

## **BRIEF ANALYSIS OF CURRENT WORKPLACE SUBSTANCE ABUSE ISSUES AND ACTIVITIES IN CANADA**

(The information in this document is not a legal opinion; it is provided  
for information only and should not be relied on as legal advice)

The following report is broken down into four key information areas. Supporting information including statistical overviews, regulations, and policy papers can be accessed through the web links found through the document.

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## 1. RESEARCH ON ALCOHOL AND DRUG USE PATTERNS AND IMPACTS

When it comes to addressing workplace alcohol and drug issues, many employers are going beyond setting up assistance programs, and are introducing alcohol and drug policies for employees as part of their overall approach to safety. Because safety obligations extend to contract workers, companies are also setting out policy expectations for contractors. An important step in this process is to make a legitimate assessment of need, so that any policy or program that is ultimately implemented responds to those stated needs. The importance of this step has been reinforced by the Supreme Court decision on establishing a *bona fide* occupational requirement. (reviewed in the Legal Climate section of this report)

This is why information on alcohol and drug use patterns and impacts in the workplace can play an important part in the background research employers undertake as they identify risk in their own organizations and determine their specific policy requirements. This type of data is valuable to companies as they make decisions on the most appropriate approach to addressing alcohol and drug issues in their own workplace. However, there is limited current Canadian data available.

**U.S. Research:** Addressing alcohol and drug issues has been a major focus in the U.S. since the Regan era. With respect to the workplace, the government issued regulations requiring alcohol and drug policies and testing programs in many government agencies and private industry under government regulation (including transportation, postal, customs, nuclear energy, etc.). In addition, the Drug-Free Workplace Act required any organization contracting with or providing services to the government to have a drug-free workplace policy in place as a condition of contract. They backed these initiatives up with considerable research money which has supported both general population surveys and workplace- specific studies.

For example, the National Household Surveys on Drug Abuse (conducted by the National Institute on Drug Abuse) provide national data about the prevalence, correlates, and trends in the use of illicit drugs, alcohol and tobacco among members of the household population who are age 12 and older and who are employed. These surveys began in 1971 and are now conducted annually. National surveys of high-school seniors and the military are also reported, and statistics are available from a variety of other federal, state, municipal, and workplace surveys. Information can be found at the following web site which includes some workplace data as well.

<http://www.nida.NIH.GOV/DrugPages/Stats.html>

## 1. RESEARCH ON ALCOHOL AND DRUG USE PATTERNS AND IMPACTS continued

**International Research:** There is a significant body of research that looks at the impacts of alcohol and other drugs on performance in a number of countries. Much of this has focused on operating vehicles and on the advancement of roadside safety programs around the world, including in North America. This information, including research on the effectiveness of education, training and deterrence programs, can be equally applicable in the workplace, and therefore provides useful information to employers. Canada plays a role in this through Transport Canada, the Traffic Injury Research Foundation, and various provincial addictions and insurance organizations, as well as the Drugs and Driving Committee of the Centre for Forensic Sciences.

Research regarding roadside safety conducted through TIRF can be accessed through <http://www.trafficinjuryresearch.com/index.cfm>

A series of useful links to international research on driving and traffic safety can be found through <http://www.icadts.org/links.html>.

**Canadian Research:** Beyond the work noted above supporting roadside safety, there is relatively limited research being done in Canada on this issue. Information on the extent of alcohol and drug use by Canadian workers is dated, and there has been limited research on workplace programs in the last several years.

