Keep Calm and … Understand Cannabis: What Employers in the Energy Sector Want to Know About Legalized Cannabis in the Workplace

Authored by Shana Wolch, Partner at McCarthy Tétrault LLP, Justine Lindner, Associate Lawyer at McCarthy Tétrault LLP, Dan Demers, Senior Manager of Strategic Business Development for CannAmm Occupational Testing Services and Ben Ratelband, Partner at McCarthy Tétrault LLP

Contents

1. EXECUTIVE SUMMARY

With the federal government's anticipated legalization of recreational cannabis use in Canada, employers are forced to evaluate the impact that cannabis will have on their workplaces. These considerations are of particular concern to organizations in the energy sector, many having operations that are safety-sensitive and require uncompromised workplace health and safety programs.

Canadian law requires a weighing of an individual's right to privacy against an employer's obligation to take specific measures to ensure its workplace is healthy and safe. Given the heightened importance of safety in the high risk working environments of the energy sector, these employers are often on the front line for worker drug testing and the enforcement of bans of possession and use of drugs on work sites.

A review of the current Canadian framework for workplace drug testing demonstrates that the law has not yet fully evolved with the advances in scientific understanding of the effects of cannabis or the advances in the technology for testing methodologies.

By exploring the practical impact of recent Canadian appellate decisions on workplace policies and practices, and applying existing legal principles to scientific and technological advances, conclusions can be drawn regarding the types of changes that can be expected in Canadian law moving forward, including the likelihood of comprehensive drug testing programs being upheld. The requirements set out by industry governing bodies and regulators, as well as the positions advanced by employer organizations, also provide useful direction for employers seeking to uphold workplace drug testing policies.

This paper intends to provide both awareness and best practices when it comes to the enforceability of drug testing programs and related workplace policies in the wake of the new legal, green landscape.

2. ANTICIPATING THE LEGALIZATION OF CANNABIS

Throughout this paper, we will refer to "cannabis" instead of the term "marijuana" or other names indigenous to local cultures, and delta-9-tetrahydrocannabinol, commonly known as "THC", which is the most predominant psychoactive compound of the 104 known "cannabinoids". The World Health Organization defines these terms as follows:

> "Cannabis. A generic term used to denote the several psychoactive preparations of the cannabis plant. Cannabis is the preferred designation of the plant Cannabis sativa, Cannabis indica and, of minor significance, Cannabis ruderalis (Gloss, 2015). Cannabis resin means "separated resin", whether crude or purified, obtained from the cannabis plant. Cannabis preparations are usually obtained from the female cannabis sativa plant. The plant contains at least 750 chemicals and some 104 different cannabinoids. The principal cannabinoids in the cannabis plant include delta-9-tetrahydrocannabinol (THC), cannabidiol (CBD), and cannabinol (CBN).
>
> Cannabinoids: Cannabinoids are a class of diverse chemical compounds that act on cannabinoid receptors in cells that modulate neurotransmitter release in the brain. The composition, bioavailability, pharmacokinetics and pharmacodynamics of botanical cannabis differ from those of extracts of purified individual cannabinoids. Cannabinoids are basically derived from three sources: (a) phytocannabinoids are cannabinoid

compounds produced by plants Cannabis sativa or Cannabis indica; (b) endocannabinoids are neurotransmitters produced in the brain or in peripheral tissues, and act on cannabinoid receptors; and (c) synthetic cannabinoids, synthesized in the laboratory, are structurally analogous to phytocannabinoids or endocannabinoids and act by similar biological mechanisms."[1]

The scope of discussion on cannabinoids in this paper is limited to phytocannabinoids.

It is anticipated that recreational cannabis use will become legal in Canada in 2018. Since the federal government's initial announcement regarding the legalization of cannabis, much of the relevant media coverage has addressed the sale, distribution, and rules of consumption of cannabis with minimal discussion of the obvious risks that cannabis use can pose to workplace safety. While the safety hazards that cannabis presents on our roads and at our workplaces is not new, understanding the size of this risk will only grow with legalization. Employers with safety-sensitive workplaces, where employees are required to use dangerous equipment, work at heights and are responsible for having a strong executive function to ensure that their work is performed safely for themselves, their co-workers and the public, are particularly concerned with the potential impact that legalization of cannabis will have on their workforces.

For context, cannabis appears to be the drug of choice for Canadians, its reported use following only alcohol and tobacco. In 2018, an estimated 4.6 million individuals aged 15 and over will use cannabis at least once, and by 2021 this number could rise to 5.2 million.[2]

In Colorado and Washington, the first American states in which recreational cannabis use was legalized, the overall urine positivity rate for cannabis testing in dangerous occupational settings, with preventative and reactionary provisions to ensure fitness for duty, outpaced the national average in 2016 for the first time since the statutes legalizing cannabis took effect. The increase was more pronounced in Colorado, which increased by 11 percent (2.61% in 2015 versus 2.90% in 2016), than in Washington, which increased by 9 percent (2.82% in 2015 versus 3.08% in 2016). The national positivity rate for cannabis in the general United States workforce in urine testing increased four percent (2.4% in 2015 compared to 2.5% in 2016).[3]

This evidence suggests that Canadian employers in complex safety-sensitive industries are vulnerable to anticipated increased cannabis use following legalization.

There is no dispute that cannabis use has been and will continue to be a safety hazard faced by Canadian employers in the energy sector. An employer's success in mitigating this risk is directly tied to the ability to deter employees from the use of any substance that has the potential to impair performance.

---

[1] World Health Organization. 2016. "The health and social effects of nonmedical cannabis use." *World Health Organization.* July. Accessed November 29, 2016. http://www.who.int/substance_abuse/publications/cannabis_report/en/.

[2] Office of Parliamentary Budget Officer, November 1, 2016, "Legalized Cannabis: Fiscal Considerations." *Government of Canada*, Accessed December 1, 2017, http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2016/Legalized%20Cannabis/Legalized%20Canabis%20Fiscal%20Considerations_EN.pdf.

[3] Quest Diagnostics. 2016. *Drug Positivity in U.S. Workforce Rises to Highest Level in a Decade.* September 15. Accessed October 9, 2016. http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing.

The truth about cannabis must be untangled from the myths before a reasonable balance can be struck amongst safety, security and other laws such as privacy, human rights, and employment/labour.

Regarding legalized mind or mood altering substances, employers are familiar with addressing alcohol and its impairing effects. Unlike alcohol however, which clearly wears off after some time, impairment from cannabis can have lasting effects that persist up to and beyond 24 hours.[4] Cannabis is not only impairing during a period of acute intoxication or when a person would be commonly referred to as being "high", but it can continue to impair functionality for unspecified periods of time.

In fact, performance can be impaired for as long as 24 hours after consuming a moderate dose of cannabis, and the user may actually be unaware of its continued influence. In addition, recently abstinent cannabis users (7 hours to 20 days), could experience impairment in attention, concentration, inhibition, impulsivity and executive function during the period of time in which THC and its metabolites are still being eliminated from the individual's body. The more prolonged the use of cannabis, the greater the residual deficits in these types of functioning following abstinence.[5]

In his review entitled "Marijuana and the Safety-Sensitive Worker," author Dr. Brendan Adams, M. Sc. MD CCFP, FASAM, ABAM for the Construction Labour Relations of Alberta, concludes that cannabis impairs the ability of individuals to perform safety-sensitive duties for periods of time that are highly variable, but which will be longer than the period of acute intoxication and that there is no particular level of blood concentration of THC which can be identified below which safety impairment is not a concern.[6]

There are many claims that individuals using cannabidiol (CBD) formulations are fit for duty and can perform safety-sensitive work. Such formulations of cannabis are understood as having high CBD content relative to tetrahydrocannabinol (THC). Some of these preparations have very

---

[4] See Government of Canada. (2017, April). Health Canada Health Risks of Marijuana Use. Retrieved March 20, 2018, from https://www.canada.ca/en/health-canada/services/substance-abuse/controlled-illegal-drugs/health-risks-of-marijuana-use.html#s1; World Health Organization 2015. "Update of Cannabis and its medical use." *World Health Organization.* December. Accessed November 29, 2016. http://www.who.int/medicines/access/controlled-substances/6_2_cannabis_update.pdf; See also Health Canada, 2013, *Information for Health Care Professionals Cannabis (marihuana, marijuana) and the cannabinoids.* February. Accessed May 9, 2016. http://www.hc-sc.gc.ca/dhp-mps/marihuana/med/infoprof-eng.php#chp60.

[5] Government of Canada. (2017, April). Health Canada Health Risks of Marijuana Use. Retrieved March 20, 2018, from https://www.canada.ca/en/health-canada/services/substance-abuse/controlled-illegal-drugs/health-risks-of-marijuana-use.html#s1; World Health Organization. 2016. "The health and social effects of nonmedical cannabis use." *World Health Organization.* July. Accessed November 29, 2016. http://www.who.int/substance_abuse/publications/cannabis_report/en/; The College of Family Physicians of Canada, 2013 "The College of Family Physicians of Canada Statement on Health Canada's Proposed Changes to Medical Marijuana Regulations." February. Accessed May 9, 2016. http://www.cfpc.ca/uploadedFiles/Health_Policy/CFPC_Policy_Papers_and_Endorsements/CFPC_Policy_Papers/Medical%20Marijuana%20Position%20Statement%20CFPC.pdf; World Health Organization, 2016, "The health and social effects of nonmedical cannabis use." *World Health Organization,* July, Accessed November 29, 2016. http://www.who.int/substance_abuse/publications/cannabis_report/en/; Volkow et al. 2014. "Adverse Health Effects of Marijuana Use." *N Engl J Med* 370(231) 2219-2227; Grant et al., 2003, "Non-acute (residual) neurocognitive effects of cannabis use: a meta-analytic study." *J Int Neuropsychol Soc* (5):679-89; Medina et al., 2007, "Neuropsychological functioning in adolescent marijuana users: Subtle deficits detectable after a month of abstinence." *Journal of the International Neuropsychological Society* 13:807–820.

