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Ornge facing 17 Canada Labour Code charges following May 2013 Crash that killed four personnel

THE TRIAL AGAINST ONTARIO'S AIR AMBULANCE SERVICE, Ornge, in connection with the fatal helicopter accident that occurred in northern Ontario on May 31, 2013 began on April 25, 2017.

At trial at the Superior Court of Justice in Brampton, ON, Ornge now faces wide-ranging charges under the Canada Labour Code for failing to provide safe working conditions for its employees.

The charges originate in the early hours of May 31, 2013, when four Ornge employees (two pilots and two paramedics) were killed after their helicopter crashed shortly after takeoff, about 800 metres from the airport in Moosonee, ON. The crew were responding to a patient emergency on the Attawapiskat First Nation reserve in northern Ontario; the helicopter, a Sikorsky, was flying in total darkness at the time of the crash.

The four-person crew included captain Don Filliter, co-pilot Jacques Dupuy, and flight paramedics Chris Snowball and Dustin Dagenais.

One year following the crash, 17 charges were laid against Ornge by the Federal Ministry of Labour. Most of these charges were laid under section 148 which makes it an offence to contravene the occupational health and safety provisions of the Code. The charges included failing to ensure employee safety by:

- failing to properly train the flight captain;
- failing to provide pilots with a means to enable them to maintain visual reference with the ground and water;
- failing to follow the policy which prevents the pairing of two pilots relatively new to their flying positions;
- failing to ensure that supervisors and managers at Ornge had knowledge of the Canada Labour Code;
- failing to provide adequate supervision for daily flight activities;
- failing to adequately consult with the Workplace Health and Safety Committees on policies and procedural changes that affected Ornge employees;
- permitting pilots to fly without adequate training in the specific aircraft being used;
- permitting an aircraft to be flown by a pilot with insufficient experience in night operations; and
- permitting an aircraft to be flown by a pilot whose Pilot Proficiency Check was incomplete on the specific aircraft used.

If convicted, each offence carries a fine up to \$1,000,000 and up to two years imprisonment.

A 2016 Transportation Safety Board report on the crash noted that the Moosonee crew were faced with flying in "total darkness" with no ambient light whatsoever and would have been forced to fly by instruments.

The Board concluded that the helicopter's descent had not been detected by the pilots because of the darkness and the lack of visual cues outside the cockpit. However, the Board investigation concluded that the cause of the accident went far beyond the actions of the captain and co-pilot. The TSB report noted that Ornge did not have experienced personnel to run its helicopter operations; that operating procedures were inadequate and that the two pilots lacked experience flying at night and in instrument conditions. The report also revealed that Transport Canada

(Continued on next page)

The lead story

Ornge facing 17 Canada Labour Code charges *(Continued from front page)*

inspectors knew of the issues at Ornge but decided not to shut the air ambulance service down, favouring instead a less draconian approach that had allowed the unsafe conditions to continue.

Arguments laid out during the first days of trial

On April 25, 2017 - the first day of trial - the Crown argued that the crash was "predictable and preventable" and that Ornge did not take steps to manage the risks to its personnel and failed to take the necessary steps to ensure their safety.

Despite warnings, the Crown argued that Ornge had assigned the pilots to "one of the hardest pieces of work, on its most basic equipment—lacking many of the available systems to increase safety, without ensuring that either had enough recent experience or training in night instrument flight to do it safely."

The Crown's first witness - Malcolm MacLeod, the base safety officer for Ornge in Moosonee at the time of the incident - testified that more than eight months before the crash, he had expressed concern to colleagues about potential safety risks. In September 2012, MacLeod said that he had sent an e-mail to Ornge's safety manager in Toronto, expressing his concern over new hires in Moosonee being scheduled to work night shifts despite little to no experience flying in the area.

"This seems to me to be a real safety concern," MacLeod said in the e-mail. "I feel that safety is being jeopardized in an effort to make sure the slots are filled."

The Crown also argued that the pilots would have benefited from night vision goggles, but that they were not provided by Ornge, nor were they mandated by federal industry regulations.

During testimony heard April 26, 2017, the court heard that nearly two years before the crash, the agency's safety manager told supervisors night-vision goggles should be given to pilots. "The case for night-vision goggles is strong and simple and revolves around safety," said Ornge's former safety manager Andrew Eaton, reading into the court record excerpts of a briefing note he sent to his supervisors in 2011.

"Why would we fly around in the night unable to see details, upcoming weather and intentionally blind when we could simply put down a set of goggles and have 20/20 sight in near total darkness?"

Eaton, a former helicopter pilot in the Canadian Air Force, testified that ORNGE management was initially receptive to his idea to look into the viability of providing night-vision goggles to crew members, even though it was not a Transport Canada requirement.

Eaton said he was given the go-ahead to look into the possibility of retrofitting ORNGE's newer, more powerful AgustaWestland 139 helicopters for night-vision capabilities, but it soon became clear that changes would be cost prohibitive. Eaton said he didn't remember any discussion of making the agency's older fleet of Sikorsky helicopters equipped for night vision.

"The difference between flying with goggles and flying without goggles is literally the difference between flying night and day," said Eaton, who left his job as safety manager for ORNGE about five months before the crash, citing what he considered the agency's lack of understanding of the proper role of a safety officer, and "constant stress."

The defence countered by indicating that at the time of the accident in May 2013, the captain and co-pilot were no longer considered new hires. Defence counsel said that the pilots were "properly trained" and "well-experienced".

Defence lawyer Fredrick Schumann suggested to Eaton that there were "inherent risks" related to the flights ORNGE helicopters perform and that "if we really wanted to be perfectly safe, we'd stay on the ground." Eaton agreed.

Many of Schumann's questions focused on the level of responsibility captains hold when operating out of a flight base. Schumann noted that the captain is the one who decides whether to head out when an emergency call comes in, not a flight operator, such as Ornge.

"If a captain thinks he can't do a flight safely, then he's expected to turn down the call," he said.

"It's his obligation to turn it down," responded Eaton.

"An operator trusts and expects the captain to do just that. The operator isn't sending captains on any particular flight, is it?" Schumann asked.

"No," Eaton responded.

In addition to the criminal trial, the family of paramedic Chris Snowball has sued Ornge and Transport Canada for their role in an accident they call "completely avoidable" in their statement of claim. The suit was filed by the medic's parents and 19-year-old daughter. The family is seeking \$3.7 million in damages.

Sources/courtesy: "Ornge Stands Trial For Their Role In May 2013 Crash That Killed Four Personnel" by Jeffrey Spiegel (Student-at-Law), Devry Smith Frank LLP; and Kenyon Wallace et al. Toronto Star.

Red flag reports

Poor risk management led to grounding of two BC barges : TSB says

On May 10, 2017 the Transportation Safety Board of Canada (TSB), released its investigation report (M16P0062) into the grounding of two barges near Victoria, British Columbia.

On 2 March 2016, the tug *HM Scout* encountered severe weather while towing barges *HM Tacoma* and *HM Blue Horizon* in tandem. As a result, the tow line between the barges parted resulting in *HM Blue Horizon* floating free and grounding near Clover Point, BC. There were no injuries.

The TSB investigation revealed that, in addition to inadequate towing equipment, the company had not developed any documented operating procedures for its marine operations and had not formally assessed the risks.

Despite the fact that the combined size and tonnage of the vessels may be similar to that of a conventional cargo-carrying vessel, tug and barge operations are not required to operate under a safety management system.

This means that, although Transport Canada and WorkSafeBC both regulate marine vessel operations for their respective areas of jurisdiction, neither has an inspection program in place to routinely check that owners and operators of tugs less than 15 GT are complying with safety-critical regulations.

According to TSB, "the solution will require all operators in the marine industry to have formal safety management processes, with effective oversight by Transport Canada."

For more information, visit:

<http://www.tsb.gc.ca/eng/inquiries-investigations/maritime/2016/m16p0062/m16p0062.asp>

Red flag reports

LCBO fined \$100,000 after worker injured

On April 19, 2017, the Liquor Control Board of Ontario (LCBO) was found guilty after a trial and fined \$100,000 after a worker was injured and a LCBO location was found to have an unsafe work environment.

The charges relate to an April 24, 2013 incident in which an LCBO worker was moving a pallet of product using a forklift at the LCBO store located at 170 Sandalwood Parkway in Brampton, ON.

As the worker began to insert the forks into the pallet, a sound was heard which caused the worker to get out of the forklift and investigate. The product on the pallet then fell on the worker, causing injuries.

A Ministry of Labour investigation determined that the pallet was moved without precautions being taken to ensure the safety of a worker. This was in violation of RRO 1990, Reg. 851: Industrial Establishments Section 45(a).

The LCBO was fined \$100,000 by Justice of the Peace Cristina Santos who pointed out that there were systemic problems at the Sandalwood LCBO location including multiple safety concerns from workers that were not responded to, and that the injured worker had been given forklift duties without having received up-to-date training.

The court also imposed a 25-per-cent victim fine surcharge as required by the Provincial Offences Act. The surcharge is credited to a special provincial government fund to assist victims of crime.

