WATSON PALMER LABOUR LAWYERS

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A. WHAT IS CANNABIS?

Cannabis is a product of the Cannabis sativa plant that is used for its psychoactive and therapeutic impacts on the body.

As noted above, tetrahydrocannabinol, commonly known as THC, is the main psychoactive ingredient and is typically responsible for the "high" when ingesting Cannabis. Cannabidiol, commonly known as CBD, may treat pain, lower anxiety, and stimulate appetite the same way as THC, but without affecting your mental state.

When a person is consuming a CBD- dominant variation of medical-grade Cannabis they are using CBD from a hemp plant. The difference between marijuana that is derived from a h p plantand other Cannabis plants is the level of THC that can be found in the strain, whichcan be as low as 0.3%. A Type III cannabis sativa plant contains less than 0/3% THC and more than 0.5 CBD. CBD and THC have the same chemical formula of 21 carbon atoms, 30 hydrogen atoms and 2 oxygen atoms.

The difference lies primarily in the way these atoms are arranged. This arrangement gives CBD and THC different chemical properties which is why they ffect your body differently. They both work with receptors that release neurotransmitters in your brain which is how they can affect things such as pain, sleep, mood, and memory. THC binds with receptors that are mostly in the brain which is why it affects mood and other feelings that can makeone feel euphoric and give them a so-called high. This high comes from THC binding with CCB1 receptors. CBD doesn't attach to CB1 or CB2 receptors and thus doesn't produce the same intoxicating effect.

In terms of whether or not Cannabis can be categorized as a hallucinogen is a tough question. Drugs usually fall within 4 categories: Depressants, stimulants, hallucinogens, and opiates.

