

Marijuana Legalization in Canada: Insights for Workplaces from Case Law Analysis

Légalisation de la marijuana au Canada: perspectives pour les milieux de travail basées sur une analyse de la jurisprudence

Legalización de la marihuana en Canadá: perspectivas para los medios de trabajo a partir del análisis de la jurisprudencia

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Résumé de l'article

La légalisation de la marijuana au Canada devrait avoir un impact significatif dans les lieux de travail, ce qui nécessitera l'élaboration ou la mise à jour des politiques et des procédures des entreprises en matière de drogue. Afin d'aider les parties en charge des relations de travail à faire face à ce changement, des recommandations sont ici formulées sur la base d'une analyse de 93 décisions arbitrales par des tribunaux ou des cours de justice rendues en lien avec des violations de la politique d'entreprise en matière de drogue, des décisions extraites de la banque de données Labour Source. Les aspects traités incluent le langage et la communication des règles au travail, le caractère raisonnable des tests de dépistage de drogue, la norme de preuve, l'obligation de prendre des mesures d'adaptation, ainsi que les facteurs atténuants.

À partir de cette recherche, plusieurs recommandations peuvent être formulées. En premier lieu, les employeurs devraient énoncer clairement leurs politiques en matière de drogue, en prenant en considération la sensibilité à la sécurité sur les lieux de travail et la culture existante dans leur milieu en matière d'abus d'alcool et de drogues. Cela peut inclure l'interdiction de possession, d'utilisation et de distribution de drogues sur le lieu de travail, l'interdiction de travailler sous l'influence de telles substances, ainsi que la nécessité de rapporter toute consommation de substance médicale nécessitant des mesures d'accommodement. Les tests de dépistage de drogue ne devraient être effectués que si la nature de l'emploi le demande ou si la sécurité est en jeu, notamment dans le cas d'un événement postérieur à un incident, ou en cas d'un doute raisonnable de consommation de drogue. En outre, il est important de comprendre que les résultats de tests de dépistage de drogue qui sont « positifs » ne révèlent que la présence de drogue déjà consommée, mais pas le degré d'incapacité ou, encore, si la substance a été consommée pendant le quart de travail. Par conséquent, pour justifier une infraction et une mesure disciplinaire, il est souvent nécessaire de corroborer les preuves fournies par plusieurs témoins et sources.

De plus, les superviseurs devraient être formés à identifier les caractéristiques liées à la consommation de marijuana et des autres drogues qui peuvent affecter les capacités au travail. Ces derniers devraient aussi connaître les procédures à suivre lorsqu'un incident survient. Les employeurs doivent également être conscients de l'obligation d'accommoder les utilisateurs de marijuana à des fins médicales, ainsi que les utilisateurs de marijuana à des fins récréatives qui ont été reconnus toxicomanes, cela en raison des droits humains relatifs à un handicap. Ce type d'accommodement peut inclure une réaffectation de travail, voire même un congé d'absence. En décidant d'une sanction (autre que celles liées aux performances passées, des antécédents disciplinaires et des circonstances atténuantes personnelles), les arbitres pourraient prendre en considération les chances de réadaptation dans leurs critères de décision afin d'évaluer leur pronostic et la viabilité de la relation d'emploi.

Il est aussi conseillé aux employeurs et aux syndicats de se tenir au courant des derniers développements en matière de législation, de technologies de dépistage de drogue et de recherche médicale liés à la consommation de marijuana.

Marijuana Legalization in Canada: Insights for Workplaces from Case Law Analysis

Helen Lam

The legalization of marijuana in Canada is expected to have a significant impact on employers as the number of employees using the drug will likely rise and employers need to balance their workplace occupational safety concerns with employees' rights to privacy and non-discrimination. As such, drug-related policies and procedures would need to be established or updated. This study is intended to help employers, unions and employees with this change, by analyzing 93 marijuana-related disciplinary cases in the past that shed light on issues relating to the language and communication of the work rule, reasonableness of drug tests, standard of proof, duty to accommodate, as well as the level of penalty and mitigating factors. Recommendations for the drug-related policies and procedures on these areas are offered.

KEYWORDS: marijuana legalization, drug testing, duty to accommodate, workplace drug addiction, case law, Canada.

Introduction

The legalization of marijuana in Canada is expected to have a significant impact on all levels of society, including at organizational and individual levels. The new law, enacted under the *Cannabis Act* that took effect on October 17, 2018 via *Bill C-45*, has focused on the supply, sales, public safety, and law enforcement areas of cannabis legalization with little discussion on its impact on the workplace. The new law does not prohibit employers from implementing their own work policies as before, such as policies restricting alcohol consumption. However, there are many workplace uncertainties and ambiguities arising from marijuana legalization, as not all existing alcohol-related work rules or similar policies necessarily apply in the case of marijuana. With the new law's potentially serious repercussions on human rights and occupational safety, as well as workplace productivity and performance, employers generally consider that they cannot take this change lightly, but are also not well prepared for the impact the new law will have on the workplace. For example, 46% of Canadian employers

said in a survey that they did not believe their existing policy adequately covered any potential new workplace issues arising from the legalization, while 75.8% said the legalization would have a great or moderate impact on their drug testing policy (HRPA, 2017: 8).

This paper focuses on the workplace level implications of marijuana legalization and aims to help parties to the employment relationship deal with the changes. It starts with a discussion of the general issues and concerns that the new law may bring to work organizations. This is followed by a detailed analysis of 93 prior disciplinary case decisions related to the use of marijuana in the workplace, both for recreational and medical purposes, which sheds light on themes relating to the language and communication of the policy, reasonableness of drug tests, standard of proof, duty to accommodate, and level of penalty and mitigating factors. Where appropriate, landmark court cases and legal principles involving general drug use are referenced and discussed.¹ The insights offered through such an analysis can potentially reduce related workplace conflicts and grievances. The paper then concludes with recommendations for employers and unions.

The paper is expected to provide unique and timely contributions to the topic in a few ways. First, although case analyses like this are provided comprehensively in law practice manuals, such manuals tend to cover drug and alcohol misuse in general. This paper, however, specifically focuses on marijuana, the drug newly legalized and the workplace change implications, which employers and unions should understand. The changed circumstance (legalization) makes it worthwhile to revisit Canadian case law regarding marijuana use. Second, unlike other drugs in general, marijuana has been used legally for medical purposes even before the enactment of the new law. Therefore, including such cases in the analysis specifically offers insight for the legalized context involving recreational marijuana use. Third, flowing from the case analysis, the paper offers concrete recommendations helpful for employers and unions to proactively address marijuana-related issues and reactively resolve such disputes when they arise. Hence, the paper is particularly suitable for non-legal organizational practitioners.

Issues of Concerns at the Workplace

There are a number of ways that the new law can impact the workplace. First, employee use of recreational marijuana is likely to increase. For example, in the U.S., in 2013, the number of positive test results for marijuana rose by 6.2% nationwide but were up by 23% and 20% respectively for Washington and Colorado, the two states that had legalized recreational marijuana earlier (Pratt, 2015). More recent data in 2016 showed a similar trend, with Washington

and Colorado marijuana positive test results increasing at rates double that of the national average (Quest Diagnostics, 2017). In Canada, a Forum Poll (2015) public opinion survey based on 1,256 voters found 18% had used marijuana in the year before, and another 13% would likely use it if it were legalized.

Although medical marijuana has been legal for years, not all medical practitioners are comfortable authorizing its use for patients suffering from severe pain or other disabilities. The reasons for such reticence include factors such as unfamiliarity with the drug, the difficulty in controlling the exact dosage, and social stigmatism. With the legalization and greater ease of marijuana access via multiple supply chains and retail locations, more patients may request that their doctors provide such authorizations and doctors may be more inclined to do so. It is not a stretch to suggest that, as a result of general marijuana legalization, there may be more medical marijuana users in the workplace.