<http://www.cbc.com/news/canada/2017/04/19/2017-04-19-lcbo-fined-100000-after-worker-injured.html>

Regulatory alert - federal initiatives -

Collective agreement includes employee wellness support program

On April 13, 2017, representatives for the Government of Canada and the Association of Canadian Financial Officers signed the first collective agreement to be finalized in the current round of collective bargaining.

The agreement, which covers about 4,400 financial officers from the FI group; reflects a settlement reached by the parties in late 2016 includes a mutual commitment to put in place a process to create an employee wellness support program that will focus on improving employee wellness and reintegrating employees after illness or injury.

Treasury Board of Canada Secretariat: <https://www.canada.ca/en/treasury-board-secretariat.html>

Review of Railway Safety Act one year ahead of schedule

On April 26, Federal Minister of Transport, Marc Garneau, launched the statutory review of Canada's *Railway Safety Act*.

In response to the June 2016 Report of the Standing Committee on Transport, Infrastructure and Communities, and as part of *Transportation 2030 - A Strategic Plan for the Future of Transportation in Canada: Safer Transportation*, the Minister has accelerated the review a year ahead of schedule to begin on May 1, 2017 in order to evaluate more promptly the current state of rail safety in Canada.

Access the review <http://www.tc.gc.ca/en/reviews/railway-safety-act-review-2017-18.html>

Proposed update to TDG small container standard posted May 1

The Transportation of Dangerous Goods Directorate has released the proposed second draft of the third edition of the *Transport Canada Standard TP 14850 Small Containers for Transportation of Dangerous Goods, Classes 3, 4, 5, 6, 1, 8, and 9* (the Standard). Highlights of the updated standard include:

- revised packing instructions to improve structure, presentation and usability;
- an added requirement to address circumstances in which container manufacturers will now have to periodically retest a representative sample of a container;
- a conditional exemption for the use of plastic drums and jerricans past 60 months of the date of manufacture; and
- a clarification of the requirements for transporting dangerous goods waste.

Comments must be provided in writing, by May 31, 2017 to: *John Paul Handrigan*

Email: TDRRegulatoryProposal-TMDPropositionReglementaire@tc.gc.ca

NEB issues reminder re: submission deadline for pipeline program management systems performance reports

On April 13, 2017, the National Energy Board (NEB) issued a reminder to pipeline companies that they are required to notify the NEB by 30 April, 2017 of the completion of an annual report on the performance of pipeline program management systems, as required by subsection 6.6(2) of National Energy Board Onshore Pipeline Regulations.

If the company's Accountable Officer has changed, he/she must submit a signed statement accepting the responsibilities of the position.

Access company submission requirements:

<https://www.neb-one.gc.ca/bts/ctr/gnnb/nshrpln/cmpnysbmssnrqrmnt-eng.html>

Pesticide labels alone are insufficient, environmental groups charge

Health Canada's Pest Management Regulatory Agency (PMRA), announced, April 28, 2017, it will continue to register products containing glyphosate for sale and use in Canada.

"An evaluation of available scientific information found that products containing glyphosate do not present risks of concern to human health or the environment when used according to the revised label directions," PMRA stated. Nevertheless, "as a requirement for the continued registration of glyphosate uses, new risk reduction measures are required for the end-use products registered in Canada."

The decision prompted negative reactions from a number of environmental groups.

"We are concerned with the changes to the labelling restrictions on glyphosate ..." said Annie Berube, director of government relations at Équiterre. "Health Canada recognizes there are risks to using glyphosate that warrant those labelling changes, but the burden cannot be on users to manage the risks of using glyphosate by following instructions on labels. It is incumbent upon Health Canada to protect Canadians' health and our environment, and pesticide labels alone are insufficient."

Glyphosate, the active ingredient in "Round-up" is used in more than 180 pest control products in Canada.

Access PMRA's decision at: http://www.hc-sc.gc.ca/cps-spc/pubs/pest/_decisions/rvd2017-01/index-eng.php

Regulatory alert - federal initiatives

New regulations announced for recreational drones

On March 13, 2017, Minister of Transport, Marc Garneau, issued an Interim Order Respecting the Use of Model Aircraft pursuant to 6.41(1) of the Aeronautics Act R.S.C., 1985, c. A-2. This interim order creates regulations for model aircraft or "drones" that weigh anywhere from 250 grams to 35 kilograms and are used for recreational purposes.

The interim order does not affect the current regulations with respect to commercial UAV operations or the necessity of obtaining a Special Flight Operation Certificate ("SFOC") from Transport Canada for certain operations.

The number of incidents involving recreational drones has more than tripled since 2014.

To view the Interim Order Respecting the Use of Model Aircraft: and the full list of new rules, visit:

<http://www.tc.gc.ca/eng/mediaroom/interim-order-respecting-use-model-aircraft.html>

For information on drone safety in Canada, visit: www.canada.ca/drone-safety

Regulatory alert - Provincial initiatives

Ontario seeking input on expiration of current exemptions on display screens and hand-held devices

On May 1, 2017, the Ontario government announced that it intends to explore options to address current exemptions on the holding and use of display screens and hand-held devices.

Current *Highway Traffic Act* exemptions outlined in O. Reg. 366/09 *Display Screens and Hand-Held Devices*, which are set to expire on January 1, 2018, allow the following to hold or use a two-way radio:

- certain public function employees (e.g., bus drivers);
- commercial drivers;
- amateur radio operators (eg., an Industry Canada-licensed operator which could include a commercial driver).

The ministry is considering three options to address the expiry of the exemption:

- extending the exemption for an additional seven years;
- making the exemption permanent; or
- allowing the exemption to expire (making hand-held use of devices illegal and requiring all currently exempted drivers to use hands-free alternatives only).

For two-way radios, the current exemption allows a driver to push and hold the button on a hand-held two-way radio device to conduct a conversation when driving. If the hand-held device is a microphone, it must be secured in, or mounted to the vehicle and within easy reach of the driver. Two-way radio hand-held devices that are clipped to the driver's belt or attached to his/her clothing are also exempt. The exemptions took effect on January 1, 2013. Comments due June 15, 2017.

Access the Regulatory Registry Notice at:

<http://www.ontariocanada.com/registry/view.do?postingId=24092&language=en>

Amendments to BC's OHS Regulation affecting rock dust and lead provisions now in effect

On May 1, 2017, a total of 13 changes to British Columbia's Occupational Health and Safety (OHS) Regulation took effect. Generally, the revisions include changes to streamline, clarify, and update specific policies; however, some sections, such as those pertaining to rock dust and lead, have been significantly expanded.

The changes affect a wide range of industries - employers are encouraged to review the revisions carefully to see what applies to their workplace. The following primers are available on silica; lead; and other May 1 regulation changes.

- **Regulatory Change: A Primer on Protecting Workers from Silica and Rock Dust Exposure:**

<https://www.worksafebc.com/en/resources/law-policy/act-amendments/regulatory-change-primer-protecting-workers-silica-rock-dust-exposure?lang=en>

- **Regulatory Change: A Primer on Protecting Workers from Lead Exposure:**

<https://www.worksafebc.com/en/resources/law-policy/act-amendments/regulatory-change-primer-protecting-workers-lead-exposure?lang=en>

- **Regulatory Change: A Primer on Changes to the OH&S Regulation, May 1, 2017:**

<https://www.worksafebc.com/en/resources/law-policy/act-amendments/regulatory-change-primer-changes-ohsr?lang=en>

In addition, the Board of Directors' decision and strike through versions of the approved amendments plus explanatory notes are available via the following link:

<https://www.worksafebc.com/en/law-policy/public-hearings-consultations/closed-public-hearings-and-consultations/bod-approves-amendments-ohsr>

Red flag reports

Pest control company charged after school spraying left kids sick

The Ontario government has charged an Ottawa pest control company with improperly spraying a pesticide that made several teachers and 30 children at Charles H. Hulse school become ill with nausea, headaches and watery eyes.

Rentokil Pest Control Canada Limited was charged on March 23 with three offences under the province's *Pesticides Act*. The province alleges that, in April 2015, Rentokil: discharged the residual insecticides (*Konk 400* and *Gardex 1% Baygon*) contrary to their permissible use; violated a prohibition on a pesticide that harms human health; and failed to notify provincial staff when a pesticide is discharged out of the normal course of events.

The Ottawa Carleton District School Board hired the contractor to spray for an ongoing cockroach infestation at the elementary school on Alta Vista Drive. It was first sprayed over the March break in 2015 and when that didn't work classrooms were sprayed again on a Saturday in mid-April.

When students and staff returned to the school many began feeling ill, and several children went home sick. Several days later, on April 16, the school was closed while workers removed carpeting, drywall and repainted in areas where the chemical had been sprayed. All the students temporarily moved to an empty school in the west end of Ottawa. Mike Carson, the superintendent of facilities at the Ottawa Carleton District School Board, welcomed the charges. "I think it's good that it has come to fruition now," said Carson. Carson said Rentokil failed to inform the board it was using the pesticides — something it was required to do — and as a result the board terminated its contract with the company in June 2015.