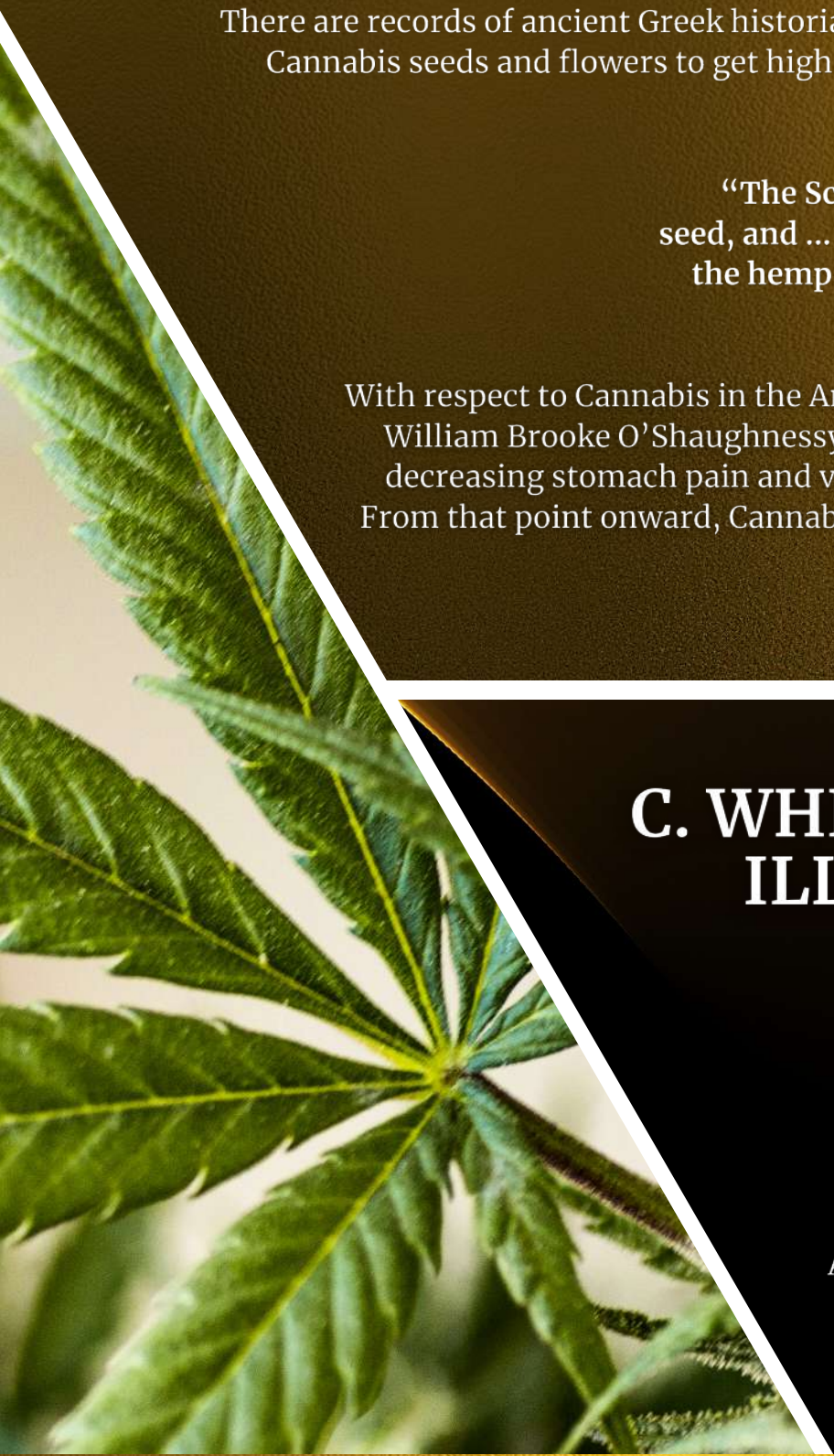
B. HISTORY OF CANNABIS

The Cannabis or hemp plant originated in Central Asia before it was introduced into Africa, Europe and eventually the Americas. Hemp fibre was used to make clothing, paper, sails and rope, while its seeds were consumed as part of a regular diet.

There are records of ancient Greek historians inhaling the smoke from smouldering Cannabis seeds and flowers to get high. In 440 B.C. historian Herodotus included the following ritualistic Cannabis use:

"The Scythians, as I said, take some of this hemp seed, and ... throw it upon the red-hot stones." When the hemp began to smoke and release a vapour, the "Scyths, delighted, shout[ed] for joy."

With respect to Cannabis in the Americas and Europe, in or around 1830, Sir William Brooke O'Shaughnessy found that Cannabis extracts could aid in decreasing stomach pain and vomiting in people diagnosed with cholera. From that point onward, Cannabis extracts became common medicine and were routinely sold in pharmacies.



C. WHEN DID IT BECOME ILLEGAL IN CANADA?

The early 1900s introduced Canadian citizens to an era of prohibition.

In 1908, Prime Minister Mackenzie King submitted a report calling for the suppression of opium, resulting in the passing and enacting of the 1908 Opium Act. This Act made it an offense to import, manufacture, possess, or sell opium. However, it was not an imprisonable offence.

In 1911, Parliament passed the Opium and Narcotic Drug Act, which added other drugs to the list of prohibited substances, including cocaine and morphine. Moreover, penalties for people who used drugs were increased, now including imprisonment. This was a direct response to the "black market" that was created through the Opium Act.

In 1923, the Opium and Narcotic Drug Act was further amended to include Cannabis on the list of prohibited substances. Nearly forty years later, in 1961, the Narcotic Control Act made the possession of Cannabis, amongst other drugs, an indictable offence and made the minimum sentence for drug trafficking fourteen years.

In 1996, the Controlled Drugs and Substances Act was passed repealing the Narcotic Control Act and Parts III and IV of the Food and Drug Act (parts dealing with the advertisement of controlled substances). The punishment for trafficking illicit drugs was increased to a maximum of life imprisonment, however, the penalties for the possession of drugs in Schedule VIII (up to 30g of Cannabis and 1g of hashish) decreased to a maximum of six months imprisonment and/or a maximum fine of $1000.

