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LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI

A photograph of a yellow and blue helicopter, likely a rescue or medical helicopter, parked on a tarmac. The helicopter is the main subject of the image, with its rotors and landing gear visible. The background shows a clear sky and some greenery.

FLYING HIGH

**The Aviation Industry
and Legalized Cannabis**



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EXECUTIVE SUMMARY

With Bill C-45, the *Cannabis Act*, and Bill C-46, *An Act to Amend the Criminal Code*, having been in force for a year as of October 17, 2019, concerns about the impact of legal recreational cannabis on the Canadian workplace persist. These concerns are heightened as new regulations permitting edible cannabis products came into force on October 17, 2019. For employers in the aviation industry, the safety-sensitive nature of the workplace, coupled with a number of high-profile incidents involving intoxicated crew members, continues to drive the need to address the use of recreational cannabis.

This White Paper presents information and recommendations for aviation industry employers, including:

- employers' obligations with respect to accommodation and safety;
- information about the current state of the law; and
- dealing with potential substance use or abuse problems through workplace policies.

Many employers may believe that recreational cannabis should receive the same treatment as alcohol. While there are similarities that make this true to an extent, the fact that cannabis is recognized as having legitimate medicinal properties, as well as the limits of current testing devices, and the potential for longer-lasting impairment puts recreational cannabis into its own category distinct from both alcohol and medical cannabis.

DEFINITIONS

Cannabis is defined by the World Health Organization as the generic term used to refer to plants in the genus *Cannabis* in its psychoactive form.¹ For the purposes of this White Paper, cannabis refers to the plant and its by-products, including the flowers, leaves, stems, seeds and oils.

Executive functions are the higher-level cognitive functions, such as short-term memory (working memory), the ability to override an impulsive response to stimuli (inhibition), attention, and decision-making.²

A **safety-sensitive position** is defined by the Canadian Human Rights Commission as "one that, if not performed in a safe manner, can cause direct and significant damage to property and/or injury to the employee, others around them, the public and/or the immediate environment."³

NOTE: This document does not address the legality of possessing, distributing, growing, or selling cannabis. This document is primarily concerned with the consumption of cannabis.

This White Paper does not constitute legal advice. The authors and Emond Harnden LLP do not endorse or make a moral statement about the use of cannabis.

INTRODUCTION

Cannabis has been accessible for medical use with authorization since 2001, but it was not until October 17, 2018 that it became legal for recreational use by adults. Adults can buy cannabis products from licensed sellers and consume the products in social settings, subject to regulations on smoking in public places and possession of specified quantities. Under the *Controlled Drugs and Substances Act*,⁴ possessing, distributing, growing, and selling cannabis outside of the legal framework remains illegal, on penalty of fines and/or imprisonment.

Operation of a passenger transportation vehicle is always safety-sensitive work because of the inherent safety risks and the potential impact on passenger and crew member safety. A pilot's intoxication, for example, was the likely cause of a cargo plane crash that killed both pilots in 2015.⁵ A hot air balloon pilot in Texas on a combination of drugs flew his balloon into a power line, which killed all 16 passengers.⁶ A driver for the Toronto Transit Commission ("TTC") tested positive for on-duty drug use just six weeks into the TTC's new random drug testing policy.⁷ A Transportation Safety Board investigation into a fatal plane crash in the Northwest Territories revealed that the pilot had cannabis in his system, which likely impaired his ability to react to bad weather. The pilot and one of his passengers died. Two other passengers sustained serious injuries.⁸

These kinds of accidents and the legalization of cannabis prompted the Transportation Safety Board to call for the implementation of a mandatory and comprehensive substance-abuse program, including testing, in 2018.⁹ Transport Canada has since responded that the law already prevents employees in the aviation industry from reporting to work while impaired.¹⁰

Since the Transportation Safety Board's recommendation, Transport Canada continues to work within the existing regulatory framework. It issued a letter to Civil Aviation Medical Examiners in December

2018 directing that if flight crew or air traffic controllers report or are suspected of using cannabis, the Regional Medical Examiners must investigate, and licences will not be issued or renewed during the investigation.¹¹ Transport Canada's approach is to apply the *Canadian Aviation Regulations* ("CARs"), which contain a comprehensive scheme of rules regarding fitness to fly. Flight crew and air traffic controllers cannot be impaired, which Transport Canada defines in relation to cannabis consumption as use within 28 days of reporting to work.¹²

This approach may have pitfalls. For example, Transport Canada revoked the license of an air traffic controller who was taking anti-depressants. The presence of the drug was enough to trigger the CARs' provisions relating to impairment. The controller appealed the decision to the Federal Court and won because Transport Canada had applied the CARs without considering the controller's unique medical history.¹³ The Federal Court said that Transport Canada was obligated to consult further medical records before revoking the controller's licence. Similar legal challenges may arise under the current approach to cannabis regulation.

Given the limited government regulation, aviation employers need to develop or refine their existing drug and alcohol policies to implement procedures that protect against the risks associated with cannabis use. This need is especially important in a safety-sensitive workplace, where employees are responsible for the safe operation of flights and related operations.

This White Paper presents information and recommendations for employers in the aviation industry. It will provide an overview of the impairing effects of cannabis and the various issues facing Canadian workplaces relating to cannabis use. Finally, this White Paper will discuss the need for strong policies and procedures to protect employees, customers, and the public in the Canadian aviation industry.

BACKGROUND

According to the World Health Organization, cannabis is annually consumed by approximately 2.5% of the world's population, or some 147 million people. It is the most commonly consumed drug, compared to 0.2% of the population consuming cocaine, and 0.2% consuming opiates.¹⁴ In the National Cannabis Survey conducted by Statistics Canada for the second quarter of 2018, nearly 16% of Canadians aged 15 or older reported using cannabis in the past 3 months.¹⁵ This statistic has not changed much since.¹⁶ In the third quarter of 2018, total medical and non-medical use of Cannabis was valued at \$1.4 billion. This number has since risen and was at \$1.5 billion in the second quarter of 2019.¹⁷



OTHER JURISDICTIONS WITH LEGAL RECREATIONAL CANNABIS

In 2013, Colorado and Washington became the first jurisdictions in the United States to legalize recreational cannabis. Since then, a number of other states have followed suit.¹⁸

In 2016, an American group called Smart Approaches to Marijuana (“SAM”), comprised of scientists and doctors from across the country, released a report that examined the impacts of legalization in Colorado, including the impact on Colorado’s workforce. Based largely on data from a drug testing company, the report noted the following trends:

- from 2011 to 2015, the number of positive workplace oral cannabis test results increased by 178%; and
- over the previous three years, there had been a steady increase in the percentage of employees in the U.S. workforce testing positive for drugs.¹⁹

While the long-term impact of legalizing recreational cannabis on the Canadian workplace is still unknown, initial predictions were that use would increase, even if only temporarily, once there was a legal, regulated market for recreational use.²⁰ This conclusion was supported by the data from Colorado, which showed an initial increase in consumption after cannabis was legalized. Since that initial increase, consumption rates have gone down and stabilized around the pre-legalization consumption rates.²¹

Canadian statistics have supported that initial prediction and mirrored what was seen in Colorado. National usage data between the second quarter of 2018 and the second quarter of 2019 has remained flat at sixteen percent.²² In financial terms, the household consumption of cannabis for non-medical purposes in the second quarter of 2018 (the last full quarter in which cannabis was illegal in Canada) was \$1.2 billion. Total household consumption (medical and non-medical use) peaked in the first quarter of 2019 at \$1.532 billion, or about seventeen-and-a-half percent of the population, and dropped in the second quarter to \$1.511 billion: sixteen percent of the population.²³ By the second quarter of 2019, household consumption for non-medical purposes dropped to \$0.9 billion. Even as expenditure on cannabis has increased and then stabilized, the actual number of users has not increased.



