



**EMERGING TRENDS IN  
EDUCATION LAW 2017**  
**HIGH PRIORITY!**  
cultivating your approach  
to cannabis in schools



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Presented by:



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**Overview**

- Medical Cannabis
- Duty to accommodate
- Legal Cannabis
- Workplace testing update
- Practical considerations & Policy development



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### Medical Cannabis

- Cannabis is used in the treatment of a variety of conditions, including pain, post-traumatic stress disorder, and epilepsy
- Cannabis has two main components which are of medical interest: *delta-9-tetrahydrocannabinol* (THC) and *cannabidiol* (CBD). These chemicals exist in varying concentrations, depending on the particular plant or strain of cannabis



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### Medical Cannabis

- The *Access to Cannabis for Medical Purposes Regulations* (ACMPR) came into force on August 24, 2016, replacing the *Marihuana for Medical Purposes Regulations* as a result of the Federal Court's ruling in *Allard v. Canada*
- The ACMPR allow for reasonable access to cannabis for medical purposes for Canadians who have been authorized to use cannabis for medical purposes by their health care practitioner

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### Medical Cannabis



- Reasonable access under the ACMPR includes purchasing cannabis from a licensed producer, producing a limited amount of cannabis for personal medical purposes, or designating someone to produce it for the patient
- To obtain medical cannabis, the ACMPR requires the patient to provide a "medical document", rather than a prescription

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### Medical Cannabis

- Review and consider your prescription medication management policy; your existing policy addressing student prescriptions may be appropriate and applicable to medical cannabis
- The School Division is entitled to the prescribed dosing and frequency for students to determine if treatment is necessary during the school day

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### Medical Cannabis

- When receiving and storing medical cannabis in connection with a student's prescription, know that the label on the container must include:
  - Patient's name
  - Name of prescribing healthcare practitioner
  - Name of licensed producer
  - Daily equivalent quantity of dried marijuana in grams prescribed
  - Expiry date of the patient's registration

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### Duty to Accommodate

- Mental and physical disabilities are prohibited grounds of discrimination under the *Alberta Human Rights Act*
- Human rights protection will also extend to the treatment indicated and prescribed for a disability, including medical cannabis
- While addiction is protected, recreational use is not

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### Duty to Accommodate

- The employee has an obligation to cooperate in the accommodation process
- In the accommodation process, it will be the employee's responsibility to:
  - Identify the need for accommodation;
  - Provide medical information substantiating the accommodation request, if required;
  - Cooperate with treatment recommendations; and
  - Accept reasonable accommodation

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### Duty to Accommodate



- In the context of a request to accommodate medical cannabis, this will involve:
  - Disclosing medical restrictions and treatment regimen if it is relevant to current job duties or otherwise has a workplace impact;
  - Providing medical information supporting and outlining the treatment regimen, including support for workplace use, if required; and
  - Negotiating terms of use in the workplace to minimize workplace impact

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### Duty to Accommodate

- The duty to accommodate requires employers to accommodate an employee's disability **to the point of undue hardship**
- Examples of hardship include financial cost, effect on employee morale, and safety risks
- A failure to accommodate is grounds for a human rights complaint

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### Duty to Accommodate

The duty to accommodate does **not** require the employer to permit:

- an employee to work while impaired to a degree that the workplace is impacted, and/or
- the employee's culpable misconduct

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### Duty to Accommodate

Recent case law examples:

- *French v. Selkin Logging*
- *Re Calgary (City) and CUPE, Local 37 (Hanmore)*
- *IBEW Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. and Valard Construction LP*
- *Stewart v. Elk Valley Coal Corp. (SCC, June 2017)*
- *Suncor v. Unifor (ABCA, September 2017)*

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### Legalization

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## Workplace Testing: current state of the law

### Pre-employment and Random Testing

- Current case law is conflicting, evolving, and uncertain
- Likely at a minimum, the employer must establish: very safety-sensitive position; proof of the existence of drug and alcohol issues in the workplace; and that the testing program is likely to significantly mitigate the risk

### Post-Incident Testing

- Automatic drug and alcohol testing post-incident without any line of inquiry or reasonable cause analysis has generally been held to be inappropriate and unenforceable
- While the threshold may be low, there must at least be some analysis of the incident and the potential for it to be related to drugs or alcohol before post-incident testing will typically be justified and valid

### Reasonable Cause Testing

- Where an employer has reasonable grounds to believe the employee is impaired by alcohol or drugs, drug and alcohol testing is typically upheld
- However, even reasonable cause testing, as with the other forms of testing, should be encapsulated in a comprehensive drug and alcohol policy

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## Practical considerations: medical cannabis

- Medical cannabis is no different than any other prescribed medication
- The duty to accommodate analysis applies to an employee's medical condition and extends to the treatment prescribed
- Employers will not be required to simply accept workplace impairment, where position is safety sensitive
- A properly drafted policy which applies to prescribed medication, and the use of both legal and illegal impairing substances will be critical

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## Practical Considerations: legalization

- Don't panic; in most respects, rules respecting recreational use for your workplace and student conduct will be similar to existing rules for alcohol
- While addiction is protected under human rights law, recreational use will not be protected
- Alberta's Cannabis Framework will prohibit use on school property, and intoxication and possession can be addressed by school policy

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**Policy Development**

- A discriminatory policy is grounds for a human rights complaint
- Any testing an employer undertakes should be addressed by a policy which identifies and addresses recreational drug and alcohol use, prescription drug use and misuse, and accommodation
- Risks of an improper policy and/or testing conducted improperly include human rights complaints, wrongful dismissal litigation and punitive damages

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**Policy Development**

- **Key components of your policy:**
  - Define “under the influence”, “impaired”, or “intoxicated”
  - Prohibit use of any intoxicant, including illegal drugs, improperly used prescription or non-prescription medication, legal drugs or alcohol while at work or during the work day, or any time when it could affect job performance
  - Ensure policy does not contain a blanket prohibition on cannabis

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**Policy Development**

- Recognize prescription drugs, including medical cannabis, as a potentially impairing substance, require disclosure of prescribed drug use which has workplace impact
- Identify the employer’s duty to accommodate, and employees’ ability to access accommodation and assistance
- Consider testing protocols founded in policy where reasonable suspicion of impairment exists
- Include disciplinary measures for violating policy, including failure to disclose

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**QUESTIONS?**

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