

# Workplace compliance: Drug testing and health & safety in unionized environments

February 12, 2025 / 12 -1 p.m. ET

## Labour Spotlight Series

Grow | Protect | Operate | Finance



# Moderator and speaker



**Craig Lawrence**  
Partner, Toronto, Canada  
+1 416 863 4420  
craig.lawrence@dentons.com

# Speaker



**April Kosten**  
Partner, Calgary, Canada  
+1 403 268 3108  
april.kosten@dentons.com



A close-up photograph of a fossilized insect, likely a fly, embedded in a light-colored, textured rock matrix. The insect's body is dark and well-preserved, showing its legs and wings. A large, solid purple shape with a pointed right edge is overlaid on the left side of the image, containing the text.

# **Drug and alcohol testing**

April Kosten

# Statutory obligations to ensure safe workplace

- Occupational health legislation imposes duties to assess & identify existing & potential workplace hazards.
- A&D may constitute workplace hazard.
- If hazard identified, employers have legal obligation to take corrective steps to eliminate, or if not reasonably practicable, control hazard.

# Statutory obligations to ensure safe workplace

- *Criminal Code s. 217.1: Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.*
- *R v Metron Construction Corp:*
  - Employer pled guilty to criminal negligence causing death.
  - 6 workers boarded swing stages; only 2 harnesses.
  - Swing stage collapsed; 4 workers died.
  - Toxicological analysis determined 3 of deceased recently ingested cannabis, including site supervisor.
  - Plea included statement that permitting person under influence of drugs to work on project can be factor in establishing criminal negligence.
  - Employer received fine of \$200,000; ONCA increased fine to \$750,000.

# Employer obligations

## *Employers must take all reasonable steps to ensure safe workplace:*

- Employers are not obligated to allow employees to use A&D.
- Legalization of cannabis does not give employees right to use in close temporal proximity to work given performance deficits associated with use.

## *Employers should use risk-management approach to manage cannabis risk in workplace:*

- Focus on managing risks known to impact safe performance, including cannabis use. Not about whether substance is legal or illegal.
- Employers must manage safety risk given performance deficits associated with cannabis use.
- Similar approach to alcohol.



A close-up photograph of a fossilized insect, likely a fly or similar insect, embedded in a light-colored, textured rock surface. The insect's body is dark and appears to be a carbonized impression. The rock has a mottled appearance with various shades of beige, tan, and light brown. A large, solid purple shape with a pointed right edge is overlaid on the left side of the image, containing the text.

# **Types of drug and alcohol testing**

# Drug and alcohol testing types

- Reasonable cause
- Post-incident
- Return to work
- Unannounced follow-up (post-treatment)
- Pre-employment & pre-access
- Certification
- Random



# Reasonable cause

- Justified when employee exhibits, or other evidence points to, performance deficits sufficient to give employer reasonable belief to suspect employee may be under influence of A&D:
  - Strange behavior;
  - Odours (ensure odour coming from individual not environment);
  - Slurred speech.
- No need for incident to trigger test.
- Assess whether both alcohol & drug test required.

# Post-incident

- Employee directly involved in workplace incident or near miss
- 3 main factors to consider:
  - Seriousness of incident;
  - Level of inquiry carried out before test:
    - Dependent on facts;
    - Investigation will be time constrained;
    - Always seek explanation from employee;
    - Cannot call test just because injury.
  - Nexus between incident & employee.
- Evidence of “impairment” not required.



# Post-incident: *Quong v Lafarge Canada Inc.* (2024 ABKB)

## FACTS

- Quong required to take A&D test after hitting mobile compactor with company vehicle.
- Tested positive for THC & refused to participate in company's Substance Abuse Program (SAP).
- Despite no prior disciplinary issues, his refusal led to termination for cause.
- Claimed wrongful dismissal, arguing:
  - (1) A&D policy was not condition of employment contract;
  - (2) SAP invaded privacy;
  - (3) Employer's actions unreasonable;
  - (4) Employer lacked cause for termination.

