**SEIU-West:**

# SUBMISSION:

# Consultation on Impairment in the Workplace

***Submitted August 28, 2018***

SEIU WEST

## INTRODUCTION

SEIU-West welcomes the opportunity to participate in this process, however, the consultation paper and accompanying/related government publications raise concerns that our government is seeking to use the impending legalization of cannabis as an excuse to alter the balance of power between employers on one hand and workers and their unions on the other.

At best, the suggestion that legalization necessitates amendments to The Saskatchewan Employment Act (SEA) and/or Occupational Health & Safety (OH&S) Regulations represents an unnecessary overreaction to a federal legislative change that will make a longstanding social reality visible.

It appears this is a calculated attempt to leverage some of the uncertainties around the impact of this change into a radical shifting of the balance of rights and interests in the province's workplaces—not the first ill-considered effort by our Sask Party government.

We would note that contemplated changes cannot be accomplished with minor housekeeping measures. This issue engages a wide range of other interrelated workplace, employment law, and social policy issues.

The legalization of recreational cannabis is either a fundamental change, requiring a multi-pronged approach that needs to be done right. Or, it's minor and best left alone. There is no middle ground here.

When our government states that it must "clarify"; this implies that the jurisprudence is divided, and that our government wants to pick a side. This temptation should be averted.

While the main goal of the consultation seems to be legislative amendments to ensure clarity about the duties of employers and workers with respect to impairment in the workplace, clarity must not be an end itself. The goal should be a regime that appropriately balances and effectually promotes the rights and interests of all parties: employer, employees, and (where appropriate) unions. The broader public "safety", though a weighty value for all parties, is not the only value at play—a relentless pursuit of safety that runs roughshod over the workers' constitutionally (and legally and quasi-constitutional) protected human rights to privacy and collective bargaining, the three worker rights under OH&S is neither desirable nor defensible. It will not, in the end, make workplaces safer, healthier, or more productive.

## STATED MOTIVESAND GOALS OF THIS CONSULTATION

The government's consultation paper[1] speaks of a need to "address impairment in the workplace". This need is driven, it states, by "concerns" that the impending legalization of cannabis might result in "an increased consumption of cannabis", which might "result in impairment in the workplace which could place others at risk of injury". Though the paper briefly acknowledges the existence of "non-legislative options" to "address safety issues related to substance use and impairment", its focus is on possible changes to *The Saskatchewan Employment Act (SEA)* and/or the *Occupational Health and Safety Regulations* (OHSR) to "clarify the duty of employees to disclose any form of impairment and the duty of employers to accommodate workers that have made a disclosure."

Respectfully, we would propose that the consultation paper contains multiple dubious claims and assumptions.

As evidence of the "concerns" and the need for a response, the consultation paper cites the government's September 2017 online survey on cannabis policy.[2] The survey's 19th question asked, "Does the introduction of legal cannabis require more to be done to keep workers and workplaces safe?" 35.2% of respondents answered "Yes, definitely", 20.6% said "Yes, probably", and 39.2% said "No, current protections are adequate." These results are misleadingly reported in the consultation paper which sets out "the majority of Saskatchewan residents (56 per cent of respondents) believe that the Government needs to take additional steps to keep workers and workplaces safe."[3]

Self-selection bias is an inherent risk of this type of survey[4]; without more information about the survey's methodology we cannot assume the results are representative of the Saskatchewan population. Even if they are representative, it is not at all clear that *SEA/OHSR* changes to "clarify duties" are the "additional steps" the majority favours. Just two questions earlier, survey participants were asked:

> 17. Which of the following approaches should be considered to ensure the public has the information they need to make responsible and healthy choices about cannabis use?
>
> a. Cannabis addiction supports (programming and education)
> b. Information in schools, libraries, and early learning and child care centres
> c. Responsible use (e.g. the same as alcohol and tobacco campaigns)
> d. Information in medical offices
> e. Public education in stores that sell cannabis.[5]

