

The Legalization of Recreational Cannabis | The Burning Issues for Employers

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The Current Legal Landscape



**Access to Cannabis for Medical
Purposes Regulations (ACMPR)
Narcotic Control Regulations
ss 53(5)**



**Controlled Drugs and Substances
Act (CDSA)**

The Proposed Legal Landscape



**Access to Cannabis for Medical
Purposes Regulations (ACMPR)
Narcotic Control Regulations
ss 53(5)**



“Cannabis Act (Bill C-45)”

The Emerging Legal Landscape



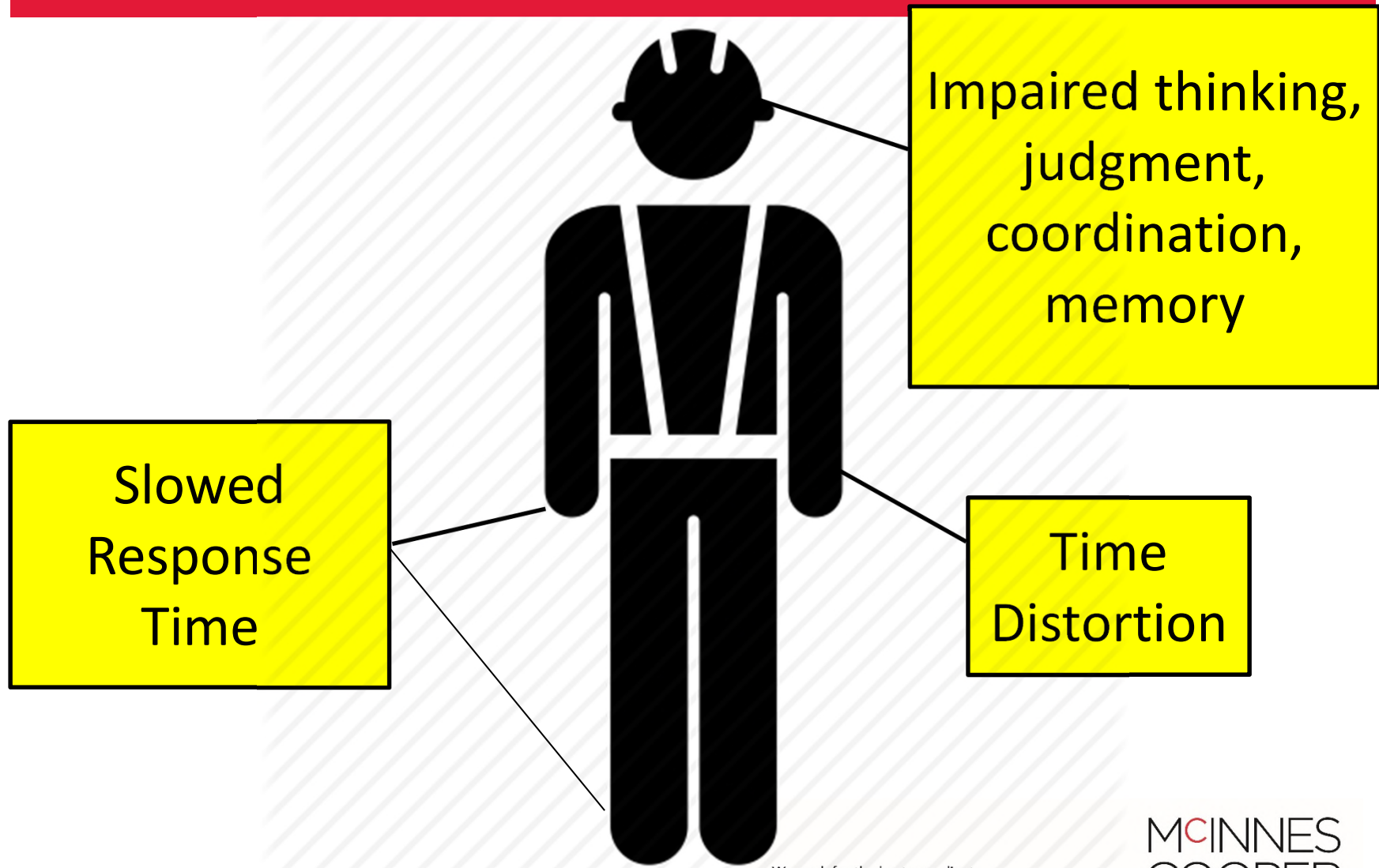
Federal Workplaces



Provincial
Workplaces



The Workplace Concern



Impaired thinking,
judgment,
coordination,
memory

Slowed
Response
Time

Time
Distortion

5 Key Cannabis Issues @ Work



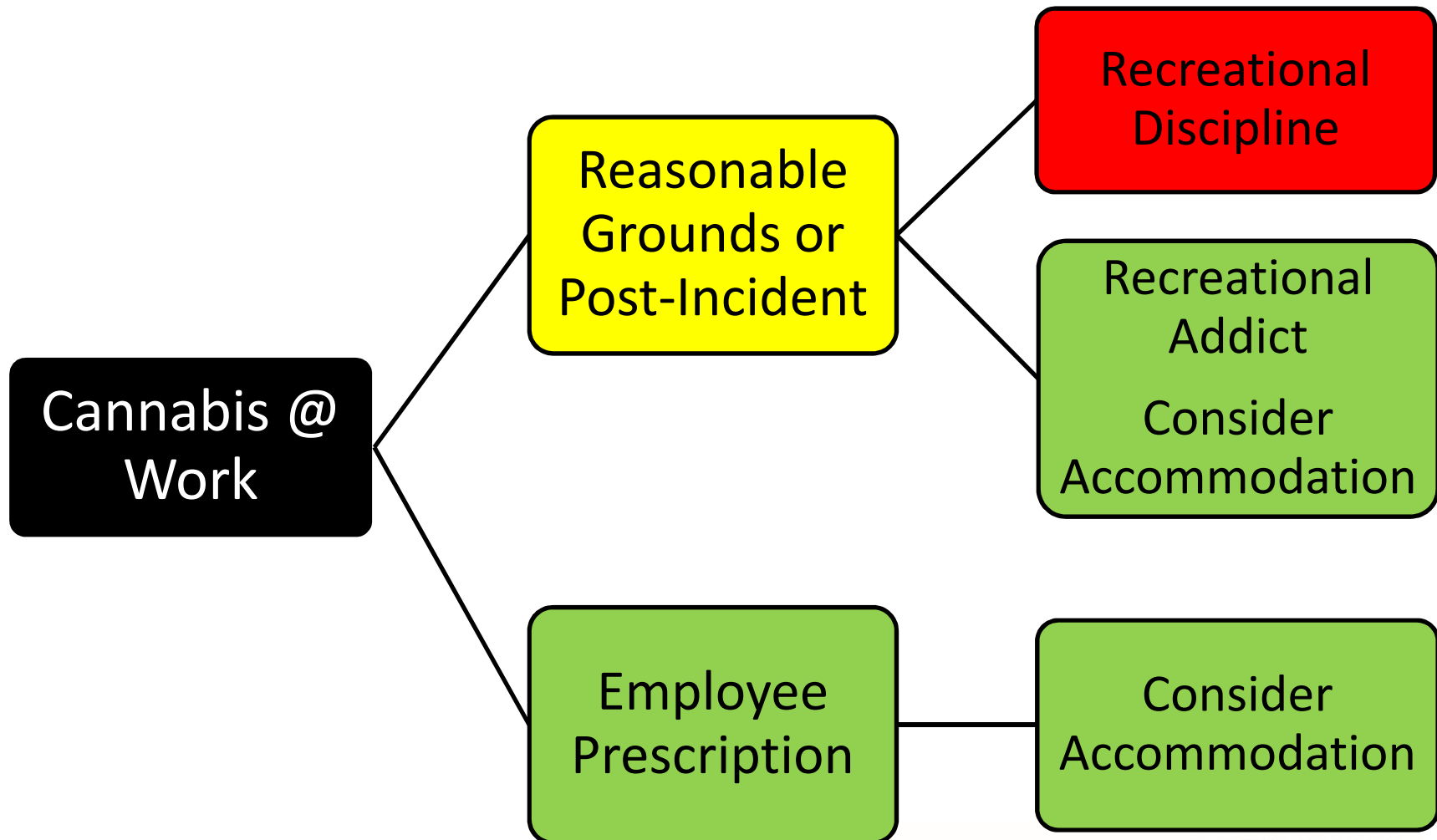
1. Occupational Health & Safety

**SAFETY
FIRST**

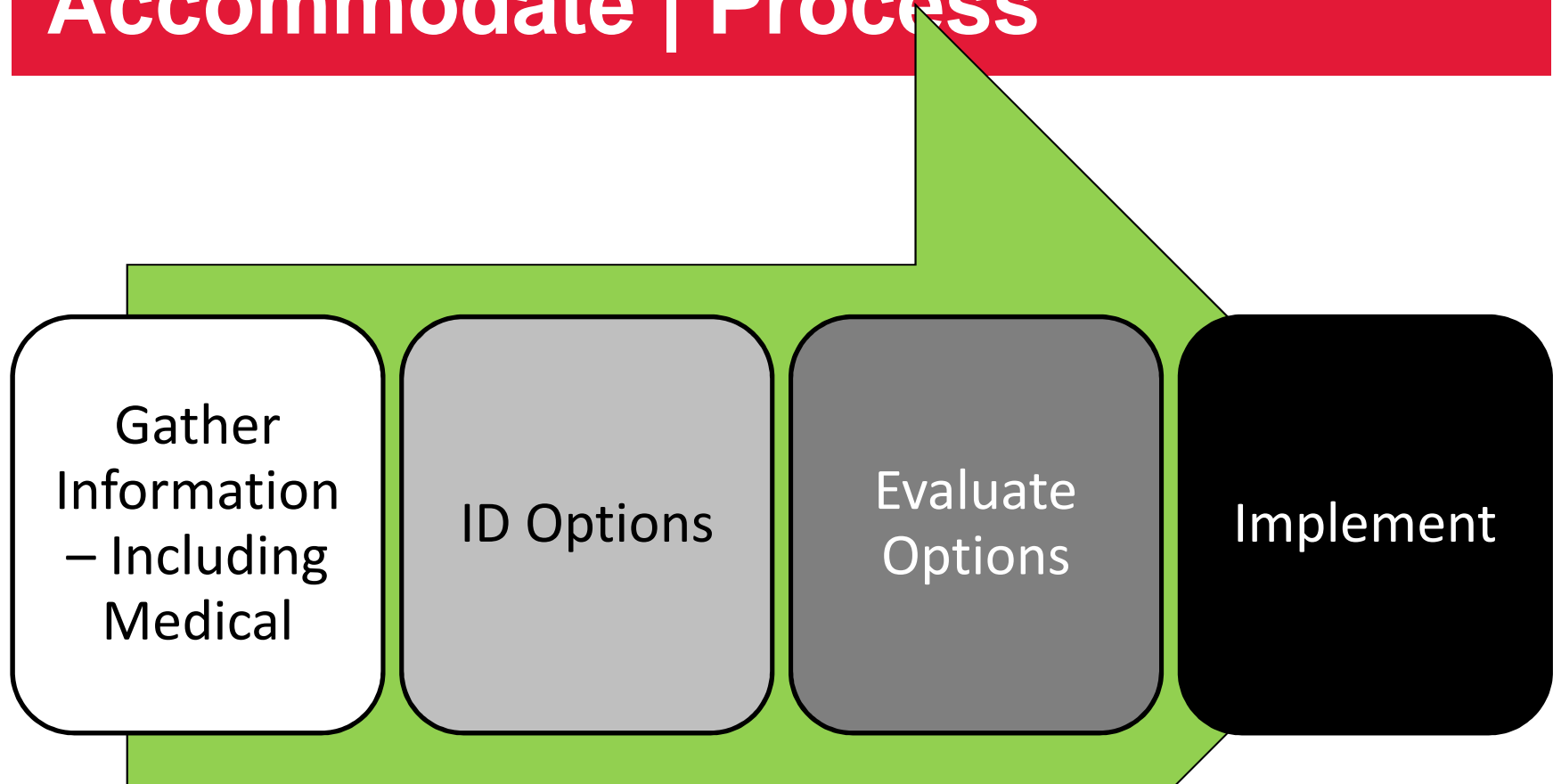
2. Accommodation



Accommodate | Systematic



Accommodate | Process



Medical Info | Employee

- ✓ Nature of the illness & how it manifests as a disability
- ✓ Whether permanent or temporary prognosis
- ✓ Detailed synopsis of restrictions or limitations (i.e. driving, working in congested environments, etc)
- ✓ Basis for the medical conclusions
- ✓ Treatment, including medication (& possible side effects) that may impact on employee's ability to perform their job

