

FORWARD TOGETHER



MILLER THOMSON  
AVOCATS | LAWYERS

WELCOME

VANCOUVER CALGARY EDMONTON SASKATOON REGINA LONDON KITCHENER-WATERLOO GUELPH TORONTO VAUGHAN MARKHAM MONTRÉAL



**MILLER THOMSON**  
AVOCATS | LAWYERS

FORWARD TOGETHER

# Marijuana in the Workplace

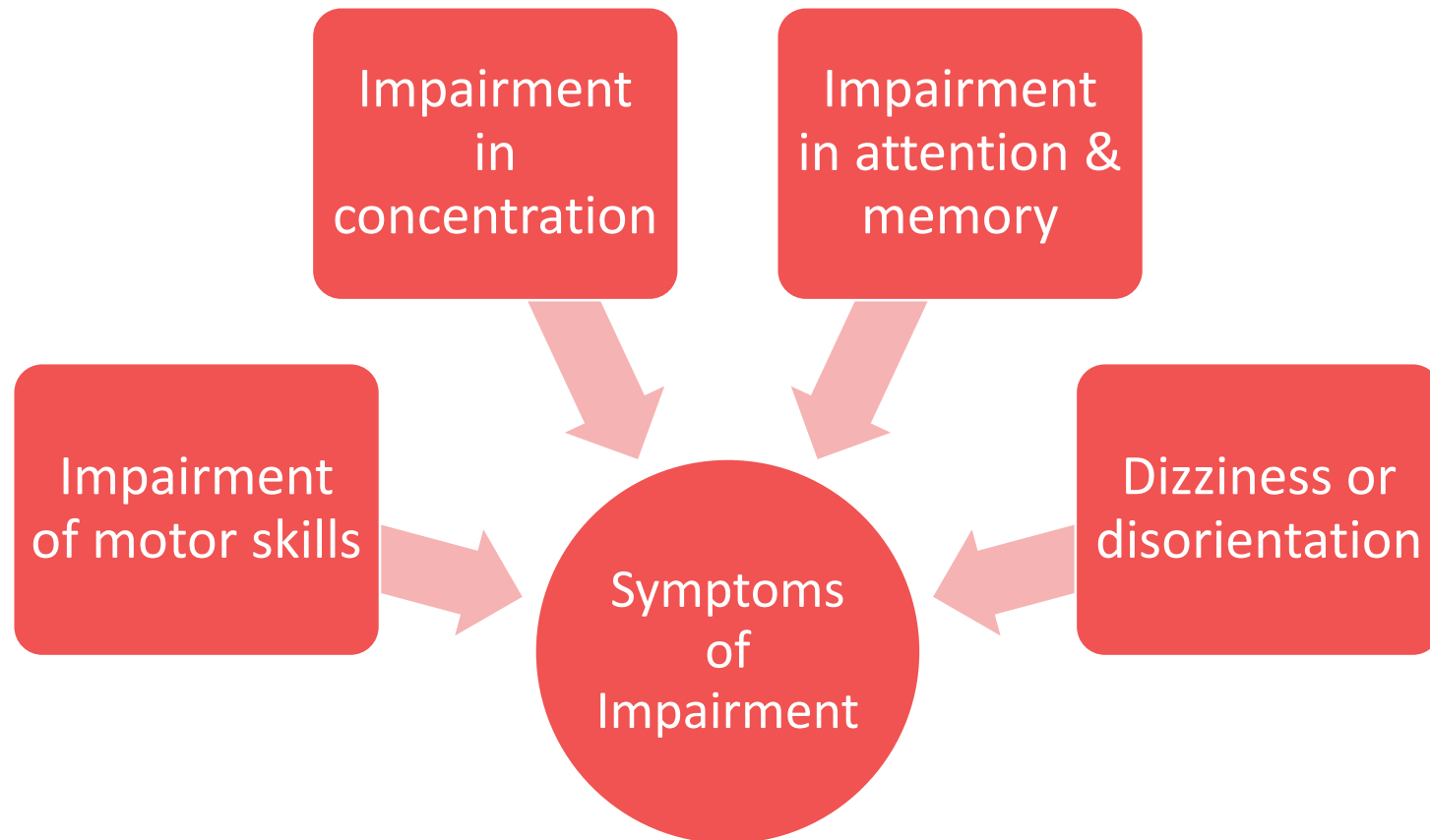


Amy Groothuis  
Regina  
306.347.8305

# Objectives:

- Understand the rights and responsibilities of employers and employees regarding marijuana use and impairment in the workplace;
- Understand the difference between recreational and medicinal use of marijuana and when the duty to accommodate applies;
- Understanding symptoms of impairment and the role drug testing may play in detecting impairment; and
- Recognize how an effective policy contributes to a safe and healthy work environment.

