The Health & Safety issue

With stories on the likely impacts of marijuana on construction sites, a new safety-management app, seven truths site supers need to know—and much more. All this, plus a tribute to GVCA’s Building Excellence Award winners!
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**MESSAGE FROM THE CHAIR**

**Be There for Your People**

As business owners, we recognize the importance of our employees feeling safe, respected and heard. The open-door policy that I am sure most of you have has never been more important.

We are legislated to make sure we have a violence and harassment policy in place, and to ensure that our staff are trained to work safe and adhere to our company health and safety policies. We are aware of the physical stresses of the work our people perform, and we train, talk about, and in most cases identify, how to handle these things.

But what about the other stresses your employees are under? The pressures of looking after young children or aging parents? Their relationships with their partners? The financial and social pressures they face? All of these can have an impact on how your employees function, which can impact your bottom line.

You as an owner have the opportunity to be there for your employees. Support them. Watch for signs of stress. Listen to them, and reinforce the value they bring to the organization. People go where they are wanted and feel safe, valued and appreciated. You have the power to make a difference. Take the time to find out what is going on. It will pay dividends in the end.

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**MESSAGE FROM THE PRESIDENT**

**Communications Pitfalls**

We’ve all miscommunicated a message at least once. Communication has taken on a weird role now that it’s all written down—all the time. That email you sent a few minutes ago that sounded perfectly fine to you? The person who just read it thought it was sarcastic and condescending. And now, instead of solving a problem, you’ve made matters worse. Bet your bottom dollar there’s an email coming back to you right now that says, DON’T TYPE TO ME LIKE THAT!

It sounds obvious to say, but it’s worth repeating: any time you’re about to send a note to someone—even if it’s just a quick thing—take a second to read it over before you send. Ask yourself, would I be happy to get this note? Does it meet the goal I’m trying to achieve? Am I being clear, honest and transparent? Most of all, could someone misinterpret my words as being offensive in any way? Harassment, after all, is in the eye of the beholder—and emails last forever.

If you’re not sure about how to handle a delicate situation, here’s my advice. Don’t try to solve it over email. Pick up the phone and call someone. Better yet, sit down with them and talk. Remember when we used to do that? It seemed to work pretty well.

Watch for a series of communications-education seminars that GVCA will launch this year. Our instructors will help you focus on not just what you do or don’t say in your communications, but also your body language, which says more than words ever can. Stay tuned.

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Steve Stacho, GSC

Martha George, GSC
New Saugeen Shores Police Services Headquarters

Project details
The New Saugeen Shores Police Services Headquarters will be located on the east side of MacKenzie Drive, north of Wellington Street and south of Concession 10 in Port Elgin. The project includes the following components:
- administrative offices and meeting rooms,
- secure storage areas,
- officer change rooms and locker areas,
- washrooms and shower areas,
- jail cells, and sally ports,
- new entry circulation roads,
- approximately 45 public and secure parking spaces,
- hard and soft landscape areas, and
- IT infrastructure and security systems.

The 15,000-square-foot building—with an estimated $5-million price tag—will be designed by G.M. Diemert Architect Inc. following a decision by Saugeen Shores councilors on November 12, 2017 to award the $290,000-design contract. The firm will also provide oversight to the construction process.

Tendering will occur in May and June. Construction starts in the summer, and occupancy is expected in fall 2019.

Project details
Prequalification for prospective mechanical and electrical sub-contractors closed on April 20. The project’s scope of work includes plumbing, in-floor heating, boilers, hot-water re-heat, VVT and VAV with roof mounted HVAC units, low and line voltage electrical work, an emergency power generator, and lighting, security and electronic door hardware.

As of April 16, the town was checking references of some of the applications from general contractors. Results will be posted at GVCA.
The Due Diligence Defence and Charges under the OHSA

Offences under the Occupational Health and Safety Act (OHSA) are typically known as “strict liability offences”. This means that if an employer is charged with such an offence, the Crown need only prove that a workplace injury or accident took place due to a prohibited act or omission. The Crown must prove its case beyond a reasonable doubt. The onus then shifts to the employer to establish, on a balance of probabilities, that it took all reasonable care in the circumstances to prevent similar accidents or injuries from happening. This is known as a due-diligence defence. A balance of probabilities standard requires a defendant to prove something is more likely than not. This shifting of the onus of proof has been upheld by Canadian courts including the Supreme Court of Canada in the leading case of R v Sault Ste. Marie (City).

