

A close-up photograph of cannabis buds and leaves, showing the intricate details of the plant's structure. The buds are covered in trichomes, and the leaves are serrated and green. The background is blurred, focusing attention on the plant.

New Risks Associated with the Legalization of Cannabis

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The Canadian Government will proceed with the legalization of cannabis effective October 17, 2018. While cannabis has been medically-legal in Canada for many years (despite the fact that it has not been approved by Health Canada), the number of medical users of cannabis is anticipated to rise dramatically as additional information is learned and as medical professionals become more comfortable in prescribing marijuana as medicine to treat a growing number of medical conditions. Additionally, it is expected that the legalization of cannabis and the increased accessibility for many Canadians will result initially in an increase in the number of Canadians consuming cannabis and an increase in the frequency of cannabis consumption by users.

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While much is still being learned about the molecular composition of the cannabis plant, the two primary cannabinoids currently being studied are Tetrahydrocannabinol (THC) and Cannabidiol (CBD), with the percentages of cannabinoids varying based on the specific strain. THC is the principal psychoactive constituent responsible for creating the “high” that consumption of marijuana is often associated with. THC has been found to be effective in treating Post-Traumatic Stress Disorder, to act as an appetite stimulant (for HIV and cancer patients), to reduce nausea and vomiting and to help with insomnia. CBD does not have any psychoactive effects. It has been known to reduce anxiety and to treat certain types of epilepsy, Crohn’s disease and Parkinson’s disease. With legalization, it is anticipated that consumers will be given an increasing amount of information about the different strains that they consume along with additional information about the benefits and risks associated with the different manners of consuming cannabis.

As it is anticipated that this legislative change will impact many aspects of society, risk managers ought to be particularly concerned about how legalization will impact them and the risks that they manage. As set out in additional detail below, there are certain areas that are anticipated to be more impacted than others.



EMPLOYMENT

Aside from the obvious risks posed while employees perform their work tasks while impaired, the legalization of cannabis is anticipated to cause challenges for companies and human resource departments across the country. There are already many in-

stances where employees and unions have launched actions as against companies due to wrongful discipline or termination resulting from the consumption of medical marijuana and challenging proposed policies on the basis that these policies restrict access to an employee’s medicine. With legalization and with the anticipated increase in the number of medical users, it is anticipated that this issue will surface more frequently and that employers and human resource departments will routinely have to revisit their workplace policies to ensure that they comply with the law.

Given the nature of impairment that is routinely associated with cannabis consumption, random drug testing has again resurfaced as a possible method for companies to manage risk. Despite the many valid reasons to support such a policy, the Courts have been clear that drug testing programs discriminate against people with addiction (which is classified as a disability under the Human Rights Code). As a result, random drug testing programs will often be deemed by the Courts as being improper unless the policy addresses the legitimate safety concerns associated with the specific work-related job and function. As a result, employers will have the burden of proving that the drug testing measures put in place were reasonable, necessary and not discriminatory.

When considering other ways in which the legalization of cannabis could impact the workplace, it is important to remember that our knowledge of the costs and benefits of cannabis consumption are in its infancy. While many argue that cannabis is not addictive, the fact is that the necessary medical studies have not been conducted to date to support or refute this proposition. Given this, it is possible that there could be a rise in the number of employees

that claim that they are addicted to cannabis which could adversely affect the workplace. Should this occur, employers need to be cognizant of their duty to accommodate employees with disabilities (and again, addiction is considered a disability). Rather than terminate the employee, the employer must take all reasonable measures to eliminate all barriers and disadvantages for the employee and must take all reasonable actions to accommodate the disability so long as it does not result in “undue hardship” to the employer. It is expected that there will be a significant increase in the number of cases where an employer’s decision to terminate rather than accommodate is challenged with the employer having the burden to prove that accommodation would result in “undue hardship”.

Employers and human resource departments should also be aware of the signs associated with cannabis consumption and addiction. If the warning signs are present, employers have a duty to inquire about an employee’s health before any disciplinary actions can be taken. If the inquiry results in an admission of a medical condition or an addiction then the employer will be required to take reasonable actions to accommodate the employee and the employee’s disability. An employer’s failure to inquire could result in litigation where whether the employer ought to have known about the employee’s disability before taking any actions as against the employee’s interests will be determined by a Judge or Jury.



DRIVING

Driving (both personal and commercial) has been identified as an area of particular concern associated with the legalization of cannabis due to the anticipated increase in individuals who operate motor vehicles while impaired by cannabis.

