

# A MATTER OF SAFETY

Random drug and alcohol testing in the workplace has been limited by the courts, despite its potential to save lives.

BY PETER MILLER

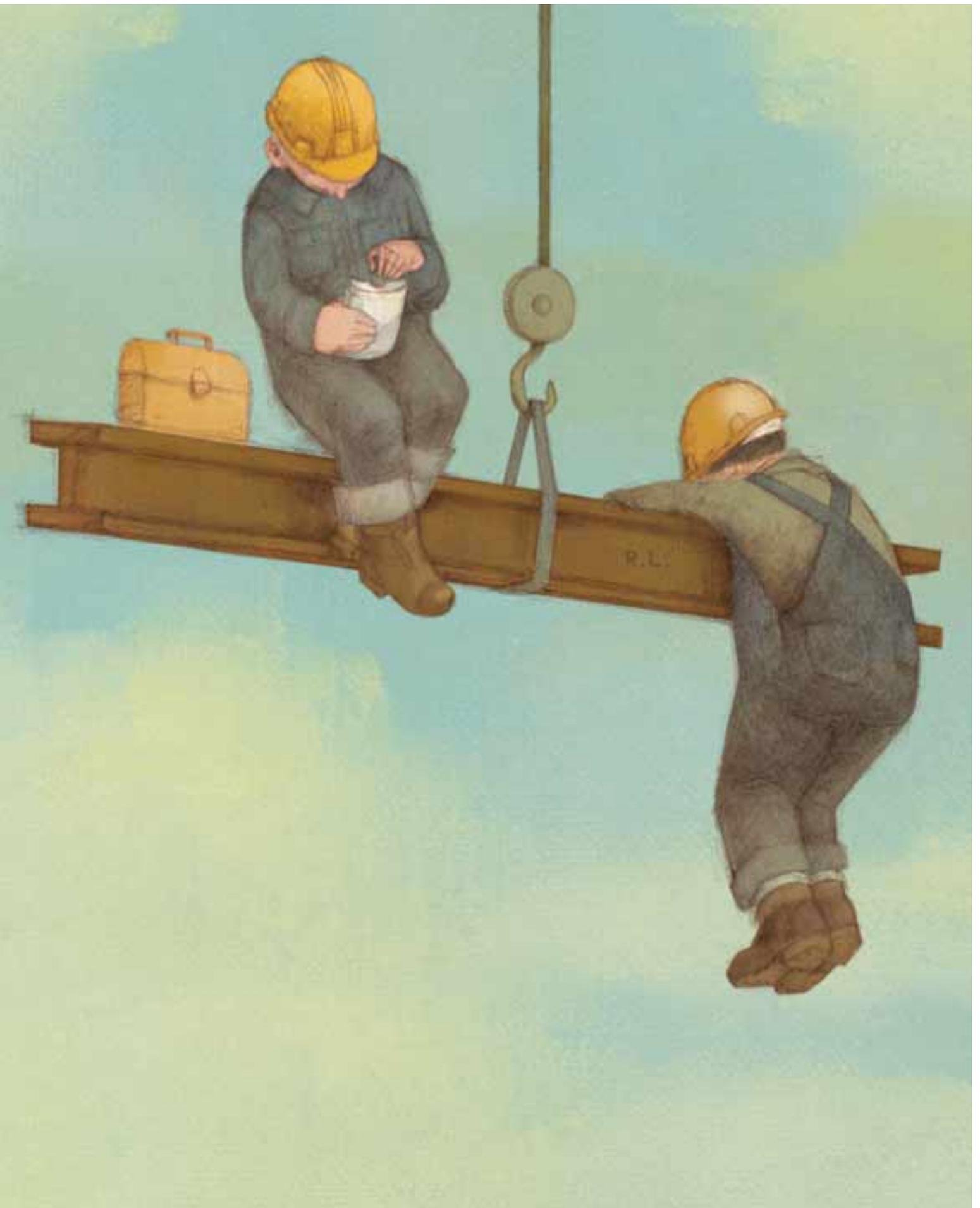
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SAFETY IN THE WORKPLACE IS A PRIMARY CONCERN FOR employers. Every employer has a legal duty to provide a safe workplace and a moral duty to his employees to minimize the risks which might jeopardize their health or safety. It is strange then, that the law would actually prevent an employer from taking the steps he feels are necessary to protect his workers' safety.