FUN FACT:

In 1998, The National Organization for the Reform of Marijuana Laws Canada's office in Ontario was raided by police after being charged with breaking Section 462.2 of the Criminal Code of Canada for handing out brochures advocating the legalization of Cannabis.

On July 31, 2000, the Ontario Court of Appeal ruled that the law prohibiting Cannabis possession was unconstitutional because it did not take users of medicinal Cannabis into account. Justice Marc Rosenberg wrote:

"I have concluded that the trial judge was right in finding that Parker needs marijuana to control the symptoms of his epilepsy. I have also concluded that the prohibition on the cultivation and possession of marijuana is unconstitutional."

On October 17, 2018, the Canadian Government passed the Cannabis Act, legalizing the recreational use of Cannabis across the Country.

D. CANNABIS & LABOUR LAW

The legalization of Cannabis across Canada has had a significant impact on labour and employment law, particularly on those employed in safety-sensitive positions.

We will address the following:

A. Will using legal Cannabis impact employment? What about recreational and medical Cannabis?

B. Are random drug tests permitted?

E. LEGAL CANNABIS'S IMPACT ON EMPLOYMENT

The case law since legalization in Canada has been a whirlwind of decisions. Manymarbitrators and judges didn't know how to handle a once illegal substance now being legal. One of the main original concerns was directed at safety-sensitive positions, particularly related to the fact that residual Cannabis can stay in one's system for a long period of time, and there was no way to accurately measure impairment.

First and foremost, it should go without saying that smoking legal recreational Cannabis immediately prior to or while working will be a serious offence, particularly for employees employed in a safety-sensitive workplace. The "GREEN" light on Cannabis is not a "GREEN" light on intoxication in the workplace. It is expected that recreational use of cannabis will be treated much like use of alcohol in terms of workplace impact.

As such we will focus on medical Cannabis, the duty to accommodate and employer-mandated drug tests, which are likely to be trickier issues to deal with as the jurisprudence develops with increased understanding.

E.1 MEDICINAL CANNABIS IN THE WORKPLACE

When looking at the use of medical marijuana, employees may seek to use it to ease disability-related symptoms as a form of workplace accommodation. This could happen whether employees are in safety-sensitive positions or not. Employers have a duty to accommodate requests in good faith and meet their duty to accommodate to the point of undue hardship.

In United Food and Commercial Workers, Local 1400 v Saskatoon Co-operative Association Limited, 2020 CanLII 78470 (SK LA) an arbitration board upheld a ten-day suspension of an employee who smoked Cannabis on the workplace premises. The board rejected the union's argument that Cannabis has been legalized, stating that "smoking Cannabis ...in a safety-sensitive workplace...is serious indeed." The fact Cannabis had just been legalized for certain purposes does not make it any less impairing or make its use in the workplace any less serious.

However, the employer cannot discriminate against any employee based on a medical condition and is required to provide accommodation. Therefore, if an employee was prescribed Cannabis for medicinal purposes, the employer must provide accommodation to the point of undue hardship.

In the Canadian case of International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc. 2020, the Supreme Court of Newfoundland and Labrador issued a decision about accommodating the use of medically prescribed Cannabis by an employee working in a safety-sensitive position. In this case, the Grievor suffered from pain and the associated consequences of

Crohn's disease and used medical Cannabis to manage the pain, which he consumed through vaporization each evening following work hours. The Grievor applied for a safety-sensitive position and was red-flagged by the Employer due to his drug test and was never called into work. The Union filed a grievance and was unsuccessful. The Arbitrator found in favour of the Employer, noting that the Grievor's daily evening use of Cannabis would create an undue hardship, as he could have residual cognitive impairment arising from the Cannabis use. This was characterized as the 24-hour rule. i.e., no smoking Cannabis 24 hours prior to your shift.

The union applied to the Supreme Court for judicial review of the Arbitrator's decision, which was dismissed.

The Union appealed the decision and was successful. The Court of Appeal found that the employer failed to accommodate the Grievor to the point of undue hardship, as they failed to permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the employer's goal of reasonable site safety.