# Recreational Use



# Therapeutic Use

Cannabis is “prescribed” to treat a myriad of ailments:

- Chronic pain, muscle spasms
- Nausea (typically as a result of chemotherapy)
- Reduced appetite
- Improving sleep

# Cannabis Impairment

The level of impairment depends on many factors:

- Strain Potency
- Physiology
- Frequency of Use
- Method of Consumption

# Why Focus on Cannabis?

There are two primary reasons to focus on cannabis:

- Occupational Health & Safety
- Accommodation in the workplace

# Health and Safety

Employers have a duty to provide a safe work environment, to practice due diligence in this regard, and to identify and control workplace hazards.


*The Saskatchewan Employment Act*

s.3-8 Every employer shall: (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers;



# What is Due Diligence?

As a legal concept, due diligence is the level of judgment, care, prudence, determination and activity that a person would reasonably expect to do under particular circumstances.

“Reasonably practical”  taking precautions that are not only possible, but that are suitable or rational, given the particular situation.

# Due diligence starts with OH&S policies, practices and procedures.

Workplace safety audits

Identification of  
hazardous practices /  
conditions

Provision of appropriate  
information and training  
to employees to permit  
them to work safely

Implementation of  
appropriate changes to  
correct hazardous  
practices / conditions

# OH&S Policies and Procedures

To be effective, a program must:

- be in writing (other documents can be referenced in the main document);
- be workplace specific;
- have commitment from the employer and senior management;
- have input from the workers;
- assign clear responsibilities and accountabilities;
- have an evaluation mechanism; and
- be available and effectively communicated.

*Understanding Occupational Health and Safety in Saskatchewan, 2015*

# Penalties for Failure

- Workplace inspections by OH&S officers range from \$250 to \$1,000.
- Maximum fine for an individual who causes a serious injury or fatality is \$500,000.
- Maximum fine for a corporation who causes a serious injury or fatality is \$1,500,000.  
(SEA, s. 3-79)

# Employee Obligations

- Duty to perform their job safely, including the need to understand their job and the impact of using substances could have on safety
- To follow prescribed health and safety legislation and the employer's policies and programs

## *The Saskatchewan Employment Act*

3-10 Every worker while at work shall:

- (a) take reasonable care to protect his or her health and safety and the health and safety of other workers who may be affected by his or her acts or omissions;

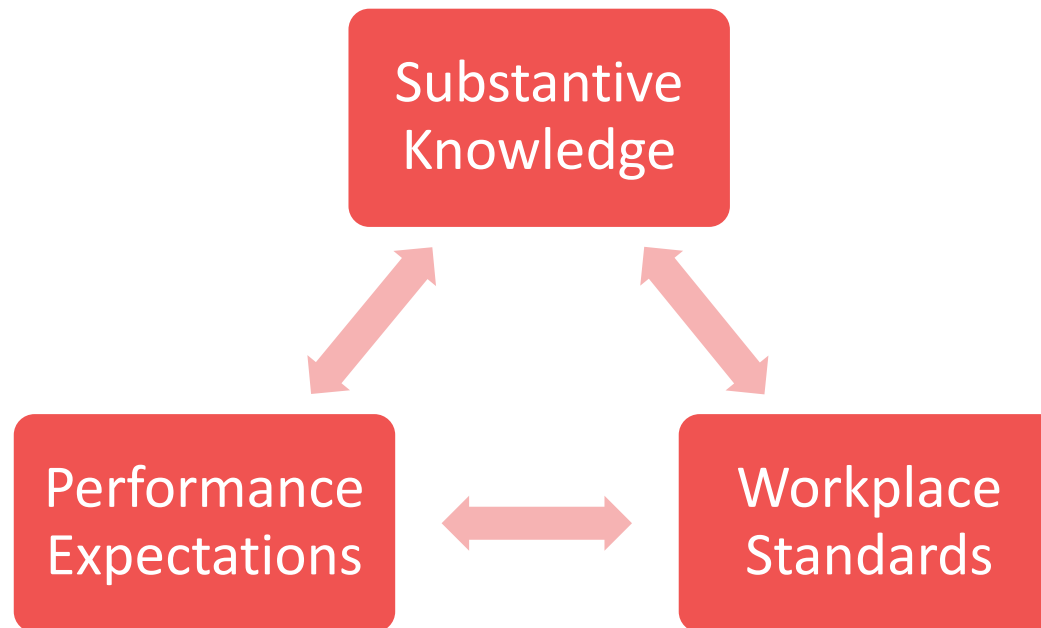
...

# So...What Hasn't Changed?

Employees are not permitted to be impaired at work or pose a safety risk to their co-workers or the public, regardless of whether they have a prescription and regardless of whether cannabis is legal.