IMPAIRING EFFECTS

The primary psychoactive compound found in cannabis is Δ -9 tetrahydrocannabinol (“THC”). Other compounds found in cannabis with similar structures to THC are known as “cannabinoids.”²⁴ The most prevalent cannabinoid, and one of the primary active ingredients in cannabis, is cannabidiol (“CBD”).²⁵

THC and CBD are the dominant psychoactive agents in cannabis. THC is the component known for producing a high. CBD counteracts the effects of THC and has been touted as a pain reliever and a treatment for anxiety. Strains of cannabis that have high THC content will produce greater impairment than strains with little to no THC content and higher CBD content. CBD produces neither a high nor intoxication and is becoming well-known for its potential as a therapeutic drug. Different strains of cannabis have different potencies of THC and CBD.²⁶ Sections 124 and 125 of the *Cannabis Regulations* require that cannabis producers specify the quantities of THC and CBD in their products.

While it is widely known that cannabis causes impairment, the intensity of the impairing effects differs widely from person to person and depends largely on the THC content of the cannabis consumed and the method of ingestion. When cannabis is inhaled, its psychoactive effects are typically experienced within minutes, and peak intoxication is reached after approximately half an hour. In comparison, when cannabis is ingested orally, its effects can take anywhere from half an hour to three or four hours to manifest, and peak intoxication varies depending on a variety of factors, including what else the individual has eaten.²⁷ When inhaled, the acute effects of cannabis generally fade after two to four hours, but they can last as long as 24 hours.

When ingested, the acute effects of cannabis generally fade after eight hours but can last as long as 24 hours.²⁸

Regardless of the method of consumption, the impairing effects are largely the same. While different strains of cannabis may produce a variety of effects,²⁹ the short-term impairing effects of strains containing THC can include:

- confusion;
- sleepiness or fatigue;
- impaired ability to remember, concentrate, or pay attention;
- anxiety, fear, or panic;
- a reduced ability to react quickly;
- decreased blood pressure, which may lead to fainting;
- increased heart rate; and
- paranoia, delusions, or hallucinations.³⁰

However, it is important to note that the most common of these effects can also be obtained from other drugs and/or lack of sleep. Employers must therefore be careful to avoid jumping to conclusions when assessing these symptoms.

Studies have also shown that long-term cannabis users tend to experience residual impairing effects in executive function over a longer period of time, even after long periods of abstaining from cannabis.³¹ It is difficult, if not impossible, to practically detect residual impairment. Though studies of impairment are not yet conclusive, current research shows that regular use of cannabis can alter a person’s brain chemistry.³²

These alterations can lead to slower decision-making and reduced response time.³³ Frequent and long-term users are also vulnerable to developing a tolerance to cannabis, requiring higher doses in order to obtain the same effects. These users are also at risk of developing a cannabis dependence. Dependency can cause an inverse relationship. If an individual is a frequent and habitual cannabis user, it can actually heighten that individual’s response time to stimuli while impaired.³⁴

MEDICAL VERSUS RECREATIONAL USE

Because medical use of cannabis has been legal since 2001, scientists and physicians have had ample time to study the impact of use and potential therapeutic effects. While legalization is likely to encourage researchers to study recreational cannabis more closely, little is yet known about the differences, if any, between the cannabis used medicinally, and that used recreationally.

Federal employers must keep medical needs in mind when assessing workplace cannabis issues. Patients taking cannabis on doctor's orders do not necessarily choose their therapy. Circumstances and/or medical conditions may require cannabis as treatment and there will not always be suitable alternatives available. Because employees are often unable to choose their form of treatment, they may be entitled to accommodation, although recreational users will not have the same rights.

Dr. Danial Schechter, the Executive Director and Co-Founder of the Cannabinoid Medical Clinic, has acknowledged the differences between medical and recreational uses of cannabis. Most notably, medical use is meant to alleviate symptoms, such that medical cannabis is often less potent or has a lower THC content than the cannabis used recreationally to get high. The analgesic and therapeutic benefits of cannabis occur before a user becomes intoxicated, meaning that medical users may be able to experience symptom relief from lower doses before reaching the point of experiencing psychoactive effects.³⁵

Medical use and medical permits do not, however, tell the whole story. A survey of 401 Ontarian participants showed that close to 29% used cannabis in the past year for therapeutic purposes. Only 15% of respondents reported having medical approval for therapeutic use. The remaining 14% of respondents reported therapeutic use without a prescription.³⁶ This evidence suggests that people may use cannabis to treat symptoms or illness without consulting treatment providers.

People may also use medically prescribed cannabis in ways that are not recognized by legal systems. The prime example is the compensation case of a worker who had lost a portion of his right ring finger in a workplace accident. He suffered from chronic pain. Medicinal cannabis was covered by the provincial compensation board. The worker, however, sought compensation for growing his own cannabis. The board denied compensation because it was required to fund cannabis only when it was obtained from a federally licenced producer.³⁷

Cannabis users with a medical prescription for cannabis products from a federally licensed producer typically attract human rights protection. Employers must be sensitive to this type of proof. While not conclusive, a prescription demands further analysis under the legislated accommodation framework.

LEGISLATIVE FRAMEWORK

MEDICAL CANNABIS

The *Marihuana Medical Access Regulations* (“MMAR”),³⁸ introduced in 2001, made it legally permissible to possess and use cannabis with medical authorization. The MMAR allowed users to purchase cannabis from Health Canada, or to purchase a license to produce their own cannabis at home or designate a producer to grow it on their behalf. In 2014, the *Marihuana for Medical Purposes Regulations* (“MMPR”)³⁹ replaced the MMAR, and required that all medical cannabis users purchase cannabis from an authorized producer. The MMPR expressly prohibited users from producing cannabis in their own homes. Both the MMAR and MMPR limited access to medical cannabis and dried cannabis, which had to be inhaled.⁴⁰

The *Access to Cannabis for Medical Purposes Regulations* (“ACMPR”)⁴¹ came into effect on August 24, 2016, replacing the MMPR. The ACMPR created a framework for commercial production by licensed producers, and introduced a provision allowing individuals with medical authorizations to produce a limited amount of cannabis for their personal use, or to designate an individual to produce it for them as the former MMAR had done. The ACMPR also allows patients to access cannabis oil and fresh cannabis, in addition to dried cannabis, which was allowed under the previous regulatory regimes. Under the ACMPR, medical cannabis is only “legal” with authorization from an authorized healthcare practitioner. To obtain authorization under the ACMPR, a patient need only consult an authorized healthcare practitioner, such as a physician or nurse practitioner, who will provide them with a “medical document” – a prescription.⁴² The “medical document” must indicate the daily quantity of cannabis product the patient is entitled to use, and the period of use.⁴³