- **Workforce Data:** AADAC's 1992 survey of employed individuals in Alberta provides a breakdown of data by key industry sectors and occupations, as well as information from unions and management representatives on a variety of related issues. Although information on personal use levels is useful, also of interest is the perceptions of employees regarding whether they know coworkers with an alcohol or drug problem, and whether they feel alcohol or drug use is a problem in their own company. In both cases, the numbers were fairly high in most industry sectors. The study was repeated in 2002 and the more recent data is available on the AADAC web page at

[http://corp.aadac.com/content/corporate/research/impacts\\_substance\\_use\\_alb\\_erta\\_workplace\\_profile.pdf](http://corp.aadac.com/content/corporate/research/impacts_substance_use_alb_erta_workplace_profile.pdf)

[http://corp.aadac.com/developments/dev\\_news\\_vol23\\_issue6.asp](http://corp.aadac.com/developments/dev_news_vol23_issue6.asp)

## 1. RESEARCH ON ALCOHOL AND DRUG USE PATTERNS AND IMPACTS continued

The 2002 survey found:

- an increase in the availability of programs to assist employees with personal difficulties, both in employer initiated Employee Assistance Programs, and union initiated Member Assistance Programs;
  - prevalence and patterns of alcohol use remained relatively unchanged since 1992, although more workers were infrequent drinkers and fewer were occasional drinkers; regular, moderate, heavy and very heavy drinking patterns remained the same;
  - 11% of workers reported using alcohol while at work and 4% used alcohol four hours prior to reporting for work;
  - 10% of workers reported being illicit drug users (up from 6%), and this was primarily marijuana use;
  - 1% reported using drugs at work and 2% used within four hours prior to reporting for work; this was primarily cannabis;
  - employer concerns about alcohol and illicit drug use in their own organization have doubled since 1992; and
  - workers in the construction, utilities, forestry-mining, wholesale/retail trade, public administration and finance/insurance/real estate sectors were most likely to report substance use at work, at-risk use, multiple substance use, or gambling issues; young males 18 to 24 years of age are most at risk for substance use.
- General Population – National: The national population survey conducted by Health Canada in 1988, followed by a second survey in 1994 allowed for a look at trends in use patterns across the country. Health Canada, the Canadian Executive Council on Addictions (CECA) and the Canadian Centre on Substance Abuse (CCSA) recently reported the results of their 2004 Canadian Addiction Survey (CAS) which provides a further update on the use of alcohol and other drugs by Canadians aged 15 and older. An analysis of data collected for all provinces is provided, with comparisons with the two previous surveys, and specific information on related harms.

With respect to alcohol use, the 2004 survey found:

- most Canadians drink in moderation; 79.3% are current drinkers, and of those, 44% drink weekly;
- more males (82%) than females (76.8%) are past year (current) drinkers, with the highest rates among youth 18 to 24 years of age (about 90%);
- 6.2% of current drinkers report heavy drinking (5 or more on a single occasion for men, 4 or more for women) at least once a week, and 25.5% at least once a month; males, persons 18 to 24 years of age and single people are more likely to be heavy drinkers;
- the highest percentage of current drinkers is in Quebec while the highest percentage of heavy drinkers live in Newfoundland and Labrador;

## 1. RESEARCH ON ALCOHOL AND DRUG USE PATTERNS AND IMPACTS

continued

- overall, 17% of current drinkers are high risk drinkers split between women at 8.9% and men at 25.1%; and
- drinking patterns appear to more closely reflect those found in the 1989 survey, while in most drinking categories there was a drop in the 1994 survey results; there was an increase in the number of heavy infrequent and heavy frequent drinkers in 2004 over the two previous surveys.

Regarding illicit drug use, the survey found:

- 14.1% of adults are current marijuana users, nearly double the level in 1994 (7.4%);
- males (18.2%) are more likely than females (10.2%) to be current users, as are younger people (30% of 15-17 year olds and just over 47% of 18 and 19 year olds) while beyond age 45, less than 10% of the population used in the past year;
- of current users, 16% report using monthly, 20.3% weekly and 18.1% daily;
- the highest percentage of current users are found in B.C. (16.8%) followed by Quebec (15.8%) and Alberta (15.4%);
- one in six Canadians has used an illicit drug other than cannabis in their lifetime, however, the rates of past year drug use are generally 1% or less (exception cocaine use at 1.9%), and overall only 3% of Canadians reported past use of a drug other than cannabis.