<http://www.ohrc.ca/news/canada/ottawa/charles-hulse-pesticide-spraying-charges-laid-1.485593>

Red flag reports

Company fined for failing to report discharge of tear gas into playground

Tactical Ordnance Inc. and Casey Brouwer pleaded guilty to one offence each on April 28, 2017 and were fined a total of \$60,000 for failing to give notice of a discharge or spill of a pollutant to the ministry, contrary to the Environmental Protection Act (EPA).

Tactical Ordnance Inc., a company specializing in tactical specialty products for law enforcement is located in the Township of King, ON.

On May 12, 2016, company owner and president, Casey Brouwer, had control of CS powder, a component of some types of tear gas, when it was accidentally discharged from a container into the air.

At the time of the discharge, 16 children and two childcare staff members were in a playground of a childcare centre located next door to the site.

Wind blew the CS powder onto the playground causing the children and staff to experience adverse effects including sore and burning throats, coughing, difficulty breathing and watering eyes.

Mr. Brouwer and the company failed to report the discharge to the ministry and failed to provide details regarding quantity of discharge, source and location, the cause and circumstances of the discharge, and the known hazards and adverse effects of the CS powder, as required by the Act.

Following an investigation, the defendant was convicted.

On April 28, 2017, Tactical Ordnance Inc. and Casey Brouwer were convicted of one offence each. The company was fined \$50,000 plus a victim fine surcharge of \$12,500, and Mr. Brouwer was fined \$10,000 plus a victim fine surcharge of \$2,500, with six months to pay the fine.

<https://news.santaro.ca/news/2017/04/company-and-owner-fined-60000-for-epa-violations.html>

Regulatory alert - provincial initiatives

BC takes steps to end mandatory high heels in the workplace

On April 28, 2017, the BC government introduced a new guideline in support of a regulatory amendment which effectively bans mandatory high heels in the workplace.

Part 8 of the province's Occupational Health and Safety Regulation - Personal Protective Equipment - includes a requirement that workers' footwear allows workers to safely perform their work.

On April 7, a new section, [8.22(2.1)], was added which stipulates that, for all workers, footwear must be "of a design, construction, and material appropriate to the protection required and that allows the worker to safely perform the worker's work" and which specifically precludes an employer from requiring a worker to wear footwear that is contrary to this requirement.

Under an accompanying guideline [G8.22(2.1) *High heels*], tripping and potential for musculoskeletal injury have been added to the list of factors that must be considered in determining appropriate footwear protection. Other factors relate to slipping, uneven terrain, abrasion, ankle protection and foot support, crushing potential, temperature extremes, corrosive substances, puncture hazards, electrical shock, and any other recognizable hazard.

In a May 1 commentary titled *No Stepping Around It! B.C. Ends Mandatory High Heels In The Workplace*, Lisa Carlson of Borden Ladner Gervais LLP writes that:

"while the amendment does not specifically state that high heels cannot be mandated in the workplace, the effect is to ban such a practice for health and safety reasons, which is to be enforced by WorkSafeBC.

"The BC Human Rights Code also sets out existing restrictions against gender-based discrimination in the workplace. This does not mean that employers in B.C. cannot dictate what their workers wear on their feet or otherwise. An employer still has the right to set a dress code for its workplace, but it must comply with these new health and safety standards and cannot be discriminatory."

Access the WorkSafeBC update at:

<https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/updates-decisions>

Access the BLG commentary at: http://blg.com/en/News-And-Publications/Publication_4916

WorkSafeBC amends rules covering flow piping and storage racks

At its March 2017 meeting, WorkSafeBC's Board of Directors approved amendments to the Occupational Health and Safety Regulation relating to the following sections:

- **Section 23.69, Oil and Gas, flow piping systems** - amendments take effect August 1, 2017. (Flow piping systems refer to piping systems used to convey to or from a well head a liquid or gas under pressure).
- **Section 4.43.1, General Conditions**, new section, storage racks take effect Jan. 1, 2018.

Details:

<https://www.worksafebc.com/en/resources/law-policy/discussion-papers/bod-approves-amendments-ohsr-flow-piping-storage-racks/section-23-69?lang=en>

Alberta law will encourage whistleblowers to report 'wrong-doings'

Alberta's Bill 11, the *Public Interest Disclosure (Whistleblower Protection) Amendment Act, 2017*, was tabled May 2, 2017. The proposed legislation will, if approved, encourage the reporting of wrongdoings within the public sector by better protecting whistleblowers from any form of punishment or retaliation from their employer.

Bill 11: http://www.assembly.ab.ca/ISYS/LADDAR_files/docs/bills/bill/legislature_29/session_3/20170302_bill-011.pdf

Changes to Nova Scotia OHS Act take effect June 12, 2017

Amendments to Nova Scotia's *Occupational Health & Safety Act*, first approved in April 2016, take effect on June 12, 2017. The amendments:

- better define when, how, and what injuries and incidents must be reported; and
- give government additional tools and authority to enforce safety requirements for those who put people at risk of serious injury or death by repeatedly disregarding safety regulations. In particular, the occupational health and safety director now has the authority to deal with repeat offenders by issuing stop-work orders at all their sites; applying to the Supreme Court of Nova Scotia for an injunction to prohibit them from working in an industry; and requiring them to advise of future work locations and activities.

News release: <https://novascotia.ca/news/release/?id=20170426006>

OH&S Act: <https://www.canlii.org/en/ns/laws/stat/sns-1996-c-7/latest/sns-1996-c-7.html>

Fitness for duty testing

Test results justify decision to implement Fitness for Duty drug and alcohol testing, CEO claims

ON MAY 8, 2017, TWO TORONTO TRANSIT Commission (TTC) employees were suspended for being impaired on the job after they both failed tests on the very first day of the transit agency's new random drug and alcohol testing program.

One employee failed a breathalyzer test for alcohol, while a second tested positive for an undisclosed drug.

TTC chair, Councillor Josh Colle, called the results "really disappointing."

The TTC began testing its workers for substance abuse on the morning of May 8 when eight workers were randomly selected.

According to TTC spokesperson Brad Ross, the very first employee given a breathalyzer blew over the limit, with a blood alcohol level exceeding .04 per cent, which the transit agency considers impaired.

The results of a drug test for a second employee tested the same day came back positive two days later. While Ross couldn't say which drug the worker had consumed, the test detects several common intoxicants including marijuana, cocaine, opiates, amphetamines and PCP.

Ross wouldn't give details about the employees, except to say that neither was a driver or vehicle operator.

The two workers were suspended with pay, but

employees who fail the tests can face additional discipline, including dismissal.

TTC CEO, Andy Byford, called the failed tests "concerning" but argued that they showed that the transit agency's decision to implement the controversial testing policy was "both justified and vindicated."

"The TTC's only motivation in pressing for the introduction of random testing to strengthen its existing fitness for duty policy was to ensure that it is doing everything possible to keep the public and its employees safe," Byford told the *Toronto Star*.

He added that he believes the "overwhelming majority" of TTC workers are "transit professionals that attend work fit for duty."

In April 2017, the Ontario Superior Court of Justice allowed the TTC to proceed with implementing random drug and alcohol testing of safety-sensitive employees, pending the outcome of an ongoing arbitration.

Under the new policy, employees are selected for testing at random by a computer program that is run by the TTC's third party Fitness for Duty (FFD) provider, DriverCheck Inc. The TTC has no input into who is selected for testing.

Ultimately, the TTC agency plans to test about 20 per cent of workers in safety-sensitive and other designated positions each year.

The FFD policy defines safety sensitive positions as those that play a direct role in a job function where performance could be impacted by drug and alcohol use.

This means anything from causing a significant incident to a failure to adequately respond to an incident, affecting the health, safety or security of employees, the public, property or the environment.

About 10,000 workers are eligible for testing because they hold positions that the agency has deemed "safety-sensitive." Workers include roughly 1,400 different TTC positions - from the CEO to managers and supervisors, bus, streetcar, and subway operators, janitors, solicitors, upholsterers, painters, auditors, and token machine attendants.

Any employee found at work with a blood alcohol concentration of between .02 and .039 can be subject to "progressive discipline" while anyone above .04 is considered impaired.

The Ontario Ministry of Transportation considers drivers who register levels of between .05 and .08 to be within the "warn range" while anyone with a level higher than that can be criminally charged.

On April 3, the Ontario Superior Court dismissed the Amalgamated Transit Union, Local 113's (the "Union") application for an interlocutory injunction restraining the implementation of a policy permitting random drug and alcohol testing of its members. The Union had requested that the injunction be in place pending the completion of the arbitration of a policy grievance (*Amalgamated Transit Union, Local 113 v. Toronto Transit Commission*, 2017 ONSC 2078).

Access the TTC policy at;

http://www.ttc.ca/Riding_the_TTC/Safety_and_Security/drug_alcohol_testing.jsp

Access the ruling at:

<http://www.ontariocourts.ca/en/2017onsc2078.htm>

Extracts from FACTUM OF THE RESPONDENT "AMALGAMATED TRANSIT UNION, LOCAL 113, and ROBERT KINNEAR on his own behalf and on behalf of all other MEMBERS OF THE AMALGAMATED TRANSIT UNION, LOCAL 113 - Applicant -and- TORONTO TRANSIT COMMISSION - Respondent.