[1] Saskatchewan. Consultation on Impairment in the Workplace. Consultation paper, no date; accessed August 14, 2018. http://publications.gov.sk.ca/documents/283/107365-Consultation%20on%20Impairment%20in%20the%20Workplace.pdf
[2] Report for Government of Saskatchewan Cannabis Survey, no date; accessed August 14, 2018. http://publications.gov.sk.ca/documents/9/104747-Cannabis%20Survey%20Results.pdf
[3] Saskatchewan. Consultation on Impairment in the Workplace. Consultation paper, no date; accessed August 14, 2018. http://publications.gov.sk.ca/documents/283/107365-Consultation%20on%20Impairment%20in%20the%20Workplace.pdf
[4] Bethlehem J. How accurate are self-selection web surveys? Statistics Netherlands Discussion Paper 08014 (2008). https://peilingpraktijken.nl/wp-content/uploads/2014/06/bethlehem04.pdf
[5] Report for Government of Saskatchewan Cannabis Survey, no date; accessed August 14, 2018. http://publications.gov.sk.ca/documents/9/104747-Cannabis%20Survey%20Results.pdf

These largely non-legislative options may well have been the sorts of additional steps the majority had in mind when responding to Question 19. They are examples of what the consultation paper (unfortunately, only briefly) refers to as "awareness and education initiatives".

It goes without saying, our government need not take all public concerns as a given; it has the ability and, if those concerns are not founded in solid evidence, the **duty** to work to allay those concerns. To take them as given is to legitimize and thereby fuel them. For example, the 20th online survey question asks, "Do you believe there should also be zero tolerance for cannabis or other impairing drugs for commercial drivers?" This is a stoking question. It ignores the fact that Canadian jurisprudence is generally opposed to American-style zero tolerance regimes—the language is inflammatory. This is especially so in the unionized context, but also on human rights grounds, because such regimes would only impair fundamental rights. It is our submission that effective public policy cannot be determined on the basis of opinion polls, particularly in this context when the constitutionally protected fundamental rights of workers is at play.

The Occupational Health and Safety Division of the Saskatchewan Ministry of Labour Relations and Workplace Safety sensibly downplays the potential impact of legalization and the need to amend OH&S legislation in response to legalization: "Legalized cannabis should not change the workplace. Employees and employers already have a shared duty to take reasonable care to protect the health and safety of themselves and others."[6] This approach is far more proactive.

A 2018 Conference Board of Canada report insists that "[w]hile legalization may reduce deterrents for curious, current non-users, the prevalence and frequency of use are not likely to skyrocket."[7]

In February 2018 the former Director of Marijuana Coordination for the state of Colorado told a Canadian conference that legalization of recreational marijuana in his state saw consumption rise in just one demographic cohort: persons over 65.[8]

## DEFINING IMPAIRMENT

The consultation paper includes the following statement:

> *In the context of this discussion "impairment" is considered the state of being mentally or physically diminished, weakened, or damaged as a result of the consumption of alcohol, legal and illegal drugs (including medications), or fatigue.*

This definition appears to be of the government's own devising. We could not find any version of it in legislation, jurisprudence, or grey or scholarly literature. Is the government proposing to include a definition of impairment in the *SEA/OHSR*, in the name of "clarity"? Apart from statutes and regulations regarding the assessment and compensation of injuries,[9] there are vanishingly few examples of

[6] Government of Saskatchewan. Occupational Health and Safety Division. Cannabis and the workplace. No date; accessed August 14, 2018. https://www.saskatchewan.ca/government/cannabis-in-saskatchewan/cannabis-and-the-workplace
[7] Haberl M. Blazing the trail: what the legalization of cannabis means for Canadian employers. Conference Board of Canada, 2018.
[8] Andrew Freedman. Co-founder and partner at http://FreedmanKoski.com. Former Director of Marijuana Coordination for the state of Colorado. Presentation to Conference Board of Canada Marijuana@Work conference, Toronto ON, February 13, 2018.
[9] See e.g. Automobile Accident Insurance Act, RSS 1978, c A-35, http://canlii.ca/t/538sq

Canadian legislation that attempt to define impairment. Even the *Criminal Code* provisions on impairment refer only obliquely to "physical coordination tests".[10] Clearly, most legislators have preferred to leave the task of defining impairment to courts and tribunals—which have developed a rich and context-sensitive jurisprudence grounded in scientific evidence on factors like attention, reaction time, gross and fine motor skills, and inhibition.[11] This strategy appears to best preserve the balance of rights and interests of all parties in our Saskatchewan workplaces.

