M E M O R A N D U M – Drug Testing in the Workplace

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Introduction

As technology advances, so do the risks associated with operating ever-growing technological workplaces. Whether it is operating heavy machinery on a construction site, acting in the course of your duties as a police officer or firefighter, or operating Canada's largest and busiest airport, one thing remains the same; the risks associated with all of these jobs are only compounded by the consumption of alcohol and drugs.

In Ontario there are a number of statutes that oversee occupational health and safety of the worker with an aim of protecting the worker against various sorts of wrongs. These include the *Occupational Health and Safety Act*,[1] the *Employment Standards Act*,[2] the *Labour Relations Act*,[3] and the *Human Rights Code*.[4] These acts all deal with complicated workplace matters for both employer and employees. Additionally, the Ontario *Workplace Safety and Insurance Act*[5] provides guidance if a worker has been injured on the job, in addition to ensuring compliance by the employer.

As indicated, as technology has become more advanced, as to have the risks of workplace injury and death. Combining these risks with the careless and at times flagrant use drugs and

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[1] RSO 1990, C O 1 [*OHSA*].
[2] 2000, SO 2000, c 41 [*ESA*].

[3] SO 1995, C 1□SCHEDULE A [*LRA*].
[4] RSO 1990, c H.19 [*HRC*].

[5] SO 1997, C 16□SCHEDULE A [*WSIA*].

alcohol has prompted many employers to enact policy surrounding drug and alcohol testing. Since the pivotal case of *Lumber and Sawmill Workers Union, Local 2537 v KVP Co. Ltd.*,[6] drug and alcohol policy and its implementation has constituted a reasonable exercise of management rights. This has progressed from a mere right of the employer, to an entrenched collective agreement standard, where often refusal to submit to drug and alcohol testing post-accident, results in a reverse onus situation for the employee to prove otherwise to show they were not under the influence of drugs and or alcohol.[7]

As a result of such testing protocol, there are often a number of issues that need to be analysed following an accident in a safety-sensitive workplace. This paper will examine the post accident scenario from four angles. First, does post-accident drug testing in safety-sensitive workplaces violate the *HRC*? Second, what is the standard to demand a worker submit to drug and or alcohol testing? Third, following a positive test result of a drug and or alcohol test, what is the standard the employer held to in order to accommodate any disability the employee may have pursuant to s. 5 of the *HRC*? Fourth, following an accident, the effectiveness of the various methods of drug and or alcohol testing to determine current impairment and their potential implications on any proceedings against an accused worker.

Summary of Conclusions

Through an analysis of the above areas, this paper will show drug and or alcohol testing in safety-sensitive workplaces is a necessary requirement for four reasons. First, post-accident drug testing does not violate the *HRC* provided it is in accordance with the principles of the established jurisprudence. Second, the standard to demand a worker to submit to a drug and or alcohol test is reasonable and probable grounds or analogous wording. Third, following a

[6] [1965] OLAA No 2, (1965), 16 LAC 73 [*KVP*].

[7] *International Union of Operating Engineers, Local 793 v Sterling Crane – A Division of Procrane Inc.*, [2009] OLRD No 4623 at 6 [*Sterling Crane*].

positive test, an employer has a duty to accommodate an employee to a level that falls shy of undue hardship on the employer. Fourth, following an accident, the most effective testing methods to detect impairment for alcohol are visual cues or a breathalyser test, and for drugs, it is through a Drug Recognition Expert ("DRE").

Analysis

1. Does post-accident testing violate the Ontario *HRC*?

Accidents occur every day in Ontario workplaces. The difference between many of them lies in the risk of another accident occurring, the severity of the accident, the injuries to employees or others, and the nature of the position. However, for some workplaces, it has become established following an accident of a specified severity, when certain factors are met, the worker who caused the accident may be required to submit to a drug and or alcohol test to rule out impairment as a cause of the accident. I am in agreement with the current state of the law, insofar as testing a worker in a post-accident situation, so long as it is in accordance with the collective bargaining agreement, and is not *prima facie* discriminatory.

In order to determine whether a post-accident test would violate the *HRC*, a number of conditions need to be ascertained. Although many tribunals and courts have upheld the legitimacy of drug and alcohol testing on workers in a post-accident situation, this only transpires after the accident has occurred and has met certain criteria. We must examine a number of key factors before any post-accident testing analysis can proceed. First, what is an accident? In *Sterling Cranes*, Arbitrator Jesin outlined "an accident or incident that has occurred and where such accident either had resulted in, or has had the potential to result in serious injury or death, or in serious and extensive harm to property…"[8] In *Sterling Cranes*, although there was no serious

[8] *Ibid* at 76.

injury or death, an accident did occur when the operator of a large crane came into contact with power lines causing a power outage to the surrounding areas for a period of time.[9] The second area that needs to be looked at is whether the accident was in a safety-sensitive area? In *Greater Toronto Airports Authority v Public Service Alliance of Canada, Local 0004*,[10] a safety-sensitive area was defined as,