There have not been any changes to the scheme that governs medical cannabis, but a review of the legislation is expected to take place within 5 years of October 17, 2018.⁴⁴

RECREATIONAL CANNABIS

Bill C-45, the *Cannabis Act*,⁴⁵ and Bill C-46, *An Act to Amend the Criminal Code*,⁴⁶ were introduced on April 13, 2017, and came into force on October 17, 2018. The *Cannabis Act* makes it legal for adults older than eighteen or nineteen, depending on provincial or territorial restrictions, to possess thirty grams of dried cannabis in a public space for personal use.⁴⁷ Bill C-46’s amendments to the *Criminal Code* create new offences for impaired driving, specific to driving under the influence of cannabis.

The *Cannabis Act*, among other things:

- authorizes the purchase of fresh cannabis, dried cannabis, cannabis oil, cannabis seeds, or cannabis plants from authorized retailers;
- authorizes possession of up to thirty grams of dried cannabis or the equivalent in a non-dried form in public and the sharing of the same amount with other adults;
- authorizes consumption in authorized locations;
- allows for the growth of up to four plants per household for personal use;
- permits the creation of cannabis-containing products at home, such as food and drinks;
- establishes criminal prohibitions on the unlawful distribution of cannabis, including sale and distribution to young persons (under the age of eighteen or nineteen);
- prohibits promotion, packing, and labelling that appeals to young persons or encourages consumption by individuals of any age; and
- repeals the *Criminal Code* provisions relating to manufacturing, promoting, or selling tools and/or printed materials intended to encourage the consumption of illicit drugs.

At present, the *Cannabis Act* permits the purchase of fresh or dried cannabis, cannabis oil, and seeds and plants for cultivation. As of October 17, 2019, the purchase and sale of products such as edibles are now permitted under the *Cannabis Regulations*. Edibles can come in most any form, including with caffeine and in alcohol,⁴⁸ raising additional concerns about interactions between other psychoactive substances.

The *Cannabis Regulations*, which are now in force, generally detail how cannabis may be farmed, packaged, and sold. They also regulate prescription drugs containing cannabis and the importation and exportation of cannabis. The regulations also specify that cannabis test kits, devices used to test for cannabis intoxication, must be registered by manufacturers with the government prior to sale.

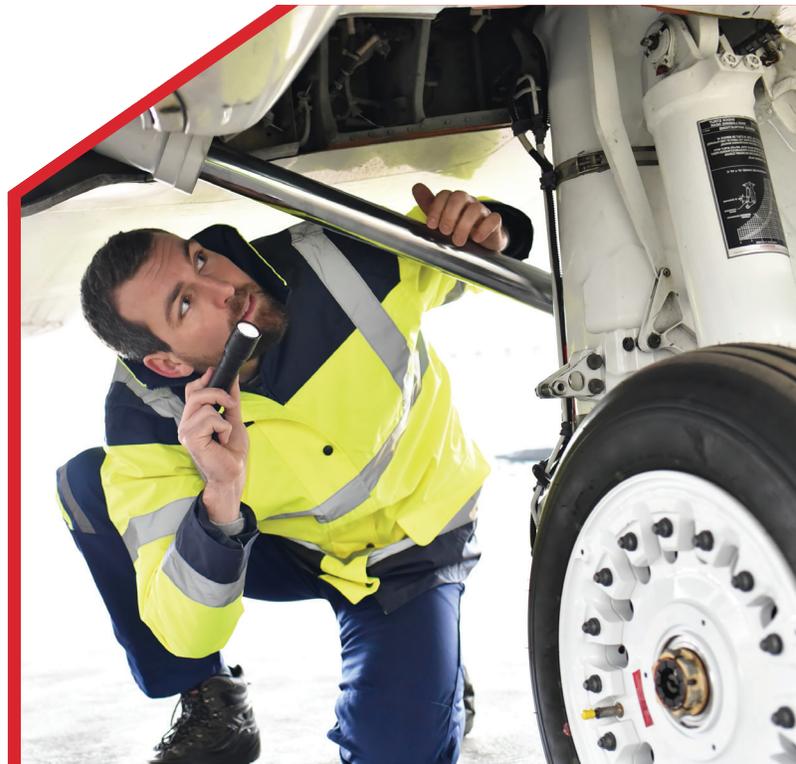
It is up to individual provinces and territories to establish restrictions and to set the legal age for consumption, either eighteen or nineteen, and to regulate where individuals can purchase and consume cannabis. The provinces and territories are also free to set additional restrictions, including placing prohibitions on an individual's ability to grow their own cannabis plants.

Bill C-46, *An Act to amend the Criminal Code (offences relating to conveyances)*, as its name suggests, amends the *Criminal Code* to create three new offences for having a "blood drug concentration" or "BDC" of more than two nanograms of THC per millilitre of blood while driving or within **two hours** after having driven.

Bill C-46 also:

- authorizes peace officers who suspect a driver of having drugs in their system to demand that the driver provide a sample of a bodily substance for analysis by drug screening equipment;
- authorizes mandatory roadside screening for alcohol; and
- authorizes the Governor in Council to establish the permitted BDC.

Although a public consultation process took place in November 2017 prior to the bill's passage, the Government of Canada's proposal regarding regulation fell short in terms of addressing potential implications of legalization in Canadian workplaces. The federal government has not since proposed workplace-specific regulations; private industry has been left to create new solutions.⁴⁹



AVIATION INDUSTRY

Cannabis' impairment of executive functions can affect flight crews' ability to safely pilot aircraft, even days after use. One 1985 study on ten experienced pilots who consumed cannabis showed impairment on a simulated landing conducted 24 hours after ingestion. Pilots' operation of all control surfaces on this approach was more sluggish and the aircraft position in each was less precise. Most importantly, pilots were not aware that they were impaired.⁵⁰

A subsequent study in 1991 confirmed that pilots were affected for at least 24 hours after smoking "social doses" of cannabis (one cigarette). Most were not aware that the quality of their flying was diminished.⁵¹

Cannabis intoxication can, moreover, be increased by low air pressure when aircraft are at high altitude. Pilot response times to emerging situations in the cockpit have diminished with THC present in their system.⁵²

These results are worrisome because 85% of air accidents are caused by pilot error;⁵³ 46% of accidents occur at airports.⁵⁴ Pilots' executive functions, reasoning, and physical reaction times – all faculties impaired by cannabis consumption – are essential to safely resolve flight risks.⁵⁵

These results speak to the need for tighter regulations.