Random drug and alcohol testing in the workplace has been a legal "hot potato" for a number of years, with the federal and provincial Human Rights Commissions leading the fight against random testing in the workplace. The 2000 Ontario Court of Appeal decision in the Entrop case was the "high water" mark limiting random testing but in recent years, subsequent cases and advanced technology, have caused those waters to recede.

For decades, a commonly held myth supported the belief that employers were not concerned about worker safety and, when accidents happened, they blamed the worker and took punitive action against him to deal with the problem. Though this may have been the case a hundred years ago, it certainly has not been part of industrial culture for the last generation.

Nonetheless, human rights activism has cast employers' efforts to provide a safe workplace in that light. They have been successful in convincing Canadian courts that individual liberties should "trump" prudent safety measures. They have created a false conflict between individual rights and safety and, in so doing, have handicapped employers' efforts to ensure the safety of all workers.



**I**NDUSTRIAL WORK TODAY IS every bit as dangerous as it was in the past, and arguably even more so because of the high-performance nature of industrial machinery. Every worker has the right to expect that his or her safety will not be jeopardized by the activities of fellow workers. Conduct which falls far below measurable “impairment” can be fatal. A co-worker’s presence of mind, attention to detail, memory, appropriate reflexes and judgment are all essential to creating a safe workplace. Performance can be affected by any cause; fatigue, illness, emotional trauma, medication or substance use are all risk factors which must be managed and, where necessary, eliminated. Random alcohol and drug testing is one of the tools available to assess this risk.

Risk management is a responsible management practice. Not only is it necessary in hazardous jobs, it is also a legal requirement. It has nothing, in its intent nor in its effect, to do with discrimination. It does not target the disability of substance abuse, though this class of workers will be identified in the testing results. Instead, it simply identifies a risk factor which a prudent employer would want to manage and which all employees have a right to expect would be removed from the workplace.

Unfortunately, because the Human Rights Commissions continue to function in the paradigm of fault and punitive reaction, they have taken from employers the ability to properly manage this risk.

The federal and provincial human rights’ legislation prohibits employers from adopting policies or practices which discriminate against workers who have a disability unless that discrimination is based on a bona fide occupational requirement (BFOR) or it can be shown to be reasonable and justified in the circumstances.

Substance abuse is identified as a disability so any action by the employer to identify and discipline an employee who shows up for work impaired by substance abuse is prohibited. Random alcohol and drug testing is a discriminatory practice. Whether a

person is actually disabled is irrelevant. Any disciplinary action which is applied, even if there is only the perception of disability, is enough to trigger legislative protection.

Even though random testing is a discriminatory practice, an employer may adopt this practice or standard if he can demonstrate that it is a bona fide occupational requirement. The Supreme Court of Canada has laid out a test to determine whether an action is a BFOR; it has three steps:

- 1) Is the standard rationally connected to the performance of the job?
- 2) Did the employer adopt the standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose?
- 3) Is the standard reasonably necessary; is there no other way to accommodate employees who have this disability?

In the Entrop case, the Ontario Court of Appeal found that Imperial Oil had met the first requirement. The stated purpose of its policy “is to minimize the risk of impaired performance due to substance abuse” in order “to ensure a safe, healthy and productive workplace”. The court found that: “Promoting workplace safety by minimizing the possibility employees will be impaired by either alcohol or drugs while working is a legitimate objective.”

The court found that Imperial Oil developed and implemented its policy honestly and in good faith by consulting with both employees and with experts to understand how impairment affects worker safety.

