Guideline on Cannabis, Alcohol, and Drug Addictions

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NEW BRUNSWICK
HUMAN RIGHTS COMMISSION
COMMISSION DES DROITS
DE LA PERSONNE DU NOUVEAU-BRUNSWICK

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Please Note:

The New Brunswick Human Rights Commission (Commission) develops guidelines as part of its mandate to protect and promote human rights in the province. These guidelines are intended to raise the awareness of the public and stakeholders about their rights and responsibilities under the New Brunswick *Human Rights Act* (*Act*).

This guideline offers the Commission's interpretation of human rights obligations in situations of cannabis, alcohol, and drug addictions. The guideline is based on the relevant decisions of boards of inquiry, tribunals, and courts; it should be read in conjunction with those decisions, and with the applicable provisions of the *Act.*[1] In case of any conflict between this guideline and the *Act*, the *Act* would prevail.

For information on rights and duties under other grounds of discrimination, please review the Commission's guidelines on those subjects or contact the Commission directly.

This guideline is not a substitute for legal advice. For clarification on any of its sections, please contact the Commission.

[1] The Commission acknowledges and thanks human rights commissions from jurisdictions across Canada for the opportunity to study and draw on their policies and documents on cannabis, alcohol, and drug addictions.

1.0 Introduction

The *Act* prohibits discrimination based on mental and physical disability in employment, housing, public services, and in memberships of trade unions, professional or business organizations, and trade associations.[1] Mental and physical disability are defined in the *Act*,[2] and human rights jurisprudence recognizes cannabis, alcohol, and drug addiction[3] as disabilities protected under human rights law. Therefore, conduct that discriminates against persons on grounds of cannabis, alcohol or drug addiction constitutes disability-based discrimination, as conceived in the *Act*.

Users of adult-use cannabis, alcohol or drugs are not protected under human rights, unless they are perceived as having an addiction. Addiction (actual or perceived) to cannabis, alcohol or drugs is crucial to prove discrimination on the ground of disability.

1.0.1 Definition and Meaning of Addiction

The Supreme Court of Canada accepted the following definition of addiction, proposed by the Canadian Society of Addiction Medicine:

“A primary, chronic disease, characterized by impaired control over the use of a psychoactive substance and/or behaviour. Clinically, the manifestations occur along biological, psychological, sociological and spiritual dimensions. Common features are change in mood, relief from negative emotions, provision of pleasure, pre-occupation with the use of substance(s) or ritualistic behaviour(s), and continued use of the substance(s) and/or engagement in behaviour(s) despite adverse physical, psychological and/or social consequences. Like other chronic diseases, it can be progressive, relapsing and fatal”.[4]

Human rights law acknowledges that addiction is a serious condition with mental health and physical challenges, and requires constant attention and rehabilitation over a prolonged process.[5] Employers, therefore, have a legal duty to accommodate persons with cannabis, alcohol or drug addiction, unless the accommodation causes undue hardship; likewise, employees with addiction have a duty to cooperate with employers in the accommodation and rehabilitation process.

The onus is on the complainants to prove that they have cannabis, alcohol or drug addiction, and that the addiction was a factor in the adverse treatment or discrimination they suffered.

Human rights law acknowledges three types of addiction situations, each of which has specific implications and outcomes for disability-based complaints:

1. **The employee has no control over their addiction:** In this scenario, the employee cannot control their conduct, which is driven entirely by their cannabis, alcohol or drug addiction; the employee's behavior in this situation is non-culpable, because it is compelled by their addiction. In this scenario, the employee would be protected from discrimination on the ground of addiction disability.
2. **The employee has reasonable control over their addiction:** In this scenario, the employee or substance user is capable of making rational choices; the employee's conduct in this situation is culpable, because it is not driven by addiction or disability. Typically, this situation involves recreational users of cannabis, alcohol or other drugs; the employee would not be protected under addiction disability in this scenario, unless it is shown that the employee was perceived as having an addiction.
3. **The hybrid situation:** In this scenario, the employee's conduct is directly connected to the addiction, but the employee also has some level of choice or control over the addiction. In this situation, to decide if the employee suffered discrimination, a court would look at the specific facts: it would rely on medical and other evidence to determine the extent of the employee's control or loss of control over addiction, and if addiction or perceived addiction was a factor in the alleged discrimination or adverse treatment.[6]

1.0.2 Actual Addiction and Perceived Addiction

A person may have an addiction to cannabis, alcohol or other drugs, or may be perceived by others as having an addiction. Human rights law protects individuals against discrimination stemming from perceived addiction, just as it protects discrimination against actual addiction.[7] For example, a former alcohol addict, who had not had a drink in seven years, was removed from his safety-sensitive position because the employer perceived that he had alcohol addiction disability. The removal was discriminatory, as it was based on the employer's perception of disability; the employee had outgrown his addiction and had no impairment in performing his job.[8]

The Supreme Court of Canada has recognized that perceptions of disability lead to situations of discrimination: "Society and its members often contribute to the idea or perception" of disability by harboring "prejudices and stereotypes". According to the Supreme Court, disability is not simply a "biomedical condition […]; an individual may have no limitations", and yet experience discrimination because of other people's perception that they have a disability.[9]

Courts use the available evidence (actions, attitudes, behaviors, and interaction of the parties, and testimonies of coworkers, etc.) in each case to determine if perception of disability was a factor in an employer, service or housing provider's discriminatory treatment.[10]

1.0.3 Safety-Sensitive Workplaces

The distinction between safety-sensitive and non-safety sensitive workplaces is crucial in assessing complaints of addiction-based discrimination in employment. While impairment poses problems for any workplace,[11] safety-sensitive workplaces have stricter regulations on impairment because of the higher health and safety risks involved.

In the *Entrop* case, the tribunal outlined key features of a safety-sensitive workplace. These positions have no direct (or very limited) supervision, and infrequent operational checks; impaired performance in these positions could result in a "catastrophic incident", endangering the health or safety of employees, sales associates, contractors, customers, the public, or the environment.[12]

Generally, to determine if a workplace is safety-sensitive, the following factors are examined: The specific context of the industry or work operation; the employee's direct involvement in a high-risk job function; the level of supervision in the job being performed; and, checks and balances and other safety rules in the workplace.

A range of industries and jobs fall under the safety-sensitive category, including but not limited to:

- Resource extraction operations, like oil and gas, mining, and forestry;
- Construction industry, with heavy machinery operations or hazardous conditions like elevated worksites;
- Transportation services, including trucking, railways, shipping, airlines, and motor vehicle operations like taxi, car rental, and bus services;
- Manufacturing industry, including factories and mills, handling heavy equipment;
- Healthcare;
- Law enforcement; and
- Other jobs requiring high levels of cognitive function.

In safety-sensitive workplaces, recreational users of cannabis, alcohol or other drugs would not be protected under human rights law, unless they can prove they have an addiction or are perceived as having an addiction. Employers in safety-sensitive

workplaces have a duty to accommodate workers with cannabis, alcohol or drug addictions; however, the duty to accommodate ends at the threshold of undue hardship. (See section 4 for details)

With legalization of cannabis, safety-sensitive work environments are expected to witness increased legal challenges on cannabis impairment; employers in these sectors should draft clear and detailed guidelines on cannabis use at work.

1.0.4 Unionized and Non-Union Workplaces

Typically, in unionized workplaces, an employer's cannabis, alcohol or drug impairment policies are reviewed under the provisions of the collective agreement; arbitration law applies the standard of reasonableness to balance the employee's right to privacy against the employer's right to ensure a safe workspace.[13] In non-unionized workplaces, alleged discrimination based on cannabis, alcohol or drug addiction is challenged under human rights legislation on grounds of disability.

The Supreme Court of Canada has stated that while different "analytic steps" are involved in adjudicating discrimination in the two (union and non-union) employment contexts, both "essentially require attentive consideration and balancing of safety and privacy interests".[14] According to the Supreme Court, in both unionized and non-union environments, employers may discipline employees only for "reasonable cause";[15] this implies a common middle ground where the two approaches converge.[16]

Other tribunal decisions have argued that parties in a unionized arrangement cannot contract out of their obligations under human rights law, and labour arbitration boards can apply human rights legislation concurrently with the collective agreement, with some caveats.[17] These observations also indicate commonalities in union and non-union discrimination complaints.

2.0 Medical and Adult-Use Cannabis in Employment, Housing, and Services

Medical cannabis has been legal in Canada since 1999; it can be prescribed by a physician for a person of any age.

Non-medical or adult-use cannabis became legal in Canada effective October 17, 2018, when the *Cannabis Act* came into force. The *Cannabis Act* allows persons of legal age to buy cannabis at government prescribed locations, and grow limited amounts for personal use. Provinces have jurisdiction to regulate sale and distribution, and set the minimum legal age for adult-use cannabis consumption.

Employers, supervisors, managers, and employees with addictions have clear duties and responsibilities with regards to medical and recreational cannabis use. In general, broad-based terms:

- Workplace restrictions that apply to the use of prescription drugs with potential of impairment would also apply to the use of medical cannabis in the workplace.
- Policies on non-medical or adult-use cannabis in the workplace should mirror workplace policies related to alcohol and other adult-use drugs:
    - Just as it is not permissible to be inebriated at work, it would not be permissible to be high on adult-use cannabis.
    - Recreational users of cannabis, like recreational users of alcohol and drugs, therefore, would not be protected by the *Act*, especially if recreational use impacts job performance.
- Users of medical cannabis, and those with addiction or perceived addiction to cannabis, are protected by the *Act*, within restrictions and subject to the facts of each situation.
- A positive result for cannabis is not an indication of present impairment or recent consumption; employers, therefore, should exercise caution when acting on positive cannabis results. (See section 3 for details)
- Vaping or smoking medical or adult-use cannabis in enclosed workplaces would not be allowed, subject to existing workplace smoking policies and the New Brunswick *Smoke-free Places Act.*[18]
- Edible medical cannabis used to treat a disability or disability-induced symptoms may be allowed in an enclosed workplace (with express permission of the

employer), if its consumption does not impact health and safety or the performance of essential job duties.

