



Weirdest Cases of 2019

Rebecca Saturley

Weirdest Cases of 2019

- What I am not talking about!
- Workers Compensation – In France, death by sex is compensable.
- Remember: You cannot fire someone because they are pregnant.
- Costs against a complainant – in Alberta, all things are possible.



Nutrition Break

Labour and Employment Seminar

October 15, 2019



Nova Scotia Legislative Update

Guy-Etienne Richard

NS Amendments – In Force

- Domestic violence leave
- Pregnancy and parental leave
- Minimum wage increase
- Defined pension benefits

NS Amendments – Proposed/Incoming

- Bill 128 – Employment and Social Assistance Act
- Bill 138 – Human Rights Act Bill
- Bill 150 – Workers' Compensation Act
- Bill 134 – Labour Standards Code

Trends

- Violence and harassment – Is it coming to Nova Scotia?







Constructive Dismissal:

How to Implement Workplace Change

Sean Kelly

Changing Terms of Employment – Constructive Dismissal & Mitigation

1. *Clarke v. Halifax Herald Limited* – 2017 NSSC 337 -  
2. *Halifax Herald Limited v. Calvin Clarke* – 2019 NSCA 31 -  

Constructive Dismissal

1. Was there a unilateral change that breaches the employment contract?
2. If so, did the change substantially alter an essential term of the contract?


Mitigation - *Evans*

- Even if constructively dismissed, in some circumstances the duty to mitigate may require the employee to return to work for the same employer, assuming there are no barriers to re-employment
- What are barriers? Work environment that would be demeaning, involve hostility, humiliation, embarrassment or acrimonious relationships
- Multifactored, contextual analysis → objective standard


Key Facts

- Traditional advertising revenue in newspaper industry on decline globally
- Created new position selling diverse range of products
- Employee highly pessimistic about prospects in the new role
- Protests and eventually leaves despite income being protected
- Employer worked hard to address concerns, told employee how valuable he was and advised his projections would not be acceptable to the employer, either

Trial Decision

- 
- Actual sales figures (i.e., sales after employee walked out the door) held not to be admissible
- Finding that income “would have” gone down, despite denying admissibility of actual sales figures
- No failure to mitigate by walking out the door, despite no environment of hostility, embarrassment, humiliation, etc.

Court of Appeal

- 
- Actual sales figures were relevant & admissible to both constructive dismissal and mitigation → this on its own justified a new trial
- Actual sales figures were relevant to assessing whether the employee's subjective beliefs were reasonable (e.g., whether a reasonable person would have foreseen growth in the new role)
- Employer fully believed that sales were to increase and said why → this evidence went unchallenged

No Constructive Dismissal, No Failure to Mitigate

- Trial Judge failed to appreciate or consider the magnitude of the change to the role (i.e., not fundamental change)
- Employer has to show intention to no longer be bound by the employment contract
- No analysis of severity of changes or the uncontested evidence → focused solely on subjective views of employee
- No concerns about acrimony or work atmosphere at the time of resignation

Key Takeaways – Implementing Change

- Provide notice, if possible
- If income related, “Red Circle” → at least for a period of time
- Convey to the employee their importance at the workplace → intention is key
- Commit to re-visit and follow up about impact of changes
- Ensure no environment that is demeaning or toxic atmosphere
- Document any concerns raised and responses → preserve evidence



Canada Labour Code Changes: An Overview

Peter McLellan, Q.C.

Canada Labour Code Changes

- Stage 1 – September 1, 2019
 - Employee “friendly” amendment to work schedules, flexible work arrangements and leave provisions
- Stage 2 – 2020
 - Workplace harassment and violence prevention regulations
- Stage 3 - ?????
 - Pay equity

Canada Labour Code Changes

- Stage 1 – September 1, 2019
- A. Hours of work and scheduling – Include
 - Flexible work arrangements
 - After 6 months, employee may request change to number of hours worked, work schedule or location
 - Employer may refuse on prescribed grounds:
 - (i) Additional cost to employer;
 - (ii) Detrimental impact on quality/quantity of work;
 - (iii) Inability to manage due to staffing constraints;
 - (iv) Insufficient work available if changes made.
 - This is the “biggie”

Canada Labour Code Changes

- Stage 1 – September 1, 2019 cont.



