Drugs, Alcohol, Social Media, and Harassment in the Workplace:
A Canadian Overview

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HARASSMENT IN THE WORKPLACE
Regulation of Workplace Harassment

- Varies from jurisdiction to jurisdiction
- Legislative/regulatory regimes, such as OH&S, human rights, workers’ compensation
- Collective agreements
- Common law/Civil law (in Quebec)
Forms of Harassment

- Discriminatory harassment
- Personal or psychological Harassment
Discriminatory Harassment

• Laws prohibiting harassment on the basis of prohibited grounds of discrimination, including race, ancestry, place of origin, age, family status, disability, sex

• Sexual harassment
Personal or Psychological Harassment

- Also referred to as “bullying”
- Examples of personal or psychological harassment
  - Malicious rumours, isolating someone, constant criticism, belittling, intimidating, deliberating impeding the work of another, threats, arbitrarily changing work expectations, unreasonable assignments, yelling
What Is *Not* Harassment

- Reasonable exercise of management rights
- Ordinary and periodic work conflicts
- Legitimate work-related stress
- Adverse or difficult conditions
Liability and Possible Outcomes

- Damages
- Fines
- Reinstatement
- Lowered workplace morale
Preventing and Mitigating Risk of Workplace Harassment

• Harassment policies (mandatory in some jurisdictions)
• Proper investigations
• Appropriate action to end harassment
• Protection for complainants against retaliation
• Education
SOCIAL MEDIA AND OFF-DUTY CONDUCT
Key Social Media Issues

- Employee screening and monitoring
- Discipline and discharge for online conduct
- Labour implications
Can employers:

- Use social media as a screening tool for employees?
- Monitor employee use of social media in (and out) of the workplace?
Privacy Issues

• Need to consider:
  – Privacy legislation
    o Is the information being sought “reasonable” as it relates to managing the employment relationship?
    o Are we requesting consent or otherwise advising employees of the information being collected?
Privacy Issues

• Need to consider:
  – Common law considerations
    o Do employees have a common law or statutory right to privacy?
    o Is this considered “intrusion on seclusion”? 
Discipline and Discharge for Online Conduct

• If you have employees who you become aware are making disparaging comments, what do you do?
• On-line conduct is treated similarly to other “off duty” workplace conduct
• Impact on the workplace is paramount
What Is Permissible?

- Facebook content, tweets, and blog posts that **do not** directly or indirectly affect the workplace
EV Logistics (2008)

- Employee created blog that included hate messages about Indians and support for Nazism
- Employee identified that he worked for EV Logistics
EV Logistics (2008)

- Employer terminated the employee for cause
- Arbitrator reversed discharge:
  - Blog not directly targeting employer
  - Employee remorse and clean record
What Is Not Permissible?

• Facebook content, tweets, and blog posts that directly or indirectly affect the workplace
• Derogatory or defamatory content
• Content that violates the duty of faith and fidelity
• Content that violates Conduct or Confidentiality Agreements
Loughheed Imports (2010)

- Two employees terminated after posting violent and inappropriate messages on Facebook about Loughheed and its managers
- Unfair labour practice complaint to BCLRB
Loughheed Imports (2010)

• BCLRB decision:
  – Employer not motivated by anti-union animus
  – Just cause for terminations
Unions and Social Media

• “Labour can’t organize with 8-tracks when workers are listening to podcasts on their iPods.”
  – Ken Georgetti, President, Canadian Labour Congress
Unions and Social Media

• “[Union representatives] are not in the union business, you are in the community-building business… People live with Facebook and Twitter in the palms of their hands. You have to reach out to them.”
  – Juliette Powell, Co-founder, The Gathering Think Tank speaking at CLC Convention
Social Media in Union Organizing

- Access to communities within the workplace
- Easily identify issues of interest
- Collect knowledge of the organization
- Identify potential access points
Social Media during Work Stoppages

- Mobilization
- Public Relations
- Protest Websites
  - Videos
  - Communications to Public
  - Email campaigns
Practical Tips

