

A man in a dark suit and tie is speaking in a meeting, gesturing with his hands. The background is blurred, showing other people in a professional setting.

# Alcohol & Drug in the Canadian Workplace

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# ▼ Agenda

1. Workplace Safety
2. Legal Status of Cannabis
3. A&D Testing
4. Disability and Duty to Accommodate
5. Fitness for Duty Policy



# 1. A&D and Workplace Safety

# ▼ Canadian Tobacco, Alcohol and Drugs Survey

- “Over 44% have used cannabis in their lifetime, and over 12% have used it in the past year.”  
(2015)

# Occupational Health & Safety

- Employer duties under OHS laws to ensure a safe workplace.
- Workers have a duty to work safely.
- Legal duty to take reasonable steps to prevent bodily harm under *Criminal Code*.
- Legal liability, prosecutions & fines for failure to comply with legal duties.

# ▼ OGCA

- “It is our experience that the abuse of substances is a growing issue with our workplaces, and the legalization of cannabis will significantly increase usage, leading to a spike in workplace injury and fatalities.”

*Letter from Ontario General Contractors Association to Attorney General of Ontario,  
July 31, 2017*



## 2. Legalization of Cannabis

# Medical

*Access to  
Cannabis for  
Medical Purposes  
Regulations*

# Recreational

*Federal Cannabis  
Act*

*Ontario Cannabis  
Control Act and  
Smoke-Free  
Ontario Act*

# Other

*Ontario  
Occupational  
Health and Safety  
Act*

*Ontario Human  
Rights Code*

## ▼ Recreational

- Decriminalized October 17, 2018 under Bill C-45, the *Cannabis Act*
- If over the age of 18: can buy, possess, grow, and use cannabis recreationally
- Provincial regulations and restrictions apply to distribution and workplace health and safety

## ▼ Medicinal

- Already legal under the federal *Access to Cannabis for Medical Purposes Regulations*
- These *Regulations* will remain unchanged

## ▼ Medicinal Use

- Who may possess marijuana:
  1. For one's own medical purposes or for those of another individual for whom one is responsible;
  2. A health care practitioner for their practice;
  3. A hospital employee for their work;
  4. A licensed producer; and,
  5. A licensed dealer

# ▼ *Criminal Code of Canada*

- Bill C-46, *Impaired Driving Act* amended the *Criminal Code* on June 21, 2018 to create new offences:
  - Summary offence: 2 - 5 ng of THC per ml of blood
  - Hybrid offences:
    - > 5 ng of THC per ml of blood
    - 50 mg of alcohol per 100 ml blood and 2.5 ng or more of THC per 1 ml of blood
- Penalties from \$1,000 fine to 120 days imprisonment

# ▼ Police Procedure for Impaired Driving

- Drug Expert (DRE) uses a 12-step test for impairment
- If officer has reasonable grounds, they may demand:
  - Perform prescribed physical coordination tests
  - Provide samples of a bodily substance to be analyzed by means of approved drug screening equipment.
- Federal government approved new saliva test for the purposes of criminal enforcement
- Q: might provinces do something similar for workplaces?

# ▼ Determining Impairment

- Case-by-case basis
  - Observation of employee
  - Discussion
  - Completion of simple job-specific tasks
- **Not** conclusive of drug consumption
- **Not** diagnosing substance use but identifying impairment

# ▼ Responding to Suspected Impairment

- **Priority is safety for all**
- Action with empathy and respect for privacy

Examples of  
Corrective  
Action

- Speaking privately
- Changing tasks
- Progressive disciplinary action
- Removal from workplace



# 3. A&D Detection & Testing

# ▼ Legislative Background

- Not legally required in Canada
- No comprehensive testing legislation
- Rely on employment, privacy, human rights, and labour case law in each jurisdiction
- Right to test is limited and subject to challenge
- Guidance from the Supreme Court: *Irving Pulp & Paper*

# ▼ 5 Categories of Testing

- Pre-employment
- Reasonable Cause
- Post Incident
- Random
- Rehabilitation

# ▼ Pre-Employment Testing

- It has also been upheld in some safety-sensitive positions but not all
- Generally more defensible where:
  - Testing is done after a conditional offer of employment;
  - No automatic withdrawal of the offer if positive test;
  - Industry evidence of drug or alcohol-related issues;
  - Recent drug or alcohol-related issues at the company;
  - The position is safety critical; and,
  - There are no less invasive means.