The due diligence burden coincides with section 25(2)(h) of the OHSA which states “…an employer shall…take every precaution reasonable in the circumstances for the protection of a worker.” Some read this provision and believe it requires an employer to provide the safest workplace possible. However, the Ontario Superior Court of Justice in R v Canada Brick Ltd., indicated that section 25(2)(h) of the OHSA simply
requires maintaining the minimally prescribed standards which seek to prevent accidents or injuries on account of employee oversight. Employers should be mindful that the OHSA is remedial legislation intended to protect workers. This fact may influence a Court’s interpretation of whether an employer took all reasonable care in the circumstances to prevent an accident.

What is important when considering the defence of due diligence is the actions of employers before accidents or injuries. Corrective steps taken after an accident will not assist in establishing a due-diligence defence. If employers hope to successfully utilize the defence when an accident or injury occurs in the workplace, they should:

• ensure written occupational health and safety policies, practices and procedures are in place,
• ensure workplace occupational health and safety policies, practices and procedures are reviewed,
• implement a plan to identify workplace hazards,
• ensure appropriate workplace safety training is provided to all employees and keep a record of such,
• ensure a program to monitor the workplace to confirm compliance of workplace safety policies, practices and procedures is implemented, and
• ensure a documented procedure for accident or injury reporting and investigation is implemented.

This article was written by Greg Murdoch, a partner at Sorbara, Schumacher, McCann LLP who provides guidance to clients through all stages of the construction process. He can be reached at gmurdoch@sorbaralaw.com or 519-741-8010
Everyone in construction has heard of the changes that WSIB has proposed to make to its rate framework. Although we did see decreases in some construction WSIB rate groups during 2017, there is still much confusion and uncertainty over what the future holds for WSIB premiums.

The consultation period for input into the new rate framework closed in January 2018, and the new rate framework is set to roll out in January 2020.

MAIN ISSUES TO DATE

Two main issues related to the new rate framework have arisen to date:

1. Changes to the historical multi-rate group, and
2. Removal of rate group 755 for non-exempt partners and executive officers.

MULTIPLE PREMIUM RATES

In the past, your company may have paid premiums under multiple WSIB rate groups for different work being performed by staff. The benefit to that was being able to access a lower rate group for at least some insurable earnings, thereby reducing your company’s overall WSIB burden. Under the new rate framework, the ability to qualify for more than one rate group is severely restricted.

In order to access multiple rate groups under the new rate framework:

- The business activity under the separate rate group must be significant (i.e., 25 percent or more of the total insurable earnings and generate annual insurable earnings of at
Rate group 755 was the class for individuals who were partners or executive officers of a construction company who did not perform any construction work and elected to be exempt. For companies with high-salary executives who never went to construction sites, this group greatly reduced WSIB premiums.

If your company used this rate group, you likely have received a letter from WSIB stating that the rate group no longer exists with the implementation of the new framework. This means those salaries will fall under your predominant rate group starting in 2020. WSIB has not yet come up with a solution for this problem. The letter companies are receiving states the executives may qualify for a separate rate group, however for that to be the case the conditions discussed previously must be met.

Together these two changes could have a significant impact on the WSIB burden faced by a construction company. When added with other increasing business costs, such as the increase in minimum wage, the results could be devastating for small businesses. Of course there is a chance the changes will reduce your company’s WSIB burden—should your predominant rate group be lower than if you were using multiple rates, for example.

In order to assess the impact of the WSIB changes, it is important for companies to plan ahead and consider what their predominant rate groups will be.

This article was written by Kimberly Aitken, CPA, CA, Co-Leader of RLB LLP’s Construction Team. Contact her at 519-822-9933 or visit rlb.ca.
IHSA Safety Talk Electric Tools

Drills

If you have to push a tool beyond its capacity, you can burn out the motor and injure yourself. Leaning into a drill and pushing too hard is dangerous. If you lose balance or control, you can fall or strain your neck, arm, and shoulder muscles.

Identify controls
(Have sample drills available to demonstrate.)
You need a drill powerful enough for the job. And you need a bit that is sharp and suited to the job.