# Employee Expectations

Employees must know what is expected of them:



# Human Rights

The *Saskatchewan Human Rights Code* says that employers have a duty to accommodate workers with disabilities:

- Accommodating use of medicinal marijuana.
- Accommodating the disability of substance dependency.



# Medical Marijuana

Why are workplace accommodation policies or procedures important?

What are the issues?

- How are different positions impacted by the use of prescribed marijuana? (short term or long term)
- What type of information is required from the employee?
- What should an employer tell other employees?

# Cannabis Dependency

Does your workplace have a policy addressing substance abuse?

- What are an employer's obligations when an employee discloses that they have developed a dependency on cannabis?
- What steps should employers take if it is suspected an employee has developed a dependency on cannabis?
- How should an employee's absence be explained to other employees?

# Steps for Accommodation

Put in writing the roles, responsibilities and expectations of the position.

Identify accommodation components based on the employee's medical information.

Designate a "go to" person that the employee can refer to with questions or concerns about the accommodation plan.

Determine what changes in the employee's behavior or performance will be deemed significant and when there would be a need for updated medical information.

# Steps for Accommodation

- Agreement should be signed by all parties.
- While the employer has a duty to accommodate, it may not be possible to adapt all jobs.

# Reaching Undue Hardship

Courts will consider:

- Cost to accommodate;
- Resulting change to the workplace; and
- Any risk to health and safety.

# Worker Privacy

How much information is an employer entitled to receive from an employee?

## **PROGNOSIS NOT DIAGNOSIS**

Do workers have a duty to disclose when they have been “prescribed” a substance that could cause impairment?

**YES!**

# Testing for Impairment

- What testing can and cannot tell us
- Types of Testing
  - Urine, blood, saliva
- Recent use or current impairment?

# Drug Tests in the Workplace

Arbitrators have consistently held that even in dangerous workplaces, an employer can generally only implement testing where:

- there is reasonable cause to believe that the employee was impaired while on duty;
- the employee was involved in a workplace accident or incident or “near miss”; or
- the employee was returning to work after treatment for substance abuse.



# Recognizing Impairment

The Canadian Human Rights Commission (CHRC) uses the following characteristics as they relate to changes in attendance, performance or behavior:

- Personality changes or erratic behavior;
- Appearance of impairment at work (odour of drugs/alcohol, glassy or red eyes, unsteady gait, slurring, poor coordination)
- Working in an unsafe manner or involvement in an incident;
- Failing a drug/alcohol test; or
- Consistent lateness, absenteeism or reduced productivity at work.

# Recognizing Impairment

- Employers should develop a clear statement of what is considered impairment in the workplace.
- Train supervisors / employees to recognize signs of impairment. If possible, a second trained person should be present to facilitate an unbiased assessment of impairment.
- The employer's role is NOT to diagnose a possible substance abuse problem but to identify affected employees and take steps per company policy.

***The Town of Kindersley v. Canadian Union of Public Employees, Local 2740, 2018 CanLII 35597 (SK LA)***

- The Grievor was authorized to use cannabis during the work day with conditions.
- During a work trip to Humboldt, the Grievor was observed using cannabis while driving the Town vehicle, and was terminated.
- Board of Arbitration:
  - Decision to terminate was justified
  - It did not endorse the medical restriction on the operation of equipment 20-30 minutes after consumption of cannabis as an acceptable waiting period.

***International Brotherhood Lower Churchill  
Transmission Construction Employers' Association  
Inc. and IBEW Local 1620 (Tizzard), 2018 CarswellNFLD  
198***

- The Grievor was hired on the condition that he pass a drug test – he did not disclose his authorization to consume medicinal marijuana.
- Arbitrator: unmeasurable safety hazard amounted to undue hardship.
- Decision was upheld on judicial review.

## Key Takeaways:

- Employers should ensure policies are up to date and review annually.
- Communicate the policies with employees.
- Discuss with employees the dangers of drug use in the workplace.
- Employers and employees have a shared obligation to prevent impairment in the workplace.

FORWARD TOGETHER



MILLER THOMSON  
AVOCATS | LAWYERS

MILLERTHOMSON.COM



© 2018 Miller Thomson LLP. All Rights Reserved. All Intellectual Property Rights including copyright in this presentation are owned by Miller Thomson LLP. This presentation may be reproduced and distributed in its entirety provided no alterations are made to the form or content. Any other form of reproduction or distribution requires the prior written consent of Miller Thomson LLP which may be requested from the presenter(s).

This presentation is provided as an information service and is a summary of current legal issues. This information is not meant as legal opinion and viewers are cautioned not to act on information provided in this publication without seeking specific legal advice with respect to their unique circumstances.