[6] 2016, "Construction Labour Relations of Alberta." *Marijuana and the Safety Sensitive Worker,* December 8, Accessed October 10, 2017, https://clra.org/assets/page/files/library/Marijuana2016v3.pdf.

low concentrations of THC (<1%), which is why they are not commonly viewed as impairing. However, a percentage is not a dose; large frequently ingested amounts can still pose a material risk. CBD is not a drug or medication approved by Health Canada. Nonetheless, with more time and research, isolated CBD might become a viable alternative to consuming cannabis with higher percentages of THC, which could become material, particularly for medicinal use.

Currently, the most recent scientific studies and reviews on cannabis use do not provide employers of safety-sensitive employees with sufficient comfort to identify thresholds of THC, CBD or other psychoactive cannabinoids in cannabis for safety-sensitive work, which is of particular concern to employers in the energy sector.

3. CANNABIS IN THE WORKPLACE: THE LEGAL FRAMEWORK

On Christmas Eve of 2009, five workers fell from the 14th floor of a high rise apartment building when the swing stage they were working on collapsed. Four workers died, with the fifth worker surviving the fall with serious injuries. The subsequent investigation into this incident by the Ontario Ministry of Labour found that there were a number of contributing factors to the incident, including several egregious violations of applicable health and safety law in relation to the swing stage and the failure to provide an adequate number of lifelines. The employer, Metron Construction, was the first corporation in Canada to plead guilty to criminal negligence causing death under the *Criminal Code* in June 2012 and was fined $200,000.[7] The fine was subsequently overturned by the Ontario Court of Appeal, which instead imposed a fine of $750,000.[8] The construction project manager was found guilty of five counts of criminal negligence and was sentenced to 3.5 years in prison for each of the five convictions of criminal negligence, these sentences to be served concurrently.[9] One significant factor that is not always addressed in discussions of these precedent-setting decisions respecting criminal negligence is that three of the deceased workers, one of which had been the site supervisor, were found to have had levels of cannabis in their systems consistent with recent use.

Although cannabis impairment in the workplace is not a new issue, the anticipated legalization of recreational cannabis in 2018 has spurred regulators to intensify their focus on workplace health and safety.[10] While legislators devise and implement further regulatory guidelines, employers must operate in accordance with the current legal framework to address the risk of impairment in the workplace.

(a) *Fitness For Duty (Safety-Sensitive Versus Non-Safety-Sensitive Positions)*

At law, safety in the workplace is a shared responsibility imposed on a range of stakeholders with distinct yet complementary duties and interests.[11] While employers bear "primary

---

[7] *R. v. Metron Construction Corporation*, 2012 ONCJ 506.

[8] *R. v. Metron Construction Corporation*, 2013 ONCA 541.

[9] *R. v. Vadim Kazenelson*, 2015 ONSC 3639 and 2016 ONSC 25, appeal dismissed 2018 ONCA 77.

[10] At the federal level, see Canada, Task Force On Cannabis Legalization And Regulation, *A Framework For the Legalization And Regulation Of Cannabis In Canada* (Ottawa: Health Canada, 2016) at p. 28-29.

[11] The statutory duties of workplace stakeholders vary across jurisdictions. Whereas the Ontario *Occupation Health and Safety Act* lists the duties ascribed to constructors, licensees, employers, supervisors, workers, owners, project owners, suppliers and directors and officers of corporations, the *Canada Labour Code* only expressly addresses the duties of employers and employees. See *Occupational Health and Safety Act*, RSO 1990, c-O.1

responsibility to develop and maintain adequate safety measures at [their] work sites, because [they have] the greatest control over circumstances there",[12] workers must nevertheless "protect themselves and each other".[13] Because liability for safety in the workplace is joint and several, failure on the part of employers in respect of their duties does not relieve employees of their own obligations[14] - in all circumstances employees must report to work in a fit, uncompromised condition.

Although the concept of *fitness for duty*, also referred to as *fitness to work*, has become a central theme of occupational health and safety programs in recent years, no authoritative definition has been adopted across jurisdictions or industries.[15] Broadly speaking, "fitness for duty" refers to a physical, psychological and emotional state that allows an individual to perform a job or task in a manner which does not compromise or threaten the safety or health of that individual, others, property or the environment. This proposed definition hinges on two important elements: capacity and task-specificity.

To begin, fitness for duty concerns a worker's capacity to perform job-related tasks, as opposed to his or her actual performance or conduct. An underperforming or unproductive individual may be capable of performing his or her job safely and effectively but might just be unwilling to do so for a variety of reasons usually addressed by traditional performance management and progressive disciplinary measures. By contrast, another individual may similarly be underperforming and be unable to adequately carry out his or her duties as a result of disability, such as addiction, which should be addressed in accordance with the company's applicable accommodation policy and procedure.

Secondly, fitness for duty is task specific. As confirmed by the Nova Scotia Court of Appeal, "[t]he medical judgment of fitness for work is not dispositive unless linked to a specific set of job duties which constitute the 'regular duties' of the claimant's occupation".[16] Like all responsibilities underlying occupational health and safety, an employee's responsibility to be fit for duty is commensurate to, among other things, the nature of the work and the circumstances of the workplace.[17]

Finally, while all employees are expected to be fit for duty, individuals in positions involving heightened risks may justifiably be held to a higher standard. Often designated as "safety-

---

[*OSHA-ON*], Part III; *Canada Labour Code*, RSC 1985, c. L-2, Part II [*CLC*]. In Alberta, following a comprehensive review of the province's occupational health and safety framework in 2017, the *Occupational Health and Safety Act* was amended to, among other things, expand the workplace safety obligations expressly addressed in the statute to a wider range of stakeholders including suppliers, services providers, owners, contractors, prime contractors, self-employed persons and temporary staffing agencies (changes to come into effect June 1, 2018). See *Occupational Health And Safety Act*, RSA c O-2.1, Part 1 [*OSHA-AB*].

[12] *R. v. Campbell* (2006), 140 C.R.R. (2d) 143 at para 4 (ONCA) [*Campbell, ONCA*], aff'g *R. v. Campbell*, [2004] O.J. No. 129 [*Campbell, ONSC*].

[13] *Campbell, ONSC*, *supra* note 8 at para 86-87.

[14] *Ibid* at para 71 citing *R. v. Stelco Inc.* (1989), 1 C.O.H.S.C. 76 (Ont. Prov. Ct.). See also *R. v. Thomas G. Fuller & Sons Ltd.*, [2009] O.J. No. 3225 (ONCA) at para 68.

[15] The Canadian Centre for Occupational Health and Safety defines fitness to work as "a medical assessment done when an employer wishes to be sure an employee can safely do a specific job or task". See Canadian Centre for Occupational Health and Safety, "OSH Answers Fact Sheets: Fit to Work", 1 April 2016, online: <http://www.ccohs.ca/oshanswers/psychosocial/fit_to_work.html>.

[16] *Braithwaite v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 1999 NSCA 77 at para 47.

[17] *Campbell, ONCA*, *supra* note 8 at para 4.

sensitive", these positions have regard to such factors as the particular dangerous environment where the work is performed, the equipment utilized and the employee's direct involvement in high-risk operations, including working from heights, and are such that impairment could result in significant property or environmental damage and/or injury to the employee, others in the workplace or the public.[18] Safety-sensitive positions often depend on alertness, quickness of response, soundness of judgment, and accuracy of coordination of multiple muscle and cognitive functions.

Determining whether a position is safety-sensitive requires a holistic assessment of both the likelihood that risks of damage or injury may materialize and the magnitude of potential loss.[19] In a recent decision, an arbitrator concluded that labourer-level positions on a construction project which involved working occasionally with motorized equipment in close proximity to larger pieces of heavy equipment in demanding field and weather conditions were safety-sensitive, as the positions demanded the worker's undivided focus and a high level of mental alertness to ensure safety.[20]

In keeping with their statutory duty to provide a safe workplace, employers, including management and supervisors, are required to take reasonable precautions to ensure the fitness for duty of employees under their control, whether on a permanent, interim or temporary basis, at the start of, and throughout, each work period.

Adopting a fitness for duty standard is inherently discriminatory as it will preclude an individual with a substance dependence disorder from employment. Human rights legislation in Canada generally prohibits discrimination or perceived discrimination on the basis of a prohibited ground, including disability, where there is an adverse consequence to an employee. In general, exceptions may be available when a discriminatory standard is a *bona fide* (good faith) occupational requirement. Where a job requires an employee to be fit for duty for legitimate safety reasons, this exception may be available to the employer.

As a starting place, employees in safety-sensitive positions should be prohibited from working or even remaining in the workplace while their ability to work is affected by alcohol, drugs or other substances in a manner that endangers their health or safety or that of any other person.[21] Employers should implement applicable policies and should also consider drug testing as part of the overall safety due diligence program. Whether a particular drug testing policy is likely to

---

[18] *Canadian National Railway and CAW, Local 100 (Workplace Alcohol and Drug Policy), Re*, 2010 CarswellNat 6164 at para 5 (Arb. Picher); Canadian Human Rights Commission, *Impaired at Work: A guide to accommodating substance dependence* (Ottawa: Public Works and Government Services, 2017) at p 4, online: <https://www.chrc-ccdp.gc.ca/sites/default/files/impaired_at_work.pdf>. See also *Entrop v. Imperial Oil Limited*, [2000] OJ No 2689 [*Entrop*], in which Imperial Oil's policy under review designated safety-sensitive positions were those "where impaired performance could result in a *catastrophic* incident" and "no direct or very limited supervision [is] available to provide frequent operational checks" [emphasis added].