With the potential increased number of both medical and recreational marijuana users, workplace issues associated with the drug will likely arise. Marijuana has been found to have negative effects on one's cognitive function, motor skills and psychological well-being, including learning and memory, attention, reaction, coordination and reasoning, all of which can adversely affect one's work performance (e.g., Goldsmith, Fanciullo and Hartenbaum, 2015; Health Canada, 2016a). According to Health Canada (2016b), a person's alertness in performing tasks may be impaired up to 24 hours after marijuana consumption.

In order to manage the potential increase in marijuana-using workers and the corresponding well-established negative effects marijuana consumption may have on workplace safety and performance, employers are likely to want to develop protocols and enforcement procedures associated with the drug. However, this is not always easy for a number of reasons. First, unlike with alcohol, there are no standardized tests with specific measurement levels that can confirm impairment due to marijuana use and current lab tests only show past drug use but not direct (or current) impairment (HRPA, 2017; Government of Canada, 2016). As evidence of impairment in the workplace is often required prior to an employer levying severe penalties against an employee, it may be very difficult to prove such impairment without a standardized test. A one-size-fits-all impairment test may also not work. For example, the job of a bus driver may require a different benchmark for impairment assessment from that of, say, a clerical worker. It will also be difficult to suggest in a policy a marijuana intake limit or educate workers on how much ingestion of marijuana would lead to impairment as the same drug dose can have different impairment effects on different individuals (Lane and Hall, 2017). Moreover, if any cut-off lab test level is to be used, it will need to take into consideration passive inhalation (Petersen and Boller, 2000). Without a valid readily available test, employers may have to rely on other evidence to demon-

strate an employee's impairment should it arise. This involves a lot of potentially subjective observations and many supervisors are not trained to recognize such impairment characteristics.

Increased marijuana usage can give rise to more addiction situations. According to human rights laws in Canada, addiction is a disability that legally requires employer accommodation to the point of undue hardship (Canadian Human Rights Commission, 2009). Accommodation may not always be straightforward either, as medical experts, when writing an accommodation recommendation, do not necessarily know the exact nature of the employee's job duties and responsibilities. Employers, however, are expected to rely on a medical recommendation to accept an employee's return to work after a drug-related leave or assign alternative work for accommodation, not really knowing if the recommendation is entirely appropriate. Compounding this problem is the wide variation in concentration of the drug (due to the nature and quality of the product, and not always having clear content labels²) so that control of the dosage, and thus the effects, could be difficult. Employers who have the responsibility for workplace safety could be caught in a dilemma and struggle to balance the rights (to accommodation) of medical marijuana users or addicted recreational users with those of others (to safety) in the workplace.

To help employment relations stakeholders gain a better understanding of their respective rights and responsibilities and properly balance them, it is opportune to revisit case law related to marijuana in the workplace.

Methodology

The relevant cases for the analysis are drawn from the *Labour Source* database, which provides access to Canada labour and employment law cases. The search criteria include cases and decisions in English in the subject areas of Employment, Human Rights, Labour, and Occupational Health and Safety.³ To remove cases in which marijuana was not the subject at issue, or those unrelated to work, two additional criteria used were that the case must contain the term "work" at least five times and "marijuana" ten times. Although the search criteria do not guarantee that all relevant cases are included, it does provide an adequate coverage of cases across Canada other than the province of Quebec. While there are minor jurisdictional differences across provinces, there is much commonality in the overall labour relations and human rights decision criteria that enable the study to generate meaningful findings for the Canadian situation. A total of 134 cases were identified in the search done on November 22, 2017, with the case period ranging from the year 1979 to 2017. The cases were checked to ensure that noted decisions had not been overturned.

Each case was then read to determine relevancy. For the purpose of this study, a case was considered relevant if discipline was imposed on workers for marijuana possession or use. A number of cases fell outside of this scope, including those in which complainants sought medical marijuana coverage under a workers' compensation program, or in which marijuana was mentioned only as a side issue or in the context of citations. After the case elimination, 93 cases were found applicable. Of these, 79 were arbitration cases, five were human rights board/tribunal decisions, four were labour board reviews, and five were judicial court reviews. As the cases analyzed are mainly arbitration and labour board decisions, the conclusions and recommendations will be most applicable to unionized workplaces. With regards to the type of discipline imposed in this set of cases, a vast majority (78 of the 93) involved dismissal and 12 related to suspension. Sixty-five of the cases involved safety-sensitive job environments, nine were somewhat safety-sensitive, or such was claimed, 16 did not specifically address this point and three did not deal with safety-sensitive positions. Most of the cases dealt with serious issues that fundamentally affected the employment relationship, such as a dismissal situation or a work policy violation that could have severe safety consequences. Among the 78 dismissal cases, 34 had the discipline upheld, three partially upheld (multiple grievors with some dismissals upheld and some substituted by lesser penalties), and 38 replaced by lesser penalties, while another three were miscellaneous ones such as remitting back to the arbitrator for further consideration and settlement prior to the hearing. In examining these outcomes, approximately half of the dismissal cases were upheld. However, a quantitative count of the cases by type does not allow for the understanding of the unique context of each case leading up to the case decision. It is therefore worthwhile to do a follow-up qualitative analysis to identify the factors that contributed to the spectrum of decisions.

Analysis

The case decisions can generally be grouped for discussion under the following main themes: 1- the language and communication of the drug-related work rule; 2- the reasonableness of drug tests; 3- standard of proof of offence; 4- the duty to accommodate; and 5- the level of penalty and mitigating factors.

Language and communication of the drug-related work rule

In many of the cases reviewed, the work rule concerning the prohibition of marijuana use or possession came from a collective agreement between the employer and the union. The exact language and the coverage of such prohibitions within the collective agreement are important as arbitrators are required to make their decisions based on the wording of the collective agreement provision and

cannot alter the terms to give a party extra rights or obligations. For example, in *Canadian Airlines International Ltd. v CALPA* [1997] CarswellBC 1516, the British Columbia Court of Appeal set aside the arbitrator's decision in part due to the arbitrator's error of requiring the employer to offer a drug assistance program to the employee that was not stipulated in the collective agreement terms. [This point is controversial though as, irrespective of the collective agreement provisions, employers have a duty to accommodate employee disability to the point of undue hardship under human rights legislation⁴ (to be discussed in a later section) and providing rehabilitation programs may be considered a common type of accommodation (Alberta Health Services, 2014).]

When drug-related provisions are not in the collective agreement, employers can still establish and impose rules in the workplace, but for them to be enforceable and upheld by arbitrators and tribunals, they need to be clear and reasonable, well communicated to employees, consistently applied, and compliant with existing laws and contracts/collective agreements, in accordance with what is normally called the KVP principles, following the KVP case (*Lumber and Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.* [1965] 16 LAC 73). It is helpful if the policy is endorsed by the union (even if not incorporated explicitly in the collective agreement) or consented to by employees, as the rules will then more likely be seen as fair and necessary. In safety-sensitive workplaces, unions are often receptive to implementing tighter drug policy provisions in order to protect the safety of their members at the worksite.

Different companies may have different rules on drug use, and generally the more safety-sensitive the workplaces, such as those in mining, construction, oil and gas, and chemical industries, the tighter the rules, which may include zero tolerance. As the determination of an offence depends on what really constitutes an offence, it is important that the list of restrictions and expectations is clear and specific. The prohibitions of drug-related work rules often fall into the following areas: possession of drugs, consumption of drugs while on duty, consumption of drugs while on company premises (including company provided residence), sales and trafficking of drugs, working under the influence or impairment, having drug test results exceeding a certain limit, or refusing a reasonable drug test. Some cases involved a rather comprehensive list of prohibitions. For example, in *Halifax (Regional Municipality) and CUPE, Local 108* [2012] CarswellNS 1051, the following rules as outlined in paragraph 10 of the decision applied:

1. Employees must report and remain fit for work ...
2. Any employee during work who is or becomes impaired and unfit for duty must report this to his or her supervisor immediately.
3. Any employee working in a safety-sensitive position who has a limitation or restriction on their ability to perform their job ... must report such limitations ...