8.8% of Canadians reported past year alcohol use has resulted in harm to themselves, 32.7% reported harm related to alcohol use by others (highest reported in Alberta in both cases), and 17.5% reported harm from past year illicit drug use (highest in Saskatchewan).

Much more detail is found in the full report at the site below, and a more detailed report will follow in a few months.

- News release <http://www.ccsa.ca/pdf/ccsa-newrel-20041124-e.pdf>
- Backgrounder <http://www.ccsa.ca/pdf/ccsa-bckgrd-20041124-e.pdf>
- Highlights document <http://www.ccsa.ca/NR/rdonlyres/B2C820A2-C987-4F08-8605-2BE999FE4DFC/0/ccsa0048042004.pdf>
- Detailed report <http://www.ccsa.ca/NR/rdonlyres/6806130B-C314-4C96-95CC-075D14CD83DE/0/ccsa0040282005.pdf>

## 1. RESEARCH ON ALCOHOL AND DRUG USE PATTERNS AND IMPACTS continued

French versions:

- le communiqué de presse <http://www.ccsa.ca/pdf/ccsa-newrel-20041124-f.pdf>
- le document d'information <http://www.ccsa.ca/pdf/ccsa-bckgrd-20041124-f.pdf>
- les points saillants <http://www.ccsa.ca/NR/rdonlyres/D698E1B2-DA74-4B17-B76F-6AD38654A69A/0/ccsa0048052004.pdf>
- le rapport détaillé <http://www.ccsa.ca/NR/rdonlyres/967CBB4C-AA41-40E7-BA98-DB3805229887/0/ccsa0040292005.pdf>

An earlier report entitled *The Use of Alcohol and Other Drugs by Older Canadians and its Consequences* is also of interest and found at:

[http://www.hc-sc.gc.ca/ahc-asc/pubs/drugs-drogues/alcohol-alcool/index\\_e.html](http://www.hc-sc.gc.ca/ahc-asc/pubs/drugs-drogues/alcohol-alcool/index_e.html)

- General Population – Ontario with Trends: Data on use patterns in the general population is collected by the Centre for Addiction and Mental Health in Ontario. They report results for both adults and students, while several other provinces have conducted student surveys which have found similar trends. Although these surveys provide an excellent breakdown of data by gender, age, education, income and region in Ontario spanning more than 20 years, they do not provide any kind of a breakdown for employed individuals and of course, the data is limited to a single province. However, this data can be helpful when it comes to developing a “profile” of possible use patterns in a particular company when looking at age and gender information.

The 2001 adult survey indicates alcohol and drug use has increased in many areas, and remains at levels of concern:

- 83.6% of males are ‘current drinkers’ (women 75.7%), 8.8% of male drinkers are daily drinkers (women 2.6%) and heavy drinking by males increased from 14.4% in 1995 to 25% of current drinkers in 2001 (5.8% of women);
- 18% of adult males said they drove within an hour of drinking two or more drinks in the past year; although this percentage had reduced slightly every year since 1997, this was a significant rise over last year’s survey at 13.6%;
- 15.4% of adult males and 7.3% of females are current marijuana users; half of these used at least once a month or more during the past 12 months;
- 26.8% of adults age 18-29 are current users, as are 15.8% of those aged 30-49;

## 1. RESEARCH ON ALCOHOL AND DRUG USE PATTERNS AND IMPACTS

continued

- CAMH reports the most salient short-term trend shows a steady increase in cannabis use among the total sample (up from 8.6% in 1998 to 11.2% in 2001), and an increase in past year use by men, by individuals age 18-29, and by individuals age 30-49; and
- the most noticeable long term trend concerns the age distribution of cannabis users. The proportion of past year cannabis users age 30 to 49 has steadily and significantly increased over the duration of the survey.