[19] See *CEP, Local 707 v. Suncor Energy Inc.*, 2012 ABCA 373 at para 19, Côté J.A. dissenting.

[20] *Lower Churchill Transmission Construction Employers' Association Inc. and IBEW, Local Union 1620*, Newfoundland Arbitration Decision, April 30, 2018, (John F. Roil) at pages 42-43.

[21] WorkSafe BC . (n.d.). *Occupational Health and Safety Regulations*. Retrieved from Part 04 General Conditions: https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation/part-04-general-conditions; Yukon Government. (2006, May 11). *Occupational Health and Safety Act and Regulations*. Retrieved from Yukon Workers Compensation Health and Safety Board: http://yukonregs.ca/RegsPublic/Home/Details/157

withstand judicial scrutiny will depend on the safety-sensitive nature of the identified positions and the circumstances of the workplace.[22]

(b) *Drug Testing: The Legal Framework*

The legality of drug and alcohol testing policies is often challenged. Unless carefully designed, such policies may be found to be contrary to human rights or privacy legislation;[23] or, in the case of unionized employers, outside the scope of the collective agreement.[24]

Drug testing is typically used as a risk management tool in an employer's broader safety system to mitigate risk related to the effects of drugs and alcohol on workplace safety. The objective of a drug test is not necessarily to identify impairment; instead, it is to conclusively identify drug usage that poses an unacceptable risk for the occupational activities in question, this use possibly being indicative of impairment of the individual's ability to perform work safely. Biological mediums for testing include urine, oral fluid (saliva), and hair testing.[25] Workplace drug testing methods will usually be in the form of either urinalysis or oral swab.

The process of drug testing generally starts with the documentation of a chain of custody form (CCF) that ensures the continuity, integrity, and privacy of the process. The collection of the specimen (urine or oral fluid) is performed by a certified collection agent in a controlled and confidential environment where the opportunities to tamper with the sample are reduced.

Accredited testing laboratories by the Substance Abuse and Mental Health Services Administration (SAMHSA) require extensive procedures for the handling, quality assurance, and defensibility of the final result. These measures include running all testing on approved instruments, including quality assurance samples and testing to the established detection limits. These detection limits are called "cut-off levels," and they are essential to ensuring that passive inhalation of a drug would not produce a positive confirmed laboratory result. There are two instrumentation methods used in the laboratory to confirm whether a final result is positive.

The final positive laboratory result is then reported to a medical review officer (the "MRO"). The MRO plays a vital role in the final stage of the process where the individual who provided the sample is contacted to discuss the result, answer questions related to use and determine if any legitimate prescriptions could have resulted in the outcome. The MRO should be a licensed physician, in good standing with the college, with specialized training and certification including with respect to interpreting results and all of the potentially valid prescription explanations for those results. The typical outcome from the MRO interview is a reported verified positive test, with or without contact or a reported verified negative result with or without a safety advisory. The MRO can report a laboratory result after a set period has elapsed without successful contact, and after a certain number of attempts have been made to reach the individual who had provided the sample.

---

[22] For example, see notably *Entrop, supra* note 14; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 [*Irving*]; *Imperial Oil Ltd. v. C.E.P.*, Local 900, 2009 ONCA 420.

[23] It should be noted that each Canadian jurisdiction has enacted its own human rights legislation. It cannot be assumed that the jurisprudence from one province is applicable in another or at the federal level.

[24] They could also result in constructive or wrongful dismissal claims if a newly implemented policy during the tenure of an employee constitutes a fundamental or significant change to the terms of employment.

[25] It is important to note that to establish a reasonable connection to risk in the workplace, hair testing is not recommended as a medium of testing.

The MRO may identify a valid prescription that caused the laboratory positive test result that poses a risk to workplace safety. In this instance, a negative result with a safety advisory result would be reported to the employer, obligating the employer to ensure it has obtained from the individual a proper clearance from the prescribing physician before performing any safety-sensitive activities. The prescribing physician should be informed of the nature of the occupation by reviewing a full detailed job description and have knowledge of both the employee's and the employer's occupational health and safety obligations.

There are alternative non-laboratory testing technologies available for drug testing. These tests are called point of collection tests ("POCT") and must align with the established standards for laboratory cut-off levels, and be performed with specificity and precision. At this time, using urine POCT is preferable, provided that there is laboratory confirmation of the result and an ensuing MRO review of all non-negative or inconclusive outcomes. Options for oral fluid instant testing devices that align with the established cut-off levels for drug testing remain limited.[26]

(i) Human Rights Law

Drug and alcohol testing engages human rights law because jurisprudence has recognized substance dependency as a disability, which is a prohibited ground of discrimination.[27] To challenge drug and alcohol screening under human rights legislation, an employee must first establish a "*prima facie* case of discrimination" on the basis of substance dependency. If the employee passes this threshold, the onus shifts to the employer to demonstrate that the impugned policy is a "*bona fide* operational requirement" (often referred to as a "BFOR").

The test for establishing *prima facie* discrimination was recently considered by the Supreme Court of Canada (the "SCC") in *Stewart v. Elk Valley Coal Corp* ("*Stewart*").[28] On appeal of this Alberta case, the SCC held that the employees must demonstrate that:

1. they possess a characteristic protected from discrimination under the provincial human rights statute;

2. they experienced an adverse impact; and

3. the protected characteristic was a factor in the adverse impact.

A *prima facie* case of discrimination will not be established if any of the criteria listed above are not proven on a balance of probability. For example, the employer might rebut the third criterion by demonstrating that substance dependency was not a causal factor in the employee's misconduct.[29]

---

[26] Demers, D. (2012). The Truth About Instant Oral Fluid Testing. Retrieved from CannAmm: https://www.cannamm.com/wp-content/uploads/2013/12/Whitepaper-OralInstantFluid.pdf; Drummer, O. H. (2006). Drug Testing in Oral Fluid. The Clinical Biochemist Review, Aug; 27(3): 147–159.

[27] See e.g. *Stewart v. Elk Valley Coal Corp.*, [2017] 1 SCR 591 at para 22 [*Stewart*]; *Entrop*, *supra* note 14 at para 89; *Mainland Sawmills v. Industrial Wood and Allied Workers of Canada, Local 2171 (Kandola Grievance)*, 2002 CarswellBC 2465 at para 69.

[28] *Stewart*, *supra* note 18 at paras 23-24.

[29] See e.g. *British Columbia (Public Service Agency) v. British Columbia Government and Service Employees Union*, 2008 BCCA 357. In *Stewart*, *ibid*, the majority held that the Tribunal's decision that Stewart had not made out a *prima facie* case of discrimination was reasonable. The employer's position that Stewart was terminated for failing to comply with his employer's Alcohol, Illegal Drugs & Medication Policy, and not for any discriminatory

Once a *prima facie* case of discrimination is established, the employer may demonstrate a *BFOR* by proving on a balance of probabilities that:[30]

1. the employer adopted the standard for a purpose rationally connected to the performance of the job;

2. the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

3. the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose.

To meet the third criterion, the employer must demonstrate that individual employees cannot be accommodated without imposing undue hardship on the employer. Even where there are potentially significant health and safety issues, the threshold of "undue hardship" is high. As explained by the SCC in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.* ("*Meiorin"*): "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test.' […] [T]he standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship".[31]

In the recent decision of *Lower Churchill Transmission Construction Employers' Association Inc. and IBEW, Local Union 1620,*[32] which is helpful to employers, the arbitrator dismissed a grievance that challenged a refusal by the employer to hire an individual who used medical cannabis into safety-sensitive position(s) on the basis of undue hardship. In this case, the undue hardship experienced by the employer was the lack of existing drug testing technology to determine impairment caused by cannabis use. The arbitrator took into consideration medical evidence that impairment by cannabis could last up to 24 hours after it had been consumed. The arbitrator held that in order to manage the safety risk posed by the use of medical cannabis, an employer must be able to measure the impact of the drug on the individual's work performance; hence, the lack of means to manage the risk of harm constitutes an undue hardship.

It is at this juncture that privacy laws must also be considered.

(ii) Privacy Law

In Canada, there is a patchwork of legislation and common law doctrine protecting the privacy of personal information, which also impacts drug and alcohol testing.

The *Personal Information Protection of Electronic Documents Act*[33] ("PIPEDA") applies to federally regulated employers. There are three provinces that have enacted privacy legislation

---

reason, was supported by Stewart's termination letter. Wagner and Moldaver JJ., concurring in the result, and Gascon J., dissenting, found that a *prima facie* case of discrimination had been established.

[30] *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 at para 54 [*Meiorin*].

[31] *Ibid* at para 62.

[32] *Lower Churchill Transmission Construction Employers' Association Inc. and IBEW, Local Union 1620*, Newfoundland Arbitration Decision, April 30, 2018, (John F. Roil).

[33] *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.

applicable to employees of provincially-regulated private sector employers: British Columbia[34], Alberta[35] and Quebec[36]. In general, privacy legislation in these jurisdictions regulates the collection, use and disclosure of "personal information". Under PIPEDA and the privacy legislation in British Columbia and Alberta, there are provisions that permit employers to collect personal information from employees without their consent provided that the collection of the information is reasonable and the employees have prior notice of the collection of information and purpose.[37] While the collection from a breathalyzer, saliva, blood or urine sample itself is not addressed by the legislation, the information that is revealed by the collection falls within the protection of the privacy statutes.