LEGISLATION

The CARs⁵⁶ are a series of regulations that govern a variety of elements of the aviation industry, including the use of airplanes and helicopters in commercial air services, operating and flight rules, and licensing and training.⁵⁷

Part VI of CARs sets out the general operating and flight rules applicable to all aircraft operations. For the purposes of CARs, a "crew member" is a person assigned to duty in an aircraft during flight time. Section 602.03 sets out the rules for alcohol and drug use by crew members:

No person shall act as a crew member of an aircraft

- (a) *within eight hours after consuming an alcoholic beverage;*
- (b) *while under the influence of alcohol; or*
- (c) *while using any drug that impairs the person's faculties to the extent that the safety of the aircraft or of persons on board the aircraft is endangered in any way.*⁵⁸

Section 801.01(1) sets out the rules for alcohol and drug use by air traffic controllers and flight service specialists:

No person shall act as an air traffic controller or a flight service specialist

- (a) *within eight hours after consuming alcohol;*
- (b) *while under the influence of alcohol; or*
- (c) *while under the influence of any drug or other substance that impairs the person's faculties to the extent that aviation safety is affected.*

These regulations under CARs are often referred to as the **Bottle to Throttle** rule, allowing pilots, crew members, controllers, and ground service personnel to consume an alcoholic beverage at least eight hours before flying. However, the regulations also create a **zero tolerance** rule with respect to alcohol and drug consumption before getting on an aircraft. Read as a whole, the regulation provides that, even if a crew member's last drink was eight hours before the flight, there cannot be any trace of alcohol in their system when they arrive for duty.⁵⁹

Since June 2017, Transport Canada has taken the position that the CARs already make it illegal to use cannabis before reporting for duty.

In June 2019, Transport Canada advised that it interpreted the CARs as implicitly restricting cannabis use because pilots, controllers, and crew are not permitted to operate flights while under the influence of any drug. A **Toke to Yoke** policy is therefore in place. Pilots, controllers, and crew cannot report for duty within twenty-eight days of consuming cannabis.⁶⁰

Despite the changes under the *Cannabis Act*, there are currently no proposed amendments to the CARs with respect to cannabis consumption.

Transport Canada's 28-day rule is a disappointing response to a concern held by so many aviation-industry employers because it fails to consider the nuances of cannabis use and the difficulties in measuring impairment. Furthermore, the CARs specifically and exclusively apply to flight crew, air traffic controllers, and flight service specialists and fail to address the obligations of other aviation employees, such as aircraft maintenance engineers, fuel handlers, baggage handlers, and other personnel who are integral to flight operations and who also occupy safety-sensitive positions.

The Chair of the Transportation Safety Board ("TSB") indicated in March 2018 that the TSB is calling for Transport Canada to collaborate with aviation industry and employee representatives to develop and implement requirements for a comprehensive substance-abuse program, which would include drug and alcohol testing, to reduce the risk of impairment for those in safety-sensitive positions.⁶¹ No such program has been implemented and there is no indication that one is forthcoming.



LIMITS OF TESTING

There are a variety of ways to test for the presence of drugs in an individual's system, including testing urine, saliva, and blood. Each method has a different window of detection. Blood, saliva, and urine testing are all able to detect most drugs one to four days after use. Urine testing is the least effective at detecting recent use because it requires that the drug has passed through the body before it will appear in a urine sample. Blood and saliva tests are both able to detect drug use within the first moments of consumption; however, the consensus seems to be that saliva testing is the most effective method for testing present impairment.⁶²

Since 2008, Canadian police have had the ability to test drivers suspected of drug-impaired driving with a Standardized Field Sobriety Test and a drug influence evaluation by way of a Drug Recognition Evaluator, and by requiring drivers to provide a blood, urine, or saliva sample to test for the presence of impairing substances.⁶³ Because of concerns relating to the length of time required to obtain a drug influence evaluation, police are calling for more effective ways to test for drug impairment.⁶⁴ The longer sampling and testing take, the less reliable the evidence of intoxication.

Saliva testing coupled with recent technological developments have made accurate and reliable roadside (or airtside) testing possible. These new portable machines give police objective evidence for collecting further physical evidence, which allows police to more confidently enforce cannabis laws.⁶⁵

As a response to these concerns, the federal government amended the *Criminal Code* in June 2018 to allow roadside saliva testing.⁶⁶

It subsequently passed regulations, which authorized police use of the Dräger DrugTest 5000 (“DDT 5000”) in 2018. This device allows officers to conduct roadside tests for the presence of drugs in a person's body.⁶⁷ It samples oral fluid (saliva) to screen for drugs. The Department of Justice is also in the process of approving a second oral fluid screening device, the SoToxa, for police use.⁶⁸

The DDT 5000 as a roadside saliva-testing device for use by law enforcement agencies is expected to be a tool to detect recent drug use (within six hours), but there are concerns as to its performance in cold temperatures and the prevalence of false positive test results. The Norwegian Mobile Police Service started using the DDT 5000 in 2015 and a study was done comparing the DDT 5000's results to the results of blood testing and another oral fluid testing device. The results of the study showed that the DDT 5000 had a large number of false-positive and false-negative results, compared to blood testing. The study nevertheless concluded that the DDT 5000 was a valuable tool in apprehending individuals driving under the influence of drugs. A further study, however, shows that the DDT 5000, though not entirely accurate, is generally consistent. It will be up to individual law enforcement agencies to decide whether or not they will equip their vehicles with the device.⁷¹