Recently, in *Kindersley v CUPE* (2018) the arbitration panel ruled 2-1 that an employee with medical authorization to use cannabis could be summarily dismissed for using cannabis on the job in the absence of any evidence of impairment.[12] The panel's struggles and divisions suggest that with legalization of recreational cannabis approaching there may indeed be a need for greater clarity in Saskatchewan employment law regarding impairment. In this particular case, greater clarity may be achieved through a further appeal to the Courts.

In contrast, the decision of the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd* acknowledges that it is the right of the employer to assess whether its employees are capable of performing their essential duties safely; in the provided context, "freedom from impairment" (by either alcohol or drugs) is determined to be a bona fide occupational requirement. The Court further recognized that an employee impaired by alcohol or drugs is incapable of performing or fulfilling the essential requirements of the job. However, the decision confirmed that random drug testing for employees in safety-sensitive positions could not be justified as reasonably necessary to accomplish the employer's legitimate goal of a safe workplace free of impairment because drug testing suffers from the fundamental flaw that it cannot measure present impairment. A positive drug test only confirms past drug use. It does not demonstrate that a person is incapable of performing the essential duties of their position. Further it was noted that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems.

Arguably we do not require the kind of clarity the consultation paper seems to contemplate; rather, what is needed is a clear message to employers (and arbitrators) that disciplinary decisions cannot be based on an employer's moral disapproval of cannabis or mere speculation about its possible effects.

## JURISDICTIONAL COMPARISONS

The consultation document notes that the OH&S legislation of every province and territory (strangely, federal OH&S legislation[13] is not discussed) includes "general duty provisions" that place safety obligations on employers and workers. It notes that Saskatchewan is among four provinces with specific provisions on impairment that apply only to specific industries—mines, in the Saskatchewan case[14]. The

[10] Criminal Code, RSC 1985, c C-46, s. 252(4)(a) http://canlii.ca/t/5390f See also Evaluation of Impaired Operation (Drugs and Alcohol) Regulations, SOR/2008-196, http://canlii.ca/t/l7j7

[11] See e.g. R. v. Andrew, 1994 CanLII 3288 (BC CA), http://canlii.ca/t/1dcxz

[12] Kindersley (Town) v Canadian Union of Public Employees, Local 2740, 2018 CanLII 35597 (SK LA), http://canlii.ca/t/hrnmj

[13] Part II of Canada Labour Code, RSC 1985, c L-2, <http://canlii.ca/t/532qw>

[14] Mines Regulations, 2003, RRS c O-1.1 Reg 2, http://canlii.ca/t/1rx1

paper seems to look enviously at British Columbia and Newfoundland and Labrador, the two provinces whose OH&S legislation obliges all workers in all workplaces to disclose impairment to their employer.

According to the consultation paper, Alberta is one of four Canadian provinces whose OH&S legislation contains no general or industry-specific provisions referring specifically to workplace impairment. Notably, in 2017-18 Alberta conducted a major review of its *Occupational Health and Safety Act* and regulations, including significant public and stakeholder consultations.[15]

As briefly alluded to in the Saskatchewan government's consultation brief, there has been ongoing litigation in Alberta tribunals and courts regarding drug testing of employees at Suncor's heavy oil operations.[16] The Alberta government in its review could have provided "clarity" on these matters to courts, employers, unions, and workers, but it clearly opted **not to** take sides. The heavily revised act, regulations, and code do not specifically address workplace impairment. The appropriate balance of rights and duties was achieved through general duty statements analogous to those in the current *SEA,* with the work of adapting these general duties to particular circumstances left to the parties, the tribunals, and the courts.

## LEGISLATION PROVIDING FOR EMPLOYEE DUTY TO DISCLOSE

If (as it appears) the government is looking to the Newfoundland legislation as a source of legislative clarity and administrative convenience for employers, it is looking in vain. These provisions have not prevented litigation analogous to the Unifor-Suncor litigation in Alberta.[17]

The British Columbia (BC) legislation regarding workplace impairment[18] obliges workers to "ensure that the worker's ability to work without risk to his or her health or safety, or to the health or safety of any other person, is not impaired by alcohol, drugs or other causes". Worksafe BC, the province's Worker's Compensation Board (WCB), takes the view that "impairment" in these provisions includes "impairment from any source" including "prescription and non-prescription drugs, and fatigue".[19] This view was endorsed by the leading arbitral decision on these provisions.[20]