- Because adult-use cannabis is now legal across Canada, employers should revise any provision in their alcohol and drug policies that suggests criminal penalization for recreational cannabis use; however, disciplining employees for recreational cannabis use within the employer's policies would be allowed, subject to the facts of each situation.

2.0.1 Duties of the Employer in Situations of Workplace Cannabis Use

The employer or accommodation provider has the following obligations in a cannabis addiction or use related scenario:

- **Duty to accommodate:** Employers have a duty to accommodate employees with actual or perceived cannabis addiction. If an employee tests positive for drugs or alcohol, the employer's duty to accommodate is triggered; accommodation options like support and rehabilitation should be efficiently communicated to the employee. The employer's duty to accommodate ends at the point of undue hardship, which begins when:
  - The employee is unable to perform essential job tasks;
  - The workplace safety risks are too high;
  - The cost of accommodation is prohibitive. (See section 4 for details)

Example – Medical Cannabis Use in a Safety-Sensitive Workplace

In a recent case, the Ontario Human Rights Tribunal agreed with the termination of an employee for on-work cannabis use in a safety-sensitive workplace. The complainant was employed by a construction company, and worked from a stage suspended thirty floors above ground; he suffered from a degenerative disc condition and self-medicated with cannabis for many years, before obtaining a prescription for medical cannabis. The employee could not prove discrimination based on addiction or perceived addiction, so the grounds of addiction disability did not apply. Furthermore, the employee did not ask for accommodation, did not get his physician's advice on using medical cannabis at work, and did not obtain the employer's permission for workplace cannabis use. The tribunal held that accommodating cannabis use in the safety context of the workplace was undue hardship to the employer, and the employer's drug and alcohol prohibition policy was a *bona fide* occupational requirement (BFOR) for the job: the health and safety risks of workplace impairment outweighed the employer's duty to accommodate.[19]

Example – Limits of Accommodation for Workplace Cannabis Use

A forklift operator was permitted to vape prescription cannabis during his workday, subject to time and equipment restrictions. On a work trip with colleagues, he vaped cannabis while operating the employer's vehicle. He was dismissed for misconduct, without progressive discipline as per the collective agreement. However, the employer had already accommodated the employee, moving him to a less stressful position and allowing him to use cannabis at the workplace. The arbitrator concluded that the decision to dismiss was not excessive under the circumstances.[20]

Example – Criminal Misconduct Not Protected Under Employer's Addiction Accommodation Duty

A nurse, who had not disclosed her opioid addiction to the employer, was dismissed for stealing drugs from her hospital; the employer argued that the theft was a breach of trust and serious criminal misconduct. The union argued that the hospital failed to accommodate the grievor's opioid addiction. It was held that the dismissal was not discriminatory: the grievor was treated in the same way as any other employee accused of the criminal offence of theft. Moreover, the grievor failed to show that she was unable to understand the impact of her actions. The arbitrator observed that if the grievor had come clean about her addiction before being caught, the matter might have been decided differently.[21]

Example – Withdrawal of Job Offer After Positive Cannabis Test

The complainant was offered a position at the company's safety-sensitive industrial plant, conditional to passing a drug test. The complainant tested positive for cannabis, and the employment offer was withdrawn. The Ontario Superior Court held that the grounds of disability and perceived disability did not apply: the complainant was a recreational user (not addicted) and there was no evidence that the employer perceived him as addicted. The withdrawal of job offer was justified because of the safety risks connected with the job duties.[22]

Example – Accommodation and Zero-Tolerance in Safety-Sensitive Workplaces

The complainant was hired as a seasonal bus driver by a motor coach business that operated vehicles for tourism. He tested positive for cannabis in a urine test conducted as part of new company policy; he was suspended for two days, and fired from his position afterwards. The complainant admitted that he was a recreational user, and did not have cannabis addiction or disability; additionally, the tribunal found no evidence that the employer perceived him as addicted, so the disability protection of the code was not

engaged. The tribunal noted that the transport industry is an extremely safety-sensitive operation; the employer's zero-tolerance approach to at-work alcohol and drug consumption was justified, including pre-employment and random drug and alcohol testing.[23]

- **Duty to inquire:** The employer has a duty to inquire about an employee's addiction-related needs; if an employee has not made a formal request for accommodation, the employer must be sensitive to signs or symptoms that indicate addiction or an addiction-related condition:

    - Because of the stigma attached to addiction, and because people with addiction may be unaware of its severity, the employer's duty to inquire is vital in addressing workplace drug use;
    - However, in discharging their duty to inquire, employers should not act on stereotypes about addiction;
    - Supervisory and managerial staff should be trained to detect impairment, and to devise appropriate responses to each situation.

Example – Employer's Duty to Inquire and the Employee's Duty to Disclose

The employee in this case did not disclose his addiction to his employer. The tribunal noted that, depending on the circumstances of each situation, it is not mandatory on drug users to communicate their addiction disability to the employer. Employers should reach out and inquire about potential drug problems; in a complaint of addiction-based discrimination, it is relevant to determine if the employer knew or ought reasonably to have known about the addiction disability of an employee.[24]

- **Progressive discipline:** Even if an employee with an actual or perceived cannabis addiction refuses accommodation, immediate or automatic dismissal would not be justified in most cases. Employers must address addiction-related issues through progressive discipline, until the situation reaches the point of undue hardship.

Example – Testing Positive for Cannabis without Symptoms of Impairment

The grievor, a ramp agent at an airport, used prescription cannabis to alleviate pain in his back and knee. He tested positive for small traces of cannabis, with no signs of impairment. The employer offered him a "Final Warning" agreement: to avoid dismissal, he had to admit that he had a substance use problem, enter an employee assistance program, meet with a counselor, remain drug and alcohol free, and consent to random drug testing. The grievor refused to sign the agreement and was dismissed. It was held

that the grievor was not impaired at work, and did not violate the employer's drug and alcohol policy. The employer failed to accommodate the grievor, dismissed him without just cause and, in doing so, violated both human rights law and the collective agreement. Reinstatement was decided as the appropriate remedy in this matter.[25]

- **Good faith:** Employers should accept requests for accommodation of addiction in good faith, unless clear and legitimate reasons prevent such presumption.

- **Expert opinion:** Employers should seek expert opinion or the advice of a medical practitioner to address addiction-related incidents in the workplace, if a situation requires it.

- **Alternative approaches:** Employers must explore alternative approaches (other than drug testing) and accommodation solutions for addiction-related issues.[26] (See section 3.5 for details)

- **Rational assessment:** It is important for employers not to jump to the conclusion that addiction was a factor in an employee's misconduct. Hard evidence and rational assessment should determine if the misconduct resulted from addiction/drug use or its symptoms.

Example - Reinstatement after Lack of Evidence of Cannabis Use

The grievor, dismissed for alleged cannabis use at work, claimed he took medical cannabis under the direction of a physician. He later admitted that he had been self-medicating without a prescription, and obtained a physician's prescription for medical cannabis after his termination. The union argued that a positive result for cannabis merely indicates the presence of cannabis in the system, and does not confirm present impairment or recent consumption. The union did not argue that the grievor suffered discrimination on grounds of disability; instead, it insisted that the grievor did not smoke cannabis in the workplace. The onus was on the company to show on a balance of probabilities that the grievor smoked cannabis in the workplace; however, there was lack of evidence of cannabis consumption on premises, so the griever was ordered to be reinstated.[27]

- **Individualized assessment:** Employers must respect that each individual situation is different, and ensure that employees are treated as individuals with specific needs unique to their circumstances; a blanket policy that addresses all situations in a similar manner would result in incidents of discrimination.[28]

- **Communication:** Employers must communicate efficiently with employees experiencing addiction-related issues, keeping them informed on the accommodation process and planned next steps.[29]

- **Respect and confidentiality:** Any inquiries should be made respectfully, and while protecting employee privacy and confidentiality, in accordance with the *Right to Information and Protection of Privacy Act*; for example, employers should only seek information that is directly relevant to the disability, and not share that information with persons outside the accommodation process.

Example – Dismissal for Cannabis Possession and Privacy Rights

The employer was concerned with drug related incidents in the workplace; a supervisor searched the coat pockets of one of the employees in her absence and found a small amount of cannabis. The employee was terminated for being in possession of cannabis at work. The union argued that the grievor was authorized to possess dried cannabis for medical purposes; by searching her belongings without consent, the employer had breached her privacy rights, in violation of the collective agreement and common law. The grievor was reinstated, but not compensated for lost pay or loss of seniority.[30]

- **Timely implementation:** Employers should strive to implement any accommodation measures in a timely and efficient way, to enable the employee to avail the accommodation benefits and move toward rehabilitation and recovery.

- **Avoiding presumptions:** If an employee declines to take a drug or alcohol test, it should not be presumed that they have an addiction. If disciplinary action is taken on such a presumption, it would amount to discrimination based on perceived disability. A case-by-case analysis should be undertaken to consider the reasons for refusal, with a review of all relevant factors, such as the employee's past conduct and service record.

