



## **Stakeholder Engagement – Fitness for Duty**

**Date:** April 11, 2018  
**To:** TTC Board  
**From:** Chief Executive Officer

### **Summary**

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Since March 2016, TTC staff have been pursuing legislation or regulation for random drug and alcohol testing in safety sensitive workplaces like the TTC – those that interact with the public and where the consequence of impairment can be catastrophic. In advance of the passage of legislation that legalizes the sale and distribution of cannabis in Canada the TTC, together with a coalition of employers and associations across the country, believes this is critical to workplace and public safety and have been engaged with the federal government to address these concerns.

The Coalition believes that legislation or regulation that recognizes the dangers of impairment in the workplace will greatly assist employers in Canada. Industries, like transportation, need legislation to protect its workers and the travelling public. For the TTC, legislation or regulation should mitigate the need for costly arbitration processes such as the one it is currently involved in with its unions.

### **Recommendations**

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It is recommended that the TTC Board:

1. Approve and promote the contained information publicly.

### **Financial Summary**

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There are no financial impacts arising from approval of the recommendations of this report.

The Chief Financial Officer has reviewed this report and agrees with its contents.

### **Equity/Accessibility Matters**

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There are no accessibility or equity issues associated with this report.

## Issue Background

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The TTC, as a safety sensitive employer and leader in this area has been engaging both the provincial and federal governments for legislation or regulation to protect employers, workers and the public.

Specifically, TTC staff have been working with various employers and employer agencies from across the country, to engage the federal and provincial governments in an effort to pursue the legislation of random testing.

## Comments

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The TTC is part of a coalition comprised of various Employers and associations from across the country engaging the federal government on the need to legislate random testing in safety sensitive industries, given the safety considerations associated with the federal government's intended legalization of cannabis.

Membership of the coalition is comprised of representation from the following companies and associations:

Federally Regulated Employers-Transportation and Communications (FETCO)	Railway Association of Canada
Metrolinx	Canadian Trucking Alliance (CTA)
Petroleum Services Association of Canada	Canadian Fuels Association (CFA)
JD Irving	Canadian Construction Association
Forest Products Association of Canada	Canadian Association of Petroleum Producers
Construction Labour Relations - Alberta	Canadian Business Aviation Association
Canadian Urban Transit Association (CUTA)	British Columbia Maritime Employers Association (BCMEA)
Canadian National Railway Company	Butler Consultants
Canada Post	

## Federal Legislation

Bill C-45 enacts the Cannabis Act that will enable cannabis to be accessed through legal sale and will regulate its production, distribution and sale.

The key objectives of the Act are to prevent the access of cannabis by young persons, to further health and public safety by establishing requirements that protect product safety and quality, and to increase penalties for violations. The Act also has a goal of reducing the burden on the justice system for cannabis related matters.

This bill had its first reading in the Senate on November 11, 2017 and has had eight chamber sittings, with the most recent February 15, 2018.

It is scheduled for final vote on June 7, 2018.

Bill C-46 is a companion bill to C-45 which amends the provisions of the Criminal Code that deal with offences and procedures relating to drug-impaired driving.

This act will set blood concentration levels above which new criminal offences will be triggered when driving within two hours. Additionally, it will permit peace officers who suspect drug use to require a driver to provide a bodily substance for analysis by approved equipment (road side oral fluid test), and permit mandatory roadside screening (i.e. random testing) for alcohol.

This bill had its second reading in the Senate December 14, 2017 and was referred to Committee where there have been six sittings, the most recent February 15, 2018.

## **Provincial Legislation**

The Ministry of Transportation (MTO) in Ontario is in the process of developing regulations to support Bill 174, Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act 2017. Amongst other elements, the MTO is intending to introduce “zero tolerance” for commercial drivers, for drug and alcohol use. This will include TTC operators and maintenance employees who hold a class B-Z and/or C-Z licenses. It will not apply to our subway and streetcar operators, who are required to hold G licenses only. The MTO intends to use approved oral fluid screening devices, once passed through bill C-46.

## **Engagement Efforts**

As an overall strategy, the TTC has worked with the coalition to draw attention to the lack of workplace considerations associated with Bills C-45 and C-46 and the resultant safety concerns this represents to safety sensitive industry employees, and in some cases the public.

Appendix 1 details a summary of steps taken by the TTC and the coalition in an effort to promote awareness of workplace safety concerns associated with the legalization of marijuana. Over the past two years, between March 2016 and March 2018 the TTC has on its own or as part of the coalition been involved in a variety of discussions from round tables, to transit association meetings, to submissions to federal and provincial governments. The crux of the concerns focus on the need for legislation requiring safety sensitive industries to have mandatory drug and alcohol testing programs as is experienced in other jurisdictions like the United States. Additionally, more recent emphasis has been placed by the TTC on the differentiation between workplace and

criminal context, and the different goals and consequences in these respective jurisdictions. For example, the standard necessary to ensure appropriateness of a criminal conviction ought not to be the same standard applied within the workplace context as the goals are different.

The Coalition continues to try to raise awareness of its concerns about workplace safety and the absence of these considerations represented in pending legislation, through discussion with individual Senators.

### **Other information of concern**

Appendix 12 highlights the concerns put forward to the Ministry of Transportation, by the TTC, in relation to proposed regulatory changes. This also references the alarming statistics published by the MTO in relation to drug impaired driving fatalities in Toronto.

The MTO summary paper also states that “With the federal government’s intended legalization of cannabis, instances of drug impaired driving will likely increase, as seen in other jurisdictions that have legalized cannabis.” This statement is in stark contrast to the assumptions put forward by labour representatives during the OHSAC extended sub-committees referenced, which is concerning.

### Survey Results

In order to obtain more fulsome information than existed through its traditional information collection mechanisms on Cannabis use, Health Canada has developed and implemented the Canadian Cannabis Survey (CCS).

<https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/canadian-cannabis-survey-2017-summary.html>

The following information represents a particular concern to TTC. This information is based on survey findings from the first data collection cycle, which commenced March 13, 2017 and ended May 24, 2017. Survey findings were weighted by region, age groups, and gender. The results for 2017 are based on online responses from 9,215 respondents aged 16 years and older across all provinces and territories. The CCS was designed to obtain a sufficient number of respondents from key sub-populations, and quotas were determined and met in order to ensure statistical relevance of results and representativeness. A total of 9,215 responses were received, including 2,650 responses from people who indicated that they had used cannabis in the past 12 months for either non-medical or medical purposes. Gender and age breakdowns included 4,486 females, 4,695 males, 590 respondents aged 16-19 years, 1,062 respondents aged 20-24 years, and 7,563 respondents aged 25 years and older. Some highlights from this survey are:

- Recreational use by adults is up to 21.7% from 12.3% in 2015;
- From those who use, 39.6% drove within 2 hours of using in the past 30 days;
- 46.2% of those who did so had done so 1-10 times, with 17.7% of those who said so having done so more than 10 times.

This further reflects concern about a seeming disconnect between the potential impairing impacts of cannabis and safety sensitive duties.

## **Conclusion**

The TTC asks the Board to support the concerns raised within this report and to speak to such concerns at a political level should there be occasion to do so.

## **Contact**

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416-220-7372  
Megan.macrae@ttc.ca

## **Signature**

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Richard J. Leary  
Chief Executive Officer (Acting)

## **Attachments**

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Appendix 1  
Appendix 2  
Appendix 3  
Appendix 4  
Appendix 5  
Appendix 6  
Appendix 7  
Appendix 8  
Appendix 9  
Appendix 10  
Appendix 11  
Appendix 12

## **Appendix 1 – Engagement Efforts**

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**March 2016:** TTC attends a roundtable discussion hosted by the Canadian Centre for Substance Abuse in Montreal, with a variety of interested parties. The key message delivered was one of the necessity of regulation/legislation from an employment perspective

**April 2016:** TTC attends Ontario Public Transport Association (OPTA) meeting to enlist support from transportation agencies in its engagement messaging

**June 2016:** federal government creates nine-member Task Force on Legalization and Regulation of Marijuana; chair is Anne McClellan, former federal politician and cabinet minister; task force releases discussion paper on the legalization and regulation of marijuana; paper has only one reference that is tangentially related to the workplace

**June 2016:** TTC hosts roundtable for OPTA members to solidify provincial support

**August 2016:** TTC makes a submission to the Task Force on Legalization of Regulation of Marijuana concerning the above noted discussion paper (Appendix 2)

**September 2016:** Meeting with Ontario Trucking Alliance representative to solidify provincial support for engagement messaging

**October 2016:** Inaugural coalition meeting hosted by the Canadian/ Ontario Trucking Association with representatives from across the country

**November 2016:** TTC Board approves random testing implementation plan

**November 2016:** Federal coalition writes all implicated senior government officials (Minister of Justice, Minister of Health, Minister of Public Safety, Minister of Transport, Minister of Labour, Parliamentary Secretary to Minister of Justice and Task Force Chair) advising them of the coalition's employer safety concerns related to marijuana in the workplace (Appendix 3)

**November 2016:** TTC, OPTA and several transportation coalition members write to the Ontario Ministry of Labour ("MOL") seeking a dialogue (Appendix 4)

**December 2016:** Federal task force releases its final report; workplace concerns were discussed in report but in only a limited manner; report acknowledged that workplace implications require further research; implicit in the writing is the sense that workplace safety obligations and zero tolerance are employer responsibilities

**December 2016:** Coalition sends letters to all affected cabinet ministers in provincial and territorial governments with responsibility for workplace safety advising them of our safety concerns related to marijuana legalization (Appendix 5)

**December 2016:** TTC finalizes plans to implement random testing in April 2017 and advises the unions accordingly. Union files an injunction.

**January 2017:** Coalition sub-group (FETCO, Canadian Trucking Alliance, CN and others) holds face-to-face meetings with senior advisors to the following cabinet ministers (Health, Public Safety, Justice, Labour) as well as the Prime Minister's Office; advisors were interested in coalition messaging on workplace safety

**February/ March 2017:** TTC defends implementation of random testing program

**March 2017:** Coalition sub-group holds further meetings with Prime Minister's Office and with Parliamentary Secretary to MP Bill Blair, who is the government's lead on the marijuana file; Mr. Blair is receptive to coalition concerns

**March 2017:** Government announces marijuana legislation will be brought forward

**April 2017:** desired implementation date is Canada Day 2018

**April 2017:** TTC receives award denying the union's injunction (Appendix 6)

**April 2017:** TTC attends OPTA Transit Expo to describe testing program

**May 2017:** TTC introduces random testing and the first unionized employee tested tests positive. Results are subsequently reported monthly via the CEO report

**May 2017:** TTC, OPTA and several transportation coalition members meet with the Assistant Deputy Minister of the Ministry of Labour and various representatives from the Ministry of Transportation in an effort to persuade provincial representatives of the need to introduce legislation requiring random testing

**June 2017:** TTC invited to participate in an extended sub-committee of the Occupational Health and Safety Advisory Committee (OHSAC- Federal tripartite committee), focused on workplace impairment. Meetings held in June and September, 2017, and January, February, and scheduled in April 2018

**June 2017:** TTC, OPTA and several coalition members write the Minister of Transportation (Appendix 6)

**July 2017:** TTC Chair issues correspondence to various stakeholders (Appendices 8-10)

**September 2017:** TTC invited to present as a witness at the House of Commons Justice Committee on Bill C-46 and submissions were made

**September 2017:** TTC wins award from Ontario Safety League for random testing program and its promotion of public sector safety in Ontario. This was presented by the Provincial Minister of Transportation at that time

**October/ November 2017:** TTC does several presentations and a conference call to various audiences with membership from across the country

**November/ December 2017:** Coalition group drafts a brief to share with Senators it is looking to meet with

**December 2017:** Several members of the coalition meet with various Senators. Messaging delivered via the brief (Appendix 11) seems to get traction

**January/February 2018:** TTC does several presentations and conference call to various audiences with membership from across the country

**February/ March 2018:** Several coalition members meet with several Senators

**March 2018:** TTC submits feedback to the Ministry of Transportation regarding proposed regulations (Appendix 12)

TTC has other speaking engagements with various national audiences upcoming.



# TORONTO TRANSIT COMMISSION



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JOE MIHEVC  
DENZIL MINNAN-WONG



August 29, 2016

Cannabis Legalization and Regulation Secretariat  
Address locator 0602E  
Ottawa, ON K1A 0K9

**RE: Input to the Task Force toward the legalization, regulation and restriction of access to marijuana**

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The Toronto Transit Commission (TTC) is the third largest transit system in North America, carrying an average of 1.8 million passengers daily in the city of Toronto, Ontario. We carry passengers via subway train, streetcar, city bus and paratransit bus. Additionally, in order to maintain this system, we have extensive maintenance and signaling functions. Altogether, we have approximately 10,630 unionized positions considered to be safety-sensitive, in addition to 2,005 non-union supervisory and executive positions, which are designated as safety-sensitive due to decision making impacts. Furthermore, we have a number of contract employees on major projects that would be safety-sensitive as well.

Further to the Task Force's discussion paper, we submit for your consideration comments relating the identified categories of:

- Enforcing public safety and protection; and
- Accessing marijuana for medical purposes.

We also respectfully suggest that an additional category that considers the interrelationship between the legalization and usage of marijuana and resultant impacts on workplaces in Canada (Federal and Provincial); specifically, the interaction and implication of marijuana at the workplace with Human Rights Legislation in Canada. In this aim, we recommend a sub-committee to the Task Force ought to be established with representative experts from different jurisdictions, in human rights law, labour and employment.



## Public Safety

The TTC recommends that the Federal Government ought to consider Federal regulations on legislation with respect to the following, and encourage Provincial Government to do the same, in advance of the legalization of marijuana:

1. An accepted tool to detect likely impairment;
2. Requirements for safety-sensitive industry and workers to have mandatory testing (including random testing) programs in place to detect and dissuade usage, including a database where positive results can be shared between associated companies/bodies within the jurisdiction.

As indicated in the associated discussion paper, "marijuana impairs a number of brain functions needed for safe driving, such as co-ordination ... and is second to alcohol as the drug most frequently found among drivers involved in crashes ...." Notwithstanding this, there is no accepted tool in Canada to determine likely impairment, and there is no legislation provincially or federally geared to safety-sensitive industry, such as public transit, trucking, rail etc.

While the technology associated with roadside oral fluid testing is not fully developed, there are other technologies that are. For example, regular oral fluid testing determines recent use, and therefore likely impairment. While there is a 72-hour turnaround time for such testing, this, in concert with other reasonable observation (such as we understand to be done when requesting a roadside breathalyzer) that would trigger a potential need for the testing in members of the public, ought to be sufficient from a public perspective to enable law enforcement to monitor and confirm/or not, impaired driving. Obviously there would be many considerations that would flow from this. However, the notion of an accepted method of testing for criminal purposes under the Highway Traffic Act, may assist in clarity in the law in other jurisdictions and contexts and limit inconsistencies in the various jurisdictions across the country.