Provincially-regulated private sector employers in other provinces are not subject to similar legislation, however employees can challenge the collection, use and disclosure of their personal information by an employer using two approaches: (i) the common law tort of "intrusion upon seclusion", also commonly referred to as the tort of invasion of privacy; or, (ii) human rights or anti-discrimination legislation.

The tort of "intrusion upon seclusion" was first recognized by the Ontario Court of Appeal in 2012.[38] This tort addresses "highly offensive" invasions of privacy, such as intrusions into "financial or health records, sexual practices and orientation, employment, diary or private correspondence". [39] The right against invasion of privacy is not absolute and may give way to competing claims.[40] Balancing this right is highly relevant to employers with strong competing interests in ensuring the health and safety of workers and the security of their worksites.

Employers in the energy sector must balance individual rights to privacy and human rights against the employer's obligation to provide a safe workplace. Every Canadian jurisdiction has human rights legislation that prohibits discrimination in hiring and in the course of employment on the basis of prohibited grounds, including disability as discussed above.[41] An individual seeking a remedy under human rights legislation in relation to discrimination on the basis of mental disability, such as a drug or alcohol addiction, and/or failure to accommodate a disability to the point of undue hardship, could also have complaints relating to a privacy breach arising from any associated drug and alcohol test or in the manner in which the way the disability was handled.[42]

In most circumstances, balance must be struck by taking into account the self-worth, dignity and the right of an employee to safeguard his/her personal information (and be free from discrimination) and that of an employer to collect, use and/or disclose that personal information to further the competing interest of workplace safety. The interest of an employer in collecting and using the results of a drug or alcohol test to support its health and safety objectives will be

---

[34] *Personal Information Protection Act*, S.B.C. 2003, c. 63.

[35] *Personal Information Protection Act,* S.A. 2003, c P-6.5.

[36] *An act respecting the protection of personal information in the private sector*, R.S.Q. c. P-39.1.

[37] See *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, s. 7.3, *Personal Information Protection Act,* S.A. 2003, c P-6.5, s. 15(1); and *Personal Information Protection Act*, S.B.C. 2003, c. 63, s. 13.

[38] *Jones v. Tsige*, 2012 ONCA 32.

[39] *Jones* at para 72.

[40] *Jones* at para 73.

[41] For example, see the *Alberta Human Rights Act*, RSA 2000, c A-25.5, s. 7.

[42] See for example *Entrop v. Imperial Oil Limited*, 2000 CanLII 16800 (ONCA), in which the Ontario Court of Appeal determined that the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 limited the employer's ability to conduct certain types of drug and alcohol testing.

assessed for its reasonableness. In most cases, reasonableness will be determined by the notice the employee had of the potential that a test would be taken (i.e., the drug and alcohol policy), the manner in which the test was taken, including the justification for the test, the way in which the results were handled and the treatment of any follow up information relating to either a disability or recreational use.

The collection and use of the results of a drug and alcohol test is more likely to be found to be "reasonable" where the employer can demonstrate that the drug and alcohol test is a component of a broader workplace health and safety program, where testing is restricted to individuals in safety-sensitive positions that require sobriety, and particularly where there is "cause" for the test (such as where there are *bona fide* reasons to suspect that an individual is impaired or where an individual has been involved in a serious incident). Prior notice of the test can be adequately provided through a properly implemented drug and alcohol policy. Consent can be a term of employment.

Other types of testing, including random, pre-employment and pre-access testing, may be reasonable, but the willingness of adjudicators to uphold these forms of testing has varied by jurisdiction, as will be discussed in greater detail throughout this paper.

(iii) Collective Bargaining

In unionized environments, the employer retains the power to impose policies and rules on employees. Where employees face discipline for rule infringements, however, those rules must be both consistent with the collective agreement and reasonable.

The approach by adjudicators in Alberta prior to the SCC's 2013 decision in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd* (2013) ("*Irving*")[43] was arguably more employer-friendly than the approach taken in Ontario. Historically, arbitrators in Ontario and other eastern provinces took the narrow view that a testing program can only be justified in limited circumstances, while arbitrators in Alberta were more likely to uphold a broad testing program, even without evidence that there is a substance abuse problem in the workplace.[44]

The SCC provided analysis of the reasonableness of drug and alcohol testing in *Irving*, in which it considered a grievance brought by the unionized employees of a paper mill in relation to their employer's policy instituting randomized breathalyzer testing for alcohol use by individuals in safety-sensitive positions. The Court held that the reasonableness requirement for imposing rules in unionized workplaces required employers to draw a reasonable balance between their objectives (*i.e.* maintaining safety) and the harmful impacts of drug testing on employee rights (*i.e.* the right to privacy):

> Assessing the reasonableness of an employer's policy can include assessing such things as the nature of the employer's interests, any less intrusive means available to address the employer's concerns, and the policy's impact on employees.[45]

---

[43] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd* (2013) ("*Irving*").

[44] *Bantrel Constructors Co. v UA Local 488*, (2007) 162 L.A.C. (4th) 122 (Smith – Chair, AB); appeal allowed 2009 ABCA 84 (CanLII), (2009) 305 D.L.R. (4th) 397, 182 L.A.C. (4th) 97 (ABCA) at p. 146.

[45] *Ibid* at para 80.

The Court upheld a consensus among labour arbitrators that, even in dangerous workplaces, the imposition of mandatory random testing for employees was "an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace."[46]

Following the SCC's decision in *Irving*, determining what constitutes sufficient evidence of a "general problem in the workplace" has been contentious. The issue was recently examined in *Suncor Energy Inc v. Unifor Local 707A* ("*Suncor*"), in which unionized employees grieved the employer's randomized drug and alcohol testing policy for safety-sensitive positions at some of its Fort McMurray worksites. The employer took the position that the addiction problems at the site demonstrated "a pervasive problem that is unparalleled in any case in Canada."[47] This included over 2,200 drug and alcohol related incidents, including three fatalities, in a nine-year period.[48] Notably, in *Irving*, in which the random testing policy was not upheld, the employer relied on eight documented alcohol-related incidents over a 15-year period.[49]

In *Suncor*, the majority of the Alberta Labour Relations Board upheld the Union's grievance. The Board found that the employer's allegations of a pervasive substance abuse problem were "unparticularized and unrefined", and concluded that the employer had not demonstrated sufficient safety concerns within the bargaining unit to justify random testing.[50]

The Alberta Court of Queen's Bench ordered the Board's decision quashed because it: (1) misapplied the balancing exercise of the employer's need to ensure safety against privacy interests as outlined in Irving; (2) only considered evidence that demonstrated substance abuse problems within the bargaining unit, ignoring the evidence of problems in the wider workplace; and, (3) failed to consider all the relevant evidence. The Court ordered that the matter be sent back for a fresh hearing by a new panel.[51]

The union appealed the decision to have the Alberta Court of Appeal's decision quashed. In its decision, the Court of Appeal upheld the Queen's Bench decision, concluding in part that the Board had unreasonably ignored evidence of substance abuse in the broader workplace. By requiring the employer to adduce evidence particularized to members of the bargaining unit, the Board had set the *Irving* evidence threshold too high. The Court of Appeal concluded that the *Irving* test "calls for a more holistic inquiry into drug and alcohol problems within the workplace generally, instead of demanding evidence unique to the workers who will be directly affected by the arbitration decision."[52]

In keeping with the Alberta Court of Appeal's decision in *Suncor*, the Ontario Superior Court recently released a decision favourable to employers seeking to establish robust drug and alcohol testing policies in *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*

---

[46] *Ibid* at para 6.

[47] *Unifor, Local 707A v. Suncor Energy Inc., 2014 CanLII 23034* (AB GAA), 2014 CarswellAlta 457 at para 158 [*Suncor 2014*].

[48] *Ibid* at para 37, 53.

[49] *Irving, supra* note 33 at para 13.

[50] *Suncor 2014*, *supra* note 37 at para 253, 266, 271.

[51] *Suncor Energy Inc. v. Unifor, Local 707A*, 2016 ABQB 269 at para 69, 79, 88.

[52] *Suncor Energy Inc. v. Unifor Local 707A*, 2017 ABCA 313 at para 46, leave to appeal to SCC requested.

("*TTC*").[53] In this case, the Court declined the union's request for an injunction prohibiting the Toronto Transit Commission (the "TTC") from implementing random drug and alcohol testing pending the completion of grievance arbitration. The Court in *TTC* distinguished the case from *Irving*, finding that the evidence provided indicated a demonstrated workplace drug and alcohol problem at the TTC.

Notwithstanding the specific caution to employers in unionized workforces with respect to relying on the management's rights clause versus bargaining for implementing testing, these decisions underscore the importance of thorough documentation of drug and alcohol problems in the workplace and the need for employers to take into account the full scope of the safety issues they can demonstrate prior to implementing drug testing.

(c) *Justifications for Testing*

While some justifications for drug testing in the safety-sensitive workforce are largely uncontroversial, others have been the subject of extensive litigation.

As confirmed by the SCC in *Irving*, there is consistent arbitral jurisprudence establishing that, in dangerous workplaces, employers can demand that an employee submit to a drug test when "there is reasonable cause to believe that the employee was impaired while on duty" or "was involved in a workplace accident or incident."[54] The Court further noted that there is arbitral consensus that employers may require drug testing as part of an employee's negotiated return to work following an incident.[55]

Beyond "reasonable cause" and "post-violation" or "post-accident" testing, the legal standard for demonstrating the reasonableness of other justifications for proactive or anticipatory drug testing remains challenging for Canadian employers, even for safety-sensitive positions in dangerous workplaces.