# Reasonable Cause

- Generally permissible for safety sensitive positions/workplaces
- Reasonable cause exists where you have made personal observations of appearance, behaviours, speech and/or odours that are consistent with drug or alcohol use (e.g., slurring, odour on breath)
- Observe, confirm, document, discuss, and if necessary test

# ▼ Post Incident

- Generally permissible for safety sensitive positions after a significant accident/near miss
- There must be a reasonable investigation into the incident
- Testing must be based on a connection between the incident and the employee

# Return to Work

- Generally permissible for safety sensitive positions/workplaces as part of a return to work after a policy violation or after rehabilitation
- May be unannounced and random for a reasonable period of time where reasonable to believe alcohol and drugs could have impact

# ▼ Random

- Permissible only in very narrow circumstances
- Requires evidence of enhanced safety risks, and/or a general problem with substance abuse in the workplace
- Expected safety gains must be real and substantial

# ▼ Safety-Sensitive Position

- No statutory definition in *OHSA*
- Case-by-case determination
- Supervision not determinative
- Objective test looking at all facts of position, including:
  - Duties
  - Responsibilities
  - Tools and equipment
  - Materials handled, etc.

## ▼ *Amalgamated Transit Union, Local 113 v TTC,* 2017 Court Decision:

- “The policy provides oral fluid drug test cut off levels as follows: marijuana 10 ng/mL (nanograms per milliliter)”
- “... By selecting a cut-off that limits the detection window to approximately 4 hours, the TTC Policy reasonably ensures that only employees who are most likely acutely intoxicated due to recent consumption of marijuana will test positive.”
- “Because cannabis impairs cognitive and motor abilities and because oral fluid testing at the TTC cut-off levels identifies recent use of cannabis (i.e. within approximately 4 hours of being tested), I conclude that oral fluid testing for cannabis at the TTC cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing.”



# 4. Human Rights Disability & Duty to Accommodate

# Human Rights Laws

- Human rights laws prohibit discrimination on actual/perceived disability
  - Medical marijuana may be a treatment for a disability
  - Drug addiction may also be a disability
- Employers have a duty to accommodate a worker's disability up to the point of undue hardship
- Guidance from the Supreme Court: *Elk Valley Coal*

## ▼ *L & L Painting and Decorating Ltd.*

- Atchison was a painter on a platform 37 floors above the ground on the outside of a building
- He treated chronic pain with marijuana
- He had no employer or doctor authorization to smoke cannabis at work
- He was terminated for smoking marijuana at work
- The Human Rights Tribunal upheld the termination and the employer's zero-tolerance policy



# 5. Fitness for Duty Policy

# ▼ What is Fit for Duty?

- When a worker is able to safely perform assigned duties without any limitations resulting from, but not limited to the use or after-effects of drugs, alcohol, and/or medications.

## ▼ Elements - Generic Fit for Duty Policy

1. Policy Statement
2. Application
3. Definitions
4. Objectives
5. Responsibilities
6. Company Standards
7. Prevention, Assistance and Rehabilitation

## ▼ Elements - Generic Fit for Duty Policy

8. Investigation
9. Alcohol and Drug Testing
10. Medical Cannabis or Marijuana
11. Policy Violations
12. Confidentiality
13. Communication
14. Interpretation

## ▼ Questions & Answers

- Alcohol & Drugs in the Canadian Workplace – An Employer's Guide to the Law, Prevention and Management of Substance Abuse, 3rd Edition
- 30 Day free review, <https://store.lexisnexis.ca/en/categories/shop-by-jurisdiction/federal-13/alcohol-drugs-in-the-canadian-workplace-an-employers-guide-to-the-law-prevention-and-management-of-substance-abuse-3rd-edition-skusku-cad-00582/details>
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