For example, oral fluid testing to detect likely impairment, in the Canadian workplace perspective, has been accepted by courts and tribunals up to the Supreme Court. However, because this is not legislated room for workplace disputes that could result in inconsistent findings within Canada. For example, the TTC's largest union, the Amalgamated Transit Union Local 113, has challenged this technology, which has resulted in a long protracted legal battle of arguably settled case law, and which is costing taxpayers millions of dollars. A summary of the status of this proceeding will be provided below.

The United States, through the Department of Transportation (DOT) has had mandatory drug and alcohol testing for various industries since the 1980s. This is done on a random basis there. The interaction of this, with the decision in various states to de-criminalize or legalize marijuana, ought not to be ignored. The TTC suggests that we cannot view the



U.S. or other jurisdictions as a *comparator* to the Canadian experience in the context of legalization of marijuana, without first considering DOT regulations and other supporting regulations or legislation. Furthermore, in the U.S. currently, the methodology utilized for drug testing is urinalysis. Urinalysis detects the presence of drugs (as opposed to likely impairment). This, in our opinion, highlights the need to distinguish legalities for the general public, while also considering special circumstances involved for those who, due to their occupation, can put the public safety at risk. While the governance within Canada and the U.S. are different, there is opportunity for consultation between the Federal and Provincial Governments to introduce reasonably consistent legislation in Canada and across the provinces that obliges employees working in safety-sensitive industries to submit to drug and alcohol testing. To leave this unregulated, risks a starkly inconsistent approach to testing, including pervasive non-testing, unnecessary liability and costs to employers, diluted safety for the general public within and across jurisdictions, and does not do what is necessary to protect public safety.

Supporting tools, such as information databases geared at preventing employees who are found to have driven impaired, and move from one employer to another, must be created within and potentially across jurisdictions. Additionally, any resultant processes, such as Substance Abuse Professional guidelines, must be designed considering the Canadian context and laws, as opposed to simply adopted from the U.S., which has different frameworks.

### **Medical Marijuana**

The TTC recommends that the following ought to be considered with respect to medical marijuana:

- Tighter restrictions for medical professionals to subscribe this to patients;
- Depending on the nature of the prescription, mandatory reporting to motor vehicle or licensing bodies/license suspensions.

Currently, it is much too easy to obtain a prescription for medical marijuana, and there appears to be no mandatory communication between prescribing physicians and regular treating physicians, where applicable. We have several examples where an employee's treating physician will not prescribe medical marijuana. However, other clinics specializing in this will prescribe. In our own testing of this and resultant visit to a cannabis clinic, TTC staff were advised (to summarize) that it is easy to obtain a prescription, should take no more than 15 minutes and one doesn't need their own doctor's referral. In brief, one must submit to a Skype interview with a physician, note some of the symptoms identified in the pamphlet available, and then a prescription will be provided. It is our respectful submission that such a process does not appear to reflect the spirit in which citizens were meant to have access to marijuana for medical purposes. There should be enhanced regulation and consistency in prescribing medical marijuana.



While one might suggest that increased access to marijuana legally will decrease what we see as "abuse" of this nature, it is our submission that there will still be a number who access medical marijuana as a result of the opportunity this can present for lawful accommodation at the workplace, pursuant to Human Rights legislation.

There are real limits on an employer's ability to obtain information relating to prescription medication. This could have negative ramifications when it comes to employees working in safety-sensitive positions, and has heightened meaning if there are increases in prescriptions for medical marijuana. As such, there ought to be some regulation applied to physicians who prescribe medical marijuana or other impairing medications, and motor vehicle licensing. This would be similar to obligations, as we understand them, surrounding conditions that could impact one's ability to drive safely, such as serious sleep apnea or coronary surgery. This would provide a greater ability for employers to have a tool to ensure employees are safely licensed, while respecting employee's rights to privacy.

#### **Employers and Human Rights Legislation**

Finally, there must be consideration given to the interaction between the workplace, legalization of marijuana and the framework of human rights law federally and provincially. Again, when we turn to our U.S. partners, the human rights context within which they function is significantly different than in Canada. When it comes to marijuana usage, medical or otherwise, federal and provincial legislation will have significant impacts on usage in the workplace that would not be predicted from U.S. experience. There is room for unintended consequences and costs, if enough time is not spent exploring this issue. Stakeholders, such as unions, employers, human rights advocates and experts, ought to be a part of this discussion.

#### **TTC Experience**

The TTC has been doing post incident, reasonable cause and certification new-hire (pre-employment) testing since 2010. Additionally, we conduct unannounced testing where an employee who was found to have a disability is accommodated. As previously indicated, we have been in ongoing labour arbitration on this matter since that time, and expect this will carry on for a number of years. This has cost taxpayers several million dollars already and will continue to cost more, as we anticipate this will need to be settled at the Supreme Court.

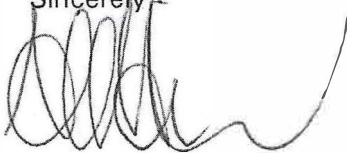
The TTC is taking active steps to implement random drug and alcohol testing given its experience with the above noted testing that has resulted in alarmingly high positive test results with impairment at work, and pre-certification positive results from 2014 to 2015. The trend continues. While Canadian law has not necessarily been supportive of such testing, our experience leads us to conclude that we must undertake this for the benefit of public safety. While we are committed to pursuing this avenue, it is our view that this is something that ought to be legislated and imposed on industry, especially an industry like



public transit that is charged with safely transporting millions of people and ensuring its workplaces, where dangers are ever-present, are safe from anyone who is unfit for duty due to drugs or alcohol.

We remain committed to answer any questions or to contribute in any way that can add value. For any such questions relating to our submission, please contact Megan MacRae, Director of Employee Relations, at 416-393-2944 or [Megan.MacRae@ttc.ca](mailto:Megan.MacRae@ttc.ca) directly.

Sincerely,



Andy Byford  
Chief Executive Officer  
Toronto Transit Commission  
40.32

Submitted on behalf of the following agencies as well:

- The Tokmakjian Group

Copy: TTC Chair Josh Colle  
Canadian Urban Transit Association (CUTA)  
Ontario Public Transit Association (OPTA)  
Ministry of Transportation (MTO)  
Canadian Centre for Substance Abuse (CCSA)  
Canadian Trucking Alliance  
Barbara Butler



## Canadian Employers' Statement on the Legalization of Marijuana

November 21, 2016

Hon. Jody-Wilson Raybould

Minister of Justice and Attorney General of Canada (jody.wilson-raybould@parl.gc.ca)

Hon. Jane Philpott

Minister of Health (Hon.Jane.Philpott@Canada.ca)

Hon. Ralph Goodale

Minister of Public Safety and Emergency Preparedness (ralph.goodale@parl.gc.ca)

Hon. Marc Garneau

Minister of Transport (marc.garneau@parl.gc.ca)

Hon. MaryAnn Mihychuk

Minister of Employment, Workplace Development and Labour (MaryAnn.Mihychuk@parl.gc.ca)

Hon. Anne McLellan

Task Force on Marijuana Legalization, Regulation and Restriction (cannabis@canada.ca)

Bill Blair

Parliamentary Secretary to the Minister of Justice (Bill.Blair@parl.gc.ca)

Dear Ministers, Ms. McLellan and Mr. Blair,

The Government of Canada is committed to legalizing the recreational use of marijuana. As employers of hundreds of thousands of workers across Canada, we feel it imperative that several issues and concerns are addressed prior to or at the same time as the legislation to legalize marijuana is introduced. This is necessary to:

1. Protect the safety of our workplaces which is the employer's legal obligation;
2. Protect the safety of the public with whom many employers share their workplace or with whom we come into contact;
3. Protect our ability to continue to conduct trade with the United States (U.S.) which will continue to treat marijuana as an illegal substance and which, for example, requires mandatory alcohol and drug testing for transportation providers (truck, bus, and rail operators); and
4. Ensure our workplaces are not subject to any human rights and other legal challenges arising from the legalization of marijuana.

The consumption of marijuana has effects which increase risk to employees and the public. It impairs several brain functions such as coordination, judgement of distances, reaction time, and the ability to pay attention, amongst other effects. In general, the use of marijuana is not conducive to safe workplace behaviour.

We are concerned that there has been very little attention given to the impact that the legalization of marijuana will have on safety in the workplace. The discussion paper issued by the *Task Force on Marijuana Legalization, Regulation and Restriction* (the Task Force), makes only one reference to workplace issues stating "consideration will need to be given to the use of marijuana in workplaces. For example, a zero tolerance policy could be applied for those who operate heavy machinery or conveyances."

Given the safety risks associated with marijuana use, employers must adopt a zero-tolerance policy regarding being under the influence of marijuana while at work.

If the responsibility to manage this risk is to be downloaded onto employers, then it is imperative that employers be allowed to apply workplace measures that will enable mitigation of risk to employees and the public. Examples include, but are not limited to, national cut-off levels, comprehensive workplace testing and a review of the duty to accommodate.



Driving under the influence of alcohol or drugs is a major safety concern with significant implications for the transportation sector. The Task Force has identified the need to guard against driving under the influence of marijuana as a central objective. We agree that this is important since marijuana is second to alcohol as the substance most frequently found among drivers involved in crashes, drivers charged with impaired driving, and drivers who have been seriously injured.

However, in contrast to alcohol, there is currently no legislated cut-off level for driving while under the influence of marijuana.

The ability of employers to test workers is more extensive in the U.S, where all Canadian truck, bus and rail drivers who operate in the U.S. are subject to U.S. alcohol and drug testing laws and can be dismissed from their employment for testing positive. No similar regulatory requirement exists in Canada where employees' rights to accommodation are broader. In addition, the various jurisdictions and territories in Canada, and the lack of a national body to manage this issue add potential uncertainty, complexity and costs for employers.

While over time, Canadian human rights commissions have come to accept that alcohol and drug testing is a bona fide occupational requirement for drivers who must comply with the US testing regulations, the cost to employers created by the lack of clear rules in Canada for domestic movements has been significant. It has also created a situation where users of alcohol and drugs confine their work to Canadian operations, which is not subject to the same screening as for cross border operations. This inconsistency underscores the need to align Canada and the U.S. screening standards so that maximum safety benefits can be leveraged. It is critical that the legalization of marijuana not lead to a new wave of human rights and other legal challenges for employers.

The increased risks of employees being under the influence of marijuana in the workplace require that the following should be in place prior to or at the same time as legislation is introduced to legalize marijuana:

1. Identification of a national cut-off level similar to the "over .08" offence for alcohol with a practical, least invasive and legally acceptable roadside and workplace testing protocol for marijuana.
2. Workplace alcohol and drug testing regulations, to require/permit employers to test employees on a pre-employment, post-incident, reasonable cause and random basis, as well as testing as part of a monitoring program for employees returning to work after treatment or in a post violation situation.
3. Clear and balanced rules setting out an employer's duty to accommodate employees who are under the influence of alcohol or drugs while at work and who suffer from substance abuse dependency.

We recognize that the task force chaired by Ms. McLellan has yet to produce its report. We look forward to its recommendations. Nonetheless, we wish to take this opportunity to make clear our view that it is incumbent on the government, in the interests of public and worker safety, to address the issues and concerns raised in this letter.

We will be contacting your office in the next few weeks for the purpose of arranging a meeting with you to discuss our concerns in more detail.

Yours truly,

The Undersigned



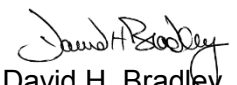
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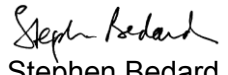
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# TORONTO TRANSIT COMMISSION



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RON LALONDE  
JOE MIHEVC  
DENZIL MINNAN-WONG



November 29, 2016

Marcelle Crouse, Assistant Deputy Minister  
Policy Division, Ministry of Labour  
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400 University Ave, Toronto, ON M7A 1T7

Dear Ms. Crouse,

The Toronto Transit Commission (TTC) is the third largest transit system in North America, carrying an average of 1.8 million passengers daily in the city of Toronto, Ontario. We carry passengers via subway train, streetcar, city bus and paratransit bus. Additionally, in order to maintain this system, we have extensive maintenance and signaling functions. Altogether, we have approximately 10,630 unionized positions considered to be safety-sensitive, in addition to 2,005 non-union supervisory and executive positions, which are designated as safety-sensitive due to decision making impacts. Furthermore, we have a number of contract employees on major projects that would be safety-sensitive as well.

The TTC, with the support of the Ontario Public Transit Association (OPTA), the Ontario Trucking Association (OTA) and the Canadian Urban Transit Association (CUTA) write to formally request the provincial government to review the absence of legislation in the Province of Ontario, relating to mandatory random drug and alcohol testing, for public transportation and commercial transportation industries.

Public transit and commercial transportation are extremely safety sensitive. Not only are the lives of employees dependent on safety at the workplace, but the broader public is dependent on safety of the workplace as well. The nature of these workplaces inherently add pressure and underscore the importance of fulfilling our obligation to provide a safe working environment to our employees, and to ensure that this is protected.

The TTC, in 2010, implemented several forms of drug and alcohol testing at the workplace, excluding random testing. Notwithstanding this, there continue to be too many instances where employees have been found to have taken an intoxicating substance with a recency that has impacted their ability to conduct safety sensitive duties. The TTC has been in litigation over this issue for approximately 5 years at a significant cost to taxpayers. It is expected this will continue for several more years at least. This is notwithstanding existing employment caselaw which is not inconsistent with the TTC's testing policy to date, and, in our view highlights the need for a clear legislated position on impairment in the workplace.



The TTC will be implementing random drug and alcohol testing in the near future. It is our view that we cannot wait any longer to be satisfied with our due diligence as an organization, to ensure we are doing all that is possible to address ongoing safety concerns. This concern is only to be compounded with the pending legalization of marijuana. The TTC and many others have taken steps to raise similar concerns related to the legalization of marijuana, at the Federal level.

The TTC, OPTA, CUTA and OTA ask that:

1. Consideration be given to the broader social benefit to be achieved by the introduction of legislation requiring mandatory post-incident, reasonable cause and random drug and alcohol testing for safety sensitive occupations within the transportation industry and that the relevant support models utilized in the United States be adapted to Canadian perspective.
2. That a provincial database be established to permit information sharing of instances where employees are found to have been likely impaired at the workplace.
3. That a working group be struck to review the Ontario Human Rights Code and related policies, with a view to the practical realities of the workplace and such matters of drug and alcohol accommodation.

We would welcome the opportunity to discuss this request further.

Sincerely,



Andy Byford  
Chief Executive Officer  
Toronto Transit Commission

40.32

CC: John Lieou, Assistant Deputy Minister Ministry of Transportation  
David Bradley, CEO Ontario Trucking Association  
Karen Cameron, CEO Ontario Public Transit Association  
Patrick Leclerc, President and CEO Canadian Urban Transit Association



## Canadian Employers' Statement on the Legalization of Marijuana



December 6, 2016



The Honourable Suzanne Anton, Q.C., M.L.A.  
Minister of Justice and Attorney General  
PO Box 9044  
Stn Prov Govt  
Victoria, BC V8W 9E2



Dear Minister:

### Legalization of Marijuana

The Government of Canada has announced plans to introduce legislation that will legalize, regulate and restrict the use of marijuana and has appointed a Task Force to "provide advice for the design of a new regulatory framework for restricted access to marijuana."