A. Pre-Employment Testing

In most Canadian jurisdictions (although not all, such as Alberta, for example), the use of pre-employment drug and alcohol testing as an applicant screening tool is not justifiable, and is in fact considered prima facie discrimination, on the basis that it does not establish or predict that the subject of the test will come to work impaired by drugs or alcohol, even if he or she tests positive for drugs or alcohol prior to starting employment.[56] Given that a positive pre-employment test result is not indicative of impairment in the workplace, the typical argument that testing is required for safety purposes may not be successful unless the employer can demonstrate that it has a sufficiently serious workplace drug and alcohol problem such that pre-employment testing is justified.

---

[53] *Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078 [*TTC*].

[54] *Irving, supra* note 33 at para 5; Note a recent decision in Ontario *Airport Terminal Services Canadian Company v Unifor, Local 2002*, 2018 CanLII 14518 (CA LA) at para. 45 in which the arbitrator noted that a post-incident testing policy was overly broad and unreasonable because it was drafted to mandate drug and alcohol testing after every accident and incident (even potentially very minor occurrences), not just serious or significant events, without an analysis or balancing of an individual's privacy interests.

[55] *Irving,* supra at para. 5.

[56] Specifically addressed in *Entrop*, supra note 14 at para 103. See also e.g. Ontario Human Rights Commission, "Policy on Drug and Alcohol Testing 2016", online: <http://www.ohrc.on.ca/en/book/export/html/19116 >.

The jurisprudence suggests that testing for drugs and alcohol after a person receives a conditional offer of employment for a safety-sensitive position may be permissible.[57] Currently, an employer intending to implement pre-employment testing should ensure that any subsequent revocation of offer following a positive test result does not violate that applicable provincial human rights legislation. To that end, employers should not allow the candidate to commence safety-sensitive duties prior to the test result being returned in order to mitigate against potentially violating human rights while upholding the integrity of the pre-employment test itself.

B. Pre-Access Testing

Pre-access drug and alcohol testing generally requires individuals to submit to a testing procedure immediately prior to being permitted on a job site.

In *Mechanical Contractors Assn. Sarnia v. United Assn. of Journeymen and Apprentices of the Plumbing & Pipefitting Industry,*[58] the Ontario Divisional Court upheld a labour arbitration board ruling concluding that such a policy was not permissible. The employer, a Suncor contractor, complied with Suncor's policy requiring pre-access drug and alcohol testing for all contractors. The arbitrator found that pre-access testing was a violation of both the applicable collective agreement and the Ontario *Human Rights Code.* The arbitrator held that drug and alcohol screening was not a *BFOR* because it "cast too broad a net" by capturing employees who were not impaired or performance deficient and who posed no workplace health and safety risk.[59]

This case remains the leading precedent on policies which include pre-access testing in Ontario and is instructive for other jurisdictions. It is clear that the arbitrator leaves open the possibility that pre-access testing may be justifiable where there is evidence of a health and safety problem in the workplace linked to alcohol and drug use. It is important to note that the analysis in the case was limited to circumstances involving drug testing technology that fails to capture current impairment or performance deficiency, as well as any information that would indicate the extent of the individual's use of the drug (i.e. whether a casual user, drug dependent, etc.). Current laboratory testing technology performed to a defensible standard is highly reliable and specific, however serves to signify a potential risk of impairment or likely impairment. As broader acceptability of the current testing methods or a revised set of testing thresholds are adopted to signify an actionable workplace risk, it is possible that drug testing methods will drive different outcomes in these types of cases. New technology and methodology in this space will require considerable scientific acceptance and due diligence to withstand the legal scrutiny that the current litigiously resilient methods of testing offer to employers.

C. Mandatory Random Testing

As *Irving* indicates, mandatory, random drug and alcohol screenings will often be found to be contrary to human rights legislation or impermissible under the collective agreement. There are also right to privacy arguments that can be made in opposition to random testing where there is

---

[57] See e.g. *Chornyj v. Weyerhaeuser Co.*, 2007 CarswellOnt 983 (Ont. Div. Ct.); also see https://www.albertahumanrights.ab.ca/employment/employer_info/hiring/Pages/pre-employment_medicals.aspx, which demonstrates that even in Alberta where pre-employment testing has not be virtually outlawed like in other jurisdictions, the guidance still instructs employers that a conditional offer ought to be made in order for the collection to be reasonable.

[58] *Mechanical Contractors Assn. Sarnia v. United Assn. of Journeymen and Apprentices of the Plumbing & Pipefitting Industry*, 2014 ONSC 6909.

[59] *Mechanical Contractors Assn. Sarnia and UA*, 2013 CarswellOnt 18985 at para 222.

no justification for implementing the program. *TTC* and *Suncor* may, however, represent a renewed willingness to find that some circumstances justify random testing.

Even in workplaces where mandatory, random screening is justifiable, it is important that the testing technology and methodology selected be able to detect present or reasonable risk of impairment with integrity. To detect risk of impairment, the test must be forensically sound and limited to biological mediums that reflect recent (rather than past, for example, hair testing) drug or alcohol usage *and* the results must be returned prior to the employee resuming work in a safety-sensitive position.

In *Entrop v. Imperial Oil Limited* ("*Entrop*"),[60] an employee challenged Imperial Oil's drug and alcohol testing policy. The Ontario Court of Appeal upheld the Ontario Human Rights Commission's finding that random drug testing discriminated on the basis of actual or perceived substance abuse.[61] The Court notably found that randomized drug testing by urinalysis was not a *BFOR*, because the test detected past drug use (which would have minimal impact on workplace safety), as well as present drug use. By contrast, the Court of Appeal held that alcohol testing constituted a *BFOR* because breathalyzer tests detected present impairment.[62]

In *Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900* ("*Nanticoke*"),[63] the Ontario Court of Appeal again considered the Imperial Oil drug screening policy. Following *Entrop*, Imperial Oil had instituted saliva testing for cannabis. The test used could detect present impairment but the results were not available for several days because they required analysis at a laboratory in Houston. The Court upheld the arbitration board's finding that such delayed results did not promote safety because potentially impaired employees were sent back to work.[64]

The Ontario Court of Appeal decisions in *Entrop* and *Nanticoke* stand in contrast with the decision in *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company,* where the Alberta Court of Appeal upheld pre-employment testing for cannabis. The Court of Appeal held that the effects of cannabis usage persisted for a number of days, and that therefore even casual users of cannabis posed a safety risk and essentially indicated a risky lifestyle.[65]

These cases tend to narrowly define impairment, conflating it with the individual's stronger, initial intoxication and the period of time during which the individual experiences the most obvious symptoms of recent use. Adjudicators seem to have anchored their understanding of cannabis impairment on alcohol impairment thereby failing to take fully into account the broader neurocognitive impairments that continue beyond the initial period of intoxication when an individual uses cannabis. A recognition of the continued impairment of executive function and other deficits following this initial period should support a finding that a positive drug test serves

---

[60] *Entrop v. Imperial Oil Limited*, 2000 CanLII 16800 (ON CA) [*Entrop*].

[61] *Ibid* at para 92.

[62] *Ibid* at para 99-113.

[63] *Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900*, 2009 ONCA 420 [*Nanticoke*].

[64] *Ibid* at para 72.

[65] *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2007 ABCA 426.

to reasonably indicate an actionable risk that an individual is impaired and should not work in a dangerous or safety-sensitive position.

The Canadian Nuclear Safety Commission, under the *Nuclear Safety and Control Act*[66], has recently passed a regulatory document entitled Fitness for Duty: Volume II: Managing Alcohol and Drug Use. This document is the first in Canada to obligate Canadian employers to drug test employees for all of the justifications explored herein, including random testing. Its contents are precedent-setting in a number of ways: first, it clearly indicates that security-sensitive and safety-sensitive occupations may necessitate fitness for duty as a *bona fide* occupational requirement; secondly, it reinforces that current justifications for testing are suitable and; lastly, the defensible methods commonplace in Canada are both an acceptable and a practical means of identifying workplace risk.[67]

(d) *Implications for Employers in the Energy Sector*

It is estimated that over 500,000 drug tests are performed each year in Canada for purposes relating to employment and that this number is increasing. An employer seeking to satisfy its obligations under human rights and privacy legislation while justifying a testing program for workplace health and safety should ensure its policy and procedures include the following elements:

1. Safety-Sensitive Positions: In general, testing will be more likely to be a *bona fide* occupational requirement where the nature of the work performed by the employee subject to the test is truly safety-sensitive. Each position should be evaluated to determine if it is safety-sensitive. In developing a job description for a new position, safety-sensitive tasks should be clearly identified.

2. Justifications for Testing: The various justifications for testing that are or may be implemented should be identified in the policy along with a description of the basis for each. Best practices suggest that employers should further identify the scope of drugs being tested and the respective cut-off thresholds and similarly the cut-off thresholds for alcohol levels as well.

3. Testing Mediums, Methods and Cut-off Levels: The only three acceptable biological mediums or specimen types for testing in Canadian workplaces are breath (alcohol), urine, and oral fluid. Taking action on results of testing requires forensic integrity of both the instrumentation used to perform the testing, as well as the process for collecting the specimens and conducting the testing. Cut-off levels should be established at arm's length by either the Department of Health and Human Services (DHHS) or a Canadian authority, if available. Employers should be aware that adhering to the established cut-off levels is often a limiting factor in the use of POCT and that no adverse employment action should be taken unless the results can be verified. Site removal pending the results is not considered adverse and is an administrative function.

---

[66] *Nuclear Safety and Control Act*, SC 1997, c 9.

