

# Clearing the Haze of Marijuana and other Drugs in the Workplace



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# MARIJUANA and Other Drugs in the Workplace



- Background and upcoming changes regarding Cannabis (“marijuana”) in Canadian law
- What is “medical marijuana”, when is it legal?
- Human rights law considerations for “addicts”;
- Alcohol & Drug policies and testing;
- Practical advice regarding “fitness for work”

# Federal Government Authority Over Illicit Drugs



- Cannabis (“marijuana”) is a psychoactive drug
- Since 1923, marijuana has been illegal in Canada through various federal **criminal** statutes
- Courts have upheld the federal power over illicit drugs and criminalized enforcement thereof
- *Controlled Drugs and Substances Act (“CDSA”) of 1997 continued the illegality of marijuana*

# Recreational Use of Marijuana is Still Currently Illegal



- Recreational use of non-medical marijuana remains a prohibited drug under the *CDSA*
- If a person possesses cannabis they are guilty of:
  - a. an indictable offence and liable to imprisonment for a term not exceeding **five years less a day**; and
  - b. An offence punishable on summary conviction, 1<sup>st</sup> offence, a fine of \$1,000 and/or **6 months in jail**; 2<sup>nd</sup> offence, a fine of \$2,000 and/or **12 months in jail**.

# Recreational Use of Marijuana is Still Currently Illegal



- If a person traffics in cannabis – subject to a **mandatory minimum of one year imprisonment**
- If a person grows cannabis they are subject to a **maximum sentence of 14 years**
- Criminal conviction can affect travel to the United States, insurability and employment status
- The law has not yet changed and people are being still being convicted

# Current Status and Promised Change



- In 2014, nearly 60,000 offences were reported for marijuana possession with 20,000 convictions
- Justin Trudeau's Liberal Party 2015 election promise to "legalize marijuana", without details
- Federal Task Force (2016), looked at how to legalize, tax and regulate marijuana, not safety
- Marijuana "legalization" promised by July 1, 2018

# A Brief History of “Medical Marijuana”



- Terrance Parker suffered two head injuries and was subsequently diagnosed with epilepsy
- In the 1960’s Parker experimented with marijuana recreationally and charged criminally
- Parker defended these two charges claiming the prohibition on cultivation and possession of marijuana was unconstitutional

# A Brief History of Medical Marijuana

(cont.)



- Judge Sheppard then read into criminal law legislation an exemption/defence for persons possessing or cultivating marijuana for their personal medically approved use
- Case led to the legalization of “medical marijuana” in 2001 through the federal *Marihuana Medical Access Regulations*, SOR/2001-227

# The CDSA and its Current Regulations



- Access to marijuana for medical purposes under the *Access to Cannabis for Medical Purposes Regulation* **only** through a medical practitioner
- Individuals may possess forms of marijuana including “fresh or dried marijuana or cannabis oil”
- Medical authorization not “a right” to use before or at workplace that is “safety sensitive”
- A person may obtain the substance for the following 4 medical related purposes:

# The *CDSA* and its Current Regulations (cont.)



1. A person who requires it for the practice of their profession as a **health care practitioner**
2. A **hospital employee**, if they possess the substance of in connection with their employment
3. A person who requires cannabis for their business as a **licensed producer**
4. A person who requires cannabis for their business as a **licensed dealer**

# Marijuana and Human Rights Legislation



- Right to equal treatment with respect to employment without discrimination on the basis of disability or perceived disability
- **Addictions** are considered “disability” under Human Rights laws; recreational use is **NOT!**
- Employers have the duty to accommodate a worker’s disability in the workplace, to the point of undue hardship, on a case by case basis

# Accommodating Substance Abuse and Substance Dependence



- Judicial/arbitral decisions have consistently recognized an employer's obligation to make reasonable efforts to accommodate employees who suffer from substance abuse or substance dependence to the point of undue hardship
- An employee has the responsibility to co-operate, respond and participate in the employer's efforts to accommodate his or her disability

