

# ALCOHOL AND DRUGS: CANADIAN POLICY DEVELOPMENT<sup>i</sup>

## Background/Introduction:

Many Canadian organizations in a wide variety of industry sectors are concerned about alcohol and drug use patterns and the need to take appropriate steps to deal with employees who may be impaired on the job. Many have provided assistance programs to help those with a current or emerging alcohol or drug problem. Some have work rules around alcohol and drug use, while others may have some reference to "fitness for duty" requirements in a health and safety policy. However, many employers have recognized this may not be enough in order to minimize safety risk and associated liabilities. They are implementing comprehensive policies and are supplementing their approach with alcohol and drug testing under certain circumstances.

There have not been a significant number of surveys on drug use patterns in Canada, however we do have some data that suggests among the general population, overall substance use is at levels that lead to unacceptable impacts on health and safety, resulting in high social and financial cost to Canadians. The Canadian Tobacco, Alcohol and Drugs Survey conducted in 2013 provides the most recent survey information on alcohol and drug use patterns for Canadian adults (age 15 or older).<sup>ii</sup> The following highlights are of interest:

- Alcohol is by far the most prevalent substance used by Canadian adults; the most recent national survey found:
  - 75.9%% of Canadian adults reported being current drinkers (past year)
  - males are more likely to be current drinkers, to exceed the low risk drinking guidelines and report harms from drinking than females; and
  - current alcohol use in Quebec is the highest in Canada (82.8%) followed by Saskatchewan (75.5%), while current drinkers in Newfoundland and Labrador are most likely to exceed the low risk drinking guidelines than in any other province.
- Marijuana continues to be the illicit drug of choice. The same survey found:
  - 10.6% of Canadians report being current marijuana users<sup>1</sup>;
  - males (13.9%) continue to be more likely than females (7.4%) to be current users;
  - 48.6% of those age 15-24 report being current users, as do 8% of those 25+;
  - 11.3% of Canadians reported using any drug<sup>2</sup> (including pharmaceuticals to get high) in the past year, with males more likely (14.9%) than females (7.9%);
  - 19.9% of current users reported harm to self as a result of use;
  - reported current cannabis use in BC is the highest in Canada at 13.3% and reported use of any drug was highest at 13.7%.

To put the Canadian situation into perspective, the International Narcotics Control Board's 2011 report (March 2012) confirmed prescription drug abuse is a significant problem in the U.S., Canada, and Mexico. Most of the cannabis produced in Canada is consumed within the country, although some is sent to the U.S. market in exchange for cocaine and firearms.

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<sup>1</sup> Note this survey was conducted before the change in medical marijuana laws, before the proliferation of illegal retail outlets and before the Government announced legalization. The numbers are likely very low.

<sup>2</sup> Cannabis, cocaine/crack, meth/crystal meth, ecstasy, hallucinogens, salvia, inhalants, heroin; abuse of pain relievers, stimulants; sedatives to get high

Canada remains a significant manufacturer of ecstasy which, although primarily intended for domestic use, is increasingly being trafficked to the U.S. and other markets.

### **Alcohol and Drug Policies and Testing Programs: Recent Trends**

A significant number of employers in many industry sectors are introducing alcohol and drug policies focused on fitness for work and minimizing risk of accidents and injuries. Court and arbitration decisions have confirmed employers do not need “proof” of a problem before taking proactive steps in this area to ensure workplace and public safety by issuing comprehensive policies and including testing under certain circumstances. (Note: The requirement of “proof” of a problem is key, however, to introducing random testing in a union workplace as a result of the Supreme Court ruling in Irving Pulp and Paper.)

Unlike the United States and some of the European countries, the Canadian government decided not to issue regulations requiring testing in certain industry sectors, nor has it provided guidance on how to appropriately deal with workplace alcohol and drug use. As a result there is no guidance on appropriate policies/programs, or Canadian standards or procedures for the testing process. There has been increasing guidance available on the need for assessment and appropriate accommodation for individuals who have a dependency, although a finite point to “undue hardship” remains unclear. There have been some program challenges in the past, and much of the direction of Canadian policies and testing programs is drawn from interpretation of a variety of legal decisions.

