

Legal Issues in Long-Term Care Facilities



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Presentation Outline

1. Marijuana in the Workplace
2. Family Status;
3. Workplace Investigations;
4. Privacy and Social Media;
5. Open Question Period.

About the Firm

- We provide strategic advice and develop timely, common sense solutions in collaboration with our clients.

Practice Group

- Wickwire Holm's Long Term Care Law Practice Group is the only such group in the Province.
- We can provide assistance in many areas, including:
 - General litigation support;
 - Corporate/Commercial matters;
 - Policy review and development; and
 - Advice on Labour, Employment and Human Rights matters.

Elder Law

- Elder law deals with issues specifically affecting seniors, including:
 - Estate Planning
 - Wills, trusts, tax planning
 - Incapacity Planning
 - Powers of Attorney, Personal Directives
 - Elder abuse
 - Abuses of Powers of Attorney, fraud
 - Other age-related issues

Marijuana in the Workplace

Marijuana in the Workplace

Medical Marijuana

Marijuana in the Workplace

~~Medical~~ Marijuana

Marijuana in the Workplace

- Issues involving:
 - Residents
 - Staff

Marijuana in the Workplace

- Increasing use by residents
 - Shifting demographics
 - Changing cultural perceptions
 - Legal changes



Marijuana in the Workplace

- Prescribed for a broad range of illness
- May be administered by:
 - Capsule;
 - Vaporizing;
 - smoking dried buds;
 - Eating extracts;
 - using oral sprays.
- Currently no evidence that smoking is the most effective delivery method.

Marijuana in the Workplace

- Residents must be prescribed marijuana in accordance with the Marijuana for Medical Purposes Regulations (MMPR)
 - 2014 amendments require that a authorized healthcare practitioner (physician or nurse practitioner) sign a ‘medical document’.
 - Must receive prescription from a licensed commercial producer
- MMPR regulations were recently invalidated by the Federal Court

Marijuana in the Workplace

- The College of Physicians and Surgeons of Nova Scotia allows physicians to authorize the use of marijuana for medical purposes only when they have direct, in-person contact with their residents.

Marijuana in the Workplace

- Challenges for facilities
 - Receiving prescriptions;
 - Administering medication;
 - Protecting resident confidentiality;
 - Conscientious objections.

Marijuana in the Workplace

Practice Guideline

Caring for Clients Authorized to use Medical Marijuana

College of Licensed Practical Nurses of Nova Scotia
College of Registered Nurses of Nova Scotia

Marijuana in the Workplace

- Core regulatory documents:
 - Standards of Practice for RNs
 - Canadian Nurses Association (CNA) Code of Ethics
 - Standards of Practice and Code of Ethics for LPNs

Marijuana in the Workplace

- Key takeaways:
 - RNs and LPNs are accountable to evolve their practice based on evidence.
 - Staff must ensure that clients have the information they require to make informed decisions.
 - Information must be presented in an unbiased and factual manner.
 - Must report if a client has obtained marijuana using illegal avenues

Marijuana in the Workplace

- Ethical dilemmas:
 - Staff may be morally opposed to medical marijuana as a treatment. This presents difficulty in providing treatment to clients.
 - If there is an issue of a conscientious objection, a manager must be informed as soon as possible.
 - If the treatment plan is in keeping with professional practice, the nurse must care for the client until an appropriate alternative arrangement can be made.

Marijuana in the Workplace

- *Nova Scotia Smoke-free Places Act*
 - Amended in 2014
 - “smoke” means smoke, inhale or exhale smoke from, burn, carry, hold or otherwise have control over a lit or heated cigarette, cigar, pipe, water pipe, electronic cigarette or other device that burns or heats tobacco or another substance that is intended to be smoked or inhaled.
- This (arguably) includes marijuana.

Marijuana in the Workplace

- *Nova Scotia Smoke-free Places Act*
 - No person shall smoke in any enclosed place that is or includes
 - (g) a nursing home or residential care facility licensed under the Homes for Special Care Act, a home for aged or disabled persons to which the Homes for Special Care Act applies or a part of a health-care facility used for the acute or long-term care of veterans;
- Regulations
 - Allows for a designated smoking room

Marijuana in the Workplace

- Use of medical marijuana by staff
 - Non- Prescribed use:
 - Marijuana remains an illegal substance and may not be used recreationally
 - Prescribed use:
 - Safety concerns
 - Accommodation of a recognized disability

Marijuana in the Workplace

- *Calgary (City) and CUPE, Local 37 2015*
261 LAC (4th) 1
 - Grievor had a medical cannabis prescription, which was disclosed to management.
 - As a heavy equipment operator, his position was safety sensitive.
 - Worked in this position for another two years.
 - Eventually removed from his job and accommodated with a lesser position.