- **Documenting the process:** Employers should keep an up-to-date record of the accommodation process they put in place to accommodate employees struggling with addiction-related issues.

- **Cost of accommodation:** Generally, employers must cover the cost of the needed accommodation, unless costs become prohibitive and reach the point of undue hardship.

2.0.2 Responsibilities of Employees with Addiction Disability

Employees with addiction disability or drug use issues have the following responsibilities:

- **Duty to disclose:** Employees with addiction have a duty to disclose their addiction to their employers, to pre-empt impairment-induced workplace incidents, and to seek accommodation and rehabilitation:

    - Employers should be sensitive, however, that because of the stigma attached to addictions and lack of awareness about addiction disability, substance users may be reluctant to come forward about their addiction;[31]
    - Automatic discipline for not self-disclosing may be discriminatory, and tribunals scrutinize the specific circumstances of each case to make a finding of discrimination;[32]
    - Employees should also disclose any recreational drug use, if workplace policy requires it for safety purposes;
    - Employers do not have the right to know the exact nature of an employee's addiction disability;[33]
    - An employee using medically prescribed cannabis with CBD (the drug's non-intoxicating ingredient) does not need to self-disclose, as the cannabis use will not cause impairment;
    - An employee who works in a safety-sensitive position with a mandatory drug testing policy should inform[34] the employer if he uses medical or adult-use cannabis outside work, for he may test positive for cannabis even though he would not be impaired at work;
    - If a self-disclosure clause exists in a collective agreement, an employee may be penalized for not complying with it; but any discipline should be reasonable, and individualized to the specific circumstances.

Example – Dismissal for Failure to Disclose Addiction

The grievor, a construction worker, was dismissed for cannabis use in the workplace; at the time of hiring, he had concealed that he used prescription cannabis for back pain and anxiety. At arbitration, it was found that based on the employer's policy, possession and failure to disclose drug use constituted just cause for termination. On judicial review, the complaint was remitted back to the arbitrator to reassess the following: Was the termination an appropriate penalty proportional to the misconduct, or would lesser penalization have been more appropriate under the circumstances? To what extent were the employee's medical condition and disability-related needs accommodated? Were implications of accommodating medical cannabis in the context of the worksite properly evaluated?[35]

Example – Disclosing Addiction After an Incident

The employer in this safety-sensitive workplace had a self-disclosure requirement in its drug and alcohol policy. The tribunal noted that it would be discriminatory to impose automatic discipline on the employee for not disclosing his addition; however, the employer was not required to accommodate the employee, because the employee had only disclosed his addiction after being involved in an incident.[36]

- **Convey accommodation details:** Employees with cannabis or other addictions should communicate their specific accommodation needs to the employer:

    - Provide information about work-related restrictions or limitations, including information from health care professionals where appropriate and needed.[37]
    - However, employees are not required to reveal their accommodation needs to persons not involved in the accommodation process.

Example – Limits of Information Sharing

A sports club asked its tennis instructor to inform his clients about his epilepsy, and instruct all staff on steps to take in the event of a seizure; the club's actions were held to be discriminatory, as they exceeded the employee's responsibility to share information about his disability.[38]

- **Cooperate with experts:** An employee must cooperate with experts, including medical professionals, whose help may have been sought to facilitate the accommodation process.

  - For example, an employee who refuses to disclose his addiction history to a drug rehab professional hinders the recovery process, and may forfeit his right to accommodation.[39]

- **Adhere to performance requirements:** Employees with addiction or drug use issues must adhere to agreed-on performance requirements, once the employer has met its duty to accommodate and a performance and rehabilitation roadmap has been set.
- **Commit to ongoing cooperation:** Employees must work with the accommodation provider on an ongoing basis to manage the accommodation process; non-cooperation with the process would end the employer's duty to accommodate.

Example – Lack of Cooperation and Right to Accommodation

A nurse was dismissed for theft of drugs from the hospital, for using opiates at work, and for failure to stick to a recovery program. She had already been reinstated twice after dismissal for drug use. The Court of Appeal acknowledged that the nurse had a disability, but she did not facilitate the accommodation process or take responsibility for her rehabilitation. The hospital, therefore, had exhausted its duty to accommodate the long-term drug problem of the employee.[40]

2.0.3 Cannabis in Housing

Housing providers have the following responsibilities to accommodate medical and adult-use cannabis:

- Housing providers have a duty to accommodate the disability or addiction-related needs of medical or cannabis users, unless accommodation would cause undue hardship.
- Accommodating the needs of addiction disability would have to be balanced by conflicting rights of other residents, if cannabis smoke or vapors impact residents with allergies or chemical-sensitivity disabilities.
- The smoke restrictions or permissions that apply in apartments, housing units, and other buildings would generally apply to smoking or vaping medical or adult-use cannabis on these premises.
- Tenants would be permitted to smoke or vape medical or adult-use cannabis on their private balconies or terraces, if it is in keeping with their building's smoking rules.
- If building rules permit smoking in certain areas, restrictions on smoking or vaping medical or adult-use cannabis in those areas may be discriminatory.

- Like tobacco, smoking or vaping cannabis would not be permitted in common areas of apartment or condo buildings.
- Edible cannabis use would be legal in housing units and housing premises.
- Apartment and condo owners should revise their smoking policies to include provisions on cannabis use; in addition, they should look to:

    - Revise their scent-free policies to add provisions on the scent of cannabis smoke;
    - Accommodate tenants in different apartment in cases of complaints of cannabis smoke or scent;
    - Improve insulation of apartments to prevent smoke leakage into adjacent units or areas;
    - Designate certain floors or units smoke free to accommodate people with sensitivity to cannabis smoke.

2.0.4 Cannabis in Services

Service providers like restaurants, hospitals, and malls have a duty to accommodate medical and adult-use cannabis, with limitations:

- Smoking or vaping medical or adult-use cannabis would be prohibited in enclosed public spaces like restaurants, malls, retail stores, service centres and other buildings.

Example – Smoking Medical Cannabis Near Restaurant Entrance

The complainant had a medical cannabis prescription; after purchasing a beer at a restaurant, he went outside to smoke cannabis. He had earlier been warned by the owner not to smoke cannabis on the premises (including the patio), because of Ontario's smoking laws for liquor-serving establishments; he could, however, smoke cannabis in the parking lot adjacent to the restaurant. In this instance, he stood close to the restaurant door while he smoked. The tribunal rejected alleged disability discrimination in provision of services: the complainant had no disability-related need to smoke cannabis close to the restaurant's entrance. The owner’s concerns about his liquor licence, and for the well-being and comfort of his customers were valid or *bona fide*.[41]

- Carrying legally permitted amounts of cannabis would be allowed in areas like restaurants, malls, retail stores, etc.
- Persons with prescription for medical cannabis would be permitted to consume edible medical cannabis in enclosed public areas like restaurants and malls.

- Children, youth, and adults who have prescription for medical cannabis would be allowed to consume the same in edible form on school premises, in the knowledge of and with express permission of school authorities.
- Smoking or vaping medical cannabis is not allowed on school premises.

Example – Refusal to Vape Medical Cannabis During an Exam

The complainant suffered from pain caused by disabilities from Crohn's disease and other disorders and requested several accommodations, including permission to vape medical cannabis in a designated space during an LSAT test for admission to a law school. While she was provided other accommodations by the school, she was not allowed to vape medical cannabis during the exam. The board of inquiry found no discrimination in the school's refusal to permit vaping of cannabis in the examination.[42]

- Smoking or vaping prescription medical cannabis in public spaces like parks where smoking is permitted may be allowed with limitations:
    - For example, users must stay away from children's playgrounds, schools, daycares, sports arenas, shelters, community centres, hospitals, and government offices.
    - Peace officers will have the right to ask persons for proof of medical cannabis prescription in these areas.

- Service providers should be vigilant that they do not discriminate against addictions-sufferers based on stereotypes about addiction and disability.

Example – Denial of Hospital Service based on Perceived Addiction

A patient suffering from mental health issues was denied adequate psychiatric and medical services at a hospital because the medical staff perceived him to be a drug addict. The tribunal held that stereotypical views about drug addiction and mental illness were factors in the hospital's failure to provide services appropriate to the patient's disability-related needs.[43]

- Insurance coverage for medical cannabis is an evolving issue; employee claims for cannabis coverage under health and benefits plans are expected to increase after legalization.[44]

Example - Denial of insurance Coverage for Medical Cannabis

The Canadian elevator industry managed a trust fund to provide health benefits to employees and former employees in the unionized sector of the industry. The respondent, an elevator mechanic covered under the plan, had an automobile accident that led to chronic pain disorder, anxiety, and depression. He began using medical cannabis on the advice of his psychologist, but was denied coverage under the trust fund. The Board of Inquiry's decision in favor of the complainant was reversed on appeal: the appeal court held that denial of insurance coverage was not discriminatory, because no other beneficiary received coverage for medical cannabis, or for drugs not approved by Health Canada under the *Food and Drugs Act*. The court also noted that the complainant's disability resulted from a compensable workplace injury, so he should seek coverage under the provincial medical plan.[45]

Example – Denial of Employment Insurance after Termination for Cannabis Use

The complainant, a crane operator, was dismissed from his employment after cannabis was detected in a urine test conducted on him. His application for employment insurance benefits was rejected. The complainant admitted that he smoked cannabis every evening to help with sleep, but denied smoking before or at work. There was no evidence that his cannabis use impacted his skills as a crane operator, or that he operated equipment while impaired. However, the denial of employment insurance was upheld, because the employee was terminated for misconduct.[46]

- Other rights challenges will emerge as legalization takes effect and labor boards and tribunals adjudicate cannabis related complaints.