In Ornge Air v Office and Professional Employees International Union, 2021 CanLII 126376 (CA LA) arbitrator Gail Misra found that a zero-tolerance policy of the air ambulance service which prohibits even the use of medically prescribed Cannabis was unreasonable and discriminatory. She found that random drug testing would be unreasonable because Cougar Helicopters had not experienced a drug or alcohol-related incident in many years and the power of the employer to a drug test when there was reasonable ground to believe that an employee is under the influence was sufficient to ensure workplace safety. The employer did not establish that the zero-tolerance standard for the use of medical marijuana by a Grievor in a safety-sensitive position was a bona fide occupational requirement.

The policy enforcing a zero-tolerance standard in regard to employees who are prescribed medical marijuana was found to be discriminatory and unreasonable as well as a violation of both the Canadian Human Rights Act (CHRA) and the collective agreement.

In Hamilton Street Railway and A.T.U., Loc. 107 (Haines) (Re), 2002 CanLII 79039 (ON LA) The Grievor, was a bus driver with a history of marijuana use which the employer knew about but did not take action around. The Grievor was with the company for 13 years before being terminated as he refused to undergo a drug rehabilitation program at his own expense and submit to random drug screening. The decision found was that the termination was unreasonable. The Grievor had the right to refuse to sign the agreement, and there was no evidence ofma safety risk given the Grievor's minimal use.

In an Alberta decision in Calgary (City) v. Canadian Union of Public Employees, 2015 CanLII 61756 (AB GAA) the Grievor was removed from his safety-sensitive position because he used Cannabis to help with back pain. The arbitration board ordered the reinstatement of the Grievor because there was no evidence of substance abuse or impairment at work.

In Maharajh v. Atlantic Offshore Medical Services Limited, 2020 CanLII 49888 (NLHRC) Maharajh claimed discrimination on the basis of disability after being disqualified from employment due to his use of medical marijuana. The tribunal found a link between the use of medical marijuana for disability and the reasons he was not offered employment. The tribunal concluded that the employer failed to take reasonable steps to accommodate the disability, despite having a legitimate safety-related concern.

In the Calgary decision, Calgary (City) and CUPE, Local 37 (Hanmore), Re, 2015 CarswellAlta 1834 the employer removed the Grievor from a safety-sensitive position due to alleged dependency on marijuana. The union contended that this dispute was not about the use of medical marijuana, but rather the employee's choice to use marijuana as their drug to combat chronic pain. The
employer stood by their decision to not consult with the Grievor's personal physician but instead, with an expert in substance abuse as medical marijuana was a fairly new concept. The Grievor was removed from his safety sensitive position in 2011, even though at least two of his supervisors were aware of his usage of medical marijuana since 2009. The case held in part; the Grievor was unjustifiably held out of safety-sensitive service, and the Arbitrator ordered him to be conditionally reinstated and compensated for all lost wages.

E.2 IMPLICATIONS OF MEDICINAL MARIJUANA USE BY EMPLOYEES

Case law suggests the consumption of medical marijuana is only permissible if employees follow protocol and accommodations set out by their employer.

In Kindersley (Town) v Canadian Union of Public Employees, Local 2740, 2018 CanLII 35597 (SK LA) the Grievor was dismissed for vaping medical marijuana after strict instruction that prohibited the Grievor from operating employer vehicles or heavy machinery within 30 minutes to an hour of vaping medical marijuana. The Arbitrator found the employer's dismissal of the Grievor was not excessive discipline, and showed the Grievor's lack of respect for the safety of the workplace.

In Aitchison v L&L Painting and Decorating Ltd, 2018 HRTO 238, Aitchison was found to be smoking medical marijuana in a dangerous area of the workplace. The tribunal found the employer did not discriminate against or fail to accommodate the disability, as they had no knowledge of the disability and therefore smoking medical marijuana in the workplace was cause for termination. The tribunal also stated that the employer did not fail to accommodate Aitchison, as no request was ever made, and there is no obligation to accommodate as it would create health and safety concerns in the workplace. The decision encourages employers to revisit their drug and alcohol policies to ensure they have the ability to accommodate the legalization of marijuana.