- Unpaid breaks of 30 minutes for every 5 hours of work
- 24 hours notice of shift change
- 96 hours notice of work schedule
- Unpaid nursing breaks
- Some of these changes not being enforced while Government considers exemption of modifications

Canada Labour Code Changes

- Stage 1 – September 1, 2019 cont.

B. Leaves – include

- Personal leave – up to five days, three paid
- Medical leave – unpaid up to 17 weeks (note from “health care practitioner” required)
- Victims of family violence – up to 10 days, five paid
- Minimum service requirement eliminated for medical leave, maternity and parental leave, leave related to critical illness and leave related to death or disappearance of child.

Canada Labour Code Changes

- Stage 1 – September 1, 2019 cont.

C. Vacations – Holidays

- No minimum service requirement for entitlement to holiday pay
- Vacation entitlements increased
 - After 1 year – 4% (no change)
 - After 5 years – 6% (was 6 years)
 - After 10 years – 10% (new)



Canada Labour Code Changes

- Stage 2 – 2020

Workplace harassment and violence presentation regulations

- Comprehensive changes
- Requires jointly developed workplace harassment and violence prevention policy
- Requires jointly developed workplace assessment
- Requires jointly developed emergency procedures



Canada Labour Code Changes

- Stage 3 – ???

Pay Equity

- Huge potential impact for employers
- Will apply if 10 or more employees
- Work of “equal value”
- Pay equity plan will be required

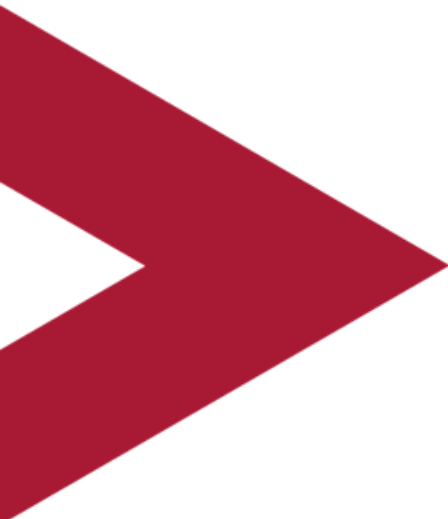




Go Ahead and Ask Us: Your Questions Answered

Rebecca Saturley

Grant Machum



Could you speak on accommodation
for those requesting comfort
animals in the workplace?



DEPRESSION HELP

Man has emotional support alligator

YORK HAVEN, Pa. (AP) — A Pennsylvania man says his emotional support alligator helps him deal with his depression.

Sixty-five-year-old Joie Henney, of York Haven, says his registered emotional support animal named Wally likes to snuggle and give hugs, despite being a five-foot-long alligator. Henney says he received approval from his doctor to use Wally as his emotional support animal after not wanting to go on medication for depression.

Henney says Wally eats chicken wings and shares an indoor plastic pond with a smaller rescue alligator named Scrappy.

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What documentation is
required for internal transfers?

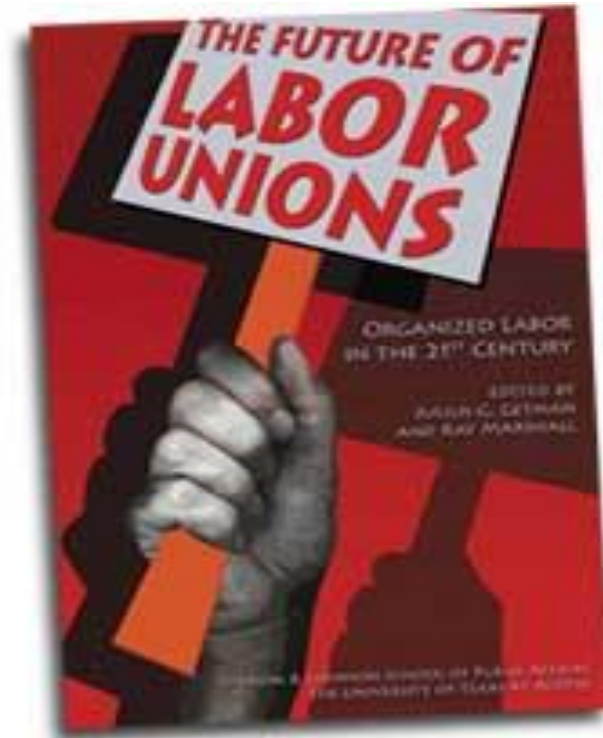


Union Organizing: What is an Appropriate Bargaining Unit?