4. Employees must not use, possess, distribute, offer for sale or sell alcohol, drugs and/or drug paraphernalia during work, on [company] premises or in [company] owned or leased vehicles.
5. Employees must not consume alcohol or drugs during work ...
6. Employees must not transport alcohol or illicit drugs in vehicles, or in equipment owned, leased, operated or otherwise directly controlled by [the company]
7. Employees must cooperate with the implementation of this Policy including the submission to testing ...
8. Employees required to operate a motor vehicle ...

Some employers, such as those in construction, adopted similarly detailed provisions under the *Canadian Model for Providing a Safe Workplace Alcohol and Drug Guidelines and Work Rule* (hereinafter called the *Canadian Model*), which aims to standardize the work rule practices across different workplaces. As provided in *Fluor Constructors Canada Ltd. v IBEW Local 424* [2001] CarswellAlta 1906 (paragraph 34), such work rules on prohibitions include:

- An employee of the company may not
 - (a) use, possess or offer for sale alcohol and drugs, while on company property or a company workplace,
 - (b) report to work or work
 - (i) with an alcohol level or
 - (ii) with a drug level for drugs set out below in excess of the concentration set out below ...
- Marijuana metabolites 50 [mg/ml] ...

As can be seen, such work rules include specific levels of metabolites concentration and the prohibition of possession of any drugs on workplace property, each of which may be easier to prove than a general offence of “impairment”. If the offence list only included impairment, then simply possession or use *per se* could not be grounds for penalty. If only possession or consumption on company premises is prohibited, then after-hour marijuana use outside of the workplace would not constitute an offence but after-hour use on a worksite would be. For example, in *Canusa, CPS, Div. Shaw Industries Co. and IWA-Canada* [1997] CarswellOnt 6817, the prohibition was for drug use on company property and so, even though the employee was using drugs after working hours, the offence was established as the drugs were consumed on the employer’s premises.

In some cases, the policy or agreement spelled out the mandatory penalty for different levels of violations, while some just indicated the discipline for a violation was discretionary and could include termination. Some cases also had an explicit commitment to progressive discipline⁵, which then must be followed. In

Epcor Utilities Inc. and CUPE, Local 30 [2016] CarswellAlta 1809, an employee was terminated for a first offence related to recreational marijuana use and the arbitrator found that the zero tolerance in this case was inconsistent with the progressive discipline principle presented to employees, and hence, allowed the grievance.⁶ Based on the cases reviewed, zero tolerance policies could also be challenged if they did not allow for reasonable accommodation, more of which will be discussed in a later section. As for mandatory versus discretionary penalties, in *Kimberly-Clark Forest Products Inc. v Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 7-0665* [2003] CarswellOnt 3537, the employee involved was on a “Last Chance Agreement”⁷ due to a prior drug-related offence and, since the language of the “Last Chance Agreement” was clear that another positive drug test would automatically lead to termination, the arbitrator was not in a position to substitute a lesser penalty. Conversely, in *Canadian Pacific Railway (Mechanical Services) v CAW-Canada Local 101* [2006] CarswellNat 4660, since it was not clear in the “Last Chance Agreement” that another offence would automatically lead to discharge, the arbitrator was able to substitute a lesser penalty.

Wording on the procedural aspects of the work rule is as important as the substantive provisions in determining disciplinary outcomes. In *Vincor International Inc. v Teamsters Chemical, Energy and Allied Workers, Local 1979* [2010] CarswellOnt 8874, the collective agreement explicitly indicated that a union representative was needed for any disciplinary meeting, and when such a procedure was not followed, the discipline was voided. In another case *National Steel Car and USWA Local 154* [1998] CarswellOnt 7456, where the union representative requirement was only for step 1 of the grievance process, and not for the initial discipline meeting, not having a union representative present when the discipline was handed down was found not to be in contravention of the agreement. Similarly, the union argument about a lack of union representation at the investigative meetings in *Lower Churchill Transmission Construction Employers' Association Inc. v IBEW, Local 1620* [2015] CarswellNfld 541, was not factored into the arbitration decision as it was not a requirement in the *Canadian Model* rules that the parties had adopted.⁸

Employers also need to ensure that adequate communication, education and training associated with the drug policy have been provided in order to succeed in arbitration, as in the case *UFCW Local 1288P v Larsen Packers Ltd.* [2004] CarswellNB 708, where there was a climate of drug abuse at the workplace, and the employer established the necessary policies and made sure employees were well aware of them. Also, as noted in *MacMillan Bloedel Ltd. v CEP, Local 76* [1997] CarswellBC 2996, if an employer wants to change its disciplinary approach, it must notify the union and employees.

The review of the case law indicates that a key controversy about company rules relates to the reasonableness of the rule. For example, most arbitrators in the cases analyzed considered company rules prohibiting employees from working while unfit or in possession of mind altering substances (especially when the substance is illegal) to be reasonable, as in the case of *Kemess Mines Ltd. v IUOE, Local 115* [2005] CarswellBC 2368⁹. As well, where safety is paramount, as in the case of *Fiberglass Canada Inc. and ACTWU, Local 1305* [1993] CarswellOnt 6252, which involved the smoking of marijuana in the “cold room” with potentially explosive chemicals, the reasonableness of the drug rule prohibiting consumption and possession tended to be well accepted. In *Canadian Airlines International Ltd. v CALPA* [1995] CanLII 861 (BCSC), a pilot’s termination for breach of a drug policy was initially substituted by a lesser penalty of suspension in arbitration, but on appeal ([1997] CarswellBC 1516), the court found the arbitrator decision patently unreasonable in part because of the grievor’s high-trust position and the company’s responsibility to public safety.

If, however, an employer compiles a long list of prohibitions, some of which severely infringe on employees’ private lives without necessarily making the workplace any safer, then arbitrators and courts may be willing to accept a challenge to the reasonability of such rules. For example, in non-safety sensitive or less safety sensitive workplaces, making an automatic discharge penalty for marijuana possession (especially considering that marijuana is legal) could possibly be challenged on its reasonableness. As well, if an employer arbitrarily sets a low limit for marijuana metabolites testing without good medical support relating it to impairment, it could mean penalizing employees for second hand smoke or disallowing smoking of marijuana during leisure time days before reporting for a work shift. In cases *Canadian Pacific Railway (Mechanical Services) v CAW-Canada, Local 101* [2006] CarswellNat 4660 and *Kimberly-Clark Forest Products Inc. v Paper, Allied-Industrial, Chemical and Energy Workers International Union, Local 7-0665* [2003] CarswellOnt 3537, second hand smoke or passive inhalation was indeed raised as a defence by the employees, although in both cases, due to the high levels found, medical expert evidence ruled that out. Insofar as reasonableness of the drug rule is concerned, most controversies relate to the requirement for drug tests, as will be further examined in the next subsection.

Reasonableness of Drug Tests

Contrary to the U.S., Canadian arbitrators and courts generally view mandatory or across-the-board random drug testing as being too broad and not necessarily reasonable due to scientific limitations of the tests and the need to address the conflicting interests of employers and employees (Pearce, 2008). They tend to take a more balanced approach, one that supports employer obligations and

concerns for workplace safety and respects employee rights to privacy and non-discrimination. Where discrimination is concerned, Canada's federal and provincial human rights laws all aim at providing equality for individuals and protecting them from discrimination based on prohibited personal characteristics. For example, Section 2 of the *Canadian Human Rights Act* states:

The purpose of this Act is to extend the laws in Canada to give effect [...] to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practice [based on prohibited grounds, including the drug-dependent form of disability].