[67] Canadian Nuclear Safety Commission. (2018, January 8). REGDOC-2.2.4: Fitness for Duty: Volume II : Managing Alcohol and Drug Use, version 2. Retrieved January 24, 2018, from http://www.nuclearsafety.gc.ca/eng/acts-and-regulations/regulatory-documents/published/html/regdoc2-2-4-v2-version2/index.cfm.

4. Self-Disclosure Mechanism: There should be a procedure in the workplace for an employee or prospective employee to proactively disclose a substance dependency or other disability without fear of reprisal. The procedure should direct the employee to the applicable accommodation policy and procedure.

5. Disciplinary Consequences: Since these policies are part of the overall safety due diligence program, they should outline the disciplinary consequences that can result for policy breaches. However, attention must be paid to any potential dependency issues and human rights obligations.

6. Consistent Implementation: All policy violations should be followed by removal from safety-sensitive work and, where appropriate, an arm's length evaluation of whether the individual has substance dependency issues in order to determine whether there are accommodation obligations and to assist with determining the process for a safe return to work.

7. Compliance with Third Party Policies: For employers who are part of joint ventures or that provide services to other companies on their sites or at their camps, there should be a provision that alerts employees to the possibility that they may need to comply with other company's drug and alcohol policies regarding site access or performing other services under those contracts. Employers should review the other entity's policies first to ensure they are reasonable.

These elements are found in most energy sector employer policies. However, while many employers have already updated their policies to address medicinal cannabis, with the anticipated legalization of cannabis, existing policies will need to be further revisited as most identify drugs as "illicit" or "unlawful." Employers must also consider the language they use in describing the objectives in their policies, for example, by ensuring that there is a focus on risk reduction and identification of the risk of impairment versus exclusively a focus on identifying actual current impairment. Testing methods that are presently available (e.g. urinalysis, oral fluid and blood testing) do not show current impairment for drugs, rather they approximate the risk or likelihood of impairment. The acceptability of these variations, primarily dependant on the biological medium chosen and respective testing cut-off threshold, will likely be impacted by legalization; and will be discussed further below.

4. MEDICAL CANNABIS CONSIDERATIONS

i. Medical cannabis at the workplace

Lawful access to medical cannabis evolved from SCC jurisprudence, *Regina v. Terrance Parker*, adjudicated the year preceding the first 2001 Marijuana Medical Access Regulations (MMAR), subsequently repealed on March 31, 2014 and replaced with Marijuana for Medical Purposes Regulations (MMPR), repealed on August 24, 2016 and replaced with the current Access to Cannabis for Medical Purposes Regulation.[68] With each revision to the medical cannabis regulations, medical accessibility and treatment options for patients has been expanded and decentralized away from the federal government's direct oversight. It is of note that the initial medical accessibility to cannabis was not the consequence of endorsement by

[68] Government of Canada. (2016, August 24). Access to Cannabis for Medical Purposes Regulations. Retrieved October 19, 2016, from http://laws.justice.gc.ca/PDF/SOR-2016-230.pdf; Government of Canada. (2017, April); Regina v. Parker, 2787 (Court of Appeal for Ontario July 31, 2000).

national medical authorities like the Canadian Medical Association, Federation of Medical Regulatory Authorities nor Health Canada. This circumstance is one where the legal community's level of evidence necessary for acceptability and the medical community's level of evidence necessary for acceptability differed. The medical authorities' broad support of both the past and present regulations is limited due to the lack of conclusive clinical quality research to support evidence-based treatments for the totality of the available medical applications under the Access to Cannabis for Medical Purposes Regulation. At this time cannabis is not an approved drug or medicine according to Health Canada and remains legally accessible via a medical authorization and obtained through a licensed producer.[69] The intent of the aforementioned is not to discredit the suitability or validity of cannabis as a medical treatment, but to highlight the limitations of the current state of available medical evidence to guide any occupational opinion, by even the most qualified medical professionals, on the topic of work clearance and fitness for duty.

There have been mixed reviews over whether the use of medical cannabis should be prohibited for employees performing safety-sensitive work. However, recently case law has developed to support employees using medical cannabis in safety-sensitive work where it can be shown that the use is not impairing.

Based on reports from both Canadian and US Occupational Medicine authorities,[70] an employer may have a reasonable basis for requiring a worker's abstinence from cannabis both on and off-duty, where the employee is unable to provide sufficient medical evidence to demonstrate that he or she will not be impaired at work. From one perspective, this denial may be justified by the lack of sufficiently credible evidence-based authoritative directives by occupational medicine authorities, the lack of pharmacokinetic evidence to support the medical clearance, and the inconsistency of such clearance as compared to occupational health standards for the railway industry, enforcement, and aviation – all of which are complex and dangerous occupations.[71] However, from another perspective, it has been found in recent jurisprudence that medical cannabis was judged to be consumable in a manner that does not render the employee unfit for safety-sensitive work. It is worth noting that these determinations, as in most cases, were limited to the evidence provided and the nuances of the applicable policies.

---

[69] Canadian Medical Association. (2013, February 28). CMA Response: Health Canada's Medical Marihuana Regulatory Proposal. Retrieved November 29, 2016, from https://www.cma.ca/Assets/assets-library/document/en/advocacy/Proposed-Medical-Marihuana-Regulations_en.pdf; Federation of Medical Regulatory Authorities. (2013, February 27). Medical Marihuana: What the Medical Regulatory Authorities have to say. Retrieved November 29, 2016, from http://fmrac.ca/wp-content/uploads/2014/02/SubmissiononMedicalMarihuana.pdf; Health Canada. (2013, February). Information for Health Care Professionals Cannabis (marihuana, marijuana) and the cannabinoids. Retrieved May 9, 2016, from http://www.hc-sc.gc.ca/dhp-mps/marihuana/med/infoprof-eng.php#chp60.

[70] Phillips JA, H. M. (2015). Marijuana in the workplace: guidance for occupational health professionals and employers: Joint Guidance Statement of the American Association of Occupational Health Nurses and the American College of Occupational and Environmental Medicine. Journal of Occupational and Environmental Medicine, 57(4):459-75; Goldsmith, R., Targino, M., Fanciullo, G., Martin, D., Hartenbaum, N., White, J., & Franklin, P. (2015). Medical marijuana in the workplace: challenges and management options for occupational physicians. Journal of Environmental and Occupational Medicine, 518-525; Els, C. (2016); Marijuana and the Workplace. The Canadian Journal of Addiction, 7(4):5-7.

[71] *Canadian Aviation Regulations*, SOR/96-433; Railway Association of Canada. 2016. "Canadian Railway Medical Rules Handbook." Accessed December 1, 2017 at https://www.railcan.ca/wp-content/uploads/2016/10/Canadian_Railway_Medical_Rules_Handbook_EN.pdf; US Department of Transportation, 2015, *US Department of Transportation.* August 20, Accessed on November 29, 2016 at https://www.transportation.gov/sites/dot.gov/files/docs/PART40_20150413.pdf.

In a recent decision from Ontario, an arbitrator heard medical evidence respecting cannabis impairment and concluded that a grievor whose urine test had been positive for cannabis use and had not consumed cannabis for at least 12 hours before commencing work on the date of the incident, was not impaired.[72] The arbitrator relied upon the decisions in *Canadian Pacific Railway and Teamsters Canada Rail Conference*[73], and *Canadian Pacific Railway and Teamsters Canada Rail Conference*[74], in which the arbitrators found that a positive urine test is not conclusive of impairment. The arbitrator went on to comment on concerns respecting the use of cannabis, including that the medical experts in the case agreed that the strain of cannabis used is an important consideration because it could have a significant effect on the window of impairment. The arbitrator concluded:

> Finally, the expert evidence and literature are inconclusive when it comes to determining the window of impairment which varies depending on the strain, dosage and the user and as such, extreme caution should be taken when an employee is taking medicinal marijuana in a safety-sensitive workplace.[75]

In *French v. Selkin Logging* (*French*),[76] the grievor, a cancer survivor who admitted to regularly smoking cannabis at work to manage pain, was operating a company vehicle and collided with a moose. Mr. French did not have a permit for medicinal cannabis and worked in the logging industry. Although no evidence was presented that Mr. French's ability to work safely was actually impaired, the British Columbia Human Rights Tribunal concluded that the employer's "zero tolerance policy" was a *bona fide* operational requirement.[77] The employer was not required to accommodate Mr. French's smoking of cannabis without medical authorization.[78]

By contrast, in *Calgary (City) v. Canadian Union of Public Employee*,[79] the opposite conclusion was reached in respect of a heavy equipment operator who used medically authorized cannabis before going to bed. The matter was referred to arbitration when the employer removed the grievor from his position upon learning of his cannabis use and accommodated him in a non-safety-sensitive capacity. In arbitration, it was found that there was no evidence that the cannabis use had any impact on the grievor's ability to perform safety-sensitive duties in a safe manner or that he had ever exhibited signs of impairment on duty. Dependency was not established. The remedy was to reinstate the grievor as a heavy equipment operator with back pay, subject to a protocol for handling the employee's cannabis usage.[80]

Any determination of whether the options and extent of accommodation required for an employee using medical cannabis in a safety-sensitive occupation will require an analysis of the strain, dosage, timing of use, alternative available treatments and factors specific to the user.

Employers must, therefore, distinguish three scenarios:

---

[72] *Airport Terminal Services Canadian Company v Unifor, Local 2002*, 2018 CanLII 14518 (CA LA) at para. 28.

[73] *Canadian Pacific Railway and Teamsters Canada Rail Conference*, 2014 CarswellNat 929 (Schmidt).

[74] *Canadian Pacific Railway and Teamsters Canada Rail Conference* (Reid), 2013 CarswellNat 4110 (Picher).

