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The Impact of a Sale of a Business on Employees

By: Larry W. Keown

SUCCESSORSHIP

- "successorship" = when one entity takes over the obligations of another
  - Includes the sale of a business
- The circumstances that trigger employment successorship rights vary depending on:
  - The type of transfer (asset vs share)
  - The regime (common law, ESA, OLRB)

Share sales

- Upon a share sale, the legal employer has not changed and the rights and obligations owed to employees has not changed;
- there is no termination of the employment contracts or the collective agreement(s);
- Thus, a share purchaser who does not wish to assume (certain) employees needs to compel the vendor to terminate the employees and pay all entitlements as part of the closing transaction;

Asset Sales

- Upon an asset sale, the legal employer does not continue --- the transfer may be voluntary or compelled by a creditor
- The impact in various regimes must be examined:

Common Law – the starting point

- Under the Nokes decision (1940) a contract of employment cannot be assigned from one employer to another
- Rooted in avoidance of hints of slavery
- As a result the sale of a business or contracting out amounts to **constructive dismissal** of employees thereby triggering their right to notice or pay in lieu
- If an employee elects to accept employment with the new employer, there is no recognition of past service – This harsh common law outcome has been tempered by recent case law:

1) Express recognition of past service by the purchaser;
Based on the concept of novation - a tri-party agreement to extinguish the old contract and substitute the new one. (*Major v. Philips*)

Often it makes good business sense for a purchaser to take on this obligation – experienced, trained staff

Note: in such a case, the vendor would normally have no further liability, but if the purchaser becomes insolvent/unable to perform, does the vendor remain potentially liable?

2) Implied Recognition of Service:

Where the business is acquired as a going concern, there is now often an implied recognition of past service based on conduct

(*Addison v. Loeb 1986* C.A.)

Recently: *Vinette v. Delta Printing 2017 ONSC 182 and*
Ariss v Noor Limited Architects 2018 ONSC 620

3) ESA

Sale, etc., of business

– **9.** (1) If an employer sells a business or a part of a business and the purchaser employs an employee of the seller, the employment of the employee shall be deemed not to have been terminated or severed for the purposes of this Act and his or her employment with the seller shall be deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment.

ESA Application:

- S.9(3) "sells" and "sale" include leases, transfers or dispositions of any other manner
- Note: "sale of a business" can include contracting out; does not require the sale to be a "going concern"
  - (*Abbott v Bombardier* , 2007 ONCA 233)
- The Act does not require the new employer to offer re-employment on the same terms
  - (*Krishnamoorthy v. Olympus 2017 ONCA 873*)

- An employee who accepts re-employment is not entitled to ESA termination pay at the time of the sale
  - *Revin v. Lamantia Garcia Products Ltd., 2008 CarswellOnt 2900*

- The ESA does not contain set-off provisions for termination pay, so if an amount is paid it may not be recoverable.

- The ESA does contains a set-off provision for severance pay previous paid [s.65(8)(3)]

- What is there is notice given to the employee of the pending sale:

  If the purchasing company chooses to rehire the employee, the notice that the business is being sold is irrelevant to calculating the statutory notice period of that employee when he or she is terminated in the future by the purchasing employer - *Small v Equitable Management, (1990) 74 D.L.R. (4th) 422*

  Note: such notice is relevant for common law notice calculations: if the employee does not accept re-employment and so, it is good practice to provide a period of notice that the business is being sold

The recent decision of *Krishnmoorthy v. Olympus Nov 2017 Ontario C.A:*

- Olympus was in the optical science business and in Canada, Carsen was its distributor;
- Mr. K began working for Carsen in 2000;
- In 2005 Olympus terminated the distribution agreement with Carsen and opened its own distribution company; Olympus purchased some but not all of the assets of Carsen
- Olympus offered employment to 122 of the 125 Carsen employees, one of whom was Mr. K
- A written employment agreement was provided and signed by Mr. K. The terms were substantially the same except: it contained a termination clause for the greater of: ESA notice and severance OR 4 weeks notice per year to a maximum of 10 months. Also it expressly indicated that Mr. K would be a new employee and it released Olympus for any claims arising from the termination by Carsen.
- A signing bonus was provided to some employees but not Mr. K
- In 2015, Mr. K was terminated and payments under the 2005 agreement were offered. Mr. K sued.
- The Trial Court held that the 2005 agreement was unenforceable for lack of consideration since no signing bonus was paid to Mr. K and merely offering him a job was not sufficient – awarded 19 months of pay in lieu of notice

- On Appeal – overturned – the 2005 agreement was enforceable
  - A promise to perform an existing contract may not be valid consideration but in this case, there are two different employers and a new contract was offered – this was sufficient consideration
  - The contract was binding on Mr. K
  - S. 9(1) ESA did not assist Mr. K – this section only deems continuity of employment for the purposes of the ESA entitlements and not for all purposes

ESA: VACATION PAY & ENTITLEMENTS

- Unpaid vacation pay and other entitlements acquired under employment with the selling company are to be considered like unpaid wages: i.e. a lien, charge and secured debt against all the real and personal property of the obligator (successor)
  - (*Helping Hands Agency Ltd v Director of Employment Standards*, (1995)131 D.L.R. (4th) 336 (BCCA))

ESA: VACATION PAY & ENTITLEMENTS CONT'D

- If employee is rehired: Since the lien is not enforceable until the vacation is taken or termination occurs, vacation pay accumulated under the selling company is usually paid by the purchasing company (successor)
- If employee is not rehired: the employee is deemed terminated by the selling company and it must pay vacation pay & entitlements

OLRA

- Sale of a unionized business is governed by OLRA, s.69
- S.69(2): the person to whom the business is sold is, until the Board otherwise declares, bound by the collective agreement

OLRA

s.69 (1):

- "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings;
- "business" includes a part or parts thereof

Thank you.

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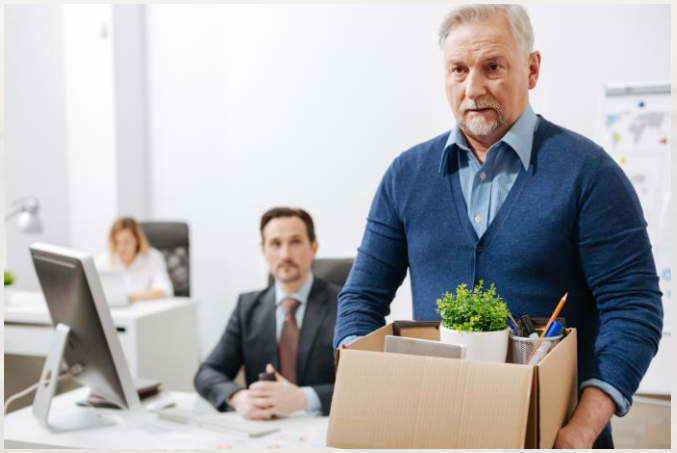
No More Age Discrimination in Employee Benefit Plans: *Talos v. Grand Erie District School Board* (2018)