- Between January 1, 2006 and September 2008 (when the TTC Fitness for Duty Policy was approved) there were approximately 40 drug or alcohol-related incidents involving TTC employees.
- One incident involved a bus operator who was driving a bus with passengers on board, while having a blood alcohol level significantly over the legal limit of 0.08 BAC.
- In April 2007, a subway track maintenance worker was killed after he drove his subway work car into the wall of a subway tunnel ... Two other employees were seriously injured. An investigation revealed that the worker had levels of tetrahydrocannabinol ("THC") in his system consistent with having consumed marijuana ... probably during his work shift.
- Evidence of a further 14 drug or alcohol-related incidents was reported to TTC investigators and/or Transit Enforcement Unit between January 1, 2006 and September 2008. This includes three separate incidents involving a bus operator, fare collector and janitor, all of whom admitted to substance abuse issues (marijuana, cocaine and/or alcohol).
- In another case, TTC investigators were advised that Toronto police had arrested a TTC crane operator, who was known to be a heroin user, for possession of OxyContin and methadone for the purpose of trafficking.

Following the approval of the Fitness for Duty Policy (i.e., October 2008) until its implementation on October 17, 2010, there were a further 53 drug or alcohol-related incidents involving TTC employees. "Most of these 107 incidents between 2006 and October 16, 2010 ... came to the TTC's attention through complaints or reports from other employees, or members of the public, or reports from police."

Due Diligence Special Report: Preparing for cannabis legalization in Canada

Nip It In The Bud:

A 5-Step Plan For Employers To Prepare For Cannabis Legalization In Canada

by Bradley Proctor and Caroline Spindler, McInnes Cooper*

RECREATIONAL CANNABIS ISN'T LEGAL yet – but much of the associated stigma is already gone, usage is up and employers are feeling the workplace effects of the pending legalization now. On April 13, 2017, Canada's federal government proposed legislation to legalize and regulate access to recreational (non-medical) cannabis in Canada. The government is hoping to make the proposed law effective in July 2018, and it still has to go through the legislative process so it could change. But employers need to nip cannabis in the workplace in the bud by acting now to be prepared for cannabis legalization when it happens.

Here's a five-step plan to help employers prepare for the workplace impact of cannabis legalization.

1 Educate yourself on cannabis basics

Many employers haven't educated themselves about cannabis because, practically, they didn't need to: the mere fact it's generally illegal (with the exception of medical cannabis, which is generally handled as is any other medication) is sufficient to "outlaw" it. But once it's legal, employers will need the ability to manage its use and effects in the workplace – and that requires at least basic knowledge about cannabis.

- **The Drug:** Cannabis (a.k.a. marijuana, marihuana, weed, pot ...) comes from the cannabis sativa plant and contains hundreds of chemical substances and more than 100 cannabinoids. The two most commonly known are: delta-9-tetrahydrocannabinol (THC), which has therapeutic effects and is primarily responsible for cannabis's psychoactive effects; and cannabidiol (CBD), which has potential therapeutic effects but no psychoactive effects. THC potency is usually expressed as a THC percentage by weight of the substances. THC potency in dried cannabis has risen from an average of 3% in the '80s to around 15% today; some Canadian licensed medical producers are capable of growing cannabis with THC levels exceeding 30%. The proposed new law doesn't limit THC potency now, though it could later do so. While typical users don't require large amounts of THC to experience the psychoactive effects, the demand for and availability of products with higher THC levels persists where cannabis is legalized.
- **Forms & Uses:** Most people are familiar with smoking dried cannabis in hand-rolled cigarettes, pipes or water pipes – but people can consume cannabis in many forms,

including: "vaping"; eaten in foods cannabis-infused called "edibles" (e.g., cooking oils and drinks); applied as oils, ointments, tinctures, cream and concentrates (e.g. butane hash oil, resins and waxes); and of course, ingested as oral pills and oral sprays. Notably, the proposed new laws prohibit the sale of edibles and concentrates (at least for now), though permits their preparation for person use. These products can be made using different types of cannabis with varying levels of THC and CBD, resulting in different intensities and effects, and the different ways in which cannabis and its extracts are used shifts the THC concentration. The two main uses of cannabis are medical and recreational (or "non-medical").

Medical: Many believe cannabis has therapeutic benefits for some medical conditions. It's now used for a wide range of "medical" purposes, including to: stimulate appetite for AIDS patients; reduce chemotherapy-related nausea and vomiting; treat MS, muscle spasticity, cancer-related pain and glaucoma; prevent epileptic seizures; lessen side effects from treating hepatitis C and increase treatment effectiveness; relieve pain and reduce inflammation from arthritis; help metabolism; improve Lupus symptoms; soothe tremors from Parkinson's disease; help with PTSD; and protect the brain after stroke. Potential benefits include that it might: prevent cancer from spreading; reduce anxiety; slow the progression of Alzheimer's disease; treat inflammatory bowel diseases; protect brain from concussions and trauma; and reverse carcinogenic effects of tobacco.

Recreational (a.k.a. "non-medical"): Cannabis is the most-used illicit drug and the most trafficked in the world and is, along with alcohol and tobacco, a favourite recreational drug of Canadians. In fact, Canada has one of the highest rates of cannabis use in the world: more than 40% of Canadians have used cannabis in their lifetime, and it's Canada's second most-used recreational drug after alcohol. In 2014, Canada's leading hospital for mental illness, the [Centre for Addiction and Mental Health \(CAMH\)](#), found 40% of Canadians have used cannabis, and 10% had used it in the prior year, 20% of youth between 15 and 24 had used it in the prior year – and a rather astonishing 70% of Canadian cannabis users are 25 or older.

- **Effects:** Cannabis's effects are caused by the actions of cannabinoids on biological "targets", a system of specific receptors and molecules throughout the body (the endocannabinoid system). Consumers can typically feel the effects of cannabis 30 minutes to 1 hour after consuming it. Short-term effects include: relaxation; time distortion; impaired thinking, judgment, coordination and memory; paranoia and anxiety; and bloodshot eyes, dry mouth, slurred speech and increased heart rate. Long-term effects include: lung irritation and breathing problems; harm to fetal brain development, if smoked during pregnancy; and decreased learning and cognitive thinking in young adults who use heavily while the brain is still developing.

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Due Diligence Special Report: Preparing for cannabis legalization in Canada (cont'd)

2 Put it into (social & political) context

The social and political landscape respecting cannabis has changed vastly in the last century. Employers need to keep up with the times of their employees, and avoid making judgment calls on the morality (or immorality) of cannabis use, even if they have a differing personal opinion of cannabis use.

- **Criminalization:** In 1923, cannabis was added to Canada's Confidential Restricted List. Historians usually point to the 1922 publication of *The Black Candle* as inspiring the addition; one chapter is entitled "Marijuana – A New Menace", and claims the only ways out of cannabis addiction are insanity, death or abandonment. This fairly common public position is reflected in a 1942 movie promoted as revealing the social evils of cannabis: "From the hot dog stand selling 'reefer' across from a school, to the parties that put teens into the vile grips of promiscuity, dancing in their underwear and murder...".

LeDain Commission: Things did change: as early as 1969, the Canadian government contemplated a different approach to recreational cannabis. Begun in 1969 and completed in 1972, the LeDain Commission of Inquiry into the Non-Medical Use of Drugs was a Canadian government commission. The majority's recommendations included the repeal of the prohibition against the simple possession of cannabis and cultivation for personal use; the minority view recommended a policy of legal distribution of cannabis, removal of cannabis from the predecessor to the [Controlled Drugs and Substances Act \(CDSA\)](#), the law that currently governs the production and possession of non-medical cannabis) and provincial controls on possession and cultivation, similar to those governing alcohol use. The report also recommended the federal government conduct further research to monitor and evaluate changes in the extent and patterns of the use of cannabis and other drugs and to explore possible consequences to health, and personal and social behaviour resulting from the controlled legal distribution of cannabis. However, the (ironically Trudeau) government largely ignored the report.

- **Costs:** Canada's prohibition and criminalization of recreational cannabis has persisted to present day – yet hasn't deterred Canadians from consuming it: youth continue to use cannabis at rates among the highest in the world; according to [Stats Canada](#), there were 104,000 drug-related offences reported by police in Canada in 2014, 66% of which were cannabis-related and primarily for possession; around 60,000 Canadians are arrested (nearly 3% of all arrests) for simple possession of cannabis every year; over 500,000 Canadians carry a criminal record for this offense, which can significantly limit their employment opportunities or restrict their ability to travel; and for 2002, the annual cost of enforcing cannabis possession laws (including police, courts and corrections) in Canada was estimated at \$1.2B.
- **Shifting Public Opinion:** Public opinion on cannabis control has shifted considerably even in just the last decade: 10 years ago about half of Canadians believed cannabis use should be decriminalized or legalized; today,

about two thirds of Canadians hold this view and most Canadians no longer believe that simple cannabis possession should be subject to harsh criminal sanctions, and support the Government's commitment to legalize, tax and regulate cannabis. Reflecting the new social landscape, during the 2015 Canadian election the Liberal Party promised to legalize, regulate and restrict access to cannabis.