> …those in which individuals, who may work independently for varying or extended periods of time, have a key and direct role in an operation where impaired performance could result in (i) a significant accident or incident affecting the health or safety of employees, others working at the airport, customers, the public or the environment, or (ii) an inadequate response to an emergency or operational situation.[11]

The Canadian Human Rights Commission policy on alcohol and drug testing also defines safety-sensitive as,

> one in which incapacity due to drug or alcohol impairment could result in direct and significant risk of injury to the employee, others or the environment. Whether a job can be categorized as safety-sensitive must be considered within the context of the industry, the particular workplace, and an employee's direct involvement in a high-risk operation. Any definition must take into account the role of properly trained supervisors and the checks and balances present in the workplace.[12]

Moving forward from these two definitions, we can begin to understand whether post-accident testing violates any Ontario statutes. Often the most contentious statute is the *HRC*. Employees who have been issued a demand for an alcohol and or drug test often use s. 5(1) of the *HRC* as a shield to the test claiming a disability.[13] A drug and or alcohol test is *prima facie* a violation of a person's human right's as defined by the *HRC*.[14] It is noted in s. 5(1) that "every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation,

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[9] *Ibid* at 10.
[10] [2007] CLAD No 243 [*GTAA*].
[11] *Ibid* at 6.

[12] Canada, Canadian Human Rights Commission, *Canadian Human Rights Commission Policy on Alcohol and Drug Testing*, (Ottawa: Canadian Human Rights Commission, 2002).

[13] *Kelly v Toronto Police Service* (20 April 2005), OCCPS #05-03, online: Ontario Civilian Commission on Police Services <http://www.ocpc.ca/files/J78U2005R405X1175X130E0352221F.pdf> at p. 22 [*Kelly*].
[14] *HRC*, *supra* 4 at s. 5(1).

age, record of offences, marital status, family status or disability."[15] In order to determine whether a drug and or alcohol addiction fits within the definition of s. 5(1), we can examine the meaning of disability more in depth. A handicap or disability has been defined in *Entrop v. Imperial Oil Ltd*.[16] as "an illness, injury or disfigurement that creates a physical or mental impairment and thereby interferes with a person's physical, psychological and/or social functioning."[17] The disability or impairment can be temporary, long lasting, or permanent. It may be an actual disability or something that is only perceived as a disability in the eyes of others, or even an impairment that no longer exists.[18] Alcoholism or drug addictions, for example, are viewed as disabilities.[19] As such, they fall under the protection of the *HRC*.

The court in *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*[20] *(Meiorin* Grievance), looked at the protection given under the British Columbia *Human Rights Code*[21] and outlined principles on when discrimination is acceptable through employment. The Supreme Court of Canada clarified and limited the amount that both the employer and employee could rely on the *HRC* as a sword or shied.[22] In the decision, the court outlined a three-part test to justify whether discriminating against a person can be held as reasonable. If the discriminatory behaviour is able to pass all three parts of the test, it will be held that it is a *bona fide* occupational requirement, and the discriminatory behaviour will stand.[23] The test outlined the following,

1. That the standard was adopted for a purpose rationally connected to the performance of the job;

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[15] *Ibid*.
16 [2000] OJ No 2689, (2000) 50 OR (3d) 18 [*Entrop*].
[17] *Ibid* at 196.
[18] Michael Lynk, "Disability and the Duty to Accommodate in the Canadian Workplace" online: Ontario Labour Federation <http://www.ofl.ca/uploads/library/disability_issues/ACCOMMODATION.pdf>.
[19] *Ibid* at 6.
[20] [1999] 3 SCR 3 [*Meiorin*].
[21] RSBC 1996, c 210 [*BC HRC*].
[22] *Meiorin*, *supra* 20 at 42.
[23] Randall Scott Echlin & Christine M. Thomlinson, *For Better or For Worse: A Practical Guide to Canadian Employment Law*, 2d ed (Aurora: Aurora Professional Press, 2003) at 127.

2. That the standard was adopted in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

3. That the standard was reasonably necessary for the accomplishment of that legitimate work-related purpose. In order to fulfil this last criterion, an employer would also be required to show that it was impossible to accommodate the individual employee(s) without imposing undue hardship on the employer.[24]

When evaluating Ms. Meiorin's complaint through the application of the three-part test, they were able to conclude that the rule establishing a set standard for cardiovascular exercise for fire fighters was *prima facie* discriminatory. As a result, they reinstated her to her former position.

Like *Meiorin*, in other recent cases, the union launches a grievance on behalf of an employee because of a policy enacted by the employer. In *Entrop*, the court held not promoting or hiring an employee to a safety-sensitive position is not *prima facie* discriminatory if certain criteria are met.[25] In his decision Laskin, J.A. (as he was then) indicated,

> I would set aside the Board's conclusion that random alcohol testing for employees in safety-sensitive positions violates the Code, and in its place I would hold that such testing is a BFOR provided the sanction for an employee testing positive is tailored to the employee's circumstances."[26]

However, the more recent decision in *GTAA* went against the Court of Appeal finding in *Entrop*. In her decision, Arbitrator Devlin indicated,

> under the GTAA's policy, a positive drug test results in automatic denial of a safety-sensitive position and, in this respect, the provision is overly broad and cannot be regarded as a BFOR. Denying a safety-sensitive position to any employee who tests positive is inconsistent with the GTAA's duty to accommodate.[27]

Although the consensus with the courts is not perfect, there are various factual issues which differentiate the cases and can be the cause for dissenting decisions.