By: Marty Rabinovitch

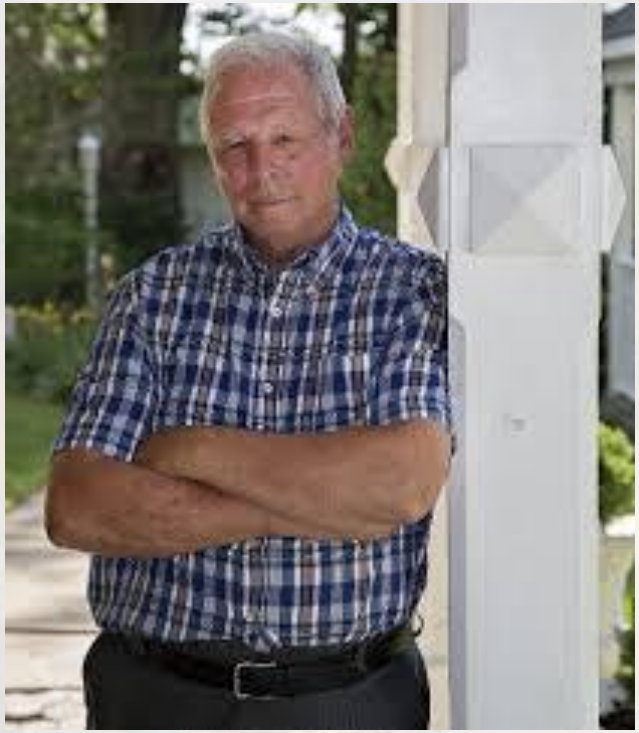
MANDATORY RETIREMENT

- In 2006, Ontario ended mandatory retirement with Bill 211, the *Ending Mandatory Retirement Statute Law Amendment Act*, 2005
- Part of Bill 211 was **section 25(2.1) permitting employers to differentiate** between workers under the age of 65 and **those over the age of 65 with respect to workplace group benefits coverage**

PRIOR PRACTICE…



- Section 25(2.1) was seen as a compromise to protect the viability of workplace benefits coverage as benefits use increases with age
- The cessation of benefits typically mirrored the availability of private pension and retirement benefits as well as government benefits at age 65
- It became common to have benefit plans that simply ceased when an employee turned 65



WAYNE (STEVEN) TALOS

- Teacher
- Age 65 → his health, dental and life insurance benefits ceased despite him continuing to work full-time
- His union signed an agreement not to grieve the benefits termination in exchange for a lump sum amount
- His extended family was in dire financial straits
- His wife was terminally ill

DIANE TALOS

- Wife of Wayne Talos
- Under 65 → did not have access to private or government benefits
- **Stage 4 Cancer**
- Relied on Trillium Drug Benefits but many drugs were not covered due to her Stage 4 Cancer diagnosis
- Could not afford many medications once Mr. Talos' benefits ceased; ceased the use of some drugs

- Under the employer's plan, the worker had a 30 day window to convert their group policy into an individual plan

As a result of the loss of benefits, the Talos incurred a loss for:

- Peace of mind;
- Deductibles in the amount of $3,000;
- Were subject to a needs-tested process to obtain insurance;
- Could not afford comprehensive replacement insurance; and
- Were reliant on the Trillium Drug Benefit fund

HUMAN RIGHTS CODE CLAIM (2013 INTERIM DECISION)

- Talos alleged that his employer discriminated against him on the basis of age contrary to the Ontario *Human Rights Code*

ONTARIO *HUMAN RIGHTS CODE:*

- ***The Code allows for benefit (and etc.) discrimination if it is in compliance with the ESA***

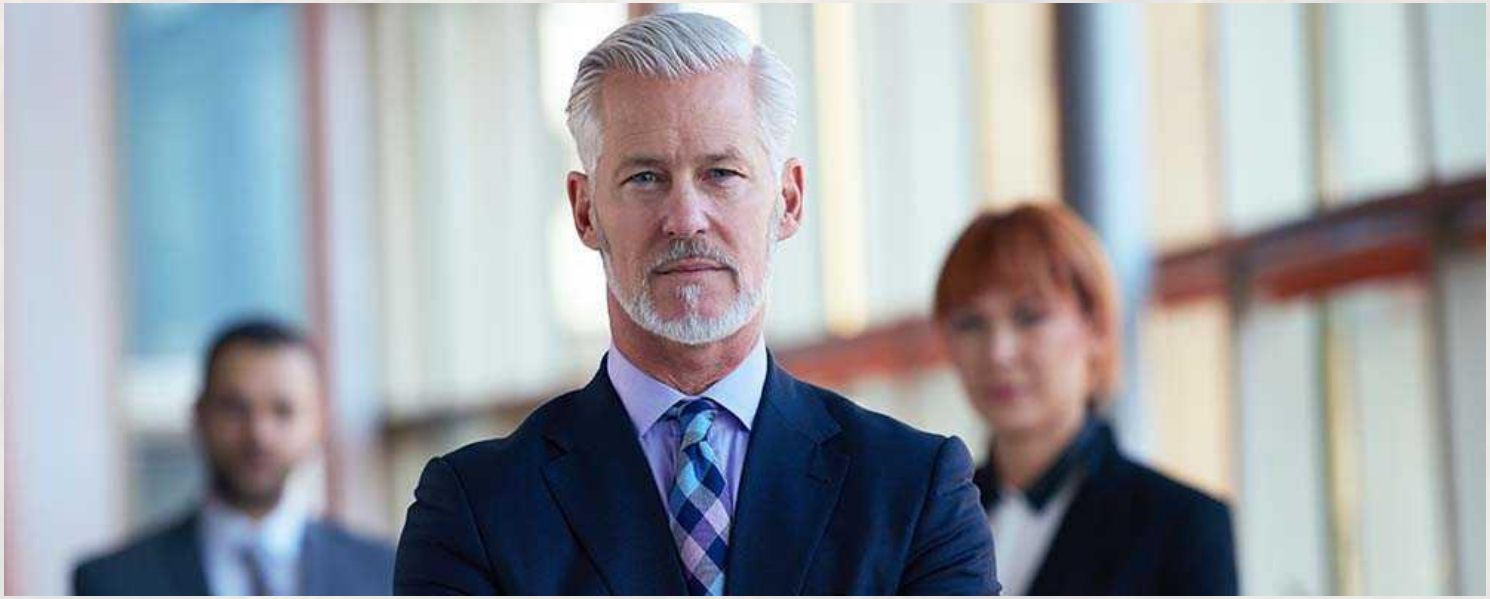
- **Employee benefit and pension plans**
- **25** (1) The right under section 5 to equal treatment with respect to employment is infringed where employment is denied or made conditional because a term or condition of employment requires enrolment in an employee benefit, pension or superannuation plan or fund or a contract of group insurance between an insurer and an employer, that makes a distinction, preference or exclusion on a prohibited ground of discrimination.
- (2.1) The right under section 5 to equal treatment with respect to employment without discrimination because of age is **not infringed by an employee benefit, pension, superannuation or group insurance plan or fund that complies with the *Employment Standards Act***, *2000* and the **regulations thereunder**.