The undersigned have recently sent a letter to the Chair of the Task Force and several federal Ministers expressing concerns with the impact the legalization of marijuana use will have on workplace safety. A copy of the letter is attached for your reference.



While we acknowledge that occupational health and safety legislation governing workplace safety is mostly under provincial jurisdiction, we hope that a common approach can be taken nationally to the issues we have raised.



We also have concerns with the impact that legalization of marijuana use could have on road safety and the motoring public.



We would appreciate hearing from you regarding plans your government has to work with the Government of Canada to address the obligations on employers set out in provincial occupational health and safety legislation to maintain a safe work environment, and the workplace safety risks associated with marijuana use. We are particularly concerned with rulings by Human Rights Commissions around employer's duty to accommodate and how that duty will be affected by the legalization of marijuana.

We are willing to work with you to address the concerns we have raised and provide whatever assistance we can.



For ease of communication we would appreciate it if you could address your response to:



Mr. David Bradley, President and CEO  
Canadian Trucking Alliance  
555 Dixon Road  
Toronto ON M9W 1H8  
[david.bradley@cantruck.ca](mailto:david.bradley@cantruck.ca)



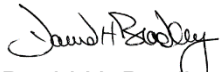
Yours truly,

The Undersigned

  
Brad Herald  
Vice President, Western Canada  
Canadian Association of Petroleum Producers  
[brad.herald@capp.ca](mailto:brad.herald@capp.ca)

  
Gil Brulotte  
Chair  
Canadian Construction Association  
[gbrulotte@ellisdon.com](mailto:gbrulotte@ellisdon.com)

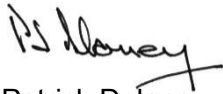
  
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Andy Byford  
Chief Executive Officer  
Toronto Transit Commission  
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# Canadian Employers' Statement on the Legalization of Marijuana

November 21, 2016

Hon. Jody-Wilson Raybould

Minister of Justice and Attorney General of Canada (jody.wilson-raybould@parl.gc.ca)

Hon. Jane Philpott

Minister of Health (Hon.Jane.Philpott@Canada.ca)

Hon. Ralph Goodale

Minister of Public Safety and Emergency Preparedness (ralph.goodale@parl.gc.ca)

Hon. Marc Garneau

Minister of Transport (marc.garneau@parl.gc.ca)

Hon. MaryAnn Mihychuk

Minister of Employment, Workplace Development and Labour (MaryAnn.Mihychuk@parl.gc.ca)

Hon. Anne McLellan

Task Force on Marijuana Legalization, Regulation and Restriction (cannabis@canada.ca)

Bill Blair

Parliamentary Secretary to the Minister of Justice (Bill.Blair@parl.gc.ca)

Dear Ministers, Ms. McLellan and Mr. Blair,

The Government of Canada is committed to legalizing the recreational use of marijuana. As employers of hundreds of thousands of workers across Canada, we feel it imperative that several issues and concerns are addressed prior to or at the same time as the legislation to legalize marijuana is introduced. This is necessary to:

1. Protect the safety of our workplaces which is the employer's legal obligation;
2. Protect the safety of the public with whom many employers share their workplace or with whom we come into contact;
3. Protect our ability to continue to conduct trade with the United States (U.S.) which will continue to treat marijuana as an illegal substance and which, for example, requires mandatory alcohol and drug testing for transportation providers (truck, bus, and rail operators); and
4. Ensure our workplaces are not subject to any human rights and other legal challenges arising from the legalization of marijuana.

The consumption of marijuana has effects which increase risk to employees and the public. It impairs several brain functions such as coordination, judgement of distances, reaction time, and the ability to pay attention, amongst other effects. In general, the use of marijuana is not conducive to safe workplace behaviour.

We are concerned that there has been very little attention given to the impact that the legalization of marijuana will have on safety in the workplace. The discussion paper issued by the *Task Force on Marijuana Legalization, Regulation and Restriction* (the Task Force), makes only one reference to workplace issues stating "consideration will need to be given to the use of marijuana in workplaces. For example, a zero tolerance policy could be applied for those who operate heavy machinery or conveyances."

Given the safety risks associated with marijuana use, employers must adopt a zero-tolerance policy regarding being under the influence of marijuana while at work.

If the responsibility to manage this risk is to be downloaded onto employers, then it is imperative that employers be allowed to apply workplace measures that will enable mitigation of risk to employees and the public. Examples include, but are not limited to, national cut-off levels, comprehensive workplace testing and a review of the duty to accommodate.



Driving under the influence of alcohol or drugs is a major safety concern with significant implications for the transportation sector. The Task Force has identified the need to guard against driving under the influence of marijuana as a central objective. We agree that this is important since marijuana is second to alcohol as the substance most frequently found among drivers involved in crashes, drivers charged with impaired driving, and drivers who have been seriously injured.

However, in contrast to alcohol, there is currently no legislated cut-off level for driving while under the influence of marijuana.

The ability of employers to test workers is more extensive in the U.S, where all Canadian truck, bus and rail drivers who operate in the U.S. are subject to U.S. alcohol and drug testing laws and can be dismissed from their employment for testing positive. No similar regulatory requirement exists in Canada where employees' rights to accommodation are broader. In addition, the various jurisdictions and territories in Canada, and the lack of a national body to manage this issue add potential uncertainty, complexity and costs for employers.

While over time, Canadian human rights commissions have come to accept that alcohol and drug testing is a bona fide occupational requirement for drivers who must comply with the US testing regulations, the cost to employers created by the lack of clear rules in Canada for domestic movements has been significant. It has also created a situation where users of alcohol and drugs confine their work to Canadian operations, which is not subject to the same screening as for cross border operations. This inconsistency underscores the need to align Canada and the U.S. screening standards so that maximum safety benefits can be leveraged. It is critical that the legalization of marijuana not lead to a new wave of human rights and other legal challenges for employers.

The increased risks of employees being under the influence of marijuana in the workplace require that the following should be in place prior to or at the same time as legislation is introduced to legalize marijuana:

1. Identification of a national cut-off level similar to the "over .08" offence for alcohol with a practical, least invasive and legally acceptable roadside and workplace testing protocol for marijuana.
2. Workplace alcohol and drug testing regulations, to require/permit employers to test employees on a pre-employment, post-incident, reasonable cause and random basis, as well as testing as part of a monitoring program for employees returning to work after treatment or in a post violation situation.
3. Clear and balanced rules setting out an employer's duty to accommodate employees who are under the influence of alcohol or drugs while at work and who suffer from substance abuse dependency.

We recognize that the task force chaired by Ms. McLellan has yet to produce its report. We look forward to its recommendations. Nonetheless, we wish to take this opportunity to make clear our view that it is incumbent on the government, in the interests of public and worker safety, to address the issues and concerns raised in this letter.

We will be contacting your office in the next few weeks for the purpose of arranging a meeting with you to discuss our concerns in more detail.

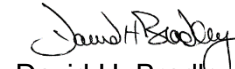
Yours truly,

The Undersigned


  
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<p>The Honourable Shirley Bond, M.L.A.  Minister of Jobs, Tourism and Skills Training  Minister Responsible for Labour  PO Box 9071, Stn Prov Govt  Victoria, BC V8W 9E9</p>	<p>The Honourable Kathleen Ganley, M.L.A.  Minister of Justice and Solicitor General  424 Legislature Bldg  10800 97 Ave  Edmonton, AB T5K 2B6</p>
<p>The Honourable Brian Mason, M.L.A.  Minister of Transportation  320 Legislature Bldg  10800 97 Ave  Edmonton, AB T5K 2B6</p>	<p>The Honourable Christina Gray, M.L.A.  Minister of Labour  107 Legislature Bldg  10800 97 Ave  Edmonton, AB T5K 2B6</p>
<p>The Honourable Gordon Wyant, Q.C., M.L.A.  Minister of Justice and Attorney General  Room 355 Legislative Bldg  2405 Legislative Dr  Regina, SK S4S 0B3</p>	<p>The Honourable David Marit, M.L.A.  Minister of Highways and Infrastructure  Room 322 Legislative Bldg  2405 Legislative Dr  Regina, SK S4S 0B3</p>
<p>The Honourable Don Morgan, M.L.A.  Minister of Labour Relations and Workplace Safety  Room 361 Legislative Bldg  2405 Legislative Dr  Regina, SK S4S 0B3</p>	<p>The Honourable Heather Stefanson, M.L.A.  Minister of Justice and Attorney General  Deputy Premier  Room 104 Legislative Bldg, 450 Broadway  Winnipeg, MB R3C 0V8</p>
<p>The Honourable Blaine Pedersen, M.L.A.  Minister of Infrastructure  Room 203 Legislative Bldg  450 Broadway  Winnipeg, MB R3C 0V8</p>	<p>The Honourable Cliff Cullen, M.L.A.  Minister of Growth, Enterprise and Trade  Room 358 Legislative Bldg  450 Broadway  Winnipeg, MB R3C 0V8</p>
<p>The Honourable Yasir Naqvi, M.P.P.  Attorney General  Ministry of the Attorney General  11 flr, 720 Bay St  Toronto, ON M7A 2S9</p>	<p>The Honourable Steven Del Duca, M.P.P.  Minister of Transportation  3 flr, Ferguson Block  77 Wellesley St W  Toronto, ON M7A 1Z8</p>



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<p>The Honourable Kelly Regan, M.L.A. Minister of Labour and Advanced Education 6 flr, 5151 Terminal Rd PO Box 697 Halifax, NS B3J 2T8</p>	<p>The Honourable H. Wade MacLauchlan, M.L.A. Premier of Prince Edward Island Minister of Justice and Public Safety and Attorney General, Minister Responsible for Labour Shaw Building, 95-105 Rochford St Charlottetown, PE C1A 7N8</p>
<p>The Honourable Paula Biggar, M.L.A. Minister of Transportation, Infrastructure and Energy Jones Building 11 Kent St Charlottetown, PE C1A 7N8</p>	<p>The Honourable Allen Roach, M.L.A. Minister of Finance Shaw Building 95-105 Rochford St Charlottetown, PE C1A 7N8</p>

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<p>The Honourable Eddie Joyce, M.L.A.  Minister of Service NL  Minister Responsible for Workplace NL  West Block, Confederation Bldg  PO Box 8700  St. John's, NL A1B 4J6</p>	<p>The Honourable Tracy-Anne McPhee, M.L.A.  Minister of Justice  Yukon Legislative Assembly  Box 2703  Whitehorse, YT Y1A 2C6</p>
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<p>The Honourable Louis Sebert, M.L.A.  Minister of Justice  Legislative Assembly of Northwest Territories  PO Box 1320  Yellowknife, NT X1A 2L9</p>	<p>The Honourable Wally Schumann, M.L.A.  Minister of Transportation  Legislative Assembly of Northwest Territories  PO Box 1320  Yellowknife, NT X1A 2L9</p>
<p>The Honourable Glen Abernethy, M.L.A.  Minister Responsible for the Workers' Safety and  Compensation Commission  Legislative Assembly of Northwest Territories  PO Box 1320  Yellowknife, NT X1A 2L9</p>	<p>The Honourable Keith Peterson, M.L.A.  Minister of Justice, Minister Responsible for Workers'  Safety and Compensation Commission  Legislative Assembly of Nunavut  PO Box 1200, 926 Federal Rd  Iquluit, NU X0A 0H0</p>
<p>The Honourable Monica Eil-Kanayuk, M.L.A.  Minister of Economic Development and Transportation  Deputy Premier  Legislative Assembly of Nunavut  PO Box 1200, 926 Federal Rd  Iquluit, NU X0A 0H0</p>	

**CITATION:** Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017  
 ONSC 2078  
**COURT FILE NO.:** CV-17-567048  
**DATE:** 20170403

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
AMALGAMATED TRANSIT UNION,	)	<i>Clayton C. Ruby, Annamaria Enenajor, Ian</i>
LOCAL 113, and ROBERT KINNEAR on	)	<i>J. Fellows and Dean Ardron, for the</i>
his own behalf and on behalf of all other	)	<i>Applicants</i>
MEMBERS OF THE AMALGAMATED	)	
TRANSIT UNION, LOCAL113	)	
	)	
Applicants	)	
	)	
<b>- and -</b>	)	
	)	
TORONTO TRANSIT COMMISSION	)	
	)	<i>Paul Schabas, Roy Fillion, Kaley Pulfer and</i>
Respondent	)	<i>Bonnea Channe, for the Respondent</i>
	)	
	)	
	)	
	)	<b>HEARD:</b> February 28 & March 1, 2017

**INTERLOCUTORY INJUNCTION RULING**

**MARROCCO A.C.J.S.C.**

[1] The applicants apply for an interlocutory injunction restraining implementation of random drug and alcohol testing of members of the Amalgamated Transit Union, Local 113 (“ATU”) until the completion of an arbitration hearing concerning the validity of the respondent’s drug and alcohol testing policy.

**The Fitness for Duty Policy**

[2] In September 2008, the respondent approved implementation of what it called a “Fitness for Duty Policy”. The policy took effect on October 17, 2010.

[3] The purpose of the Fitness for Duty Policy is to “[e]nsure the health and safety of Commission employees and the safety of Commission customers and members of the public.”

[4] The Policy intends to achieve this goal by requiring that TTC employees and senior management be mentally and physically fit to perform their assigned tasks without any limitations resulting from, among other things, the use or effects of drugs or alcohol. The Policy allows for the identification of individuals who create safety risks in the workplace due to drug or alcohol use and for the treatment and return to work of employees with substance abuse disorders. It also provides for disciplinary action against employees in defined circumstances.

[5] The Fitness for Duty Policy, as currently implemented, provides for drug and alcohol testing of employees in safety sensitive, specified management and designated executive positions. The policy requires drug and alcohol testing in the following situations:

- where there is a reasonable cause to believe alcohol or drug use resulted in the employee being unfit for duty;
- as part of a full investigation into a significant work-related accident or incident;
- where an employee is returning to duty after violating the Fitness for Duty Policy;
- where an employee is returning to duty after treatment for drug or alcohol abuse; and
- as a final condition of appointment to a safety sensitive position.

[6] The Fitness for Duty Policy did not initially provide for random drug and alcohol testing. However, when the Policy was introduced, the respondent advised the ATU that it reserved its right to implement random testing.

[7] After the respondent announced its Fitness for Duty Policy but prior to it taking effect, the ATU filed a policy grievance under its Collective Agreement. In the normal course, the policy grievance was referred to arbitration, which started on March 8, 2011 before Arbitrator M.K. Saltman. Even though six years have elapsed, the arbitration is not completed. The ATU has not yet completed its case and the respondent’s case has not started.

[8] The ATU’s position before the Arbitrator is that the entire Fitness for Duty Policy is contrary to the Collective Agreement and the *Ontario Human Rights Code*, R.S.O. 1990, c. H.19.