Marijuana in the Workplace

- *Calgary (City) and CUPE, Local 37 2015*
261 LAC (4th) 1
 - City claimed that the Grievor had a marijuana dependency that required treatment.
 - Board found that the employer’s investigation failed to prove that the employee had substance abuse issues or that he had been impaired while on duty.
 - Grievor had properly disclosed his prescription and worked without incident for almost two years.
 - Grievor was reinstated to his original position
 - Possession of a permit for medical marijuana did not alone disqualify him from holding his position.

Marijuana in the Workplace

- *French v. Selkin Logging*, 2015 BCHRT 101
 - Employee fired for smoking marijuana while operating equipment at work.
 - Filed a human rights complaint
 - Claimed his marijuana use was medicinal
 - Did not have a permit for medical marijuana.
 - No evidence that the employee's consumption resulted in impairment,
 - Employer was not informed that it was for medicinal purposes.

Marijuana in the Workplace

- *French v. Selkin Logging*, 2015 BCHRT 101
 - Tribunal dismissed the claim.
 - Employees prescribed marijuana have an obligation to:
 - obtain the proper medical authorization
 - use the marijuana as medically prescribed and in a manner that allows for the safe exercise of their job duties; and
 - inform the employer about their medical authorization and use of marijuana.

Marijuana in the Workplace

- Use of medical marijuana by staff
 - Employees must be fit for duty
 - Professional obligations prohibit employees working while impaired
 - If you suspect impaired employee at work – send them home
 - Develop a policy regarding disclosure of prescription medication use (including marijuana) in safety sensitive positions.

Accommodation Family Status

Accommodation

- What is the Duty to Accommodate?





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Accommodation

- Duty to Accommodate
 - Nova Scotia *Human Rights Act*
 - ...a person **discriminates** where the person **makes a distinction**, whether intentional or not, based on a **characteristic, or perceived characteristic...**
 - that has the effect of **imposing burdens, obligations or disadvantages** on an individual or a class of individuals not imposed upon others

Accommodation

- Duty to Accommodate
 - Discrimination does not have to be intentional
 - Not sufficient to treat all employees the same
 - Duty to accommodate only arises once grounds for accommodation have been established

Accommodation

- Prohibited grounds of discrimination include:
 - age
 - race
 - colour
 - religion
 - creed
 - gender
 - sexual orientation
 - gender identity
 - gender expression
 - physical or mental disability

Accommodation

- Prohibited grounds of discrimination include:
 - an irrational fear of contracting an illness or disease
 - ethnic, national or aboriginal origin
 - family status
 - marital status
 - source of income
 - political belief, affiliation or activity

Accommodation

- Prohibited grounds of discrimination include:
 - an irrational fear of contracting an illness or disease
 - ethnic, national or aboriginal origin
 - **family status**
 - marital status
 - source of income
 - political belief, affiliation or activity

Accommodation & Undue Hardship

- Duty to Accommodate

- Nova Scotia *Human Rights Act*

The prohibitions against discrimination do not apply if a denial, refusal or other form of alleged discrimination is (s. 6(f)):

- (i) based upon a *bona fide* qualification,
 - (ia) based upon a *bona fide* occupational requirement; or
 - (ii) a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society;

Accommodation & Undue Hardship

- Duty to Accommodate

- Meiorin Test

- 1) The standard must be rationally connected to the performance of the job;
- 2) The particular standard is necessary to fulfil a legitimate work-related purpose; and
- 3) The standard must be reasonably necessary.

Accommodation & Undue Hardship

- Duty to Accommodate
 - It must be impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.
 - Not required to change working conditions in a fundamental way.
 - Must attempt to arrange the employee's workplace or duties to enable the employee to do his or her work.