Rick Dunlop

Union Organizing

- Labour Boards recognize that unionization is on the decline



Union Organizing

- The bargaining unit is the group of employees that the Union is seeking to represent. The Labour Board determines whether the bargaining unit the Union has applied to represent is appropriate.
- In the non-construction industry, the *Trade Union Act* (“TUA”) requires that an automatic secret ballot representation vote be held within 3-5 days of the date the application is filed.
- In order for the Union to be ultimately successful (in the non-construction industry) a majority (50% plus 1) of the employees in bargaining unit who actually vote must have voted in favour of unionization.

Union Organizing

- The composition (i.e. the “ins” and “outs”) of the bargaining unit is important. The “ins” votes count.
- Unions often seek to represent as small (i.e. as few employees as possible) a bargaining unit as possible because this reduces the number of employees the union has to convince to support the union.



Union Organizing

- How does the Labour Board decide what is an appropriate bargaining unit?



Union Organizing

Approach #1 – Community of Interest

- The TUA says that “the Board in determining the appropriate unit shall have regard to the community of interest among the employees in the proposed unit in such matters as work location, hours of work, working conditions and methods of remuneration.”
- The Board does not consider the TUA to be exhaustive so in almost every “in and out” case it considers a number of factors.
- Community of interest is a malleable concept that can be easily manipulated.

Union Organizing

Approach #2 – Serious Labour Relations Problem

- The Board says that the “sharp focus” on community of interest has dimmed.
- The Board’s focus is whether there is a serious labour relations problem: “does the unit which the union seeks to represent encompass a group of employees with a sufficiently coherent community of interest that they can bargain together on a viable basis **without at the same time causing serious labour relations problems for the employer?**”
- Serious labour relations problem (e.g. fragment the workplace into a number of different bargaining units).
- The Labour distinguishes between employees who are “functionally integrated” (which results in inclusion) and employees who only have a “functional relationship” (which usually results in exclusion). It is difficult to tell the difference.

Union Organizing

Regardless of Approach #1 or Approach #2, the Labour Board consistently cites the following statement with approval:

“Labour boards are more flexible in the application of the criteria on an initial or first application for a workplace. Here access to collective bargaining and deference to employee wishes as reflected by the certification application will be given considerable weight.”

Union Organizing

SECRET

The employee wishes consideration is illogical because the success of the certification application is based upon the results of a secret ballot vote, and the results of the secret ballot vote will not be known until the results are counted. Therefore, how can the Board be influenced by employee wishes?

Union Organizing

Key Take Away:

Take the necessary steps to avoid an application to the Labour Board so you never have to “fight” about bargaining unit appropriateness





#MeToo: Where are we now?

Michelle Black

Person of the Year

TIME

**THE
SILENCE
BREAKERS**

THE VOICES
THAT LAUNCHED
A MOVEMENT



time.com

Now, 100% Awareness ... right?

Or wrong?

- Study published in 2018 by Angus Reid Institute
- “Movement or Moment?”
- Attitudes and mindsets in Canadian workplaces
- N = 2004

For each of the following, please indicate whether you personally consider that to be acceptable or unacceptable in the workplace?
Percentage saying "Acceptable"