In order to delve further into whether there is a potential violation, we turn to *KVP* to determine whether a worker's refusal to submit to a post-accident drug and or alcohol test is

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[24] *Ibid*.
[25] *Entrop*, *supra* 16 at 128-129.
[26] *Ibid* at 138.
[27] *GTAA*, *supra* 10 at 303.

considered a violation of the collective agreement. According to the ruling in *KVP*, the breach of a rule introduced unilaterally by the employer can only be acted upon and give just cause for discipline if the rule meets the following criteria:

> 1. It must not be inconsistent with the collective agreement.
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> 2. It must not be unreasonable.
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> 3. It must be clear and unequivocal.
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> 4. It must be brought to the attention of the employee affected before the company can act on it.
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> 5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
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> 6. Such rule should have been consistently enforced by the company from the time it was introduced.[28]

Furthermore,

> although the employer must satisfy all of these requirements, many awards turn on the arbitrator's assessment of the reasonableness of the rule in question. Whether or not a rule is found to be reasonable generally depends on whether the employer is able to establish that it promotes health and safety in the workplace or advances legitimate business interests.[29]

Through an examination of the factors that make up a potential s. 5(1) claim under the *HRC*, what is clear, is any potential grievances by a worker or union will be fact driven, and the grievance will need to be tested against the policy of the employer, collective agreement, and corresponding jurisprudence. This was the case in *Trimac Transportation Services - Bulk Systems v Transportation Communications Union Crane*,[30] where Arbitrator Burkett indicated,

> it is accepted that management will make rules and issue policies that are necessary to the achievement of its business objectives, subject to the right of the union to challenge these rules as not meeting the test of just cause if they are not reasonably related to the achievement of legitimate business objectives or as otherwise contrary to the terms of the

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[28] *KVP, supra* 6 at 34.
[29] Mort Mitchnick & Brian Etherington, "13.3 Failure to Comply with Employer Rules", online: Lancaster House: Labour Law on-line <http://onlinedb.lancasterhouse.com/index.asp?navid=37&layid=73&csid=1732&csid1=23&csid2=1031&fid1=23>.
[30] [1999] CLAD No 750 [*Trimac*].

> collective agreement. There is not a single case of which I am aware that has found that rules relating to the safe operation of the workplace are not within the authority of management under its general right to manage. Indeed, in all cases dealing with drug and alcohol testing cited herein, this is taken as a given.[31]

As a result of the current jurisprudence in this area, taken in conjunction with the relevant facts and policies, I would submit an employer's demand for analysis to determine whether an employee is impaired post-accident is in compliance with the *HRC*. When there is an accident in a prescribed safety-sensitive area, and the criteria is met that warrants a drug and or alcohol test, I am in agreement with the courts in *Entrop* who have spoken clearly by outlining an employer's right to test post-accident is *intra vires* the *HRC*.

2. What are reasonable and probable grounds post-accident?

In a post-accident situation in a designated safety-sensitive workplace, the courts have permitted the employer to demand that an employee submit to a drug and or alcohol test where the accident is of a certain level.[32] The *Criminal Code of Canada*[33] demands officers have reasonable and probable grounds to make an arrest or to demand a sample of an accused's alcohol in instances when impairment is suspected.[34] At times in unionized environments, employees are told to "obey now and grieve later"[35] in order to avoid immediate sanction by the employer. However, I would submit those who are seeking to have the employee consent to the testing at the time, and grieve later need to have evidence to support the demand on a scale analogous to reasonable and probable grounds.

Although current jurisprudence permits testing of employees in post-accident situations, I struggle with the identification of grounds needed and who can demand a test of an employee in

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[31] *Ibid* at 59.
[32] *GTAA*, *supra* 10 at 6.
[33] RSC 1985, c C-46 [*Criminal Code*].
[34] *Ibid* at s. 254(2).
[35] *KVP*, *supra* 6 at 85.

such a situation. In *United Transportation Union v Canadian National Railway Co. (Keeping Grievance)*,[36] Aribitrator Picher, commenting on post-accident testing by the employer he stated,

> …the right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such it must be used judiciously, and only with demonstrable justification, based on reasonable and probable grounds.[37]

In another case, Arbitrator Brent in *Re: Provincial-American Truck Transporters and Teamsters Union, Loc. 880*[38] outlined a two-part test for drug and or alcohol testing following an accident that was reiterated in *Sterling Crane*.