Follow these safe work practices when using drills.

• Heavy-duty drills or hammer drills have a low rpm and high horsepower rating. Take a break when you have to, especially when you’re up on a ladder or scaffold. You may even need help with some kinds of drilling.
• Check your balance and grip. Sudden torque can twist your arm and throw you off balance.
• When drilling deep holes, occasionally withdraw. This clears cuttings from the hole.
• When you’re drilling on loose material, securing the work is half the battle.
• Hands off. Don’t hold the work in your hand, on your knee, or against your boot while you’re drilling. Clamp small pieces in a vice.
• When you’re drilling, don’t push or lean too hard on the drill. You can damage the tool or the work, or be thrown off balance if the drill twists and grabs.
• Punching a layout hole or drilling a pilot hole can make your work more accurate, efficient, and safe.

Demonstrate
Review types of drilling done by your crew. Inspect sample drills and bits used on the job.

Editor’s note: This Safety Talk was published by the Infrastructure Health and Safety Association and appears in its original form on ihsa.ca.
As of September 1, all hazardous products sold or imported into Canada and intended for storage, handling or use in a Canadian workplace must be compliant with WHMIS 2015. Each federal, provincial and territorial jurisdiction has agreed to target a final deadline of December 1 for transition to WHMIS 2015. Created by the Canadian Centre for Occupational Health and Safety, this infographic outlines your responsibilities and duties as an employer, including worker education and training, and tips to help you make the transition to the new system.

For more information, see www.cchos.ca.
GVCA SIGHTINGS

Jeff Haid, Tri-Con Haid Concrete Finishing: Four time Gold Trowel Award winner

Trigon Construction: first place in United Way Dodge Ball tournament

Paulsan Construction: Pink Shirt Day

Paul Seibel: CCA Community Leader Award

BNE Contractors: 2,000 lbs of food for Food Bank

CCA Association of the Year Award

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MOL ANNOUNCES
Workplace Inspection Blitzes for 2018–19

Don’t be surprised if the Ministry of Labour drops by your worksite for an unscheduled visit this summer. In April, the government announced its provincial and regional blitz and inspection schedules for the year ahead.

Here’s what you can expect:

**Provincial blitzes**

**Working at heights – fall protection training**
- Phase 1: compliance support and prevention education (MOL and IHSA), May 1–31
- Phase 2: enforcement campaign (MOL only), June 1–30

**Reversing equipment on construction projects**
- Phase 1: compliance support and prevention education (inspected by MOL and IHSA), September 1–30
- Phase 2: enforcement campaign (MOL only), October 1–31

**Employment standards**
- Including minimum wage, hours of work, overtime pay, public holidays and paid vacation, May 1–August 31

**Provincial initiatives**

**Internal responsibility system**
- June 1, 2018–March 31, 2019

**Regional initiatives (Central West)**

**Road construction projects**
- What to look for in traffic control and traffic protection plans, May 1–31

**Temporary labour agencies initiative**
- Worker training and hazard exposure, June 1, 2018–March 31, 2019

**Regional initiatives (West)**

**Temporary and foreign workers**
- Phase 2: MOL enforcement campaign, June 1, 2018–March 31, 2019.

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Annamaria Bartolomucci wants to make safety simpler. That’s why she founded Site Safety Solutions in 2017 and created Rebar—software that combines project management, digital storage and safety checks specifically for contractors. Rebar uses automation, data-management tools and cloud-based technologies to help construction owners manage site responsibilities, store compliance data and reduce worksite injury risks.

Rebar helps construction owners manage multiple large-scale sites online. Site supervisors use the digital interface to delegate work. When a task is finished, teams check off the work, and the app instructs them to move to the next step. The cloud-based software updates their progress on all platforms. Contractors can check project developments digitally.

Project management might not impact worker safety in obvious ways. For example, wouldn’t it make more sense to support worker wellbeing with a compliance-specific app? Not necessary. Rebar uses project management to make health and safety compliance more manageable. It gives businesses tools to hammer out all the details before they can safely and confidently hammer onsite.

The app requests and compiles everything—from permits to worker information, licensing and certificates—into folders that contractors can access from their smartphones. If compliance legislation changes, and it often does, Rebar will notify teams with updated requirements.