	Total (2,004)	Men			Women		
		18-34 (217)	35-54 (351)	55+ (411)	18-34 (363)	35-54 (348)	55+ (314)
Expressing sexual interest in a co-worker	16%	30%	19%	12%	19%	14%	6%
Standing very close to a co-worker in their personal space	15%	24%	18%	11%	15%	16%	11%
Displaying, sharing or looking at materials that some might consider sexually suggestive	15%	26%	16%	12%	17%	12%	11%
Telling "off-colour" jokes at work	14%	27%	18%	8%	13%	16%	10%
A boss kissing the cheek of an employee	14%	20%	15%	13%	9%	14%	15%
Making a comment about a colleague's body (legs, figure etc.)	13%	25%	15%	13%	11%	9%	12%
Giving a colleague an uninvited shoulder rub	9%	19%	8%	6%	6%	10%	10%
Using sexualized language in a work conversation	7%	20%	9%	2%	7%	6%	3%
Reading a pornographic magazine at one's workstation on lunch break	4%	13%	5%	3%	2%	3%	1%
Making gestures of a sexual nature	3%	14%	4%	1%	2%	3%	1%

For each of the following, please indicate how personally you consider that to be acceptable in the workplace?
 Percent "acceptable"



	Total (2,004)	Men			Women		
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Case Law



Legislative Responses



Employer's Obligations

- Safe workplace
- Thorough and fair investigations
- Workplace culture





Cannabis: One Year Later

Brian Johnston, Q.C.



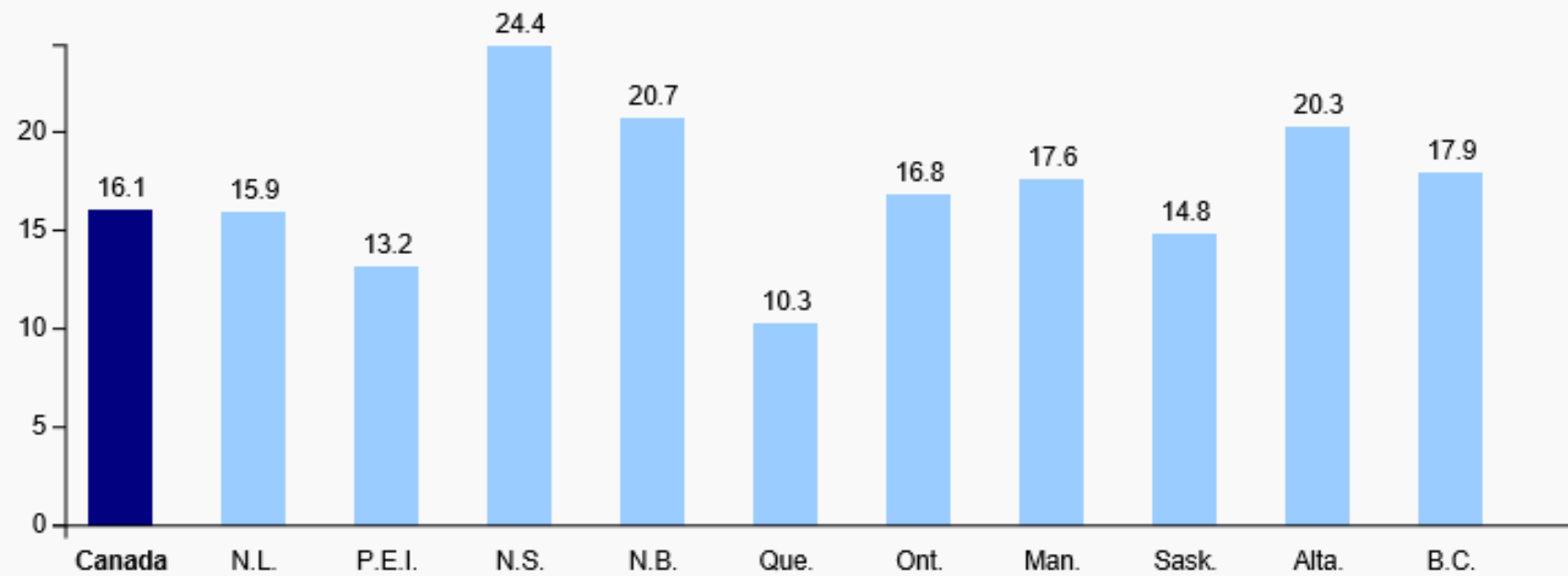
What's new?