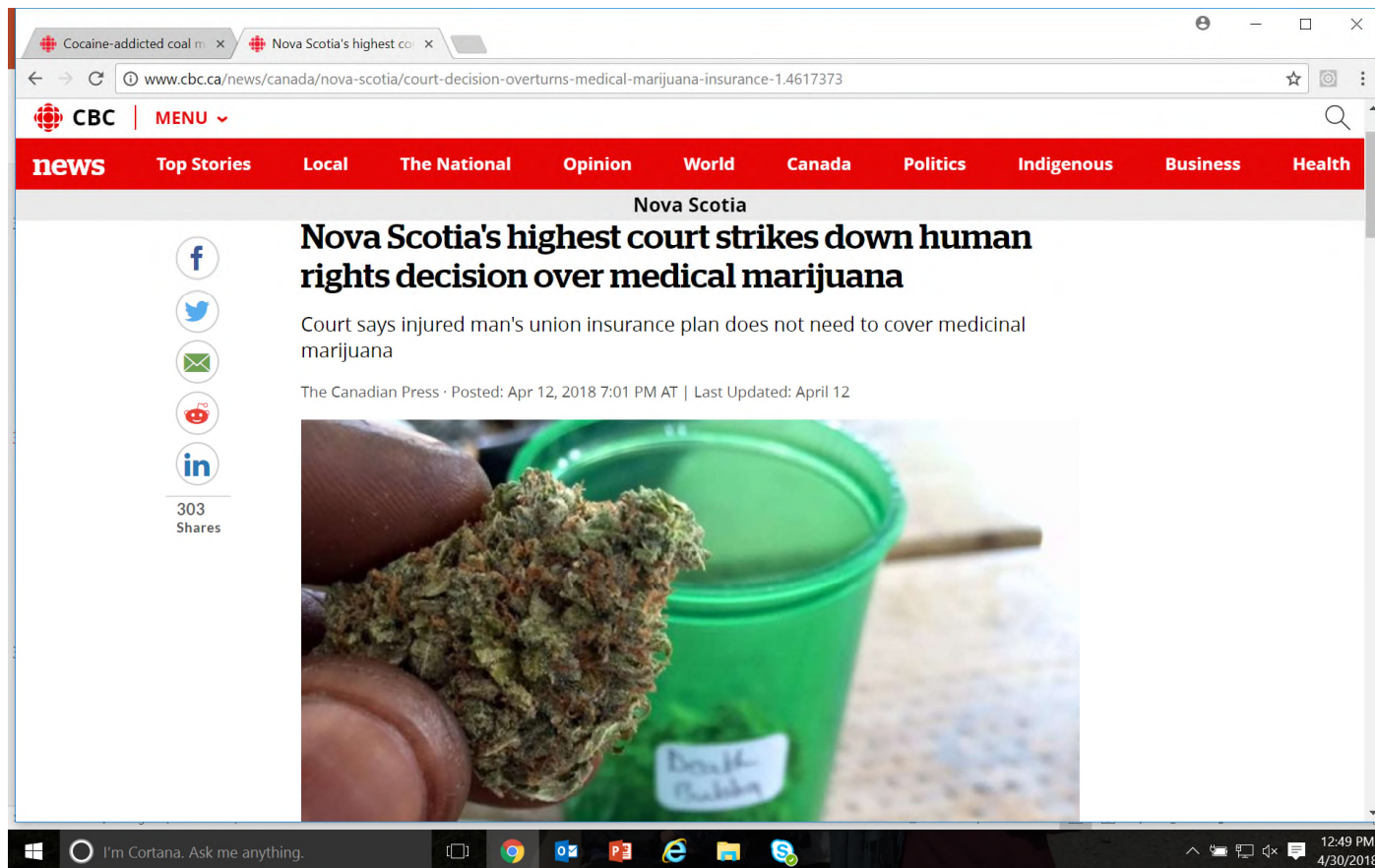
Accommodate | Terms & conditions

- Strictly prohibit attending workplace impaired/unfit for duty
- Set usage parameters (in consultation with physicians)
- Require reporting of any dosage change &/or additional meds
- Require reporting of any schedule breach or need for meds before or during shift
- Manage expectations: could be moved to less safety-sensitive position or remove from duty temporarily
- Advise employer will follow-up periodically with employee / physician for future monitoring of dosages/meds
- Consider alternative testing methodologies where impairment is suspected
- Advise violation of terms could result in removal from workplace / discipline

3. Health Benefit Plans



Benefits | Cdn. Elevator Industry Welfare Trust Fund v. Skinner



Skinner | Benefits Plan

- Plan excluded payment for drugs not approved by Health Canada
- Conventional meds did not work
- Insured obtained medical authorization for medical cannabis which worked
- Coverage under benefits plan denied because excluded