# Accommodating Substance Abuse and Substance Dependence(cont.)



- *Elk Valley Coal Corporation*, a recent case that deals with drug addiction as a disability and the duty to accommodate in the workplace
- Stewart, an employee of Elk Valley Coal Corporation, was involved in a workplace vehicle collision in October 2005;
- Stewart tested positive for cocaine while driving

2015 ABCA 225

# Accommodating Substance Abuse and Substance Dependence(cont.)



- The Policy stated that employees with a drug dependency or addiction could seek assistance with the employee's rehabilitation without fear of discipline including involuntary termination, prior to the occurrence of a "significant event"
- Possibility of discipline or termination could not be avoided for abuse, dependency or addiction sought only after a significant event

# Accommodating Substance Abuse and Substance Dependence(cont.)



- Elk Valley had a practice of allowing terminated employees to return to work 6 months after termination if they were rehabilitated
- After Stewart's termination, he claimed to have an addiction to cocaine, but was in "denial"
- Alberta Human Rights Tribunal dismissed Stewart's complaint and found there was no discrimination based on addiction/disability

2012 AHRC7



# Accommodating Substance Abuse and Substance Dependence(cont.)



- The Alberta Court of Queen's Bench upheld the tribunal's decision of no discrimination, but in the alternative said accommodation was inadequate
- The Alberta Court of Appeal upheld Stewart's termination in a split decision, 2 -1;
- Majority found that there was evidence that the complainant could have complied with Elk Valley's Policy; appeal to **SCC decision pending.**

# Workplace Marijuana and Other Drugs, Discovery and Testing



- Employers often have drug and alcohol policies that prohibit employees use
- Leading case regarding drug alcohol and drug testing in unionized workplaces is the Supreme Court’s decision in *Irving Pulp and Paper*
- Both the majority and minority judges recognized arbitral jurisprudence as a “valuable benchmark”

<sup>21</sup> *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] S.C.J.,



# Workplace Alcohol and Drug Testing

(cont.)



- Employer may not conduct proactive/random A&D testing unless problem is “out of control” or mandated by legislation
- Employers may conduct A&D testing in the following situations:
  - Reasonable cause to believe alcohol or drug use
  - Worker was involved in a workplace incident
  - Returning to work after treatment for substance abuse, usually on under “Last Chance” agreement.

# Occupational Health and Safety Legislation



- The use of **marijuana in the workplace** also triggers employers' duties under provincial occupational health and safety legislation
- In Ontario, for example, employers have the duty to **“take every precaution reasonable in the circumstances for the protection of a worker”**
- Employer may request medical documentation to address employees ability to do their job safely

s. 25(2)(h) OHSA



# Drugs & Accidents: Disturbing Statistics (U.S. and Canadian sources)



- 93% of all businesses are affected by substance abuse
- 70% of illegal drug users are employed in the workforce
- Marijuana & cocaine users have 75% & 85% higher rate of accidents in the workplace than non-users
- 35 – 40% of workplace accidents involve substance abuse
- 300% higher WSIB costs for substance abusers
- 51% reduction in substance abuse by workers as a result of A&D testing

# Drugs & Accidents: *Metron Construction*, 4 Fatalities



- The most tragic workplace accident in Ontario in years involving use of marijuana in 2009
- On December 24, six men boarded a swing stage on the 18<sup>th</sup> story of an apartment building
- Only one worker attached himself to the fall arrest safety system
- Four die and one seriously injured when suspended scaffold fails.

# Drugs & Accidents: Metron & Project Manager Punished



- Toxicology analysis determined that three of the four deceased, including the site supervisor, had **marijuana** in system consistent with recent use
- CofA increased fine: \$200,000 - **\$750,000**, in part; **employer's failure to prevent worker's drug use**
- Project Manager, **Kazenelson** found guilty of five counts of OHS criminal negligence with **3.5 years in prison**, served concurrently, under appeal



# Practical Advice In Managing Employer's A&D Legal Risk



- A&D Policy that prohibits being “under the influence” of A&D at work and “fit for work”
- Self-disclosure policy, like *Elk Valley Coal*, that provides EAP support and rehabilitation services
- A&D testing for 1. Reasonable Suspicion, 2. Post-Incident, & 3. Last Chance Agreements
- Get legal advice before disciplining any employee involved in Incident under the influence