Accommodation & Undue Hardship

- Undue Hardship
 - Fact specific inquiry
 - Primary responsibility lies with the employer to find and propose a solution
 - Employee must cooperate in the accommodation process

Accommodation & Undue Hardship

- Undue Hardship
 - Factors in assessing whether a certain hardship is undue in an employment context:
 - financial costs
 - interference with other employee's rights
 - disruption to a collective agreement
 - problems of employee morale and mobility
 - interchangeability of the work force and facilities
 - size of the employer's operation
 - safety

Accommodation & Undue Hardship

- Employers, courts and tribunals should be innovative yet practical when considering how to accommodate an employee within particular circumstances.

Accommodation & Undue Hardship

- Points to keep in mind
 - Keep interests of employee at the forefront
 - The duty to accommodate generally trumps other obligations
 - Conduct a case-by-case analysis
 - Safety alone is not an excuse.

Accommodation & Undue Hardship

- Points to keep in mind
 - Respect the employee's privacy, but get enough information to allow you to make an informed decision and know what accommodation is necessary.
 - Accommodation is a collaborative process involving the employer, the employee and their union (if any).

Family Status

- *Canada (Attorney General) v. Johnstone*, 2014 FCA 110
 - Employee of the Canada Border Services Agency (“CBSA”).
 - She filed a complaint CHRC after her request was denied to alter her shift schedule to coincide with available childcare arrangements in order to remain a fulltime employee.
 - Court ruled that employers must accommodate where a workplace rule interferes with the fulfillment of a childcare obligation

Family Status

- *Canada (Attorney General) v. Johnstone*, 2014 FCA 110
 - Parental obligations are those which engage the parent's legal responsibility for the child, such as childcare obligations
 - Not to personal choices

Family Status

- Campbell River Test
 - 1) a *prima facie* case of discrimination must be made out by the complainant
 - (i) that a child is under their care and supervision;
 - (ii) that the childcare obligation engages the individual's legal responsibility for that child;
 - (iii) that they have made reasonable efforts to meet those childcare obligations through alternative solutions, and that no such alternative solution exist
 - (iv) that the impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfillment of the childcare obligation

Family Status

- Campbell River Test
 - 2) The onus is then on the employer to show that the policy/practice is a *bona fide* occupational requirement, and that accommodation would amount to undue hardship.
- Relatively high threshold of serious interference with familial duties
- Analysis is highly contextual and fact based.

Family Status

- *Canada (Attorney General) v Hicks*, 2015 FC 599
 - The Complainant, who was starting a job in a new city, was denied a re-location benefit which would allow him to maintain two residences temporarily so that his wife could continue providing care for her ailing mother
 - The benefit was denied because the mother-in-law was not considered a “dependent” as she lived outside of the Complainant’s home

Family Status

- *Canada (Attorney General) v Hicks*, 2015 FC 599
 - Tribunal found that the respondent’s actions were discriminatory contrary to s. 7 of the CHRA on the grounds of family status
 - On judicial review, the Federal Court found that the Tribunal was correct to find that the ground of family status includes eldercare obligations, stating that eldercare obligations are “entrenched in Canadian societal values”

Family Status

- Family status is a developing area of human rights law.
- Test for determining when a *prima facie* case of discrimination has been made out remains in flux.
- Employers must be aware that workplace rules and policies that result in issues such as childcare problem for employees are protected by human rights legislation

Workplace Investigations

Workplace Investigations

- Range of possible workplace issues requiring consideration by an employer.
- Possible issues leading to an investigation:
 - Harassment;
 - Bullying;
 - Discrimination;
 - Inventory issues;
 - Health and Safety;
 - resident care/abuse concerns.

Workplace Investigations

- First step – is an investigation needed
 - What kind of wrongdoing is being alleged?
 - Who appears to be involved in the event or series of events giving rise to the complaint?
 - What workplace policies and practices, if any, are involved?
 - What, if any, laws are involved?
 - If the workplace is unionized, consider whether any provisions of the collective agreement apply to an investigation or potential investigation of wrongdoing.

Workplace Investigations

- First step – is an investigation needed
 - If the workplace is unionized, consider whether any provisions of the collective agreement apply to an investigation or potential investigation of wrongdoing.

Workplace Investigations

- Second step – scope of the investigation
 - Identify the goals and objectives of the investigation
- Who should be involved in the investigation?
- Role of:
 - Supervisory staff;
 - External investigator/third party;
 - Legal Counsel;
 - Union.