Skinner | Outcome

- Human Rights Tribunal
 - Adverse effect discrimination
- Appeal Court
 - Not discriminatory for a private drug plan to limit reimbursement for the cost of drugs to only those approved by Health Canada
 - “Benefit plans are necessarily limited in many ways”
- PS: It’s not discriminatory for WCB Policy to limit either



4. Discipline



- Generally
 - ✓ Just & reasonable cause
- Off-duty conduct
 - ✓ Conduct has **detrimental impact** on employer's business
- Progressive Discipline

5. Policies



Policies | New

- Non-Unionized
 - ✗ Unilateral change to fundamental term or condition
- Unionized
 - ✗ Inconsistent with CBA
 - ✗ Unreasonable
 - ✓ Clear & unequivocal
 - ✓ Notice
 - ✓ Consistent enforcement

5 Key Workplace Policy Areas



1. “Drug” defined in policies

- “Illegal”
- “Illicit”
- “...including marijuana ...”



Redefine

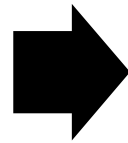
2. Workplace usage policies



3. Impairment, testing & safety policies

10

+



Testing | Circumstances

Pre-employment

- Dangerous workplace + Safety Sensitive Position

Reasonable grounds

- Indicators = Reasonable conclusion inability to work safety b/c of substance use

Post-incident

- Directly involved + Significant incident + Actual damage or near-miss + Reasonably necessary to rule out impairment

RTW

- RTW agreement post-treatment + Part of broader assessment process + Time-limited

Mandatory random

- Dangerous workplace + Safety Sensitive Position + “Reasonable cause” or “enhanced safety risks”

Testing | “Safety-sensitive position”

Role of properly trained supervisors & workplace checks and balances in workplace

Employee’s key & direct role

Performance affected by substance use could result in a significant incident, near miss or failure to adequately respond to a significant incident & detrimentally affects the health, safety or security of the employee, others, property, the environment or employer’s reputation