• Be careful about screening and monitoring practices
• Ensure policies address confidentiality and clearly communicate what is (and is not) acceptable conduct
• Ensure sufficient notice
• Be consistent in applying policies
• Discipline when appropriate
RANDOM DRUG AND ALCOHOL TESTING
Random Drug and Alcohol Testing

The New Rule

• An employer cannot unilaterally subject employees to a policy of random alcohol testing, even in dangerous workplaces, unless there is evidence of a general problem with alcohol abuse in the workplace.
The Facts

- Grievance re management rights clause
- No dispute it was a dangerous workplace
- No dispute that testing for safety sensitive positions
- BUT weak evidence that alcohol was a problem in the workplace
Safety vs. Privacy

- Random testing is an “affront to the dignity and privacy of employees”
- Proportionality test: must balance safety concerns against employee’s interests
- Need for rule must outweigh harmful impact on privacy rights
Testing is Reasonable in a Dangerous Workplace Where:

- There is reasonable cause to suspect an employee of alcohol or other drug use in the workplace
- After direct involvement in a work-related accident or incident
- As part of a monitoring program for any employee returning to work following voluntary treatment for substance abuse
Random Testing is Justified Where:

- There is evidence of an existing problem with alcohol use in a dangerous workplace
- It is agreed to in collective bargaining and included in the collective agreement
Dissent (Three Judges)

- Employer doesn’t have to prove workplace alcohol problem is “serious” or “significant”
- Evidence of alcohol use doesn’t have to be tied to an accident or near-miss
• The trend in workplace policies – will the new SCC test apply?
• Drug testing poses more difficulties
Human Rights Consideration

• Testing is *prima facie* discriminatory
• Alcohol testing may be a *bona fide* occupational requirement (BFOR) in safety-sensitive positions
• Employer’s response must be consistent with accommodation principles
• Distinction between casual and addicted users
Establishing BFOR

• Show testing is necessary:
  – To employer’s operations
  – To safety of workers and/or public
  – No other less intrusive means is available
Pre-Employment Screening

• Must be linked to essential requirements of the job
• May not be predictive of future behaviour
• Applicant’s circumstances may justify testing
Best Practices for Workplace Testing

• Notify & communicate
• Be flexible
• Use professionals
• Protect confidentiality
Early Alberta Experience

• **Canadian Model for Providing a Safe Work Place**
  – A Best Practice of the Construction Owners Association of Alberta adopted in February 1999

• Building trade unions accept “for cause” and post-incident testing
The Current Alberta Situation

  - Expert evidence accepted on the real risks of marijuana use
  - Drug testing justified because it reduces risk and acts as deterrent
The Current Alberta Situation

• Chiasson v. KBR (2007) (Alberta Court of Appeal)
  – Testing is not *prima facie* discriminatory
  – Need actual or perceived disability to receive HR protection
  – If no disability, no HR protection
Other Factors Driving Change

• Occupational health and safety becomes focus of government
• Larger fines, more inspectors, criminal legislation
Canadian Model Version 2

• Effective October 1, 2010
• Endorsed by CLAC and later by various building trades with some reservations
• Acceptance of oral fluid testing
• New concentration limits
Drug and Alcohol Risk Reduction Pilot Project (D.A.R.R.R.P.P.)

• Approved November 24, 2011 and intended to run from April 1, 2012 to end of 2014
• Primarily for oil sands but also other industrial maintenance/construction
• Shared data gathering on random testing
Drug and Alcohol Risk Reduction Pilot Project (D.A.R.R.P.P.)