# Post-incident: *Quong v Lafarge Canada Inc.* (2024 ABKB) (Continued)

## FINDINGS

- Justice Feasby rejected Quong’s arguments, finding Policy “*reasonable, unambiguous, well published, consistently enforced, and the employee... kn[e]w or ought to have known of the policy including consequences of breach*”.
- By continuing his employment without objection, Quong accepted Policy as implied term of contract:
  - Received annual training on Policy since 2012;
  - Trained employees on Policy.
- SAP was justified measure to assess need for treatment or accommodation.
- Though Quong used cannabis off-site, employer acted reasonably to ensure safety.
- His refusal to comply with Policy was considered repudiation of contract.



# Pre-employment: *Chiasson v KBR*, AHRC (2005), rev'd QB (2006), aff'd CA (2007), leave to SCC ref'd (2008)

- Pre-employment A&D testing policy.
- Chiasson tested positive for marijuana & terminated.
- Argued termination discriminatory.
- Casual user so human rights not engaged.
- Policy perceives persons who use A&D are safety risk, clear connection between policy & purpose, not breach of *Act*:
  - *“Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face to logic”.*

## Pre-access: *Luka v Lockerbie*, AHRC (2008), rev'd QB (2009), rev'd CA (2011)

- Site owner requirement that contractors implement pre-access testing.
- Luka tested positive for marijuana & denied access to site.
- Alleged discrimination.
- AHRC found no *prima facie* discrimination.
- AHRC found both site owner & contractor employers under *Act*.
- ABCA found site owner not employer & obligations under *Act* were contractor's.



## **Pre-access: *Mechanical Contractors v UA, Local 663 (Sarnia)*, Ont Arb (2013), aff'd ONSC (2014)**

- Pre-access A&D testing required for contractors.
- Found pre-access testing may be justified if demonstrated A&D problem at safety-sensitive workplace.
- Onus on employer to demonstrate with evidence that testing reasonably necessary (not merely desirable) & likely to have desired effect.
- No demonstrable need for pre-access A&D testing sufficient to justify invasion of privacy
- Upheld on judicial review.

# Random: *Irving*, SCC (2013)

- First SCC decision regarding random testing.
- Obligation to balance privacy vs. safety.
- Finding workplace is dangerous is first step in determining if random testing reasonable – begins proportionality exercise:
  - *[a] unilaterally imposed policy of mandatory random testing for employees in a dangerous workplace has been overwhelmingly rejected as an unjustified affront to the dignity and privacy of employees unless there is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.*



# Random: *Phillips v Westcan* (2020 ABQB)

## FACTS

- Employer carried out random A&D tests as per policy.
- As part of employment application, employee signed agreement subjecting him to random A&D testing as condition of employment if application successful.
- Employee was hired & signed offer letter – employment terms included agreeing to be bound by A&D testing policy.
- Employee sought permanent injunction to prevent employer from carrying out random testing.
- Employee claimed random testing was unconscionable & therefore unenforceable.

# Random: *Phillips v Westcan* (2020 ABQB) (Continued)

## ABQB

- Application for injunction dismissed; random testing enforceable.
- Employee expressly agreed to random testing as term of employment.
- To be unconscionable, term would need to be “*sufficiently divergent from community standards of commercial mortality*”.
- Court held no divergence from community standards & enforceable.
- Court concluded that even if no enforceable contractual term, unilaterally imposed random testing regime would be upheld as proportionate response.
- Significant rate of positive testing in random tests, physical evidence of alcohol at work, vast workplace & inherently dangerous work.

# Random: *Power Workers' Union v. Canada (Attorney General)* (2024 FCA)

## Background Facts

- January 2021, Canadian Nuclear Safety Commission imposed requirement for A&D testing for persons operating “Class 1” nuclear facilities.
- Unions challenged pre-placement & random testing provisions:
  1. Breached *Charter*;
  2. Implementation was unreasonable on administrative law grounds.



# Random: *Power Workers' Union v. Canada (Attorney General)* (2024 FCA) (Continued)

## FCA Decision

- FCA confirmed Commission has broad power & authority to implement any terms or conditions necessary for purposes of carrying-out *Nuclear Safety & Control Act*.
- Charter: Section 7 – Life, Liberty & Security of Person:
  - Not engaged;
  - Reasonable person would consider relatively non-invasive nature of seizure;
  - Absence of disciplinary consequences does not rise to level of seriousness required to engage section 7 protection.

