Recreational Cannabis — Where Do We Stand One Year On?

November 07, 2019

October 17, 2019 marked the first anniversary of the legalization of recreational cannabis. The last twelve months have been characterized by many changes and much adaptation for employers to adjust to this new reality. This new reality has given rise to anxiety and questions for many employers about the repercussions that the Federal *Cannabis Act*[1] and various corresponding provincial laws would have in the workplace. In this bulletin, we review some of the changes that have occurred in society and the legal community over the last year.

Cannabis Consumption

In the three months following the historic date of October 17, 2018, the number of Québec residents aged 15 years and over who confirmed that they used cannabis for recreational purposes was 939,600, compared to 703,000 in the previous quarter[2], a 34 per cent increase. Nevertheless, by last spring, the figure had declined to 713,600.[3] The initial excitement surrounding the accessibility of cannabis products therefore seems to be subsiding. In Canada, the number of consumers has remained largely unchanged during the last 12 months, according to available data. Concern about the increased consumption of cannabis now seems purely illusory.

We must not rejoice too quickly, however, since between October 2018 and March 2019, an estimated 13 per cent of recreational cannabis users admitted that they had taken it before or during working hours.[4] The ability of employers to validly detect whether their employees are impaired at work is therefore becoming increasingly important, not only to comply with their duty to provide employees with a safe and healthy working environment, but also to make sure that the effects of cannabis are not impairing the performance of their employees on the job.

At the same time, a decision was rendered in the province of Newfoundland and Labrador in 2019 concerning the use of cannabis for medical purposes.[5] It was held there that in a safety-sensitive working environment, the employer's inability to effectively measure or monitor the residual impairment from medical cannabis used outside of working hours constituted undue hardship and, therefore, the employer had met its duty to accommodate. Given the dearth of case law on the subject, this decision could potentially have a major impact elsewhere in Canada, especially to counter the

defence of employees attempting to invoke a disability as a prohibited ground of discrimination, if they are caught red-handed consuming or being under the influence of cannabis at work, especially where their consumption is recreational. It is important, however, to be cautious when referring to this decision since it specifically refers to medical cannabis being consumed in a safety-sensitive work environment. For more information, we refer you to this article which summarizes the decision.

Legislative Amendments

Only a few days after cannabis was legalized, a Québec resident contested sections 5 and 10 of the *Cannabis Regulation Act*[6] regarding home cultivation of cannabis in Québec. On September 3 2019, the Superior Court of Québec upheld that challenge, declaring those provisions unconstitutional.[7] Although the federal statute provides that an individual may lawfully grow up to four cannabis plants per household, the Québec enactment was more restrictive, in that it prohibited possession or cultivation of any cannabis plant outside of medical access. Those provisions having been held invalid, the Province of Manitoba now remains the only jurisdiction in Canada where personal cultivation of cannabis is prohibited.

Furthermore, on October 17, 2019, one year to the day after the legalization of cannabis, the *Cannabis Regulations*[8] were amended by the federal government, legalizing some new cannabis products, although they will be not be available in stores until mid-December. Among those items are ingested products, either eaten or drunk (*e.g.* candies), inhaled products (*e.g.* vaping), as well as products intended for topical application to the skin, hair or nails.[9] For its part, the provincial government in Québec intends to regulate, in its own way, which products may be sold on its store shelves.[10] Such a regulation could potentially create major difficulties for employers, in that the clandestine use of recreational cannabis at work could now be easier and not release the odour normally associated with cannabis.

Another important change occurred on August 1, with the coming into force of the *Act to provide no-cost, expedited record suspensions for simple possession of cannabis.*[11] Individuals with criminal records for simple possession of cannabis may now submit applications for pardon to the Parole Board of Canada, which may, among other things, help them get a job more easily.[12]

Finally, on October 29, the Government of Québec adopted Bill n°2, known as An Act to tighten the regulation of cannabis. The first objective of this legislation is to raise the age at which Québecers will be able to buy or possess cannabis or be admitted to a cannabis retail outlet to 21. This will come into effect on January 1, 2020. It also tightens up certain rules applicable to the possession and use of cannabis, in particular by adding certain places where it is now prohibited to smoke cannabis in Québec, such as parks, playgrounds, sports grounds and the grounds of day camps.

Conclusion

In light of the above, it would seem that Canada’s federal and provincial governments are still attempting to make adjustments and to regulate as best they can the accessibility and use of recreational cannabis. It is important for employers to keep abreast of the different changes that will likely continue to occur over the next few years.

Given this new legislation, it will be essential to revise and/or adopt policies, particularly to cover all the forms of use and possession of cannabis that are restricted or prohibited in the workplace. While a complete ban on cannabis use can be a challenge, consistently informing employees of the rules that apply at the workplace is essential to deterring inappropriate behaviour.

[1] S.C. 2018, c. 6.

[2] STATISTICS CANADA, *Canadian Cannabis Survey*, 2018.

[3] Idem, Second Quarter of 2019.

[4] Idem, First Quarter of 2019.

[5] *International Brotherhood of Electrical Workers, Local 1620* v. *Lower Churchill Transmission Construction Employers' Association Inc.,* 2019 NLSC 48.

[6] CQLR,c. C-53.

[7] *Murray Hill* c. *Procureur générale du Québec*, 2019, QCCS 3664 (dated Septembr19, 2019; no application for leave to appeal has been filed).

[8] SOR/2018-144.

[9] For an overview of the new rules, see:

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