3 Understand the legal landscape

The law is notoriously slow to change, and cannabis regulation has been no different – until recently: the Canadian legal landscape for cannabis access and use is about to drastically change.

- **The path to "legalization":** In 2015, the newly-elected Liberal majority government soon announced it was creating a federal-provincial-territorial process to discuss a jointly suitable process for the legalization of cannabis possession for recreational purposes and embarked on doing so. In Fall 2015, the Prime Minister sent a Mandate Letter to Canada's health minister expressing his desire that she begin working on efforts leading to the eventual legalization and regulation of cannabis. In November 2015, Canada's Justice Minister said she and the ministers of Health and Public Safety were working on specifics around the legislation. In its December 2015 Throne Speech, the government committed to legalizing, regulating and restricting access to cannabis and in April 2016, Canada's Health Minister announced the government's plan to introduce new legislation to the House of Commons the following spring. Shortly after, in June 2016, Health Canada announced the creation of the newly formed Task Force on Marijuana Legalization and Regulation to seek input on the design of a new system to meet its intention to legalize, strictly regulate and restrict access to cannabis. Its mandate was to consult with key stakeholders and recommend a framework. [The Task Force's initial Discussion Paper](#) reiterated that the current approach to cannabis prohibition isn't working and set out to explore five key themes. From July 1 to August 29, 2016, an [open public consultation forum](#) was available for Canadians. Finally, on December 13, 2016 the Task Force released its final report, "[A Framework for the Legalization and Regulation of Cannabis in Canada](#)". On April 13, 2017, the federal government proposed legislation that will legalize recreational cannabis in Canada; the target effective date is July 1, 2018: ([Bill C-45 An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts](#) and [Bill C-46 An Act to amend the Criminal Code \(offences relating to conveyances\) and to make consequential amendments to other Acts](#)). The legislation now must go through the legislative process, so assuming it is ultimately passed into law, it could still change before it takes effect.
- **"Medical" vs. "recreational" cannabis use:** Canadian law treats "recreational" (or "non-medical") cannabis and its use, and "medical" cannabis and its use, differently. It's important that employers understand this difference. **Medical:** Since about 2001, cannabis used for medical purposes has been legal, if used in a manner that complies

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with the applicable laws. Currently, two laws govern the use, possession and distribution of medical cannabis in Canada: the [Access to Cannabis for Medical Purposes Regulations](#), under which a person can only obtain a legal supply of cannabis from a federally licensed producer, which can only sell or provide it to a person who has a "medical document" provided by a medical or nurse practitioner; and the [Narcotic Control Regulations \(NCR\)](#), under which a health care practitioner can administer dried cannabis to, or prescribe or transfer it for, a person if the person is a patient under their professional treatment, and the dried cannabis is required for the condition for which the person is receiving treatment. The proposed new laws don't impact this medical cannabis legal regime, which will continue to operate parallel to the newly proposed recreational cannabis legal regime.

"Recreational": It is the legal regime governing the use of recreational cannabis that is undergoing major reform. Currently, Canadian criminal law governs the production and possession of non-medical cannabis with the [Controlled Drugs and Substances Act \(CDSA\)](#). Recreational users must either buy it on the black market or grow it themselves; both constitute production/trafficking offences under the CDSA, though its prohibition and criminalization of its users hasn't stopped people from consuming cannabis. The new legal regime proposed to govern recreational cannabis, once passed and in effect, will be comprised of [Bill C-45 An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts](#) and [Bill C-46 An Act to amend the Criminal Code \(offences relating to conveyances\) and to make consequential amendments to other Acts](#). Until the new laws are passed and in force as law, however, the current legal regime remains in effect.

- **"Decriminalization" vs. "legalization":** These terms aren't interchangeable. Decriminalization is a loosening of criminal penalties imposed for personal cannabis use even though the manufacturing and sale of the substance remain illegal. Essentially, law enforcement is instructed to look the other way when it comes to the possession of small amounts of cannabis meant for personal use. The manufacture and sale of cannabis remains unregulated by the state and those caught using the substance face civil fines instead of criminal charges. Growers, suppliers and retailers typically still face the prospect of criminal sanctions. In contrast, legalization is the lifting or abolishment of laws banning the possession and personal use of cannabis that, importantly, allows the government to [regulate and tax cannabis use and sales](#).

4 Review, update and revise existing workplace policies to deal with cannabis at work

Not surprisingly, the new draft laws don't deal with workplace safety because it's an area that primarily falls within the authority of provincial, rather than federal, laws. Even though there aren't yet any provincial laws in place, since the stigma is disappearing and usage is up, employers should immediately undertake a thorough review of all workplace policies to ascertain which require revision to address the legalization of recreational cannabis. The number

of affected policies and their names will vary from employer to employer, but here are the five key broad areas on which to focus:

- **"Drug" Definition:** Many workplace policies that related to drugs (alone or in combination with alcohol), define "drugs" as "illicit" or "illegal" drugs, often expressly including cannabis in that category. But when recreational cannabis becomes legal, these definitions will no longer apply to cannabis. At that point, cannabis will more closely resemble alcohol than cigarettes in this respect: legal, but with the ability to impair. Employers will need to review all policies that include a definition of "drugs" and revise them to ensure they include – or don't exclude – cannabis, as appropriate.
- **Workplace Impairment, Testing & Safety Policies:** Once legalized, cannabis will more closely resemble alcohol in this respect but with two – significant and intertwined – distinctions that will create uncertainty and could wreak havoc on most employers' impairment and drug testing policies: the lack of a metric for cannabis impairment and the lack of precise and timely current impairment testing methods, both of which the 2016 Task Force Report acknowledges specifically in relation to workplace safety:

...We acknowledge the clear need for investment in detection and enforcement tools. Most importantly, investment in research to link THC levels to impairment and crash risk is required to support the establishment of a scientifically supported per se limit. In addition, investments to support the development of accurate and reliable roadside testing tools are required ... The concerns expressed on workplace safety reinforce the urgent need for research to reliably determine when individuals are impaired. [As above in relation to] impaired driving, the ability to determine impairment with cannabis – through technology or specialized training – is not as advanced as our ability to measure the relationship between consumption and impairment with alcohol...

Despite these uncertainties, at least one Canadian arbitrator expressly, and another implicitly, accepted that an oral swab (sometimes called a "buccal" or a "cheek" swab) test accurately detects actual impairment due to cannabis at concentrations of 10 nanograms of THC per ml. of oral fluid at the time the test is taken: see the 2006 decision in *Imperial Oil Limited v. Communications, Energy & Paperworkers Union of Canada, Local 900* at paragraphs 26-27; the Ontario Court of Appeal upheld the Divisional Court's denial of the union's application for judicial review; *Halifax Employers Association v. Council of International Longshoremen's Association*. But employers must beware: there are rigid constraints on the circumstances in which they can conduct any drug or alcohol testing, and any review or revision of an existing testing policy must continue to comply with these constraints (and now is a good time to review that aspect of the policy too).

- **The magic number:** There is an accepted lack of scientific data correlating the presence of THC and actual impairment. Unlike with alcohol, for which evidence was gathered over years to arrive at an established metric for alcohol intoxication (Blood Alcohol Concentration or BAC), this type of data doesn't exist for cannabis. Indeed,

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the proposed new laws make driving with a blood drug concentration exceeding the prescribed limit a criminal offence – but hasn't yet set that prescribed limit. Experts have observed that, "[t]here is no reliable way to relate urine or blood levels to impairment". As with alcohol, the effects of cannabis vary tremendously between users: "[m]arijuana metabolism varies widely due to wide variability in THC concentration in cannabis leaves, depth of inhalation, respiratory function, fat accumulation, and variable rate of liver metabolism." But unlike alcohol, THC can remain in the brain and body of chronic, heavy cannabis users for prolonged periods of time – sometimes several days or weeks – far beyond the period of acute impairment and potentially contributing to a level of chronic impairment. Some heavy, regular users (including those who use it for medical purposes) might not show any obvious signs of impairment even with significant THC blood concentrations; yet infrequent users with the same or lower THC concentrations might show more significant impairment. To further complicate things, there's a significant combination effect when cannabis is consumed with alcohol, leading to a greater level of intoxication and motor control problems than when either is consumed alone.