Rebar also lets construction workers advocate for their own safety measures. Workers who notice a jobsite hazard—say, a wet board or a loose nail—can report the finding in Rebar. The app will then send notifications to the site supervisor until the issue is resolved.

“With Rebar,” says Bartolomucci, “no finding will be left open.”

Bartolomucci knows firsthand how unnecessary and painful workplace injury is. She lost her father to a workplace-related injury that could have been avoided. Now she wants to make safety compliance as easy as possible. Her app breaks down complicated regulations and compliance procedures into achievable steps. “It has to be easy and accessible,” she says, “otherwise no one will use it.” With Rebar, Bartolomucci hopes no construction business will put safety second.

If you’re interested in test driving Rebar for your business, visit sitesafetysolutions.ca and request a free 30-day trial.
Meet Ontario’s New CPO

The Ontario government announced its new Chief Prevention Officer on March 7. Ron Kelusky replaces George Gritziotis as the province’s top safety official.

Ron Kelusky is the former president and CEO of Public Services Health and Safety Association (PSHSA). PSHSA provides health and safety services and advice to more than 10,000 firms and 1.67 million workers across Ontario’s public, not-for-profit and private sectors in health and community care, education and culture, municipal and provincial government, public safety and emergency services, and First Nations communities.

Kelusky also worked with the Canadian Red Cross, as Director General and the National Executive Lead for Health Programs. During his tenure, he was involved with the international response to the 2010 earthquake in Haiti and was the principle lead, involving the merger of two community health organizations resulting in the creation of a $200-million operation responsible for delivering homecare services in all 14 health networks across Ontario.

“Ron Kelusky’s experience in the public, private and not-for-profit sectors makes him an outstanding choice as the Chief Prevention Officer,” said Labour Minister Kevin Flynn. “His ability to build and maintain strong relationships with stakeholders, as well as his passion for worker health and safety, is well known throughout the health and safety sector. I am confident that he will lead us to healthier and safer workplaces, which will benefit people across the province.”

While Kelusky counts significant experience in some areas, he doesn’t have a long history of work with construction and other high-hazard sectors. Ian Cunningham, president of the Council of Ontario Construction Associations noted as much when he attended Kelusky’s introduction ceremony on March 6.

“I’m very confident that he will be highly competent serving as the CPO,” Cunningham told the Daily Commercial News. “However, it would appear that he has had limited exposure to the high-risk sectors, the sectors that employ vulnerable workers and the sectors that are comprised largely of small businesses.”

“The construction industry looks forward to working with him to provide him with an orientation, information, education, ideas and solutions to help him do his job to the best of his abilities.”

Kelusky officially replaced George Gritziotis as CPO on March 12.

“George did terrific job, coming in as our first CPO, essentially defining the job,” said Flynn. “George was able to bring the health and safety file to a certain position but there was a feeling shared by George, not because of George, that we had plateaued, getting us to this acceptable level, but we couldn’t go much further than that. We weren’t going to go much further doing the same things.”
Prevention Office: Successes since 2011

The Chief Prevention Officer oversees the Prevention Office within the Ministry of Labour, and has a wide range of responsibilities. It works with Ontario’s health and safety system partners to prevent workplace injuries, illnesses and fatalities, reports to the Minister of Labour on the performance of Ontario’s occupational health and safety system, sets province-wide training and safety programs standards, and creates the province’s occupational health and safety strategy.

Since it was created, the Prevention Office has realized several important successes. It:

• developed Ontario’s first Integrated Occupational Health and Safety Strategy
• released annual reports on Ontario’s occupational health and safety system
• implemented a regulation on mandatory health and safety awareness training
• developed a Construction Health and Safety Action Plan, which was one of the most substantial action plans undertaken to date to prevent deaths, injuries and illnesses, and was developed in close partnership with labour and employer representatives from the construction industry
• delivered regulation on Working at Heights Training: as of February 2018, over 476,000 workers had received this training, and more than 200 organizations are approved to provide this critical training
• implemented new joint health and safety committee certification training standards, which formalized the Part 2 hazard training and requires refresher training every three years
• elevated attention and focus on occupational disease, including the development of a comprehensive approach to respond to ongoing and emerging cases of occupational disease in Ontario workplaces
• hosted two annual summits on mental health/post-traumatic stress disorder and developed a number of supports for businesses, including ThinkMentalHealth.ca

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Lead by example, give people tools to succeed, and show people their worth. Author Kevin Burns gives seven tips safety professionals and site supervisors can put in place to make their workplaces better.