Reliability of the survey data: The Ontario Centre for Addiction and Mental Health confirms sample survey research remains the most feasible technique to monitor health behaviours and outcomes in the general population, and that steps to enhance the validity of self-report surveys are well established in survey research methodologies. However:

- researchers recognize that because they rely on self-reported behaviour, surveys tend to underestimate true use patterns. For example, studies of under-reporting suggest denial, mostly by heavy drinkers, can account for self-report shortfalls; and
- problems of reliability and validity in measures of drug use can be considerably greater than for other types of behaviour or attitudes because it is often illegal and socially disapproved; respondents may conceal a significant part of their use despite promised anonymity, which can result from fear of admitting use of illegal substances or of social and moral condemnation.

## 2. GOVERNMENT INITIATIVES

Canadian Initiatives – Transport Canada: In the late 1980's as one participant in Canada's Drug Strategy, Transport Canada started examining the issue of alcohol and drugs and transportation safety to determine if existing regulatory initiatives were meeting current safety needs. Through this, they examined what the U.S. was doing in this area and discovered their intention to regulate all foreign cross border operations as well as their own. Regulations were issued for railway workers in 1985 and for the other transportation modes in 1988, with an agreement to postpone application to Canadian transportation workers for a specific period of time. This postponement was premised on the fact that the Canadian government had decided to investigate the issue in Canada and develop appropriate regulations for Canadian workers. TC initiated its own studies which led to:

- a report on alcohol and drugs in transportation accidents;
- research/report on employee assistance programs;
- public opinion research/focus groups;
- a study of existing programs in the federally regulated industry;
- extensive communication with associations, companies and unions affected;
- surveys of employees in marine, aviation, airports and surface modes (rail previously completed);
- multimodal overview and integrated reports analyzing key findings (all released 1990)

## 2. GOVERNMENT INITIATIVES continued

The Transport Minister tabled a comprehensive strategy for the prohibition and prevention of substance abuse in safety sensitive positions in the transportation sector (March 1990) which included employee assistance and testing requirements. After consultation through the Standing Committee on Transport and further refinement, it was ready to be tabled as legislation; the government changed, and the legislation was put on hold. Ultimately, in December 1994 the new Minister released a letter to industry associations stating the government would not introduce legislation “at that time”, but would facilitate development of a satisfactory program to meet U.S. DOT requirements.

Status? Although they have maintained a “watching brief” and have provided comments on behalf of the industry to the U.S. government and the Canadian Human Rights Commission at certain points in time, there has been no further work undertaken in this area by Transport Canada.

**U.S. Government Initiatives – Motor Carrier:** As noted, the U.S. government had postponed application of their regulations to cross-border operations on numerous occasions with the expectation that Canada would regulate its own industry and agreement on any differences would be reached. When advised of the government’s decision not to regulate our industry, they had to take action. For example, the U.S. Department of Transportation received significant pressure from the U.S. motor carrier industry to subject foreign-based drivers to the same regulations as U.S. drivers when on U.S. highways.

As a result, effective July 1, 1996 (and for smaller carriers, July 1, 1997) all commercial motor vehicle drivers (GVWR 26,000 lb+, designed to carry 16 or more passengers including the driver, or placarded to carry hazardous materials) were subject to U.S. Federal Motor Carrier Safety Administration regulations setting alcohol and drug use standards and testing requirements.

Although Canadian companies that operate into the United States are responsible for meeting all requirements set out in these regulations, two specific parts set out the requirements for the drug testing programs. Part 382 sets out the ‘Controlled Substances and Alcohol Use and Testing’ requirements for employer policies and programs. Part 40 sets out the procedures that must be followed for ‘Transportation Workplace Drug and Alcohol Testing Programs’, including further direction for compliance by employers and their service providers. Substantial revisions to both regulations were effective in August 2001.