- Voluntary participation of organizations including unions and employers
- Extensive reporting obligations to support study
- Random oral fluid testing of half the workforce each year, but some urine testing chosen by some
Random Testing Stalls in Late 2012

- Suncor attempts to implement
- In-house union gets interim injunction in October stopping implementation until arbitration can adjudicate lawfulness
- Court of Appeal upholds interim injunction
- Arbitration by Tom Hodges still in progress
- Many contractors and owners elect to hold off until arbitration concluded
Irving Pulp & Paper Case in Supreme Court of Canada

- New Brunswick Court of Appeal had overturned arbitrator who disallowed random alcohol testing because the site was not ultra-sensitive to safety risks
- SCC issued decision in June 2013; upheld the original arbitration and essentially concluded that random testing required proof of a problem in the affected workforce
Teck Random Testing Proceeds

- In contrast to Suncor, the union was unsuccessful, even after the Suncor decision, in trying to get an interim order stopping the implementation of random testing for a Teck mine in BC.
- There was better evidence supporting testing.
- Arbitrator Colin Taylor chose safety over privacy concerns in balancing interests.
Ontario Reluctant to Accept Site Access Testing

- August 2013 – Ontario arbitrator in Re Mechanical Contractors Association Sarnia et al. rejects site access testing without proof of alcohol/drug problem at that work location
- Based on Irving decision from SCC
- Further confirmation of divide between Western and Eastern Canada
- Highlights need for good evidence
Current State of the Alberta Law

• Pre-employment, reasonable grounds, post-incident, unscheduled post-rehab, and site access testing all well accepted if safety sensitive positions

• Random testing more uncertain

• Refusals and tampering
Current State of the Alberta Law

• Duty to accommodate or not – addiction or not?
• Extent of the duty to accommodate individual circumstances
• Just cause for termination?
• The move to fitness for work testing
STATUTORY ENFORCEMENT AND PENALTIES
Statutory Enforcement and Penalties

Big question:

What are the statutory rules that bind employers and impose penalties (or some form of consequence) with respect to drugs, alcohol, social media use, and harassment in the workplace?
Four Broad Categories of Legislation

- Occupational Health and Safety (OHS) Legislation
- Human Rights Legislation
- Workers’ Compensation Programs
- Labour Relations Legislation and any other legislation that protects against reprisal against an employee
- Privacy Legislation
• Workplace issues that may engage OHS Law
  – Harassment, generally or through social media
  – Violence, whether from escalating harassment or drug/alcohol use
  – Injuries due to drug/alcohol use
OHS Legislation – Harassment

• Harassment is treated as an OHS issue in Ontario, Manitoba, Saskatchewan and British Columbia

• Employers are required to develop and implement policies for preventing harassment in the workplace
  – Legislation prescribes policy content, i.e., how harassment complaints are to be made, investigated, etc.
OHS Legislation – Harassment

• Employer that breaches its responsibilities under OHS legislation with respect to harassment policies may be subject to penalties
OHS Legislation – Psychological Harassment

• Psychological harassment is defined as “any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee’s dignity or psychological or physical integrity and that results in a harmful work environment for the employee”
OHS Legislation – Psychological Harassment

• Quebec’s *An Act Respecting Labour Standards* requires that an employer take reasonable action to prevent “psychological harassment” and end such behaviour where it arises

• More stringent definition than in Ontario, Manitoba, or BC, for example
OHS Legislation – Violence

• Violence may arise as a product of harassment or drugs/alcohol
• Risk of violence against employees may emanate from co-workers or non-employees
• Compared to harassment, more jurisdictions across Canada impose duties on employers in relation to violence in the workplace
OHS Legislation – Violence

• Violence is addressed in OHS legislation in BC, AB, SK, MB, ON, NFLD/L, NS, PEI and CAN (Federal)
• Physical violence is not addressed in QC, NB, YK and NWT legislation
• BC, NFLD/L and PEI have a limiting definition of violence that excludes violence between co-workers
OHS Legislation – Violence

• In those jurisdictions without explicit violence provisions in OHS legislation, a general duty clause could be used to address violence.