Policy Development – Canadian Direction: The primary impetus for programs in Canada came initially in the transportation and oil and gas sectors. In the mid 1990’s, cross border truck and bus drivers were regulated by the U.S. government in the absence of Canadian regulatory direction. Companies were obliged to have comprehensive alcohol and drug testing programs (including pre-employment and random testing) in place for their drivers as a condition of operating into the United States. Most felt obliged for health and safety reasons to extend their policies to all employees, although not the random testing requirement.

A key human rights decision (Autocar Connaisseur) as well as changes in Canadian Human Rights Commission direction in this area caused some companies to rethink maintaining this differentiation. The ruling allowed for random testing of bus drivers remaining in Canada as well as those crossing the border. As such, the most recent policy of the Commission has allowed for testing in all situations (noted below) and in particular allows for random alcohol and drug testing for truck and bus drivers whether regulated by the U.S. government or not. It also notes a case could be made for random testing of other safety-sensitive positions as long as a *bona fide* occupational requirement can be established. As a result there has been further policy development and testing activity in this sector since the new policy was released. With the changes in marijuana laws, it is expected carriers/bus companies will have more impetus to extend their random testing requirements for all commercial motor vehicle operators. It would be consistent with human rights policy.

Parallel to this, after the Exxon Valdez incident off the coast of Alaska in the late 1980’s, many companies in the oil and gas sector began to introduce comprehensive policies with testing triggered in a number of circumstances. The Exxon subsidiary in Canada (Imperial Oil) also introduced random testing, but it was not widely embraced by other Canadian companies in this sector. Most companies had programs in place by the mid 1990’s and many have reviewed and updated these programs in recent years as the legal situation around testing has become clearer. They have also extended their requirements to contract workers through a separate statement of contractor requirements leading to more policy implementation in many different sectors to meet client requirements.

The introduction of policies, including alcohol and drug testing, has primarily been in higher risk industries, including transportation, oil and gas, mining, construction, utilities, forestry and manufacturing. Some municipalities, health care and retail distribution have also introduced policies with testing under certain circumstances.

Policy Development - Process: There are a number of key areas that policies must address, and several difficult decisions that need to be tackled. The first step is to establish a background justification for the specific policy decisions that follow. There are some valid reasons for taking a "two step" process. The courts/arbitrators/human rights tribunals have found the reasons for establishing the policy - the thought patterns that go behind it - are just as important as the policy components themselves.

The policy should meet the standard set out by the Supreme Court<sup>iii</sup> to establish a *bona fide* occupational requirement for introducing the policy, as well as for introducing certain requirements (e.g. testing) or having higher standards for safety-sensitive or other designated positions or designated safety-sensitive work locations.

Policy Components: Various adjudicators have indicated that simply putting in place a policy copied from a U.S. parent, or someone else in the industry will not meet the Supreme Court test. There is no 'typical' policy or program; if the steps above are followed, each program will reflect the unique corporate culture and values of the company, the fundamental aspects of the business it is in, the regulatory environment within which it must operate, and most important, the specific program needs. However, there are a number of key areas that policies must address, and several difficult decisions that need to be tackled. And it should be clear throughout the following sections that assistance for those who may have a problem is an important part of a balanced approach.

Canadian companies cannot simply implement a testing program or policy. Testing may play a role as an investigation tool or deterrence tool, but must be part of a broader approach that includes the following:

1. Awareness and education programs, both at policy introduction and ongoing;
2. Access to assistance, through an internal or contracted employee assistance program, or as appropriate, community resources, and assessment tools as required;
3. Training for supervisors on their role under the policy, including both performance management, and appropriate steps to take to investigate a possible policy violation, including decisions on reasonable cause and post incident testing; and
4. A variety of tools to investigate if someone may be in violation of the policy.