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[15] Alberta. OHS regulations consultation, no date; accessed August 14, 2018. https://www.alberta.ca/ohs-regulations-consultation.aspx

[16] See Suncor Energy Inc v Unifor Local 707A, 2017 ABCA 313 (CanLII), http://canlii.ca/t/h6dh3; application for leave to appeal to SCC dismissed 2018-06-14. https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/17137/index.do?r=AAAAAQAGc3VuY29yAQ

[17] Worker at "dry" remote site failed to disclose his cannabis prescription, was terminated. Union grieved, but lost at arbitration. IBEW 1620 v Lower Churchill Transmission Construction Employers' Association, 2016 CanLII 86106 (NL LA), <http://canlii.ca/t/gs446 Union won on judicial review: IBEW, Local 1620 v. Lower Churchill Transmission Construction Employers' Assn. 2016 CanLII 84114 (NL SC), <http://canlii.ca/t/gvx9f> Similar grievance involving same union and employer arose two years later. Union grieved and lost: International Brotherhood Lower Churchill Transmission Construction Employers' Assn. v. IBEW 1620 2018 CarswellNfld 198. However, it appear the union has recently applied for judicial review: Supreme Court of Newfoundland and Labrador Daily Court Docket. St. John's General Division. August 3, 2018. https://bit.ly/2v7ujeq

[18] "Every worker must ensure that the worker's ability to work without risk to his or her health or safety, or to the health or safety of any other person, is not impaired by alcohol, drugs or other causes." Workers Compensation Act, RSBC 1996, c 492, S. 116(2)(d). http://canlii.ca/t/533v0 "A worker with a physical or mental impairment which may affect the worker's ability to safely perform assigned work must inform his or her supervisor or employer of the impairment, and must not knowingly do work where the impairment may create an undue risk to the worker or anyone else. A worker must not be assigned to activities where a reported or observed impairment may create an undue risk to the worker or anyone else." Occupational Health and Safety Regulation, BC Reg 296/97, s. 4.19 http://canlii.ca/t/532w7

[19] British Columbia. Worksafe BC OH&S Regulation Part 04: General Conditions, no date; accessed August 14, 2018. https://www.worksafebc.com/en/law-policy/occupational-health-safety/searchable-ohs-regulation/ohs-regulation/part-04-general-conditions#0C626A3E7E0347B7A7F41E8DDEBB07C3

[20] Rio Tinto Alcan v Unifor, Local 2301, 2016 CanLII 32699 (BC LA), http://canlii.ca/t/grxgb

This provision has had unexpected consequences: workers whose WCB benefits have been terminated when they rejected an employer's return to work proposal have filed appeals, claiming that the termination violates the [BC] WCB legislation—which, like that in other provinces, states that employers cannot discriminate against an employee for "carrying out any duty" in accordance with the *Act* or the regulation—the duty here being not to report to work impaired.[21]

We also note that these provisions include an employer duty not to assign a worker to "activities where a reported or observed impairment may create an undue risk to the worker or anyone else" at section 4.19(2). We know from our members that short-staffing and non-replacement are endemic in the health and long-term care sectors in particular, and that these practices lead to stress, fatigue, diminished capacity, and injury among our members. If such a provision were added to the *SEA/OHSR*, we would rely upon them to ground refusal of unsafe work claims.

## LEGISLATIVE OPTIONS CONSIDERED

In Canada there is, in effect, an ongoing natural legislative experiment: different approaches to articulating rights and duties regarding workplace impairment. What evidence do we have about their different impacts on employer and employee behaviour and on overall safety that would move us to depart from the status quo of the *SEA/OHSR*?

Based upon the "general duty provisions" contained in our current legislative and regulatory scheme, decision-makers must take account of the risks of the workplace, the worker, and the job. Such considerations are all in keeping with arbitral authorities or judicial precedent. While proposed blanket provisions regarding impairment, accommodation of persons with addictions or medical authorizations, and testing may be administratively convenient for employers, and may be the norm in American jurisdictions, they do not reflect the (in our view, more salutary) balance struck by Canadian courts and tribunals.