Another important factor is determining the level of accommodation needed for employees using medical marijuana to safely perform work-related duties. In International Brotherhood of Electrical Workers, Local 2038 v. PCL Intraction Power Inc., 2021 CanLII 86217 (SK LA) the employer asked the Union for the Grievor to complete a medical examination by a company doctor for using medical marijuana, to determine his fitness to perform safety-sensitive work. The Arbitrator ruled that the employer did not violate the collective agreement or any Human Rights Laws and that the Grievor's medical marijuana use gave the employer reasonable and probable grounds to suspect he was unfit for the job, and required a medical assessment to ensure workplace health and safety.

In Ornge Air and OPEIU (DeGeit), Re 2021, a grievance against the employer's zero-tolerance Drug & Alcohol Policy in regard to the use of medically prescribed cannabis was dealt with. The Arbitrator was of the opinion that the employer failed to accommodate the Grievor to the point of undue hardship and that the employer did not establish that it was a bona fide occupational requirement of the safety-sensitive AME job that the Grievor be prohibited from using medically prescribed cannabis to treat his medical condition. The arbitrator was of the opinion that the zero tolerance standard of the employer can be modified without imposing undue hardship on the employer.

F. RANDOM DRUG TESTING

In Canada, the general rule is that no employee can be subjected to random, unannounced drug testing.

The exceptions to this principle are drug tests where:

- They are part of an agreed rehabilitative program
- The employer has reasonable cause to believe that the employee is impaired while on duty
- There has been a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred

Furthermore, Canadian case law has found that in the context of safety-sensitive workplaces random drug testing could be justified if there is a demonstrated workplace problem of drug use (i.e., a high rate of accidents due to substance abuse).