Each of these components should be included in any company program. The policy statement itself should:

- be written down and broadly communicated to all employees;
- provide clear direction on the objective and application (who is covered and under what circumstances);
- outline the applicable rules around the use and possession of alcohol, illicit drugs, and other mood altering substances, responsible medication use, and expectations associated with on call and unexpected call in situations, including any higher standards for risk- or safety-sensitive positions;
- confirm employee, supervisor/manager responsibilities, and the responsibilities of the designated Program Administrator (primarily managing the testing program);

- clarify avenues to access assistance, reinforce the importance of obtaining assistance for a problem before it impacts the workplace, and outline conditions for return to duty, including aftercare provisions on a case by case basis;
- set out the procedures which will be followed to investigate a possible policy violation, (e.g. investigation and escort procedures if someone is unfit for work, accident investigation, impaired driving situations, searches, alcohol and drug testing); and
- set out consequences for a policy violation and any conditions for continued employment, including provisions for a Substance Abuse Professional assessment to determine whether the individual has a problem in need of accommodation.

Finally, in order to be effective, it must be carefully communicated so everyone knows what is expected of them and where to get assistance if they need it. As well, supervisors need specific training on their responsibilities around performance management, investigating possible policy violations, and making referrals for an alcohol and drug test. Someone must be in charge of the overall program, usually called the Program Administrator, who will ensure consistent communications, education, and training all take place, and who will contract for necessary external resources including testing services, Employee Assistance Program or other counseling services, and Substance Abuse Professionals to provide specific assessments in a post violation situation or if an employee reaches out for assistance for an alcohol or drug problem.

Canadian unions, human rights bodies, privacy commissions and civil liberties organizations have not questioned an employer's obligation to provide a safe workplace and the importance of setting out clear and well-communicated policies to this end. Their major concerns have focused on the investigative tools used to ensure compliance, the introduction of alcohol and drug testing, the consequences for a violation, and ensuring those with a problem receive appropriate accommodation.

Trends in Accommodation: Federal and Provincial Human Rights Legislation prohibits discrimination on the basis of a disability. Current or former dependence on alcohol or other drugs is considered a disability under the federal Act, and has been interpreted in the same manner at the provincial level. Issues around reasonable accommodation, and establishing a *bona fide* occupational requirement (*bfor*) for treating someone differently need to be addressed.

Prevention initiatives including access to assessment, assistance, treatment, and follow-up services, as well as modifying hours or duties in certain circumstances would all contribute to accommodation responsibilities. Employee (and Family) Assistance Programs (EAP/EFAP), either internally provided or externally contracted, are an employee benefit provided by many larger organizations. As more and more companies of all sizes have been putting in place policies in recent years, they have recognized the need to provide broad brush, confidential assistance programs for employees and often for family members.

Most EAPs provide access to services provided by a variety of professionals including psychologists, social workers, and addiction specialists. Although not limited to addictions, they can be one of the most effective ways to deal with alcohol and other drug problems in the workplace. An effective EAP provides confidential assistance for problems that interfere with an employee's ability to function on the job efficiently and safely through prevention, identification, assessment and referral, and follow-up services. EAP services are normally accessed on a voluntary basis, although suggested referrals during the performance management process may also be triggered.

Although there have been professionals working in the field of substance abuse for many years, the concept of a "Substance Abuse Professional", or SAP, has taken on a new meaning when it comes to workplace policies in recent years. SAP services are entirely separate and different from the counselling services provided by an EAP. A SAP referral is normally triggered under a company alcohol and drug policy when an employee violates stated rules regarding alcohol or drug use (e.g. use on the job, a positive test result, etc.) and is subject to discipline. The SAP must have knowledge of and clinical experience in the diagnosis and treatment of alcohol and drug related disorders. Because of human rights obligations to accommodate an individual with an alcohol or drug dependency, the SAP's role is to:

- assess whether the individual has a dependency;
- make recommendations regarding education and/or treatment as appropriate;
- confirm that the recommended program had been or was being followed; and
- recommend a return-to-duty monitoring program to support someone's continued recovery and return to work, which often includes unannounced testing, particularly in higher risk situations.