ONTARIO *EMPLOYMENT STANDARD ACT*

- ***This Act prohibits against benefit plan discrimination on the basis of "age", but….***
- **Differentiation prohibited**
- **44** (1) Except as prescribed, no employer or person acting directly on behalf of an employer shall provide, offer or arrange for a benefit plan that treats any of the following persons differently because of the age, sex or marital status of employees:
- 1. Employees.
- 2. Beneficiaries.
- 3. Survivors.
- 4. Dependants

ESA REGULATION (*O Reg 286/01*):

- "age" means any age of 18 years or more **and less than 65 years**

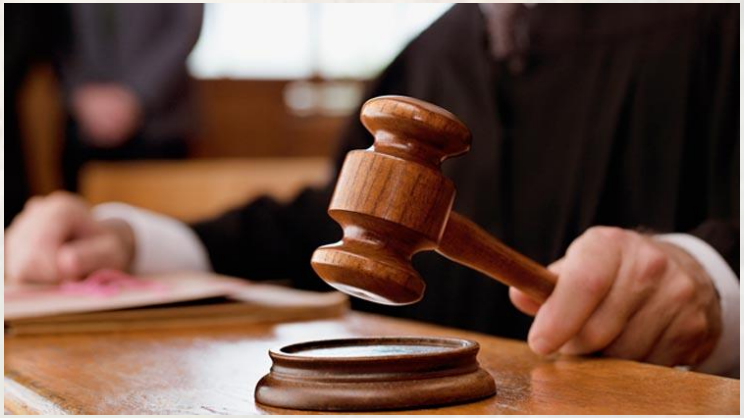


DISCRIMINATION UNDER THE *CODE*…

- Summary hearing test applied = reasonable prospect of success
  - Test: whether the applicants rights under the *Code* may have been breached
- Collective bargaining test did not apply:
  - Whether the union and employer have negotiated a benefit plan that differentiates between employees who are older than 65 years
  - Differentiation on the basis of age requires clear and unambiguous language of the intention
- A plain reading of the legislation indicated that the legislature permitted the differential treatment
- As such → no prospect of success

…CONSTITUTIONAL CHALLENGE

- The claim for discrimination under the *Code* was dismissed but the interim HRTO adjudicator determined that the constitutional challenge of the legislation itself may have a reasonable prospect of success



CANADIAN CHARTER OF RIGHTS AND FREEDOMS

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

- **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

CONSTITUTIONALITY: 2018 DECISION

- HRTO: Talos experienced disadvantage on the basis of age contrary to s.15(1) of the *Charter* due to the *Code*, s.25(2.1) and this infringement is NOT justified under s.1 of the Charter
  - i.e. having different (or no) benefits plans after a worker becomes 65 is discriminatory and "unconstitutional"

ANALYSIS:

- The *Code* (+ *ESA*) creates a distinction between workers who perform the same type of work
- Benefits are a part of a worker's remuneration package
- Allowing for different benefits past age 65 makes elderly workers vulnerable to not being rewarded equally for the work they perform
  - Provide the same labour they did at age 64
- Bill 211 did not end all the differential treatment of workers over the age of 65

➢ *Prima facie* age discrimination

- The actuarial evidence was that the average plan cost increase was:
  - Negligible for health care;
  - Nil for dental care; and
  - Had some impact on life insurance but the effects could be mitigated
- Retirement is based on individual financial considerations, not age
- Removing health supports could force someone into retirement

REJECTED ARGUMENTS:

- "Generous" nature of his pension had no bearing on whether the legislation was constitutional;
- Transition to government funded programs is not an equal substitution;
  - No government replacement for para-medical, dental, travel and life insurance
- The fact that Talos was in a high-paying, unionized job had no bearing on whether the legislation was constitutional;
- Prior arbitral decisions with respect to the constitutionality of s.25(2.1) have no bearing
  - Even if they did, mandatory retirement was eliminated in 2006 and societal views of workers and compensation packages have changed significantly

SECTION 1 ANALYSIS:

1. Legislative goal: preserving the financial viability of workplace benefits plans
   - The goal is pressing and substantial
   - There is a rational connection between the legislative distinction and the objective
2. The provision is not minimally impairing
   - The legislature did not consider a range of reasonable alternatives; and
   - There is no empirical evidence benefit plan costs would drastically raise at the time of enactment nor now
3. Proportionality
   - Requiring workers to collectively bargain for their plans after age 65 would not be viable;
   - Actuarial evidence is that it would not be prohibitive to provide a plan until the age of 79

PROPOSED ALTERNATIVES

- The HRTO suggested that the financial viability of benefits packages could be maintained if the legislation permitted employers to differentiate benefits packages upon showing a reasonable or *bona fide* reason for doing so (the test for undue hardship) or as justified on an actuarial basis
- The *Code* already mandates that differences in benefits on the basis of age (under 65), sex, and martial status must be made on an actuarial basis

QUESTIONS TO CONSIDER:

- Are we entering a new era of workplace benefit plans if this case is not overturned?
- The HRTO decision explicitly stated that it was not addressing long term disability insurance, pension plans and superannuation funds

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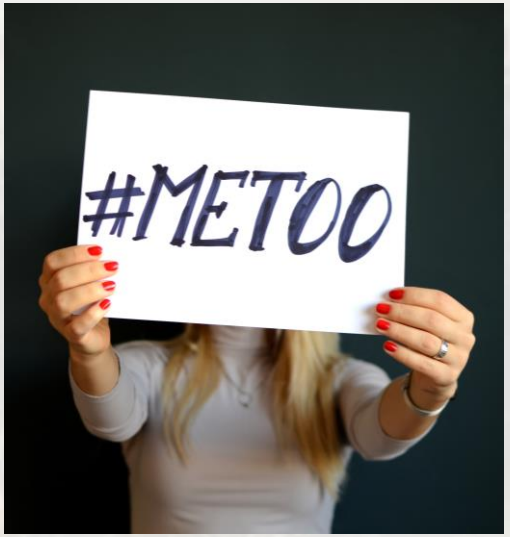
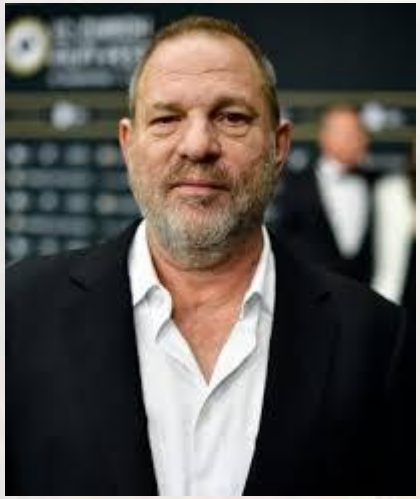
Increased General Damages Awards at the Human Rights Tribunal in the #MeToo Era