[9] In the arbitration, the ATU asks for:

- an order prohibiting the respondent from continuing the implementation of the Fitness for Duty Policy;
- an order requiring management to receive human rights and antidiscrimination training with respect to the matters raised in the grievance; and

- damages for breach of its right to be free from discrimination, for mental distress and for other “noneconomic losses”.

### **Random Drug and Alcohol Testing**

[10] On October 19, 2011, the respondent amended the Fitness for Duty Policy to require random drug and alcohol testing.

[11] The respondent advised the applicants that random testing would apply to employees in safety-sensitive, specified management, senior management and designated executive positions including that of the Chief Executive Officer.

[12] Employees randomly selected for testing will take an alcohol breathalyzer test and an oral fluid drug test.

[13] Administration of breathalyzer tests and the collection of oral fluid samples will be carried out by qualified and trained technicians from DriverCheck Inc., a company that provides alcohol and drug testing services to more than 5000 employers in Canada; 3600 of whom rely on it for random drug and alcohol testing.

[14] Selection for random testing will be facilitated by DriverCheck Inc. The selection rate of employees for random testing will be 20% per year; meaning that an employee eligible for random testing would have a chance of being tested once every five years.

[15] Mr. Peter Bartz, the Program Lead for the Fitness for Duty Program, provided an affidavit in support of the respondent’s position on this motion. He indicated that:

- Every week, DriverCheck Inc. will provide the TTC’s Program Administrator, through a confidential electronic portal, with the names of employees selected for random testing that week.
- A request to submit to testing will be communicated to employees in a manner that protects their privacy and confidentiality.
- Testing will occur at the employee’s assigned work location in a room or area that provides privacy and confidentiality. If that is not feasible, the employee will be asked to attend at a nearby testing depot or clinic.
- A drug test result at or above the applicable cut-off or concentration levels will be followed by a review by a Medical Review Officer who will discuss the test results with the individual before determining whether a drug test should be reported to the respondent as positive or negative.
- All test results received from the Medical Review Officer will be stored in a confidential and secure manner.

- The December 2016 Fitness for Duty Update specifically represents that no details about substances or amounts detected will be provided to the respondent unless the employee fails a test. Confidentiality will be maintained to the greatest extent possible except where limited disclosure is necessary for related health and safety concerns.

[16] Under the Fitness for Duty Policy, an alcohol test result of .04 blood alcohol concentration (BAC) or higher is classified as a positive alcohol test and constitutes a violation of the Policy. So, does a positive oral fluid drug test. A positive oral fluid drug test is one in which the laboratory analysis determines that the sample tested contains a drug at or above a specified cut-off level and the Medical Review Officer, following a review, reports that the drug test result was positive.

[17] A failure to submit to a random test is a violation of the Policy.

[18] A TTC employee testing positive will be in violation of the Policy and considered unfit for duty.

[19] Oral fluid drug testing results are not immediately available, so the Policy provides that employees will return to work after testing, so long as their breathalyzer test result is less than 0.02 BAC. Employees who have an alcohol test result between .02 and .039 BAC will be removed from duty until it is safe for them to return to work and will be subject to progressive discipline.

[20] The policy provides oral fluid drug test cut off levels as follows:

- marijuana 10 ng/mL (nanograms per milliliter);
- cocaine 50 ng/mL;
- opiates 50 ng/mL;
- acetylmorphine 4 ng/mL;
- phencyclidine 10 ng/mL; and
- amphetamines 50 ng/mL.

[21] There seems to be agreement that these drugs are impairing. For example, Dr. Macdonald, an expert whose credentials are described elsewhere, provided an affidavit and a Report which were filed by the applicants. Dr. Macdonald appended a schedule to his Report which he called Table 1 containing a category entitled "Under the Influence". Dr. Macdonald states at page 4 of his report "Table 1, column 1, shows the time periods in which a person consuming the drug under typical conditions would normally be considered under the influence of each drug." In addition, at page 11 of his report Dr. Macdonald states: "with the exception of stimulants, research shows the acute effects of drugs (i.e. cannabis, PCP and opiates) can negatively affect performance, such as the ability to operate equipment." Dr. Macdonald

qualifies the statement by pointing out that a limitation of the studies is that they may not be applicable to real-world conditions. The expert affidavits and reports filed by the respondent are unanimous in their view that these drugs are impairing.

[22] Whether the experts completely agree on this or not, the evidence establishes to my satisfaction that the substances covered by the TTC Fitness for Duty Policy can impair the psychomotor and cognitive abilities of persons under the influence of those drugs.

[23] Finally, the TTC oral fluid drug cut-off levels are higher than those currently proposed for the same drugs in the draft Mandatory Guidelines for Federal Workplace Drug Testing Programs by the U.S. Substance Abuse and Mental Health Services Administration (SAMHSA Guidelines). For example, a TTC employee will test positive and be unfit for duty with an oral fluid concentration of cocaine at or above 50 ng/mL.; a TTC employee with an oral fluid concentration of cocaine less than 50 ng/mL will test negative and be considered fit for duty. Under SAMHSA Guidelines, an employee will be unfit for duty at an 8 ng/mL oral fluid cocaine concentration.

#### **The Delay in the Implementation of the Random Drug and Alcohol Testing Policy**

[24] As indicated, random testing was added to the Fitness for Duty Policy in October 2011. The approval of implementation of random testing, however, was delayed for several years.

[25] In September 2012, the Respondent took the position that the Arbitrator had no jurisdiction to deal with random testing as part of the grievance as it was worded at the time before the Arbitrator. The Arbitrator ruled that she had jurisdiction to decide the appropriateness of the respondent's random drug and alcohol testing policy even though it was announced after the arbitration had begun.

[26] In addition, the respondent knew that there was a 2011 decision of the New Brunswick Court of Appeal dealing with the issue of unilateral implementation of random alcohol testing that was pending before the Supreme Court of Canada. That decision, *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Limited*, 2013 SCC 34, was released in June 2013. The Respondent approved implementation of random drug and alcohol testing on March 23, 2016, slightly less than three years after the release of the *Irving Pulp and Paper* decision.

[27] When the respondent announced implementation of random testing, the applicants brought this motion for an interlocutory injunction.

#### **The test for injunction**

[28] On an application for injunction, the party requesting the injunction must demonstrate that its application meets the criteria set out by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. These criteria are that: a) there is a serious issue to be tried; b) the party seeking the interim relief will incur irreparable harm if the relief is not granted; and c) the balance of convenience, taking into account the public interest, favours granting the interim relief.

**Serious issue to be tried**

[29] I am satisfied that there are serious issues to be tried in the arbitration. For example, the Arbitrator must determine how the decision of the Supreme Court of Canada in *Irving Pulp and Paper* is to be applied in this case and whether the *Irving Pulp and Paper* threshold requirement of a demonstrated workplace problem with alcohol and drugs has been met.

**Irreparable harm**

[30] I am satisfied for the purposes of this motion that the Fitness for Duty Policy is subject to the rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*. Specifically, it is subject to the employees' right to be free from unreasonable search and seizure.

[31] The guarantee of security from unreasonable search and seizure only protects a reasonable expectation of privacy: see *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at para. 25. Individuals can have different reasonable expectations of privacy in different contexts: see *R v. McKinlay Transport*, [1990] 1 S.C.R. 627 at para. 30.

[32] Accordingly, to determine the reasonable expectation of privacy, requiring the Court's protection, it is necessary to consider the circumstances surrounding the decision to institute random drug and alcohol testing.

**The circumstances surrounding the decision to institute random drug and alcohol testing**

[33] First, external candidates interested in working for the TTC in a safety sensitive or designated management or executive position must pass a pre-employment urinalysis test for drug use.

[34] I am satisfied that a reasonable person would assume that if he or she had to test negatively for drugs and alcohol to get a job with the TTC, then he or she would be required to continue to test negatively for drugs and alcohol to keep that job with the TTC.

[35] Second, Mr. John DiNino, an employee of the TTC since 1986, a former shop steward and a member of the ATU Executive Board, makes the following statement at paragraph 27 of his affidavit in support of this motion: "I have personally had employees tell me that as they became aware of another employee being tested for drug or alcohol use, they believed that the employee must be impaired and that they did not want to work with them in the future."

[36] I appreciate that Mr. DiNino was attempting to say that drug testing can be stigmatizing. That is an educational issue. I infer from his comment, however, that a notable number of TTC employees do not want to work with persons who test positive for drugs or alcohol. This attitude is not surprising. If a tragic accident happens, its consequences will not be limited to the victims and the person who was possibly unfit. Everyone caught up in the occurrence will be affected by the resulting legal proceedings that can go on for years.

[37] Mr. DiNino's observation is confirmed by Dr. Melissa Snider-Adler who provided affidavit evidence which was submitted by the respondent. Dr. Snider-Adler, apart from being a



licensed physician, is the Chief Medical Review Officer at DriverCheck Inc. Dr. Snider-Adler stated at paragraph 42 of her affidavit that it is very likely that an employee with a substance use disorder will report to work in an impaired condition.

[38] Dr. Snider-Adler was not cross-examined.

[39] Dr. Snider-Adler's evidence is entirely consistent with the respondent's experience that between October 2010 and December 2016, 187 (or approximately 2.4% of) external applicants for designated or safety-sensitive positions — individuals who knew they would be subjected to drug testing — returned positive urinalysis tests for drugs.<sup>1</sup>

[40] I am satisfied that the negative attitude of TTC's employees towards working with individuals who test positive for alcohol or drugs, as described by Mr. DiNino, is one of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing. Accordingly, I am satisfied that TTC management and its employees, both of whom assist people in making approximately 1.8 million journeys on the TTC's subway, buses and streetcars every day, expect that steps will be taken to make sure that those in safety critical positions are fit for duty. This safety concern will reasonably diminish their expectation of privacy concerning their drug and alcohol consumption.

[41] Third, the nature of the workplace is also part of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing. In *Irving Pulp and Paper* the workplace was a pulp and paper mill. In this case the workplace includes the subway, buses and streetcars that travel throughout the city. The workplace genuinely is Toronto itself.

[42] Fourth, the procedure for and method of testing are also circumstances surrounding the respondent's decision to institute random drug and alcohol testing. Just because an expectation of privacy is diminished does not mean it is eliminated.

[43] According to Mr. DiNino, current reasonable cause or post incident drug and alcohol testing takes place in a secluded area. He also testified that while the testing itself takes approximately 30 minutes, the entire interval required is 2 to 3 hours.

[44] The breathalyzer test requires a person to breathe into a device that screens the person's breath for a measurable presence of alcohol. The breathalyzer measures a person's breath alcohol level at the time of the test. It does not reveal other personal information about the individual. If the first breathalyzer test reads zero, there is no second test. If there is any reading on the breathalyzer, per Mr. DiNino, a second test is performed approximately 15 minutes after the first test.

[45] The oral fluid test takes about 5 minutes and involves rubbing something like a Q-tip against the inside of a person's cheek. Two samples are taken concurrently. One is used for

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<sup>1</sup> Bartz Affidavit, Respondent's Application Record, Vol. 2, at 654-655.

testing and the other is kept in case the employee wants to have the oral fluid sample retested. Unlike urinalysis, oral fluid testing does not pose the privacy issue of having to directly observe specimen collection to prevent adulteration of the sample.

[46] Dr. Snider-Adler states at paragraph 12 of her affidavit: “An important advantage of oral fluid testing over urinalysis is that the collection process for oral fluid is relatively quick, non-invasive, minimally intrusive and painless.”

[47] Dr. Snider-Adler also points out that an advantage of oral fluid testing over urinalysis is that “it provides a much better indicator of recent use and is therefore a more accurate measure of likely impairment at appropriate cut-off levels.” This statement is inconsistent with a DriverCheck Inc. Disclaimer for Release of Quantitative Levels, tendered by the applicants. The Disclaimer states: “quantitative levels are levels at a snapshot in time, and do not illustrate impairment, do not indicate if levels are increasing or decreasing, and cannot be used to determine time, method or amount of use.” Dr. Snider-Adler explained this discrepancy by stating at paragraphs 51-54 of her affidavit that DriverCheck Inc. provided this Disclaimer in a labour arbitration concerning a TTC employee who had participated in an oral fluid drug test on one occasion and a post-treatment urinalysis drug test on another. Dr. Snider-Adler indicated that the Disclaimer was provided to the employee regarding the quantitative levels for his urine drug test result and not for his oral fluid drug test result. Dr. Snider-Adler indicated that the Disclaimer was five years old and provided at a time when the clear majority of requests for quantitative levels pertained to urine drug tests. Dr. Snider-Adler indicated that this Disclaimer would not be used if the request pertained to quantitative levels for oral fluid drug testing.

[48] Dr. Mace Beckson provided an affidavit which was filed by the respondent on this motion. Dr. Beckson is a Health Sciences Clinical Professor of Psychiatry at the University of California, Los Angeles. He has been employed as a staff psychiatrist working in substance abuse programs and psychiatric intensive care. In his affidavit, Dr. Beckson indicated that he has evaluated and treated thousands of individuals with alcohol and drug problems and addiction and that his evidence has been previously received as expert evidence in judicial proceedings. At paragraph 18 of his affidavit, Dr. Beckson states that “workplace oral fluid drug test results can be used as a proxy for blood drug test results, while avoiding the invasiveness inherent in blood testing.”

[49] Dr. Mace Beckson was not cross-examined.

[50] Dr. Snider-Adler also indicated at paragraph 40 of her affidavit that she had advised the TTC that for cocaine, an oral fluid cut off concentration lower than the TTC’s current level of 50 ng/mL would still detect likely impairment. It was Dr. Snider-Adler’s opinion that the higher cut off levels in the TTC Fitness for Duty Policy, such as the one used for cocaine, provide greater assurance that a positive test result indicates a higher likelihood of impairment at the time of testing based on recent drug use. This means that the higher cut off levels chosen by the TTC minimize the intrusion into the employees’ personal life choices by screening out test results which detect drug use that is unlikely to cause impairment because it occurred long before the test.

[51] As indicated, Dr. Snider-Adler was not cross-examined.

[52] Consideration of these circumstances leads me to conclude that the procedures and methods that the respondent has chosen to randomly test for drugs and alcohol are minimally invasive and superior to other methods of testing for drugs available on the market.

[53] Fifth, the nature of the Fitness for Duty Policy is also part of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing.

[54] The Policy has a treatment component. Mr. Paul Gardiner of Integrated Workplace Solutions (IWS) provided an affidavit in support of the respondent on this motion. His unchallenged evidence is that the TTC retained IWS to provide substance abuse professional services to support the Fitness for Duty Policy. Mr. Gardiner indicated that IWS would continue to provide the services following implementation of random drug and alcohol testing. Pursuant to its agreement with the TTC, IWS substance abuse assessments are provided by physicians specializing in addiction medicine. Mr. Gardiner indicated that the TTC can refer an employee for an assessment following a violation of the Fitness for Duty Policy, a positive drug or alcohol test result, or an employee's voluntarily declaration of a substance use problem. Disclosure of any recommendations made to the employee by the substance abuse professional can only occur with the employee's consent.