# Contact Particulars

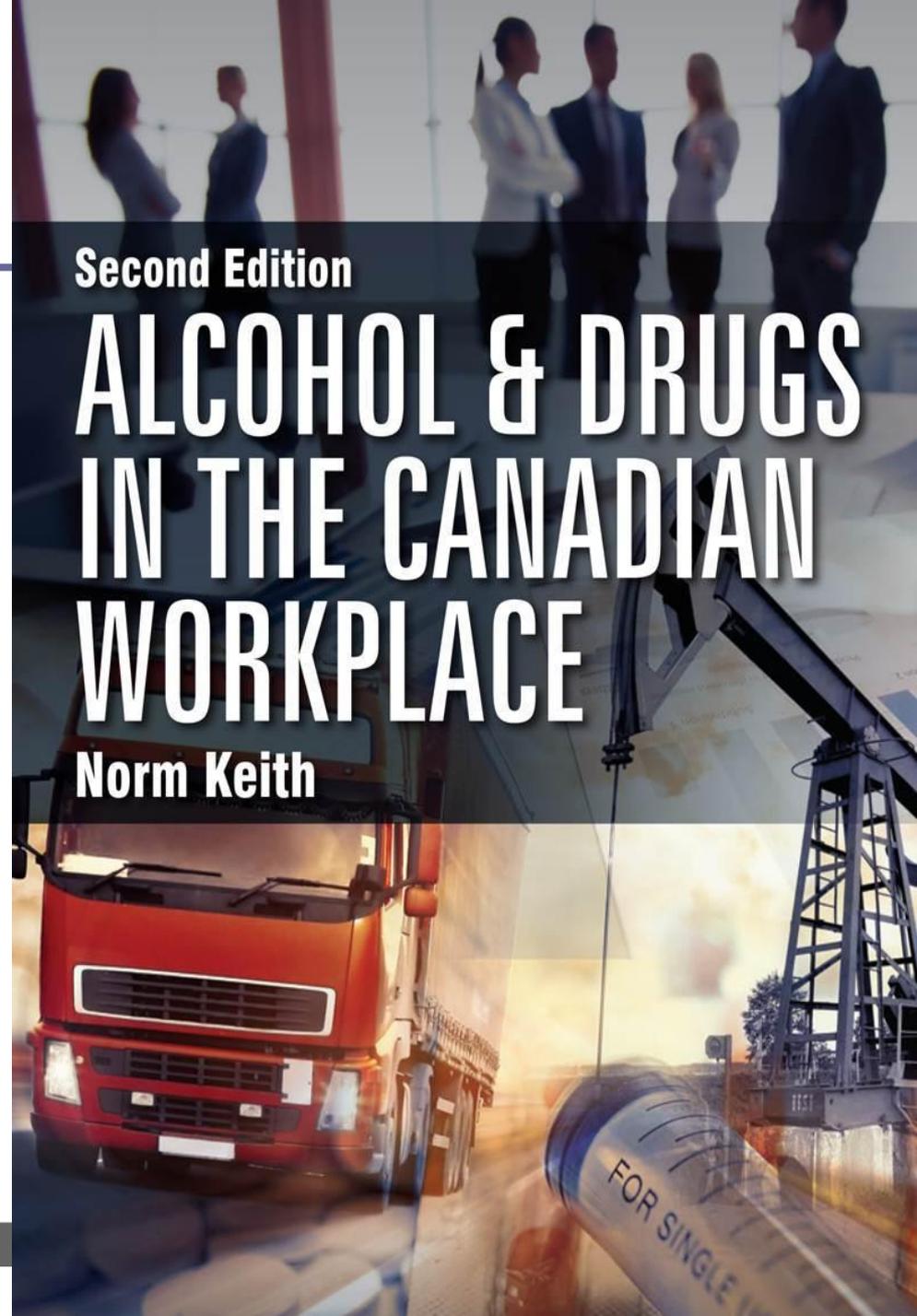


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Second Edition

# ALCOHOL & DRUGS IN THE CANADIAN WORKPLACE

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MARTINEAU**