By: Sara Mosadeq

WHAT IS #MeToo

- #MeToo is a movement against sexual harassment and assault
- The hashtag #MeToo spread virally over social media in October 2017 to raise awareness about sexual harassment issues especially within the workplace
- Individuals of all genders have used the hashtag #MeToo





WHAT STARTED #MeToo

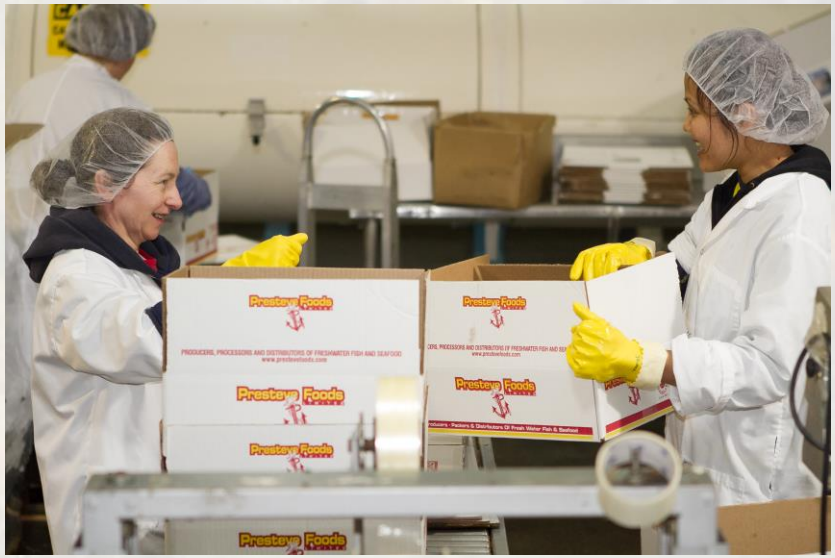
- #MeToo started as a response to a New York Times article in which dozens of women accused American film producer Harvey Weinstein of rape, sexual assault, and sexual abuse over a period of at least 30 years
- Many within the entertainment industry are alleged to have known and condoned Weinstein's conduct
- Currently more than 80 women have accused Weinstein of improper conduct
- Weinstein has been arrested, charged with rape and other offences, and has been released on bail

GENERAL DAMAGES BEFORE THE #MeToo ERA

- Prior to October 2017, the Human Rights Tribunal of Ontario ("HRTO") typically awarded general damages for compensation for injury to dignity, feelings, and self-respect in the range of $10,000-$20,000
- The highest case at the time was $50,000
  - *Smith v. Menzies Chrysler Incorporated*
    - Smith complained of sexually vexatious comments and a poisoned work environment
    - Co-worker and owner were complicit in making sexually lewd comments and co-worker exposed himself to Smith
    - Smith was not subject to sexual touching

OPT v. PRESTEVE FOODS LTD

- **Damages award: $150K** (3x higher than the previous highest general damages award by the HRTO)
- Occurred prior to the #MeToo era



OPT v. PRESTEVE FOODS LTD (cont'd)

- Presteve Foods Ltd. (and its owner Jose Pratas) hired two migrant workers to work in its fish processing plant
- After being sexually assaulted numerous times, the workers made a complaint on the grounds of unwanted sexual solicitations and advances, sexual assault and touching, a sexually poisoned work environment, discrimination on the basis of sex, and reprisal for claiming a *Human Rights Code* violation

OPT v. PRESTEVE FOODS LTD (cont'd)

- The owner would force one migrant worker, who was the sole provider for two children as her husband had been tragically killed, to perform fellatio and to have unwanted intercourse numerous times
  - Touched her inappropriately at work
- The owner forced her to do things by threatening to deport her back to Mexico
  - When she returned to Mexico, he would call her saying he would come to see her and her children
- In order to avoid deportation, she thought she had no choice but to comply as temporary foreign workers can be deported for any reason without notice

GENERAL DAMAGES BEFORE THE #METOO ERA

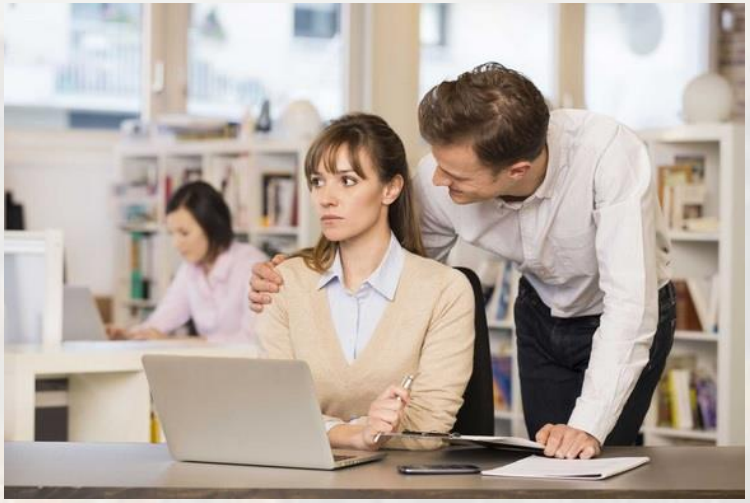
- Despite the British Columbia Human Rights Tribunal awarding $75K in general damages in 2013, and an Albertan Arbitration $125K in 2013 (with an additional $512K for lost income)(which involved coworkers subjecting a worker to rat poison and harassment after her supervisor was criminally convicted for sexual assault against her) many legal practitioners dismissed *Presteve Foods* as an outlier
- Throughout 2016 to late 2017, HRTO general damages awards remained relatively stagnant, slowly creeping up to the $20K average

HRTO GENERAL DAMAGES IN THE POST #MeToo ERA

- 2018 started with two precedent-setting HRTO general damage award cases:
  - *AB v. Joe Singer Shoes Ltd* ($200K)
  - *GM v. X Tattoo Parlour* ($75K)

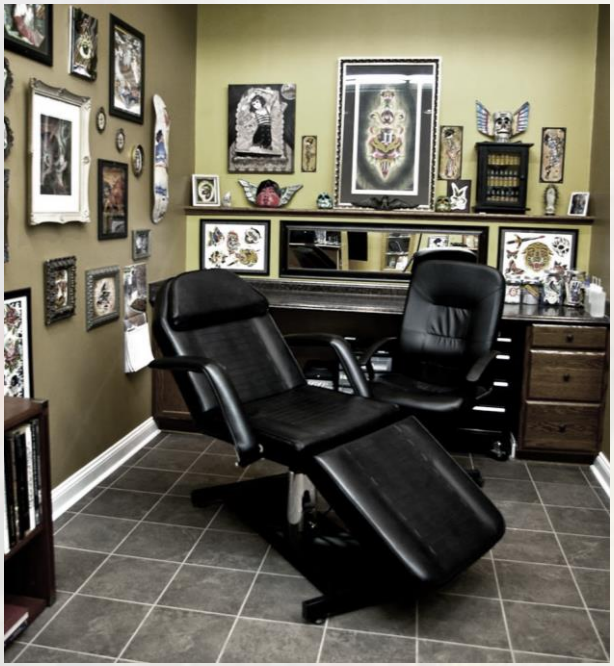
AB v. JOE SINGER SHOES LTD

- Highest general damage award ever awarded by the HRTO: $200K
  - Awarded against the company and personally against the owner
- Ordered by Vice-Chair Dawn Kershaw (who is no longer an adjudicator with the HRTO)
- January 2018