One obviously foreseeable challenge will be that many people in society have become accustomed to driving after consuming marijuana. According to various studies, Canadians routinely drive while impaired by cannabis or ride in a vehicle with a driver who recently consumed cannabis. When probed deeper about whether these Canadians had concerns about the driver being impaired, 4/10 reported that they believed that driving while under the influence of cannabis was less risky than driving under the influence of alcohol or posed no real risks¹. Given these results, it is apparent that Canadians need to be “retrained” in how to understand the risks and consequences associated with the consumption of cannabis and the impact on drivers.

Notwithstanding the perception held by many Canadians, the law has consistently held that it is illegal to operate a motor vehicle while impaired by drugs or alcohol. Despite this, the various law enforcement agencies and the judicial system have been routinely hampered in their ability to enforce the law as it relates to impairment due to the challenges associated with determining drug impairment. Support for this can be found in the unusually low number of convictions for driving while impaired by cannabis given the number of individuals believed to have driven while impaired by cannabis.

To address this challenge, the Government of Canada has altered the laws to make it easier for the law enforcement agencies to convict people of impaired driving. Now, if a police officer has a reasonable suspicion that a driver has a drug in their body, they can demand an oral fluid sample to test for drug presence during a routine roadside stop. If the Police have reasonable grounds to believe an offence has been committed (such as a positive oral fluid test result along

with other observed behaviours such as red eyes, agitation or certain speech patterns), police can then either bring in a Drug Recognition Expert or take a blood sample to determine whether the driver is in fact impaired by drugs. The new laws make it an offence to drive when you have over 2 nanograms of THC in a milligram of blood with penalties increasing from a simple fine (of up to \$1,000) to imprisonment for multiple infractions. There are additional penalties for operating a vehicle with both THC and alcohol in your blood.

To support the law enforcement agencies, the Canadian Government has recently approved the first roadside saliva screening device. The Dräger DrugTest 5000 markets itself as a fast, accurate means of testing oral fluid samples for drugs such as amphetamines, opioids, cocaine and cannabinoids, amongst other impairing compounds. Despite this, there are many concerns about the effectiveness of the device, as it has been found to produce inaccurate results in temperatures below 4 degrees Celsius and has resulted in false positive results (where a positive result is generated despite there being no drugs in the tested individual’s blood system).

All things considered, it is quite likely that there will be an increase in the number of drivers tested for having drugs in their system while driving and a corresponding increase in the number of individuals charged with drug-impaired driving. It is further anticipated that saliva testing will be readily administered following motor vehicle accidents to determine whether any of the drivers involved in the accident were impaired and whether this caused or contributed to the causation of the accident. Notwithstanding this anticipated development, it is suggested that each charge be reviewed carefully to determine whether a

defence to the charge of impairment can be properly mounted given the significant consequences associated with a criminal conviction.

BUSINESSES THAT OPERATE IN THE CANNABIS SPACE

Given the anticipated size of the cannabis market in Canada and as many Canadian companies hope to be global pioneers in the international market, there are many new businesses that have started up to service this industry and market. From the growers of cannabis, to the producers of cannabis derivatives (edibles, distillates and others), and to the manufacturers and distributors of the different consumption devices (vapes, pipes, etc.), these companies are bound to face significant and numerous legal challenges.

The law has clearly established that companies will face exposure if the products they manufacture or distribute operate differently than as stated. Quality control will be important to ensure that the product that is being sold is true to form, that it is tested to ensure that there are no latent defects and that it is grown/manufactured in accordance with the many laws potentially applicable to cannabis and cannabis-related products. Labelling, warnings and appropriate instructions will also be necessary to ensure that consumers are properly warned about the risks associated with consumption so that they are able to make informed decisions. Similarly, companies that distribute products manufactured by others could potentially assume the role of the ‘learned intermediary’ and could then potentially assume the obligation of educating the consumer about the risks associated with their consumption decisions.

Given the impairing nature of cannabis, all

¹Public Opinion Research on Drug Impaired Driving by EKOS Research Associates Inc. dated November 28, 2017

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companies that work with the plant and its compounds need to employ proper risk management strategies to limit their potential exposures. These companies ought to consistently be asking themselves whether they are providing sufficient and complete information for consumers to make fully informed decisions.

CONCLUSION

Risk managers ought to be cognizant of the many ways that the legalization of cannabis could result in exposure and potential litigation. Risk managers, and all organizations for that matter, are encouraged to review their corporate structure and all aspects of their business to identify whether there is additional risk that is not currently properly protected or managed.

It is recommended that risk managers and businesses consult with proper advisers for any questions or concerns that they may have relating to the upcoming legalization of cannabis.



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