Blaney McMurtry LLP

PUBLICATION

Under A Cloud: how Insurers can Respond to the upcoming Legalization of the Recreational Use of Cannabis in Canada

Date: October 10, 2018
Author: Anna Casemore

Yes, it's true. On 17 October 2018, Canada will become the first G7 country to legalize the recreational use of cannabis nationwide[1]. That means that individuals[2] will be able to buy, possess, consume, grow and share cannabis under the federal governance of the *Cannabis Act*[3]. Provincial governments have introduced complementary legislation to regulate activity within their respective borders[4].

The primary objectives of legalization are health, safety and revenue: ensuring a safe and controlled supply while keeping it out of the hands of minors, eliminating the illegal market, reducing the burden on the criminal justice system, and increasing revenue (sales arising from the legal recreational market are expected to generate up to CDN$4.34 billion in 2019).

This new venture is nothing short of ground-breaking, and will significantly change the Canadian societal landscape as we know it. No doubt, the world will be watching, with bated breath, to monitor developments.

It doesn't take an overly active imagination to appreciate that this New Frontier will have a significant impact on multiple areas of insurance such as property, health, disability/life, commercial/social host, employment (EPL), automobile, crime[5], and products liability. Furthermore, it will almost certainly raise cross-border[6] and immigration challenges.

This short article certainly does not cover every aspect of this looming seismic shift, but, hopefully, it will serve to raise sufficient awareness for insurers, so that they can adequately respond.

As an example, I have highlighted some key considerations that may arise in the context of the workplace to demonstrate what insurers could be facing.

Random Drug Testing in the Workplace

The primary goal of employers is to maintain health and safety in the workplace[7] while ensuring that they do not discriminate against workers[8].

Currently, it is permissible for an employer to test an individual employee, after the fact, if there are reasonable grounds to believe that he is impaired.

Courts have not yet granted employers the automatic right to randomly test for illicit drug or alcohol use[9]. A policy that would unilaterally impose random drug testing without reasonable cause, and where there is no broader problem of substance abuse, would likely be successfully challenged. Courts may permit random testing, however, if it is proved to be a proportionate response to legitimate safety concerns, taking into consideration the privacy of the workers. Generally, evidence of an enhanced safety risk (such as a pervasive problem with substance abuse, rather than an individual incident) in a dangerous, inherently dangerous, or highly safety-sensitive environment[10] would be required before a court orders random testing. Basically, a balancing exercise between the risk of danger and the right to privacy must be applied, on a case-by-case basis, before a right to randomly test would be granted[11].

There is no doubt that the consumption of cannabis can potentially result in impairment. The challenge for employers will be to prove impairment since some medicinal cannabis products, high in CBD (cannabidiol), do not produce the psychoactive effects that THC[12] does, so impairment may be less obvious. As well, cannabis is more complex, chemically, than alcohol: given the multiple number of strains available, testing may be a challenge. Furthermore, the issue of the combined effect of alcohol and drug consumption does not seem to have been addressed. All of these challenges would apply also in the automobile context.

Duty to Disclose / Duty to Accommodate

In terms of medically prescribed cannabis, there is no definitive rule or law that requires an employee to disclose her use. There is, however, a requirement for the worker to report to her employer or supervisor any contravention of the *Occupational Health and Safety Act* ("***OHSA***"), or any hazard of which she is aware: a worker does not have the right to be impaired in the workplace if it may endanger her own safety or the safety of others[13]. She must be fit for duty during work hours. Consequently, the worker is obligated to ask her health-care provider about the likely effects of her prescribed cannabis, and to disclose any concerns to her employer.

An employer would have a duty to accommodate[14] a worker who has been prescribed cannabis, as long as the employee has made full disclosure. The employer is typically relieved of its duty if it has not been made aware of the relevant circumstances.

In summary, there is no overall duty on a worker to disclose her use of medicinal cannabis, but this is subject to the obligation to disclose situations where impairment as a result of such use may endanger the worker's own safety or the safety of others in the workplace. Furthermore, in order to be accommodated under human-rights legislation, the worker must disclose her use to her employer, and explicitly request accommodation[15].