AB v. JOE SINGER SHOES LTD

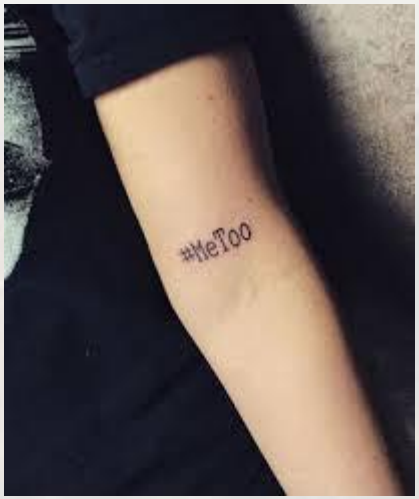
- Involved a single immigrant mother who not only worked for Joe Singer Shoes but lived in an apartment above the store
  - She took care of a son with a disability
- Paul Singer sexually harassed and assaulted her over many years, made fun of her language skills and body and made inappropriate comments about her place of origin
- She was sexually harassed and solicited not only at work but in her apartment
- Paul Singer frequently threatened her that he had money so he would get the best lawyers if she reported him



GM v. XTATTOO PARLOUR

- General damages award: $75K
  - Made against the company and harasser personally
  - HRTO applicant only sought $75K in damages
- Boss plead guilty to three criminal charges, including one for sexual assault
  - Admitted that he engaged in a sexual conversation and behavior with her but denied having harassed, forced or assaulted her
  - Only issue was remedy
- February 2018

GM v. XTATTOO PARLOUR



- Worker was a 15 year old unpaid intern who wanted to become a tattoo artist
  - Boss was in a position of power
- The inappropriate behaviour started with sexual conversations and after two weeks escalated to inappropriate touching and sexual solicitation in exchange for money and a tattoo
  - Would ask about her gender preferences, favourite sexual positions and what sexual activities she enjoyed
  - Touched her sexually and exposed himself to her
- Boss was a trusted family friend → his wife was the best friend of the 15 year old's mother
- She was a minor and this was her first job in her chosen career path → she was extremely vulnerable
  - She started self-cutting, did poorly at school and engaged in risky behaviours
  - Trust issues and difficulty sleeping
- Before the incidents she had a love of drawing and now she had no interest in the field

QUESTIONS TO CONSIDER

- Do these cases mean that sexual harassment will be treated more seriously in the #MeToo era?
  - Likely yes
- Does this mean general damages will rise across all categories?
  - It may be too early to tell
  - There has not been a corresponding trend of damages with respect to disability
- How will this change how employers treat sexual harassment and employee conduct?

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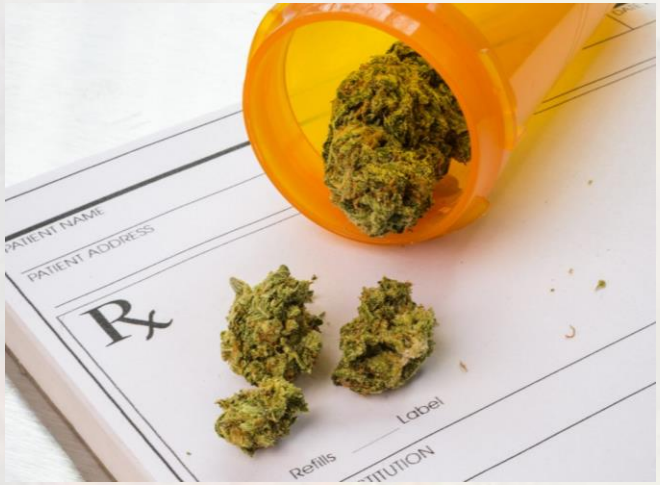
Legalization of Marijuana - Latest Developments and Impact on the Workplace

By: Michelle Cook

DO YOU HAVE A DRUG & ALCOHOL POLICY?

- **Marijuana will be legalized on October 17, 2018**
- It is important to consult an experienced employment lawyer about your drug and alcohol policy ("Policy")
- Employers that do not have a Policy are susceptible to:
  - Employees showing up to work impaired as they did not understand their employer's position on legal drug use
  - Employees arguing that there is no ground for drug-based discipline
  - Employees challenging employer conduct as discriminatory under human rights legislation
  - Supervisors not knowing what to do in the event they come across consumption or impairment in the workplace



CURRENT STATUS OF MARIJUANA

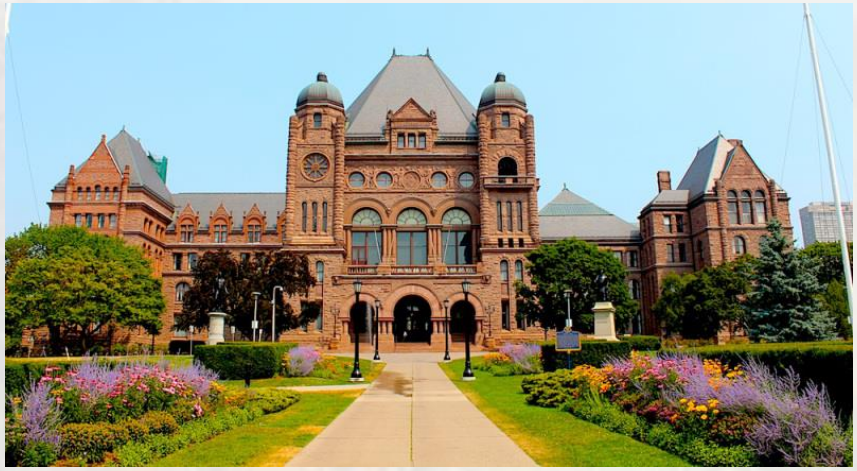
- Until legislation comes into force, marijuana remains illegal unless an individual has a valid medical prescription (medical need + authorization from a qualified health care practioner)

FEDERAL LEGISLATION

- **BILL C-45 (the Cannabis Act)**
  - Individuals over 18 (or higher as set by province) can legally possess up to 30 grams of dried marijuana or its equivalent
  - (Ontario = 19 years or older)
  - Adults can legally share up to 30g of dried cannabis (or equivalent)
  - Edibles will be legalized (at a later date)
  - Adults can grow up to four flowering plants per residence
- **BILL C-46 (Impaired Driving)**
  - Permits oral fluid screening on the roadside
  - If the oral fluid test comes back positive and the officer has reasonable grounds to suspect that the driver has drugs in their system and operated a motor vehicle within 3 hours → blood test at the station
- "safety sensitive", "drug test" and "drug dependency" are not defined in any legislation