Example – Growing Medical Cannabis on Mortgaged Premises

The applicant alleged discrimination in the provision of services against his bank based on family status; the bank demanded repayment of a mortgage loan because the complainant's son and daughter-in-law were growing medical cannabis at the mortgaged premises owned by the bank. The complaint was dismissed by the tribunal for lack of evidence of discrimination, and the matter was returned to the tribunal for redetermination and, if necessary, further investigation.[47]

3.0 Cannabis, Alcohol or Drug Testing in Employment

Employers are required to ensure safety in the workplace, to comply with occupational safety and health legislation; therefore, testing employees for workplace drugs or alcohol impairment is part of an employer's safety procedures, especially in dangerous or safety-sensitive workplaces. However, workplace safety requirements must be balanced by employee rights to privacy and dignity, and the duty of employers to accommodate employees with addictions to the point of undue hardship.[48]

3.0.1 General Principles of Drug and Alcohol Testing

Drug and alcohol testing is implemented primarily in safety-sensitive workplaces; testing in non-safety sensitive workplaces is very rare, because, in most circumstances, testing would not be justifiable as a BFOR in non-safety workplaces.

Drug and alcohol testing regimes in safety-sensitive workplaces must adhere to the following general principles:

- Testing should allow for a range of outcomes and be part of a wider process to address addiction issues in the workplace.
- Employers should not take a positive test as confirmation that the employee would be impaired at work, currently or in the future.
- If an employee's job performance is not affected, the employer would have less right to enact unilateral testing policies.
- Severe disciplinary measures after a positive test raise a red flag that discrimination based on disability or perceived disability may be a factor in the decision to impose discipline.
- If testing treats casual users of drugs or alcohol as addiction sufferers and imposes discipline, it would be *prima facie* discriminatory based on perceived disability.
- Automatic dismissal or disqualification after a positive drug or alcohol test is not a valid course of action for employers, because employers should always opt for progressive discipline choices[49] (See section 2.0.1 for details); courts see termination of service as the ultimate disciplinary step an employer can impose.[50]
- Drug or alcohol testing should be used to measure impairment and fitness for work, not for moral sanction or judgement.
- Testing is justified if it is shown to be a *bona fide* occupational requirement (BFOR) of the job; to qualify as a BFOR, a testing policy should pass the

three conditions laid out by the Supreme Court of Canada in the Meiorin Test.[51]

- Employers should always be open to less intrusive alternative methods to address addiction issues. (See section 3.5 for details)

3.0.2 Testing Techniques

Alcohol testing technology is quite advanced; however, a fully accurate and reliable test for cannabis is not yet developed. Cannabis testing poses problems partly because cannabis stays in the blood until many days after ingestion, and its THC (intoxicating component) levels do not necessarily reflect current levels of impairment;[52] a urine test for cannabis, for example, can come up with "false positives and false negatives", causing potential complications for employees and accommodation providers.

The following testing techniques are currently in use:

- **Blood testing** is very reliable to detect levels of impairment; however, it is highly intrusive on employee rights of privacy and dignity, and thus raises fundamental human rights concerns.
- **Breathalyzer or breath testing** is accurate for testing alcohol levels, and shows if alcohol levels are above the established legal limit. It also measures current impairment, and courts have endorsed it for workplace alcohol testing.[53] However, breathalyzers cannot be used to test for cannabis or other drugs; a breathalyzer for drugs is being developed, but little data is yet available on it.
- **Urinalysis or urine testing** indicates impairment during certain time windows, but it is not as precise as breath-alcohol testing. It can detect past use, but it cannot detect the quantity of drug ingested, or current impairment. It was found useful for testing on drivers who worked unsupervised most of the time: it did not indicate current cannabis impairment, but a positive test was a "red flag" to identify drivers potentially at risk of accidents.[54]
- **Oral fluids, cheek-swab or saliva testing** only shows negative or positive status for cannabis, but does not show exact levels of cannabis in the blood; it has to be followed by a blood test to determine exact levels of impairment.[55] The test has relevance for testing for impaired driving; however, in the employment context, its delayed testing mechanism would not ensure immediate safety in the workplace, unlike the alcohol breathalyzer test.

3.0.3 The Supreme Court of Canada on Testing

The Supreme Court of Canada has declared that acquiring body samples for drugs or alcohol testing is a flagrant invasion of privacy, unless it is justified by the circumstances and follows established protocols.[56]

The Supreme Court established the following recommendations for workplace drug and alcohol testing:

- **A "balancing of interests" approach:** Workplace testing should balance employee privacy rights and an employer's right to provide a safe workplace – a disciplinary rule based on testing outcomes would be justified only if workplace impairment or performance issues significantly outweigh individual privacy rights.
- **A "reasonable cause" approach:** This is based on the basic tenet of collective bargaining law that an employee may be disciplined only for reasonable cause. Under this approach, testing would be justified if an employee has been involved in a workplace accident or near miss, and there is sufficient evidence to believe that impairment was a factor in the incident.
- **A case-by-case "risk factor" approach:** Each workplace testing situation should be assessed in its entire context to assess safety risks. For example, in the *Irving* case, the Supreme Court of Canada looked for evidence of a drug or alcohol problem in the workplace that would justify the company's random testing policy. The Supreme Court found that the company experienced eight incidents of alcohol or drug violation over a 15-year period, which showed "very low incremental risk of safety concerns" to justify a unilateral random testing policy.[57]

Different workplace testing situations have developed from employer practices, including pre-employment testing, post-accident testing, random testing, and post-rehab testing.

3.1 Pre-Employment, On-Hiring or Pre-Access Testing

Employers in safety-sensitive workplaces often conduct drug or alcohol testing before hiring or confirmation of hiring. Such testing can be a *bona fide* occupational requirement (BFOR) or legitimate need of the job, if employers demonstrate the specific risks attached to the workplace or job duties. If BFOR is not shown, this kind of testing can be discriminatory based on addiction or perceived addiction.

Automatic withdrawal of an employment offer after a positive pre-employment test would be *prima facie* discriminatory on grounds of disability or perceived disability, unless the employer pleads a BFOR or undue hardship. A positive pre-employment test should not lead employers to presume that the employee would be impaired at work in the future.[58]

Claims of discrimination in pre-employment testing situations are dealt in accordance with the specific facts and evidence of each case.[59]

Pre-access testing, conducted when an employee is transferred to a new position, should adhere to the same legal protocols as pre-employment testing.

Example – Withdrawal of Job Offer After a Pre-Employment Test

A construction company in Fort McMurray used some of the largest equipment in the industry and required applicants in non-unionized positions to pass a drug test after receiving an employment offer. If a candidate failed the test, he or she would be reconsidered for employment after six months. The complainant smoked cannabis a few days before the test, but did not tell the company or request a later date for the test. He commenced employment, but was terminated after a few days when the test results came positive for cannabis. The Alberta Court of Appeal reversed the Court of Queen's Bench decision that the testing policy was a "pre-employment barrier, with zero tolerance, automatic termination and no accommodation." According to the Court of Appeal, the complainant was not terminated based on addiction or perceived addiction; he was a casual user, so the ground of addiction disability was not attracted. The court endorsed the company's drug-testing policy, which aimed to minimize workplace accidents by prohibiting impairment in a potentially dangerous work environment. The policy was connected to its purpose of ensuring safety in a high accident-risk workplace, protecting its employees, the public, and "the planet and the environment". The court determined that human rights protections cannot be extended when lives of employees and the public are endangered, and there is risk of environmental damage.[60]

Example – Pre-Access Testing Without Drug Problem at Worksite

An arbitrator allowed the union's grievance regarding the company's pre-access drug testing policy at a safety-sensitive mining site. While the company provided evidence of drugs and drug-contaminated paraphernalia at the mine, the arbitrator found that the evidence was not substantial to indicate a problem with drug use in the specific bargaining unit bringing the grievance.[61]

3.2 Post-Accident, Near-Miss or For-Cause Testing

If an employee is involved in an accident or a close call (near miss), drug and alcohol testing may be justified if certain conditions are met and “reasonable grounds” exist to link the accident to impaired behavior. According to the Canadian oil and gas industry guidelines, “reasonable grounds” for post-accident or near-miss testing are as follows:

- The employee is seen using alcohol or drugs at work;
- The employee’s behavior is consistent with someone impaired by alcohol or drugs; and
- Substances or substance paraphernalia are discovered from the employee’s work area.[62]

Post-accident testing in a safety-sensitive workplace is justified as a BFOR in most instances, but it should follow the procedures outlined in the collective agreement (in unionized workplaces) and respect the dignity, privacy, and confidentiality of employees.