Information about the regulations and supporting material for implementation is regularly updated on DOT’s main web page located at:  
<http://www.dot.gov/ost/dapc/>



## 2. GOVERNMENT INITIATIVES continued

The company that directs the driver is responsible for compliance, whether they use employee drivers, or drivers that are contracted, leased or otherwise utilized by that company. The company does not have to be a motor carrier - they simply have to direct drivers under their operating authority to carry a product or passengers into the U.S. Employers must ensure all drivers they use for any cross border work are under a program that meets the regulatory requirements.

Penalties for non-compliance are severe. Failure to maintain the designated records, failure to test as required, use of unqualified (testing) service providers, and use of a driver that is not qualified to drive in the United States (under the DOT-regulated program) can result in fines up to \$10,000 U.S. per infraction. Failure to have a program in place can result in loss of operating authority into the United States. DOT officials are auditing Canadian companies for compliance.

Implications for Canadian Companies: Because of the work of the truck and bus associations, most companies had a fairly good understanding of the requirements, but those that do not belong to an association still may not be compliant, or may have contracted for testing services with one of the smaller consortia who do not appear to be keeping their members up to date with the requirements. It is important that every truck and bus company that provides cross-border services review the requirements through the web links provided and ensure they are in compliance with the regulations.

**U.S. Government – Other Transportation Modes:** The Federal Railway Administration regulations have always applied to cross-border operations, but agreement was reached in the late 1980's to limit that application somewhat. Any U.S. based employees of Canadian companies were subject to the full requirements of the regulations, but because the Canadian operations into the U.S. were limited, only those components covering "small railroad operations" were applicable when Canadian-based crews were in the U.S. Specifically, carriers have had to comply with the prohibitions and consequences, post accident testing, and testing for cause in compliance with FRA testing procedures and the DHHS requirements as updated in August 2001.

Given the change in north-south rail operations, Canada's "intrusion" into the U.S. has increased from one of a small railroad. As a result, the FRA has now issued a final Rule to extend all aspects of the regulations, including the requirement for employee assistance programs, pre-employment and random testing to cover foreign employees performing dispatch and train services in the U.S. beyond a 10 mile "exchange" area within the U.S. border. The random testing can be undertaken in either country, and violation of the rules will result in removal from U.S. service. The regulation is effective on June 11, 2004.

[http://www.fra.dot.gov/downloads/safety/cross\\_border.pdf](http://www.fra.dot.gov/downloads/safety/cross_border.pdf)

## 2. GOVERNMENT INITIATIVES continued

Requirements for compliance with regulations in the other transportation modes have been put on hold or cancelled.

- mass transit would be covered at such point that there was a cross border mass transit system based from Canada.
- the U.S. Coast Guard retains the right through existing legislation to board any vessel in U.S. waters and investigate, including testing were required; therefore, they have not required Canadian companies to implement testing programs, including for the pilotage authorities on the Great Lakes.
- pipeline crews who operate on cross-border pipelines but remain in Canada are not covered at this time (indefinitely postponed).
- the aviation requirements were sent to the International Civil Aviation Organization (ICAO) who issued guidelines to all member countries; the requirement to test foreign air crew who enter U.S. airspace has also been indefinitely postponed.

**Implications for Program Infrastructure in Canada:** Employee testing programs have not been regulated in Canada, although regulated motor carriers must comply with the recently revised Part 40 regulations issued by the U.S. government. These set stringent requirements for all aspects of the testing program. Employers must comply with the regulations and contract with service providers that meet these standards (or risk fines). However, as a result,

- there is an extensive network of trained collectors capable of properly handling both urine and breath collection;
- three Canadian laboratories have been certified to administer testing for these programs;
- there are up to a dozen certified Medical Review Officers located across the country capable of reviewing lab results with employees;
- there are two national and several local consortia who can manage all parts of the testing program for an employer, including the random and unannounced testing;
- there is a growing network of Substance Abuse Professionals who have been trained and certified (whose job is to meet with and assess any individual who violates the regulations and advise on treatment and follow-up programs); and
- supervisor training is provide through a number of the provincial trucking associations for regulated companies, and a Canadian supervisor training course which meets U.S. DOT requirements is now available through the internet so that this resource can be accessed across the country; there is also a version available for non-regulated employers.