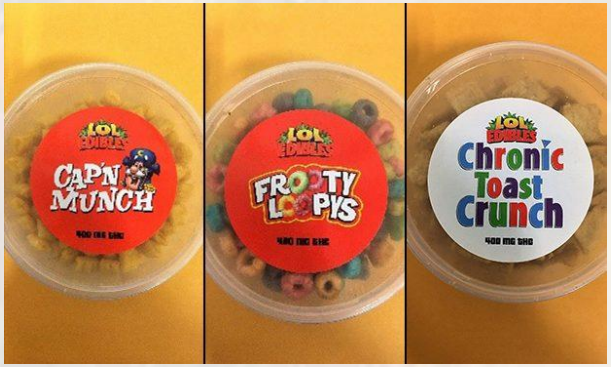
PROVINCIAL LEGISLATION

- Illegal to consume recreational marijuana in:
  - Any public place
  - Workplaces
  - Motor vehicles
- Illegal to operate a motor vehicle while impaired
  - 2 nanograms of THC/mL of blood
- Adults can purchase marijuana:
  - Online (30g of dried cannabis or equivalent per purchase as well as marijuana seeds for home growth)
  - Private retail model would launch by April 1, 2019



PROVINCIAL LEGISLATION

- Policy re marijuana in the workplace:
  - The province is enacting legislation preventing marijuana consumption in the workplace
  - The province has made clear statements that employers have occupational health and safety obligations but also need to accommodate medical cannabis
  - As of now, there is no specific legislation with respect to marijuana testing



WAYS IN WHICH MARIJUANA CAN BE CONSUMED

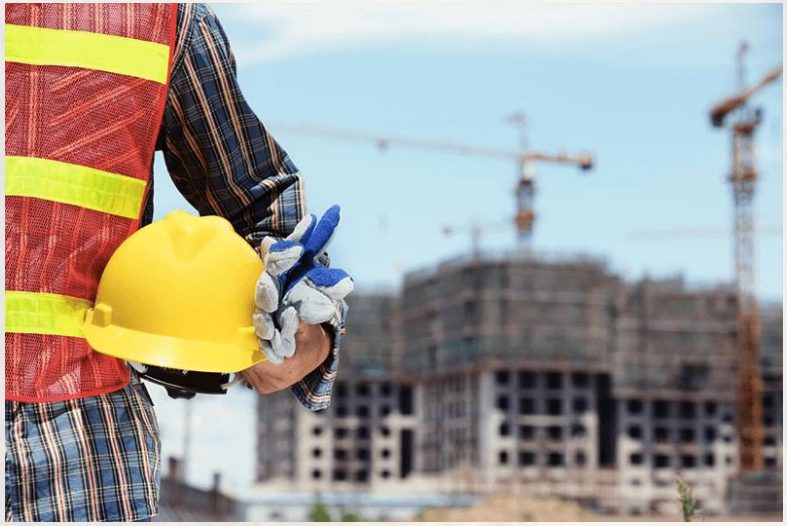
- Ingesting (eating)
- Edibles (brownies, cupcakes, cotton candy, gummies, etc.)
- Vaping
- Dabbing
- THC oil and oil-infused products

IMPAIRMENT

- The psychoactive effect of marijuana comes from the cannabinoid THC
  - THC is metabolized in fat → can stay in urine for up to 5-60 days*
- Effect of marijuana varies depending on the individual → impairment can last up to 24 hours even if other effects have faded
  - **Relaxant**
    - **Slower reaction times**
    - **Forgetfulness**
    - **Decreased concentration**
    - **Mild distortion of perception and cognition**
  - But some people feel tense and anxious
  - Can produce hallucinations (not common)
- Long term effects may include impacts in brain development, cognitive functioning, memory loss, and differential abstract thinking → requires 28 days to return to normal
- When combined with tobacco or alcohol, the psychoactive effect amplifies
- Cannabis smoke is carcinogenic

HOW TO MEASURE IMPAIRMENT

- Have a supervisor administer an approved field test to measure reaction times
- Oral fluid swabbing (at 10 nanograms of THC/mL of oral fluid)*
  - (safest option but takes approximately 3 days to get results)
- Blood
- Urine testing**
  - **easily cheated
- Breathalyzer (?)



OCCUPATIONAL HEALTH & SAFETY

- Employers are liable for reducing occupational health and safety risks in the workplace as well as for any workplace accidents
- Employers and supervisors can be personally criminally charged for occupational health and safety incidents

MARIJUANA DEPENDENCY AS A "DISABILITY"

- Approximately 9% of individuals develop a dependence (addiction) on marijuana
- Ontario *Human Rights Code* prohibits discrimination on the basis of a disability
  - Ontario also has a procedural duty to accommodate (i.e. a failure to assess an employee's disability-related needs can constitute a finding of actionable discrimination even if substantive discrimination is not made out)
- **Casual marijuana users are likely protected under the provisions for a "perceived disability" (i.e. drug abuse or drug dependency)**
- *Prima facie discrimination* must be defended as a *bona fide* occupational requirement (BFOR)
  - Marijuana use just needs to be one factor of the decision, not necessarily the main or significant factor

SAFETY SENSITIVE VERSUS NON-SAFETY SENSITIVE ENVIRONMENTS

- It is unlikely that drug testing, in any circumstances, will be justified in non-safety sensitive environments
  - Suspected impairment must be treated like any other performance failure → a warning with progressive discipline or a termination with reasonable notice

SAFETY SENSITIVE: FOR CAUSE

- Testing a specific individual because the employer has reasonable suspicion that worker is impaired or post-incident
- Testing after a work accident, incident or near miss may be permissible <u>if part of a larger assessment</u>
  - May be able to terminate if a worker refuses a reasonable cause drug test demand

SAFETY SENSITIVE: RANDOM DRUG TESTING

- i.e. testing done on random individuals without cause
- Courts are struggling with whether the tests demonstrate impairment
- Random testing MAY be legal in safety-sensitive environments if there are appropriate safeguards on confidentiality and accommodation of the employee post positive tests*

SAFETY SENSITIVE: PRE-EMPLOYMENT

- Drug testing before an offer of employment are discriminatory and will not be upheld
- Drug testing for certification may be permissible if the employer "can establish that testing is necessary as one facet of a larger process of assessment"

SAFETY SENSITIVE: DISCLOSURE OF DRUG DEPENDENCIES

- There is growing support for drug policies that require their workers to disclose current drug use or else be at risk of discipline (including that they "may" be terminated)
  - The policy MUST set out that all voluntary disclosures will be accomodated
- However, truly drug dependent individuals may try to argue that they did not have the ability to recognize their addiction or the capacity to disclose