Christina Hall, partner with Fasken Martineau DuMoulin and adjunct employment law professor at University of Western Ontario, confirms: Problems arise because employers try to impose policies from other jurisdictions (especially the US) in a Canadian context.[22] Recent Ontario arbitration, building on the seminal Supreme Court decision in *Irving Pulp & Paper*,[23] held that post-incident testing, even in safety-sensitive workplaces, is unreasonable if not "limited to 'serious' or 'significant' accidents or incidents…The seriousness of the incident will be a factor in determining what is considered 'reasonable grounds' in the circumstances".[24]

The consultation paper discusses the Supreme Court of Canada's 2017 decision in *Stewart v. Elk Valley Coal*,[25] in which an employee with a cocaine addiction was terminated after failing a post-incident drug

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[21] See e.g. WCAT-2012-01877 (Re), 2012 CanLII 55127 (BC WCAT), http://canlii.ca/t/fsw35

[22] Impairment versus intrusion: drugs and alcohol in safety-sensitive positions. OHS Canada. April 22, 2015. https://www.ohscanada.com/features/impairment-versus-intrusion-drugs-and-alcohol-in-safety-sensitive-positions/

[23] Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., [2013] 2 SCR 458, 2013 SCC 34 (CanLII), <http://canlii.ca/t/fz5d5>

[24] Airport Terminal Services v. Unifor. 2018 CarswellNat 991, 135 C.L.A.S. 28

[25] Stewart v. Elk Valley Coal Corp., [2017] 1 SCR 591, 2017 SCC 30 (CanLII), http://canlii.ca/t/h49b1

test. The consultation paper's main takeaway from the decision seems to be that even though an addiction is a disability (and thus a prohibited ground of discrimination), the employee's termination was valid because he failed to disclose his addiction, contrary to the employer's policy. A leading Canadian authority on workplace testing has a more nuanced, holistic deduction: the decision stands for the proposition that companies must have impairment policies that are comprehensive, up-to-date, and applied by well-trained managers in a "prudent case-by-case" manner "mindful of the duty to accommodate a real or perceived underlying disability…when any violation or self-disclosure happens."[26]

If the *SEA/OHSR* is to be amended to clearly impose a duty on all workers to disclose impairment (and any disabilities that may be contributing to it), employers must have clearly-defined legal obligations to create the conditions for the employee to safely disclose. This was emphasized in a recent Conference Board of Canada brief to employers on the workplace implications of cannabis legalization. Employers should have "confidential…non-disciplinary protocols to follow should they suspect an employee is struggling with cannabis dependence, or…self-identifies as such." The managers who implement these protocols must be "capable of being open and understanding with employees so that individuals feel comfortable approaching them". This may require the employer to invest in "peer, manager, and leadership training to ensure affected employees' accommodation needs are met throughout the recovery process." Merely directing the employee to a third-party administered employee assistance (EFAP) plan is not enough. Employers also have a role to play in "stigma reduction efforts to avoid any risk of discrimination against employees who are open about their recreational cannabis use."[27]

Impairment in the workplace can only be addressed effectively with workplace policy that incorporates a holistic, healthy public policy perspective.[28] For example, policymakers should recognize that thousands of Canadians use cannabis formally (with a medical authorization) or informally (i.e. recreationally) to treat chronic pain, and that there is a large and growing body of credible scientific evidence to support this treatment.[29] Approximately 40,000 Saskatchewan residents suffer from extreme chronic pain. The closure of (the former) Saskatoon Health Region's pain clinic approximately five years ago left Saskatchewan as the only province west of the Maritimes that does not have a public, multidisciplinary pain clinic.[30]

## THE LANDING PAGE DOCUMENT AND "HIGH HAZARD WORKPLACES"

The top result of a Google search for "Saskatchewan cannabis workplace" is a landing page on cannabis in the workplace authored by the Occupational Health and Safety Division of the Saskatchewan Ministry

[26] Demers D. Case study: Stewart v Elk Valley Coal Corp (2017). CANN/AMM Occupational Testing Services. Blogs and Opinions. Oct. 24, 2017. https://www.cannamm.com/news/blog/case-study-stewart-v-elk-valley-coal-corp-2017/ ]
[27] Haberl M. Blazing the trail: what the legalization of cannabis means for Canadian employers. Conference Board of Canada, 2018.
[28] World Health Organization (WHO). Adelaide Recommendations on healthy public policy, 1988. http://www.who.int/healthpromotion/conferences/previous/adelaide/en/index1.html Canadian Medical Association. Ensuring healthy public policy. May 2013. https://www.cma.ca/Assets/assets-library/document/en/advocacy/Ensuring-Healthy-Policy-e.pdf
[29] Allan GM et al. Simplified guideline for prescribing medical cannabinoids in primary care. Canadian Family Physician/Le Médecin de famille canadien. 64. February 2018. 111-20.
[30] James T. Saskatchewan health ministry has no plans for pain clinic. Saskatoon StarPhoenix. January 7, 2018. https://thestarphoenix.com/news/local-news/pain-management-in-sask