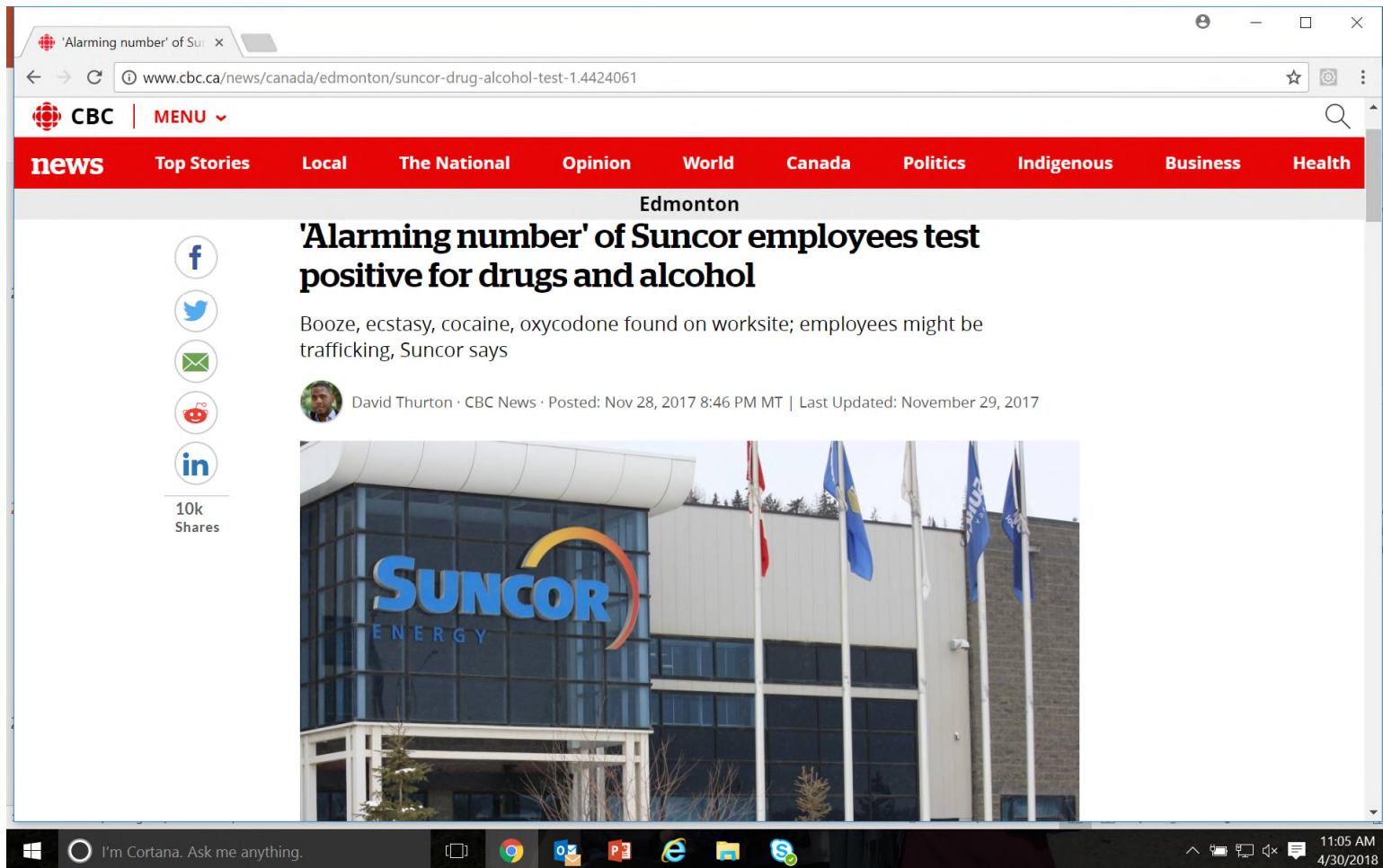
Industry Context

Particular Workplace

Random | Recent developments



Random | Suncor Energy (AB)



Suncor | Policy Arbitration (2014)

- Union grieved
 - Unnecessary & unreasonable invasion of employee privacy rights
- Decision: No random testing program:
 - Benefits gained from random-testing didn't outweigh the harm caused by privacy breach



Suncor | Arbitration Review (2016)

- Policy OK
 - Board made “numerous” errors (3 key)
- New arbitration panel to apply different test that looked at the full picture at the worksite, not just one that focused on unionized workers



Suncor | Arbitration Appeal (2017)

- Board decision-making process flawed
- Different arbitration panel to determine Permissibility of random testing program as a reasonable safety measure back to be heard by different arbitration panel
- Union applied to appeal to SCC



Suncor | Injunction (2017)

- Union sought court order restraining policy implementation until appeal / new arbitration
- Court granted injunction order:
 - Workers privacy might be unreasonably invaded if testing proceeded & damages not adequate compensation
 - Privacy rights of workers are “*as important as safety concerns*”
 - Safety concerns relevant but insufficient to tip balance to refusing order



Suncor | Injunction Appeal (2018)

- Majority of Court confirmed injunction order
- “Scathing” dissent
 - Safety interests of workers must have priority in assessment of whether the “balance of convenience” favoured an injunction
 - The risk of serious injuries or death far outweighed the momentary anxiety or embarrassment associated with random drug & alcohol testing



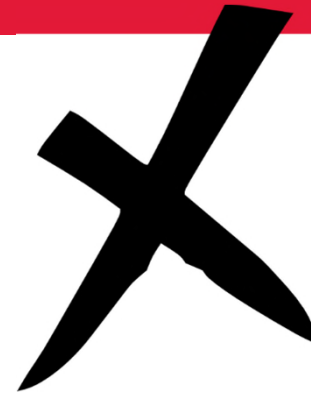
Random | TTC Transit (ON)

The screenshot shows a web browser window displaying a CBC News article. The browser's address bar shows the URL: www.cbc.ca/news/canada/toronto/half-of-ttc-employees-who-failed-random-drug-test-in-first-6-months-tested-positive-for-pot-1.4401489. The page features a red navigation bar with the CBC logo and a menu. The article title is "Half of TTC employees who failed random drug test in first 6 months tested positive for pot". Below the title, a sub-headline reads "About 2% of 1,269 employees tested positive for drugs or alcohol since May". The author is listed as "Nicole Brockbank · CBC News · Posted: Nov 15, 2017 5:00 AM ET | Last Updated: November 15, 2017". A social media sharing sidebar on the left includes icons for Facebook, Twitter, Email, Reddit, and LinkedIn, with a total of 860 shares. The main image is a photograph of a red TTC streetcar, number 4037, on a city street. The streetcar's destination sign reads "504 BROADVIEW STN VIA KING". A silver taxi is visible in the background.

4. Accommodation Policies



- Physical disability: dependence on drugs (actual or perceived)
- Medically prescribed or authorized drugs



- Just had too much

Accommodate | Recent Policy Developments