While random alcohol testing was found to be reasonably necessary to accomplish the goal of safety in the workplace, pre-employment and random drug testing failed this third test.

Experience and science have demonstrated that “breathalyzer testing can show impairment”. However, the court found that “no tests currently exist to accurately assess the effect of drug use on job performance...”. Drug testing “cannot measure impairment. A positive drug test shows only past drug use ... a positive drug test provides no evidence of impairment or likely impairment on the job.”

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**THOUGH THE ONTARIO COURT OF APPEAL FOUND THAT: “PROMOTING WORKPLACE SAFETY BY MINIMIZING THE POSSIBILITY EMPLOYEES WILL BE IMPAIRED BY EITHER ALCOHOL OR DRUGS WHILE WORKING IS A LEGITIMATE OBJECTIVE”, IT WAS CONCERNED ABOUT THE LEVEL OF ACCURACY IN CURRENT DRUG TESTING METHODS.**

testing suffered from the same flaw; “a positive test does not show future impairment or even likely future impairment on the job”.

When Imperial tried to argue that “in the interests of safety it is legitimately entitled to adopt a ‘no presence’ standard, that does not depend for its efficacy on the discovery of impairment”, it was defeated by its own wording in its policy. In relying on the common language of the day, “freedom from impairment”, Imperial Oil’s policy opened the door for the courts to cast the issue as a “human rights-disability” issue rather than a safety, risk management issue which it truly is. Arguably, a corporate safety policy which is unequivocally framed in terms of the management of risk factors, and not impairment per se, would be able to rely on the “no presence” standard.

Since the Entrop case was decided in 2000, both the law, and the science, relating to drug testing have advanced to the point where employers can, and must, once again assess the prudent requirements of providing a safe workplace.

In 2003, the Alberta courts, in the Elizabeth Metis Settlement case, decided that it was proper for Human Rights Panel to take “judicial notice” of the fact that “substance abuse does impair an individual’s performance to some extent”. Judicial notice is the acceptance of a fact without proof. It applies to facts which are so notorious as not to be the subject of dispute among reasonable persons and facts that are capable of immediate and accurate demonstration by resort-



ing to readily accessible sources of indisputable accuracy. This finding is “...significantly different than the fact the Director wished the Panel to adopt from Entrop, that the use of alcohol and drugs cannot unequivocally be linked to negative consequences in the workplace.” The court was asked to adopt a negative presumption and, instead, it adopted a positive presumption which best reflects reality.

The court pointed out that “Abuse implies use to the point of negative consequences; it differs and is more extreme than mere use.” This finding is somewhat circular: substance abuse to the point of negative consequences will have negative consequences on performance. It also leaves open the question: where is the threshold that crosses over into negative consequences and how is it measured? Nonetheless, it is a vital and significant recognition that the issue is not a “human rights-impairment” issue but rather a risk management issue.

It further opens the question of whether an employer must put his workers at risk, and wait for an injury accident to occur, before he can go looking for impairment in a worker who indulges in substances which have the ability to impair performance. An employer is faced with a greater dilemma in the case of drug abuse because the impairment may not be observable.

The Canadian Human Rights Commission, in its “Policy on Alcohol and Drug Testing”, offers a naïve and simplistic alternative to random testing. While acknowledging that “an employer should focus on ways of identifying potential safety risks and remedying them”, the policy denies employers one of the most effective tools available to identify that risk. Instead, it suggests that “Awareness, education, effective interventions and rehabilitation are the most effective ways of ensuring that performance issues associated with alcohol and drug use are detected and resolved.”