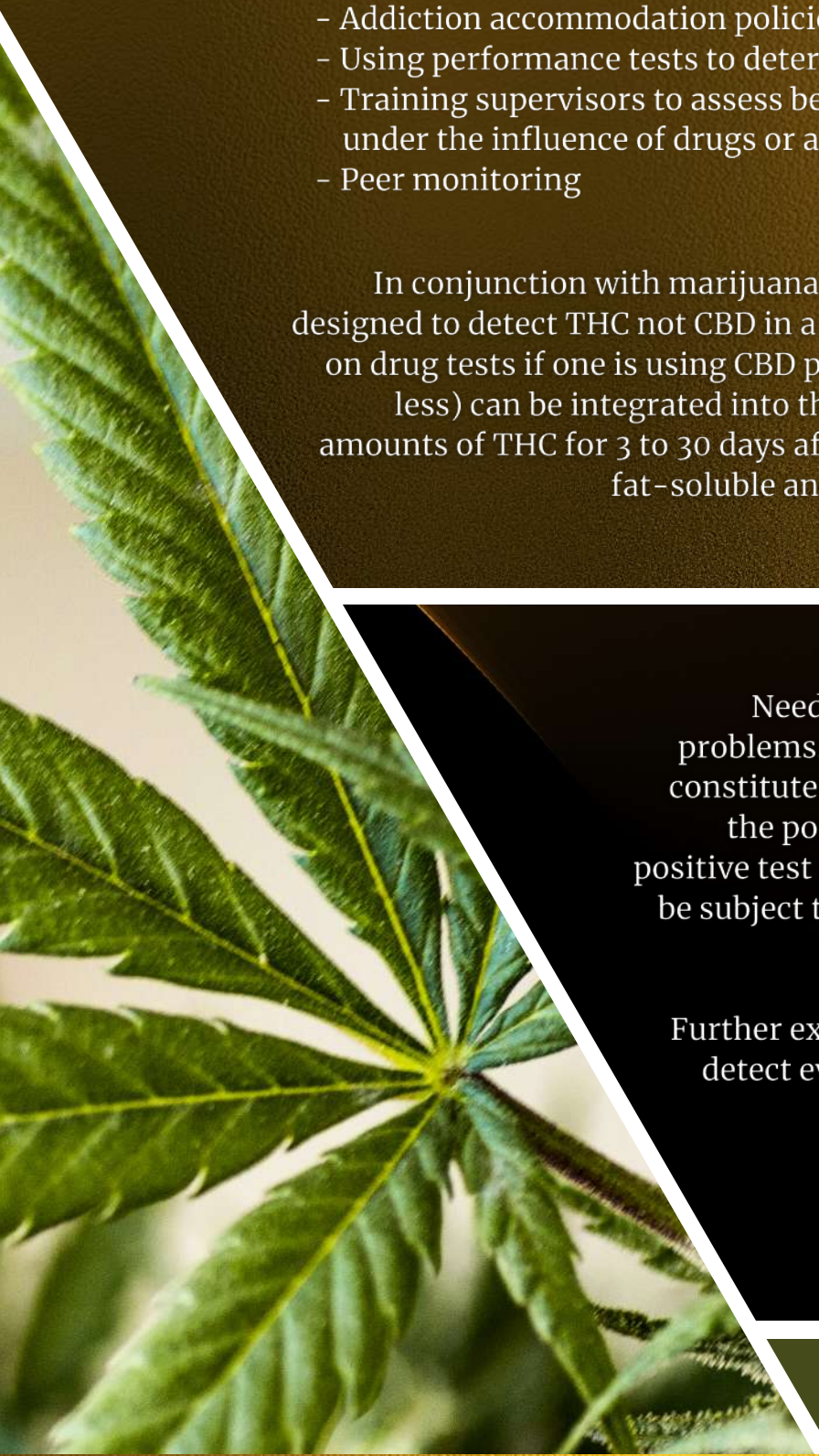
The Ontario Human Rights Commission ("OHRC") states random drug and alcohol testing is not an obvious violation of human rights. The OHRC argues that collecting an employee's bodily fluids or breath for drug and alcohol testing raises privacy concerns for employees with disabilities and without disabilities. Although the purpose of these programs is to ensure workplace safety, people with and without addictions will fall into this category of discrimination. Random drug and alcohol testing policies negatively affect those individuals with a disability.

A key issue present in random drug testing policies is focusing on the actual level of impairment of an employee's ability to perform work-related tasks at the time of testing. Unlike breathalyzers for alcohol testing, it is significantly harder to measure impairment through drug testing. Various drug testing methods like urinalysis can detect past use, but cannot detect the amount a drug was used, or whether the employee is currently impaired. Blood testing is more likely to give better insight into an individual's level of impairment, but is highly intrusive.

The OHRC suggests alternatives to random drug and alcohol testing and states that employers should use less intrusive means of assessing impairment of fitness for work, as many safety-sensitive employers carry out high-risk work without the use of drug and alcohol testing. Other alternatives include:

- Employee assistance programs
- Health and substance awareness programs
- Addiction accommodation policies
- Using performance tests to determine cognitive or physical impairment
- Training supervisors to assess behaviour associated with being under the influence of drugs or alcohol
- Peer monitoring

In conjunction with marijuana and drug testing, generally, drug tests are designed to detect THC not CBD in a person's system. THC can still be detected on drug tests if one is using CBD products as trace amounts of THC (0.3% or less) can be integrated into the CBD product. Drug tests can detect trace amounts of THC for 3 to 30 days after usage depending on the dosage. THC is fat-soluble and can be stored in the body for a long time.



Needless to say, this poses significant potential problems. These trace amounts can hardly be said to constitute impairment, yet employers will likely take the position that employees with any finding of a positive test ought to be precluded from work (and may be subject to discipline for alleged breach of employer drug and alcohol policies).

Further exacerbating the problem, if these drug tests detect even trace amounts of THC for up to 30 days after use, it is unreasonable to assume impairment, yet will almost certainly adversely impact upon employees testing positive in these circumstances.