[55] The Fitness for Duty Policy contains controls intended to ensure accountability for the information collected. Further, there is no evidence that, under the current testing policy, the results of drug and alcohol tests are used in a manner inconsistent with the reasonable expectations of the persons submitting to the testing.

[56] The procedures for collection, laboratory analysis and reporting of the drug tests provided for in the Policy give employees an opportunity to challenge and explain their test results before the results are reported to the respondent.

[57] I recognize that the TTC will not provide employees subject to testing with an oral fluid sample for their own independent analysis. However, as indicated, two oral fluid samples are taken so that the person tested can challenge the positive result by asking for an analysis of the second specimen.

[58] Laboratory results are reported to the Medical Review Officer and not to the TTC. If the laboratory analysis indicates that an individual's oral fluid specimen contains drug concentrations above the cut off levels, a review process will be conducted by a Medical Review Officer who is a licensed and trained physician employed by the independent testing company DriveCheck Inc. Specifically, prior to reporting a positive test result to the TTC, the Medical Review Officer contacts the employee to determine if there is a legitimate medical explanation for the positive result. If the Medical Review Officer is satisfied that there is such an explanation, then the Officer has the discretion to report the test result as negative.

[59] The nature of the Medical Review Officer's report is described by Mr. Bartz in his affidavit at paragraphs 14 et seq. Both breathalyzer and oral fluid test results are classified as

positive, negative, cancelled or a refusal to test. If an employee advises the Medical Review Officer that he or she is taking medication that may affect his or her fitness for duty, a safety sensitive flag is attached to the negative result. Thus, Mr. Bartz receives the employee's name, a one-word description of the test result and possibly a safety sensitive flag next to a negative result. For the sake of completeness, a result is described as cancelled if an irregularity has occurred during the testing process. In addition, Dr. Snider-Adler indicated at paragraph 29 of her affidavit that it is the practice of Medical Review Officers under her supervision to advise the employee of the laboratory result and ask the employee to call the Medical Review Officer back within 72 hours. This gives the employee an opportunity to discuss laboratory result with a Union representative prior to discussing it with the Medical Review Officer.

[60] Andrew Byford, the Chief Executive Officer for the TTC, describes at paragraph 58(c) of his affidavit a situation in December 2015 where a bus hit a pedestrian and the operator tested positive for cannabinoids. After the bus operator decided to participate in a review by the Medical Review Officer, the test result was changed from positive to negative because the Medical Review Officer found that the operator had a prescription for medical marijuana. There was no suggestion that the Medical Review Officer was required to disclose to the TTC the reason why the employee's physician prescribed marijuana.

[61] Finally, the fact that a refusal to submit to a random test is considered a policy violation, just like a positive test result, adds a coercive element to the Fitness for Duty Policy. I am satisfied that it is impossible to effectively enforce the Policy if an employee can simply refuse to test. In my view, there is no other sensible way to view a refusal to submit to a random test.

[62] I am satisfied that the nature of the Fitness for Duty Policy is not only disciplinary but also remedial. I am also satisfied that employees have some degree of control over the information collected and generated under the policy and that there is accountability for the information collected.

[63] In short, I am satisfied that the Fitness for Duty Policy is reasonably tailored to its stated health and safety purpose.

[64] If the random test process under the Policy is not properly explained to employees, is unreasonably slow or carried out in an embarrassing way, the grievance process may provide a remedy, if the Collective Agreement covers drug and alcohol testing and the ATU takes up the grievance. If the grievance procedure is not available, then this may be an issue when the next agreement is negotiated. For the purposes of this motion I am satisfied that problems in the execution of the Policy are not irreparable.

[65] Sixth, part of the circumstances surrounding the respondent's decision to institute random drug and alcohol testing is the state of the law of damages with respect to breaches of privacy.

[66] The Ontario Court of Appeal recognized a common-law tort of invasion of privacy in the context of intrusion upon seclusion in *Jones v. Tsige*, 2012 ONCA 32. In that case, the Court of Appeal found that the defendant committed the tort when she used her position as a bank employee to access private bank records of her ex-spouse's common-law partner 174 times.

Significantly, for the purposes of this motion, the Court of Appeal awarded damages for the privacy violation committed by the defendant. At paragraph 87 of the decision, the Court of Appeal set out considerations in awarding damages and stated that “damages for intrusion upon seclusion in cases where the plaintiff has suffered no pecuniary loss should be modest but sufficient to mark the wrong that has been done.” At paragraph 90 the court made a more specific observation concerning the consequences of an invasion of privacy: “I would place this case at the midpoint of the range I have identified and award damages in the amount of \$10,000. Tsige’s intrusion upon Jones’ seclusion does not, in my view, exhibit any exceptional quality calling for an award of aggravated or punitive damages.” It is clear from this comment that the Court of Appeal not only felt the damages were an appropriate remedy but also contemplated aggravated or punitive damages for an egregious invasion of privacy.

[67] I am satisfied that the considerations in awarding damages outlined in *Jones v. Tsige* at paragraph 87 can be adapted to this situation so that a court can calculate damages for wrongfully obtaining breath or fluid samples from employees, should that be the result of the arbitration. Specifically:

- the nature, incidence and location of the act will be known;
- the effect of the taking of the samples on the health, welfare, social, fine or financial position of employees can be determined;
- the relationship between the parties is known;
- any distress, annoyance or embarrassment suffered by the employees can be described in evidence; and finally
- the conduct of the respondent leading up to and including the taking of the sample is easily described.

[68] Accordingly, I am satisfied that, should the TTC’s Fitness for Duty Policy be found to contravene the Collective Agreement or the Ontario *Human Rights Code*, the law of Ontario provides for the payment of money damages to those employees whose privacy has been “wrongfully” infringed by random testing.

[69] The applicants complain about possible reputational damage. I do not accept this submission.

[70] The Policy tests 20% of the Safety Sensitive, Specified Management and Designated Executive workforce in a year. This means the entire population of employees who are subject to random testing will have a chance of being tested within five years. It seems to me that because everyone will have a chance of being tested, over time, any stigma attached to compelling an employee to attend a location where drug and alcohol testing takes place will be quickly eliminated. In addition, presumably the TTC workforce will know that there is a random testing policy and will appreciate that a co-worker attending at a testing location may be there to be randomly tested and for no other reason. Further, random testing applies to senior management

of the TTC, including the Chief Executive Officer. This will also reduce any stigma associated with being tested for drugs or alcohol.

[71] The applicants also complain that random testing will permanently damage the relationship between employees and management. The applicants claim in their factum that this risk is exacerbated by the fact that no clear, detailed and comprehensive information has been communicated about the random testing procedures. The applicants complain that there is an atmosphere of secrecy that causes mistrust.

[72] I do not accept this submission.

[73] The respondent's record contains a letter from Andrew Byford to all TTC employees dated April 18, 2016, providing an update on the TTC Board's decision of March 23, 2016 to approve funding for random drug and alcohol testing. The respondent's record also contains a booklet issued by the TTC to all employees that provides an overview of the Fitness for Duty Policy. The respondent's Record also contains a Fitness for Duty Update dated December 2016, explaining random drug and alcohol testing. One of the employees, Mr. Akhmetov, provided an affidavit dated January 12, 2017, in which he in part claimed that management had provided no information about random testing. However, he acknowledged on cross-examination that TTC did provide information about random testing, but he did not read it.

[74] I am satisfied that the TTC distributed comprehensive information to all employees about its Fitness for Duty Policy and about its intention to implement random drug and alcohol testing. I am not persuaded that random testing will permanently damage the relationship between employees and management.

[75] The applicants complain about the risk of false positives due to, for example, exposure to second hand smoke, flawed testing or prescription medication.

[76] With respect to the applicant's concern that exposure to secondhand smoke may lead to a false-positive result, Dr. Kadehjian, a toxicologist whose unchallenged affidavit evidence was tendered by the respondent, stated at paragraph 23 of his affidavit that "[u]sing the 10 ng/mL cutoff for THC as specified in the TTC policy, a positive result for marijuana would be virtually impossible except under the most extreme smoke exposure conditions."

[77] With respect to false-positive results due to flawed testing, two samples are taken in case the employee who has tested positive wants a retest. In addition, a certified laboratory analyzes the oral fluid samples.

[78] False positive results caused by prescription medication will be addressed through a review by the Medical Review Officer. An employee who tests above a cut-off level will have an opportunity to provide a legitimate explanation to a Medical Review Officer who, if satisfied with that explanation, will report the test result as negative.

[79] Wrongful dismissal due to a proven false positive result would also be compensable in damages. Monetary damages are available as compensation for loss of employment. As the

Saskatchewan Court of Queen's Bench stated in *Robinson v. Saskatoon (City)*, 2009 SKQB 183 at paras. 23-24,

[l]oss of employment with a particular employer, or loss of a particular opportunity to earn self-employed income, can lead to harm. That harm is compensable in damages, though. The loss of employment is not, and does not lead to, irreparable harm. Canadian courts have recognized the trauma and strain experienced by a person when losing a job. Courts have not determined, however, that irreparable harm flows from the loss of a job. The loss of a job leads to a claim for damages, not to irreparable harm.

[80] This court routinely calculates damages for wrongful dismissal.

[81] I do not wish to diminish the difficulties of proving that the test result is falsely positive or the anxiety associated with losing a job. Rather, the test for me on this motion is whether the harm caused by a false positive result is compensable with money. I am satisfied that it is.

[82] The applicants submitted the evidence of Dr. Ann Cavoukian, a former Information and Privacy Commissioner of Ontario for 17 years, who stated that random mandatory drug and alcohol testing "is among the most intrusive forms of personal surveillance." Dr. Cavoukian acknowledged that the focus of her work was on protection of data about identifiable individuals and not on collection of that data through, for example, collection of bodily fluids. She agreed that she had not looked at any guidelines on collecting and interpreting results of oral fluid, urine, or breathalyzer testing. Dr. Cavoukian acknowledged that she had not studied or written about the psychological impact of being tested.

[83] Dr. Cavoukian stated at paragraph 21 of her affidavit that she

share[d] the opinion of various Canadian courts that given that the existence and application of a mandatory random alcohol and drug testing for workers in "safety sensitive" positions may create psychological harm to individuals, such testing and policies must only be done in circumstances where there is clearly reasonable cause to do so.

[84] In her report, at paragraph 16, Dr. Cavoukian recognized that privacy interests must be balanced against the interests of security and safety.<sup>2</sup> On cross-examination Dr. Cavoukian acknowledged that she had written a report about the TTC's video surveillance program in response to a complaint from Privacy International in which she recognized that there was a role for video surveillance by the TTC despite the privacy invasion it caused.

[85] Finally, two members of the ATU described in their affidavits the anxiety that they feel about the possibility of being randomly tested.

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<sup>2</sup> Cavoukian Report, Application Record, Vol. 5 at 1197.

[86] I am not persuaded by the evidence that instituting random drug and alcohol testing creates the likelihood of psychological harm to the TTC employees.

[87] Despite random testing being common place in the US, Australia and other foreign jurisdictions, there is no evidence that employees subject to random testing in those countries suffer any emotional or psychological harm. Dr. Cavoukian acknowledged, when cross-examined on her affidavit, that she was not aware of any studies of individuals suffering psychological harm due to workplace random testing.

[88] Mr. Byford stated at paragraph 66 of his affidavit that he had been subject to random testing when he was employed in the United Kingdom and Australia and that “there was no feeling of loss of dignity or discomfort with the testing process. We accepted the testing was necessary for safety. Nor did any stigma attach to being randomly tested because the programs applied to all safety critical workers, which will also be the case at the TTC.”

[89] The Fitness for Duty Policy and the Fitness for Duty Update explain how information generated by random drug and alcohol testing will be used.

[90] Persons being tested have some control over the results in the sense that the Medical Review Officer will discuss with them a result above the cut-off to find an explanation for it before reporting a positive result. There is an opportunity to retest an oral fluid sample because two test samples are taken. In short, this is not a situation in which the person being tested has completely lost control over the information produced by the test.

[91] I attach no weight to the statements of anxiety that the two members of the ATU voiced in their affidavits. One of them has never been tested, and the other submitted without complaint to post accident drug and alcohol testing.

[92] The applicants argue that random testing raises an issue of embarrassment and humiliation. Specifically, the applicants are concerned that employees who are not impaired at work may be embarrassed or humiliated by testing positive due to drug consumption outside of the workplace. In *B.(A.) v. Stubbs* (1999), 97 O.T.C. 15 (Ont. S.C.J.), the plaintiff sued a surgeon because he was unhappy with the result of a penile enlargement procedure. At the beginning of the litigation, the plaintiff asked for an injunction preventing publication of his name. The plaintiff claimed that he would suffer intense embarrassment and thus be irreparably harmed. The injunction was denied. The court held in para. 22 et seq. that the potential for embarrassment does not in itself constitute irreparable harm. Evidence of irreparable harm must be clear and not speculative.

[93] In conclusion, after considering all the evidence submitted on this motion and after considering the surrounding circumstances including those to which I have referred, I am not satisfied that the applicants will suffer irreparable harm unless I issue an injunction. On that basis, I am dismissing this motion with costs.

[94] In case I am wrong, I propose to comment on other aspects of the test for an interlocutory injunction.



*The balance of convenience*

[95] Under the third branch of the *RJR-MacDonald* test, the court must determine which of the two parties will suffer the greater harm from the granting or refusal of the injunction, pending the decision on the merits: see *RJR-MacDonald* at para. 67.

[96] In applications involving *Charter Rights*, in addition to the damage each party alleges it will suffer, the interest of the public must be considered when assessing where the balance of convenience lies: see *RJR-MacDonald* at paras. 69, 71 and 85.

[97] On this motion, the interest of the public is also a consideration because, as indicated, people in Toronto make 1.8 million journeys on the TTC every day and it is important that they do so as safely as possible.

[98] It is important, before proceeding further, to emphasize what could easily be forgotten. The applicants and the respondent agree on the importance of public safety; they disagree on the importance of random testing in achieving the TTC's public safety goals.

[99] Dr. Scott Macdonald provided two affidavits and an expert report that were filed by the applicants. Dr. Macdonald is a social epidemiologist and a biostatistician. He is a Professor at the School of Health Information Science, University of Victoria in British Columbia.

[100] Dr. Macdonald repeatedly accepts that the breathalyzer is a valid indicator of impairment and that there is a body of evidence linking alcohol impairment and collisions.<sup>3</sup>

[101] Breath alcohol testing measures breath alcohol concentration that allows for estimation of blood alcohol concentration. The breathalyzer result is admissible evidence on the issue of impairment. The *Criminal Code* provides a blood alcohol concentration cut-off and makes it an offence to drive when exceeding the cut-off without requiring proof of impairment: see section 253(1)(b) of the *Criminal Code*, R.S.C., 1985, c. C-46.

[102] Dr. Macdonald also agrees that performance deficits can result from acute use of some drugs.<sup>4</sup>

[103] Dr. Macdonald agrees that the presence of drugs in oral fluid indicates recent drug use.<sup>5</sup>

[104] Dr. Macdonald agrees that a positive saliva test can be used to determine prior use of drugs within certain detection periods that vary, depending on the drug.<sup>6</sup>

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<sup>3</sup> Macdonald Expert Opinion at Application Record, vol. 3, at 672, 703-704, 780; Macdonald Affidavit at Application Record, Vol. 3, 619 at para. 4.