A more recent trend is to not wait until a policy violation to trigger a SAP referral. Because of the greater obligation to address potential safety risk, increasingly employers are making directed referrals for a SAP assessment when the employee specifically says they may have a problem or requests help for a problem with alcohol or other drugs. In this case, and especially in situations where the individual's work is risk- or safety-sensitive, employers can not ignore the situation. This is an opportunity to trigger an assessment and assistance for their problem. Failure to do so could present a safety risk to the individual and those they work with, as well as legal liabilities should nothing be done and a serious incident involving the worker result.

The key to this is understanding that the SAP responsibilities are separate and distinct from the counseling services provided through the EAP. Finally, there is a potential conflict of interest if the organization providing the SAP assessment also profits from providing a treatment or testing program; one would have to question the objectiveness of an assessment when financial considerations are in play. This is why, in the U.S. alcohol and drug testing regulations which impact our cross border truck and bus drivers, and rail operations, there is specific direction that SAPs can not have any affiliation with a treatment facility. Employers contracting for SAP services should ensure this type of independence exists.

Medical Marijuana: Human rights laws also protect people from discrimination and harassment because of past, present or perceived disabilities. Disability covers a broad range and degree of conditions including physical, mental disorders, hearing or vision disabilities, and other conditions including medical conditions. Employers have a duty to take reasonable steps to accommodate the individual's needs up to undue hardship which will vary with each situation (e.g. financial costs, size and resources of the employer, extent of disruption of operations, morale problems of other employees etc.). These laws must be taken into consideration when looking at medical marijuana in the workplace.

Until April 1, 2014, Health Canada provided individual licenses for individuals with serious medical conditions to grow and use marijuana for medical reasons. Changes in the law and the Health Canada program has allowed medical practitioners to authorize individual use; note this is not a prescription, it is only an authorization. Health Canada is licensing commercial producers to provide the product under strict security and quality control. (30 as of June 2016). Other retail distributors are illegal, but popping up in communities across Canada, some being closed and some being allowed by the municipality under conditions.

Health Canada has made it clear that "Marijuana is not an approved drug or medicine in Canada and has not gone through the necessary rigorous scientific trials for efficacy or safety. Health Canada does not endorse the use of marijuana but the courts have required reasonable access to a legal source of marijuana for medical purposes."

Medical associations have expressed caution to members because of the limited research on health effects, however there are many doctors now providing the authorization to individuals for a variety of reasons – it is no longer a situation where the individual is seriously ill as was the case with Health Canada's original program. The government has issued updated guidance to doctors expanding on potential adverse effects on the teenaged brain and on driving safely. It states: "Studies have shown that acute cannabis administration (ie. THC) affects areas of the brain involved in perception, attention, concentration, inhibitory/impulsivity control, executive control/decision-making, awareness, alertness, and co-ordination all of which are required to safely operate a motor vehicle."

It appears the employer's perspective was not taken into account at all when the regulations were issued. From the employer's perspective, because authorization is presumably for a medical condition, there may be a duty to accommodate an employee who advises use of medical marijuana is required to address their medical condition. However the question becomes whether the individual truly has a valid medical condition in need of accommodation, and if yes, whether the employer must accommodate the choice of medication, particularly if it can present risk on the job.

Company policies need to be very clear on the rules around fitness for work, illicit drug use and possession, responsible medication use (including use of a safe alternative when available), and reporting the need for modified work if their medication use can impact their ability to perform their job. Once an employer is aware of medical marijuana use, decisions are needed on:

- whether the employee can continue in their job or whether there is work modification available to accommodate the situation;
- how long alternative work can actually be accommodated, if at all;
- if there is a need to accommodate their choice of medication or whether an alternative medication can be used that would allow them to work safely;
- whether they will require an Independent Medical Evaluation to determine if the person is safe to do their job and/or if an alternative medication should be used; and
- at what point does the accommodation meet the standard of undue hardship such that employment needs to be terminated, or lay off occur until they can safely resume duties.

It is difficult to know how this will work out for employers, and in particular those in high risk industries, until clarification is provided through the courts, human rights rulings and arbitration decisions. There are only very preliminary decisions at this point. With the possibility of legalization, it is even more essential that employers have clear policies and positions in place, and ensure they are communicated.

