

# Compliance Alert: Lack of Reliable Drug Test Not Enough to Prove Accommodation of Safety-Sensitive Medical Marijuana User



Drug and alcohol testing is easier to justify for employees who are safety-sensitive. The problem is that marijuana takes longer to metabolize than alcohol and can remain in the system long after the high is gone. Result: A positive marijuana test doesn't prove an employee was impaired *at the time of testing*. An important case from Newfoundland analyzes the legal implications of this in terms of accommodating safety-sensitive employees who legally use medical marijuana.

## The Case

The issue was whether an employer could refuse to hire a safety-sensitive construction worker who admitted to legally vaping 1.5 grams of medical marijuana containing high THC levels after work for Crohn's disease pain. The worker was entitled to accommodations, the Newfoundland arbitrator ruled, but without a test capable of detecting current impairment, hiring him for a safety-sensitive job would be undue hardship.

One failed appeal later, the case came to the Newfound Court of Appeal which found the arbitrator's decision reasonable and faithful to previous accommodations cases as far as it went. But it felt that the lack of a test is too easy an excuse since all employers must do to deny employment to medical marijuana users is show their jobs are safety-sensitive.

The Court said the standard should be higher. Maybe there are other ways to determine a worker's fitness for duty, like a daily pre-shift functional assessment. Employers should have the burden of proving they considered these alternatives and explaining why they were rejected [*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20 (CanLII), June 4, 2020].

## Takeaway

Although binding only in Newfoundland, the *Lower Churchill* case could prove influential elsewhere. There's also the chance of a Canadian Supreme Court appeal. But it's far from assured that the high court would take the case, let alone strike it down.