SAFETY SENSITIVE: LAST CHANCE AGREEMENTS

- Contracts signed by the employee upon a return to work from substance abuse treatment (typically requires a number of conditions to be met, including testing at random intervals)
- Permissible but must be tailored to the individual's circumstances and include further accomodation

UNIONIZED WORKPLACES

- In order to be legal, marijuana testing and procedure must be clearly addressed in the collective agreement, otherwise it is illegal

CASES TO WATCH OUT FOR: ATU v TTC

- ATU (the union for TTC workers) is involved in an unionized grievance over the TTC's drug testing policy (which includes random drug testing)
- ATU brought an application for an injunction to prevent the TTC from administering their drug test
  - Justice Marrocoo refused to grant the injunction allowing TTC to drug test until the arbitration is settled

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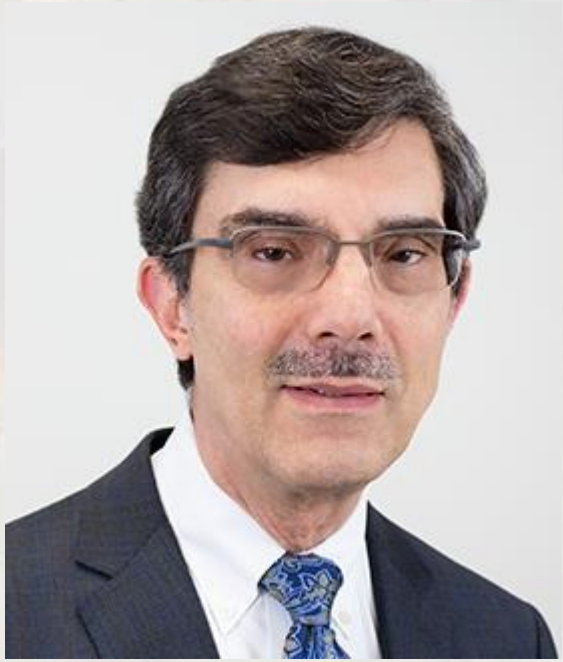
Recent Trends in Immigration Processing, including the Impact of Canada's Legalization of Marijuana



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SCOPE OF PRESENTATION

This presentation will provide an overview of:

1) The Expansion of Biometrics Collection

2) The Global Skills Strategy Initiative

3) The Impact of Canada's Legalization of Marijuana: Crossing the Border into the U.S.

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The Expansion of Biometrics Collection

July 2018

Biometrics

The Government of Canada is committed to the safety and security of all Canadians and to the integrity of our immigration system.

- **Biometrics:**
  - are the measurement of unique physical characteristics
  - for Canadian immigration programs, biometrics include fingerprints and a photograph of the face
  - have been collected from asylum claimants since 1993; visa-required temporary residents from 30 nationalities since December 2013; and overseas refugee resettlement claimants since November 2014

- **3 broad components:**
  - **Collection** of biometric information from all foreign nationals (excluding U.S. nationals) applying for a temporary resident visa, work permit, study permit, or temporary resident permit; and all permanent residence applicants.
  - **Verification:** Systematic fingerprint verification at major airports, and expanded fingerprint verification at additional ports of entry (airports and land borders), for travellers who have provided their biometrics.
  - **Information-sharing:** Increased biometric-based information-sharing between Canada and the U.S. and automated biometric-based information-sharing among the other Migration 5 partners: Australia, the United Kingdom and New Zealand.

Expansion of Biometrics

- expanded recently on July 30, 2018 to include all nationals from countries in Europe, Africa and the Middle East if they are applying for a Canadian visitor visa, a work or study permit, or permanent residence
- starting December 31, 2018 will include all nationals from Asia, Asia Pacific, and the Americas if they are applying for a Canadian visitor visa, a work or study permit, or permanent residence
- **how much it costs:**
  - individual applicants: CAD$85
  - Families applying together at the same time: maximum total fee of CAD$170
  - Groups of 3 or more performing artists and their staff who apply for work permits at the same time: maximum total fee of CAD$255

- **how often biometrics are needed:**
  - applicants for temporary residence – once every 10 years
  - applicants for permanent residence (including U.S. citizens and nationals) – a must regardless of whether you gave your biometrics in the past to support a temporary resident application or a different permanent resident application
- **where to give biometrics:**
  - Visa Application Centre (VAC) worldwide
  - Application Support Centers (ASCs) in the United States
  - Temporary locations at certain offices in Europe (Germany, Ireland, Norway, Sweden, France, and Austria)
  - at a Canadian port of entry (POE) – 58 POE locations across Canada (only for applicants who are eligible to apply for a study or work permit at a Canadian POE)

- **Exemptions:**
  - Canadian citizens, citizenship applicants (including passport applicants), or existing permanent residents
  - visa-exempt nationals coming to Canada as tourists who hold a valid electronic travel authorization (eTA)
  - children under the age of 14
  - applicants over the age of 79 (there is no upper age exemption for asylum claimants)
  - heads of state and heads of government

- **Exemptions (cont'd):**
  - cabinet ministers and accredited diplomats of other countries and the United Nations, coming to Canada on official business
  - U.S. visa holders transiting through Canada
  - refugee claimants or protected persons who have already provided biometrics and are applying for a study or work permit
  - temporary resident applicants who have already provided biometrics in support of a permanent resident application that is still in progress
  - applicants for a visa, study or work permit, or permanent residence in Canada (temporary exempt until the in-Canada service is established)

The Global Skills Strategy Initiative

Global Skills Strategy – The Rationale

- Canadian government recognizes that **innovative Canadian companies** need access to highly **skilled international talent in order to grow**
- Stakeholders collaborate and government launches Global Skills Strategy **to facilitate quicker entry** into Canada of **highly skilled global talent**
- The initiative targets:
  - **high-growth Canadian companies** that need to access global talent to facilitate and accelerate job creation and growth
  - **global companies** making **large investments**, **relocating** to Canada, establishing **new production** or expanding production, and creating new **Canadian jobs**

Key Terms

Employment & Social Development Canada (ESDC)

- Regulate & govern social & labour programs
- Conduct **Labour Market Impact Assessments (LMIAs)** i.e. how foreign worker impacts Cdn.s' in workforce as precursor to IRCC issuing work permit
- Assess **Global Talent Stream LMIA** applications for expedited temporary entry into Canadian Workforce
- Collaborate on **National Occupational Classification (NOC)**, providing standard taxonomy of labour market info. 30K + occupations grouped into 500 units by skill type and level

Skill Types
e.g. **0 = management and executive**
2 = natural and applied sciences
Skill Levels
e.g. **A = professional jobs usually requiring a university degree**
B = technical skilled trades usually requiring a diploma

Work together to implement programs for temporary foreign workers

Immigration, Refugees and Citizenship Canada (IRCC)