How can construction site supervisors and safety professionals be more effective in their jobs? How can they motivate employees to care about safety and about their work more broadly?

Safety consultant and speaker Kevin Burns recently published an ebook, *Seven Truths Supervisors & Safety People Need to Know*, in which he lists a series of actions these people can take to help their teams and themselves perform better in the workplace and on the jobsite.

The first truth is that, “people who don’t care about the job won’t care about safety.” Burns argues that people who don’t care about the work they’re doing certainly won’t care about doing their work safely. They are disconnected in the sense that they will follow rules and procedures to the extent that they must—so that they don’t get injured themselves, or fired—but they don’t buy into the overall concept of workplace safety. Nor will they care about the wellbeing of others.

Burns’ advice is to supervisors and safety people to lead by example. Show crew members that you care about them—just as a good coach cares about the performance or his or her players, and the worth of that performance to the team as a whole.

“People will care about safety when they know how much you care about them. If you don’t care about your employees, they won’t care about you (or at least they may care less) or the work. When employees are valued by supervisors, by their employers, and by their peers, they start to care about what they do and how they do it. That’s when employees will start to care about safety.”

The second truth, “you work for them; they don’t work for you.” Burns argues that this is a new paradigm in the safety world. Supervisors and safety managers should not be of the opinion that their
role is to tell workers what to do, but rather to arm them with skills and training they need to perform their best on every task, every day. In this sense, he says, the safety officer is like a manager of a baseball team. The manager doesn’t hit pitches or catch balls. The manager trains the players to be their best so they can perform optimally.

“Ask yourself each morning: what can I do for my team that puts them in a position to win today? Then do it.”

Truth three, Burns argues, is that employees value six things more than money. His claim is based on the results of a survey by TINYpulse, an employee engagement and performance company. The group analyzed 200,000 responses from 500 organizations worldwide, asking what people wanted most from their jobs. The findings showed that money scored seventh. Things like camaraderie, recognition, professional growth and having a real impact all scored higher than the size of the cheque they took home every second week.

Supervisors have a significant role to play in meeting employees’ six more highly rated priorities. They can help workers fit in on the job site, they can offer training to help workers improve their skills, they can create cultures where good work is recognized and appreciated, they can empower employees to mentor one another, and they can give people more responsibilities as these are merited.

“Employees want you to be more than competent” is Burns’ fourth truth. In it, he invokes the situation of the incompetent boss who does everything to give the impression that he or she is anything but. And he reminds readers that site supervisors and safety managers are all too often in similar situations. They got promoted to where they are today because no one else was willing or available to take on the challenge.

“To be given a position without skills and tools is a recipe for disaster,” Burns says. “Many supervisors fail because they’re not given any support or any training from their own bosses. The same philosophy of care and attention applied to safety, is often not applied to supervisory training.”

The term “safety management”, he says, is made up of two components: safety and management. They are not separate notions. Passing a safety course does not guarantee people the skills to be a great supervisor or safety officer. They need basic supervisory skills to understand how best to work with people—and it’s up to them to develop those skills properly. Supervisors without such skills, says Burns, are as dangerous as employees who operate heavy machines without training.

Burns’ fifth truth is that, “employees want to feel like it matters.” He argues that no one wants to go to work every day feeling like their work means nothing. Supervisors, he says, are in the ideal position to communicate meaning to employees. They can help workers feel a sense of belonging to the team, and help them understand that their work is contributing to a greater cause. It’s true that this cause may not be saving whales or cleaning the planet, but it’s nonetheless significant when it comes to doing everything you can to protect the life of another worker.

“Safety is the one thing that everyone at work can agree on: no one wants...
The sixth truth, “safety is how you show people that they are valued,” calls attention to the role supervisors and safety people play in building and sustaining corporate culture. These are the people who manage employees on the front line—where the greatest activity happens and the greatest risks are taken. Burns argues that employees work better for supervisors who respect and care about their people.