Can an Employer Fire an Employee for being High?

Maybe. An employee who is found to be impaired in the workplace could be in breach of a term of his employment contract - to be fit to perform his assigned duties. He could also be in breach of certain provisions of the *OHSA*, as stated above. It will depend on the circumstances and the extremity of the incident, as well as the type of workplace.

There is no absolute right to use cannabis in the workplace, even when medically prescribed. It would be more challenging to terminate the worker, in the case of prescribed cannabis, because the employer would face a greater duty to accommodate pursuant to provincial human-rights legislation. Again, the issue would be determined on a case-by-case basis.

Even in cases where an employee has agreed to a zero-tolerance policy, or has agreed to pre-incident addiction disclosure, an employer will still have to demonstrate that it has properly discharged its duty to accommodate by having been flexible and fair. The greater the safety risk in the workplace, the less likely the impaired employee will be tolerated.

It is imperative, therefore, for employers to have clear, written policies in place, and that new employees acknowledge these policies, in writing, prior to the commencement of employment. This would provide the employer with greater leverage if a claim arises later, especially in the context of disability or illness. The employer would then be able to rely on the fact that the employee knew or ought to have known that she violated the rules and/or knew of her disclosure obligations under the employment contract.

So, what does the Legalization of Cannabis mean for Insurers?

A lot. There are multiple, diverse stakeholders involved in this significant cannabis initiative, each giving rise to a potential coverage exposure / opportunity.

Inevitably, insurers will face a higher volume of claims once the new legislation comes into force. This increase will likely be pervasive, involving multiple areas of coverage such as property / equipment break-down[16], commercial/social host, business interruption, directors' and officers', health[17], employment, cargo/transit, immigration, automobile, products liability, crime, consumer protection (e.g. quality, price and safety)[18], advertising, cybersecurity and product recall. For example, in the property context, indoor growing would likely give rise to a demand for additional heat, water and electricity, which could, in turn, create an increased fire risk. There will also be a requirement for coverage for the cannabis itself (i.e. the quality of the product). Online purchasing[19] and its related risks, including the protection of customers' personal information, will require robust cybersecurity. Furthermore, it is likely that the use of recreational cannabis will give rise to increased commercial-host liability claims due to the proposed opening of public cannabis lounges.

While probably wanting to proceed with caution, it is critical for insurers to be proactive, anticipate future risk, and adapt and prepare for this significant change in the Canadian landscape. They are strongly encouraged to learn all there is to know about the applicable federal and provincial legislation, and keep up with the literature (it can be reasonably assumed

that there will be many modifications to the regulatory regime, at all levels of government, and much discussion and debate on the subject especially during the early years).

Legalization of cannabis in Canada will certainly give rise to exciting new opportunities for insurers who do business in Canada, and are considering writing and designing new insurance products and customized insurance solutions in the cannabis field[20]. They may need to revisit their existing policy wording (e.g. expanding exclusions in the property context), and ensure that insureds who are involved in the cannabis industry are properly armed (increased security measures on property, sophisticated computer software etc.) to prevent resultant claims.

The time is now, to start to formulate solutions and get ahead of the game. Before proceeding, however, insurers are strongly advised to consult with their legal counsel for assistance in navigating this new, and rapidly moving, regime.

Stay tuned. This is the first of a series of articles that will serve to update you regularly as this dynamic area of law evolves.

Anna is a Partner of Blaney McMurtry LLP, and practises exclusively in the area of insurance. She specializes in litigating complex professional-liability claims, and providing coverage advice and monitoring services. She is also the insurance representative of the Blaneys' Cannabis Group.

Blaneys offers a variety of literature, webinars, podcasts and other information respecting numerous areas of insurance. Please contact Anna at acasemore@blaney.com if you have any questions or comments about this article, or if you wish to discuss any other insurance related matter.

DISCLAIMER: This publication is intended to convey general information about legal issues and developments as of 8 October 2018. It does not constitute, and must not be treated or relied on as, legal advice.

