3 of those killed (one a manager), were impaired by recent cannabis use. Initially, employer found guilty for a preventable accident and fined \$200,000. Increased at the Court of Appeal in 2013 to \$750,0000.

CONTACT US



Trina Fraser
Brazeau Seller Law
Ottawa, Ontario
CANADA
tfraser@brazeauseller.com



Tracy Kay
Minden Gross LLP
Toronto, Ontario
CANADA
tkay@mindengross.com



Matt Letson
Lawson Creamer
Saint John,
New Brunswick
CANADA
mletson@lawsoncreamer.com



MODERATOR
Kelly VanBuskirk
Lawson Creamer
Saint John, New
Brunswick,
CANADA
kvanbuskirk@lawsoncreamer.com





MERITAS[®]
LAW FIRMS WORLDWIDE

THANK YOU