• General requirement that employers take every reasonable precaution to ensure the health and safety of their employees, the defence being due diligence.
OHS Legislation – Violence

• Legislation imposes duties on employers either based on the type of business engaged in (e.g., education, police, corrections, crisis counseling etc.) or based on a mandatory assessment of the risk of violence in the workplace.
OHS Legislation – Violence

- Where such a risk is identified, employers typically must establish a violence prevention policy and implement procedures or programs to address workplace violence, conduct training, provide information about risks of violence to employees.
OHS Legislation – Violence

• ON imposes a duty on employers to take every reasonable precaution to protect an employee who may be endangered due to an act of domestic violence. BC requires employers to conduct a risk assessment and then take appropriate steps to eliminate the risk.

• ON also gives employees the right to refuse work if workplace violence is likely to endanger them – this could give rise to possible reprisal complaints.
OHS Legislation – Penalties

• Harassment may lead to physical violence and injury

• Drug/alcohol use may also lead to accidents and injury

• Any failure on the part of employers to protect employees under OHS obligations could lead to significant fines under OHS legislation
OHS Legislation – Penalties

• Regulatory prosecutions - fines set in legislation, vary across jurisdictions, often set out a maximum for first offence, second offence, etc.

• Typically in the hundreds of thousands of dollars

• $1,312,500 (including victim surcharge) Ontario fine against Vale Canada – highest in Canada (September 17, 2013)
OHS Legislation – Penalties

• Bill C-45 Criminal Code Prosecutions - no maximum on fines

• Consider the recent decision in *Metron Construction* and fine of $750,000

• Conviction of criminal negligence causing death; owners sentenced to 2 years less one day (Pasquale Scocca)
Human Rights Legislation – Harassment

- HR legislation generally prohibits harassment on the basis of a prohibited ground of discrimination as prescribed in the legislation
- Employer clearly runs risk of being penalized if it directly engages in harassment of an employee
- Issue: can employer be held responsible when employees harass each other?
Human Rights Legislation – Harassment

• Employers can be held responsible:
  – *Canadian Human Rights Act* (FED): an employee act in the course of employment is an act of the employer
  – Employer can defend against VL by demonstrating that it did not consent to the harassing employee’s act, and exercised all due diligence to prevent the act
Human Rights Legislation – Harassment

– Human Rights Code (ON) specifically excludes harassment prohibition from the vicarious liability provisions of the legislation

– However, the legislation offers a civil remedy against a party who infringes a right

– Employees have a right to be free from harassment by another employee in the workplace
Human Rights Legislation – Harassment

– Employees have a right to be free from harassment by another employee in the workplace

– Therefore, employer may be liable to some extent for not fostering an environment that discourages or prevents harassment even if not vicarious liable for the specific harassing act of an employee
Human Rights Legislation – Harassment

• In MB, an employer is expressly prohibited from permitting, or failing to take reasonable steps to terminate harassment between employees
Human Rights Legislation – Penalties

• Human rights legislation typically grants broad remedial powers
• Damages for dignity, hurt feelings, self-respect
• Compensation for lost wages
• Reinstatement
• Direct employer to conduct training, implement policies
Workers’ Compensation

- Where injuries occur at the workplace, whether due to drug/alcohol use by employees or harassment that escalates to physical violence, employers may have WC issues arise.

- Not really a penalty but a cost issue because a compensable injury may mean an increase in premiums to be paid by the employer.
Workers’ Compensation

• Issue: Can non-violent harassment/psychological stress trigger an employee claim under WC legislation?
• Depends on the jurisdiction
• Some jurisdictions only cover mental or psychological stress that results from an acute reaction to a traumatic event/workplace trauma or if it results from a willful or intentional act of another person
Workers’ Compensation

• In harassment context, usually looking for one traumatic event, such as threats of physical violence, personal harm, or death that arise out of the harassment

• There have been instances where cumulative exposure to harassment for an extended period of time have given rise to compensation – view the last event of harassment as the "acute traumatic event"
Workers’ Compensation

- BC, AB, SK, QC, and YK have the most expansive definitions of accident and injury – they go beyond the traumatic event requirement
- Typically, the more expansive definitions capture chronic stress that has built up over time as distinguished from stress from a single traumatic event
- New BC legislation specifically addresses bullying and harassment in relation to mental disorder claims
Reprisal Provisions