of Labour Relations and Workplace Safety.[31] The page consists of brief statements on various issues, as well as links to relevant documents, including reference to the consultation paper. The overall direction of this page is hard to discern: its statements are hard to reconcile with each other, the consultation paper, and existing legislation and jurisprudence. There are fairly uncontroversial assertions that follow naturally from the *SEA*'s general duty statements:

> *It's important to remember there are a variety of factors that can cause impairment at work. Substance use is one cause. Other causes include stress, fatigue, malnourishment, shift work, and bullying. In every case of workplace impairment, the most important responsibility is to ensure people are safe. That responsibility is shared by workers and employers.*

However, several other statements are more controversial: they would read to layperson as a summary of the current state of legislation and/or jurisprudence, but are not. Do these statements represent the views of the Ministry/government on these issues? Do they express the government's interpretation of the current state of the law, such that employers are encouraged to act in reliance on them; or, are they meant to describe or advocate for the government's desired future state of legislation and jurisprudence on these issues? Among the most troubling passages in this regard:

> *Workers must show up fit for duty. Under existing legislation, it is unacceptable, dangerous, and illegal to come to work impaired by cannabis, alcohol, or any other intoxicating substance. Consumption of cannabis is also not permitted in public or in workplaces. None of that changes after cannabis is legalized.*

The "fit(ness) for duty" concept is widely used by OH&S professionals and appears in many employer policies, in statements such as "all employees must present themselves at work in a condition in which they are able to carry out their duties without risk to themselves, others, company property or the environment…due to the adverse effects of fatigue, stress, or drugs."[32] However, it is rare in Canadian legislation, appearing in just four current provincial regulations:

- It is mentioned once, without definition, in Saskatchewan's Municipal Police Recruiting Regulations,[33] and once in a similar statute from Newfoundland and Labrador.[34]
- It is elaborated in some detail in two Alberta regulations on testing the "medical fitness for duty" of railway employees who occupy a "safety critical position".[35]

Is this a signal that the government is considering adding an employee fitness duty to the *SEA/OHSR*? If so, such a significant change would require further stakeholder consultation informed by a draft text of the proposed amendments.

SEIU-West endorses the following statement from the webpage:

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[31] Government of Saskatchewan. Occupational Health and Safety Division. Cannabis and the workplace. No date; accessed August 14, 2018. https://www.saskatchewan.ca/government/cannabis-in-saskatchewan/cannabis-and-the-workplace

[32] CANN/AMM Occupational Testing Services. Draft (company name) fitness for duty policy. Updated 2017.08.

[33] Municipal Police Recruiting Regulations, 1991, RRS c P-15.01 Reg 5, <http://canlii.ca/t/530k8>

[34] Royal Newfoundland Constabulary Regulations, CNLR 802/96, <http://canlii.ca/t/k061>

[35] Industrial Railway Regulation, Alta Reg 338/2009, http://canlii.ca/t/knkt; Heritage Railway Regulation, Alta Reg 352/2009, http://canlii.ca/t/5357w

> *Every workplace should have a workplace impairment policy. The policy should include a definition of impairment that captures medical marijuana use. It should say when and where medical marijuana use is acceptable. It must treat all prescription drugs equally.*

However, it is unclear whether this statement is meant as friendly advice to employers about Human Resources and Labour Relations (HR/LR) best practices, or if it purports to be a summary of the state of the law on these matters. A recent Ontario arbitration decision held that the employer has a duty to "accommodate an individual who suffers from a physical ailment which requires the individual to take pain medication, which includes an authorization to take medicinal marijuana". Automatic termination, or requiring these individuals to enter an addictions treatment program, is not reasonable accommodation.[36]

Among the most puzzling passages on the webpage is one headed "Additional Requirements for High-Hazard Workplaces":

> *Impairment policies are especially important for prescribed places of employment and high hazard work, such as mining. Employees involved in high-hazard work (such as driving or operating heavy machinery) have a general duty to advise their employer if they've been prescribed a medication with side effects that include impairment.*