- The numbers
- The law
- Edibles, extracts and topicals - legal on October 17
- The challenges

Cannabis use in the past three months by province

Second quarter 2019

(%)

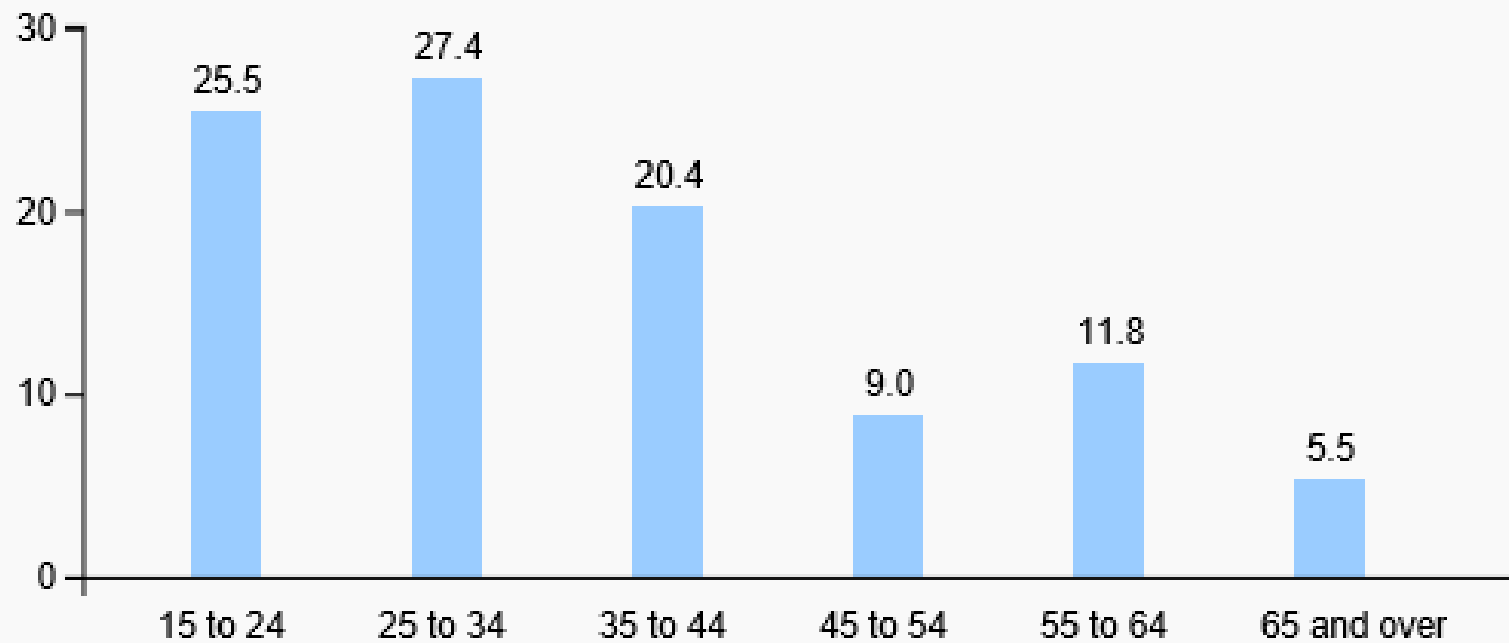