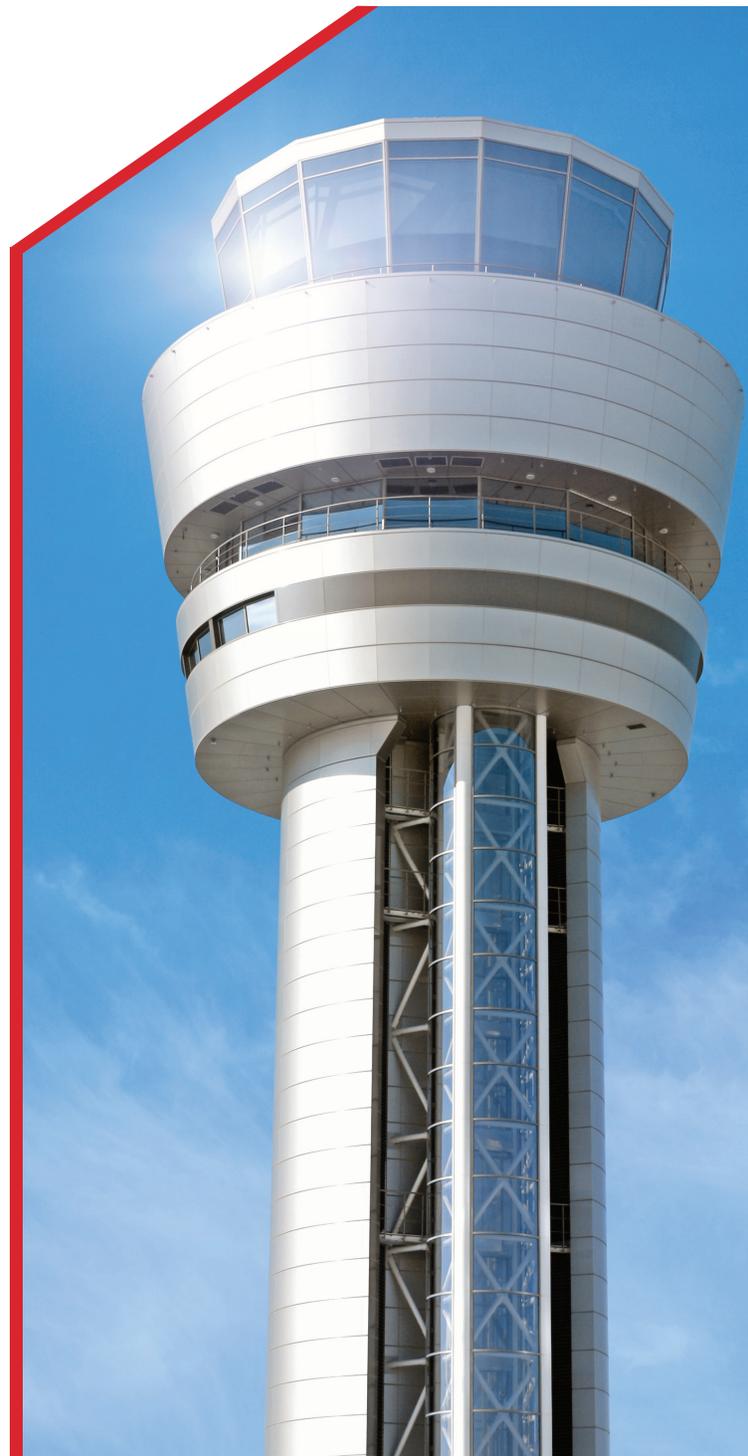
Saliva screening devices are currently the most advanced and frequently used devices for testing and are able to detect recent use. However, unlike blood testing, saliva testing that returns a positive result is not necessarily a clear indication of impairment as the tests will only return a positive result where the cannabis has been consumed recently.

However, unlike the roadside devices used to detect alcohol impairment, the oral fluid screening devices will not be able to convert the sample to a blood drug concentration, meaning that observations about the individual's demeanour and behaviour will have to play a role in determining impairment.⁷²

Because blood drug concentration has a more direct correlation with impairment, countries such as Australia and the United Kingdom, where oral fluid devices are already used for roadside screening, will often follow-up on a positive screening test with a confirmatory blood test.⁷³

There are a few companies in North America working towards developing breathalyzer devices to test for cannabis impairment; however, these devices require further beta-testing before they become available for use. While these breathalyzer devices are expected to detect THC in breath samples, the presence of THC in a breath sample is not necessarily reflective of the amount of the substance present in the individual's blood or brain.⁷⁴

Because of the limits in determining impairment through cannabis testing, employers will need to have additional evidence to support taking action against an employee with a positive test. Employers should ensure that supervisors are well-trained in signs of cannabis impairment, not only to detect situations where a test is required, but to ensure there is support for any decision to remove an individual from duty or take other disciplinary or administrative action.



CANNABIS AT WORK

Employers have competing obligations when it comes to the risks associated with impairment in the workplace. On one hand, employers have a duty to accommodate employees who have a legitimate need to use cannabis for medical reasons or who have a dependency. On the other, they also have a duty to ensure employees are safe at work. However, unions will likely contest employer attempts to impose drug and alcohol policies. When crafting these policies, aviation employers will need to guard against preliminary and permanent judicial prohibitions on mandatory drug and alcohol testing that may be imposed by courts or arbitrators.

HUMAN RIGHTS

When it comes to alcohol and drugs, the law is clear that an employer's duty to accommodate is engaged where an employee discloses that they have an alcohol addiction, a disability for which they use medical cannabis as a treatment, or a demonstrated drug dependency.

While substance dependency, whether it involves drugs or alcohol, is considered a disability under the *Canadian Human Rights Act*,⁷⁵ recreational use of drugs does not attract the *Act's* protections. Drawing a distinction, however, between recreational use and addiction may prove challenging in practice.

The duty to accommodate employees using cannabis for medical or disability-related reasons is no different than the duty to accommodate any other employee in the workplace. The employer is required to accommodate up to the point of undue hardship and the employee is required to cooperate with the employer's reasonable accommodation process.

In some instances, an employer may be able to demonstrate that the employee cannot be accommodated because of a *bona fide* occupational requirement ("BFOR"). A BFOR is a skill or characteristic that is essential to a job, without which the job cannot be performed.⁷⁶ The test for demonstrating that a discriminatory standard is a BFOR, as established by the Supreme Court of Canada, is:

1. the standard must be rationally connected to job performance;
2. the employer must have an honest and good faith belief that it is necessary; and
3. the standard must be reasonable and necessary for a legitimate purpose. To show that a standard is reasonably necessary, it must be impossible to accommodate the individual employee(s) without imposing undue hardship.⁷⁷

For example, the requirement that a pilot not use cannabis within the twenty-four hours before a flight would likely be a BFOR, even if it is medical cannabis used in relation to a disability.

The duty to accommodate persists until an employer reaches the point of undue hardship. There is no clear definition of what amounts to undue hardship, and it is a difficult threshold to meet. Determining whether undue hardship has been met requires assessment on a case-by-case basis, and both the individual's circumstances and the workplace's needs will be taken into account.

On balance, undue hardship may be met when the negative effects on the employer outweigh the benefits to the employee. Undue hardship will occur when the cost of accommodation reaches an unreasonable point. It also occurs when workplace health and safety is substantially impacted due to the accommodation.

Financial costs and health and safety risks, along with other relevant considerations, will be taken into account in determining whether the high threshold for undue hardship has been met. However, the fact that the employer has to incur costs or is otherwise inconvenienced is generally not sufficient. That being said, one arbitrator has held that an employer's inability to measure the extent of impairment from medical cannabis use because of a lack of available monitoring amounted to undue hardship. Specifically, he noted that if an employer is expected to manage risk, it has to be able to measure the risk of cannabis use on the performance of the worker.⁷⁸

Generally, there will be no obligation to accommodate an employee claiming that they require medical cannabis in the absence of an authorization,⁷⁹ where the employee is self-medicating,⁸⁰ or where the employer is not and could not reasonably be aware of the employee's need for medical cannabis.⁸¹ Employers are generally entitled to ask for confirmation of the risk of impairment associated with an employee's medical cannabis use, and to confirm whether or not non-impairing alternatives are available.

That being said, employers have a duty to inquire if there is a reasonable suspicion that the employee may have a substance dependency or a disability relating to substance use. Although, since denial is often a feature of dependency, employers must exercise caution where such suspicions arise. The duty may be discharged if the employee conceals the fact that they are addicted.⁸²

However, where an employer is aware or suspects that an employee has a condition that may require accommodation, employers have a duty to inquire into whether or not accommodation is required.⁸³ Employers also have a duty to consider all possible accommodations before determining that an employee's needs cannot be met.