The "general duty" referred to is not clear from the *SEA* or the *OSHR*. We acknowledge that the dangerousness of a specific workplace context affects the balance of rights and interests (e.g. safety vs. privacy). However, the concept of "high hazard work" is novel in the context of employee workplace duties.[37] The terms "low hazard work" and "high hazard work" appear, with definitions, in the Saskatchewan *OHSR*, but are used only for specifying the level of first aid equipment and services the employer must provide at a worksite. There are similarly worded provisions in several other Canadian jurisdictions, though the list in each category differs by jurisdiction.[38] The Saskatchewan *OHSR* list of **"**Activities That Constitute High Hazard Work" (in Table 8) overlaps somewhat with, but is shorter than, the list in Table 7 of "Prescribed Places of Employment" whose activities are deemed hazardous enough to oblige the employer to establish an "occupational health and safety program" at the workplace.

If the *SEA/OHSR* is to be revised in the name of clarity around safety responsibilities, there are far more serious breaches of clarity. Note the following three overlapping provisions:

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[36] Airport Terminal Services v. Unifor. 2018 CarswellNat 991, 135 C.L.A.S. 28

[37] The concept of "high hazard" does appear in a few other legislative contexts. For example, **Canadian national building code standards** include the concept of high, medium, and low hazard industrial or commercial occupancies based on the amount of flammable or explosive materials in the building. National Research Council of Canada/Canadian Commission on Building and Fire Codes. National Building Code of Canada 2015. https://www.nrc-cnrc.gc.ca/eng/publications/codes_centre/2015_national_building_code.html These standards are adopted, and explicitly cited to varying extents, in provincial legislation. See e.g. Regulation respecting industrial and commercial establishments, CQLR c S-2.1, r 6, <http://canlii.ca/t/hqh3> ; Fire Safety Inspections (2014) Regulation, Man Reg 208/2014, http://canlii.ca/t/52pd5 Also: the British Columbia OHSR defines high, moderate, and low-hazard atmospheres based on the **air quality in certain enclosed workspaces**, and prescribes different rules for each regarding testing, ventilation, and personal protective equipment. Occupational Health and Safety Regulation, BC Reg 296/97, http://canlii.ca/t/532w7

[38] Occupational Health and Safety Code. Alberta Regulation 87/2009. As amended, to June 1, 2018. http://www.qp.alberta.ca/documents/OHS/OHS.pdf ; First Aid Regulation, NB Reg 2004-130, http://canlii.ca/t/52rkl; Occupational Health and Safety Regulations, NWT Reg 039-2015, http://canlii.ca/t/52scs

1. Per s. 3-19 of the *SEA* the Minister has the power to designate that a workplace or category of workplaces must have an "occupational health and safety service". Such designation imposes a number of duties on the employer; these are stated implicitly in s. 3-1(1)(q) (e.g. "contributing to the…maintenance of a high degree of physical and mental well-being in the workers"), and are to be spelled out in detail in the designation order. In deciding which workplaces to designate, and what duties to impose on the employer, the Minister is to consider the "degree of hazard" at the workplace.
2. The Cabinet has the power under s. 3-20 of the *SEA* to prescribe in the *OHSR* that a workplace must have an "occupational health and safety program". Per s. 3-83(1)(ll) of the *SEA*, the choice of workplaces to prescribe is to be based on "the degree of hazard to the health and safety of workers and other persons" in that workplace. The duties of an employer in a prescribed workplace are spelled out in s. 22 of the *OHSR*. Table 7 of the *OSHR* lists the types of workplaces that have been prescribed: hospitals, nursing homes and home care; metal foundries and mills; mines; and any workplace in which any of two dozen listed activities occur.
3. The Director of the OH&S branch has the power under s. 3-20 of the *SEA* to order an employer to develop an OH&S program based on the frequency of injuries, illnesses, and/or OH&S contraventions in the workplace.

Considering the duties listed or implicit in these provisions, the Minister, the Cabinet, and the Director already have the all the powers needed to mandate a properly balanced workplace impairment regime suited to the circumstances of any given workplace, including in particular a circumstance to which the court and arbitral jurisprudence has attached cardinal importance: the degree of hazard in that workplace. The question is why is this level of overlap and duplication needed? There are surely clearer and cleaner ways to articulate and arrange these powers and duties.