- **Testing methods:** The second fundamental distinction is the lack of precision around testing for both timely and accurate current impairment levels for cannabis. Measuring THC in blood, urine, or saliva is relatively easy, but none can, as yet, distinguish recent use from chronic or earlier (e.g. days or even weeks earlier) use. Research indicates people are most impaired only within a couple of hours of smoking cannabis (though the Medical Review Officer handbook indicates employees have "reduced abilities" for "at least 4-6 hours after a dose of marijuana"), not days later. Frequent cannabis users will have elevated levels of THC in blood, urine, and saliva even if they haven't smoked in days, and thus might not be impaired. Oral fluid swab is currently the most common and widely-accepted test for cannabis impairment due to recent use because of the similarity between oral fluid THC concentrations and blood plasma THC concentrations compared to urine or hair testing, and it's less invasive than a blood sample. But unlike alcohol testing methods, to date there's no accepted, reliable oral swab that delivers an immediate result. Some can give a fast reading, but only indicate a positive or negative result for active THC, not the amount. Swabs must be analyzed in a lab, either on or off-site, with the results taking days to weeks to reach the employer. However, oral fluid testing that detects and indicates THC levels within minutes is in development; in particular, employers will want to keep an eye on the current [Canadian police pilot of portable roadside testing tools to measure THC presence](#) in a driver's system.
- **Workplace Usage Policies:** Many workplace policies prohibit the use of "illicit drugs" on the employer's premises; however, once legalized, cannabis will no longer be illicit. In this respect, cannabis will become more similar to alcohol, and less like cigarettes: legal, but with impairment potential. Employers have the authority to prohibit its use in the same way they prohibit the use of alcohol on their premises, as well as during working hours or otherwise as appropriate depending on the position and

work environment (for example, while "on call").

Accommodation-Related Policies: Under human rights laws, employers have a legal duty to accommodate a disability: a duty to arrange an employee's workplace or duties, if it can do so without undue hardship, to enable the employee to do their work. The duty to accommodate applies to medical cannabis use; it also applies to dependency on drugs, whether legal or illegal, as it does to alcoholism. But just as there's no duty to accommodate recreational alcohol use that falls short of a disabling alcohol dependence, there's no legal duty to accommodate recreational cannabis use that falls short of a disabling drug dependence – even when it's legal. Review accommodation-related policies to ensure they clearly delineate when the employer's duty to accommodate for cannabis use, both medical and non-medical, as well as drug use generally, applies.

Scent Policies: Time to sniff out that old scent policy and give it the smell test. Similar to cigarette smoke, and perhaps to a lesser degree alcohol, cannabis smoke has a strong, distinct – and for many, unpleasant – odor. Consider revising scent policies to address the smell of cannabis smoke and, if it doesn't already, add in cigarette smoke and alcohol odor too.

5 If you don't have any of these policies, get them

Workplace policies are good practice generally, but the looming legalization of recreational (non-medical) cannabis makes them even more important. Just remember that there are rigid constraints on the circumstances in which one can conduct any drug or alcohol testing, so any new testing policy must comply with these constraints. Furthermore, when implementing new policies in the workplace generally:

- **Non-unionized workplace:** Employers of a non-unionized workplace have the right to unilaterally institute or change a policy provided it doesn't amount to a fundamental change to an employee's contract of employment that demonstrates that the employer no longer intends to be bound by the employment contract. If it does so, the employee is entitled to consider itself constructively dismissed. Generally speaking, it's unlikely that the proper introduction of any of the policies above would amount to a constructive dismissal, but employers should take care: it will depend on the particular circumstances.
- **Unionized workplace:** Employers of a unionized environment have the right to institute a policy without the union's endorsement if it satisfies the "KVP" criteria (named for the arbitration case in which it was first enunciated):
 - The policy (or any aspect of it) must not be inconsistent with the collective agreement.
 - The policy must not be unreasonable.
 - The policy must be both clear and unequivocal.
 - The employer must have brought the policy to the affected employee(s)' attention before acting on it, putting them on notice of what's required, that a breach could result in discipline including discharge (if applicable) and if their employment is in jeopardy.
 - The employer must consistently enforce the policy.

Due diligence (cont'd)

A 5-Step Plan For Employers To Prepare For Cannabis Legalization In Canada (cont'd)

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Provincial initiatives

Regulation responds to dangers of wildfires in forest protection areas

A new Forest and Prairie Protection Regulation (Alta. Reg. 65/2017) under Alberta's Forest and Prairie Protection Act took effect, March 30, 2017, by Order in Council. The regulation tightens flammable debris disposal and other industry-based requirements for industrial operations in or near a forest protection area, including measures to address burning in a protection area outside the fire season; flare pits and flare tanks; flaring gas; pipelines endangered by fire; and incinerators.

http://www.qp.alberta.ca/documents/orders/Orders_in_Council/2017/317/2017_114.html

Ontario issues resource to help workers and employers understand obligations related to workplace violence and harassment

Ontario's Ministry of Labour issued, May 3, 2017, *Preventing Workplace Violence and Workplace Harassment* - a resource to help the workplace parties understand some of their obligations under the Occupational Health and Safety Act (OHSA). Under the Act:

Workplace violence means:

- the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
- an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker;
- a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Workplace violence may include hitting a worker, throwing objects at a worker, sexual violence, or threats, whether conveyed verbally, in writing, or through behaviour.

Workplace harassment means:

- engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome; or workplace sexual harassment.

Workplace sexual harassment means:

- engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or
- making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Employer duties re: Workplace violence

- **Assessment:** Employers must proactively assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work. Employers must advise the Joint Health and Safety Committee or representative of the assessment, and provide a written copy, if available.
- **Policy and program for workplace violence:** Employers must prepare a policy with respect to workplace violence, and develop and maintain a program to implement the policy. The workplace violence program must include measures and procedures for:
 - controlling risks identified in the assessment of risks;
 - summoning immediate assistance when workplace violence occurs or is likely to occur;
 - enabling workers to report incidents of workplace violence; and
 - investigating and responding to incidents or complaints of workplace violence.

Employers must provide information and instruction to workers on the contents of these policies and programs. In addition, employers and supervisors must provide information to a worker about a risk of workplace violence from a person with a history of violent behaviour if the worker can expect to encounter that person in the course of work, and if the worker may be at risk of physical injury.

Domestic violence:

Employers who are aware, or ought reasonably to be aware, that domestic violence may occur in the workplace must take every precaution reasonable in the circumstances to protect a worker at risk of physical injury.

For more information, access MOL webpage at: https://www.labour.gov.on.ca/english/hs/pubs/fs_vvh.php

OHS due diligence - distracted and impaired driving

Will distracted driving kill your employees?

IT IS ESTIMATED THAT DRIVER DISTRACTION is a factor in about 4 million motor vehicle crashes in North America each year. Moreover, according to the Insurance Bureau of Canada, nearly 80% of collisions and 65% of near-collisions involved some form of driver inattention up to three seconds prior to the event.

As David K. Law, of Gowlings WLG, recently points out in his article *Will Distracted Driving Kill Your Employees?* these alarming statistics should be a matter of concern for all employers.

"Anyone driving from home to a location different from their usual workplace, or travelling for work, is usually "in the course of employment" under workers' compensation law," Law states.

"Thus distracted driving is very much an employer responsibility and risk...when something bad happens, an employer will always be scrutinized and often be blamed. . .Even where a rule is in place and people have been trained in safe practice, a breach of that practice will trigger an examination of whether the employer adequately enforced the rule."

The article points to the importance of establishing and reinforcing due diligence measures (see sidebar); and of developing and enforcing a policy that will sanction employer action if an employee breaks the rules.

To illustrate the latter, the article cites the case of *BFI Canada Inc. v General Teamsters Union, Local 362*, 2015 CanLII 15350 (AB GAA) in which a truck driver with BFI was dismissed for violating the company's distracted driving policy after an on-board camera showed him holding and using his cell phone while driving at a truck stop.

The union grieved the termination. The arbitrator found that the incident constituted a clear case of unsafe driving, a far from trivial transgression for a professional driver who was rightly held to a high standard.

Furthermore, the driver had been disciplined four times before and did not appear to learn from these incidents. As such, BFI had just cause to terminate the Grievor's employment.

"In addition to the Grievor's misconduct, the arbitrator considered the following factors in coming to its decision to uphold the termination:

- BFI had in place a reasonable cell phone use and distracted driving policy as part of its safety program. The policy was brought to the Grievor's attention and he was trained on it;
- BFI's safety training identifies cell phone use while driving as a safety hazard that substantially increases the risk of injury;
- The policy warns of discipline for violations, up to and including termination and it was consistently enforced between employees.

Access the full text of this article at:

<https://gowlingwlg.com/en/canada/insights-resources/will-distracted-driving-kill-your-employees->

The RCMP defines as follows:

Distracted driving is a form of impaired driving as a driver's judgment is compromised when they are not fully focused on the road. Distracted driving qualifies as talking on a cell phone, texting, reading (e.g. books, maps, and newspapers), using a GPS, watching videos or movies, eating/drinking, smoking, personal grooming, adjusting the radio/CD and playing extremely loud music. Even talking to passengers and driving while fatigued (mentally and/or physically) can be forms of distracted driving.

Distracted driving due diligence

In his article on distracted driving, David K. Law of Gowlings WLG lists the following 'due diligence' measures that employers can take to reduce the risks arising from distracted driving:

- First, discourage the use of the phone while driving – avoid prompting distracted driving, by not calling, texting or emailing someone when she is known to be operating a vehicle;
- Second, adopt a policy requiring employees to use only hands-free devices for phone calls while driving, and not to engage in texting or email while driving;
- Communicate that policy frequently, in person and in writing (emails);
- Reinforce that policy through reminder training, such as the very dramatic and effective video public service announcements now ubiquitous on the web;
- Have the Joint Health and Safety Committee or worker safety representative include distracted driving on the list of issues which it inspects for and reports upon;
- Examine employee call, text and email traffic to assess whether they appear to be engaging in those activities while operating a vehicle;
- Warn and sanction employees known to be in violation of the rule. Note that a "sanction" should not include suspension, unless an employment contract or collective agreement permits it.