> She concluded that drug testing would be within management's rights if reasonable cause to demand the test existed. But for universal testing to be sustained, an employer would have to first prove that there was a drug and alcohol problem in the workplace and then prove that lesser non-invasive tests were not effective in solving the problem.[39]

In a third case, Arbitrator Jolliffe in *United Assn. of Journeyman and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 663 v Mechanical Contractors Assn. of Sarnia (Drug and Alcohol Policy Grievance)*[40] commented on the policy of testing simply on the basis the accident occurred with no other reason gives rise to the suspicion of drug and or alcohol use. "[The policies] are acceptable where an incident/accident has occurred where there is cause to suspect alcohol or drug use by reason of the occurrence itself, observations and surrounding circumstances, and in such case testing should be done as soon as possible."[41] I would respectfully disagree with the beginning part of this statement, and would suggest conducting a test because the accident has occurred is fundamentally contradictory to other decisions where it has been held there needs to be reasonable and probable grounds, or grounds analogous in order to make a demand.

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[36] [1989] CLAD No 4 at 23 [*Keeping*].
[37] *Ibid* at 23.
[38] [1991] OLAA No 16 [*Provincial-American Truck*].
[39] *Sterling Crane*, *supra* 7 at 53.
[40] [2008] OLAA No 621 [*Mechanical Contractors*].
[41] *Ibid* at 151.

In addition to the reasonable grounds needed in order to conduct a test, the *Mechanical Contractors* case lacks a clear definition of what grounds are considered reasonable in order to test, and it does not outline who can evaluate the potential symptoms needed in order to make a decision to order an employee to submit to a test. Further to this, in *Sterling Crane*, the company stated, "a supervisor of an employee must request an employee to submit to an alcohol and drug test if the supervisor and the next level of management at the company cannot reasonably eliminate alcohol or drugs as a contributing factor."[42] Looking further at the policy, reasonable grounds is defined as but not limited to,

1. Odour of alcohol;
2. Slurred speech;
3. "Groggy" or disoriented behaviour;
4. Glassy eyes,
5. Flushed face;
6. Unsteadiness in standing, walking, etc.;
7. Acting in a suspicious or unusual manner;
8. Explained inability to correct a chronic job performance or behaviour problem;
9. Excessive sick leave or suspicious patterns of sick leaves;
10. Involvement in a post rehabilitation program.***26

I would suggest that many of these signs and symptoms of intoxication are what would be considered as classic symptoms, however, what I fail to note, is how an employee can be forced to submit to a test if none of these signs or symptoms are present in a post-accident situation. Again, in *Sterling Crane* the facts of the case indicate the employer had no grounds to believe the worker was impaired other than the fact the incident occurred. After a worker, who had a clean accident record and 19 years experience refused to submit for a drug and or alcohol test he was suspended. I would submit the employer did not have a right to enforce such a suspension and Arbitrator Jesin agreed. In his decision, the Arbitrator reaffirmed the recent Ontario Court of

[42] *Sterling Crane*, *supra* 7 at 19.

Appeal decision in *Imperial Oil Ltd. v CEP Local 900*[43] by indicating a policy, which purports to test an employee in a post-accident situation, must be bound by reasonable cause.[44]

Although reasonable cause or reasonable and probable grounds are an extremely important aspect of the testing procedure, I submit, the most important part of the process in determining whether to demand a sample from an employee comes from the observations of the person who makes the demand. If a person happened to be involved in a motor vehicle collision and it is suspected that alcohol may be involved, the only person who can demand a sample of your breath and or blood is a police officer.[45] This however, is not the case following a workplace accident. As outlined in the employer's policy in *Sterling Crane* in order to receive permission for a demand for sample, the worker's immediate supervisor needs to have formed reasonable grounds and this needs to be cleared with their immediate supervisor.[46] Although this was obtained, the employer conceded in cross-examination that the grievor did not exhibit any noticeable signs of impairment during the investigation. It was also established that the employer was not trained to observe signs of impairment.[47] Furthermore, the tribunal heard,

> the evidence also confirmed that individuals can be trained to observe signs of impairment. Studies dealing with police officers were referenced showing that officers were able to assess impairment with an accuracy rate of between 75% and 95%, depending on the number of factors that were observed.[48]

I would suggest these percentages are extremely important in a post-accident situation. Police officers in Ontario (not RCMP members) attend the Ontario Police College and receive specific training with respect to observing signs of impairment in people who are operating a motor

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[43] [2009] OJ No 2037 [*Imperial Oil*].
[44] *Sterling Crane*, *supra* 7 at 61.
[45] *Criminal Code*, *supra* 33 at s. 254(2).
[46] *Sterling Crane*, *supra* 7 at 19.
[47] *Ibid* at 7.
[48] *Ibid* at 26.