At Watson Palmer Labour Law, our firm believes random drug and alcohol testing is an infringement of an individual's bodily and privacy rights. Random drug testing should be precluded from employer policies or at the very least be limited to cases with cause for testing.

In Office and Professional Employees International Union v Cougar Helicopters Inc., 2019 CanLII 125448 (CA LA) the employer, who operated a fleet of helicopters providing offshore passenger transfer and search and rescue support to the oil and gas industry, sought to introduce random drug testing of its employees. Arbitrator Susan Ashley found that even though a random oral swab was much less intrusive than other means of testing, this was an "unjustified affront to the dignity and privacy rights of the affected employees".

In Vancouver Shipyards Co. Ltd. v. Marine And shipbuilders, Local 506, 2022 CanLII 100825(BCLA) a safety-related incident occurred triggering the employer to submit the Grievor to drug and alcohol testing. The Grievor agreed to the testing where results came back positive for cannabis. The Grievor admitted to using marijuana at 8 p.m. the night before the shift. This resulted in the Grievor having to undergo a medical examination, random testing for a 12-month period, and a 10- day suspension without pay. The Arbitrator ultimately found the employer's order for drug and alcohol testing was not justified and was a violation of the Grievor's privacy rights. The Arbitrator also ruled that drug and alcohol testing cannot be used when the only justification is ruling out the possibility of impairment, and the employer failed to notify the Grievor of the disciplinary rule and cannot enforce a suspension.

In the Saskatchewan decision in Nutrien v United Steelworkers, Local 7552, 2021 CanLII 72192 (SK LA) (Daniel Ish) a grievance was filed by the union on behalf of the Grievor on the basis that the Grievor experienced excessive discipline in the form of termination of his employment. The Grievor had suffered from a past alcohol addiction which was disclosed and treated. As a part of his return to work agreement after his treatment, the Grievor accepted conditions including random drug tests, abstaining from drugs and alcohol, as well as consequences of his employment being terminated if the Grievor took a drug test and had a positive result that was not prescribed by a doctor.

The Grievor was randomly drug tested over five times. The Grievor ingested a marijuana gummy, that was prescribed by his doctor, but did not disclose the medical prescription to his employer. The employer argued that this violated their drug and alcohol policy as well as the return-to-work agreement, therefore the employer terminated the Grievor.

The courts found that the termination was unreasonable as the Grievor believed he was not violating any agreement or policy as marijuana was medically prescribed.

In the Ontario decision Greater Toronto Airports Authority v. P.S.A.C., Local 0004, 2007 CarswellOnt 4531 it was found that the random drug testing policy that was being enforced was unreasonable as there was no evidence that a positive drug test correlated with increased accident risk. The grievance was filed by the union contesting the implementation of a drug and alcohol policy that required the employees to meet a standard in regard to drugs and alcohol. The policy included a clause stating that if one failed a random drug test, which was considered a sufficiently serious violation, termination may be warranted for a first-time offence.

As a matter of law, an employer can only base a right to demand a drug or alcohol test of an employee in a safety-sensitive industry on express statutory authority or contractual consent. The Greater Toronto Airport Authority failed to introduce evidence to demonstrate that such testing can be justified for employees occupying non-safety-sensitive positions.

In the case, Airport Terminal Services Canadian Company v Unifor, Local 2002, 2018 CanLII 34078 (CA LA) the Grievor was employed at Airport Terminal Services Canadian Company and used medically prescribed marijuana. After an incident occurred at work and he produced a positive drug test, the company gave the Grievor a letter requiring him to stay drug and alcohol-free, enter into an employee assistance program and be subjected to random drug testing. The Grievor refused to sign and was terminated as a result.

The mandatory discharge should an employee test positive for drugs is subject to mitigating circumstances that are specifically limited to situations where the employee suffers from addiction and do not include situations where the employee requires medical accommodation.