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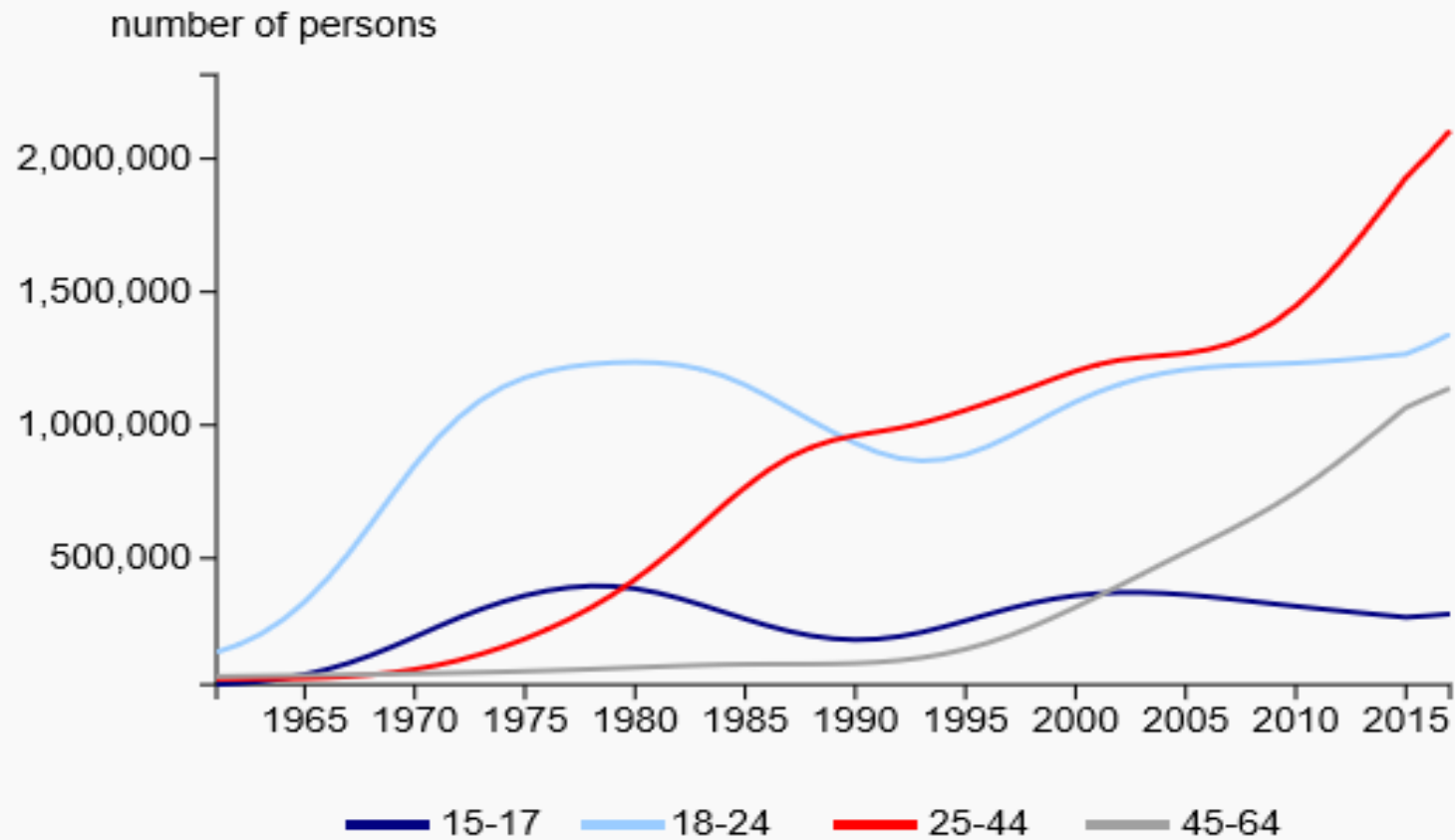
Cannabis use in the past three months by age, Canada

Second quarter 2019

(%)