Broad drug and alcohol testing policies could be construed as discriminatory, if not properly justified. For example, in the case of *Canada Human Rights Commission v Toronto-Dominion Bank*, [1994] 4 FC 205 (not included in the searched set of cases as it is not marijuana-specific), the Court of Appeal found the bank's policy requiring all new and returning employees to submit a urine sample for drug testing discriminatory against the drug-dependent group, who could face adverse employment effects, and there was not sufficient proven connection between such a policy and job performance. The traditional approach used to test whether an individual has established *prima facie* discrimination is based on three elements:

- (1) that he or she has (or is perceived to have) a protected characteristic;
- (2) that he or she has experienced an adverse impact or received adverse treatment; and
- (3) the protected characteristic was a factor in the adverse impact or treatment (Neumann and Sack, 2017).

From the cases analyzed, a balancing approach is evident. For example, as illustrated in *Allied Systems (Canada) Co. v Teamsters, Local 938* [2008] Carswell-Nat 2600, commercial truck drivers were required to pass mandatory drug tests according to U.S. laws in order to drive in that country, but there was no such a legal requirement in Canada. In this case, drug tests were held to be a reasonable *bona fide* occupational requirement for cross-border drivers but not for the domestic ones driving just within Canada.

A major challenge relating to the reasonableness of drug tests can be reflected by the following statement from *Entrop v Imperial Oil Ltd.* [2000] CarswellOnt 2525, para 99, which has been widely cited by a number of arbitrators and union counsels¹⁰: "A positive drug test shows only past drug use. It cannot show how much was used or when it was used." Therefore, if the company rule is to prohibit impairment, then a drug test may not be the appropriate tool for the enforcement of such a rule, as a drug test alone cannot show impairment.

Instead, there could be more valid cognitive or motor skills impairment tests to actually show the negative effects on work performance¹¹. In this situation, a mandatory drug test requirement could be considered unreasonable. This was illustrated in *First Bus Canada Ltd. v ATU, Local 279* [2007] CarswellNat 1786, where a driver was disciplined for refusing to take a drug test demanded by the employer following a report from a member of the public that he might have smoked marijuana. The drug test requirement was found to be not reasonable as the policy only mandated that an employee not report to work under the influence of alcohol or drugs and the drug test would not have been able to confirm this. As a result, the penalty for the refusal was set aside.

What then are reasonable circumstances for drug tests? Even though drug tests may not necessarily establish impairment to justify discipline, they may be a useful tool for enhancing workplace safety and providing opportunities for employees to be aware of their substance abuse issue and seek necessary help through counselling or employee assistance programs. Drug tests are more likely to be considered reasonable after an incident, such as a driving accident, or erroneous use of machinery causing damage or breakdown. For example, in *Elk Valley Coal Corporation v IUOE, Local 115* [2004] CarswellBC 3748, para 61, the arbitrator, citing *Fording Coal Ltd. v USWA, Local 7884* [2002] CarswellBC 4004, para 22, followed the view that employers had the right to impose mandatory drug testing “where reasonable cause exists or in response to workplace incidents where the condition of the employee involved was seen as a reasonable line of inquiry”¹². In *Gilbert and D & D Energy Services Ltd.* [2017] CarswellNat 2499, an oilfield driver had an accident, and the company demanded a drug test, which the employee failed. Although the drug test did not prove impairment, the arbitrator did not find the test unreasonable, and when the employee provided an initial false sample (one provided by another person that could not be used as it was too cold for the test), that was sufficient grounds for upholding the dismissal. In *Suncor Energy Inc. and CEP, Local 707* [2008] CarswellAlta 2503, the arbitrator found the post-incident drug test requirement reasonable even though the accident leading to the drug test requirement was a minor incident that caused a ladder to be bent. The minimal severity of the incident was only considered for the level of penalty and not with respect to the reasonableness of the drug test. The author would be remiss not to mention at this time a couple of recent highly relevant landmark cases on general workplace drug and alcohol tests (even though they are not within the searched set of cases as they are not marijuana-specific). In a Supreme Court of Canada case, *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34, para 6, the Court noted that:

[...] a unilaterally imposed policy of mandatory random and unannounced testing for all employees in a dangerous workplace has been overwhelmingly rejected by arbitra-

tors as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace.

For the Suncor case mentioned above, indeed, the dispute involving reasonableness of a general drug testing policy continues to this date between the employer and the union (the union now called Unifor after a merger). When Suncor introduced a random alcohol and drug testing policy applicable to employees in safety-sensitive positions at its oil sands operations, the union grieved. The arbitrator in *Suncor Energy Inc. and Unifor, Local 707A* [2016] CarswellAlta 921, found the policy to be an unreasonable exercise of employer's management rights as gains from the testing would not be sufficient to justify the testing based on the problem shown not being considered significant. On appeal, the Court of Queen's Bench of Alberta, 2016 ABQB 269, quashed the decision and sent it back for further hearing, in part due to the unwarranted elevation of the standard of evidence needed for proving the workplace problem with drugs and alcohol—requiring a “significant” or “serious” problem rather than a “general” problem as stated in the Irving case—as well as an inappropriate narrowing of the workplace problem scope to just within the bargaining unit. Further union appeal ended up with the Court of Appeal dismissing the appeal (2017 ABCA 313), even though an injunction on the implementation of the policy pending rehearing was granted (2017 ABQB 752). This case shows that random drug and alcohol testing policies are not all unreasonable but certain criteria must be met regarding the danger of the workplace and the extent of the substance abuse problem.

Drug tests can also be challenged based on procedural grounds. In *USW, Local 5795 and Iron Ore Co. of Canada* [2017] CarswellNfld 409, a post-incident drug test for an employee was positive at a high level, but as the procedures for initiating the drug test—involving completion of a checklist by the supervisor that showed the need for the test, with validation by another employee—were not followed, the discipline could only be based on the accident itself but not the result of the drug test.

Standard of Proof

For disciplinary cases, employers have the burden of proof, after a *prima facie* case of discipline has been established by the employee (that is, showing that there was a discipline imposed). For work rule violations, the decision is based on a balance of probability, which means where both parties' claims are equal in weight, the party that bears the burden of proof will lose. *Vale and USW, Local 6166* [2013] CarswellMan 764, para 119, cited *Genfast Manufacturing Co. v USWA, Local 3767* [2005], CarswellOnt 2397, para 28, which says: “termination is an appropriate disciplinary response when clear and cogent

evidence reveals that an employee, working in an industrial environment, has been using drugs or alcohol during his shift". That is, arbitrators are looking for clear and cogent evidence to show the discipline is warranted, rather than just suspicions and assumptions.

Witness testimonies are critical for arbitration and court decisions. For employers trying to prove an employee had violated a drug policy based on the possession and consumption of drugs, just having another employee or a supervisor confirming the presence of the smell of marijuana was often found to be evidentially insufficient (e.g., *Halifax (Regional Municipality) and CUPE, Local 108* [2012] CarswellNS 1051, *National Gypsum (Canada) Ltd. v IUOE, Local 721 and 721B* [1997] CarswellNS 554, *Trace Canada Co. v HFIA, Local 110* [2004] CarswellAlta 2436, and *Thona Inc. and CAW, Local 199* [1993] CarswellOnt 5881). In *British Columbia Maritime Employer Association v ILWU* [2012] CarswellBC 207, even having two foremen confirm the smell of marijuana was not enough, as the arbitrator considered both witnesses as non-experts and that the smell could be something else, as argued by the union representative. Similarly, in *AFG Industries Ltd. v USWA, local 295G* [1998] CarswellOnt 6876, observations by a single agent, who was found not to have been properly trained in investigating marijuana use and its effects, were considered insufficient evidence, as the agent's notes had a number of inconsistencies that raised questions about the credibility of his evidence. However, in a different arbitration involving another employee arising out of the same agent's investigation in the same company, *AFG Industries Co. and Aluminium, Brick and Glass Workers International Union, Local 295G* [1998] CarswellOnt 7208, the arbitrator arrived at a different decision, indicating that the credibility of the witness must be assessed independently by the arbitrator concerned, and in this case, the arbitrator believed the agent had sufficient knowledge of marijuana's look and odour, and there was no material inconsistency provided by the agent. In another case, *Amcan Castings Co. v USWA, Local 4153* [1993] CarswellOnt 6124, an outside agent observed the passing of a joint, which had a different look than a cigarette. The agent further confirmed the smell of marijuana. The evidence in this case was found to be sufficient as the witness was credible.