Workplace Investigations

- Third step – Conducting the investigation
 - Objectivity
 - Confidentiality
 - Detailed record keeping
 - Procedural fairness and natural justice



Workplace Investigations

- Third step – Conducting the investigation
 - Disclosure
 - Individual who is the subject of the must be given the opportunity to provide a full and meaningful answer
 - Must know:
 - the nature of the complaint/investigation;
 - potential consequences flowing from the outcome of the investigation.
- In a unionized workplace, consideration has to be given to the collective agreement.

Workplace Investigations



Workplace Investigations

- Final step – Communicating the results of the investigation
 - Communicate findings and results to the subject of the complaint
 - Inform the complainant that the investigation is complete, and that appropriate action has been taken
 - Maintain confidentiality over the results of the investigation.

Workplace Investigations

- Failing to properly perform an investigation
 - *Vernon v British Columbia (Liquor Distribution Branch)*
2012 BSCS 1331
 - Thirty year employee with a “no nonsense” management style
 - New employee lodged complaint
 - Employer Labour Relations Advisor assumed role of prosecutor
 - Manager confronted with allegation with no warning
 - Employer selectively interviewed co-workers
 - Gave manager the option to resign or be fired

Workplace Investigations

- Failing to properly perform an investigation
 - *Vernon v British Columbia (Liquor Distribution Branch)* 2012 BSCS 1331
 - Result?
 - Court found that the Employer had acted in a reprehensible manager
 - Ordered pay in lieu
 - \$35,000 for improperly conducted investigation
 - \$50,000 for attempting to persuade Manager to resign with a reference letter.
- Keep an open mind during investigations

Privacy in the Workplace

Privacy in the Workplace

- Privacy issues regarding:
 - Use of work-issued computers
 - Use of work-issued cell phones
 - Personal cellphones at work
 - Social media posts outside work hours

Privacy in the Workplace

- Do employees have a right to privacy over the personal information contained on work-issued computers?
 - Does this include work issued cellphones?

Privacy in the Workplace

No automatic right to privacy in Canada

- Question is the level of privacy an individual can reasonably expect in a given situation.
- Digital information is meaningful, intimate and touches on a user’s “biographical core”.
- There is an expectation of privacy with respect to a user’s information where personal use is permitted or reasonably expected.
 - Even if the employer owns the computer or electronic device.

Privacy in the Workplace

No automatic right to privacy in Canada

- The level of privacy to be expected is determined by:
 - the nature of the personal information in issue;
 - who owns the computer;
 - the workplace policies and procedures; and
 - the technology in place at the workplace.

Privacy in the Workplace

- Develop an effective policy for workplace technology:
 - 1) Implement a policy addressing use of Employer owned technological devices such as computers, smart phones, etc.
 - 2) State in the policy that the Employer owns the devices and requires that employees comply with the policy.
 - 3) Specify in the policy that the Employer retains the right to monitor usage and that the employee should, accordingly, have no expectation of complete privacy.

Privacy in the Workplace

- Social media policy
 - Allows employers to clearly communicate to employees what constitutes appropriate use of social media.
 - Proactive rather than reactive
 - Protects your reputation

Privacy in the Workplace

- Employer obligations regarding employee information
 - Includes the non-disclosure of information internally and to third parties

Privacy in the Workplace

- *St. Patrick's Home of Ottawa Inc. v CUPE, Local 2437*, 2016 CanLII 10432
 - Employee advised that she required an accommodation in her other position at a different long-term care facility due to medical reasons
 - St. Patrick's asked for a medical certificate indicating her fitness and ability to do her job.
 - The other long-term care facility then requested information about the employee's employment at St. Patrick's, including any workplace accommodations or provided any work-related restrictions.

Privacy in the Workplace

- *St. Patrick's Home of Ottawa Inc. v CUPE, Local 2437*, 2016 CanLII 10432
 - St. Patrick's gave the other facility the requested information, including a medical note from the employee.
 - Later acknowledged that information should not have been disclosed without

Privacy in the Workplace

- *St. Patrick's Home of Ottawa Inc. v CUPE, Local 2437*, 2016 CanLII 10432
 - The disclosure violated:
 - S 63(1)(f) and 62(2) of the OHS Act The collective agreement as it constituted “harassment”
 - The disclosure also constituted the tort of “intrusion upon seclusion”.
 - The arbitrator ordered St. Patrick's to comply with its own confidentiality policy and to pay the employee \$1,000.00 in damages.



Thank you

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Questions