---

[1] In the United States, the law varies widely depending on the particular state. For example, the recreational use of cannabis is legal in nine states including California, Washington, the District of Columbia and Colorado. There is also more limited use elsewhere.

[2] In Ontario, the minimum age to purchase and possess cannabis will be 19 years. Other provinces may vary.

[3] Bill C-45, the *Cannabis Act*, S.C. 2018, c. 16, is now law. It obtained Royal Assent on 21 June 2018, and will come into force on 17 October 2018. Possession, production, distribution and sale outside of the law will remain illegal and subject to criminal sanctions. Cannabis will also be governed provincially/territorially, and municipally. Consequently, significant cooperation

at the different levels of government will be required, so that laws, by-laws and associated regulations properly complement one another (federal and provincial regulations are still in the process of being drafted).

[4] For example, in Ontario, the provincial government passed the *Cannabis Act, 2017*, and subsequently introduced Bill 36, *An Act to enact a new Act and make amendments to various other Acts respecting the use and sale of cannabis and vapour products in Ontario*.

[5] In Ontario, it may be permissible for cannabis to be sold in private retail stores.

[6] Border rules will not change on account of legalization. One cannot bring cannabis into, or take it out of, Canada. Taking cannabis, or cannabis-containing products, across Canada's international borders will remain illegal, and could result in serious criminal penalties both in Canada and abroad. This prohibition will exist even if entering a US state where cannabis is legal. There may be rare circumstances in which Health Canada will issue an exemption for medical or scientific purposes.

[7] Section 25(2)(h) of the *Occupational Health and Safety* Act, R.S.O. 1990, c. O.1, as amended.

[8] Under the *Human Rights Code*, employers have a duty to accommodate, and would therefore have a duty to accommodate workers who consume cannabis for medical purposes.

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

[10] This does not take into consideration the issue of drug and/or alcohol problems in a safe workplace.

[11] See *Suncor Energy Inc. v. Unifor Local 707A*, 2017, ABCA 313 (CanLII) for a judicial discussion of the balancing act between the right of an employee to privacy and the maintenance of workplace safety. In *Suncor*, it was demonstrated that more than 95% of employees (both unionized and non-unionized) who were tested subsequent to a safety incident in the workplace tested positive for traces of drugs and/or alcohol.

[12] A cannabinoid, chemically described as delta-9-tetrahydrocannabinol.

[13] Section 28(1)(d) of the *Occupational Health and Safety* Act, *supra* note 7.

[14] An employer may have a duty to accommodate, as long as it does not cause undue hardship to the employer. Undue hardship may be established if the employee is unable to perform his work safely, or if his actions adversely impact work performance.

[15] A recent decision of the Human Rights Tribunal of Ontario upheld the right of a contractor to dismiss an employee for using cannabis at work, and concluded that there had been no discrimination by the employer. The worker had been performing restoration from a swing-stage

outside the 37th floor of a high-rise building. He had medical authorization to use cannabis for a recognized health condition, and was observed by his supervisor smoking it on a break. The worker knew he was governed by a zero-tolerance policy, which included the prohibition of the use of cannabis. The worker asserted that the employer had failed to accommodate him regarding his disability. The Tribunal disagreed. The Adjudicator of the Tribunal went on to establish the three following principles:

1. A trade contractor must reasonably be expected to follow any zero-tolerance policy for substance use, including cannabis, on the job.
2. There does not need to be evidence of actual, or a high level of, impairment before a health and safety concern may be raised on a construction project.
3. A zero-tolerance policy is not *prima facie* discrimination under the *Human Rights Code*. This case emphasizes the fact that workers in a safety-sensitive position at a dangerous workplace do not have an absolute right to smoke cannabis in the workplace, even when it has been medically prescribed.

[16] Cannabis may be sold in private retail stores.

[17] Many of the risks associated with cannabis are analogous to those of tobacco.

[18] There is a strong appetite for edibles (such as baked goods, chocolate, honey etc., which contain cannabis), which will give rise to additional insurance needs, although they won't be offered for at least a year after legalization.

[19] This will be addressed at the provincial level.

[20] Cannabis remains a Class B drug in the U.K.