## 2. GOVERNMENT INITIATIVES continued

Employers across the country who include testing as part of their policy, whether regulated or not, can make use of these qualified services. One caution is that, because there are no regulations around testing standards for non-regulated companies, all sorts of “entrepreneurs” are selling quick and cheap testing methods, or failing to ensure all steps are followed (e.g. skipping the MRO component or using a local hospital lab which is not certified or monitored for proficiency, or breath testing equipment that is not calibrated). Employers in other industry sectors should ensure they contract with fully competent and experienced third party providers who meet standards consistent with those set out for regulated companies. Where testing has been upheld in legal cases, the programs were consistent with these standards.

## 3. TRENDS IN POLICY DEVELOPMENT

It has been ten years or more since any Canadian surveys looked at the nature and extent of company programs to address alcohol and other drug use in the workplace. Studies were conducted by Transport Canada, AADAC, the Ontario Addiction Research Foundation, Mercer, and the Conference Board of Canada in the late 1980's and early 1990's. It appeared that few employers had drug testing programs; more tended to provide access to employee assistance services and were starting to establish formal written policies. Larger corporations were more inclined to have comprehensive programs, and usually this was where there were large groups of employees in safety-sensitive positions.

Although there has not been another comprehensive study done in Canada, trends would indicate that those survey results are now considerably out of date. A significant number of companies in Canada have been putting alcohol and drug policies in place during the past few years, and in many situations, testing of one form or another has become a policy component.

**Motor Carriers:** As previously noted, in the truck, bus, and rail industries, any company operating into the United States must have a comprehensive policy and testing program in place, including pre-employment and random testing, as a condition of crossing the border. A large number of carriers have extended their policy across their operations to cover more than just the U.S.-bound drivers, and many have included Canada-only drivers and other high risk positions in their random program. Based on the activity of the two largest consortia, well in excess of 50,000 drivers are subject to the testing under – or because of - these regulations.

**U.S. Parent Company Expectations:** There appears to be increasing interest from U.S. parent companies in developing programs for their Canadian operations. Generally, this includes the requirement that the Canadian subsidiary implement an alcohol and drug testing program within their company policy, as this is a key component of most U.S. programs.

### 3. TRENDS IN POLICY DEVELOPMENT continued

Since there is no significant difference in drug availability and use patterns in the two countries, and this remains a health and safety issue, many U.S. companies are expecting a consistent approach to workplace alcohol and drug problems throughout their operations on both sides of the border. Canadian companies must still ensure compliance with Canadian health and safety laws and human rights legislation, keeping in mind the legal trends evolving around workplace programs and alcohol and drug testing.

**Contractor Issues:** Because of occupational health and safety concerns, employers are not limiting the policy to their own employees, but are expecting contract workers to adhere to similar requirements; this is particularly prevalent in the oil and gas sector resulting in major activity in Alberta and the east coast, although other sectors are beginning to move in this direction.

Therefore, there are an increasing number of Canadian companies putting in place policies that include certain forms of testing because of client requirements. In addition to this, when Canadian companies are providing equipment installation and maintenance services to U.S. clients, they are also finding that employees sent to do the work must be under a testing program as a condition of site access.

Contractors in this situation must make program decisions: will their own company policy simply cover the employees signed to that client's work, or will they implement company-wide policies, recognizing they may face similar demands from other clients? Given health and safety obligations extend to all operations, it may be difficult to suggest alcohol and drug policies can be limited to one group solely because of client demand.

**Other Pressures:** Canadian companies are concerned about liabilities associated with unsafe operations, and are ensuring their approach to occupational health and safety includes policies and programs on alcohol and other drugs. They recognize alcohol and drug use can negatively affect performance, and are implementing policies to prevent accidents and injuries. As dealing with this issue becomes a common practice and an industry standard in many sectors, not having a comprehensive policy may not meet due diligence standards.