When testimony regarding marijuana odour was combined with other evidence, such as a moist marijuana butt, odd employee behaviour or the employee being located in an inappropriate place as if to hide something, arbitrators have found the evidence to be in favour of the employer. For example, in *Federal Mogul Windsor Co Ltd. and CAW-Canada, Local 195* [2001] CarswellOnt 10595, the grievor was found by the supervisor to be smoking in an undesignated area with the smell of marijuana. The supervisor then found a moist and still warm joint butt at the picnic table after the employee had left. Another employee also smelled the odour when approaching the grievor. All the evidence led the

arbitrator to conclude the employee did smoke marijuana. Similarly, in *Canam Steel Works and BCOIW, Local 805* [1998] CarswellAlta 2038, the grievor was found smoking in a storage room, in which he had no reason to be, and the fact that he did not provide his foreman with the cigarette butt (to show it was not a marijuana joint) when confronted made the evidence stronger for the employer to justify the dismissal. In *McDonnell Douglas Canada Ltd. v CAW, Local 1967* [1990] CarswellOnt 4132, the arbitrator found that the strong smell confirmed by the employer witness showed recency of the smoking and this, coupled with the grievor being found at a place he should not be, his odd behaviour and inconsistencies in testimony, constituted sufficient evidence to show the grievor had committed the offence. In *Clark Transport and Teamster, Local 938* [1997] CarswellOnt 7356, the grievor was seen by his supervisor with a small joint in his mouth, and the joint was later picked up by the supervisor as evidence. Noticing the grievor's glassy eyes, the supervisor offered to have him take a drug test and to send him home by taxi, both of which were declined. These actions supported the supervisor's concern that the grievor was under the influence. This, in addition to witness testimony that the grievor admitting to "screwing up", provided sufficient evidence for the drug rule violation. In *National Steel Car and USWA, Local 154* [1996] CarswellOnt 7456, two supervisors saw an employee smoking marijuana and when approached, the employee was seen to put the joint butt on a floor board. The butt was retrieved and confirmed to be marijuana by the police. The physical evidence plus the multiple witness statements provided sufficient evidence for the employer to justify imposing the original suspension penalty. Conversely, a similar case had the opposite finding. In *General Tire Canada Ltd. v URW, Local 536* [1991] CarswellOnt 7722, two supervisors noticed the smell of marijuana where the grievor was and later found a marijuana butt a few feet away. The arbitrator concluded that the joint butt could not be directly linked to the grievor as anyone could have left it, and with some inconsistencies in the witnesses' testimonies, the grievor was fully reinstated.

In some of the cases reviewed, the supervisor did not take the appropriate follow up action after suspecting an employee had smoked marijuana and this inevitably jeopardized the employer's chances in succeeding in the arbitration. For example, if the employee was not removed from the worksite right away or was allowed to drive home himself or herself, this has been construed as the supervisor not believing the employee was impaired, or that the concern for safety was not really an issue in the situation, which, in turn, might either cast doubt on the reasonableness of the policy against drugs or the argument that the employee was in a safety-sensitive position. In *CertainTeed Insulation Canada v CEP* [2011] CatswellOnt 13619, the grievor was caught smoking marijuana and did not deny it. However, as he was told to go back to work and not removed from the workplace, it was an indicator that safety was not a major concern. Together with the

employer failing to provide evidence about any drug abuse culture that would warrant a strong deterrent effect, the grievance partially succeeded with a lesser penalty substituting dismissal. In *National Gypsum (Canada) Ltd. v IUOE, Local 721 and 721B* [1997] CarswellNS 554, again, the supervisor allowing the employee suspected of using marijuana to continue to work for a short period of time after first identifying the problem signaled the lack of concern for impairment, and in this case where the prohibition rule agreed to by the union involved impairment and not possession, this contributed to the arbitrator's finding that the employer had not shown reasonable cause for the discipline. In general, demonstrating impairment would be harder than proving possession or use, as the evidence may not be as direct and objective. Some of the issues about the validity and reasonableness of the drug test were discussed in an earlier section. In a number of cases reviewed, the grievors claimed a positive drug test was due to off work recreational use days earlier, making it difficult for the employers to establish, based on the test, that there was drug use or impairment during work shifts, as the drugs could have stayed in a person's system for a long time. In the court review *Obed Mountain Coal Ltd. v Alberta (Employment Standards)* [1994] AWLD 461, 154 AR 75, the original decision requiring the employer to pay wages in lieu was upheld as there was no evidence of impairment and the drug test done five days later did not prove at all that marijuana was used on the day concerned.

An employer's policy language can help in establishing the standard of proof required. In *Fluor Constructors Canada Ltd. v IBEW, Local 424* [2001] CarswellAlta 1906, para 49, the policy involving the *Canadian Model for Providing a Safe Workplace -- Alcohol and Drug Guidelines and Work Rule* detailed provisions for what constituted "reasonable grounds" for believing an employee may be violating a standard related to drug and alcohol as follows:

Firstly, a situation where the supervisor or leader observes, overhears or otherwise discovers something which would cause any reasonable person in that situation to believe the employee is in breach of the guidelines, including, for example:

- where the smell of alcohol is detected on an employee's breath; or
- where the supervisor or leader overhears a conversation at work in which an employee admits to just having consumed or used alcohol or drugs.

In this case, it was concluded that "a conversation with a registered nurse, reported to a supervisor or manager, is an indicator and sufficient to meet the 'reasonable ground' element" (para 145).

If it has been decided that a violation of drug-related work rule has occurred, before imposing a penalty, it is important to consider if there is an addiction element, which could trigger a duty for the employer to accommodate, as discussed in the following section.

Accommodation

Section 25 of the *Canadian Human Rights Act* clearly defines disability as “any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug” and thus, according to Section 15 of the same *Act*, people with drug addiction would require employer accommodation to the point of undue hardship. Similar provisions are found in other provincial *Human Rights Laws*. Moreover, whether an addiction is concerned or not, legal medical use of marijuana authorized for a disability condition gives rise to the need for accommodation.

A number of cases reviewed involve this drug-related disability accommodation but not all claims of marijuana addiction or medical use have necessarily led to accommodation. In *Burton v Tugboat Annie's Pub* [2016] CarswellBC 1791, the human rights tribunal dismissed the employee complaint due to the complainant's failure to provide the link between his disability and termination, and to establish prior to his termination that his marijuana use was for medical reasons, citing *Gardiner v BC (Attorney general)*, 2003 BCHRT 41, para 152-154, which said: “[t]he tribunal has stated that an employer must be aware of an employee's disability, or ought to be reasonably aware, before a duty to accommodate will be triggered”. Also, in *Leonard v Noble Drilling (Canada) Ltd.* [2010] Carswell-Nfld 189, the complaint was dismissed as no addiction or employer perceived addiction was proven through various witnesses' testimonies. To establish addiction, self-claiming medical use or self-diagnosis were deemed insufficient and sometimes, even having the addiction counsellor's evidence instead of a medical expert's might still be found to be inadequate, as in the case of *Spectra Energy Transmission West and CEP, Local 686-B* [2012] CarswellBC 4236. In *French v Selkin Logging* [2015] CarswellBC 1898, even a cancer survivor who claimed discrimination had his case dismissed as the termination was due to a *bona fide* occupational requirement (safety-sensitive workplace) and without providing the employer with a medical card for possession and use of legal marijuana, the employer was found to have no obligation to accommodate. Where there was no addiction or perceived disability found, as in the Alberta Court of Appeal case of *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426, no accommodation by the employer was required and the employment termination after the employee had a positive pre-employment drug test was not considered discriminatory.