“The simple act of valuing people, and doing your best to bring out their best, will make yours a better place to come together each day. And it is these actions and interactions by supervisors and safety people that create company culture.”

Burns’ final truth is that employees want a reason to respect their supervisors. He asks supervisors to consider their own qualifications for their jobs—just as they would ask new workers what skills they have. Make lists of skills that can be transferred to the supervisory role, and be honest about strengths and weaknesses.

“A good crew wants to be able to look up to their supervisor. They want to feel confident that the supervisor has some skills that can help the team. Employees want to have a reason to like and respect their supervisor. You don’t have to be the most experienced, but you have to be trying to improve. Employees will always respect a supervisor who admits that they have gaps but they are doing something to improve; to fill in the gaps.”

For more information, or to read the report, visit www.kevburns.com.
Clearing the haze on the
legalization of recreational
marijuana and employer risk

Editor’s note: This article was written by Norm Keith, LL.M., CRSP, Partner at Fasken and originally appeared in the spring/summer 2018 edition of the Ontario General Contractors Association’s The Generals magazine.

OGCA members need a clear understanding the legal risk they face with likely increased use of marijuana in Canada in 2018. The pending legalization of recreational cannabis in July 2018 may put the safety of workers in the general contracting industry at risk.

There have already been many workers injured because another worker was under the influence of alcohol or drugs at work. With the legalization of recreational cannabis, social acceptance and use will likely grow. This change in public policy will also put employers at risk, if they do not manage the increased workplace hazards associated with impairment by cannabis and hashish. The recent increase of fines under the Occupational Health & Safety Act (OHSA)—by 300 percent for employers and 400 percent for managers and supervisors—makes this issue more critical than ever to address. This article will briefly review the law with respect to employers’ duties and responsibilities to respond to the greater social acceptance and legalization of recreational cannabis.

The Trudeau Liberals campaigned on the promise of legalizing cannabis for recreational use in the 2015 election. This policy was apparently a big vote-getter, especially among young, first-time voters. Young voter turnout was higher than ever, according to Elections Canada data, in the 2015 election. Some experts have suggested that the legalization of cannabis helped give the Liberal government a majority in the House of Commons.

This year, the federal government, through the Cannabis Act 2017, will formally legalize the drug for recreational use in Canada; the first G20 country to do so. This change comes with some risk for employers who have a high legal duty to provide a safe workplace for workers. U.S. states where recreational marijuana has been legalized, have seen increases in motor vehicle accidents, injuries and fatalities. In the U.S., employers are lawfully permitted to conduct random drug testing. With increased social acceptance and use, especially among young workers, will come increased risk of workers attending their jobs under the influence of marijuana and other drugs, resulting in greater risk of workplace accidents, injuries and death.

Governments have largely ignored the risk of impairment of workers in the construction industry by cannabis and other drugs. The federal and provincial governments have not provided employers, workers and other stakeholders with a legislative framework to deal with the heightened safety risk associated with the legalization of recreational marijuana. The lobbying efforts of the OGCA and other employers’ associations, both federally and provincially, have fallen on deaf ears. Without a baseline legislative framework that would place some responsibility on workers and unions to ensure workers do not show up for work under the influence of marijuana, which may stay in the system causing impairment for up to two days, employers are left on their own to sort out this trendy new social policy.
Currently, there is no prohibition under the OHSA for a worker to attend work unfit for work, due to the use of cannabis or other drugs. The federal and provincial governments essentially left it to employers, unions and the courts to deal with this heightened workplace risk. With the U.S. experience confirming that there will likely be greater use, misuse and accidents as a result of the legalization of recreational marijuana, and the Ministry of Labour blaming employers when an accident happens due to worker impairment, you would think that appropriate legislative tools would include random testing for substances that impair workers from being fit for work.

One well known example of the seriousness of the legal risk for employers when workers show up for work in a dangerous workplace, under the influence of cannabis or other drugs, was the terrible tragedy of the Metron Construction case. In that case, where four workers died when scaffold platforms failed on Christmas Eve, 2009, the corporation was charged with criminal negligence causing death; several individuals were also charged. However, the foreman and two workers were under the influence of marijuana when they chose not to use safety equipment that was provided by the employer and was at the worksite.