Testing Programs: As noted, Canadian companies have taken the initiative to put in place comprehensive policies with a priority on workplace safety, including assessment and assistance provisions. The testing procedures that have been adopted, for the most part, mirror those developed in the U.S. governing Canadian cross-border drivers. Canadian laboratories have been accredited directly by the U.S. Department of Health and Human Services to provide sample analysis services at a very high standard.

The following trends have been seen in recent years.

- Canadian companies are increasingly including alcohol and drug testing as one component of their company policy, particularly in what would be considered risk or safety-sensitive industries or activities. Historically, the standard practice has been:
  - to collect a urine sample for analysis in a certified laboratory with the core testing panel of marijuana, opiates, amphetamines (including methamphetamine and ecstasy), phencyclidine (PCP), and cocaine;
  - to use a calibrated breath analyzer for alcohol testing, although in remote situations, alternative technology may be required where a breath machine is not readily available.
- Protocols can be set up to test for other drugs as required under the circumstances (e.g. for a follow-up testing program on direction from the SAP or treatment centre in special client circumstances, or where there are significant problems with additional drugs in a community).
- Because of the demands of the regulated motor carriers for qualified testing services:
  - a comprehensive network of trained collection facilities was established across Canada to meet 'cross border' motor carrier needs; collection capability has expanded further as there is more demand throughout the country;
  - there is currently one Canadian lab certified to provide fully accurate testing services for Canadian companies which is located in London, Ontario; the company has also introduced a DHHS approved screening lab in Edmonton in order to expedite the screening process; and
  - a number of Canadian occupational health physicians have had the appropriate training to be certified as Medical Review Officers - an essential part of any workplace testing program as the MRO contacts the employee to determine if there are legitimate medical reasons to overturn the lab result.

As such, an infrastructure has been established, and companies exploring the option of including testing under their policy can be assured of reliable and accurate results - provided they used qualified and experienced service providers. Normally this is managed by a Third Party Administrator which provides all of the necessary services under one package. This is a case of "buyer beware", though. Unfortunately, product manufacturers with quick and cheap solutions, unqualified collectors, doctors claiming to be qualified Medical Review Officers (MROs) who are not, and non-certified labs have shown up and started promoting their services. In the absence of any government standards employers have been at the mercy of product promoters; without asking the right questions, some have ended up with highly ineffective programs, or programs that would not be defensible if challenged.

- Other technologies have also been introduced:
  - "On site" or "point of collection" urine drug testing screens are increasingly being used for reasonable cause and post incident testing, particularly where there are concerns about turnaround times because of distance from the lab. The process is the same as would be followed for standard lab urinalysis, except the first stage immunoassay screen is performed at the collection site. It is important that these test kits also have the capability to test for adulterants at the time the 'screen' test is taken or else they could present a "false negative" result that would not go on to a lab for confirmation testing.

Any “non-negative” result must be confirmed in a certified laboratory with qualified independent Medical Review Officer review of positive lab results.

- Oral fluid (saliva) samples are being increasingly used to test for drug presence, primarily in random testing situations and this technology is also being looked at as an alternative to use in other testing circumstances; the technology tightens the window of detection from what is found with a urine sample.

Oral fluid testing is being introduced in U.S. regulations as an option for the truck/ bus/rail industry including cross-border drivers. This decision is tied to the proliferation of cheating on the unobserved urine sample collection. In this case, the sample must be collected, sealed, and forwarded to a laboratory for analysis using the same procedures for urinalysis. Use of oral fluid testing technology may be an option in remote locations where there are no trained external collectors. In this situation, a local medic, first aid, safety or security person (either an employee or a contracted service) would need to be properly trained to perform the collection. And where a breath analyzer is not readily available, the lab can also test for alcohol levels from the oral fluid collected.