Employees requiring accommodation have an obligation to disclose that requirement and their restrictions and/or limitations. Where an employee fails to do so, the employer will not be expected to accommodate an employee who breaches the employer's policies by not disclosing cannabis use, medical or otherwise, prior to an accident or incident in the workplace.⁸⁴

OCCUPATIONAL HEALTH AND SAFETY

Employers are required to take all reasonable precautions to protect employees and others in the workplace, and this obligation is heightened where a position is safety-sensitive.⁸⁵

Under Part II of the *Canada Labour Code*, employers have a general duty to ensure that the health and safety of all employees is protected. Where an employee's medical or recreational cannabis use raises legitimate safety concerns, the employer has an obligation to seek additional information from the employee, including medical information relating to the authorization for cannabis and its potential effects on the employee, including the extent and nature of any impairment.⁸⁶

With respect to drug and alcohol testing in the workplace, testing in safety-sensitive workplaces is more likely to withstand scrutiny because of the employer's obligations to ensure safety.⁸⁷

PRIVACY

There are a number of privacy implications associated with requiring employees to undergo drug and/or alcohol testing in the workplace. Federally regulated employers, such as aviation-industry employers, have obligations under the *Personal Information Protection and Electronic Documents Act*⁸⁸ with respect to the personal information of employees. These obligations include not collecting any more personal information than is reasonably necessary and not disclosing sensitive information without the subject's express consent.

In unionized environments, when determining whether or not an employer is entitled to require an employee to undergo drug testing, arbitrators will consider the privacy interests of employees and balance those interests against the benefits of testing for the employer.⁸⁹ Where the benefit to the employer outweighs the possible harms to employees, the employer will likely be entitled to require drug testing.

Canada's Privacy Commissioner has established ground rules for protecting employee's health information.

For example, a 2005 complaint from a railway employee alleged that his union violated PIPEDA by sharing information about his alcohol dependency and reintegration into the workforce following an alcohol-related incident. The union had shared the information with the employee's supervisor. The employer then shared that information with the company's medical services provider without first obtaining the employee's consent. The employee complained to the Commissioner. The Commissioner ruled against the employer, finding that sharing the information was required in the circumstances because the worker had signed a contract stipulating that the information would be shared within the workplace in order for him to remain employed.⁹⁰

In 2007, the Privacy Commissioner ruled that an employee's previous employer may not share drug testing information with a future employer unless the employee specifically consented to the sharing of that information. In that case, a truck driver had been dismissed after testing positive for drugs. His former employer shared this information with a future employer checking the driver's references, thereby sharing personal medical information. The driver did not get the job and made a complaint to the Commissioner. The Commissioner dismissed the complaint and said:

the complainant would reasonably have expected that a prospective employer would ask a former employer about his driving performance and history. It was likely that the complainant had provided express consent by signing an authorization form that allowed the prospective employer to make investigations and inquiries of his "employment and other related matters as may be necessary in arriving at a final decision" with respect to hiring him. The same authorization released employers from all liability in responding to inquiries and releasing information in connection with his application.⁹¹

Employers cannot, however, disclose drug test results to an administrative tribunal, like a workers' compensation board, without an employee's consent. In 2016, a worker's employer required him to submit to a random drug test just before returning to work after his injury. He tested positive and was suspended from work. The employer disclosed the positive drug test to the board under the erroneous assumption that it had to disclose all medical information to the board. The Commissioner declared that such disclosure violated PIPEDA because it served a purpose other than that for which it was collected. Once the company showed that it had complied with the Commissioner's suggestions, the complaint was resolved.⁹²

LABOUR AND EMPLOYMENT

Unions typically challenge employers' drug and alcohol policies, especially when mandatory random testing is imposed.

This was the case in *Office and Professional Employees International Union v Cougar Helicopters*.⁹³ The union represented helicopter pilots; search and rescue personnel; and weather, radio and dispatch personnel, positions that are considered safety-sensitive because they relate to flight operations. The employer imposed a random drug testing policy for pilots in 2010, which was unopposed by the union until 2016, at which time the union grieved that certain pilots were being targeted under the policy. The employer put its policy in abeyance pending the outcome of the grievance.

In 2018, after cannabis was legalized, Cougar Helicopters revived its policy. The union was consulted before the policy was brought back. This consultation, however, did not satisfy the union because random testing was expanded to include all employees in safety-sensitive positions – virtually the union's entire bargaining unit. The union grieved.

The union sought a preliminary injunction, which was awarded. A preliminary injunction stops the complained-of activity pending the outcome of the grievance. There is a three-part test for preliminary injunctions. A successful party must convince the arbitrator:

1. that there is a serious issue to be tried;
2. that irreparable harm will result if the relief requested is not granted; and
3. that the balance of convenience favours granting the motion.

The arbitrator in Cougar's case examined the Ontario Superior Court's decision in *Amalgamated Transit union Local 113 v Toronto Transit Commission*. The union in that case challenged the Transit Commission's drug and alcohol policy. The Court denied a temporary injunction and said:

The public interest presents itself in two ways,

First the reasonable expectation of privacy of the employees of the TTC must be protected by the court. The right to privacy is protected by the Charter of Rights and Freedoms and recognized as common law ...

Second, the workplace is literally the City of Toronto and as a result all the people who move about in the City, whether or not they are passengers on the TTC, have an interest in the TTC safely taking its passengers from one place to another.

The best way to take the second aspect of the public interest into account is to have reference to it, as I have, when deciding what is reasonable when defining a TTC employee's reasonable expectation of privacy.

The Court in the *TTC* decision found that employees' expectation of privacy gave way to the public's interest in safe transportation and declined to order an injunction.

In contrast, in *Cougar Helicopters* the arbitrator awarded a preliminary injunction, having found that employees' privacy concerns outweighed the risk of inconvenience to the employer's operations. The arbitrator specifically noted that a final resolution of the issue was imminent, which played into minimizing the employer's inconvenience.

Employers that wish to impose random drug and alcohol testing policies must be ready for union challenges. Unions will often ask for preliminary injunctions to preserve employees' privacy rights pending the outcome of a grievance. To stay ahead of unions' arguments, employers can determine whether flight operations affect the public interest enough to justify violating employees' rights to privacy. If a large cross-section of the public is affected by safety concerns, the employer may be better able to justify imposing its policy straightaway.

Unions may also raise human rights challenges to discipline under safety-sensitive employment policies, similar to the policy at issue in the *Cougar Helicopter* case.

Another Newfoundland and Labrador case, *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. and IBEW, Local 1620 (Tizzard)*, saw a construction worker refused employment because he smoked medical cannabis off-duty for pain management. The union claimed that the employer failed to accommodate the employee. The issue in this case was potential residual impairment in a safety-sensitive position. The arbitrator denied the grievance because the employer was unable to measure the level of impairment, so it could not effectively manage risk. The inability to manage risk became undue hardship because the employer could not meet its statutory obligations under the *Health and Safety Act*.⁹⁴



THE NEED FOR A STRONG POLICY

Safety is paramount in the aviation industry and is the responsibility of all workplace parties, including employers, employees, and unions. A strong policy is an invaluable tool for aviation industry employers to define expectations around the use of cannabis, whether for medical or recreational use, other drugs, and alcohol in the workplace.