# Random: *Power Workers' Union v. Canada (Attorney General)* (2024 FCA) (Continued)

## FCA Decision (Continued)

- Charter: Section 8 – Search & Seizure:
  - “Wait & see” approach to safety not appropriate in nuclear industry.
  - Despite no evidence of impairment problem, evidence of gaps in fitness for duty programs – filling gaps is valid & compelling objective.
  - *“Safety-critical workers have diminished expectation of privacy, given nature of their work & unique environment in which that work is being performed”.*
  - Breath, urine or saliva samples are amongst less intrusive when it comes to bodily searches.
  - Affected workers’ interest in being left alone by government does not outweigh government’s interest in intruding on privacy to advance goals of limiting risk to national security, health & safety of persons, & environment associated with development, production & use of nuclear energy.
- Charter: Section 15 – Equality:
  - Impugned provisions create distinction based on job category.
  - No distinction based on enumerated grounds of discrimination.

# Random: *Power Workers' Union v. Canada (Attorney General)* (2024 FCA) (Continued)

FCA Decision (Continued)

## *Administrative Challenge*

- FCA dismissed claims of inadequate reasons for introducing regulations & fettered discretion.
- Commission entitled to rely on 10-year consultation process to support decision.

A close-up photograph of a fossilized insect, likely a fly or similar, embedded in a light-colored, textured rock surface. The insect's body is dark and appears to be preserved in a natural position. The rock has a mottled appearance with various shades of beige and light brown. A large, solid purple shape with a pointed right edge is overlaid on the left side of the image, containing the text.

# **Human rights obligations**



# Accommodation obligations

- Disabilities must be accommodated to point of undue hardship.
- Human rights not engaged absent actual addiction or subjective perception of disability (*Chiasson, Luka*).
- Past human rights decisions have confirmed:
  - Terminating employee for policy violation provided they previously had opportunity to refer is not generally *prima facie* discrimination (*Elk Valley*).
  - A&D testing constitutes BFOR in dangerous work environment.
- Human rights do not prevent employers from prohibiting cannabis use (subject to duty to accommodate).
- Don't forget duty to inquire.

# ***IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc. (2020 NLCA)***

## **FACTS**

- Grievor accepted for employment on safety-sensitive worksite;
- Grievor disclosed use of medical marijuana; grievor vaped every evening to manage chronic pain;
- Grievor failed drug test & refused employment;
- Union grieved.

# ***IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc. (Continued)***

## **NL ARB**

- Concluded grievor discriminated against, but employer unable to accommodate without undue hardship.
- Found employer unable to readily measure “impairment” from medical marijuana with currently available technology.

## **NLSC**

- Application for judicial review refused.

# ***IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc. (Continued)***

## **NLCA**

- Appeal allowed & arbitrator's decision overturned; employer failed to demonstrate undue hardship.
- Absence of test or standard did not lead to conclusion that grievor incapable of performing job.
- Employer did not investigate alternatives allowing for individual testing of grievor.
- Immediate/perfect accommodation not required.
- Employer did not take any steps to explore accommodations.



# *Gregg v CanWel Building Materials Ltd. (2022 AHCR)*

## **FACTS**

- Mr. Gregg worked as forklift operator & warehouse employee.
- Frequently missed work after becoming full-time.
- Had no performance issues & was not under influence at work.
- Company policy required one-hour notice before missed shifts.
- Company verbally warned Gregg about his absences before terminating him.

# *Gregg v CanWel Building Materials Ltd. (2022 AHCR)* (Continued)

## **FINDINGS**

- AHRC found (based on testimony), that Gregg was alcoholic.
- Gregg claimed he informed Company of addiction before termination & termination day.
- His supervisor acknowledged Gregg mentioned his alcoholism 6 weeks earlier but denied it was discussed at termination meeting.
- Commission ruled that Company was aware of Gregg's alcoholism & failed to consider accommodations, opting instead to terminate him.
- This was deemed discriminatory.

A close-up photograph of a fossilized insect, likely a fly or similar insect, embedded in a light-colored, textured rock surface. The insect's body is dark and appears to be preserved in a natural position. The rock has a mottled appearance with various shades of beige and light brown. A large, solid purple shape with a pointed right edge is overlaid on the left side of the image, containing the text 'Recommendations'.