- Regulate and govern immigration to & citizenship in Canada
- Assess applications for work permits & temporary resident visas
- Assess applications for permanent resident visas
- Administer **International Mobility Program (IMP)** for LMIA-exempt work permits

Four Initiatives under the GSS

Goals	Initiatives	Departments
✓ Significantly reduce wait times between identifying global talent and getting them into workplace	1. Ten business day processing of applications 80% of the time	IRCC
✓ Significantly increase employer access to immigration information from government during process	2. Dedicated Service Channel	
✓ **Access top global talent without delays and administrative barriers common to traditional avenues**	3. Work Permit Exemptions	
	4. Global Talent Stream	ESDC

Four Initiatives under the GSS (cont'd)

Administered by ESDC

Global Talent Stream (GTS)

Category A	Category B
Employers seeking **unique** and **specialized** talent to scale up and grow	Highly skilled **occupations in shortage** and **identified on occupations list**

- Flexible recruitment requirements
- Application replaces traditional LMIA
- Stringent post-hire compliance requirements (Labour Mkt. Ben. Plan)
- Work permit issued max 2 years

Administered by IRCC

10 business day service standard for work permit

Applicable to:

- Those with a positive assessment under the GTS
- Highly skilled LMIA exempt applicants with occupations classified as NOC skill type 0 or level A

Dedicated Service Channel

Applicable to companies referred to IRCC under the GSS:

- Dedicated staff to address individual employer queries throughout the application process

Work Permit Exemptions

1. Very short term assignments (15 days once every 6 months, or 30 days every 12 months) for individuals with NOC 0 or A

OR

2. Researchers in short duration research projects (up to 120 days , publicly funded university)

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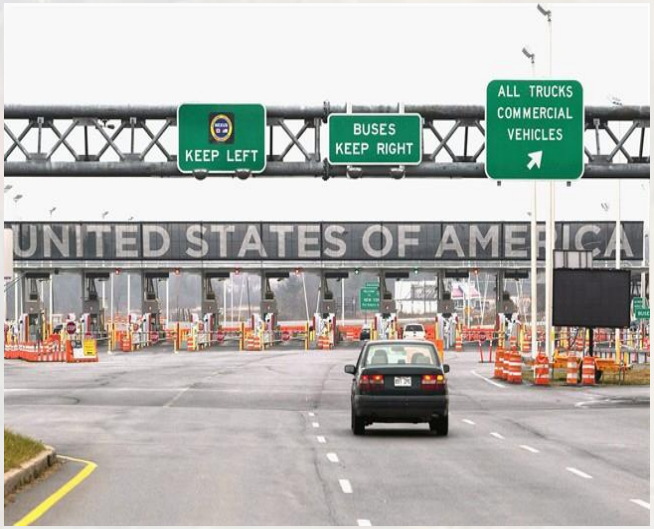
The Impact of Canada's Legalization of Marijuana: Crossing the Border into the U.S.

Will Your Proposed Visit to the U.S. Go Up in Smoke?



- The U.S. *Immigration and Nationality Act* prescribes classes of inadmissibility
- Those relevant to the marijuana industry are:
  - criminal activity
  - health-related
  - illicit trafficking
- A finding of inadmissibility, in many instances, results in a permanent bar
- Can only be overcome by approval of an application for a “waiver of inadmissibility”

Criminal Grounds of Inadmissibility

- Anyone convicted of, or who admits to having committed a crime
  - or an attempt or conspiracy to commit such a crime
  - or a violation of any law of a U.S. State, the United States (i.e., a federal law) or a foreign country relating to a controlled substance
- Currently in the U.S.
  - medical marijuana is legal in 29 states
  - recreational marijuana is legal in 9 states
  - however, under U.S. federal law marijuana is listed as a controlled substance under the *Controlled Substances Act,* and its use/possession is a crime

Health-Related Grounds of Inadmissibility

- Anyone is inadmissible who is determined
  - to have a communicable disease of public health significance
  - to have a physical or mental disorder and behaviour associated with the disorder, that may pose a threat to the property, safety, or welfare of the person or others
  - to have had a physical or mental disorder as described above, and which is likely to recur
  - who is determined to be a drug abuser or addict (harmful behavior is not required)

Illicit Trafficking

- The risk of being found inadmissible is not restricted to the “use” of marijuana
- Any person is inadmissible who the officer “knows or has reason to believe”
  - is or has been an illicit trafficker in any controlled substance
  - or is or has been a knowing abider, abettor, assister, conspirator or colluder with others in the illicit trafficking in any such controlled substance

Illicit Trafficking (cont'd)

- The reach of this section extends to immediate family members
  - the spouse, son or daughter, who has within the previous five years obtained any financial or other benefit from the illicit activity, and knew or reasonably should have known that the benefit was the product of such illicit activity

Some Examples

1) Use/Possession of Marijuana in Canada after the *Cannabis Act* becomes law
   - since marijuana use/possession will not be prosecuted as a criminal offence in Canada, it should not give rise to criminal inadmissibility
   - however, even legal use/possession could still result in a bar on health-related grounds
   - similar to alcoholism, if harmful behavior also exist, a bar on health-related grounds may result

Some Examples (cont'd)

- if one is determined to be a drug abuser or drug addict, a finding of inadmissibility may result regardless of the existence of harmful behavior
- for the above grounds to apply an officer will refer the individual to a Panel Physician who will make a determination concerning a mental disorder or drug abuse/addiction

2) Employment in the marijuana industry in Canada after legalization

- one may be denied admission based on a "reasonable belief" the person is an illicit trafficker, or a knowing abider, abettor, assister, conspirator or colluder

Some Examples (cont'd)

- it is arguable that if the activities take place solely in Canada, they do not fall under this ground of inadmissibility
- one is more likely to be found inadmissible if the person is travelling to the U.S. on business, as a representative of the Canadian employer
- this would be true even if seeking entry to enter the U.S. to do business with a company located in a state that has legalized marijuana

Real Life Cases

- In early 2018, Sam Znaimer, a businessman from Vancouver, was banned for life from the U.S. as a result of his investments in U.S. marijuana companies (https://business.financialpost.com/cannabis/vancouver-man-banned-from-u-s-for-pot-investments-seeks-waiver-to-cross-border)
- Also in early 2018, three individuals from Vancouver who were looking to sell agricultural equipment to a cannabis business in Washington State (where cannabis happens to be legal) were banned from the U.S. for life

  (https://www.thestar.com/vancouver/2018/07/05/canadian-cannabis-workers-targeted-by-us-border-guards-for-lifetime-bans.html)

Conclusion

- Broadly-worded U.S. immigration legislation and the lack of published guidance for officers, has resulted and will continue to result in roadblocks for Canadians and other non-U.S. citizen travelers to the U.S.
- The enactment of Canada's marijuana legislation will likely lead to more uncertainty and inadmissibility findings
- Travelers to the U.S. should stay informed about new guidance which will be issued relating to the grounds of inadmissibility in light of Canada's legalization of marijuana

U.S. Customs and Border Protection