OHS due diligence - distracted and impaired driving

Cause for concern: Some of the top distressing things drivers do – or believe they can do

On April 3, 2017 - marking the start of Distracted Driving Awareness Month in the US - that country's National Safety Council (NSC) released results of a study of some of the top driver behaviours and beliefs that put all roadway users at risk and increase the likelihood of being involved in a crash.

Compiled through NSC surveys conducted over the last 12 months, the following alarming driver habits and opinions underscore the importance of raising awareness of a growing problem both on- and off-the job:

- 47 percent of drivers believe it is safe to send a text either manually or via voice-dictation systems.
- 45 percent say they feel pressure from employers to check email while driving; however, 44 percent say they have crashed in the last three years while they were either commuting or traveling for business.
- 35 percent of teens – a cohort that has seen an increase in fatal crashes – would use social media behind the wheel.
- 17 percent of teens feel their own distraction may have contributed to a crash.
- 71 percent believe they can have up to 3 drinks before they are not safe or too impaired to drive.
- 33 percent believe it is acceptable to drive with less than four hours of sleep. In fact, drivers who are tired can be as impaired as drivers who are legally drunk.
- 32 percent say new cars can essentially drive themselves.
- 13 percent have driven after using marijuana in the last month.
- Two-thirds of drivers have felt unsafe because of another driver's distraction, but just 25 percent feel their own distractions have put themselves or others at risk.

For more information, visit; nsc.org/ddmonth

Testing for marijuana impairment when driving remains problematic

The relationship between the impending legalization of marijuana - anticipated to take effect in 2018 - and impaired driving is another issue explored this month in an article - *Legalized Marijuana – Another Balancing Act For Employers* by Michael Horvat of Aird & Berlis LLP,

Mr. Horvat writes; ‘For employers whose employees regularly operate on Canada's roads, the potential legalization of marijuana raises competing interests. Canadian society appears to be more open to the regular recreational use of marijuana, which employees may rightfully argue will become a legal right that can be exercised on their own time. At the same time, the government has clearly signalled that legalized pot will come with wider testing and greater discretion given to law enforcement to engage in that testing.’

Horvat points out that; ‘‘Safety is a key aspect of the government's legalization efforts, and the proposed law could provide police with significant authority to conduct legal roadside saliva tests on all drivers based on a reasonable suspicion that the driver has drugs in their body.

‘‘...Questions remain as to whether the roadside test currently being contemplated by authorities is reliable or can provide immediate results evidencing current impairment from marijuana. The government has conceded that the current oral saliva test does not measure the level of intoxication or time of use, only the presence of THC, the main impairment ingredient in cannabis. Also problematic for law enforcement is that, unlike alcohol intoxication, there is no generally accepted level of THC that is recognized as the legal limit to prohibit the operation of a vehicle.

The government has referenced the potential for strict penalties for "driving high," such as licence suspension and vehicle seizure, as an immediate response for an infraction for maximum deterrent impact. Clearly, those companies who employ drivers will have a clear economic interest in not only ensuring the safe operation of their vehicles, but in protecting their assets.

‘‘We wait to see how federal regulations and local provincial law enforcement will balance legal marijuana use with public safety concerns and the deterrence of illegal behaviour in a generally more permissive environment. Employers will have to be flexible and ready to react quickly, with testing and accommodation policies that meet both the changing legal and social rules governing a potential future of legal recreational marijuana.’’

Read the full text of the article ‘‘Legalized Marijuana – Another Balancing Act For Employers’’ by Michael Horvat of Aird & Berlis LLP at;

<http://www.airdberlis.com/Templates/Newsletters/newsletterFiles/213551/Legalized%20Marijuana%20-%20April%202018,%202017.pdf>

OHS standards, codes and guidelines

CSA standard updates requirements for steel storage racks

CSA Group released in May 2017 an updated edition of CSA A344, *User guide for steel storage racks*. The guide establishes the requirements for a safe environment where steel storage racks and lift trucks are the primary equipment of the workplace. The typical workplaces affected by these documents are warehouses and distribution centres.

The new version applies primarily to selective pallet racks, although the principles set out in the guide may be used when purchasing and using other types of racks, such as double-deep, push-back, drive-in and drive-through racks, cantilever racks, portable racks, rack-supported buildings, and stacker racks.

CSA Group website: <http://www.csagroup.org/>

Draft CSA Z462 - Workplace electrical safety (New Edition)

A recently-released draft edition of CSA Z462 - *Workplace Electrical Safety* - specifies requirements necessary for the practical safeguarding of workers during activities such as the installation, removal, inspection, operation, maintenance, and demolition of electric conductors and equipment, as well as work in proximity to energized electrical equipment.

The 2017 edition of CSA Z462 adds resource material geared towards organizations seeking to make electrical safety an integral part of their overall safety management system.

Access new edition draft (free registration required) at:

<http://publicreview.csa.ca/Home/Search?pageNum=2&pageSize=20&sort=relevance&ascending=True&searchText=CSA%20Z462%20-%20Workplace%20Electrical%20Safety>

Safety Code on articulating boom cranes posted for review

CSA Group recently posted Z150.3 *Safety Code for Articulating Boom Cranes* for public review. The standard specifies requirements for the design, construction, installation, inspection, testing, maintenance, and operation of articulating boom cranes.

Table 1 details maximum load ratings, while Table 2 outlines minimum safe approach distances from energized conductors.

Workers are put at hazard when a crane is operated near a source such as a radio transmitter or energized high-voltage electrical equipment that might induce an electric charge. As a precaution, the crane should be effectively grounded by applying grounding cables or other effective means before workers contact the load and all flammable materials should be removed from the immediate work area. Review period ends June 4, 2017.

website: <http://publicreview.csa.ca/Home/View/834494>

NEB pilot project makes pipeline safety standard available free of charge

On April 6, 2017, the National Energy Board (NEB) announced that it is launching a one-year pilot project to make a key pipeline safety standard available to the public free of charge. CSA Z662 is a detailed document with over 500 pages setting out requirements around the technical aspects of design, construction, operation, deactivation and abandonment of oil and gas pipeline systems. The requirements of CSA Z662 are incorporated by reference into the NEB's Onshore Pipeline Regulations and are applicable to all NEB-regulated oil and gas pipelines.

In Ontario, all persons who are subject to the Technical Standards & Safety Authority (TSSA) Oil and Gas Pipeline Systems Regulation are required to comply with CSA Z662.

Interested persons can access CSA Z662 through the CSA web portal at:

<https://community.csagroup.org/login.jspx?referer=%2Fcommunity%2Foil-and-gas%2Fz662-view-access>

ULC publishes standard for liners used for containment of aboveground tanks

ULC Standards has announced publication of the first edition of CAN/ULC-S668-12 (R2017), *Standard for Liners Used for Secondary Containment of Aboveground Flammable and Combustible Liquid Tanks*.

<https://www.scc.ca/en/standardsdb/standards/26276>

CSA releases first edition of probabilistic safety assessment for nuclear plants

On April 18, 2017, CSA Group released CSA N290.17-17 - a standard outlining requirements regarding the preparation and maintenance of a probabilistic safety assessment at a water-cooled nuclear power plant. CSA Group: <http://www.csagroup.org/>

CNSC issues draft REGDOC-2.5.5, Design of Industrial Radiography Installation

REGDOC-2.5.5 was developed to provide guidance to persons intending to design and construct installations for the purposes of performing industrial radiography. Comments due June 16, 2017.

http://www.nuclearsafety.gc.ca/pubs_catalogue/uploads/REGDOC-2-5-5-design-of-radiography-eng-draft.pdf

Technical safety standards

ABSA to run seminars on updated Alberta technical safety codes

Some significant revisions to several sections of the ASME Boiler and Pressure Vessel Code are expected this year when new code editions are published in late July.

A technical team at ABSA (Alberta Boilers Safety Association) has been assembled to study the upcoming changes in order to prepare material for its annual Code Update Seminars - an opportunity for industry to catch up on relevant information about changes to the most commonly used codes and standards adopted by Alberta legislation. This year's seminars are scheduled for October 13 in Edmonton; and October 20 and October 27 in Red Deer.

For additional information access ABSA website at:

<http://www.absa.ca/seminars/course-listing/>

BC amends technical safety standards regulations

Safety Standards Act Ministerial Order No. M 065, posted April 25, 2017, amends B.C. Reg. 104/2004 - Power Engineers, Boiler, Pressure Vessel and Refrigeration Safety Regulation, with some provisions effective immediately; others, effective October 2, 2017, and still others effective December 3, 2019.