There are no accurate “quick” saliva/oral fluid tests available at this time despite what the marketers are saying – they are not yet specific enough to accurately identify use of a number of the drugs being tested at designated cut off levels. The result is drug users will have negative test results at site, and their sample would never go to the lab. However, it is expected the accuracy of these devices will improve in time, particularly with the pressure for accurate roadside screening devices to address medical and recreational marijuana users who are operating vehicles in violation of the Criminal Code.

- Many Canadian employers are also recognizing the significant problems with Oxycontin (prescribed pain killers) which are increasingly being used illegally. Testing for these synthetic opiates is often added to the opiate group but must be specifically requested in the testing program. It is also being introduced to the U.S. regulated programs.
- Adulteration? There are hundreds of products available in North America to help individuals who want to “beat” the urine drug test. These are available through magazines, head shops, novelty shops, dietary supplement retailers and websites. The products include dilution products, cleansing products, adulteration additives, and substituted urine (devices, reservoir, catheter). Some products are effective and detectable, while others are not yet detectable or disappear on their own. Some are not effective but are still marketed and sold as being able to “beat a test”.

Because of the proliferation of products, if an employer decides to begin testing, the company must ensure adulterant checks are part of the program, and any confirmed adulteration of a sample is considered a “refusal to test” with appropriate consequences.

## **Legal Developments**

Canadian employers face a variety of potential legal issues that may be related to alcohol and drugs that are best addressed through consistent implementation of a clear and reasonable policy. This can include addressing the liabilities associated with the actions of impaired employees at work, due diligence responsibility around workplace safety, actions in response to possession or trafficking of illicit drugs, and the duty to accommodate those with a chemical dependency in accordance with human rights provisions.

In fact, a recent court decision confirmed that “human rights legislation fits within the entire legal framework within which enterprises must function...and... that framework includes other standards that also reflect deep values of the community such as those established by workers’ compensation legislation prohibiting an employer from placing an employee in a situation of undue risk, and the standards of the law of negligence.”<sup>iv</sup> The Court stated that this fuller legal framework must be considered when a company’s occupational requirements are being assessed. The key responsibilities follow.

- Occupational Health and Safety Legislation places the onus on employers to ensure the health, safety and welfare of employees; employers must prove diligence in minimizing or eliminating all potential safety risks, including those associated with independent contractors. Organizations can be liable for any negligent or wrongful acts committed by an employee acting within the scope or course of employment, which could include negligence in allowing an alcohol or drug impaired employee on the worksite or on a public highway once declared unfit to work, and negligence when returning someone to a risk-sensitive job after treatment or after a policy violation where sufficient monitoring mechanisms are not in place and a substance-related incident results. The company policy should have provisions to address these responsibilities.
- Reinforcing these safety obligations, Canada’s Criminal Code has been amended to set rules for attributing to organizations, including corporations, criminal liability for the acts of their representatives. There is a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public. In essence, criminal negligence is established where the organization or individual, in doing anything or in omitting to do anything, that is its/his/her legal duty to do, shows wanton or reckless disregard for the lives or safety of others. Strong fines and jail times can result from a Criminal charge.
- Contract Workers: The courts have clarified that occupational health and safety responsibilities can extend to contracted workers and sub-contractors. As a result, increasingly companies are not only introducing policies for employees, they are also introducing separate but parallel requirements for contractors (generally by issuing a ‘Statement of Expectations (or Requirements) for Contractors’). Putting contractors under the employee policy can present the risk of an obligation to accommodate contract workers; accommodation under human rights legislation is the responsibility of their employer. However, it is important that contractors are clear when they are performing work or on the company premises/ worksite: what rules their representatives are expected to comply with, the investigations tools that will be use to determine a possible violation, and the consequences for a confirmed violation including conditions of reassignment.
- Driver Liability makes the owner of a vehicle accountable for any injuries or damages caused by a person driving the vehicle with the owner's consent. This is why companies must be clear that the rules around alcohol and drug use apply when someone is operating a company vehicle and/or operating a vehicle on behalf of the company. It is also why policies set out the requirement to report receiving an impaired driving charge or license suspension (provincial or territorial law) in these situations as they have lost their license for a specified period of time after being identified as a safety risk by the police.
- Hosting Liabilities associated with the provision of alcohol to others or hosting alcohol-related events can include the provider of the alcohol, the occupier of the premises where the problem occurred, and the sponsor of the event. If they are in any way implicated in an event involving alcohol use, the company can be held responsible for injuries the person who drank may receive, and for any third party they may injure.