vehicle as well as in other situations.[49] I would argue most supervisors in safety-sensitive workplaces do not have the same level knowledge or skill to recognize physical symptoms of impairment to the standard necessary to intrude on a person's rights. Furthermore, police officers deal with people who are under the influence and have consumed alcohol on a daily basis, and often use this knowledge in a proactive manner to prevent further incident from occurring. Whereas supervisors may only become aware there is an employee under the influence once an accident has occurred. Furthermore, because workplace supervisors are not specifically trained to recognize very minute signs of impairment, in addition with their lack of regular contact with the signs and symptoms of impairment, I would suggest they are not qualified to make a determination on reasonable and probable grounds that an employee may be under the influence. Moreover, in *Entrop*, it was a medical opinion that "properly trained supervisors had a 'very high likelihood of being able to detect impairment' on the job. His opinion fails to appreciate that Imperial Oil does not use trained supervisors to detect impairment, but in conjunction with breathalyser testing."[50] I would suggest that this type of testing is exactly the sort the unions are consistently fighting against. A supervisor, who is not trained to recognize the signs and symptoms of impairment, especially drug impairment, cannot in theory then use a breathalyser result in order to back up credence to the legitimacy and need for the test in the first place. It is this sort of circular logic that leads to *HRC* and *Canadian Charter of Rights and Freedoms*[51] violations.

In the end, although I see value in the ability to test workers immediately in a post-accident situation, I do believe there are other routes an employer can undertake. If it is suspected an employee is impaired following a severe accident, I would further suggest the most

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[49] This and all information in this paper related to knowledge obtained by police officers in the course of their education and or training is the author's experience through his career from 2004 – 2008 as a Police Constable with the York Regional Police.
[50] *Entrop*, *supra* 16 at 108.
[51] Part I of the *Constitution Act, 198,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

efficient route to determine if impairment was a root of the accident would be to contact the police.

3. Is there a duty to accommodate a worker with a drug and or alcohol dependency?

In Ontario, there are specific cases that have ruled on how employers are to treat employees who are suffering from alcohol and drug addiction or dependence. However, courts have not yet firmly determined how to deal with drug problems that exist prior to employment with a company. The *HRC* adopts an expansive definition of the term "handicap" from s. 5(1) that encompasses physical, psychological, and mental conditions or disabilities.[52] Severe substance abuse is classified as a form of substance dependence, which has been recognized as a disability.[53] Examples include alcoholism and the abuse of drugs, both over the counter drugs and illicit drugs. The Ontario Human Rights Commission ("Commission") has found that "alcoholism is a handicap within the meaning of the Code [*HRC*], in that it is 'an illness or disease creating physical disability or mental impairment, and interfering with physical, psychological and social functioning.'"[54]

As mentioned above, s. 5(1) of the *HRC* stipulates that employers, except in limited circumstances, cannot discriminate based on disability. Moreover, employers are obligated to accommodate their employee's disabilities except to the degree of causing undue hardship to the company or employer. While no precise definition of "undue hardship" has been given, I would suggest case law has provided guidelines for this interpretation. The effort on behalf of the

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[52] *HRC*, *supra* 4 at s. 5(1).
[53] *Ibid* at s. 1.
[54] *Entrop v. Imperial Oil Ltd.*, [1996] OHRBID No 30 [*Entrop 2*] at 17.

employer to accommodate must be "serious" and "conscientious."[55] The steps taken to accommodate must be "genuine" and demonstrative of the employer's "best efforts."[56]

The duty to accommodate must be a central feature in the workplace.[57] Cases have articulated how much duty is to be imposed on an employer and several principles have been extracted from these cases. *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Montreal (City)* held employers and unions must be sensitive to the various ways in which individual capabilities may be accommodated.[58] *Grismer v British Columbia (A.G.)* stated workplace standards that unintentionally distinguished among employees (i.e. lifting requirements) on a protected human rights ground (i.e. disability) may be struck down or amended.[59]

Currently, *Meiorin* is the most comprehensive decision on the duty to accommodate. It held accommodation measures must be taken to the point of undue hardship, and a strict approach must be taken with respect to exemptions from the duty to accommodate. This case outlines a variety of considerations for employers with respect to employees with disabilities. A list of questions was stipulated for determining whether there is a duty to accommodate:

1. Have alternative approaches been investigated that do not have a discriminatory effect, such as individual testing?

2. If alternative standards have been investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

3. Is it necessary to have all employees meet the single standard for the employer to meet its legitimate purpose? As well, could standards reflective of group or individual differences and capabilities be established?

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[55] *Krznaric v Timmins Police Services Board*, (1997), 98 CLLC 230-004 [*Krznaric*].
[56] *CUPW v Canada Post Corp*, (1997), 6 Lancaster's Equity and Accommodation Reporter 5 (May/June) [*CUPW*]; *Holmes v Attorney-General of Canada*, (1997), 97 CLLC 230-022 [*Holmes*].
[57] Lynk, *supra* 18 at 3.
[58] [2000] 1 SCR 665 [*Quebec*].
[59] [1999] 3 SCR 868 [*Grismer*].

4. Is there a way to do the job that is less discriminatory while still accomplishing the employer's business objectives?

5. Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

6. Have other parties in the workplace – the union and the individual employee seeking accommodation – fully assisted in the search for a solution?[60]

As mentioned above in a previous section, *Meiorin* also postulated a three-step test to determine if the discrimination can be justified as a *bona fide* occupational requirement under human rights law. Although the tests in *Meiorin* are helpful for determining whether discrimination is justified, some of the terms used in the test were not so clear. For example, what is meant by "undue hardship"? *Central Alberta Dairy Pool v Alberta (Human Rights Commission)*[61] held "undue hardship" could be determined by considering a variety of factors including financial cost, impact on a collective agreement, employee morale, interchangeability of the work force and facilities, size of the employer's operations, and safety.[62] A certain degree of hardship is acceptable in accommodation requests, and the employer only has a defense if the inconvenience or hardship was undue.[63] The employer must demonstrate a real and substantial effort was made to accommodate. [64]

If an employee's drug dependency alters his or her performance at work, an employer is obligated to provide the employee with the opportunity to address his or her problem through rehabilitation and abstention programs.[65] However, an employer is not mandated to coerce a worker to attend a rehabilitation program or monitor the employee's progress. The employer's accommodation duty is satisfied when an employer has extended several chances to an employee

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[60] *KVP*, *supra* 6 at 34.
[61] [1990] 2 SCR 489 [*Central Alberta Dairy*].
[62] *Ibid* at 42.
[63] *Central Okanagan School District No. 23 v Renaud*, [1992] 2 SCR 970 at 26 [*Central Okanagan*].
[64] *Ibid*.
[65] *Lynk*, *supra* 18 at 29.

to address his or her drinking even if the employee drops out of the rehabilitation program.[66] If an employer accommodates an employee to the point of undue hardship, particularly if the employee's addiction continues to disrupt productivity and threatens the safety of other workers, an employer is justified in terminating the employment contract.[67]

Furthermore, in terms of disability, when an employee has a disability that requires accommodation, there is a duty on the employee to provide the employer with enough information so the employee may be assisted.[68] In particular, the employee should supply the employer with information from a qualified professional confirming a disability exists and outlining what assistance would be needed for the employment. The letter from the qualified professional does not need to outline the disability in detail, but should just give enough information so the employee can be properly accommodated.[69] It is the responsibility of the employee to make his or her need known, to give the employer information about restrictions or limitations, to discuss with the employer possible accommodation solutions, and to continue to update the employer with regards to the status and success of the accommodation.[70]

It is the employer's responsibility to accept accommodation requests (unless there are valid reasons not to),[71] to get expert opinions where it is required, to facilitate the accommodation process and to take an active role in arranging the accommodation.[72] Any costs associated with

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[66] *Ibid*.
[67] *Kelly*, *supra* 13 at p. 24.
[68] Ontario Human Rights Commission: "Policy and guidelines on disability and the duty to accommodate" (2000) at 19 [*Policy*].
[69] Ontario Human Rights Commission: *Guide to Your Rights and Responsibilities under the Human Rights Code* (2009) at 21 [*Rights*].
[70] *Re GSW Heating Products Ltd*, [1996] OLAA No 106, (1996), 56 LAC (4th) 249 at 5 [*GSW*].

[71] *Toronto (City) Police Service v Kelly*, [2006] OJ No 1758 at 22 [*Kelly 2*].
[72] *GSW*, *supra* 70 at 5.

medical documentation are for the employer to bear.[73] The information provided to the employer must be kept confidential.

The courts have also indicated many employers are bound by a duty to accommodate once it is learned an employee has a substance abuse problem; and where a program does not exist, one should be created.[74] In *Communications, Energy and Paperworkers Union , Local 707 v Suncor Energy Inc.*,[75] the employee had been with the company for almost twenty-seven years[76] and throughout his employment he had suffered through both drug and alcohol abuse. Suncor made available a substance abuse program for its employees, and the policy specifically outlined that Suncor "encouraged employees to seek treatment before their job performance was affected."[77] The employee did not take advantage of the program and as a result, a number of workplace incidents occurred which were directly attributed to his substance abuse problem. He was terminated for this and other incidents directly relating to his addictions. He appealed the decision and the board indicated Suncor had made sufficient efforts to accommodate the employee; the termination was found to be appropriate.

In the end, the duty to accommodate an employee who is suffering from a drug and or alcohol disability appears to be a very fact driven issue with numerous variables that can account for whether an employer has done too little or the accommodation can be seen as to the point of undue hardship.

4. Effectiveness of the drug/alcohol testing methods

In a post-accident scenario where there is reason to believe the accident was caused by drug and or alcohol consumption, the goal of the investigator is simply to prove whether

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[73] *Policy*, *supra* 68 at 19.
[74] *Kelly 2*, *supra* 71 at 22.
[75] [2005] AJ No 871 [*Suncor*].
[76] *Ibid* at 2.
[77] *Ibid* at 13.

consumption of a drug was present, and secondly, to determine if the presence of the drug caused impairment. However, as rights have been more clearly defined through the *HRC* and jurisprudence, and technology has developed alternative testing methods, debate has risen surrounding the various forms. There has been focus on whether new methods of testing can prove impairment as opposed to simply presence of a substance in the worker. Despite the availability of new tests, the traditional test methods including urinalysis to test for the presence of drugs and a breathalyser for alcohol are still the most reliable.[78] I would submit although technology has improved, there is difficulty-proving impairment of drugs other than through visual observations. Additionally, I would also suggest that the traditional means of a breathalyser is the most effective and established test to determine impairment from alcohol.