Employers should be sensitive that accidents also happen from other causes: lack of training, fatigue, mechanical or structural failure, and environmental factors; if any of these factors is present, post-accident testing would not be justified.[63]

Even if reasonable grounds exist for conducting a drug and alcohol test after an accident or near miss, testing should not be a random measure, but "one facet of a larger assessment”.[64] The larger assessment options include employee assistance and rehab programs, education and awareness initiatives, peer and supervisory reviews, incident reports, corrective action, progressive discipline, and so on.[65] (See section 3.5 for details)

Example – Post-Accident Testing and Self-Disclosure of Addiction

The complainant worked as a loader driver in a coal mine, where the employer’s drug and alcohol policy had a “No Free Accident” (NFA) rule: an employee who used drugs or alcohol was required to self-disclose their addiction, following which they would be offered treatment; if they did not self-disclose and got into an accident, a positive post-accident test would result in termination. The complainant had not disclosed that he used cocaine on his off-days; he was involved in an accident and tested positive for the drug. His employment was terminated, in accordance with the NFA rule. The Supreme Court of Canada agreed with the Alberta Human Rights Tribunal’s decision that the complainant did not suffer discrimination: he was not terminated because he was addicted to cocaine,

but because he failed to comply with the company's self-disclosure policy. Relying on medical and other evidence, the Supreme Court determined that the complainant's drug use had not diminished his capacity to self-disclose the addiction to his employer. While denial, lack of knowledge, and social stigma of addiction prevent some people from disclosing their condition and seeking help, these factors did not apply in this case.[66]

Example – Justification of a Post-Accident Testing Policy

After a minor workplace accident (backing into a parked vehicle), an employee in this safety-sensitive worksite tested positive for cannabis. He was referred to a substance use expert, completed the rehab program and returned to work. The union grieved that the drug and alcohol testing policy was discriminatory. The policy, however, was found reasonable at arbitration: the employer was entitled to conduct the test and rule out impairment, because the accident was caused by poor judgment.[67]

Example – Termination for Recreational Cannabis Use After Post-Accident Test

The complainant was responsible for installing electrical wires and outlets in pre-fabricated homes at the employer's manufacturing facility. She sustained a workplace injury, and a post-accident drug test revealed high levels of cannabis in her system. The company terminated her employment on grounds of workplace impairment; the complainant admitted that she ingested cannabis before her shifts on a regular basis, but insisted that she was never impaired during work. The termination was upheld: the employee did not suffer from cannabis addiction, and was not perceived by the employer as having an addiction. Therefore, the employer's duty to accommodate was not triggered.[68]

Example – Zero-Tolerance Policy and Post-Accident Testing

The tribunal rejected that the employer used a zero-tolerance policy to terminate the complainant after a positive post-accident test. The complainant was not terminated immediately (automatic termination); he was removed from the workplace by his supervisor when he discovered him smoking cannabis on his elevated platform, and without wearing his safety hat. He was terminated a few days later by the manager.[69]

3.3 Random Testing

The Supreme Court of Canada has stated that employers in a unionized workplace must show evidence of a general drug or alcohol problem to justify random drug and

alcohol testing – this is termed the Irving Test: "The fact that you have a safety-sensitive workplace is not enough; you have to have evidence of a problem".[70]

In a non-safety sensitive work environment, random drug or alcohol testing and zero-tolerance policies on impairment are very difficult to justify, unless they can be shown as BFORs or justified on grounds of undue hardship.

To justify random on-the-job drug and alcohol testing in a safety-sensitive workplace, an employer must show that:

- There is compelling evidence of safety risk in the workplace;
- The workplace has experienced significant drug and alcohol related incidents;
- The tested employees work under minimal supervision; and
- The employer has met its duty to accommodate employees who test positive for drugs or alcohol.[71]

Testing policies that meet the above requirements may still be challenged for violation of privacy rights. A case-by-case analysis based on evidence is used by courts to decide if random testing in a safety-sensitive workplace met the privacy and other accommodation guidelines.

Example – Random Testing in Workplace with a Drug Problem

According to the Alberta Court of Queen's Bench, an employer must demonstrate: 1. That it has a dangerous workplace; and 2. That there is a general problem with drug or alcohol abuse in that workplace. The court rejected the arbitration decision that the company's random testing standard was unreasonable. Commenting on the evidentiary burden of the Irving Test, the court noted that an employer in a safety-sensitive workplace was only required to show evidence of a general problem with drugs and alcohol in the workplace; the employer was not required to establish a causal connection between substance use and specific workplace incidents. Based on that principle, the company's random testing policy was justified in the interest of its workplace safety requirements.[72]

Example – Random Testing in a Workplace Without a Drug Problem

Reviewing an employer's random alcohol and drug testing policy, the Ontario Superior Court of Justice agreed with the arbitrator's decision that the policy was unjustified in the context of the workplace; the worksite was safety-sensitive, but there was no evidence of alcohol or drug problem or of any safety incidents at the worksite.[73]

3.4 Post-Rehab or Return-to-Work Testing

Arbitration and human rights jurisprudence recognizes that employees with addiction must be given the opportunity to rehabilitate prior to termination.[74] An employee who returns to a safety-sensitive job after rehabilitation may be justifiably tested after reinstatement, and placed under certain conditions;[75] these conditions could include surprise testing and last-chance or back-to-work agreements, whose breach could result in termination. If these conditions are instated for returning employees, they:

- Must meet the employer's duty to accommodate;
- Must be individualized to the needs and circumstances of the employee;
- Must be reasonable (e.g. the frequency of mandatory or surprise testing should be fair).

In last-chance agreements, rehabilitated employees typically waive their right to file a human rights complaint, and agree that their employment may be terminated if they test positive after reinstatement.

Employers must be aware of the following:

- A zero-tolerance post-reinstatement policy or last-chance agreement does not absolve employers of their duty to accommodate employees undergoing relapse after treatment.[76]
- If an employer fails to accommodate a returned employee after their relapse, it would have to plead undue hardship as a defense.[77]
- In unionized workplaces, last-chance agreements should not be entered without the knowledge and involvement of the union.
- The relevant human rights commission should be informed of any last-chance agreements.

Example – Last-Chance Agreements and Human Rights Law

An employee in a safety-sensitive workplace disclosed his drug and alcohol addiction to the employer, and he was referred for rehab treatment. On returning to work, he had to sign a "Conditional Reinstatement Agreement" (CRA), which required him to abstain completely from drugs and alcohol; if he violated this condition, his job would be terminated. After six months, he suffered a relapse, but did not disclose it to the employer for fear of termination. However, he tested positive in a random drug test, and was put

under indefinite suspension; after a few months, his employment was terminated for violating the conditions of the CRA. The tribunal found that the
employee's relapse, his failure to disclose his relapse, and his positive drug test were all causally related to his addiction disability. The company's last-chance agreement or CRA discriminated against the employee, because the CRA dealt more severely with drug-addicted employees than with recreational drug or alcohol users. According to the tribunal, last-chance agreements such as the CRA cannot override human rights law.[78]

Example – Return-to-Work Agreements and Privacy

An employee returning to work after a relapse refused to disclose the medical information requested by the employer; he argued that the requested information was too exhaustive and included personal details. Basing its conclusion on testimony of expert medical practitioners, the court held that the employee was required to disclose the details: the information was needed to enable the employer to make an informed decision about the employee's back-to-work prospects, develop a return-to-work program, and devise a monitoring schedule – these were important elements for successful reemployment after rehabilitation.[79]

Example – Accommodating an Employee After Relapse

The grievor, who had relapsed into alcohol addiction, showed up to work intoxicated and was terminated. The termination was held to be discriminatory, because the employee's conduct was non-culpable: she had been advised rest by her physician after the relapse, but the employer had not granted her leave of absence. The employer also breached the collective agreement by not removing previous disciplinary records from her file, which factored in the termination decision. The grievor was reinstated with compensation conditional to enrollment in an accredited treatment program.[80]

3.5 Alternative Approaches or Methods Other Than Testing

More workplace accidents are caused by fatigue, stress, and other factors unrelated to drug or alcohol impairment. Employers in safety-sensitive workplaces have the option to test employees for alcohol and drugs, but testing should not be viewed as the automatic or default choice for assessing impairment; employers should be open to other non-intrusive, non-invasive, non-discriminatory ways to review impairment, alertness, and fitness for work.[81]

Employers are encouraged to incorporate the following alternative approaches in their workplaces to manage existing and potential addiction issues:

- Temporarily removing employees from safety-sensitive job duties;
- Offering support through employee assistance or rehabilitation programs;
- Managing employees through progressive discipline and performance reviews;
- Training supervisors, managers, and employees in drug prevention and workplace impairment;[82]
- Encouraging employees to come forward voluntarily to seek addiction help;
- Requesting employees (who show evidence of addiction) to attend medical assessment to address addiction issues;
- Communicating with and listening to employees, and setting clear expectations about drugs and alcohol in the workplace;
- Explaining job functions clearly at hiring or job relocation, and inquiring about addiction related limitations;
- Promoting health incentives and drug education programs to pre-empt addiction issues;
- Developing and using performance tests and non-invasive alertness testing to assess cognitive or psychomotor functions essential for the job – for example, the Canadian Center for Occupational Health and Safety recommends a Standardized Field Sobriety Test;
- Conducting periodic checks, observations, and audits;
- Providing more frequent breaks to employees with addiction problems;
- Implementing alternative scheduling or alternative duties;
- Encouraging employees to advise supervisors about modified work schedules to assist in addiction recovery and general well-being;
- Granting incentives to workers who self-report addictions, without retaliation or adverse employment consequences;
- Requesting medical information from physicians or health care providers, and seeking assistance from independent rehab and industry experts;
- Granting leaves of absence to employees, with assurance of reinstatement;
- Exploring options of long-term disability in appropriate situations;
- Encouraging peer monitoring among employees to disclose impairment of coworkers, for collective workplace safety.[83]

4.0 Duty of Employers to Accommodate Addiction Disability

Employers have a duty to accommodate employees with addiction-related disability; the duty to accommodate ends at the point of undue hardship, or when accommodation begins to pose excessive difficulty for the employer.[84] (See section 4.1)

After an employee tests positive on a cannabis, alcohol or drug test, the employer should inform them about the available accommodation options:

- Employees are entitled to individualized assessment to explore their specific needs for assistance, support, and accommodation; only a generalized, one-size-fits-all solution is inadequate as accommodation.
- Policies that result in automatic dismissal or reassignment to a lesser position, or impose inflexible reinstatement conditions, without regard to the individual circumstances of the employee, violate the duty to accommodate.
- Accommodation is not limitless, but to the point of undue hardship. The duty to accommodate ceases if:

    - The accommodation would fundamentally alter the nature of the employment;
    - The employee cannot perform the essential duties of the job;
    - The employee cannot be adjusted in a viable alternative position;
    - The employee is unable or unwilling to take part in the accommodation process, despite the employer's best efforts;
    - The employer has tried and exhausted all reasonable channels of accommodation.