This is why Canadian companies must have clear rules around when alcohol can be consumed, as well as procedures for social and business hosting where alcohol use may be involved. This includes procedures to minimize the possibility that someone may leave in an intoxicated state that could result in injury to themselves or a third party.

- Federal and Provincial Human Rights Legislation prohibits discrimination on the basis of a disability. Current or former dependence on drugs or alcohol is considered a disability under the federal Act, and has been interpreted in the same manner at the provincial level. Issues around reasonable accommodation, and establishing a *bona fide* occupational requirement (*bfor*) for treating someone differently need to be addressed. Prevention initiatives including access to assessment, assistance, treatment, and follow-up services, as well as modifying hours or duties in certain circumstances would all contribute to accommodation responsibilities.
- Legal direction on Testing is becoming clearer on a number of fronts. There are at present no provincial or federal laws that would specifically prohibit drug testing. However, a number of recent decisions provide some guidance on where the law may stand on this issue. An interesting twist in the last few years has made legal interpretation a bit more complicated.

The human rights laws apply to all individuals, and decisions would accept testing in a number of situations, with the key limitation being the requirement for applicant and random testing only acceptable for safety-sensitive positions where a *bona fide* occupational requirement can be established. However a number of arbitrators have concluded there may need to be higher standards to meet in a unionized setting leading the way to limiting reasonable cause and post incident testing to safety-sensitive positions or safety-sensitive working environments.

Although each case has its' own unique aspects, it appears the trend has been to find testing acceptable:

- as part of an investigation in an unfit for duty (reasonable cause) situation where there is evidence alcohol or drug use may be a contributing factor;
- as part of a full investigation into an accident/incident situation, without reasonable cause, provided testing is only for those whose acts or omissions contributed to the situation;
- as part of a monitoring program after treatment to support continued recovery, normally on the advice of a substance abuse professional or treatment program;
- as a condition of return to duty after a policy violation and on an on-going follow-up basis;
- as a condition of "certification" or qualification to a higher risk position for new hires and existing employees transferring to the position, and
- on a random basis for alcohol in higher risk (safety-sensitive) positions with the qualification noted below.

In one significant human rights hearing, the Federal Human Rights Tribunal upheld alcohol and drug testing on a pre-employment and random basis for safety-sensitive positions in the motor coach industry.<sup>v</sup> The Tribunal also ruled that any individual who tests positive and has an alcohol or drug dependency, must be provided with assistance and accommodation. This means employers must have a process in place to ensure that professional assessment is done. However this requirement was overturned in an individualized case in Alberta, where termination was upheld by the Court of Appeal for a post incident cocaine positive test result, and the Supreme Court has agreed to hear an appeal of the decision.

The Federal Human Rights Commission's new policy resulted from this motor coach decision and would allow for random testing for other federally regulated safety-sensitive positions where justification can be established (testing meets a *bona fide* occupational requirement for the position).<sup>vi</sup>

In other industries, however, random testing is still being challenged and a few key decisions have been issued which better clarify an employer's options in this area. There is no question random testing would have to be limited to the highest risk "safety-sensitive" positions in any operation, and even then random drug testing may not be upheld beyond the federally regulated sector. Alternatively, if it is upheld, the drug testing may be limited to using the newer oral fluid testing technology. However, it appears the law is taking a different perspective in a unionized setting.