In a post-accident investigation where it is suspected on reasonable grounds that alcohol has played a role in the accident, the courts have firmly indicated an oral breathalyser test performed by the employer can adequately prove impairment.[79] In an evaluation of a breathalyser, Arbitrator Devlin outlined,

> alcohol testing under the GTAA's drug and alcohol policy involves the use of a calibrated breathalyzer which can accurately detect impairment… [T]he use of a breathalyzer is described as minimally intrusive, and there was no dispute that it provides an immediate result. In other words, it is not a situation in which an employee is tested, returns to work in a safety-sensitive position and the test result is provided at a later date.[80]

Decision makers have universally accepted this view of determining alcohol impairment through a breathalyser as the most effective testing method. For further evidence, one needs not look any further than your local RIDE (Reduce Impaired Driving Everywhere) program. When police officers have grounds to believe a motorist is over the legal limit of 0.08 milligrams of alcohol per 100 milliliters of blood, they can arrest the motorist and demand they submit a breath sample

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[78] *Sterling Crane*, *supra* 7 at 5.
[79] *GTAA*, *supra* 10 at 186.
[80] *Ibid* at 265.

into a Intoxilyzer 5000C.[81] This device will give a numeric reading of the motorist's blood alcohol concentration. As a result of the numeric value, if it is over 0.08, it is considered conclusive that the operator of the motor vehicle was impaired at the time of operation. It should be noted, the numeric value of 0.08 is the *Criminal Code* standard. Employers in safety-sensitive workplaces often have a zero-tolerance or thresholds that are lower than the legal limit.[82]

A second method to test for impairment of alcohol is through a buccal swab. In *Imperial Oil Ltd. v Communications, Energy and Paperworkers Union of Canada, Local 900 (Policy Grievance)*,[83] it was held that,

> oral fluid testing is no more intrusive than taking a breath sample. The Supreme Court of Canada has stated in a different context that a "buccal swab is quick and not terribly intrusive" (*R.* v. *S.A.B.*, [2003] 2 S.C.R. 678, at para. 44)… Oral fluid testing is reliable and minimally intrusive. A positive oral fluid test shows impairment. Although there is a delay in allowing the Company to be informed of a positive test, the company still becomes aware that an employee was impaired while at work and can take measures to prevent a recurrence.[84]

As the court correctly pointed out, although it is minimally invasive, and it will return the same results, a breathalyser is an immediate test without the enhanced risk of contamination and other complications through delay.

Moving forward, methods of testing that determine whether there is impairment through drugs is not as straightforward as alcohol. The traditional method to test for drug impairment is through urinalysis. In *Sterling Crane*,

> all of the witnesses agreed that urinalysis testing of the sort requested by the Responding Party in this case cannot confirm impairment of any individual. Indeed, the evidence suggested that some of the substances tested for, such as marijuana, may stay in one's system for days and even weeks - long after any impairment would have dissipated. The evidence did indicate that any urinalysis test should be conducted within a short period of

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[81] *Criminal Code*, *supra* 33 s. 254(3)(i)(a).
[82] *GTAA*, *supra* 10 at 9-10.
[83] [2006] OLAA No 721 [*Imperial Oil 2*].
[84] *Ibid* at 152-153.

> time after the incident, two to four hours later at most, in order to have any probative value.[85]

Furthermore in *GTAA*, an expert in the field of substance abuse in the workplace[86] outlined that "urinalysis testing cannot establish that an individual was suffering from impairment at the time of testing. Such testing is therefore not probative in and of itself." Although it is extremely difficult if not impossible to prove impairment through chemical tests alone, physical tests akin to tradition field sobriety tests used in policing are effective in determining impairment by drug.[87] A DRE officer is able to determine impairment through a series of physical tests as well as the type of drug the person has consumed.[88] However, it should be noted in order to testify in court as to the qualifications as a DRE, the officer has to qualify as an expert as per the Supreme Court of Canada's holding in *R v Mohan*.[89]

In addition to urinalysis, blood samples have also been used to determine impairment. It has been concluded that a blood test is an accurate measure of one's impairment, particularity with cannabis. In his findings, Dr. Scott MacDonald, an Epidemiologist with a specialization in addiction and substance abuse,[90] outlined "studies involving blood tests, which measure recent use and, therefore, impairment, have found an increased crash risk among drivers who tested positive for cannabis."[91] Although there is a correlation between cannabis and motor vehicle accidents, what a blood test does not conclusively indicate is the level of impairment. Thus, I would suggest, this carries a diminished evidentiary weight when attempting to determine impairment.