4.0.1 Duty to Accommodate – Specific Examples

- Employee assistance programs (EAPs), including rehab, counseling, and addiction support services;[85]
- Leave of absence, sick pay benefits, etc.;
- Transfer or reassignment to a different, less stressful or dangerous position;[86]
- Time off to attend rehab or therapy;
- Individualized assessment and support;[87]
- Objective, unbiased assessment, without prejudice and stereotypes about addiction;[88]
- Due respect and consideration for privacy and confidentiality;
- Effective communication and exchange of information.

Accommodation is a collaborative process, not an adversarial one.[89] An employee must cooperate in the accommodation process; employees who fail to cooperate with the employer in the accommodation process abandon their right to accommodation.[90]

Example – Automatic Termination and the Employer's Duty to Accommodate

An employee was terminated for vaping medical cannabis while driving a company car. The tribunal found that the employee did not have addiction disability, and his use of medical cannabis while operating a company vehicle did not merit protection under the human rights code. However, the car company's practice of automatic withdrawal of employment offers or termination of employment after a positive drug test was discriminatory. The company was asked to revise its unidimensional automatic discipline policy: substance users testing positive in an employer-sponsored drug test should be individually assessed and accommodated to the point of undue hardship.[91]

Example – Duty to Accommodate Ends with Undue Hardship

A company undertook significant measures to accommodate its employee's drug addiction; these included:

- Immediate offer of individualized support and assistance;
- Access to an employee assistance program;
- Waiver of a two-day suspension;
- Approval of a leave of absence to enable the employee to attend counselling;
- Approval of sick leave credits, even though the employee was not entitled to them;
- Extension of a missed deadline to allow another chance to avoid termination;
- Another leave of absence for further rehabilitation; and
- Extension to submit medical documentation after expiration of the submission deadline.

The tribunal noted that further accommodation would amount to undue hardship for the employer, because the employee's unplanned absences, no-shows, and leaves of absence were disruptive to company efficiency and productivity.[92]

Example – One-Time Cannabis Use and Employer's Duty to Accommodate

The grievor was suspended from work for smoking cannabis in the company parking lot during a coffee break. He did not have cannabis addiction, so the employer's duty to accommodate addiction disability was not triggered. However, it was held at arbitration that the dismissal was excessive in the context of the employee's misconduct. For one

violation, a three-month suspension would be a more appropriate sanction, in keeping with the company's policy on drug and alcohol use in the workplace.[93]

4.1 Undue Hardship

Human rights law recognizes that "some hardship" is an aspect of accommodation; only "undue hardship" can justify an employer's refusal to accommodate employees with addiction disability.[94]

4.1.1 The Supreme Court of Canada on Undue Hardship

The Supreme Court of Canada has identified the following components of undue hardship, which should be balanced against the employee's right to privacy and protection from discrimination:

- Financial cost: the cost of the accommodation is too high and would alter the nature or viability of the employer's work or business;
- Serious health or safety risks: these risks (for workers, members of the public, or the environment) are so serious that they outweigh the requested accommodation;
- Employee's inability to perform essential duties of the job; however, employers should not presume that the addiction-afflicted employee would be unable to perform their duties; the decision should be made after an accurate, ethical, and individualized assessment;
- A major disruption of a collective agreement;
- Problems of morale of other employees;
- Interchangeability of workforce and facilities.[95]

Other factors to consider when assessing if an employer has reached the point of undue hardship in accommodating an employee's addiction disability include:

- The employer's previous efforts at accommodation;
- The nature and seriousness of the employee's infractions;
- The employee's response and commitment to treatment or corrective programs, and their prospects for long-term recovery;
- The size of the workplace and availability of alternative work options; and
- The financial health of the employer's business.

The employer must provide direct and objective evidence of any of the above undue hardship factors. For example, to show excessive financial costs of accommodation, clear

and quantifiable estimates should be presented, not just vague impressions about potential expenses.

Example – Individualized Context of Duty to Accommodate and Undue Hardship

The employee, an operator at a waste transfer station, challenged his dismissal for absenteeism. He had been given a leave of absence to attend an alcohol rehab program, which he quit after one day without informing his employer. The union argued that the employer had failed to accommodate the grievor to the point of undue hardship, and had cited previous breaches of discipline that were no longer valid because of the collective agreement's sunset clause. The employer argued that the employee abandoned his job when he stayed away from work after leaving the rehab program. In addition, because the employee did not complete the rehab treatment, it was reasonable to assume that his erratic attendance pattern would continue. The grievance was allowed. The evidence did not indicate that the employer had reached the point of undue hardship in dealing with the employee. The employee's conduct was typical of someone in the grip of an addiction; it was unrealistic to expect his alcoholism to cure in the first rehab attempt. He was seeing a counsellor twice a week to deal with his addiction, which showed his resolve to rehabilitate; he should be reinstated, with a commitment to abstinence and continued treatment.[96]

5.0 For More Information

For more information about the *Act* or this guideline, please contact the Commission at 1-888-471-2233 toll-free within New Brunswick, or at 506-453-2301. TTD users can reach the Commission at 506-453-2911.

You can also visit the Commission's website at http://www.gnb.ca/hrc-cdp or email us at hrc.cdp@gnb.ca

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Endnotes

[1] New Brunswick *Human Rights Act*, R.S.N.B. 1973, ss. 10(1)-10(5). Disability is an "elastic" concept that "embraces multiple conditions of disadvantage", including visible (physically obvious) and invisible (physically not obvious) conditions (7 A-8.2). Walter Tarnopolsky and William Pentney. *Discrimination and the Law*. Toronto: Thomson and Carswell, 2004. Courts and tribunals have expanded the statutory definitions of disability (see note 2) to include cannabis, alcohol or drug addiction as disabilities protected under human rights. A few court decisions have offered definitions of disability; the British Columbia Council of Human Rights, for example, defined physical disability as follows: "The concept of physical disability, for human rights purposes, generally indicates a physiological state that is involuntary, has some degree of permanence, and impairs the person's ability, in some measure, to carry out the normal functions of life" (D/446). *Boyce v New Westminster City (1994)*, 24 CHRR D/441.

[2] Section 2 of the *Act* defines mental and physical disability as follows: "'Mental disability' includes (*a*) an intellectual or developmental disability, (*b*) a learning disability, or dysfunction in one or more of the mental processes involved in the comprehension or use of symbols or spoken language, and (*c*) a mental disorder"; "'Physical disability' means any degree of disability, infirmity, malformation or disfigurement of a physical nature resulting from bodily injury, illness or birth defect and includes, but is not limited to, a disability resulting from any degree of paralysis or from diabetes mellitus, epilepsy, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair, cane, crutch or other remedial device or appliance".

[3] *Entrop v Imperial Oil (No. 6)* (1995), 23 CHRR D/196 (Ont. Bd. Inq.) [*Entrop*]: In one of the earliest decisions on addiction (alcohol) disability, the Ontario Court of Appeal labeled drug and alcohol addiction as "handicaps" that create "physical disability or mental impairment and interfere with physical, psychological and social functioning". In another early case (*Handfield v North Thompson School District No. 26 (1995)*, 25 CHRR D/452 (BCCHR)), the tribunal stated: "Alcoholism is both a physical and a mental disability" within the meaning of the British Columbia *Human Rights Code* (para 131). Similarly, in *Crouse v Canadian Steamship Lines Inc*., 2001 CanLII 38301 (CHRT), the tribunal affirmed: "Addiction to alcohol is considered to be a disability which is a prohibited ground of discrimination" (para 56).

[4] *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44 (CanLII) (para 101). The American Psychiatric Association (APA) recognizes 10 separate classes of drugs that induce substance use disorders or addiction, including cannabis, alcohol, opioids, sedatives, and others. https://dsm.psychiatryonline.org/doi/10.1176/appi.books.9780890425596.dsm16: "Taken in excess [all drugs involve] direct activation of the brain reward system, [which leads to] reinforcement of behaviors and [neglect of] normal activities [and] produces feelings of pleasure, often referred to as a 'high'. Individuals with lower levels of self-control […] may be particularly predisposed to develop substance use disorders". The newest version of the *Diagnostic and Statistical Manual of Mental Disorders* (*DSM-5*) issued by the APA defines addiction as "substance use disorder", revising the previous categories "substance dependency" (previously used to classify severe addiction) and "substance abuse" (previously used for less severe addiction). According to *DSM-5*, "Substance use disorder" leads to "clinically significant impairment or distress", with varying patterns of behaviour "within a 12-month period"; it can range from "mild," "moderate" or "severe," depending on criteria set down by the association. Quoted in *Policy on Drug and Alcohol Testing*. Ontario Human Rights Commission, 2016 [*ON Policy*].