“Having a bona fide medical condition does not insulate any employee from the normal rules of the workplace, including the obligation to abstain from drug and alcohol consumption immediately prior to attending at work, or the obligation to accede to a reasonably made request to undergo drug and alcohol testing”, as stated in *Via Rail Canada Inc. and Teamsters Canada Rail Con-*

ference [2011] CarswellNat 6602, para 12. The need to comply with company rules is also illustrated in a recent Supreme Court of Canada case (not included in this searched case set as it is not marijuana-specific), *Stewart v Elk Valley Coal Corp.*, 2017 SCC 30. In this case, an employee was dismissed for breaching the company's drug and alcohol policy that required employee disclosure of addiction before any drug-related incident occurred involving the employee, with dismissal as the discipline for post-accident disclosure or a positive drug test result. While the employee had an addiction problem with cocaine, the Court agreed with the Alberta Human Rights Tribunal decision (as affirmed by the Alberta Court of Queen's Bench and Alberta Court of Appeal) that *prima facie* discrimination was not established as there was no connection proven for the disability and the termination, and that the dismissal was for the breach of policy. It was also found that the addiction, in this case, did not diminish the employee's capacity to comply with the terms of the policy. This case has important implications as it shows that: "[t]he connection between an addiction and adverse treatment cannot be assumed and must be based on evidence" (para 39). It may also have the effect of encouraging employers to implement a similar drug policy requiring early and proactive disclosure of addiction and for drug-dependent employees to come forward to comply with such a policy.

Employees have a role to play in the accommodation process to help themselves too. In *Coca-Cola Bottling Ltd. v Teamsters, Local 213* [2001] CarswellBC 4059, the arbitrator considered that employer accommodation need not include paying for the employee the cost of drug treatment. In *Rio Tinto Alcan Primary Metal Kitimat/Kemano Operations BC and CAW-Canada, Local 2301* [2009] CarswellBC 4006, the dismissal for excessive absenteeism was upheld as the grievor's participation in the accommodation plan for his alcohol and drug addiction was found to be not satisfactory. As stated in the decision (para 70), "[t]he accommodation process is intended to end with the return of the employee to useful employment" and "the accommodation may also come to an end if the employee does not or cannot reasonably participate in the rehabilitation process or it may end when the employer's duty to accommodate the employee is exhausted."

In a rather unique way, accommodation situations can give rise to issues relating to adherence to or waiver of the grievance time line. In the preliminary hearing of *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620* [2017] CarswellNfld 339, para 47, the arbitrator noted that:

[I]t would be inequitable to allow the Employer to now insist on strict compliance with the Collective Agreement's time limitations when it willingly engaged in a continuing discussion with the Union after that initial assertion of its rights was made. The Employer has waived its right to compliance by its subsequent actions.

Thus, ongoing discussions about accommodation could be construed as an agreement to waive grievance time lines.

Level of Penalty and Mitigating Factors

Most of the cases analyzed did not have the exact penalty for the offence explicitly stated, leaving a range of possible disciplinary levels that could be applied by the arbitrator. Arbitrators usually consider proportionality (the penalty fits the offence), consistency of the discipline with other similar cases, and other mitigating factors. The principle of progressive discipline, as described in an earlier footnote, often applies, especially for relatively minor misconduct.

For proportionality, possession of drugs tended to attract a lower level of penalty than outright drug consumption, when both of which were in contravention of the company rule. For example, in *VME Equipment of Canada Co. and IAM, Local 2183* [1990] CarswellOnt 4418, the grievor admitted to possession of marijuana, which he claimed was to be used at a party after work. The arbitrator noted that all of the cases cited by counsel involved discharges upheld only when there was evidence of drug use on the premises, rather than simple possession on the premises. He continued to say at para 27, “[i]t seems to me that one reason why possession may have attracted a lesser penalty is that it represents a lesser threat to the interests of the employer and the other employees than does the presence of an impaired worker in the work place”. However, the arbitrator still considered the possession to be of potentially serious concern and, with other mitigating factors, decided for a reinstatement without back pay, which was equivalent to a long suspension of around 1.5 years. In *National Steel Car Ltd. and USWA, Local 7135* [2001] CarswellOnt 10045, 18 employees were spotted by a surveillance camera violating the company’s drug rule regarding marijuana consumption. The arbitrator, in deciding on the penalty of one of the grievors, referred to two previous arbitration decisions for this group of employees, and based on proportionality and consistency, imposed a penalty in between the penalties of those two prior cases, involving a 50-day suspension. In *Canada (Treasury Board) v Aucoin* [1988] CarswellNat 1061, four employees were disciplined relating to a prank of putting marijuana into a baked loaf of cake, with three involved in the actual baking, and the fourth learning about it later but not alerting the victim of the prank, who after consuming a couple of pieces of the cake, fell very sick and had to be hospitalized. All employees were found to be at fault and suspended for 20 days. The fourth employee grieved and the arbitrator found that her non-action to stop the prank and inform the employer/medical professionals involved made her part of it, but due to the lesser nature of her involvement, reduced her suspension to 10 days. In *CAW-Canada Local 1256 v Automodular Corp.* [2012] CarswellOnt 3311, two employees caught by surveil-

lance for smoking marijuana in a car in the company's parking lot were found to be in violation of the company's drug policy but, due to mitigating circumstances, were given a lesser penalty of suspension of about one year in place of the dismissal, with conditions attached in the "Last Chance Agreement". The employee who supplied the drugs, considered the 'ringleader' who played a more significant role in this offence, had the conditions lasting for 12 months, whereas the other had the conditions for only half the time.

Of the 93 cases reviewed, reinstatements with conditions were not uncommon. In over 10 cases, the arbitrators imposed various conditions for reinstatement, with the conditional period usually ranging from six months to two years in which the reinstatement could be revoked (i.e., the employee terminated) if there was a further offence of a similar nature. This was often written in a "Last Chance Agreement", following which the only grievance that could be filed upon another alleged offence would involve deciding on whether the offence has occurred, but not the disciplinary level. Mandatory drug tests and requirement to participate in drug treatment or rehabilitation programs usually formed part of the "Last Chance Agreement" terms in the cases reviewed.

As with all grievance cases, mitigating factors were considered in determining the penalty for this set of cases reviewed. Common mitigation factors included length of service, prior disciplinary records, difficulty in finding alternative employment, extenuating personal or family circumstances, impact of the dismissal, honesty, and remorse for the wrongdoing. A more unique factor for these marijuana-related cases, however, related to rehabilitation. Although the Supreme Court of Canada in *MUA, Local 6889 v Cie minière Quebec Cartier* [1995] 2 SCR 1095 (SCC) (as cited in a case reviewed—*Canadian Airlines International Ltd. v CALPA* [1997] CarswellBC 1516) held that arbitrators exceed their jurisdiction when they rely on subsequent event evidence as grounds for annulling a dismissal, post-event evidence is allowed if it sheds light on the reasonableness and appropriateness of the discipline. In the cases reviewed, arbitrators did consider post-dismissal events, particularly relating to the prognosis of the drug rehabilitation, either as part of the accommodation requirement or as part of determining whether the employment relationship would still be viable. For example, in *Algoma Tubes Inc. and USW, Local 8748* [2006] CarswellOnt 10818, the arbitrator, citing the abovementioned Supreme Court case, decided to allow for reinstatement with conditions attached as the post-discharge evidence showed addiction, treatment and successful rehabilitation. Similarly, in *Indalloy v USWA, Local 2729* [1979] CarswellOnt 961, the employee's subsequent involvement in a union program for members with alcohol and drug problems was considered a mitigating factor, which, together with his unblemished disciplinary record and satisfactory performance, resulted in a lesser penalty of six months' suspension instead of dismissal.