A final test for drug impairment is hair follicle testing. Although the procedure to test hair follicles does not appear to be new, it does not appear to be utilized in the field of post-

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[85] *Sterling Crane*, *supra* 7 at 25.
[86] *GTAA*, *supra* 10 at 44.
[87] *R v Jurcevic*, 2010 ONCJ 577, [2010] OJ No 5231 at 14-18 [*Jurcevic*].
[88] *Ibid*.
[89] [1994] 2 SCR 9 [*Mohan*].
[90] *GTAA*, *supra* 10 at 178.
[91] *Ibid* at 181.

accident in a safety-sensitive workplace. In fact, the only relevant case discussing hair samples is *Imperial Oil 2*.[92] In this case, the discussion centres around the legality of obtaining a hair sample from an individual without their consent and not on impairment.[93] Although this type of testing is not being utilized in post-accident workplace investigations, hair follicle testing is being utilized in Family Court to enforce orders. Despite follicle testing not being utilized at the moment, there is an opportunity in the future. The Family Court has commented on the reliability of hair follicle testing in comparison with urinalysis as,

> …hair follicle drug testing witness conceded that, although any drug testing is subject to human error, urine testing is less reliable than hair follicle testing, because of:
>
> 1. the timeliness of the testing; and,
>
> 2. the assessment of the randomness of the testing must be considered as marijuana dissipates in the urine within 3-5 days.[94]

Despite the availability of tests to determine impairment by drug and alcohol, I would submit that the most effective tests are not performed in a laboratory, but performed by a trained expert in the recognition of the signs and symptoms of alcohol and or drug impairment. The courts have recognized "that supervisors may be trained to observe signs of impairment and that a positive test coupled with…observations may result in a reasonable inference of impairment."[95] In addition, and perhaps most conclusively, the court found in *Entrop* that there was no evidence to show any current test available could accurately determine the effects of drugs on an employee.[96] Consequently, if the results could not be accurately determined, the test on the whole could potentially lead to a violation of the *HRC*.

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[92] *Imperial Oil 2*, *supra* 83 at 68.
[93] *Ibid*; *R v Stillman*, [1997] 1 SCR 607 [*Stillman*].
[94] *Children and Family Services for York Region v T.B.*, 2010 ONSC, [2010] OJ No 5501 at 16 [*T.B.*].
[95] *Sterling Crane*, *supra* 7 at 43.
[96] *Entrop*, *supra* 16 at 99.

Conclusion

In any workplace that has been designated as safety-sensitive, there is an overriding theme of safety and accident prevention. In the event where an accident does occur, there are a number of steps that need to be followed to ensure it does not occur again in the future. One of these steps is ensuring the sobriety of the workers on the site. This is done through drug and or alcohol testing when there are reasonable grounds to believe an employee who has been involved in an accident is under the influence of drugs and or alcohol. Although objections can be made as to invasion of privacy, jurisprudence in this area has concluded this sort of testing is within the scope of safety for all parties involved and is necessary in a post-accident investigation.

This paper has examined a number of areas in post-accident drug testing in a safety-sensitive workplace including, first, whether post-accident testing violates the *HRC*; second, what are reasonable and probable grounds in a post-accident situation; third, whether there is a duty to accommodate a worker with a drug and or alcohol disability; and fourth, an examination of the various methods used to determine intoxication in a post-accident scenario. I would submit the following conclusions could be made. First, drug and or alcohol testing in a post-accident, safety-sensitive workplace is not a violation of the *HRC* so long as the principles of cases such as *Meiorin* and *KVP* are followed. Second, I would submit reasonable and probable grounds following an accident amount to actual physical indicators, and do not apply to testing as a means of ruling out impairment. Although an accident free workplace is an utmost priority in all safety-sensitive industries, jurisprudence, the *HRC*, and *Canadian Human Rights Act*[97] have all indicated an individual's fundamental rights trump mere suspicion.[98] Third, if it is presented that an employee has a drug and or alcohol problem that qualifies as a disability by the *HRC*, an employer must accommodate the employee. However, it should be noted although there is an onus of accommodation placed on the employer, this only extends to such an extent where it

[97] RSC 1985, c H-6 [*HRA*].
[98] *GTAA*, *supra* 10 at 115.

would otherwise be considered unduly hard. Should it exceed this level, the employer may terminate the employment contract.[99] Fourth, I would submit the most effective methods for determining current impairment in post-accident investigation for alcohol is either a visual test performed by a trained individual or a breathalyser. However, the ability to test for drug impairment is more complicated. Many of the current methods, including urinalysis, swabs, hair follicle samples, and blood can only detect the presence and level of a drug in a person's system, and cannot conclusively determine impairment. It should also be pointed out that medical professionals have indicated there is a strong correlation between higher levels of a drug in the body and higher levels of impairment.[100] However, the only conclusively proven method to determine impairment by drug in a person is through a series of physical tests and measurements.

In the end, despite the various arguments on either side, the very least a worker can ask of his employer is to prove a safe workplace, and I would suggest the overwhelming consensus is that drug testing in the workplace is an appropriate method to enhance safety of the public and workers.

[99] *Suncor*, *supra* 75 at 115.
[100] *GTAA*, *supra* 10 at 281.