[75] *Airport Terminal Services Canadian Company v Unifor, Local 2002*, 2018 CanLII 14518 (CA LA) at paras. 29 & 30.

[76] *French v. Selkin Logging*, 2015 BCHRT 101.

[77] *Ibid* at para 134.

[78] *Ibid* at para 132.

[79] *Calgary (City) v Canadian Union of Public Employees (Cupe 37)*, 2015 CanLII 61756. See also *Wilson v. Transparent Glazing Systems Ltd.*, 2008 BCHRT 50.

[80] *Ibid* at para 155.

1. An employee using cannabis recreationally or without proper medical documentation or justification, in which case, there is no duty to accommodate the employee;

2. An employee using cannabis in accordance with proper medical documentation and is therefore unfit for duty due to this use. In many situations, this employee may be entitled to accommodation in a non-safety-sensitive position; and

3. An employee using cannabis in accordance with proper medical documentation and is willing to pursue an alternative effective treatment that does not pose a workplace risk. The employer may not be able to remove this employee from the safety-sensitive position.

Since the federal government has announced the legalization of cannabis for recreational use, employers must consider the extent to which they need or prefer to restrict the use of recreational cannabis both on and off work duty.

5. RECREATIONAL CANNABIS CONSIDERATIONS

Many drug and alcohol policies allow for limited social drinking during the workday for specific, non-safety-sensitive employees or at social-host parties or events that include drinking during off-duty hours. In all cases, employees are expected to come to work and remain fit for work throughout their shift. Once cannabis is legalized, its social use will become more acceptable and employers will need to decide whether they will continue to prevent any such use during the work day or at company events. Employers will need to adapt their policies and practices with recreational use in mind particularly with regard to the presence of metabolites in an employee's system due to off-duty recreational use.

It is conceivable that more employers, or at least the law, will move toward mandating oral swab or other methods, like urine, for identifying risk or risk of impairment. Appreciating that the current thresholds may change, the employee will regardless have to remain off work for typically 4 or more days if the final result is positive or negative with a safety advisory (non-negative, not conclusive, etc.). Laboratory testing with forensic integrity requires two technical methods, screening and confirmation as well as a discussion between the employee and a physician certified as a medical review officer to verify the final outcome of the result directly with the employee prior to the employer notification. For safety-sensitive employers who currently use urinalysis for drug testing, they may have to change their gears from weeding out candidates following pre-employment tests or releasing employees following positive *for cause* tests, where there is no dependency, based on test results that show *risky lifestyles* (i.e., show potential past impairment, and current risk of impairment) due to the anticipated increase in use once cannabis is legalized. Similarly, employees in the past have often disclosed or been diagnosed with dependency following a drug test when assessed by a substance abuse professional, which invokes the employer's duty to accommodate, and the question becomes whether employees will begin to maintain that their use is recreational after a positive test result. Clearly, the net result for these employees is potential job protection, if the use was due to dependency, versus job loss, if the use was recreational.

While the type of drug and alcohol policy implemented for addressing consequences of use will be key, it would not be surprising if employees begin to challenge the types of tests chosen for privacy reasons, particularly in jurisdictions with specific privacy legislation, given that the substance will be legalized. An employee's argument could be that the test results are overly broad, fail to achieve the objective of the policy (because they do not show current impairment)

and therefore the testing is an unreasonable collection of personal information. Hence, the importance again of focusing on risk of impairment or risk reduction as the primary intent of the fit for duty policy.

It is important that employers in the energy sector approach drug testing as a reasonable risk identification tool within a broader program aimed at removing risk, while retaining the individual. Focusing on time of use, current impairment is fraught with peril, as there is no biological test to date that measures current impairment for cannabis – nor is such a test necessary when the objective is risk reduction. What is important is that to be fit for duty, there should not be any objective evidence of recent drug use that surpasses the currently accepted thresholds. The available methods, including testing thresholds, are reasonable indicators of risk of impairment and the lingering neurocognitive effects of cannabis – what is skewed however, is the understanding of the acute period of intoxication that is, at this stage, likely too narrow a view for safety interests of the energy sector.

6. IS A ZERO TOLERANCE POLICY ACCEPTABLE?

In addition to being exposed to potential civil liability, employers risk incurring criminal charges pursuant to section 217.1 of Canada's *Criminal Code* should they be found to have failed to "take reasonable steps to prevent bodily harm to [a person over whom they undertake, or have the authority, to direct how that person does work or performs a task], or any other person, arising from that work or task".[81]

Across Canada, employers have a general duty under occupational health and safety legislation to take all precautions reasonably necessary for the protection of workers. In the event of a workplace incident resulting in a worker's injury or illness, an employer may have a defence to a breach of a statutory health and safety obligation where it can show that it has been duly diligent in taking all precautions reasonably necessary to ensure the safety of a worker in the circumstances.

Faced with these risks, zero tolerance policies may seem like attractive measures to employers with safety-sensitive operations. These policies express that there will be zero tolerance for on-the-job consumption, possession, sale or distribution of drugs and alcohol, and accordingly a breach of the policy will result in dismissal. However, employers must consider whether the policy has the potential to result in discrimination or failure to accommodate an employee with a dependency. Accordingly, zero tolerance testing policies are only likely to withstand judicial review in limited higher risk circumstances.

Zero tolerance policies also need to clarify whether they are addressing past or present use. The Canada Human Rights Tribunal phrased the issue as follows in *Milazzo v. Autocar Connaisseur Inc.* (2003): "The question then arises: Zero tolerance of what? Zero tolerance of employee impairment? Or zero tolerance of employees having drug metabolites in their systems?"[82]

Case law in respect of zero tolerance policies is largely unsettled and will likely evolve significantly following the legalization of cannabis and currently used technology that does not test for current impairment as it is currently understood by the courts.

---

[81] *Criminal Code*, RSC 1985, c C-46, 271.1.

[82] *Milazzo v. Autocar Connaisseur Inc.*, 2003 CHRT 37 at para 63.

Most recently, the Ontario Superior Court's decision in *TTC* suggests a less stringent, threshold-based policy, is more likely to be upheld upon review. Under the TTC's Fitness for Duty Policy, a positive oral fluid drug test was one in which a sample tested contained a drug at or above specified cut-off levels. The thresholds adopted by the TTC were higher than those in the Mandatory Guidelines for Federal Workplace Drug Testing Programs drafted by the U.S. Substance Abuse and Mental Health Services Administration ("SAMHSA").[83] The Court observed that the TTC's relatively high cut-off levels, along with other factors, made it likely that the person who tested positive was indeed impaired when tested. Therefore, "the TTC Policy reasonably ensures that *only* employees who are most likely acutely intoxicated due to recent consumption of cannabis will test positive" [emphasis added].[84] After considering all the evidence, the Court was satisfied that random testing would increase public safety because "the likelihood that an employee in a safety critical position, who is prone to using drugs or alcohol too close in time to coming to work, will either be ultimately detected when the test result is known or deterred by the prospect of being randomly tested".[85]

Ultimately, *TTC* indicates that an appropriately-selected impairment threshold supported by third-party research such as SAMHSA or the Canadian Medical Association[86] is more likely to survive judicial review than zero tolerance policies, which are at risk of being deemed unreasonably broad or unclear.

In any event, it is essential to recognize that drug testing in general is not "zero tolerance," as a laboratory responsible for testing will have a threshold of an acceptable presence of any given drug. This threshold is called a "concentration cut-off level." The purpose of this cut-off level is to preserve the integrity of the testing by reasonably accounting for passive or environmental exposure.

7. POLICIES REQUIRING DISCLOSURE OF SUBSTANCE DEPENDENCY

Courts have readily acknowledged that alcohol and drug testing engages an individual's right to privacy.[87] As discussed above, employee privacy interests must be considered within the context of an employer's work environment, including an employer's obligation to maintain a safe work environment. An employee's right to privacy does not necessarily override an employer's health and safety obligations.[88] This balancing act is particularly important in respect of safety-sensitive positions, where safety concerns that are known to employees "will reasonably diminish their expectation of privacy concerning their drug and alcohol consumption".[89]

The tension between privacy and safety is highlighted in decisions regarding policies that require an employee to disclose drug or alcohol use prior to committing a policy breach.

---

[83] See *TTC*, *supra* note 43 at para 23; Substance Abuse and Mental Health Services Administration, "Drug Testing", online: <https://www.samhsa.gov/workplace/drug-testing#HHS Mandatory Guidelines>.

[84] *TTC*, *supra* note 43 at para 117, 144.

[85] *Ibid* at para 153-54.

[86] See e.g., Canadian Medical Association, CMA Driver's Guide: Determining medical fitness to operate motor vehicles, 9th ed. (Toronto: Joules, 2017).

[87] See e.g. *Irving* at para 52.

[88] See *Suncor 2014*, *supra* note 37 at para 35 citing *inter alia R. v. Cole*, 2012 SCC 53 at para 52.

[89] *TTC*, *supra* note 43 at para 40.

(a) *Disclosure*

(i) Discipline For Failure To Disclose Substance Use

The SCC has recently upheld an Albertan employer's decision to terminate an employee for breaching its drug and alcohol policy despite the employee's dependency disability. In *Stewart* (discussed in 3(b)(i) above), the SCC affirmed the Alberta Human Rights Tribunal's finding that the employer could terminate an employee for testing positive following an incident. This case directly addressed the question of whether an employer can discipline an employee who failed to disclose substance dependency.

The employee worked in a mine operated by Elk Valley Coal Corporation. The duties of his position included driving a loader. The employer implemented a policy requiring that employees disclose any dependence or addiction issues before any drug-related incident occurred. If an employee disclosed such an issue, he/she would be offered an opportunity to receive treatment, however, an employee who failed to disclose would be terminated in the event that they are involved in an accident and subsequently test positive for drugs. The employer had a policy that provided for post-incident testing.