<sup>4</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 697.

<sup>5</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 695.

<sup>6</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 661.

[105] With respect to marijuana, Dr. Macdonald cites studies showing a positive relationship between tetrahydrocannabinol (THC) concentrations in the blood with “both being a driver of car crashes and being responsible for crashes.”<sup>7</sup> He agrees that “there is some evidence that blood tests can be used to determine impairment for cannabis.”<sup>8</sup>

[106] Dr. Macdonald maintains, however, that oral fluid tests do not correlate with blood tests and are incapable of measuring impairment.<sup>9</sup>

[107] I do not find Dr. Macdonald’s position persuasive. One of the aspects of the public interest involved in this case is the interest of safety of millions of TTC passengers. Thus, the question is not the extent of impairment of a TTC employee in a safety-sensitive position, but whether he or she poses a greater safety risk due to recent consumption of any of the drugs referred to in the TTC Fitness for Duty Policy.

[108] It is not necessary to correlate oral fluid drug concentrations to blood concentrations to identify those posing an increased safety risk. If the cut-offs for oral fluid drug testing are appropriately chosen, then a positive test result (i.e. a result above the cut-off) for a drug can be associated with use of that drug which is sufficiently recent that it falls within the known time frames for the impairing effects of that drug.

[109] For example, Dr. Snider-Adler states in her Report that at the TTC cut-off level of 50 ng/mL, cocaine is first detected 2-5 minutes after use and then for up to 8 hours after use. She also states that the impairing effects of cocaine can last up to 9 hours after use and many days after binge use. It is because of this overlap that Dr. Snider-Adler states that a positive oral fluid test for cocaine indicates impairment from the substance.<sup>10</sup>

[110] In a similar vein, with respect to THC, Dr. Snider-Adler points out that an oral fluid test reflects the remnants of THC (prior to it being metabolized) found in the oral cavity after marijuana use. These remnants remain there for several hours. A Table in Dr. Snider-Adler’s Report indicates that when the cut-off for THC is set at 10 ng/mL, as it is in TTC’s testing policy, the remnants will test positively for approximately 4 to 8 hours after use. In her explanation to the table, Dr. Snider-Adler clarifies that the timeframe is limited to approximately 4 hours after use. After this time, the THC levels fall below the 10 ng/mL cut-off level and the test result will be negative. Dr. Snider-Adler states that it is accepted that psychomotor and cognitive deficits from marijuana use last 4-24 hours at minimum. Dr. Snider-Adler maintains that it is thus reasonable to correlate a positive test for THC with impairment.<sup>11</sup>

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<sup>7</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 753.

<sup>8</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 687.

<sup>9</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 753.

<sup>10</sup> Snider-Adler Report at Respondent’s Application Record, vol. 4 at 2246-2247.

<sup>11</sup> *Ibid.*

[111] Dr. Macdonald agrees with the minimum detection window for THC in the TTC policy as described by Dr. Snider-Adler. At one point in his Report he cites his own 2010 study that showed that “meaningful deficits from cannabis peak within 2 hours and persist for about 4 hours after use.”<sup>12</sup>

[112] In her report, Dr. Snider-Adler charts the detection windows and impairing effects timeframes for all drugs covered by the TTC Fitness for Duty Policy.<sup>13</sup>

[113] I agree with Dr. Snider-Adler’s approach.

[114] I am satisfied on the evidence that due to the high cut-off levels set out in the TTC Policy (which are higher than the cut-off levels proposed in the draft SAMHSA Guidelines) and the corresponding short windows of detection, the time periods when oral fluid samples test positive for drugs overlap with the time periods during which these drugs impair the psychomotor and cognitive abilities of the person tested. Therefore, there is a likelihood that the person who tested positive was impaired when tested.

[115] I recognize that there is a disagreement among the experts about the length of impairment caused by marijuana. Dr. Beckson and Dr. Macdonald disagree whether “under the influence” or “impairment” includes the carry-over effect of cannabis after the 4-hour period. In Dr. Beckson’s opinion, impairment may occur past the 4-hour period of acute intoxication due to carry-over effects, withdrawal and long-term toxicity of drugs. For example, Dr. Beckson relies on a study that states that cannabis carry-over effects can last 24-31 hours.<sup>14</sup>

[116] Dr. Macdonald states that the preponderance of scientific evidence indicates no meaningful carry-over or hangover effect for cannabis.<sup>15</sup>

[117] This issue would have been significant had the TTC chosen a lower cut-off level for THC, which resulted in a longer detection window for THC. However, by selecting a cut-off that limits the detection window to approximately 4 hours, the TTC Policy reasonably ensures that only employees who are most likely acutely intoxicated due to recent consumption of marijuana will test positive.

[118] I recognize that there is also a question about chronic use of marijuana. A chronic user may test positive for THC even if he or she consumed marijuana more than 4 hours before the test due to a build-up of the substance in the body. This does not mean, however, that the chronic user does not still pose a safety risk.

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<sup>12</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 759.

<sup>13</sup> *Ibid.*

<sup>14</sup> Beckson Report at Respondent’s Application Record, vol. 5 at 2335-2336.

<sup>15</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 761.

[119] Dr. Macdonald agrees that “chronic use or dependency may elevate safety risks for some people.”<sup>16</sup>

[120] Finally, I approach the balance of convenience issue by considering two hypothetical outcomes.

**The first hypothetical outcome is that the applicants are successful at the arbitration but unsuccessful on this injunction motion.**

[121] If this motion is refused, random testing will proceed. Annually, 20% of the eligible employees will be tested. It is impossible to predict how long the arbitration will take. There appears to be no end in sight. So, it is safe to assume that a significant number of eligible employees will be tested before the arbitration is finally completed.

[122] For those who test negatively, DriverCheck Inc. will advise Mr. Bartz that the employee’s test was negative. Assuming the applicants are successful at the arbitration, the testing and disclosure of the negative result will constitute a privacy violation, which I am satisfied is compensable in damages, per the formula set out in *Jones v. Tsiges*. These damages will reflect the public interest that these employees have in the protection of their privacy.

[123] For those who test positively in this hypothetical outcome, some will then be referred to IWS for substance use disorder professional help. Some will enter agreements with the TTC that allow them to continue their employment in return for their consent to a treatment programme and unannounced periodic testing for a specified period following their return to work (Last Chance Agreement). Some will be subject to progressive discipline. Some may lose their jobs. Assuming the applicants are successful at the arbitration, these consequences will result in damages for the persons concerned. The damages will reflect the public interest that these employees have in protection of their privacy.

[124] These consequences are serious. However, they are consequences visited upon persons who test positive on a workplace test for drugs or alcohol and who likely pose a safety risk at the time of the test.

[125] I have already indicated that I am not persuaded that instituting random drug and alcohol testing creates the likelihood of psychological harm to the employees, results in reputational damage or permanently damages the relationship between employees and management. I have also indicated elsewhere why I do not accept that there is a real risk of harm from false-positive results.

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<sup>16</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 716.

**The second hypothetical outcome is that the TTC is successful at the arbitration but unsuccessful on this injunction motion and an injunction is issued.**

[126] In this hypothetical situation, random testing will not commence until the conclusion of the arbitration. It is impossible to predict how long the arbitration will take. There appears to be no end in sight.

[127] This motion does not seek to prevent the testing currently in place. The employees in safety sensitive, specified management and designated executive positions will continue to be tested:

- where there is reasonable cause to believe drug or alcohol use has made them unfit for duty; or
- as part of a full investigation into a significant work-related accident; or
- where the employee is returning to duty after violating the Fitness for Duty Policy; or
- where the employee is returning to duty after treatment for drug or alcohol abuse; or
- as a final condition of appointment to a safety sensitive position.

[128] The question of whether and to what extent the TTC will suffer harm if it is prevented from adding random testing to this list requires a consideration of drug and alcohol use by TTC employees. It is important to keep this consideration in perspective. The evidence suggests there is a problem in Ontario with drugs and alcohol and there is no reason to believe that the applicants and the respondent have been spared from it.

[129] Specifically, Dr. Melissa Snider-Adler stated at page 11 of her Report that approximately 10% of Ontarians have been diagnosed and/or self-identify as having substance use disorders.<sup>17</sup>

[130] A 2012 Canadian Community Health Survey by Statistics Canada showed that 18.1% of Canadians 15 years or older met the criteria for abuse or dependence of alcohol. 6.8% of Canadians 15 year or older displayed symptoms of cannabis abuse or dependence. This is much higher than the rate of abuse or dependence for other substances, which was 4%. According to Health Canada, approximately 27% of Canadians surveyed in 2012 who had used cannabis in the past three months reported that they used cannabis every day.<sup>18</sup>

[131] Mr. Byford in his affidavit at paragraphs 44-46 stated that there were continuous instances of impairment at work since the Fitness for Duty policy was implemented in 2010. Specifically, there were 116 instances where employees tested positive or refused to be tested

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<sup>17</sup> Snider-Adler Report, Respondent's Application Record, vol. 4 at 2250.

<sup>18</sup> *Ibid.*

between October 2010 and December 2016, with 27 incidents occurring in 2015. In addition, 2.4% of external applicants for safety sensitive positions — individuals who knew they would be subjected to drug testing — tested positive.

[132] Two offsetting facts must be remembered to keep this evidence in perspective.

[133] First, the TTC has 11,000 employees. Dr. Macdonald stated at paragraph 14 of his supplementary affidavit that the TTC has experienced a decline in the proportion of combined positive and refusal test results since 2010.

[134] Second, drug or alcohol misuse at the TTC carries the complication that any accident can have tragic consequences for many people, not all of whom are TTC employees, and thus the TTC is not a typical Ontario workplace.

[135] Mark Russell is a Staff Sergeant with the Investigative Services Unit at the TTC. He has been in that role since 2001. He is responsible for investigating allegations of wrongdoing and misconduct by TTC employees as it relates to their employment.

[136] Staff Sergeant Russell provided an affidavit filed by the respondent. He states at paragraph 12: “it is evident to me that there is a culture of drug and alcohol use at the TTC, particularly in certain large complexes and in TTC yards (i.e. large areas on TTC property where buses, streetcars, subway cars and other vehicles are stored, cleaned and serviced when not in operation).”

[137] Staff Sergeant Russell also commented at paragraph 12 of his affidavit on the difficulty of detecting employees who are unfit for duty: “[g]iven the difficulties in detecting drug and alcohol-related Misconduct, and the difficulties in corroborating allegations of such Misconduct, I believe that many cases of drug and alcohol-related activity among TTC employees at work go undetected and unverified.”

[138] Staff Sergeant Russell was not cross examined.

[139] The evidence satisfies me that there is a demonstrated workplace drug and alcohol problem at the TTC which is currently hard to detect and verify. This is factually different from the *Irving Pulp and Paper* decision where the arbitration board concluded that the employer exceeded the scope of its management rights under a collective agreement by imposing random alcohol testing in the absence of evidence of a workplace problem with alcohol use.

[140] While the ATU challenges the entire drug testing policy, the evidence as to the workplace safety risks posed by drugs and alcohol seems to focus largely on marijuana.

[141] Dr. Snider-Adler states that when looking at marijuana specifically, several studies have shown that cannabis impairs the cognitive and motor abilities necessary to operate a motor

vehicle and doubles the risk of crash involvement. After alcohol, cannabis is the most commonly detected substance among drivers who die in traffic crashes in Canada.<sup>19</sup>

[142] Dr. Snider-Adler cites a statement by Health Canada that the ability to drive or perform activities requiring alertness may be impaired for up to 24 hours following use of marijuana.<sup>20</sup>

[143] Dr. Macdonald, however, maintains that “research studies have failed to show that drug users, as determined by saliva or urinalysis tests, are more likely to be drivers injured in crashes”.<sup>21</sup>

[144] Because cannabis impairs cognitive and motor abilities and because oral fluid testing at the TTC cut-off levels identifies recent use of cannabis (i.e. within approximately 4 hours of being tested), I conclude that oral fluid testing for cannabis at the TTC cut-off level will detect persons whose cognitive and motor abilities are likely impaired at the time of testing.

#### **Random testing is a deterrent.**

[145] Specifically, Dr. Snider-Adler points out at paragraph 36 of her affidavit that DriverCheck Inc. has seen a significant decline in the rate of positive random drug tests among employees of 3,377 employers who are clients of DriverCheck Inc. and are subject to U.S. DOT regulations mandating random testing programs: from 2.31% in 1996 to 0.55% in 2015.

[146] Mr. Byford in his affidavit attaches an Exhibit which shows a reduction in positive test results in other jurisdictions after the implementation of unannounced/random drug and alcohol testing. In London Underground, the positive tests results went from 3.42% in 1993 when random testing was introduced to 1.18% in 1995.<sup>22</sup>

[147] Counsel for the applicants pointed out that these statistics demonstrate a decline in persons testing positive and not a decline in workplace accidents.

[148] However, because I accept that the acute effects of cannabis and the other drugs referred to in the TTC Fitness for Duty Policy can negatively affect performance, I am satisfied that a decline in persons testing positive for those drugs, given the Policy cut-off levels, reduces the risk that persons impaired by those drugs will cause a performance related accident.

#### **The public interest**

[149] The public interest presents itself in two ways,

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<sup>19</sup> Snider-Adler Report at Respondent’s Application Record, vol. 4 at 2253.

<sup>20</sup> Snider-Adler Report at Respondent’s Application Record, vol. 4 at 2259.

<sup>21</sup> Macdonald Expert Opinion at Application Record, vol. 3 at 672.

<sup>22</sup> Byford Affidavit, Exhibit U at Respondent’s Application Record, vol. 1 at 287.

[150] First the reasonable expectation of privacy of the employees of the TTC must be protected by the court. The right to privacy is protected by the Charter of Rights and Freedoms and recognized at common law by the Court of Appeal in *Jones v. Tsige*.

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

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

**Conclusion concerning the balance of convenience**

[153] After considering all the evidence, including the evidence to which I have referred, I am satisfied that, if random testing proceeds, I will increase the likelihood that an employee in a safety critical position, who is prone to using drugs or alcohol too close in time to coming to work, will either be ultimately detected when the test result is known or deterred by the prospect of being randomly tested.

[154] This will increase public safety.

[155] To the extent that refusing the injunction results in, if the applicants are ultimately successful at the arbitration, an invasion of an employee's reasonable expectation of privacy, the person concerned can be compensated with damages.

[156] Accordingly, I am satisfied on the evidence that the balance of convenience favours the respondent on this motion and I would have refused this motion on that basis.

**Conclusion concerning the applicants' motion**

[157] For the reasons set out, this motion is dismissed.

**Costs**

[158] The parties have agreed that costs in the amount of \$100,000 would be reasonable. Having read the materials and listened to the argument I agree that this is a reasonable sum. Accordingly, the applicants will pay the respondent \$100,000 inclusive of HST and disbursements on account of costs.