Even when an employee has committed a rule violation that warrants discipline, if the manner of dismissal or handling of the discipline is done in bad faith, punitive damages may be imposed. For example, in *Richards and Great Canadian Coaches Inc.* [2014] CarswellNat 6433, a driver was dismissed when a small bag of marijuana, claimed to have been picked up on the bus, fell out of his pocket. The company had never provided instructions to drivers about the protocols around finding or disposing of such substances. The dismissal was handled very poorly, with no clear letter or explanation for the dismissal given to the employee and no opportunity for the grievor to tell his side of the story. In addition, the dismissal was conducted in front of customers in a loud and angry manner. The employer further failed to follow up with the employee, despite promising to do so. The arbitrator found that a lesser penalty of suspension of two weeks to one month was appropriate, and awarded punitive damages of \$1,000 for the manner of dismissal.

Recommendations and Conclusion

This case law review provides timely insights into the issues related to workplace marijuana use in the past, most of which will continue to apply in the legalized context, particularly if employers continue to implement their own prohibitive workplace marijuana policies. Although the context of each case is different and what applies to one situation may not necessarily apply to another, it is possible to suggest a set of general recommendations (as in Table 1) based on the case review for consideration in the establishment and implementation of relevant new or revised rules.

Information provided in the table is not only relevant for employers. It is also useful for unions, as they likely have to negotiate and work with employers to establish reasonable policies and procedures, to protect the rights and safety of workers. In the event of a grievance, the parties to the collective agreement can review this set of recommendations to see what might have fallen short in order to prepare their case accordingly, and hopefully resolve the conflict in an efficient and effective manner. Employers and unions should also proactively educate employees on the use and effects of marijuana (and other drugs) with the hope that employees will make informed and responsible decisions that do not adversely harm others or themselves in the workplace. As the law is new and while marijuana-related testing technologies and medical research are emerging, it is important for employers, unions, and employees to keep abreast of changes, especially regarding case law in the new legalized context, and consult legal counsel as needed. Further research should be explored on both the legal and organizational front to identify the impact of marijuana legalization in the workplace.

TABLE 1**Recommendations for Drug Policies and Procedures in Workplaces****Language and Communication of Work Rule**

- List offences relating to the possession, use, distribution and sales of marijuana or other drugs or working under the influence, as appropriate
- State penalty levels (mandatory or discretionary), as appropriate, with consideration given to safety-sensitivity and drug abuse culture of the workplace
- Include reporting procedures for employees (and witnesses) and investigation/action procedures for supervisors and managers (e.g., stopping the suspected employee from working, and be aware of privacy infringement if any searches are to be done)
- Ensure all rules are clear, reasonable, balanced, and well communicated (preferably consented)

Drug Test

- Identify safety-sensitive positions to which drug testing may be applicable
- Specify conditions requiring drug testing, e.g., post-incident, reasonable suspicion of offence, bona-fide occupational requirement (such as cross-border truck drivers), and return to work post drug treatment
- Recognize that drug test does not show impairment and so if policy is about impairment, company needs to find other cognitive or motor skills tests appropriate for the job position concerned
- Obtain medical evidence to support specific cut-off levels used for the tests
- Train supervisors on identifying situations or drug characteristics that would justify reasonable suspicion for drug tests

Standard of Proof

- Collect clear and cogent evidence of the drug violation incident (including direct physical evidence, properly conducted surveillance videos, multiple credible witness statements, drug test results, employee acknowledgement of reading the rule, etc.)
- Involve a due process – telling employee the alleged offence and hearing his/her side of story
- Train supervisors on identifying drug characteristics as well as user impairment characteristics*

Accommodation

- Encourage drug-dependent employees to come forward to seek assistance without fear of penalty
- Make inquiries/investigation into addiction possibilities when there is a suspected drug violation and seek medical/counselling advice as needed
- If addiction or medical use is proven, accommodate until undue hardship, including providing alternative positions, modification of work, temporary leave as needed until again fit for work, and opportunities for the employee to take rehabilitation programs
- Understand that accommodation does not mean the employee can bypass company's safety or other rules and employee has a role to play in the accommodation (need to satisfactorily participate)
- Where accommodation is not possible, demonstrate bona fide occupation requirement and the non-feasibility of other alternatives.
- Be aware that ongoing investigation/discussions relating to accommodation may sometimes be construed as extending grievance time lines.

Penalty and Mitigation

- Assess proportionality and seriousness of offence and subsequent employee attitude (e.g., honesty, remorse, etc. which would likely be factored into arbitration decisions, if it proceeds that far)
- Refer to prior relevant agreement and disciplinary records, as well as similar disciplinary situations
- Consider employee's personal extenuating circumstances, including particularly the rehabilitation situation and future prognosis to inform the viability of continuing the employment relationship

* See, for example, Canadian Centre for Occupational Health and Safety (2017:15-16).

Notes

- 1 Although marijuana has been legalized in some states in the U.S., it is still illegal under the federal law. With the major jurisdictional and contextual differences between the U.S. and Canada, references to the U.S. situation were only made in a limited way in this paper in relation to general marijuana characteristics and consumption.
- 2 After marijuana legalization, the content label situation should improve for products sold in authorized stores; however, people can still consume home-grown marijuana that does not come with a content label.
- 3 The search in English that excludes many Quebec cases is acknowledged as a limitation necessitated by the author's language skills.
- 4 Human rights legislation is "a fundamental law intended to supersede all other legislation" (*Insurance Corporation of British Columbia v. Heerspink*, [1982] 2 SCR 145, p 146).
- 5 Under the principle of progressive discipline, when an employee commits a misconduct, he or she would be "subject to a system of progressive, corrective discipline", that includes a verbal warning, a written warning, a suspension, and finally dismissal as the last resort, with the goal of correcting the misbehaviour (Human Resources and Skills Development Canada, 2009: 7)
- 6 A supplementary award was provided for this case in [2017] *CarswellAlta* 333, in which the calculation related to the damage, was addressed.
- 7 A "Last Chance Agreement" (LCA) is described by Thomson Reuters as an agreement "signed by an employer, union, and union-represented employee who has engaged in misconduct worthy of discharge to conditionally reinstate that employee and provide him a chance to improve his performance. In an LCA, the employer agrees to withdraw pending or previously issued discipline in return for the employee's promise to refrain from further infractions and to waive certain procedural rules concerning the grievance and arbitration process if the employee commits another infraction resulting in discharge." ([https://ca.practicallaw.thomsonreuters.com/4-616-8005?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&bhpc=1](https://ca.practicallaw.thomsonreuters.com/4-616-8005?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhpc=1))
- 8 A supplementary decision for this case, [2016] *CarswellNfld* 150, addressed a different issue relating to the contractor not following the Canadian Model procedures of referring the employee to a Substance Abuse Expert.
- 9 This case was found to be a hybrid case with both culpable and non-culpable elements with the arbitrator allowing reinstatement under certain circumstances. The case was appealed by the employer without success, (see [2006] *CarswellBC* 293), and a leave for appeal to the Supreme Court of Canada ([2006] SCCA No. 140) was dismissed.
- 10 Examples within this set of cases reviewed include *First Bus Canada Ltd. v ATU*, Local 279 [2007] *CarswellNat* 1786; *Kimberly-Clark Forest Products Inc. v Paper, Allied-Industrial, Chemical and Energy Workers International Union*, Local 7-0665 [2003] *CarswellOnt* 3537.
- 11 Impairment tests are evidence-based tests. An example is the standardized field sobriety test in Canada for roadside checks of driver impairment. If the test shows impairment, further evaluation is needed by a Drug Recognition Expert (Government of Canada, 2016).
- 12 This employer, Elk Valley Coal Corporation, later had a human rights case that went all the way to the Supreme Court of Canada, which is discussed in a later section.

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SUMMARY

Marijuana Legalization in Canada: Insights for Workplaces from Case Law Analysis

The legalization of marijuana in Canada is expected to have a significant impact on workplaces, requiring the development or updating of company drug-related policies and procedures. To help employment relations stakeholders with this change, recommendations are made based on an analysis of 93 past arbitration/tribunal/court cases involving marijuana-related policy violations, drawn from the *Labour Source* database. Issues addressed include language and communication of the work rule, reasonableness of drug tests, standard of proof, duty to accommodate, and mitigating factors.