[5] For example, an arbitration board noted as follows: "While addiction is a curable disease, it is not one that is easily remedied. Unlike some metabolic illnesses, it cannot be cured by a simple medication regime or a single course of therapy. Treatment takes time, involves a combination of training, therapies, and opportunities to learn from errors and successes. Addicts may require a combination of lifestyle, behavioral, pharmaceutical and/or cogitative approaches. Medical interventions, as well as group and/or individual

sessions, may be needed, the length and frequency of which will vary according to the individual's needs. It is also an ongoing process, requiring constant attention and consideration by both the addict and his/her family" (para 29). *Clean Harbors Canada Inc. v Teamsters, Local Union No. 419,* [2013] CLAD No. 393 [*Clean Harbors*].

[6] *Canada Post Corporation v Canadian Union of Postal Workers*, 2007 BCSC 1702 (CanLII) (para 83). The Supreme Court of Canada has endorsed these three addiction scenarios: "In some cases, a person with an addiction may be fully capable of complying with workplace rules. In others, the addiction may effectively deprive a person of the capacity to comply, and the breach of the rule will be inextricably connected with the addiction. Many cases may exist somewhere between these two extremes. Whether a protected characteristic is a factor in the adverse impact will depend on the facts and must be assessed on a case-by-case basis. The connection between an addiction and adverse treatment cannot be assumed and must be based on evidence". *Stewart v Elk Valley Coal Corporation*, 2017 SCC 30 (CanLII) [*Elk Valley*]. In another case, from physician testimonies, the tribunal identified three categories of drug users: casual users, drug abusers, and drug-dependent users. Casual users make a conscious choice to ingest drugs, and have control to desist or stay away from them. Addiction sufferers or drug dependent users lose the ability to control drug use, which leads to disability or addiction (para 70). *Milazzo v Autocar Connaisseur Inc. et al*., 2003 CHRT 37 (CanLII) [*Milazzo*].

[7] In *Horrocks v Northern Regional Health Authority*, 2015 MHRBAD 103 (CanLII) [*Horrocks*], the tribunal noted: "Under human rights law it is well-recognized that […] discrimination based on disability may be based as much on perceptions and stereotypes as on the existence of actual functional limitations […] Disability may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors" (para 135). In one of the earliest human rights cases, *Foucault v Canadian National Railways (1981)*, 2 CHRR D/475, the complainant's employment was terminated because the employer perceived that he had a physical disability, an old injury to the back that had been fixed by surgery. According to the tribunal, the employer's "perception" that the complainant was afflicted with a "physical handicap" was discriminatory (D/477).

[8] *Entrop*, *supra* note 3.

[9] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Boisbriand (City)*, [2000] 1 SCR 665, 2000 SCC 27 (CanLII). The Supreme Court was reviewing three decisions of the Quebec appellate court to adjudicate whether a physical condition that does not result in functional impairment at work was a disability under the Quebec *Charter*. The Supreme Court concluded that disability had a subjective component (perceived disability), and the *Charter* protected persons from discrimination on this ground (para 71). The Supreme Court proposed a "socio-political model [of disability]", which does not ignore disability's "biomedical basis" but favors a "multi-dimensional approach" – including disability discrimination that flows from perception of disability (para 77).

[10] For instance, in *Alberta (Human Rights and Citizenship Commission) v Kellogg Brown & Root (Canada) Co*, 2007 ABCA 426 [*Kellogg*], the court ruled out perceived disability on the basis of witness testimonies: "All witnesses […] who had dealings with [the complainant], and who testified at the hearing, stated that they did not consider [the complainant] to be addicted to [cannabis]" (para 10).

[11] Impaired work in a non-safety sensitive workplace typically causes performance and attendance issues like lateness, frequent absences, and loss or delay in work.

[12] *Entrop*, *supra* note 3 (para 6). In *Milazzo*, *supra* note 6, the Canadian Human Right Tribunal accepted the following definition of a safety-sensitive position: "A position [or] operation where performance limitations due to substance use could result in a significant incident or accident causing fatalities or serious injury, significant property damage or significant environmental damage*".*

[13] "Drug Testing in the Workplace". *Library of Parliament: Law and Government Division*, 2008: In a unionized context, the employer's right to impose a unilateral drug testing policy should meet the following conditions: 1. It is clear and enforced consistently by the company; 2. It is reasonable, and consistent with the collective agreement; and 3. Its provisions, including penalties for violation, are explained clearly to the employees (p. 14).

[14] *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.*, 2013 SCC 34 [2013] 2 SCR 458 [*Irving*]: While the case looked at employee rights under a collective agreement, the Supreme Court stated that even in a non-unionized setting, "an employer must justify the intrusion on privacy resulting from random testing by reference to the particular (workplace) risks". The Supreme Court reviewed the collective agreement, holding that the management rights clause of the agreement did not authorize the company to impose a unilateral testing regime. In a non-union setting, employer discrimination against an addiction-afflicted employee is challenged on disability grounds, unless the employer's actions are shown as *bona fide* requirements (BFOR) of the job.

[15] *Ibid.* The concept of reasonableness is context-bound, and would depend on the specific circumstances of each case. For example, in *Renaud v Central Okanagan School District No 23*, [1992] 2 SCR 970, 71 BCLR (2d) 145, the court noted: "What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case" (para 26).

[16] The Supreme Court of Canada (in *Irving*, *supra* note 14) cited the KVP test, which was established early in arbitration jurisprudence in *Lumber & Sawmill Workers' Union, Local 2537, and KVP Co* (1965), 16 LAC 73. The KVP Test sets down criteria of "reasonableness" for employer policies under a collective agreement (para 57). In the human rights context, tribunals and courts use the Meiorin Test (established by the Supreme Court of Canada – see note 51) to assess the legitimacy of employer policies; both KVP and Meiorin have been used by tribunals and courts in recent years, suggesting another commonality in union and non-union litigation. In *Irving*, the dissenting note stated: "Whether an arbitrator applies the *Meiorin* test in the human rights context, or traditional labour relations law and the KVP test, at bottom, the inquiry in both cases is concerned with the reasonableness of the company policy".

[17] *Horrocks*, *supra* note 7 (paras 98-99).

[18] R.S.N.B. 2011, c. 222.

[19] *Aitchison v L & L Painting and Decorating Ltd*., 2018 HRTO 238. (CanLII) [*Aitchison*].

[20] *Kindersley (Town) v Canadian Union of Public Employees, Local 2740 (Desjarlais Grievance)*, [2018] SLAA No.4.

[21] *Cambridge Memorial Hospital v Ontario Nurses' Association*, 2017 CanLII 5289 (ON LA).

[22] *Weyerhaeuser Company Limited v Ontario (Human Rights Commission)*, 2007 CanLII 65618 (ON SCDC) [*Weyerhaeuser*].

[23] *Milazzo*, *supra* note 6.

[24] *Wall v The Lippé Group*, 2008 HRTO 50 (CanLII).

[25] *Airport Terminal Services Canadian Company v Unifor, Local 2002 (Sehgal Grievance)*, [2018] CLAD No. 34.

[26] *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, 3 SCR 3, 1999 CanLII 652: The Supreme Court of Canada directed the employer to "investigate alternative approaches that do not have a discriminatory effect" (para. 65).

[27] *Bombardier Transportation (Thunder Bay Plant) v Unifor (CT Grievance)*, [2018] OLAA No. 64 [*Bombardier*].

[28] *Ibid.*

[29] *Hodkin v SCM Supply Chain Management Inc.,* 2013 HRTO 923 (CanLII).

[30] *Unifor Local 2001 NB v Old Dutch Foods Ltd. (Haines Grievance)*, [2016] NBLAA No. 18.

[31] *Krieger v Toronto Police Services Board*, 2010 HRTO 1361 (CanLII) [*Krieger*]: The tribunal stated that while employees are expected to disclose their disability and accommodation needs, they may not realize that they have a disability, or recognize the seriousness of their addiction.

[32] For example, in *Elk Valley* (*supra* note 6), it was decided that the dismissal of an employee who had not self-disclosed his addiction did not amount to discrimination. The majority found that, based on the evidence, the employee did not have sufficient loss of control and could have complied with the self-disclosure requirements.

[33] *Krieger*, *supra* note 31.

[34] *Elk Valley*, *supra* note 6.

[35] *International Brotherhood of Electrical Workers, Local Union 1620 v Lower Churchill Transmission Construction Employers' Assn. Inc.*, [2016] N.J. No. 410.

[36] *Aitchison*, *supra* note 19.

[37] *Baber v York Region Dist. School Board (No 3)*, 2011 HRTO 213 (CanLII): The tribunal found that the employee failed to cooperate in the accommodation process, because he refused reasonable requests for medical information; the employer fulfilled its duty to accommodate, but the accommodation process was thwarted by the employee's lack of cooperation.

[38] *Ravi DeSouza v 1469328 Ontario Inc*, 2008 HRTO 23 (CanLII).

[39] *Brady v Interior Health Authority and Inaba (No. 4)*, 2007 BCHRT 233 (CanLII) [*Brady*].

[40] *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v B.C. Nurses' Union*, 2006 BCCA 57 (CanLII).

[41] *Gibson v Ridgeview Restaurant Limited*, 2013 HRTO 1163 (CanLII).

