

Pot Cookies Case

The Supreme Court of Canada lifts ban on cannabis derivatives (R. v. Smith SCC 2015) June 2015
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Alternative forms of medical marijuana were legalized by the Supreme Court of Canada on June 11, 2015. The implications are significant for patients, drug producers and workplaces across the country.

Under the *Controlled Drugs and Substances Act* (CDSA), possession of marijuana is a criminal offence. The Medical Marijuana Purposes Regulations (MMPRs) create an exemption to the CDSA's prohibition for possession of marijuana.

Expert evidence demonstrates that different methods of administering marijuana offer different medical benefits. For example, oral ingestion of active marijuana compounds may aid gastro-intestinal conditions and may be more appropriate for chronic conditions. Furthermore, inhaling presents health risks and is less effective for some conditions than administration of cannabis.

Despite that evidence, Parliament had **limited the legal use of cannabis to dried marijuana products**. That was challenged in the case of *R. v. Smith* and on June 11, 2015 the Supreme Court of Canada (SCC) found those limitations contrary to the *Charter of Rights and Freedoms* (the Charter). In a concise judgment, the SCC found that confining medical access to dried marijuana violates section 7 of the Charter. The restriction was deemed **arbitrary** by the Court because it

“does nothing to enhance the state’s interest in preventing diversion of illegal drugs or in controlling false and misleading claims of medical benefit”¹.

Furthermore, the Court ruled that the prohibition prevents those who have already established a legitimate need for marijuana from reasonable medical choices through the threat of criminal prosecution (a loss of liberty).

How will R v. Smith affect the workplace?

Because medical marijuana is used to treat a variety of illnesses that may meet the definition of a “disability” under human rights legislation, the use of medical marijuana in the workplace engages the issue of accommodation. Similarly, employers have a duty to inquire into the relationship between the disability, and the performance of the employee before making an adverse decision based on performance. Employers may be found in violation of human rights legislation if the employee’s mental or physical disability is deemed to have been a factor in the decision to terminate his or her employment².

For a start, employers who are aware or reasonably ought to be aware that an employee is a prescribed user of medical marijuana have a duty to accommodate the employee to the point of undue hardship. However, employers need only make accommodation for needs that are known, therefore an employee must bring evidence to substantiate a claim for accommodation of a disability. For example, Tribunals may require evidence from a medically qualified practitioner attesting to the fact that the employee has been prescribed medical marijuana.³

Human rights legislation sets out three factors to be considered in determining whether the threshold of undue hardship has been met: cost, health and safety requirements and outside sources of funding. Given the SCC’s

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decision, the threshold to claim an undue hardship defence is high. Individuals who have been prescribed medical marijuana will now have access not only to dried marijuana for smoking, but edible and topical cannabis products, such as cookies, gel capsules, rubbing oil, topical patches, butters and lip balms.

In the past, some employers have relied on the case of *Ivancicevic v. Ontario (AGCO)*, in which the Ontario Human Rights Tribunal dismissed a complaint involving a claimant's right to smoke medical marijuana in an open-patio tobacco smoking area. The Tribunal outlined several health hazards associated with passive marijuana inhalation in dismissing the complaint. Employers may have relied on this decision to insist that medical marijuana be consumed privately, away from anyone who could inhale it passively. This could mean that smoking in a workplace or building's designated tobacco smoking areas might be validly prohibited as well. Prescribed medical marijuana users will now have access to cannabis derivatives as an alternative to smoking dried marijuana in light of the *R v. Smith* ruling. Therefore, health and safety concerns regarding passive inhalation of medical marijuana may not be a relevant factor in the evaluation of undue hardship.

In conclusion, employers will have to be sensitive when providing on-the-job accommodations to employees with a prescription for medical marijuana. It is well established that employees must be treated with dignity and respect, regardless of whether they have a disability. What is now clear, following the *R v. Smith* ruling, is that employers will now have to accommodate a broader scope of medical marijuana consumption.

¹ *R. v. Smith*, 2015 SCC 34 at para 8.

² See *Hamilton Street Railway v. A.T.U. Local 127*, in which the Board decided to reinstate a Grievor who had been terminated following an off-duty consumption of marijuana without conditions and with full back pay. The Board found no evidence linking the off-duty consumption of marijuana with poor job performance.

³ See: *Johnson Controls, L.P. and CAW-Canada, Local 222*, where the Board did not consider the written statement of the addictions counsellor that the Grievor had a "substantial issue" with cannabis to be sufficiently probative to establish that the Grievor was addicted to marijuana, at any material time. The Board also found that the surrounding circumstances were not sufficiently probative to establish that the Grievor was addicted to marijuana, as opposed to being a recreational user.