While the Commission’s approach is undoubtedly the kinder and gentler approach, it is far less effective. The question which an employer must address is how long will he place his workers at risk while he undertakes this unwelcome intervention into an indi-

### THOUGH ZERO TOLERANCE IS A HARSH AND UNFORGIVING STANDARD, WHEN CONSIDERING THE CONSEQUENCES – POSSIBLE LOSS OF HUMAN LIFE – FOR FAILING TO DEAL WITH THE ISSUE OF DRUG OR ALCOHOL USE IN THE WORKPLACE, IT MUST BE SEEN AS APPROPRIATE.

vidual’s life with no guarantee of success. Awareness and education are naïve in the extreme; surely all of society has taken “judicial notice” of the fact that substance abuse is detrimental to one’s health and it endangers the lives of others who depend on their fellow workers to perform their work competently at all times.

That being said, most employers today recognize the benefit of offering a comprehensive employee assistance program. These programs are provided both in-house and through the services of independent, third party, consulting firms.

The court in Entrop questioned whether disciplinary action in all cases of a positive test “is too severe, more stringent than needed for a safe workplace and not sufficiently sensitive to individual capabilities”. A drug testing policy is not designed as a screening tool to identify employees having a medical disability, it is a safety management tool intending to serve as a deterrent to the presence of performance inhibiting substances in the workplace. “Zero Tolerance” is a standard which is necessary to ensure the protection of lives in safety sensitive positions. It is the only standard that is acceptable in these circumstances. It is a standard which is not uncommon in the workplace, having

been applied as well to violence and insubordination. There is no question that it is a harsh and unforgiving standard, however, when considering the consequences – possible loss of human life – for failing to deal with the issue, it must be seen as appropriate in the circumstances.

Advances in medical science have changed the playing field dramatically over the past three years. When Entrop was decided, the court found that “no tests currently exist to accurately assess the effect of drug use on job performance”. Since that time, Imperial Oil, and others, have expended considerable effort and resources to change this fact, and with success. Today greater reliance can be placed on saliva testing methods which effectively close the gap identified in the Entrop case. No doubt, this new body of science will be placed on trial soon after it is employed.

Employers are faced with an unfair dilemma; they are required to provide a safe workplace for their employees and yet, when faced with a well known and pervasive risk, they are left without the tools necessary to address that risk. An employer is required to demonstrate “due diligence” in discharging his duty. The test for due diligence is whether there is one more thing that reasonably ought to have been done to avoid the harm that is the subject of the inquiry. Our legislatures have left this question up to the courts to decide, in each particular case, “how much is enough”.

The Entrop case was one of the most important precedents in Canadian safety law because it answered this question in the context of substance abuse. It drew a line establishing that an employer may not employ random drug testing in order to free his workplace from the threat of worker impairment due to substance abuse. Though it was effective in terms of delivering certainty for a due diligence defence, it was a bad decision, made for the wrong reasons. It mis-characterizes a safety issue as a disability issue. It places an individual’s right to come to work impaired by substance abuse, without the threat of detection or sanction, ahead of the rights of all other workers to enjoy a safe workplace.

Random testing is not designed to target the disabled; it is intended to eliminate a risk

factor from the workplace which threatens every worker. The 'no presence' standard, both in pre-employment testing and in random testing, is applied to all employees, not just those who suffer from an abuse disability. Those who truly do suffer from a disability must be given the opportunity to recover from that disability, and to do so in a way that does not endanger the lives of their fellow workers. The medical issue must be separated from the safety issue.

The court, in *Entrop*, used twisted logic to conclude that casual users will be "perceived" to be disabled workers, thus bringing them also under the protection of the Act. Query whether a corporate testing policy which required all disabled workers to self-declare their disability would, by definition, leave all remaining employees outside of the disabled category. An express declaration on the part of the employer that no perception or attribution of disability is intended or implied should, again by definition, place these people outside of the protection of the Act. The policy would then be clearly focused on safety, not disability.

It is now time to move beyond *Entrop*. In that case, the court did acknowledge that an employer has the right to assess whether its employees are capable of performing their essential duties safely. Its only reservation had to do with the 'state of the art' in testing methodologies. Those have now been 'upgraded' to satisfy this concern.