A robust policy will provide employees with a clear understanding of what is not acceptable at work and will allow employers to take necessary action where employees fail to abide by the policy.

In safety-sensitive environments, such as airports, aerodromes, air traffic control towers, landing pads, hangars, etc., it is appropriate to have a stricter and more comprehensive drug and alcohol policy than one might find in, for example, an accounting firm. Strong policies should include a prohibition on using impairing drugs and alcohol in the workplace or showing up to work while under the influence of any impairing drug, including cannabis or alcohol. An effective drug and alcohol policy should include the following, among other provisions:

- definitions, including the positions that are considered safety-sensitive;
- the duties of the company, management, supervisors, and employees with respect to ensuring that the drug and alcohol policy is followed;
- prohibitions on reporting to work under the influence of alcohol or drugs;
- the circumstances in which an employee may be required to submit to a drug or alcohol test;
- the duty to report use of medically-authorized or prescribed drugs that have the potential to impair the employee;
- “bottle to throttle” and “toke to yoke” rules stipulating how soon before reporting to work an employee may consume impairing substances and still be deemed fit to perform their duties;
- consequences of non-compliance with the policy;
- rules relating to return to work following a positive test result; and
- an accommodation procedure for employees who have a drug- or alcohol-related disability, or who require the use of a potentially impairing drug for medical reasons.

A provision relating to prescription drugs, including medically-authorized cannabis, should indicate that, even where an employee has a medical prescription or authorization to use the drug, whether or not the employee is safe to perform the duties of their job will have to be evaluated by the employer in consultation with the employee’s physician. For pilots and flight crew, CARs provide the zero tolerance policy for all impairing drugs. Regardless of medical authorization, this will remain the same.

Aviation employers must remember that flight crew cannot be immediately dismissed if the CARs render them unable to fly. When the CARs apply, the accommodation process is triggered. A pilot or flight attendant unable to fly may be reassigned within collective agreement rules to another kind of work in the organization. The employer, union, and employee must work together to see if such reassignment is possible where a disability exists.

Where no disability exists, the employer is entitled to impose discipline after the CARs render a person unfit for duty.

Since the underlying purpose of a drug and alcohol policy is to preserve the safety of the workplace, employers should bring the policy to employees’ attention. Employers should also encourage employees to report all safety-related incidents, including those relating to drugs or alcohol.

Employers who do not already have such a policy in place may consider implementing a just culture policy, whereby employees are encouraged to report incidents, generally without fear of disciplinary action except in cases of wilful or negligent conduct.

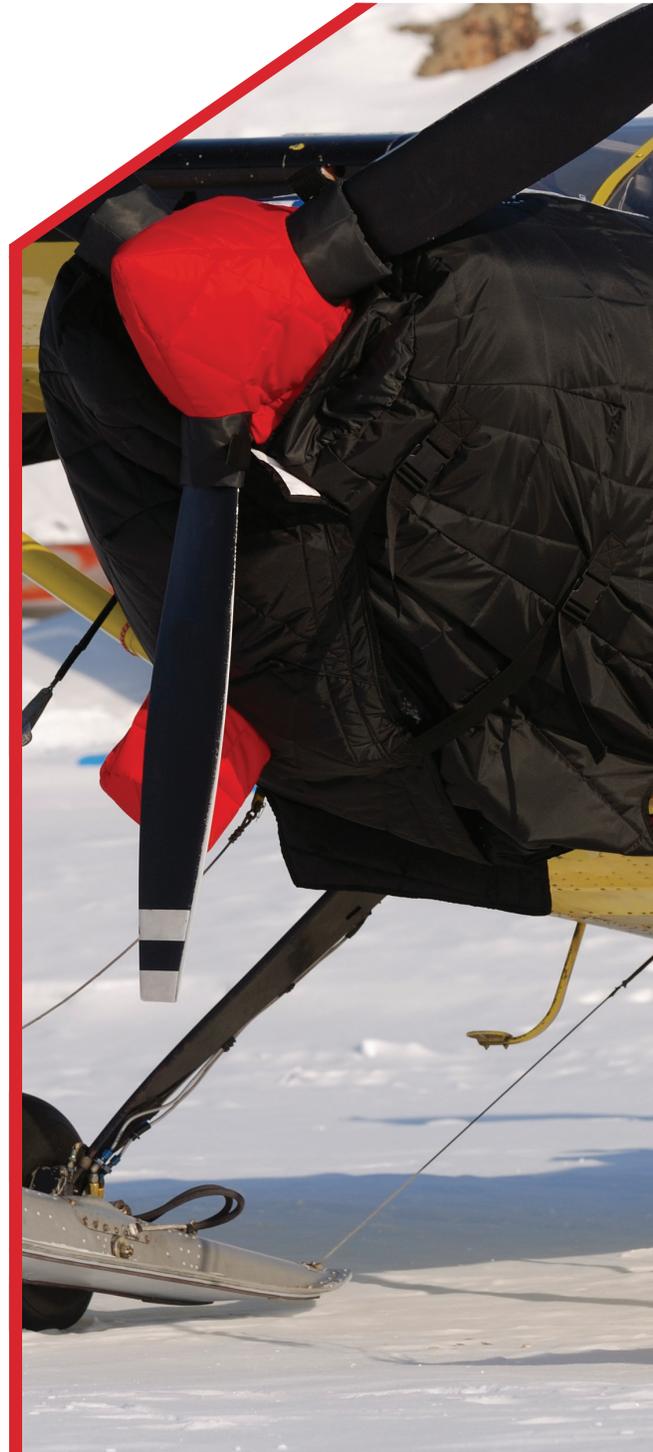
TESTING POLICY

Many drug and alcohol policies will also include rules regarding testing. While the TSB recognizes the need for a comprehensive program, unions have traditionally opposed random drug and alcohol testing, even where there is a demonstrated need for it in the workplace.

Arbitrators have found drug and alcohol testing to be appropriate where:

- there is reasonable cause to believe that an employee is impaired while on duty;
- the employee has been directly involved in workplace accident or significant incident; and/or
- the employee is returning to work after treatment for substance abuse.⁹⁶

To implement random testing, employers will be required to demonstrate particular risks in the workplace, or a general problem of substance abuse among employees.⁹⁷ Doing so requires employers to lead evidence about the nature and extent of the safety concerns in the workplace. Aviation employers will always have to weigh the reputational impact of such a course against the need to ensure safety. Arbitrators are, however, reluctant to find that a workplace has a general problem of substance abuse, making proving such a problem a difficult task. In one case, evidence of three fatalities related to drug or alcohol consumption in the workplace within a four-year period was not sufficient for the arbitrator to find the employer's drug and alcohol testing appropriate.⁹⁸





CONCLUSION

In the wake of legalization, employers' obligations to protect the health and safety of their employees remain paramount. The obligations of aviation industry employers with respect to safety are even more significant because of the dangerous nature of the work employees do, and the possible harm to employees, customers, the general public, and the environment.

Employers who do not already have a drug and alcohol policy in effect should take the necessary steps to put a policy in place as soon as possible. Employers who do have a policy should take the time to review and update the policy to ensure it captures the recreational and medical use of cannabis, and to remain sure all employees are aware of the expectations.