A series of labour arbitration rulings have stated that to introduce random testing in a unionized setting in Canada, employers either have to have prior union agreement, or evidence of an 'out of control' drug culture. In an Irving Pulp and Paper case, the New Brunswick Court of Appeal overturned this requirement, saying proof of an extensive problem is not necessary; the particular hearing dealt with random alcohol testing, but in an earlier ruling, the Court of Queens Bench commented that they could see the same situation for random drug testing. The union in this case was granted leave to appeal this to the Supreme Court of Canada, which issued a decision confirming that for random alcohol testing to be acceptable, there must be a demonstrated problem with alcohol use or evidence of an alcohol problem in the workplace.<sup>vii</sup>

An arbitration case involving Suncor attempted to demonstrate a problem sufficiently serious to justify the introduction of random testing, but the grievance by Unifor against Suncor's new requirement was upheld in March 2014.<sup>viii</sup> The company appealed this ruling to the courts and the ruling was overturned, finding the arbitrator had interpreted the Courts direction on proof of a problem as too broad and sending it back for another hearing.

## **CONCLUSION**

Many Canadian employers have concluded one of the most effective ways to prevent workplace alcohol and drug problems, and to effectively investigate and take corrective action, is by first establishing a clear and comprehensive workplace policy. Each company must decide what will work best in their own environment; there is no model policy. Each program should be tailored to meet the specific needs of each workplace, and should be seen as a reasonable and responsible response to those stated needs. The result should be an appropriate balance between health and safety (due diligence) and respect for individual rights and privacy.

This means finding a balance between measures to control or deter use (clear standards, investigation tools and consequences/discipline) and prevention measures (education, training, and employee assistance). Alcohol and drug testing has been introduced in a significant number of workplaces in Canada and in particular in higher risk sectors, but these programs are only defensible if they are part of a more comprehensive approach, and the highest standards are used for the testing process.

With respect to both medical marijuana and the potential legalization, it would be wise for employers to have a policy in place and a strategy to address the situation if someone claims the need for use for medical reasons. And legal marijuana is still a mood altering substance and its use can clearly present risks on many job sites.

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<sup>i</sup> More information on Canadian policy and testing issues can be found at <http://www.butlerconsultants.com/barb.html>

<sup>ii</sup> 2013 Canadian Tobacco, Alcohol and Drugs Survey, Health Canada, 2014. [http://healthy Canad ians.gc.ca/science-research-sciences-recherches/data-donnees/ctads-ectad/summary-sommaire-2013-eng.php](http://healthy Canadians.gc.ca/science-research-sciences-recherches/data-donnees/ctads-ectad/summary-sommaire-2013-eng.php)

<sup>iii</sup> SCC file No. 26274, September 9, 1999 (Meiorin) accessible at: <http://scc.lexum.umontreal.ca/en/1999/1999scr3-3/1999scr3-3.html>  
These tests were confirmed in *British Columbia superintendent of Motor Vehicles v. British Columbia Council of Human Rights*, SCC file NO. 26481, December 16, 1999 (Grismer) at: <http://scc.lexum.umontreal.ca/en/1999/1999scr3-868/1999scr3-868.html>

<sup>iv</sup> *Oak Bay Marina Ltd (Painter's Lodge) and B.C. Human Rights Tribunal and Robert Gordy*, B.C. Court of Appeal, September 2002 accessible at: <http://www.lancasterhouse.com/decisions/2002/sept/bcca-gordy.htm>

<sup>v</sup> *Salvatore Milazzo and Canadian Human Rights Commission, and Autocar Connaissanceur Inc. (Coach Canada)*, Federal Human Rights Tribunal, November 6, 2003. Decision can be accessed at: <http://chrt-tcdp.gc.ca/NS/decisions/index-eng.asp?filter=year&yr=2003&SortedByLetter=>

<sup>vi</sup> Canadian Human Rights Commission Policy on Alcohol and Drug Testing, October 2009 can be viewed at: <http://www.chrc-ccdp.ca/eng/content/policy-alcohol-and-drug-testing>

<sup>vii</sup> *Communications, Energy and Paperworkers Union of Canada Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC34, June 2013 can be viewed at: <http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/item/13106/index.do?r=AAAAAQAVSXJ2aW5nIFB1bHAgYW5kIFBhcGVyAAAAAAAAAQ>

<sup>viii</sup> The Suncor arbitration decision and dissent can be viewed at: <http://www.coaa.ab.ca/safety/SuncorUniforArbitrationDecision.aspx>