The Court of Appeal for Ontario, in that case, doubled down on the “blame the employer” mantra and increased the monetary penalty for the corporation from $200,000 to $750,000, citing the “failure of the employer to prevent the workers from using drugs at the workplace.” This was the same Court of Appeal, decades earlier in the Entrop case, that started a line of Canadian cases that employers cannot generally randomly test for alcohol or drug testing to deter workers from using cannabis or other substances in the workplace that could adversely affect their performance and the safety compliance in the workplace.

This line of random alcohol and drug testing cases culminated with the Irving case which overturned the New Brunswick Court of Appeal’s decision allowing random alcohol testing for workers in safety sensitive positions in a dangerous workplace: a pulp and paper mill. Although the Supreme Court permitted “reasonable cause” and “post-incident” testing, it overturned the appeal court decision and prohibited random alcohol and drug testing, even though there was a clear criminal standard for impairment for any person driving a motor vehicle that had a blood alcohol content of 0.08 milligrams per 100 milligrams. In short, with politicians and policy makers avoiding the safety implications of legalizing cannabis, and the courts to date having rejected random alcohol or drug testing to act as a deterrent, employers are in a very awkward legal position with the pending legalization of recreational marijuana.

A lower court decision involving an attempt by the Amalgamated Transit Union to obtain an injunction against the Toronto Transit Commission to prevent random alcohol and drug testing, was rendered by a well respected trial judge, Mr. Justice Frank Morocco. His Honour held that the public, as well as worker, interests in having TTC transit employees sober and fit for work, outweighed the potential contraventions of privacy and dignity rights of the unionized workers for the TTC. However, the public safety, rather than worker safety, argument carried the day. Is the public really more important than workers in the court’s view?

In a rare case that was a breath of fresh air in the haze of workplace drug use cases, the Supreme Court in Elk Valley Coal upheld the termination of a worker who caused an accident in a dangerous workplace and then tested positive for cocaine use. The union’s claim to the Alberta Human Rights Tribunal that he should get his job back because he was a drug addict in denial, was rejected by a majority of the Court. The need for workers to cooperate with management in admitting they have a substance abuse problem was a key fact in the court’s decision. The law remains hazy and unclear on whether random testing is legal, and if so, when. The failure of political leadership in Canada is a stark contrast to the
United States, Europe and other jurisdictions where substance abuse in the workplace is prevented by random testing.

What can and should employers in the general contracting industry in Ontario do in advance of the legalization of recreational marijuana? The following five steps may be considered by employers in the general contracting industry, both to protect workers and to reduce legal risk:

1. Establish a Fitness for Duty Policy that prohibits workers from attending at work under the influence of marijuana and other drugs.
2. Arrange a third-party provider for substance abuse testing based on “reasonable cause” and “significant incident” criteria.
3. Provide comprehensive training to all workers on the Fitness for Duty Policy.
4. Encourage self-reporting by workers who have substance abuse dependencies/addiction problems, and direct them to union-supported employee assistance programs.
5. Exercise appropriate discipline, up to and including discharge, for workers who violate the Fitness for Duty Policy.

The development of a Fitness for Duty Policy was one of the aspects of the successful TTC decision. The Court thought it was fair for the TTC to focus on the legal obligation of workers to present themselves fit for work, and without the influence of substances, that may compromise their safety as well as workers and members of the public. Further, even in an age of changing values, legalization of recreational marijuana, and greater social acceptance, employers have been left to lead when establishing a culture of safety and sobriety at work. The obvious failure of governments to address the issue, and prohibit workers from attending work under the influence of marijuana or other substances that could impair them, put their safety at risk, as well as cause accidents, injuries and death, is nothing short of reckless and appalling. However, employers need to be aware that the same government will still hold general contractors and other employers legally responsible if a stoned worker hurts himself or another worker or a member of the public under the OHSA.

The author is working with a number of construction associations to develop a Fitness for Duty Policy that will be industry specific, tailored to the needs of general contractors, and provide a rollout program to “train the trainer” before the legalization of recreational marijuana takes place in July 2018.

These new, looming realities for employers and management must be taken seriously. The need for an effective health and safety management system is more important than ever to both prevent accidents, but also to be able to establish a due diligence defence.