Even though it is now in place, there are many unknowns about how the recreational cannabis scheme will unfold. Employers in any industry are not expected to tolerate impaired employees and, when dealing with safety, it is better to increase scrutiny and restrictions at the outset than to wait and see how it plays out. However, employers will continue to be expected to abide by their obligations under the *Canadian Human Rights Act* while dealing with effects of the legislative changes.

The best way to prepare for the new laws is to sit down with a lawyer. For more information or help with your drug and alcohol policy, contact Steven Williams, Larissa Volinets Schieven, or Lauren Jamieson at Emond Harnden LLP.

TESTING RESOURCES

The authors are not affiliated with, nor do they endorse any of the companies listed below.

CANN/AMM Drug & Alcohol Testing

- DOT and Non-DOT testing
- Urine drug testing
- Oral fluid/saliva drug testing
- Breath alcohol testing
- Emergency/after-hours testing
- Mobile drug testing

Locations

- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland and Labrador
- Nova Scotia
- Ontario
- Prince Edward Island
- Quebec
- Saskatchewan
- Yukon

For a full list of collection sites, visit cannamm.com.

Sure Hire Drug & Alcohol Testing

- Alcohol testing
- Non regulated urine drug testing
- Oral fluid drug testing
- Hair follicle testing
- Random drug & alcohol testing
- Reasonable suspicion training
- Substance abuse professional services
- Mobile on-site testing

Locations

- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland and Labrador
- Northwest Territories
- Nova Scotia
- Ontario
- Prince Edward Island
- Quebec
- Saskatchewan
- Yukon

For a full list of locations and specific services offered by area, visit surehire.ca.

DriverCheck Medical Testing & Assessments

- DOT and Non-DOT testing
- Supervisor training
- Employee education
- Alcohol & drug testing
- Substance abuse professional services

Locations

- Alberta
- British Columbia
- Manitoba
- New Brunswick
- Newfoundland and Labrador
- Northwest Territories
- Nova Scotia
- Ontario
- Prince Edward Island

- Quebec
- Saskatchewan
- Yukon

For a full list of locations, visit drivercheck.ca.

Dynacare

- DOT testing
- Urine drug testing
- Oral fluid testing
- Hair testing

Locations

- Manitoba
- Ontario
- Quebec

For a full list of locations, visit dynacare.ca.

Life Labs

- DOT and Non-DOT testing
- Hair testing
- Urine testing

Locations

- Alberta
- British Columbia
- Ontario
- Saskatchewan

For a full list of locations visit lifelabs.com.

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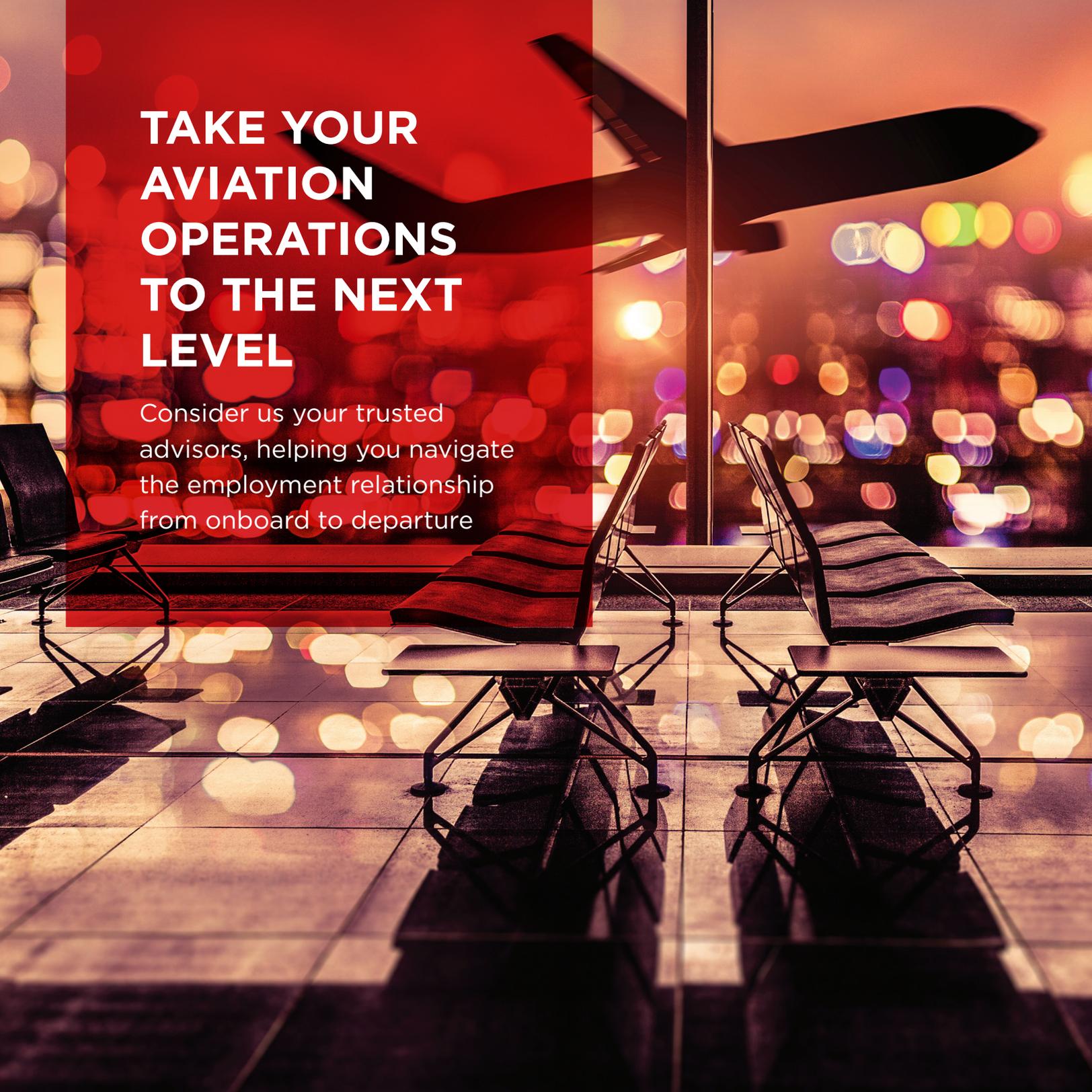
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- ⁸³ See, for example, *union of Northern Workers and Government of the Northwest Territories (Richardson)*, 2019 CarswellNWT 7, where an arbitrator found that the employer had a duty to inquire whether the grievor had an alcohol dependency after it has reasonable grounds to suspect the dependency.
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A photograph of an airport terminal at night. In the foreground, several rows of empty metal airport chairs with wooden seats are arranged on a polished floor that reflects the ambient light. In the background, a large window looks out onto a night sky filled with colorful bokeh lights from city buildings. A dark silhouette of an airplane is visible in the upper right portion of the frame, appearing to be in flight. A vertical red bar is positioned on the left side of the image, containing white text.

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