

August 27, 2018

Workplace Impairment Consultation
Ministry of Labour Relations and Workplace Safety
300 – 1870 Albert Street
Regina, Saskatchewan S4P 4W1

By Email: labourlegislationLRWS@gov.sk.ca

Re: Consultation on Impairment in the Workplace

The Canadian Federation of Independent Business, Construction Labour Relations Association of Saskatchewan Inc., Merit Contractors Association, NSBA, Saskatchewan Construction Association, Saskatchewan Heavy Construction Association, Saskatchewan Hotel and Hospitality Association, and the Saskatchewan Trucking Association write collectively to provide input to the Government of Saskatchewan on possible changes to Part III (Occupational Health and Safety) of *The Saskatchewan Employment Act* (the “Act”) and/or *The Occupational Health and Safety Regulations, 1996* (the “Regulations”) to address impairment in the workplace.

We agree there are numerous ways to address safety issues related to substance use and impairment in workplaces. The government’s discussion paper provided legislative and non-legislative options for stakeholders to consider. We strongly believe the government ought to avoid amendments to the Act, and instead consider amendments to the Regulations and develop additional tools and resources to help employers and employees maintain a safe workplace.

The undersigned represent the interests of tens of thousands of businesses in Saskatchewan, ranging in size from sole proprietors to large, national companies and representing a wide range of sectors. The direct impact of cannabis legalization on the workplace may vary among our members, but maintaining a safe and productive work environment is a uniformly held concern.

Over the past year or so, each of the undersigned associations have received both formal and informal feedback from our individual members, and overwhelmingly we have heard that the employers we represent want to ensure they have the legal right to manage safety risks in the work environment, as well as the tools and guidance to help them and their employees meet their health and safety responsibilities with regard to workplace impairment. Although this issue is broader than considerations around legal cannabis’ impact on the workplace, the approaching legalization has certainly acted as the impetus for the overall discussion.

We are aware that Part III (Occupational Health and Safety) of the Act places positive duties and obligations on both employers¹ and workers. However, the duties placed on workers are far less onerous than those placed on employers. Recognizing that employers hold the ultimate responsibility for the safety of employees during working hours both on the job site and when operating in public and private locations, we submit that the government ought to consider ways in which workers’ responsibilities for safety can be enhanced and made clearer. For example, we have heard concerns that while workers are required by common law to disclose when they have

¹ While we use the broader term “employer” throughout, its use in this submission is meant to also include reference to supervisors, contractors, prime contractors, owners and suppliers.

consumed impairing substances, there are currently no consequences for workers who fail to disclose when they consume substances (medicinal or otherwise) that may or do cause impairment.

We also recognize that in any discussion about workplace impairment and the duty to ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's workers, that a balance must be struck between the employer's obligation to ensure safety and the worker's privacy and human rights. However, the "balance" must also look to the potential consequences of a worker's unsafe work practices. We appreciate and agree with Alberta Court of Appeal Justice Côté's comments on this balance, which were provided in dissent in *Communications, Energy and Paperworkers Union, Local 707 v. Suncor Energy Inc.*²:

[14] Killing or maiming people in a big accident, or a number of smaller accidents, is a uniquely weighty danger. The legal term "convenience" or "inconvenience" scarcely suffices. The big issue here is the "balance of convenience". Very full detailed and overwhelming evidence here shows the dangers of accidents, and of the danger of drinking or drugs among workers. Privately giving a urine sample to be tested for alcohol or drugs does not begin to equal death or dismemberment, or widowhood or becoming orphaned, by an accident. People routinely go to labs to give their physicians urine samples, and for a far broader set of tests. If the chambers judge did not see comparing death or maiming with that as the pivotal issue, that was error of law. And if it was seen, the contrary view is unreasonable, in my respectful view.

...

[16] The physical dangers would be bad enough if those facing the perils of accidents were all Suncor employees and members of the respondent union. But they are not; those people work alongside thousands of other workers. Any accident, ranging from a truck backing up to a huge explosion, is likely to kill or injure others. Maybe even to kill or hurt members of the public not employed at the plant in question. Those others have no say in this litigation...

In providing this submission, our purpose is to make clear to the government that the above quote from Justice Côté captures our members' concerns from a variety of sectors across the province. Employers require a level of flexibility to ensure the proper management of a safe workplace. The duties imposed on employers to establish and maintain a safe workplace are high; it is imperative that employers be provided the tools and resources (e.g. required amendments to regulations) to ensure that they are able to fulfill that duty, without the threat of facing prohibitively costly litigation. To be clear, our members are not seeking to avoid their obligation to provide a safe workplace. Indeed, they are seeking the necessary flexibility and authority to implement and maintain a safe workplace.

To that end, we believe the government ought to avoid legislative amendments to the Act, and instead consider amendments to the Regulations. It would be beneficial for the Regulations to reflect certain common law developments that are not otherwise found in legislation. For example, the general duties of a worker listed at section 13 of the Regulations ought to include a worker's obligation to disclose impairment or the ingestion of impairing substances to his or her employer. We also urge the government to consider formalizing within the Regulations those instances where the common law provides employers with the authority to perform drug and alcohol testing, namely:

1. Where the employer has reasonable cause to believe the worker is impaired;

² [2012] ABCA 373

2. Where the worker has been involved in an incident or near-miss; and
3. Where the worker is returning to work after treatment for substance abuse.

We welcome the opportunity to provide the government our members' views on this important issue. We therefore strongly encourage the government to consider non-legislative ways in which employers may be supported in their efforts to ensure a safe worksite, and to guard against impairment in the workplace. Our coalition of employer groups stands ready to consult with the government on potential options at your earliest convenience.

Should the government seek to amend the Regulations, we encourage consideration of ways in which employers may be supported in their efforts to maintain a safe worksite. Any proposed additions or amendments to the Regulations ought to be publicly released for consideration and feedback. Although cannabis legalization is approaching, there is value in taking the necessary time to find appropriate, long term solutions, and not being held to an artificial due date. We believe this current engagement with industry should be the beginning of the ongoing conversation, not the end.

Sincerely,



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