# Recommendations

# Recommendations

- Employers implementing A&D testing should consider following:
  - Incremental measures in place;
  - Robust education & training;
  - Evidence of ongoing problem;
  - Ensure policy reviewed & updated with reasonable frequency;
  - Ensure justification in context of own work environment.
- If evidence of enhanced safety risk such as general workplace problem with A&D, random testing may be justified.
- Review & update existing A&D policies for gap closures:
  - Employers should not build policies around signs of impairment, rather, focus should be on elevated risks associated with alcohol or drug use:
    - Positive test shows performance deficits incompatible with safety-sensitive work environment.
- Ensure compliance with human rights obligations when managing dependencies.



A close-up photograph of a fossilized insect, likely a fly or similar insect, embedded in a light-colored, textured rock surface. The insect's body is dark and appears to be preserved in a natural position. The rock has a mottled appearance with various shades of beige, tan, and light brown. A large, dark purple, semi-transparent arrow-shaped graphic points from the left towards the right, partially overlapping the fossil and the text.

# **Health and safety in unionized environments**

Craig Lawrence

# The Basics

- Management rights and responsibilities
- Employee/Supervisor rights and responsibilities
- Joint health and safety committee

# Introducing Health and Safety Policies and Practices

- Small changes vs. big changes.
- Beware of a policy grievance.
- Consider:
  - Balancing interests;
  - What invited the introduction of the policy?
  - Negotiate with the union.

# Proper Documentation

- Did workers complete health and safety training? *Prove it.*
- Properly investigate and document near misses/accidents (ideally under privilege).
- Remember to report certain accidents:
  - Fatalities;
  - Critical injuries; and
  - Occupational illnesses.

# When is a health and safety violation “just cause”?

- Refer to the guiding principles
  - The importance of safety;
  - The seriousness of a safety violation;
  - Employer’s legal obligations;
  - Deliberate? Reckless? Intentional?
  - Near-misses are equally important



# When is a health and safety violation “just cause”?

- Consider mitigating circumstances:
  - Length of service;
  - Isolated incident (or not);
  - Provocation;
  - Premeditation;
  - Any economic hardship the Grievor experienced;
  - Failure of the employer to uniformly enforce rules;
  - Whether the safety infraction was a misunderstanding ;
  - The seriousness of the offence;
  - Whether the worker was dishonest.

# When is a health and safety violation “just cause”?

- *Tonolli Canada Ltd. and USW, Local 9042 (Marsiglia), Re:*
  - Failure to wear a respirator.
- *Sudbury Integrated Nickel Operations and Sudbury Mine, Mill & Smelter Workers' Union (Unifor, Local 598) (Peirson), Re, 2015 CarswellOnt 9195 (Ont. Arb.):*
  - Speeding in underground mine, causing derailment.
- *Lac Des Iles Mines Ltd. and USW, Local 9422 (Saarinen), Re, 2019 CarswellOnt 18558 (Ont. Arb.):*
  - A pattern of safety infractions.

# Before you terminate for “just cause”

- Past discipline?
- Culminating incident?
- What was the damage?
- Review your policies;
- Review your training;
- Prepare for a grievance.

# Physical Fitness Testing

- Physical may be permitted if it is not arbitrary, discriminatory, or administered unfairly.
- *Durham (Regional Municipality) v. C.U.P.E., Local 1764, 2010 CarswellOnt 10732:*
  - The “chair” test – permissible.
- *Rubbermaid Canada Inc. v. C.A.W., Local 252, [2009] O.L.A.A. No. 639:*
  - 50+ pound lift – permissible.
- *Goodyear Canada Inc. v. U.S.W.A., Local 834, [2001] O.L.A.A. No. 715:*
  - Grievor moved into a new role after failing fitness test – fitness testing permitted.

# Thank you



**Craig Lawrence**  
Partner, Toronto, Canada  
+1 416 863 4420  
[craig.lawrence@dentons.com](mailto:craig.lawrence@dentons.com)



**April Kosten**  
Partner, Calgary, Canada  
+1 403 268 3108  
[april.kosten@dentons.com](mailto:april.kosten@dentons.com)