The Order also amends BC Regs.101/2004 - Elevating Devices Safety Regulation; 103/2004 - Gas Safety Regulation; and part of Reg. 105/2004 - Safety Standards General Regulation,

Access details at:

http://www.bclaws.ca/civix/document/id/mo/mo/2017_m065

TSSA Code Adoption Documents issued

Gaseous Fuels Code Adoption Document Amendment (FS-225-17) and Propane (FS-224-17) Code Adoption Document Amendments under the Technical Safety Standards Act were issued on April 10, 2017 and will become effective on July 1, 2017.

Access amendments at:

<https://www.tssa.org>

Workers' compensation news

Bullied To Death?

PEI WCB awards benefits to widow after finding a link between workplace bullying and fatal heart attack

by Cristina Wendel, Dentons LLP

The Workers Compensation Board of Prince Edward Island recently awarded WCB benefits to the widow of a worker who died of a heart attack in November 2013. The worker had suffered a workplace back injury a few months earlier and had recently returned to work. According to the widow's submissions to the WCB, the worker was bullied at work by his supervisor and did not feel he was receiving the proper support from his employer.

The worker's family had initially approached the WCB about the availability of benefits but were advised that because the death was not caused by a workplace injury, benefits were not available to them. The worker's estate, widow and children subsequently commenced a court action against the employer and supervisor claiming damages. The claim alleged that the worker died from heart failure as a result of workplace bullying, and that the work conditions led to stress, anxiety and physical symptoms which ultimately caused his fatal heart attack.

The Supreme Court of PEI initially dismissed the action on the basis that it did not have jurisdiction as there was a collective agreement in place that governed, and so there were other remedies available to the plaintiffs including grievance arbitration and a WCB claim.

On appeal, the PEI Court of Appeal reversed the decision, finding that the PEI *Fatal Accidents Act* did give the Court jurisdiction over the claim brought by the dependents. The Court of Appeal also considered whether a stay was appropriate on the basis that the claim was within the jurisdiction of the *Workers Compensation Act*. However, the Court was unable to decide that issue on the limited record, reminding the parties that the WCB can adjudicate and determine whether a right of action is removed by the *Workers Compensation Act*.

The plaintiffs returned to the WCB seeking a determination. The WCB confirmed that a workplace accident could include bullying and harassment. After receiving submissions from the parties, the WCB determined that the worker's death was linked to workplace bullying and harassment, thus entitling the widow to benefits. The employer has filed an appeal with the WCB so this is likely not the last word.

Read the full text of this article at:

<http://www.workplacesafetynorth.ca/news/news-post/new-tool-measures-workplace-safety-systems-and-culture>

Information resources

2017 edition of Injury Facts® reveals most significant safety threats facing Americans today

This month, the US National Safety Council released the 2017 edition of *Injury Facts*® – that country's definitive annual publication for preventable deaths and injuries.

The report shows that preventable deaths – commonly known as "accidents" – have reached an all-time high, with 146,571 Americans dying in 2015 from causes such as drug overdoses, motor vehicle crashes, falls, choking and drowning. The number of people killed in preventable incidents trails only heart disease, cancer and chronic lower respiratory disease, and outpaces strokes, diabetes and Alzheimer's disease.

Among the more jarring statistics in the 2017 edition:

- poisonings, including those from opioid prescription painkiller overdoses, were the leading cause of preventable death in 24 states and Washington, D.C.
- an American's lifetime odds of dying from an opioid overdose are 1 in 98. The lifetime odds of dying in a motor vehicle crash are 1 in 112.
- transportation incidents now account for 41% of work-related fatalities.
- possibly 478,000 workplace injuries may involve fatigue or sleep problems.

A free recording of a webinar addressing highlights from the 2017 edition of Injury Facts® is available, and the entire book can be purchased at nsc.org/injuryfacts

New NIOSH sound level meter app available on iTunes

New NIOSH Sound Level Meter App for IOS devices is now available on iTunes for the OH&S community as well as the general public.

View the video for a demonstration of the app's features at:

<https://www.youtube.com/embed/ZUoeDIYOAIQ>

SSM offering hearing and respirator fit testing services

Safety Services Manitoba (SSM) is now offering a full range of hearing and respirator fit testing services - on-site or by appointment.

SSM's base line and annual hearing assessments for individual employees include: early warnings and referrals; counselling for employees regarding their test results; secure record keeping; a comprehensive report which includes recommendations and statistics on standard deviations; and a copy of test results and our recommendations for each employee.

<http://www.safetyservicesmanitoba.ca/occupational-safety-training/hearing-and-respirator-fit-testing/hearing-testing-services/>

SSM offers respirator fit-testing services for all makes and models of respirators.

A written report is provided on completion upon successful testing.

<http://www.safetyservicesmanitoba.ca/occupational-safety-training/hearing-and-respirator-fit-testing/respirator-fit-testing/>

IWH work on provincial review supports new mining safety culture and systems audit tool

The *Internal Responsibility System Climate Assessment and Audit Tool* (IRS CAAT), developed by IWH and Workplace Safety North, is now being piloted in Ontario's mining operations

Concerns about the integrity of the internal responsibility system in underground mining became a focus during the 2014 *Mining Health, Safety and Prevention Review*, called by Ontario's Minister of Labour. When the review wrapped up in 2015, one of its recommendations was for the employer group, the Ontario Mining Association, to "work with labour representatives to develop an Internal Responsibility System best practice guideline as an industry benchmark."

As a member of the review's advisory group, Institute for Work & Health (IWH) President and Senior Scientist Dr. Cameron Mustard, helped develop a series of best practice statements describing what an effective IRS looks like. And responding to this recommendation, he led a research team at IWH to help the health and safety association Workplace Safety North (WSN) create a questionnaire based on these statements.

The result of this work is an assessment method called the Internal Responsibility System Climate Assessment and Audit Tool (IRS CAAT). The tool is now being piloted by WSN to provide mining operations with a snapshot of how their IRS is functioning.

See www.workplacesafetynorth.ca/news/news-post/new-tool-measures-workplace-safety-systems-and-culture

For more on the IRS CAAT, see Mustard's presentation on the tool at: www.iwh.on.ca/other-reports.

EHS conference, training and professional development planning calendar

May 2017

May 16-18, 2017; **AQHSST 39th Annual Congress**; Victoriaville, Québec; Association québécoise pour l'hygiène et la santé et la sécurité du travail (AQHSST); *website: <http://www.congresaqhsst.ca>*

May 17-19, 2017; **NLOHSA Safety Conference & Tradeshow**; Newfoundland and Labrador OHS Association; Gander, NF; *website: <http://www.nlohsa.ca/conference-2017/>*

May 25-26, 2017; **Keeping Workers Well 2017 - 46th Annual Conference**; Ontario Occupational Health Nurses Association; Kingston, ON; *website: <http://www.oohna.on.ca/oohna-conference/>*

June 2017

June 1-2, 2017; **International Society for Occupational Ergonomics and Safety (ISOES) Annual Conference**; Seattle, WA; *website: https://www.ace-ergocanada.ca/news_and_events/events.html/event-info/details/id/1681*

June 4-7, 2017; **AIHce 2017**; American Industrial Hygiene Association; Seattle, Washington; *website: <https://www.aiha.org/events/AIHce2017/Pages/default.aspx>*

June 15-16, 2017; **Slips, Trips, and Falls International Conference**; Toronto Rehabilitation Institute-University Health Network; Toronto, ON; *website: <http://www.slipstripsfallstri.com>*

June 19-22, 2017; **American Society of Safety Engineers: Safety 2017**; Denver, Colorado; *website: <http://safety.asse.org>*

June 20-23, 2016; **PREMUS 2016 - 9th International Scientific Conference on the Prevention of Work-Related Musculoskeletal Disorders**; Allstream Centre, Toronto, ON; Institute of Work and Health; *website: <https://premus2016.iwh.on.ca>*

July 2017

July 31-August 3, 2017; **Association of Canadian Ergonomists Annual Conference**; Banff, Alberta; *website: https://www.ace-ergocanada.ca/news_and_events/national_conferences/index.html*

July 27-29, 2017; **10th International Conference on Emerging Materials and Nanotechnology**; Vancouver, BC; *website: <https://d2cax41o7ahm5l.cloudfront.net/cs/pdfs/emerging-materials-2017-preliminary-program.pdf>*

July 31-August 3, 2017; **Association of Canadian Ergonomists Annual Conference**; Banff, Alberta; Association of Canadian Ergonomists; *website: https://www.ace-ergocanada.ca/news_and_events/national_conferences/index.html*

August 2017

July 31-August 3, 2017; **Association of Canadian Ergonomists Annual Conference**; Banff, Alberta; Association of Canadian Ergonomists; *website: https://www.ace-ergocanada.ca/news_and_events/national_conferences/index.html*

September 2017

September 3-6, 2017; **XXI World Congress on Safety and Health at Work**; Republic of Singapore, Singapore; Occupational Safety and Health Division, Ministry of Manpower, Singapore, in conjunction with the International Labour Organization and the International Social Security Association; *website: <https://www.safety2017singapore.com>*

September 17-20, 2017; **Canadian Society of Safety Engineering Professional Development Conference**; Halifax, Nova Scotia; Canadian Society of Safety Engineering; *website: http://www.csse.org/2017_conference*