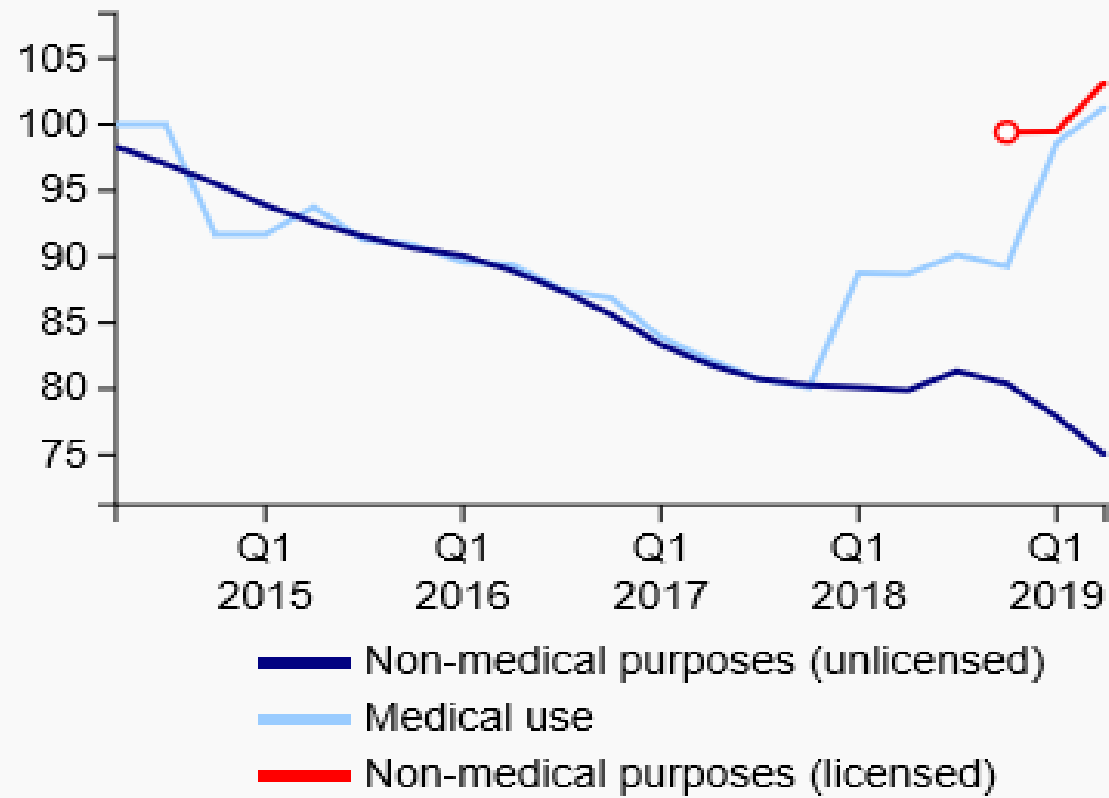
Consuming population by age group — Total, all frequencies 2017



Cannabis implicit price index, Canada

Second quarter 2019

(2012=100)



The Law

- *IBEW, Local 1620 v. Lower Churchill*, 2019 NLSC 49 upheld arbitrator's decision that denial of employment at a safety-sensitive construction site due to medically prescribed cannabis use was reasonable. Employer unable to measure impairment and safety risk; undue hardship.
- *Aitchison v. L & L Painting and Decorating Ltd.*, 2018 HRTO 238, Tribunal said no "absolute right" to use cannabis at work even if medically prescribed.
- Safety-sensitive position - "if not performed in a safe manner, can cause direct and significant damage to property and/or injury to the employee, others around them, the public and/or the immediate environment."

Edibles, Extracts and Topicals

- Demand expected to be high
- Take longer to take effect, and effect lasts longer than if inhaled
- Euphoric effect peaks in 4 hours, lasts up to 12
- Takes longer to have any effect....up to 2 hours
- Unintentional over-consumption

The Challenge

- Effective policies
- Detection
- Closing the education gap

1:00 – 2:30pm

Breakout Sessions

Investigating Misconduct and Workplace Culture:
Different Approaches for Difficult Issues
Ballroom (Main Seminar Room)

Climate Change: Human Rights in Nova Scotia
Room 501-502

Does Age Matter? Update on Post-65 Benefits
Room 503

Navigating Today's Workplaces:
Explore the Challenges of AI, BYOD, Privacy and Beyond
Room 506-507



These materials are intended to provide brief informational summaries only of legal developments and topics of general interest.

These materials should not be relied upon as a substitute for consultation with a lawyer with respect to the reader's specific circumstances. Each legal or regulatory situation is different and requires review of the relevant facts and applicable law.

If you have specific questions related to these materials or their application to you, you are encouraged to consult a member of our Firm to discuss your needs for specific legal advice relating to the particular circumstances of your situation.

Due to the rapidly changing nature of the law, Stewart McKelvey is not responsible for informing you of future legal developments.