For more information on how to assess the current quality of your organization’s health and safety program or to deal with a Ministry of Labour investigation, feel free to contact Norm Keith at 416-868-7824 or nkeith@fasken.com – the first call is always free.
Impairment by workers on a construction site can have dire consequences. The quickly approaching legalization of recreational marijuana may result in increased use by employees during work hours. Employers need to proactively address both recreational and medical use of marijuana to limit the potential for impairment of workers in compliance with their obligations under the Occupational Health and Safety Act.

As a starting point, it is important to note that the legalization of marijuana does not prevent construction employers from prohibiting the recreational use of marijuana during work hours. This is similar to a prohibition on the consumption of alcohol by employees during work hours. However, responding to marijuana use is more challenging when an employee advises he or she has been prescribed marijuana for a medical illness or disability. Medical marijuana is being increasingly prescribed for a host of medical conditions from sleeping disorders to cancer.

Consumption of medical marijuana for a bona fide disability triggers obligations under the Ontario Human Rights Code to accommodate the worker to the point of undue hardship. The treatment of a disability cannot be separated from the disability itself. As such, consumption of medical marijuana as a treatment may itself need to be accommodated.

Medical marijuana—a license to use during work hours?

Many construction employers are now dealing with workers pushing the boundaries by advising they have medical marijuana prescriptions and can therefore consume marijuana whenever they want with no recourse by the employer. This is not accurate. Employees should be required to provide sufficient medical documentation to substantiate they have been prescribed marijuana to treat a disability and that the treatment requires consumption during work hours. A prescription which stipulates consumption prior to work will require further investigation by the employer as to the timing and dosage. However, an employee does not have a right to consume marijuana absent providing

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such medical documentation. The extent of the information sought by the employer to substantiate the medical illness and prescribed treatment must be balanced by an employee’s privacy rights. As a general rule, employers are not entitled to the diagnosis of the specific illness but are entitled to particulars regarding work restrictions caused by the illness and treatment. This includes information regarding prescribed medications which may impact the performance of the individual.

Once a legitimate prescription for use of marijuana has been confirmed, the employer must then consider whether the requested consumption will cause undue hardship by imposing a significant safety risk to fellow employees or the public. If so, the employer may be able to prohibit the consumption of the medical marijuana.

Undue hardship— a hazy issue

The Ontario Human Rights Code does not expressly define the meaning of “undue hardship” but the notion has been interpreted by the courts and arbitrators as imposing a high burden on employers. The assessment of undue hardship is highly fact specific. Blanket rules cannot simply be applied. A failure to accommodate an employee to the point of undue hardship constitutes a violation of the Ontario Human Rights Code.

Generally, the impairment of an employee through marijuana consumption which endangers their own safety or the safety of co-workers, fellow contractors or the public is likely to reach the threshold of undue hardship. Whether the worker holds a safety-sensitive position is also relevant to the assessment of undue hardship. What constitutes a safety-sensitive position is not defined by legislation and will vary depending on the specific workplace. Generally, a position which can impact the safety of co-workers or the public will reach the threshold of being safety sensitive. Employers should proactively consider their respective workplace as to what positions are truly safety sensitive. Doing so will assist in responding to requests for marijuana usage by employees who hold those positions.

Recreational and medicinal consumption of marijuana by employees is likely to continue to increase. An employer must balance their obligations to accommodate under the Ontario Human Rights Code, a worker’s privacy rights and the duty to take all reasonable precautions to protect employees as imposed by the Occupational Health and Safety Act. This is a challenging balancing act for construction employers, but the dire consequences of a workplace accident should motivate employers to place the emphasis on workplace safety.

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The Safety Groups Program (SGP) is an innovative initiative the WSIB has implemented to help eliminate workplace injuries and illnesses in Ontario. The program is voluntary and rewards firms that implement effective health and safety and return to work measures into their daily business. Safety Groups is based on the premise that a well-integrated workplace health and safety program is good for business. Firms from similar or different businesses or rates groups volunteer to join a safety group with a collective purpose: to learn from each other's experience in implementing injury and illness prevention programs. Firms that invest and implement effective health and safety programs can benefit from a WSIB financial incentive.

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SAFETY GROUPS

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June 14
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July 19
LinC Golf Tournament - Conestoga Golf Club

August 23
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To view a complete list of upcoming events and to register, please visit www.gvca.org/events

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