For example, the Court of Appeal for British Columbia (Oak Bay September 2002) established a clearer balance between regarding human rights legislation and the broader legal framework within which a company must function. The Court said full adherence must be given to human rights standards, but that tribunals must recognize this broader framework and not force non-compliance with some legal obligations (health and safety, liabilities, negligence) in exchange for compliance with human rights legislation. (See Legal Climate below)

### 3. TRENDS IN POLICY DEVELOPMENT continued

**Implications for Canadian Companies?:** With this heightened awareness, many companies that had a simple statement banning alcohol and drug use realize that expectations need to be better articulated and communicated. Others that have had an Employee Assistance program recognize there are many matters the EAP does not cover, and that they need a clearly communicated policy, standards of conduct and consequences, not only for employees, but also for contract workers.

As a result, there is considerably more activity in the area of policy implementation now than there was in the early 1990's when some of the initial survey research was conducted. In fact, the 2002 AADAC survey found a significant increase in the number of workplaces that had alcohol or drug policies over the 1992 survey findings.

A comprehensive White Paper on company policies and alcohol and drug testing can be obtained by contacting [info@maxxamanalytics.com](mailto:info@maxxamanalytics.com).

### 4. CURRENT LEGAL CLIMATE

Although most reviews of legal issues facing employers focus on testing, there are other decisions that impact a variety of issues employers face when dealing with alcohol and other drugs. The key ones are highlighted below.

**Meeting and Balancing Human Rights Responsibilities:** 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 may be interpreted in the same manner at the provincial level. Issues around reasonable accommodation and establishing a *bona fide* occupational requirement 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. Setting standards that respond to an assessment of need specific to the company's requirements and ensuring there is justification for treating individuals differently under certain circumstances would contribute to meeting the *bfor* standard.

The Supreme Court has helped clarify an employer's obligations when it comes to setting standards that some might consider discriminatory.<sup>1</sup> The company is expected to establish those standards as a *bona fide* occupational requirement, and to do so must meet three tests. (These tests are used in assessing employer alcohol and drug policies in court and arbitration hearings). The tests are:

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<sup>1</sup> British Columbia (Public Service Employee Relations Commission) v. British Columbia government Service Employee's Union, SCC file No. 26274, September 9, 1999 (Meiorin)

#### 4. CURRENT LEGAL CLIMATE continued

- Was the standard adopted for a purpose rationally connected to the performance of the job?
- Did the employer establish that it adopted the standard in an honest and good faith belief that it was necessary for the fulfillment of that legitimate work-related purpose?
- Did the employer establish that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose? - and to meet this test, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer.

The full court decision can be found at:

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3

<http://scc.lexum.umontreal.ca/en/1999/1999rcs3-3/1999rcs3-3.html>

These requirements clearly reinforce the fact that how and employer determines what should be in their policy is just as important as what is ultimately in the policy. First, there must be a good faith assessment of need, so that the employer will be able to establish a policy that responds to their own stated and unique requirements, and can ultimately and logically explain that policy to those who are affected.

As noted previously, the Courts and arbitrators are also recognizing that company policies need to find the right balance between due diligence and respect for human rights and privacy. In alcohol and drug policies this would mean a balance between initiatives to control or deter inappropriate use (rules, investigative tools and consequences) and preventative components (education, training, assistance and aftercare programs).