[42] *Yashcheshen v University of Saskatchewan*, 2018 SJ 75, 2018 SKQB 57.

[43] *X.P. obo J.R. v The Hospital and The Correctional Centre*, 2018 BCHRT 4.

[44] The Canadian Medical Association has suggested that the medical cannabis prescription program should be closed after cannabis legalization, because clinical research on the benefits of medical cannabis is inconclusive. However, nurses' associations, patient advocacy groups, and cannabis companies support the continuation of clinical and physician oversight for medical cannabis, to prevent people from self-medicating with adult-use cannabis.

[45] *Canadian Elevator Industry Welfare Trust Fund v Skinner*, 2018 NSBI 126.

[46] *Paradis v Canada (Attorney General),* 2016 FCJ 1332.

[47] *McIlvenna v Bank of Nova Scotia*, 2017 FC 699, CHRR Doc. 17-3061.

[48] *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industries of the United States and Canada, Local Union 663 v Mechanical Contractors Assn. of Sarnia*, 2004 CanLII 49783 (ON LRB): The board noted that a drug and alcohol testing policy can be challenged: If the tests are contrary to the provisions of a collective agreement (in a unionized workplace); if the tests are in violation of human rights law on grounds of disability or perceived disability; and, if the tests are a breach of privacy, in violation of both common law and statute law (para 3).

[49] *Bombardier*, *supra* note 27.

[50] *Horrocks*, *supra* note 7 (para 185).

[51] To pass the Meiorin Test, an employer must show that alcohol or drug testing: 1. Is rationally connected to the performance of the job; 2. Was adopted in honesty and good faith; and 3. Was reasonably necessary to fulfill a legitimate work-related purpose.

[52] In a recent decision (*Bombardier*, *supra* note 27), the arbitration observed: "Current tests for cannabinoids are incapable of demonstrating either present impairment or recent consumption. Unless and until more sophisticated tests become available […], more reliable methods of assessing impairment and/or alternative policy approaches to the problem of [cannabis] use in the workplace [should be considered]" (para 34).

[53] *Entrop*, *supra* note 3.

[54] *Milazzo*, *supra* note 6.

[55] *Entrop*, *supra* note 3 (para 10).

[56] *Irving*, *supra* note 14 (paras 19-20). Commenting on the privacy violation of the company's random alcohol testing policy, the Supreme Court noted: "The invasion of privacy by the random alcohol testing policy is not a trifle. It effects a significant inroad. Specifically, it involves a bodily intrusion and the surrender of bodily substances. It involves coercion and restriction on movement. [….] There can be an element of public embarrassment. Taking its results together, the scheme effects a loss of liberty and personal autonomy. These are at the heart of the right to privacy" (para 13).

[57] *Ibid.*

[58] *Kellogg*, *supra* note 10: Commenting on the company's policy of pre-employment drug testing by urinalysis, the court stated: "Pre-employment drug testing suffers from the same two flaws: a positive test does not show future impairment or even likely future impairment on the job, yet an applicant who tests positive only once is not hired" (para 103).

[59] *Weyerhaeuser*, *supra* note 22: The court dismissed a claim of discrimination based on perceived disability because the complainant was a recreational (not addicted) user of drugs; was not automatically dismissed after testing positive; and, was not perceived by the employer (based on evidence) as an addict.

[60] *Kellogg*, *supra* note 10. Leave to appeal to the Supreme Court of Canada was denied in the case.

[61] *Agrium Vanscoy Potash Operations and United Steelworkers Local 7552,* 2015 Carswell Sask 1.

[62] Quoted in *ON Policy*, *supra* note 4 (pages 10-11).

[63] *Ibid.* (page 11).

[64] *Entrop*, *supra* note 3 (para 114).

[65] *ON Policy*, *supra* note 4 (page 11).

[66] *Elk Valley*, *supra* note 6.

[67] *Canadian Energy Workers Assn. v ATCO Electric Ltd.*, [2018] AJ No.401.

[68] *Alberta and Northwest Territories (District of MacKenzie) Regional Council of Carpenters and Allied Workers, Local 2010*, [2018] ALRBD No. 13.

[69] *Aitchison*, *supra* note 19.

[70] *Irving*, *supra* note 14. The Supreme Court declared: "The invasion of privacy by the random alcohol testing policy is not a trifle. It affects a significant inroad. Specifically, it involves a bodily intrusion and the surrender of bodily substances. It involves coercion and restriction on movement" (para 14).

[71] *Ibid*. In *Greater Toronto Airports Authority v Public Service Alliance of Canada, Local 0004*, [2007] CLAD No.243 (QL), the arbitration reiterated the principle articulated in the *Irving* case: "The safety-sensitive nature of a particular industry [is] not, in itself, sufficient to outweigh the privacy interests of individual employees, and to support a regime of random testing" (para 251).

[72] *Suncor Energy Inc v Unifor Local 707A*, 2017 ABCA 313 (CanLII).

[73] *Mechanical Contractors Association Sarnia v UA, Local 663, 2014 ONSC 6909.*

[74] *Kemess Mines v International Union of Operating Engineers, Local 115*, [2006] BCJ No. 263 (BCCA).

[75] *Entrop*, *supra* note 3: According to the Ontario Court of Appeal, "post-rehab testing did not contravene the *Code* if it was part of a larger assessment to determine alcohol or drug use" (para 129).

[76] In *Milazzo*, *supra* note 6, the tribunal stated: Last chance agreements are "unenforceable [under] the Act […]; an analysis must be made in each case to determine whether or not it is impossible for the employer to accommodate the needs of the employee to the point of undue hardship". [Employers may] "warn employees returning to work after rehabilitation that any relapse could result in termination of employment, [but] a last chance agreement cannot serve to nullify the duty of accommodation established under human rights legislation" (para 34).

[77] *Ibid*.: The last-chance agreement in this case stated that if the employee tested positive after rehabilitation, they will be terminated without further accommodation – the tribunal noted that the employer would have to prove undue hardship to justify dismissal without accommodation (para 14). See also, *Horrocks*, *supra* note 7 (para 220).

[78] *Merrick v Ipsco Saskatchewan Inc. (No. 3) (2008)*, 65 CHRR D/220 (SHRT).

[79] *Brady*, *supra* note 39.

[80] *Canadian Union of Public Employees, Local 4777 v Prince Albert Parkland Health Region (Storey Grievance),* [2016] SLAA No. 11.

[81] *Milazzo*, *supra* note 6: The tribunal noted that the company's new policy "remains one of zero tolerance, but now sets out clear rules, investigative tools and consequences for employees. The policy also focuses on prevention, through the use of supervisor training, and by encouraging employees to come forward voluntarily and to seek help where an employee thinks that he or she may suffer from a substance abuse problem".

[82] *Ibid.*

[83] *Policy on Preventing Discrimination Based on Mental Health Disabilities and Addictions.* Ontario Human Rights Commission, 2014. www.ohrc.on.ca/en/policy-preventing-discrimination-based-mental-health-disabilities-and-addictions.

[84] The Supreme Court of Canada laid out fundamental principles of the duty to accommodate and undue hardship: "The duty to accommodate is therefore perfectly compatible with general labour law rules, including both the rule that employers must respect employees' fundamental rights and the rule that employees must do their work. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future". *Syndicat des employees de techniques profesesionelles & de bureau d'Hydro-Quebec, section 2000,* [2008] 2 SCR 561 (CanLII).

[85] In *Kellogg* (*supra* note 10), the court acknowledged that the employer had made "far reaching efforts" to accommodate and rehabilitate the grievor over a three-year period. He had been sent to two residential programs, one paid for by the employer, and had received sick pay benefits (para 50).

[86] *Dover Flour Mills (Dover Industries Limited) v United Food and Commercial Workers Canada, Local 175*, 2012 CanLII 1234 (ON LA)*:* The employer made a "number of efforts to accommodate the grievor, including several leaves of absence, a transfer to the day shift as a result of a request by a physician, and time off to attend group therapy" (para 104).

[87] *Horrocks*, *supra* note 7: "Accommodation must be individualized to the needs of each employee in the context of the surrounding facts, including the nature of the employee's disability and the nature of the workplace, such that each case must be decided on its own facts" (para 151).

[88] *Ibid.*: "It constitutes discrimination for an employer to rely on personal experiences and common place assumptions or stereotypes rather than on objective assessments when determining an accommodation plan for an employee who has a disability" (para 165).

[89] As noted by the tribunal in *McLoughlin v British Columbia (Ministry of Environment, Land and Parks*), [1999] BCHRTD 47: "The accommodation process is one in which everyone involved must work together towards a solution that balances competing interests. The process necessarily involves an exchange and refinement of information, and cooperation can only speed that process along" (para. 96).

[90] *Collingwood General & Marine Hospital v Ontario Nurses' Assn., [2010] OLAA No. 196*: "An employer will not be found to have discriminated against a disabled employee […] where the evidence establishes that the employee will not accept necessary treatment or will not be motivated to continue or succeed with necessary treatment" (para 37).

[91] *Milazzo*, *supra* note 6.

[92] *Canada Post Corporation v Canadian Union of Postal Workers*, 2007 BCSC 1702 (CanLII).

93 *Canada Safeway Ltd. v United Food and Commercial Workers Local 373A,* [2006] AGAA No. 23.

94 *Clean Harbours*, *supra* note 5 (para 30).

95 *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*, [1990] 2 SCR 489 (CanLII) (para 62).

96 *Clean Harbors*, *supra* note 5.