The evidence established that the airport terminal services failed their duty to accommodate the Grievor and terminated the Grievor without just cause, violating the Canadian Human Rights Act and their obligations under the collective agreement.

The THC antibodies found in the post-incident drug test do not explicitly mean that the Grievor was intoxicated. A positive drug test can not be just cause for discipline as there is no positive way to tell when or how long ago one partook in using marijuana. The decision held was that the termination was unreasonable and discriminatory. The Grievor used lawful marijuana and the employer should have accommodated the Grievor's medical condition.

In the case of British Columbia Rapid Transit Company v Canadian Union of Public Employees, Local 7000, 2019 CanLII 101858 (BC LA) the Grievor tested positive for Cannabis during a periodic medical examination. As a result, the Grievor was ordered to undergo randomized, twice-monthly urine screening tests for one year, even though no marijuana dependence or use disorder was found after a comprehensive medical assessment. The Grievor argued the employer's drug policy does not prohibit the use of marijuana outside of the workplace and work hours. The arbitrator ruled suspending randomized testing of the Grievor.

In Amalgamated Transit Union, Local 113 v Toronto Transit Commission, 2017 ONSC 2078 (CanLII) Deals with the "Fitness for Duty Policy", focusing on the health and safety of TTC employees. The policy provides drug and alcohol testing for employees in safety-sensitive, specified management and executive positions, and requires drug and alcohol testing in situations such as where there is reasonable cause intoxication resulted in an employee being unfit for duty, as part of an investigation of a work-related incident, where the employee returns to work after violating such policy, or where an employee is returning to duty after treatment for drug or alcohol abuse. After the respondent announced its Fitness for Duty Policy but prior to it taking effect, the ATU filed a policy grievance under its Collective Agreement. The Justice ruled that there was reasonable cause for implementation of the drug and alcohol testing policy. However, he ruled there would be no harm to the Union by implementing such a policy. The Justice ruled in favour of random testing of TTC employees, due to the significant consequences drug and alcohol use by TTC employees could have on public safety.

WATSON PALMER LABOUR LAWYERS

Labour Lawyers in the Greater Toronto Area and Muskoka.

At Watson Palmer Labour Lawyers, we redefine representation. Specializing exclusively in union-side labour and employment law across Canada, our dynamic team brings unmatched passion, experience, and integrity to every case. From litigation prowess to skillful negotiation, we are the cornerstone of exceptional advocacy, consistently delivering extraordinary results.

A Legacy of Excellence

Recipient of prestigious awards, including "Private Union Law Firm of the Year" and "Labour Law Firm of the Year," we're a force to reckon with in the legal landscape. Our dedication transcends boundaries, ensuring your rights are upheld with unwavering commitment.

CINDY WATSON

The founder and managing partner of Watson Palmer Labour Law.

A graduate of the prestigious Osgoode Hall, Cindy is an experienced and respected attorney, and for the past 30 years has specialized in social justice.

Cindy is a sought-after trainer and speaker in the corporate arena, helping to build bridges between men and women in order to aid in productivity, communication and heal gender bias.

Dedicated to breaking down barriers, securing pay equity and to ending discrimination: Cindy has a proven track record empowering, advocating, and motivating people to become the best version of themselves.

She is an international speaker, award-winning author and consultant, known for her passion, commitment and ability to inspire.

RILEY PALMER

Riley is a Managing Partner of Watson Palmer Labour Lawyers.

He is a relentless advocate, dedicated to achieving the best result for his clients. His practice focuses exclusively on labour law, helping Unions fight to achieve their workplace goals. He is a highly skilled litigator, who has had the pleasure of working with Unions at both the provincial and federal level, litigating weekly at arbitration, Labour Boards and Tribunals.

In addition to litigation, Riley also provides legal advice during collective bargaining and is passionate about protecting worker's rights through training and education. He has traveled across the country hosting countless training seminars for Union Stewards, Executive Board members, and Business Agents/Presidents with overwhelmingly positive feedback.

To book your consultation or get more info, contact us at:
www.watsonpalmerlaw.com