When arbitrators and OH&S specialists address how the level of dangerousness of a workplace affects the balance of rights and duties, they generally use the term "safety sensitive". As mentioned above,[39] the term "safety critical" is often used in legislation governing the rail industry. The federal *Railway Safety Act* refers to "positions critical to safe railway operations", but requires that the list of such positions be developed though an intensive consultation process with affected unions.[40] OH&S specialists use the term "hazard" in a very specific way, distinct from how they use the concept of "risk".[41] It is not clear that the authors of the webpage fully grasp this difference. If the *SEA/OHSR* is to clearly address how the dangerousness of a workplace affects the balance of duties at play, it should do so using the terms that are most widely used in the field to address these issues.

In the final analysis it is worth considering the following passage from the Supreme Court's seminal *Irving Pulp & Paper* decision

[39] See text accompanying note 35 above.
[40] Railway Safety Act, RSC 1985, c 32 (4th Supp), http://canlii.ca/t/53007; Railway Association of Canada. Canadian Railway Medical Rules Handbook (For Positions Critical To Safe Railway Operations). May 2018 https://www.railcan.ca/wp-content/uploads/2018/07/RAC-Handbook-FINAL-May-2018-ENG.pdf
[41] Canadian Centre for Occupational Health & Safety. Hazard and risk: know the difference. Health and Safety Report. 15:2. Feb. 2017. https://www.ccohs.ca/newsletters/hsreport/issues/2017/02/ezine.html

> *The dangerousness of a workplace — whether described as dangerous, inherently dangerous, or highly safety sensitive — is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.*[42]

On the facts of the case the statement pertains mainly to random workplace drug testing, but we endorse it as a statement about achieving the appropriate balance of rights and obligations where workplace impairment and workplace drug use are at issue.

## CONCLUSION

SEIU-West will oppose any changes that would attempt to override the collective bargaining process, remove too many aspects of the impairment issue from the collective bargaining process, change the balance of power in collective bargaining, and/or override current or future collective agreements or arbitral jurisprudence.

In our view, the creation of added statutory or regulatory duties (i.e. employee duty to disclose) could expose employees to potential negative consequences such as prosecution, contravention, discipline and/or termination. In our past dialogue with the Ministry of Labour Relations and Workplace Safety, SEIU-West repeatedly shared our objection to the planned introduction of Summary Offence Ticketing of employees. At the outset, regulations would have seen up to 15 different tickets that could be received by employees; we were assured that only one ticket could be received by an employee who neglected to use personal protective equipment. Our impetus over the two (2) year period in advancing our strong concerns was to ensure fairness for our members and all working people. Once again, we will share our vision for fairness and advance the rights of working people relative to the issue of impairment in the workplace.

We submit that neither statutory nor regulatory provisions should be used to expand the scope of the employer's management rights embodied in the collective agreement. Therefore, our government must acknowledge clearly in the context of future legislative amendments that any relevant collective agreement will override the legislative provisions. Otherwise, it appears that they are using this as an opportunity to shift the balance and reduce the privacy rights of employees. A hankering after the American model, especially of testing, would represent a race to the bottom. A mandated "fitness for duty model" is simply unacceptable in Saskatchewan.

Efforts by employers to impose zero-tolerance, even for off-duty use of medical cannabis, random testing or such similar regimes on workers—regimes that are prevalent and legal in the United States will be the subject of much and vigorous dispute. Our courts have repeatedly stated, these are not our laws in Canada, particularly when fundamental individual privacy rights are in the balance.

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[42] Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd., [2013] 2 SCR 458, 2013 SCC 34 (CanLII), <http://canlii.ca/t/fz5d5>

We are skeptical that this government has the political courage (including the willingness to devote the resources needed) to do this right, in a way that balances rights, productivity, health and safety.

SEIU-West is agreeable that clearly, much more research is needed on the topic of impairment. Research, not legislative tinkering, will provide the "clarity" the government claims to seek on these issues. Does it have plan to fund research, e.g. through the Sask Health Research Foundation, the various industry safety organizations like construction, SASWH, and others? We would support a pronounced effort to fund research initiatives and engagement of all stakeholders in a process of meaningful dialogue; this would ensure transparency and the shared added resources could inform much-needed effective policy development in all Saskatchewan workplaces.