  
MARROCCO A.C.J.S.C.



**CITATION:** Amalgamated Transit Union, Local 113 v. Toronto Transit Commission, 2017  
ONSC 2078  
**COURT FILE NO.:** CV-17-567048  
**DATE:** 20170403

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

AMALGAMATED TRANSIT UNION, LOCAL 113,  
and ROBERT KINNEAR on his own behalf and on  
behalf of all other MEMBERS OF THE  
AMALGAMATED TRANSIT UNION, LOCAL 113

Applicants

– and –

TORONTO TRANSIT COMMISSION

Respondent

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**REASONS FOR JUDGMENT**

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**MARROCCO A.C.J.S.C.**

**Released:** 20170403



Via email: [steven.delduca@ontario.ca](mailto:steven.delduca@ontario.ca)

June 26, 2017

Honourable Steven Del Duca  
Minister of Transportation  
3rd Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, ON M7A 1Z8

Dear Minister,

**Re: Impacts of the Legalization of Marijuana on Public/Workplace Safety**

As you know, the Government of Canada has introduced legislation to legalize the recreational use of marijuana. This will, of course, also have significant implications for the provinces which ultimately will be responsible for implementing and enforcing the new federal law. The undersigned are participants in a coalition of employers in safety-sensitive industries who are seeking to ensure that the appropriate safeguards are in place to protect public safety and safety in the workplace. Recently, a subset of the coalition and other employer groups including the Toronto Transit Commission, the Ontario Trucking Association, the Ontario Public Transit Association and the Canadian Urban Transit Association met with officials from the ministry of labour to discuss the impact legalization will have on our collective workplaces. As Ontario's minister responsible for transportation safety, there are important issues that require your attention and consideration. We are writing today to seek an early meeting with you to discuss these issues.

With legalization, marijuana will achieve a status similar to that of alcohol. And, like alcohol, the consumption of marijuana has certain short-term effects which decrease concentration and reaction times for those operating motor vehicles and heavy equipment. It is a known fact that marijuana impairs several brain functions such as coordination, judgement of distances, reaction time, and ability to pay attention. Marijuana is second to alcohol as the drug most frequently found among drivers involved in crashes and drivers charged with impaired driving, and among seriously injured drivers. In short, the use of marijuana, like alcohol consumption, is not conducive to the safe operation of any type of motor vehicle, heavy machinery, etc. The Federal Task Force on the Legalization of Cannabis identified the need to guard against marijuana-impaired driving, for example, as a central objective. However, to date there has been very little meaningful discussion or consideration of the impact of legalizing marijuana on employers in the transportation sector or measures needed in the workplace – e.g., random alcohol and drug testing – to ensure public safety as well as occupational safety.

There has been very little meaningful consideration to date with regard to workplace impacts. We understand that does not necessarily fall under your purview. However, what happens in the workplace has a direct bearing on public safety. The movement of people and goods, by whatever type of conveyance is a case in point. To date, federal efforts have focused almost exclusively on developing a system of roadside testing where a virtual zero-tolerance policy (similar to that which exists in the Ontario graduated license system) will apply and violations will trigger administrative sanctions (e.g., license suspensions/fines). Reliance on roadside testing will not provide sufficient protection for the public in our view nor assist workplaces including public transport and commercial trucking in an effective manner.

Our coalition is seeking the following:

1. Consideration be given to the broader social benefit to be achieved by the introduction of legislation requiring mandatory post-incident, reasonable cause and random drug and alcohol testing for safety sensitive occupations within the transportation industry and that the relevant support models utilized in the United States be adapted to Canadian perspective.
2. That a provincial database be established to permit information sharing of instances where employees are found to have been likely impaired at the workplace.
3. That a working group be struck to review the Ontario Human Rights Code and related policies, with a view to the practical realities of the workplace and such matters of drug and alcohol accommodation.

You may be aware that all Canadian trucking companies and truck drivers entering the United States are subject to US drug and alcohol testing laws which require post-accident, pre-employment and random testing.

The TTC has also introduced random testing which to date, implementation has been upheld by the courts, notwithstanding the matter of the merits is outstanding. This however has been subject of continued and costly challenges.

We look forward to meeting with you to discuss these important issues at your earliest convenience.

Sincerely,



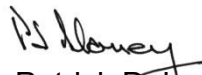
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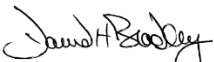
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Chief Executive Officer  
Ontario Trucking Association  
[david.bradley@ontruck.org](mailto:david.bradley@ontruck.org)

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Josh  
**Colle**



Chair, Toronto Transit Commission

Toronto City Councillor

Ward 15 Eglinton-Lawrence

Councillor Josh Colle  
Office of the TTC Chair  
Toronto City Hall  
100 Queen Street West  
Suite A21  
Toronto, ON  
M5H 2N2

October 13, 2017

Hon. Steven Del Duca  
Minister of Transportation  
3rd Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, ON M7A 1Z8

Dear Minister Del Duca,

RE: Legalization of Marijuana and associated workplace safety implications

As you know, the Toronto Transit Commission (TTC) is the third largest transit system in North America, carrying an average of 1.8 million passengers daily in the city of Toronto, Ontario. We carry passengers via subway train, streetcar, city bus and paratransit bus. Additionally, in order to maintain this system, we have extensive maintenance and signaling functions. Altogether, we have approximately 10,630 unionized positions considered to be safety-sensitive, in addition to 2,005 non-union supervisory and executive positions, which are designated as safety-sensitive due to decision making impacts. Furthermore, we have a number of contract employees on major projects that would be considered safety-sensitive as well.

You are in receipt of a letter dated June 26, 2017 sent on behalf of a coalition group of which the Toronto Transit Commission is a part of. This is a group of parties who share a common concern about the impact that the legalization of marijuana will have on safety in the workplace, and in particular, roadways.

The TTC is a member of coalition groups both Federally and Provincially, working to raise awareness about the safety implications the legalization of marijuana will have on the workplace, and seeking safeguards to mitigate such risks. As you will have seen, their requests are consistent, as follows:

1. Consideration be given to the broader social benefit to be achieved by the introduction of legislation requiring mandatory post-incident, reasonable cause and random drug and alcohol testing for safety sensitive occupations within the transportation industry and that the relevant support models utilized in the United States be adapted to Canadian perspective.
2. That a provincial database be established to permit information sharing of instances where employees are found to have been likely impaired at the workplace.
3. That a working group be struck to review the Ontario Human Rights Code and related policies, with a view to the practical realities of the workplace and such matters of drug and alcohol accommodation.

I write to formally voice my support of the TTC and coalition's request that the Provincial Government review the absence of legislation in the Province of Ontario, relating to mandatory random drug and alcohol testing, for public transportation and commercial transportation industries.

As you may be aware, the TTC implemented a random drug and alcohol testing program in May of this year. Since that time, the positive results have unfortunately been overwhelming. As of July 19, 2017 3.3% of instances of where random testing has taken place, have yielded a non-compliant result or refusal. In actual numbers, there have been 14 positive results, 10 of which were for drugs and 2 test refusals. Additionally and not included in the above number were 2 safety sensitive flags (which means that the individual is taking prescription medication legitimately that could have impairing impacts, which flagged through testing) and 1 alcohol policy violation (result between 0.02-0.039 BAC).

The considerations given to the impact of legalization of marijuana on safety sensitive workplaces that we have seen, do not give confidence that potential workplace impacts are being taken as seriously as they ought to be. The focus of efforts with respect to regulation on the roadways and devices to detect impairment, have been centered strictly on road side devices as we understand, and are being considered solely from a criminality and policing point of view. While of course this must be done and we are supportive of such steps, the missing piece is the consideration of workplaces. Currently, there exists technology that the TTC with the help of experts, has determined to be sufficient to detect recent use of drugs of abuse and therefore likely impairment at the workplace. The legal standard in the employment context is different than in the criminal context and we suggest both streams must be considered simultaneously and in advance of legalization of marijuana. That said, the law is very fact specific and we see there being opportunity for legislation to enhance clarity and consistency in the goal of safety.

The TTC has been in litigation over drug and alcohol testing generally (not just random testing) for approximately 5 years at a significant cost to taxpayers. It is expected this litigation will continue for several more years at least. This is notwithstanding existing employment caselaw which is not inconsistent with the TTC's testing policy to date. This, in our view, highlights the need for a clear legislated position on testing in safety sensitive workplaces.

Public transit is extremely safety sensitive. Not only are the lives of employees dependent on safety at the workplace, but the broader public is dependent on safety of the workplace as well. The nature of such workplaces inherently add pressure and underscore the importance of fulfilling our obligation to provide a safe working environment to our employees, and to ensure that this is protected.

We would welcome the opportunity to discuss this request further.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh Colle". The signature is fluid and cursive, with the first name "Josh" being more prominent than the last name "Colle".

Josh Colle  
Chair of the Board  
Toronto Transit Commission

40.32

CC: His Worship John Tory  
Hon. Kevin Flynn, MOL  
TTC CEO Andy Byford



Josh  
**Colle**



Chair, Toronto Transit Commission

Toronto City Councillor

Ward 15 Eglinton-Lawrence

Councillor Josh Colle  
Office of the TTC Chair  
Toronto City Hall  
100 Queen Street West  
Suite A21  
Toronto, ON  
M5H 2N2

October 13, 2017

His Worship John Tory  
Mayor, City of Toronto  
100 Queen Street West  
City Hall, Second Floor, West

Dear Mayor Tory,

RE: Legalization of Marijuana and associated workplace safety implications

As you know, the Toronto Transit Commission (TTC) is the third largest transit system in North America, carrying an average of 1.8 million passengers daily in the city of Toronto, Ontario. We carry passengers via subway train, streetcar, city bus and paratransit bus. Additionally, in order to maintain this system, we have extensive maintenance and signaling functions. Altogether, we have approximately 10,630 unionized positions considered to be safety-sensitive, in addition to 2,005 non-union supervisory and executive positions, which are designated as safety-sensitive due to decision making impacts. Furthermore, we have a number of contract employees on major projects that would be considered safety-sensitive as well.

The TTC is a member of coalition groups both Federally and Provincially, working to raise awareness about the safety implications the legalization of marijuana will have on the workplace, and seeking safeguards to mitigate such risks. Their requests, provincially, have been as follows:

1. Consideration be given to the broader social benefit to be achieved by the introduction of legislation requiring mandatory post-incident, reasonable cause and random drug and alcohol testing for safety sensitive occupations within the transportation industry and that the relevant support models utilized in the United States be adapted to Canadian perspective.
2. That a provincial database be established to permit information sharing of instances where employees are found to have been likely impaired at the workplace.
3. That a working group be struck to review the Ontario Human Rights Code and related policies, with a view to the practical realities of the workplace and such matters of drug and alcohol accommodation.

I write to formally seek your support of the TTC and coalition's stated requests. I understand that you will be meeting with Ontario's Premier to discuss related issues, and ask that you consider raising the issue of workplace safety in particular, and the coalition's three above noted points with emphasis on the first.

As you may be aware, the TTC implemented a random drug and alcohol testing program in May of this year. Since that time, the positive results have unfortunately been overwhelming. As of July 19, 2017 3.3% of instances of where random testing has taken place, have yielded a non-compliant result or refusal. In actual numbers, there have been 14 positive results, 10 of which were for drugs and 2 test refusals. Additionally and not included in the above number were 2 safety sensitive flags (which means that the individual is taking prescription medication legitimately that could have impairing impacts, which flagged through testing) and 1 alcohol policy violation (result between 0.02-0.039 BAC).

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We would welcome the opportunity to discuss this request further.

Sincerely,

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Josh Colle  
Chair of the Board  
Toronto Transit Commission

40.32

CC: Andy Byford, CEO of TTC



Josh  
**Colle**



Chair, Toronto Transit Commission  
Toronto City Councillor  
Ward 15 Eglinton-Lawrence

Councillor Josh Colle  
Office of the TTC Chair  
Toronto City Hall  
100 Queen Street West  
Suite A21  
Toronto, ON  
M5H 2N2

October 13, 2017

Hon. Kevin Flynn  
Ministry of Labour  
14th Floor, 400 University Ave.  
Toronto, ON M7A 1T7

Dear Minister Flynn,

RE: Legalization of Marijuana and associated workplace safety implications

As you know, the Toronto Transit Commission (TTC) is the third largest transit system in North America, carrying an average of 1.8 million passengers daily in the city of Toronto, Ontario. We carry passengers via subway train, streetcar, city bus and paratransit bus. Additionally, in order to maintain this system, we have extensive maintenance and signaling functions. Altogether, we have approximately 10,630 unionized positions considered to be safety-sensitive, in addition to 2,005 non-union supervisory and executive positions, which are designated as safety-sensitive due to decision making impacts. Furthermore, we have a number of contract employees on major projects that would be considered safety-sensitive as well.

You may be in receipt of a letter dated November 29, 2016 sent to the Assistant Deputy Minister of the Ministry of Labour, Marcelle Crouse, on behalf of a coalition group of which the Toronto Transit Commission is a part of. This is a group of parties who share a common concern about the impact that the legalization of marijuana will have on safety in the workplace, and in particular, roadways. Staff met with Ms. Crouse and her staff as well as representatives from the Ministry of Transportation on May 24, 2017.

The TTC is a member of coalition groups both Federally and Provincially, working to raise awareness about the safety implications the legalization of marijuana will have on the workplace, and seeking safeguards to mitigate such risks. As you will have seen, their requests are consistent, as follows:

1. Consideration be given to the broader social benefit to be achieved by the introduction of legislation requiring mandatory post-incident, reasonable cause and random drug and alcohol testing for safety sensitive occupations within the transportation industry and that the relevant support models utilized in the United States be adapted to Canadian perspective.
2. That a provincial database be established to permit information sharing of instances where employees are found to have been likely impaired at the workplace.
3. That a working group be struck to review the Ontario Human Rights Code and related policies, with a view to the practical realities of the workplace and such matters of drug and alcohol accommodation.

I write to formally voice my support of the TTC and coalition's request that the Provincial Government review the absence of legislation in the Province of Ontario, relating to mandatory random drug and alcohol testing, for public transportation and commercial transportation industries.

As you may be aware, the TTC implemented a random drug and alcohol testing program in May of this year. Since that time, the positive results have unfortunately been overwhelming. As of July 19, 2017 3.3% of instances of where random testing has taken place, have yielded a non-compliant result or refusal. In actual numbers, there have been 14 positive results, 10 of which were for drugs and 2 test refusals. Additionally and not included in the above number were 2 safety sensitive flags (which means that the individual is taking prescription medication legitimately that could have impairing impacts, which flagged through testing) and 1 alcohol policy violation (result between 0.02-0.039 BAC).