The employee did not disclose to his employer that he was using cocaine on his days off from work. After being involved in an incident with his loader, the employee tested positive for drugs. The employer terminated his employment.

The SCC agreed with the Alberta Human Rights Tribunal that the employee's termination was due to non-disclosure rather than the employee having an addiction. The SCC concluded that the employee's denial about his addiction was irrelevant to the case because the employee had the capacity to come forward to disclose his drug use and to make rational choices regarding his drug use.[90]

Allowing disclosure to be made to a designated medical authority is encouraged to further protect employee privacy while encouraging self-reporting. As explained by an arbitrator in *Vancouver Shipyards Co. v. U.A., Local 170*:[91]

> [22] […] In particular, employees must be seen as entitled to require that the disclosure be limited to appropriate medical authorities employed or retained by the Employer so that the goal of assessing whether any proactive intervention required to protect the interests of both the employee and the Employer can be achieved without compromising the employee's right of privacy beyond the level needed to protect the Employer's right of disclosure.
>
> [23] In an age when drug and alcohol addiction is routinely seen as a disability that requires accommodation by employers, the balancing of interests implicit in the approach dictated in the legislation and the relevant Court and arbitral decisions requires that disclosure be limited to the level necessary to permit the Employer to respond objectively. It is implicit that an employee who has a current drug or alcohol problem must disclose that fact and thus permit managerial and supervisory employees to be informed to ensure that the safety aspects of an employer's operation are addressed. By contrast, disclosure of past problems

[90] *Stewart, supra* note 18 at para. 38.

[91] *Vancouver Shipyards Co. v. U.A., Local 170*, [2006] B.C.C.A.A.A. No. 187 at paras. 22-23.

> that are acknowledged to have been in remission for up to six years favour a restriction on the level of reporting. In particular, the interests of the Employer would be preserved if disclosure is made to a designated medical authority so that the implications of the past problem and the possibility of a relapse can be assessed and accommodated. [underline emphasis added]

Employers should emphasize that confidentiality will be maintained in any self-disclosure case to the extent possible in keeping with the obligation to manage the employee and the workplace. Employers should utilize a qualified third party substance abuse professional to assess for disability post testing and requirements, including a return to duty drug test for a safe return to work, and follow up unannounced testing for ongoing compliance and deterrence of relapse.

Regarding recreational use, it can be anticipated that most employers of safety-sensitive employees will maintain that employees cannot use cannabis in a manner that makes them unsafe or unfit for duty; therefore, under the current state of the case law, self-disclosure of recreational use will be irrelevant because a positive test will likely then have disciplinary consequences notwithstanding. However, as technology evolves or as the case law develops, or both, employers could see a shift in acceptable levels of off duty use that does not impact the safe performance, which again can result in privacy challenges, grievances or wrongful dismissal claims, unless the employer's policies, practices and testing standards shift as well.

(ii) Discipline For Failure To Report Substance Use By A Colleague

Employers may consider implementing provisions in their policies that encourage (or even require) employees to report *bona fide* suspicions or knowledge of substance use by a colleague that may impact safe performance of job duties, with appropriate references to the general obligations of supervisors and workers under the applicable occupational health and safety laws.

It is critical that such a discipline policy be flexible so that each case is evaluated on its merits. For example, it may be difficult to demonstrate that an employee who suspected or was aware of a colleague's substance use should be severely disciplined for failure to report. However, where a colleague is found to have been aiding, encouraging or was otherwise culpable in a preventable safety incident and there is clear evidence of the employee's knowledge, employers should preserve discretion to apply more severe discipline as part of their overall safety program.

In addition to providing for discipline relating to a failure to comply with the policy by reporting suspicions of substance use, employers may also want to consider having a workplace policy that provides the potential for discipline for employees who have reported substance use in bad faith or who are otherwise dishonest in their reporting.

Regarding recreational cannabis use, employers will have to consider the extent to which they can expect or require an employee to report off-duty use, which may be witnessed at a social gathering or similar outing unrelated to the workplace. At the very least, employers ought to emphasize the requirement to report suspicions that a co-worker is unfit for duty based on observations at the time of reporting. Whether an employer would be justified in requiring reports of off-duty recreational use as reasonable or too far-reaching (e.g., privacy) will need to be challenged and decided by our courts and regulators.

8. CONCLUDING REMARKS: WHAT TO EXPECT FROM FUTURE LEGISLATION

Few countries have legalized cannabis, placing Canada and its employers at the forefront of establishing an approach to address the associated risks in workplaces, and more broadly in society. The anticipated legalization of recreational cannabis in 2018 has caused regulators to consider the implications for occupational health and safety and related legislation.[92] To date, plans for additional or amended legislation vary across jurisdictions. City of Calgary bylaws have been considered that would prevent use in most public places however local police have indicated that these bylaws would be nearly impossible to enforce.[93]

In Ontario, Bill 174 received Royal Assent in December 2017 and prohibits consumption of cannabis in a workplace within the meaning of the *Occupational Health and Safety Act*,[94] with exceptions for persons who consume it for medical purposes in limited occupational settings.[95]

By contrast, Alberta has committed to reviewing occupational health and safety regulations and to working with employers, labour groups and workers to ensure that current rules continue to address cannabis impairment issues.[96]

One may speculate over whether this recent interest in the regulation of legalized cannabis use, industry groups and regulators of dangerous, safety-sensitive workplaces will strive for an approach similar to that of the Canadian Nuclear Safety Commission to make the implementation of testing programs mandatory. However, in safety-sensitive industries that fall short of dealing with nuclear or other extremely dangerous goods with high potential of catastrophic damage, it remains to be seen whether our regulators would actually go that far. It is possible that occupational health and safety laws will be amended to address all intoxicating substances over time.

As we have described above, Health Canada has acknowledged that THC in cannabis impairs an individual's ability to drive safely and to operate equipment, and can also potentially increase the risk of falls and other accidents. THC affects an individual's executive functions, including coordination, reaction time, ability to pay attention, make decisions and judge distances. Health Canada has recognized that impairment from cannabis can last for more than 24 hours after use, well after the symptoms associated with recent use may have faded.[97]

Cannabis use is expected to rise, and employers in the energy sector are left in the position of having to try to preempt and prevent the consequential workplace risks. To manage the added workplace risk imposed by legalization of cannabis, employers need to understand that

---

[92] At the federal level, see Canada, Task Force On Cannabis Legalization And Regulation, *A Framework For the Legalization And Regulation Of Cannabis In Canada* (Ottawa: Health Canada, 2016) at p. 28-29.

[93] Calgary Herald. (2018, April 8). From Calgary city hall: Should cannabis use be limited to homes? Retrieved from http://calgaryherald.com/news/local-news/live-from-calgary-city-hall-council-debates-ban-on-cannabis-use-in-public.

[94] *OSHA-ON*, *supra* note 7.

[95] Bill 174, *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017*, 2nd Sess, 41th Parl, 2017, cl 11 (assented to 12 December 2017), SO 2017, c.26.

[96] Government of Alberta, "Alberta Cannabis Framework and Legislation", online: <https://www.alberta.ca/cannabis-framework.aspx#p6241s8>.

[97] Government of Canada. (2017, April). Health Canada Health Risks of Marijuana Use. Retrieved March 20, 2018, from https://www.canada.ca/en/health-canada/services/substance-abuse/controlled-illegal-drugs/health-risks-of-marijuana-use.html#s1

impairment from cannabis is not the same as impairment from alcohol. Cannabis impairment presents differently, is more subtle and lasts longer than alcohol – often unknowingly to the user. Cannabis as a medicine is also not risk-free despite the many low THC formulations. Research and knowledge about dosages and effects have yet to become more enhanced. The implications of the conclusions by research authorities regarding cannabis in the workplace are also significant. The conclusions point out that focusing on just the "high" or on acute impairment, as Canadians tend to do, is insufficient. Research serves to reinforce existing approaches that focus on managing risk versus impairment – enabling employers now more than ever to adopt current technology and best practice standards that are both trustworthy and well established. What is critical, however, is to ensure that any standards that are adopted are applied correctly, in a fair and reasonable manner and in accordance with the current legal landscape.

Employers in the energy sector will have to ensure that they are aware of and stay current on anticipated legal, scientific and technological advancements relating to cannabis in order to ensure they are onside the law while remaining to be an attractive, safe place to work. Employers are well aware of their legal obligation, and shared responsibility to enforce workplace safety, including implementing adequate safety measures to prevent harm. While all employees are expected to be fit for duty, individuals in positions with heightened risks are justifiably held to a higher standard. Increasingly, these standards include using drug and alcohol testing as a reasonable deterrent and compliance tool; and, for these tools to work properly, they hinge on a balancing of several interests, where safety considerations must be real and tangible.

With legalization, current policies and practices will need to be reviewed to address fitness for duty, social and other potentially acceptable instances of cannabis use (or the continued prohibition of cannabis use at any event related to the company) and, the specific language used in the policy may need to be adjusted as it will likely subsume cannabis in the category of illicit drugs. Testing components of policies will have to adapt to, and develop with, the anticipated evolution of drug testing methodologies and case law. The energy sector with its many safety-sensitive occupations will be among those industries that lead the way in navigating the new, legal landscape that will make waves across Canada, and beyond, if and when cannabis is legalized. Understanding cannabis and its impacts on workplace safety, along with balancing the associated human rights and privacy rights, are the first steps in promoting a safe future for our Canadian workplaces in tandem with the groundbreaking likelihood that using cannabis will soon become an acceptable and common social norm.