The recent decision by the B.C. Court of Appeal put this into perspective.<sup>2</sup> The Court examined a company's obligations to accommodate someone with mental disabilities when the individual held a safety-sensitive position and could put clients and the public at risk. In overturning the decision of the B.C. Human Rights Tribunal which had found in favour of the complainant, the Court stated the following in their decision:

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<sup>2</sup> Oak Bay Marina and B.C. Human Rights Tribunal and Robert Gordy, September 2002

#### 4. CURRENT LEGAL CLIMATE continued

“The value of human rights legislation is great and the courts accord more than usual deference to decisions of human rights tribunals. Human rights legislation, however, fits within the entire legal framework within which enterprises must function. 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, for example the standard that applies to Oak Bay Marine Ltd. for its clients. Even as full adherence must be given to the standards of human rights, a human rights tribunal must be mindful of the fuller legal framework regulating an enterprise when it assesses the occupational requirements asserted by that enterprise, and decide in a fashion harmonious with that framework in order not to force non-compliance with some legal obligations in exchange for compliance with the human rights legislation.”

The full decision is available at:

Oak Bay Marina Ltd. v. British Columbia (Human Rights Commission) 2002 BCCA 495

<http://www.lancasterhouse.com/decisions/2002/sept/bcca-gordy.htm>

**Due Diligence/Negligence Obligations:** A series of court and arbitration decisions have clarified that:

- Employers have responsibility for any individual who is unfit on the job – they can not simply “send them home” but must ensure proper escort procedures are followed so the individual does not injure him/herself or a third party.
- Employers have a responsibility to any individual that they host in a social or business hosting situation where alcohol is served. They must ensure proper hosting procedures are followed to minimize the possibility that anyone served alcohol may injure him/herself or a third party after a company event. If the employer provides the alcohol, provides the premises, or hosts the event, they can be responsible for the outcome.
- Employers are vicariously responsible for the actions of their employees – even though they may not be at fault. This includes impaired employees on the job, impaired employees on a client job site, and impaired employees operating a company vehicle, even on their private time. As a result, employers need to set clear standards on what is expected and actively ensure those standards are being met.

For example, the owner of a vehicle is accountable for any injuries or damages caused by a person driving the vehicle with the owner’s consent. This is why company policy standards must apply when operating a company vehicle, and why policies should address reporting and consequences of receiving an impaired driving charge in this situation.

#### 4. CURRENT LEGAL CLIMATE continued

- 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 of, 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 a policy violation where sufficient monitoring mechanisms are not in place and a substance-related incident results.

Reinforcing these safety obligations, Bill C45 which has been enacted in law establishes 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. There is no change in the current law regarding personal liability of directors, officers and employees; the new Act deals with the criminal liability of organizations.

In essence, OHS 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.

There have been no cases at this point, but it is expected that this legislation will impact how organizations deal with substance abuse issues, and apparently there is no due diligence defence – only a criminal defence. However, the lawyers advise having a clear well communicated policy, ensuring supervisors are trained and have the tools and support to act to prevent workplace problems, and taking all responsible steps to minimize the risk of accidents associated with alcohol or drug use would help with that defence.

**Alcohol and Drug Testing as a Policy Component:** There is considerable controversy about the legality of drug testing programs. Concern centres on the employee's right to privacy and the potential for discrimination based on a disability. Workplace testing programs could be challenged through a variety of routes.

- in a non-unionized environment the most likely route would be to a human rights commission (either policy-wide or individual), or a wrongful dismissal action.
- in a unionized environment, management's right to introduce a testing program in general may be grieved if it is believed to be contrary to the collective agreement, or a union may grieve the company's actions under their policy on behalf of an individual member



#### **4. CURRENT LEGAL CLIMATE** continued

- in addition to the above, in a government setting, a challenge under the Charter of Rights and Freedoms could be launched (the Charter does not apply to the private sector).

At present, there are no provincial or federal laws that have been passed which would specifically prohibit drug testing, and there has been no Supreme Court decision in this area. However, a series of arbitration decisions, a recent Ontario Court of Appeal decision, and a decision of the Federal Human Rights Tribunal all provide some guidance on where the law may stand on this issue. This information is found in a separate resource section of this web page.

More information on the legal situation around testing can be found in the paper "[Current Legal Context: Employee Testing](#)" which provides an overview of key decisions and links to full documents where available.