The considerations given to the impact of legalization of marijuana on safety sensitive workplaces that we have seen, do not give confidence that potential workplace impacts are being taken as seriously as they ought to be. The focus of efforts with respect to regulation on the roadways and devices to detect impairment, have been centered strictly on road side devices as we understand, and are being considered solely from a criminality and policing point of view. While of course this must be done and we are supportive of such steps, the missing piece is the consideration of workplaces. Currently, there exists technology that the TTC with the help of experts, has determined to be sufficient to detect recent use of drugs of abuse and therefore likely impairment at the workplace. The legal standard in the employment context is different than in the criminal context and we suggest both streams must be considered simultaneously and in advance of legalization of marijuana. That said, the law is very fact specific and we see there being opportunity for legislation to enhance clarity and consistency in the goal of safety.

The TTC has been in litigation over drug and alcohol testing generally (not just random testing) for approximately 5 years at a significant cost to taxpayers. It is expected this litigation will continue for several more years at least. This is notwithstanding existing employment caselaw which is not inconsistent with the TTC's testing policy to date. This, in our view, highlights the need for a clear legislated position on testing in safety sensitive workplaces.

Public transit is extremely safety sensitive. Not only are the lives of employees dependent on safety at the workplace, but the broader public is dependent on safety of the workplace as well. The nature of such workplaces inherently add pressure and underscore the importance of fulfilling our obligation to provide a safe working environment to our employees, and to ensure that this is protected.

We would welcome the opportunity to discuss this request further.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh Colle". The signature is fluid and cursive, with a large initial "J" and a stylized "C" at the end.

Josh Colle  
Chair of the Board  
Toronto Transit Commission

40.32

CC: His Worship John Tory  
Hon. Steven Del Duca  
Ms. Marcelle Crouse  
TTC CEO Andy Byford

## Legalization of Marijuana The Need for Legislated Alcohol and Drug Testing in Canada

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### Issue

- With the introduction of Bill C-45 (Legalization of Marijuana) and Bill C-46 (Impaired Driving), the Government of Canada has failed to address the impact of recreational marijuana on the workplace. This is a serious oversight with potentially significant consequences for workers, employers, and the public at large. Federal leadership is required on this critical issue.

### Background

- Alcohol and drug use – and its impact on the workplace – is a serious concern.
- Employers in Canada have a duty to provide their employees with a safe workplace. This obligation extends to ensuring that employees do not work under the influence of alcohol or drugs. Where the workplace extends into the public realm, the employer's obligation with respect to safety extends there as well.
- With legalization of cannabis, societal acceptance of – and use of – this drug is going to increase. Using the recent experience in Washington and Colorado as a guide, the legalization of marijuana will result in an increased consumption in Canada.<sup>1</sup> This view is also supported by experts in the field of addiction medicine.<sup>2</sup>
- This increased usage is going to impact the workplace, which will exacerbate the likelihood of workplace accidents, affecting employee and public safety.
- Employers will need additional tools to mitigate the risk of increased cannabis use in the workplace.
- Further, as noted in the Task Force's Final Report, the federal government should work with provinces... to facilitate the development of workplace impairment policies.
- The Canadian Nuclear Safety Commission has just moved forward with Fitness for Duty regulations mandating alcohol and drug testing (including random) for certain employees. Further, the recent Transportation Safety Board report (November 2, 2017) of the Carson Air crash strongly recommended the use of alcohol and drug testing (including random) in the aviation industry.

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<sup>1</sup> The Legalization of Marijuana in Colorado, Volume 3, September 2015  
Rocky Mountain High Intensity Drug Trafficking Area

<sup>2</sup> Affidavit of Dr. Melissa Snider – Adler (TTC Litigation)

## Jurisprudence / Legislation

- Canadian employers have been addressing marijuana in the workplace for a number of years. For example, cross-border trucking companies and railroads have been dealing with this issue since 1995 due to Department of Transportation regulations in the United States. The recent introduction of medical marijuana has added complexity to this issue. Legalization of marijuana for recreational consumption will increase this complexity considerably.
- The law related to alcohol and drug testing in Canada is unclear. The leading case on this issue (*Irving Pulp & Paper*) was a split decision of the Supreme Court of Canada with a strong dissent by three Justices, including the Chief Justice. Employers are confused as to whether or not they can undertake alcohol and drug testing, and if so, in what situations. It is inefficient and not in the best interest of employees or employers to resolve these matters through the courts. Clear direction is required from the Federal Government.
- Other jurisdictions have already addressed this potential safety issue. The US Government, for example, has legislated alcohol and drug testing in certain federally regulated safety-sensitive industries, such as transportation and nuclear. Other jurisdictions to similarly respond include the railway industry in New South Wales and the aviation industries in Australia, India, and the United Kingdom.
- Studies support the fact that alcohol and drug testing, including random testing, is an effective deterrent and results in less people being under the influence of alcohol and drugs at work thereby significantly mitigating the risk (see Appendix A for additional information).

## Request

- The Government of Canada should introduce legislation requiring alcohol and drug testing for employees in safety-sensitive positions. Introducing mandatory alcohol and drug testing in Canada will accomplish four main objectives:
  1. It will serve as a deterrent for individuals contemplating being at work under the influence of alcohol or drugs, thereby reducing the risk of workplace accidents. This will also increase the likelihood that persons suffering from substance abuse issues will come forward for help.
  2. It will bring Canada in line with many other jurisdictions that take the safety and security of the workplace and the public as a paramount concern.
  3. It will provide an additional and consistent tool for employers to rely upon in an effort to promote greater safety in the workplace.
  4. It will provide much-needed legal clarity for employees, unions, and employers, thereby avoiding the need for lengthy and costly legal proceedings.

## Privacy and Safety

- Some groups will argue that alcohol and drug testing infringes an individual's privacy. This is not a valid argument. Employers are aware that they have no authority over the choices made by employees during their off-work hours unless this has a direct impact on the workplace. However, employers expect employees to work safely and not to be under the influence of alcohol or drugs. Workplace and public safety must take precedence over individual privacy rights.
- The "Charter Statement" in Bill C-46 (Impaired Driving) found that the individual privacy interests engaged by the proposed forms of alcohol and drug testing were "low" and consequently the compelling interests served by the proposed testing effectively outweighed any individual privacy rights that may apply.
- If privacy rights are outweighed for an individual driving a car on the highway, the same logic must apply to a pilot flying a plane with 200 passengers, a train conductor hauling 50 cars of chemicals, a bus driver carrying 60 passengers, or a truck driver operating on a major highway.

***The Government of Canada should pass legislation mandating alcohol and drug testing in federally regulated safety-sensitive positions prior to the legalization of marijuana and before it is prompted to do so in reaction to a tragedy.***

## Appendix A

### Impacts of Random Testing

1. United States: The American Journal of Epidemiology (Volume 170, No.6, 2009) found that implementation of mandatory alcohol testing programs in 1995 was associated with a 23% reduced risk of alcohol involvement in fatal crashes by motor carrier drivers.
2. United States: Following the introduction of random testing for federally regulated workplaces in the US positive rates dropped from 1.76% in 1995 to 1.2% in 1998, and in 2005 were at 0.79%. Post-incident positive rates also dropped, from 4.3% in 1997 to 2.3% in 2011.
3. London Underground: Random testing was introduced for employees of the London Underground in 1993. Positive test rates dropped significantly following its introduction, from 3.42% in 1993 to 1.9% in 1994 to 1.18% in 1995, and have stayed low ever since.
4. New South Wales: The introduction of random testing in the railway industry in New South Wales in 2004 saw the rate of positive drug tests decrease from 3% in 2004 to 1.4% in 2006, and as of 2012 was about 0.75%. Positive alcohol tests also saw a major decline.





**Toronto Transit Commission**  
1900 Yonge Street, Toronto, ON M4S 1Z2  
416-393-4000

March 2, 2018

Kathryn McGarry, MPP  
Ministry of Transportation  
3<sup>rd</sup> Floor, Ferguson Block  
77 Wellesley Street West  
Toronto, Ontario M7A 1Z8

Dear Minister,

**RE: Feedback concerning proposed regulatory amendments to address impaired driving, distracted driving and vulnerable road user safety**

TTC understands that The Ministry of Transportation (MTO) is in the process of developing regulations to support *Bill 174, Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act 2017*, and is engaging stakeholders in the consultation process. Please accept this feedback concerning the measures to address impaired driving:

*Summary of Concerns*

TTC is concerned about the proposed cut-off levels and the use of the term “zero-tolerance” in this regard, and the potential unintended negative consequences this will have on its workplace. TTC strongly believes that there is a need for mandatory random drug and alcohol testing for safety-sensitive industries, including but not limited to, the public transit and trucking industry. TTC would like to see a joint approach and consultation between the Ministry of Labour and MTO to acknowledge and consider the interrelationship that will exist between the standards being contemplated, criminal standards, and workplace standards for those industries whose “workplace” is the roadways.

*Background*

Among other elements, the MTO is intending to introduce “zero tolerance” for drug and alcohol use for commercial drivers.. This would apply, as we understand, to TTC operators who hold a class of license higher than G Class, which is generally our bus and Wheel-Trans operators. It will not apply to those who are required to hold G Licenses only. The MTO intends to use approved oral fluid screening devices, once passed by Bill C-46. We understand that the MTO will use the same devices and cut-off levels as approved through Bill C-46, and that there is no intention to explore any alternative mechanism or cut-off levels provincially.

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Josh Colle, Chair  
Alan Heisey, Q.C., Vice-Chair  
Richard J. Leary, Chief Executive Officer (Acting)  
Rick Byers, Commissioner

John Campbell, Commissioner  
Vincent Crisanti, Commissioner  
Glenn De Baeremaeker, Commissioner  
Joanne De Laurentiis, Commissioner

Mary Fragedakis, Commissioner  
Ron Lalonde, Commissioner  
Joe Mihevc, Commissioner  
Denzil Minnan-Wong, Commissioner



TTC is not expressing any view on the legalization of cannabis. Rather, TTC's concern is about safety in the workplace. While the introduction of Bill C-46 federally as the companion Bill to C-45 –and the measures currently undertaken by the MTO in relation to Bill 174 and supporting regulations – would seem to reflect an acknowledgement and concern for potential impacts to road safety.

TTC is concerned that there is an absence of recognition of the overlap between roadway and workplaces in many instances. For example, the roadways of Toronto are TTC's workplace for many. This is true for others, such as members of the Ontario Trucking Alliance.

The summary documents published by the MTO detailing proposed regulatory amendments reviews several concerning trends. Notably, based on the Ontario collision database from 2014, 29 per cent of collisions on Ontario roads involve an impaired driver. And drivers testing positive for the presence of drugs are more than twice the number of those testing positive for alcohol. Furthermore, they identify that cannabis is the most prevalent drug found in fatal injuries to drivers in Ontario.

This paper states that, "With the federal government's intended legalization of cannabis, instances of drug-impaired driving will likely increase, as seen in other jurisdictions that have legalized cannabis."

We are relieved to see this acknowledged by the Province and wholly agree with this statement.

#### *Zero Tolerance and Cut- Off Levels*

TTC understands that the cut offs being contemplated using the oral fluid screening devices is 25ng for THC, and that this is based on consistency with Federal legislation as well as the advice of the Drugs and Driving Committee at the Centre for Forensic Science. TTC is very concerned about the false sense of security the term "zero tolerance" has when contrasted with such a cut off. Based on experts hired by TTC to defend its Fitness for Duty program, which includes testing using oral fluid technology, the cut off levels used at TTC are 10ng. This level has been set this high (as opposed to some using 2ng or 5ng of oral fluid) because we must defend our case and demonstrate likely impairment within the Canadian and unionized context.

TTC is leading evidence on this cut-off level as being indicative of recent use consistent with likely impairment. Based on this, 25ng **is not** zero tolerance, but **is** significantly greater than its standards. TTC is of the view that there is either a confounding between acute intoxication and impairing effects or that these cut-off levels are being set based on the technology alone, and not what is deemed "safe".

TTC recognizes that the technology and process used at its workplace is more advanced than the devices being proposed for roadside use. To ensure defense of its program, TTC must adhere to the usage of such technology and processes, which includes lab-confirmed testing at the only laboratory certified in Canada. This methodology protects against false positives and takes several days. TTC recognizes that this may not be practical for roadside use, and



acknowledges that the roadside device will be confirmed with blood alcohol concentrations. That said, TTC is concerned about suggesting the standard is “zero tolerance” and the message that associating this with a cut off of 25ng sends to the public and the implications on this for it legal case as well as the false sense of security it may bring.

Additionally in TTC’s consultations regarding roadside devices using oral technology, TTC understands that roadside devices are unreliable and have a significant false negative rate. While we have not asked experts to opine on this specifically since the technology TTC uses is much more accurate, the contemplation of such devices without acknowledging a different cut off or per se limit based on more advanced technology, poses a risk of conflicting roadside results should one of its operators be tested.

It is more than feasible that a likely impaired operator who could test negative under the proposed regulations, would test positive under the TTC’s program. This runs the risk of an employment adjudicator having to make an employment decision that may conflict with the Provincial and Federal message.

In the reverse case, where an operator could test positive using a roadside device, he or she would need to be transported for the blood test as we understand. This could impact TTC’s ability to test the operator, which would be essential to the TTC’s program given the high unreliability of the roadside device and our need to treat all employees equally. TTC will need to pursue a discussion at some point, we suggest, relating to the precedential order of testing in terms of TTC testing program and police roadside testing.

#### *Proposed Solution*

The above noted concerns and challenges would be obviated if safety-sensitive industries were required to have workplace policies, which required oral fluid testing (non- roadside) that can confirm much lower thresholds than 25ng and that are more reliable. With appropriate design, and MOL and MTO working together, such regulation could require information access from the workplaces to MTO via central database or other appropriate mechanism in order for the individual to be held to the MTO standard, in addition to the workplace standards, without compromising workplace safety. This would enhance the safety of all road users and recognize safety as the true goal for all, while recognizing the technological constraints that are a reality.

#### *Marijuana for Medicinal Use*

We have been advised that medical users of marijuana are exempt from the “zero tolerance” obligations under Bill 174 as it pertains to the Highway Traffic Act (HTA). However, they will not be exempt from “drug-impaired sanctions if they are deemed impaired following the results of a SFST or an evaluation by a DRE”. Put differently, we understand this to mean that anyone operating a vehicle while under the impacts of medicinal cannabis in some form will not be charged under the HTA if they test positive for the roadside oral fluid and subsequent blood test. We are advised that should a person using medicinal marijuana be pulled over and fail a field sobriety test, or be deemed impaired following an evaluation by a Drug Recognition Expert, then



they will face fines.

TTC is of the view that while operating a motor vehicle, it matters not if the substance is medicinal or not, and while we understand the requirement to protect the individual's human rights, we don't see the rationale in the MTO's proposal. It is our view that the sanctions ought to be the same, whether cannabis or other prescription drugs are utilized for medicinal purposes or not.

We would be pleased to discuss our comments further. Should you wish to do so, please contact Megan MacRae, Executive Director of Human Resources.

Sincerely,

A handwritten signature in black ink that reads "Richard J. Leary".

*lu* Richard J. Leary  
Chief Executive Officer (*Acting*)

40.32

Copy: Marcelle Crouse, Assistant Deputy Minister- MOL  
Stephen Laskowski, President, OTA  
Karen Cameron, President and CEO, OPTA