• Employer may be penalized for reprising or threatening to reprise an employee for exercising his or her rights

• Reprisal provisions may arise under
  – Human rights legislation;
  – Labour relations legislation; or
  – OHS legislation
Reprisal Provisions

• Employer conduct that is typically prohibited
  – Acts that affect any term or condition of employment (lay-off, suspension, dismissal, loss of opportunity for promotion, demotion, demotion, transfer of duties etc.)
  – Acts of intimidation or coercion towards a worker by an employer (i.e., trying to discourage the employee from complying with or seeking enforcement of legislation)
Reprisal Provisions – Penalties

• These vary, depending on legislation; will often attempt to remedy impact on employee, depending on reprisal action
  – Reinstatement or compensation for lost wages if employee was terminated, transferred, demoted
  – General damages
  – Direct employer to conduct training, implement policies
Privacy Legislation

• Privacy issues may arise if the employer is trying to investigate harassment/violence/drug or alcohol use

• Could expose employer to penalties under privacy legislation if employer is not mindful of privacy issues

• Could result in exclusion of evidence in an arbitration
Privacy Legislation

- Jurisdictions with legislation that regulate the disclosure of employee’s personal information in the private sector
  - **Federal**: *Personal Information Protection and Electronic Documents Act*
  - **Alberta**: *Personal Information Protection Act*
  - **British Columbia**: *Personal Information Protection Act*
  - **Quebec**: *An Act Respecting the Protection of Personal Information in the Private Sector*
Privacy Legislation

• Typically only allow disclosure of personal information with consent, unless prescribed circumstances are met (set out in applicable legislation)

• Disclosure without consent or prescribed circumstances could lead to penalties if a complaint is made
Privacy Legislation

- BC and AB legislation
  - Complaint may be made to Commissioner who can issue an order requiring an employer to stop disclosing personal information
  - Offence where failure to comply with order = fine
    - $10,000 or less for an individual
    - $100,000 or less if a person other than an individual
Privacy Legislation

• BC and AB legislation (cont’d)
  – Employer may also be subject to civil liability
    • Order = cause of action against employer for damages for actual harm suffered
Privacy Legislation

• QC legislation
  – Communication to third persons or uses of personal information not in accordance with the legislation results in a fine of $1,000 to $10,000 for a first offence and $10,000 to $20,000 for each subsequent offence
Privacy Legislation

• Four jurisdictions have legislation that create a tort for violating privacy
  – MB, NFLD/L, SK, and BC
• Actionable without proof of damage where person willfully violates privacy of another
• Give rise to claim for damages
Privacy Legislation

• “Violation of privacy” broadly defined - i.e., eavesdropping or surveillance (BC); use of letters or diaries without consent (MB and NFLD/L)

• Defences include:
  – Consent
  – Incidental to exercising a lawful right of defence
  – Authorized or required under a law
Canada Labour Code – Group Termination

• *R. v. Servisair* [2011] BCJ No. 1299
• Employer failed to provide 16 weeks of Group Termination Notice
• Prosecution in Provincial Court – case of first instance
• Crown seeking compensation for missing notice over $500,000 + fines for each breach
Canada Labour Code – Group Termination

- Compensation to employees for lost wages not ordered
- Required notice to minister – not employees
- Fines of $1,500 and $3,000 ordered
Useful Links

• News Release on Vale:

• WorkSafe BC Discussion Paper – Workplace Bullying:

• WorkSafe BC On-Line Tool Kit:
  http://www2.worksafebc.com/Topics/BullyingAndHarassment/Resources.asp?reportID=37260
Useful Links

• Occupational Health and Safety Council of Ontario Violence and Harassment Policies: A Tool Kit:

• HRcomplianceinsider: Workplace Violence Compliance Kit:
  http://www.hrinsider.ca/specialreports/WPV%20Compliance%20Kit%20-%20140%20pg.pdf
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