Based on the study of those 93 court cases, some recommendations can be formulated. First, employers need to clearly state their drug-related policies, taking into consideration safety-sensitivity and any substance abuse culture. This may include prohibition of possession, use, and distribution of drugs at the workplace or working under the influence, and the need to report any medical drug use that requires accommodation. Drug tests should only be done when there is a bona fide occupational requirement or where safety is a concern, such as post-incident or when there is reasonable suspicion of drug impairment. Also, it is important to understand that positive drug test results can only show past drug use but not the level of impairment or whether the drug was used while on a work shift. Therefore, to support an offence violation and discipline, corroborating evidence from multiple witnesses and sources are often necessary.

Supervisors should be trained to identify the characteristics related to marijuana and drug impairment and the procedures to follow when an incident occurs. Employers must be cognizant of the duty to accommodate medical marijuana users or recreational users who are addicted, under human rights protection for disability. Such accommodation may include work reassignment or a leave of absence. In deciding on a penalty, other than past performance and disciplinary records and personal extenuating circumstances, arbitrators may consider rehabilitation situations to assess the prognosis and viability of the employment relationship.

Employers and unions are advised to stay abreast of latest developments in the laws, drug test technologies and medical research related to marijuana use.

KEYWORDS: marijuana legalization, drug testing, duty to accommodate, workplace drug addiction, case law, Canada.

RÉSUMÉ

Légalisation de la marijuana au Canada: perspectives pour les milieux de travail basées sur une analyse de la jurisprudence

La légalisation de la marijuana au Canada devrait avoir un impact significatif dans les lieux de travail, ce qui nécessitera l'élaboration ou la mise à jour des politiques et des procédures des entreprises en matière de drogue. Afin d'aider les parties en charge des relations de travail à faire face à ce changement, des recommandations sont ici formulées sur la base d'une analyse de 93 décisions arbitrales par des tribunaux ou des cours de justice rendues en lien avec des violations de la politique d'entreprise en matière de drogue, des décisions extraites de la banque de données *Labour Source*. Les aspects traités incluent le langage et la communication des règles au travail, le caractère raisonnable des tests de dépistage de drogue, la norme de preuve, l'obligation de prendre des mesures d'adaptation, ainsi que les facteurs atténuants.

À partir de cette recherche, plusieurs recommandations peuvent être formulées. En premier lieu, les employeurs devraient énoncer clairement leurs politiques en matière de drogue, en prenant en considération la sensibilité à la sécurité sur les lieux de travail et la culture existante dans leur milieu en matière d'abus d'alcool et de drogues. Cela peut inclure l'interdiction de possession, d'utilisation et de distribution de drogues sur le lieu de travail, l'interdiction de travailler sous l'influence de telles substances, ainsi que la nécessité de rapporter toute consommation de substance médicale nécessitant des mesures d'accommodement. Les tests de dépistage de drogue ne devraient être effectués que si la nature de l'emploi le demande ou si la sécurité est en jeu, notamment dans le cas d'un événement postérieur à un incident, ou en cas d'un doute raisonnable de consommation de drogue. En outre, il est important de comprendre que les résultats de tests de dépistage de drogue qui sont « positifs » ne révèlent que la présence de drogue déjà consommée, mais pas le degré d'incapacité ou, encore, si la substance a été consommée pendant le quart de travail. Par conséquent, pour justifier une infraction et une mesure disciplinaire, il est souvent nécessaire de corroborer les preuves fournies par plusieurs témoins et sources.

De plus, les superviseurs devraient être formés à identifier les caractéristiques liées à la consommation de marijuana et des autres drogues qui peuvent affecter les capacités au travail. Ces derniers devraient aussi connaître les procédures à suivre lorsqu'un incident survient. Les employeurs doivent également être conscients

de l'obligation d'accommoder les utilisateurs de marijuana à des fins médicales, ainsi que les utilisateurs de marijuana à des fins récréatives qui ont été reconnus toxicomanes, cela en raison des droits humains relatifs à un handicap. Ce type d'accommodement peut inclure une réaffectation de travail, voire même un congé d'absence. En décidant d'une sanction (autre que celles liées aux performances passées, des antécédents disciplinaires et des circonstances atténuantes personnelles), les arbitres pourraient prendre en considération les chances de réadaptation dans leurs critères de décision afin d'évaluer leur pronostic et la viabilité de la relation d'emploi.

Il est aussi conseillé aux employeurs et aux syndicats de se tenir au courant des derniers développements en matière de législation, de technologies de dépistage de drogue et de recherche médicale liés à la consommation de marijuana.

MOTS-CLÉS : légalisation, marijuana, test de dépistage, mesure d'accommodement, toxicomanie, milieu de travail, jurisprudence, Canada.

RESUMEN

Legalización de la marihuana en Canadá: perspectivas para los medios de trabajo a partir del análisis de la jurisprudencia

La legalización de la marihuana en Canadá tendrá un impacto significativo en los lugares de trabajo, haciendo necesario el desarrollo o actualización de las políticas y procedimientos de las empresas en materia de droga. Con el fin de ayudar a las partes encargadas de las relaciones laborales a enfrentar este cambio, se formulan recomendaciones sobre la base de un análisis de 93 decisiones arbitrales rendidas por los tribunales o las cortes de justicia sobre las violaciones de la política de empresa en materia de droga, decisiones que fueron extraídas de la base de datos *Labour Source*. Los aspectos tratados incluyen el lenguaje y la comunicación de las reglas en el trabajo, el carácter razonable de las pruebas de detección de droga, la norma de la prueba, la obligación de tomar medidas de adaptación y los factores atenuantes.

A partir de esta investigación, varias recomendaciones pueden ser formuladas. En primer lugar, los empleadores deberían enunciar claramente sus políticas en materia de droga, tomando en consideración la sensibilidad a la seguridad en los lugares de trabajo y la cultura existente en el lugar de trabajo en cuanto al abuso del alcohol o de las drogas. Esto puede incluir la prohibición de trabajar bajo influencia de tales sustancias, así como la necesidad de postergar todo consumo de sustancias medicinales que necesiten medidas de acomodamiento. Las pruebas de detección de droga deberían ser efectuadas solamente si la naturaleza del empleo lo exige o si la seguridad está en juego, especialmente en el caso de un evento posterior a un incidente, o en caso de duda razonable de consumo de droga. Es más, es importante de comprender que los resultados de las pruebas de detección de droga que son positivos solo revelan la presencia de droga consumida, no mi-

den el grado de incapacidad ni indican si la sustancia ha sido consumida durante el horario de trabajo. Por consecuencia, para justificar una infracción y una medida disciplinaria, es a menudo necesario de corroborar las pruebas proporcionadas por los diferentes testigos y fuentes.

Además, los supervisores deberían ser formados para identificar las características vinculadas al consumo de marihuana y otras drogas que pueden afectar las capacidades de trabajo. Deberían también conocer los procedimientos a seguir cuando un incidente ocurre. Los empleadores deben igualmente ser conscientes de la obligación de acomodar los utilizadores de marihuana a fines medicinales, así como los utilizadores de marihuana a fines recreativos que han sido reconocidos toxicómanos, esto en razón de los derechos humanos vinculados a una discapacidad. Este tipo de acomodamiento puede incluir una re-asignación de trabajo, incluso un permiso de ausencia. Al decidir de una sanción (otra que aquellas vinculadas a los rendimientos anteriores, los antecedentes disciplinarios y las circunstancias atenuantes de tipo personal), los árbitros podrían tomar en consideración las probabilidades de readaptación dentro de sus criterios de decisión con el fin de evaluar el pronóstico y la viabilidad de la relación de empleo.

Se aconseja también a los empleadores y a los sindicatos de tenerse al corriente de los últimos desarrollos en materia de legislación, de tecnologías de detección de droga y de investigación medical vinculados al consumo de marihuana.

PALABRAS CLAVES: legislación, marihuana, prueba de detección, medida de acomodamiento, toxicomanía, lugar de trabajo, jurisprudencia, Canadá.