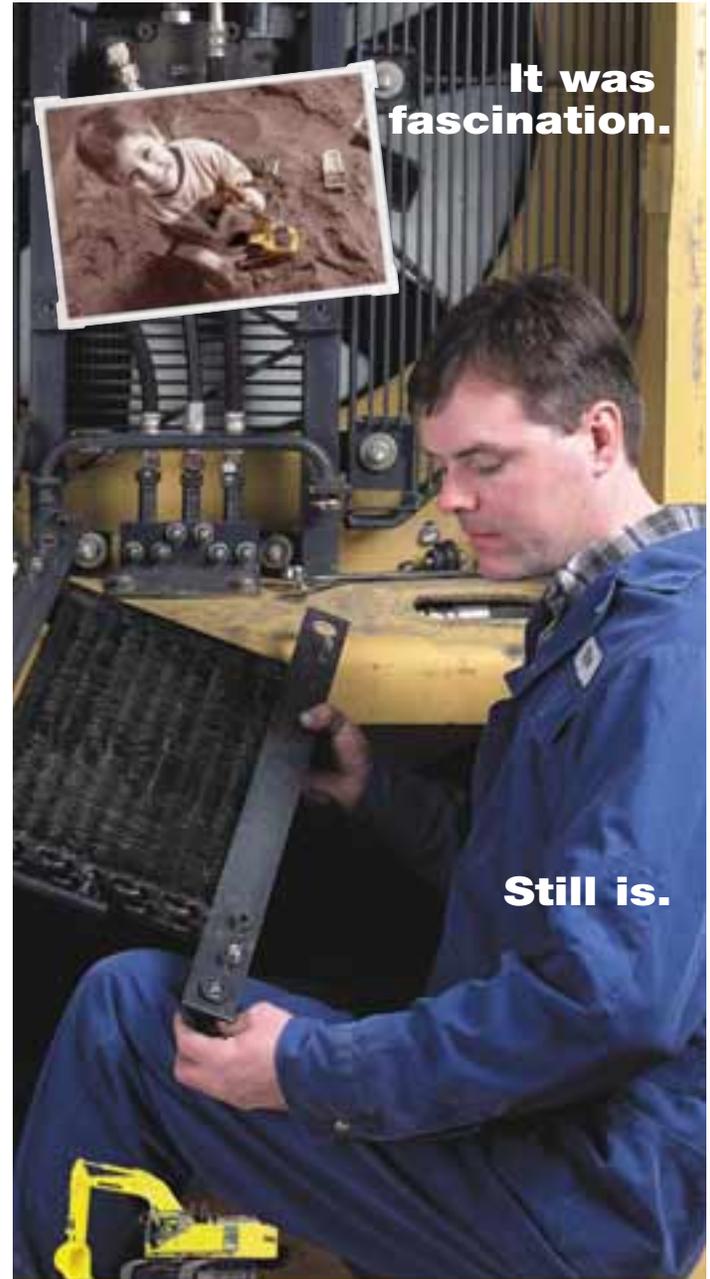
The Alberta courts, in the C.P.R. case, have moved beyond *Entrop* by recognizing that drug testing is an essential investigation tool available to an employer. It acknowledges that "...there is no other objective method by which an employer can obtain information concerning drug use by an employee". The use of drug testing is condoned in any case where other circumstances give rise to an investigation: "...neither (*Entrop* nor the Canadian Human Rights Commission) prohibits an employer from requiring an employee in a safety sensitive area to take a drug test where there is some evidence that the employee may have been a party to a drug offence".

Again, the Alberta courts, in the *Elizabeth Metis Settlement* case, have broadened the acceptability of drug testing. In that case the court recognized as a BFOR the employer's desire to have its employees "...become role models for the rest of the community". While this BOFR may be unique to this type of situation, it recognizes the legitimacy of the "no presence" standard and de-links the issue from the "human rights-disability" issue.

A number of recent cases considered by the courts, including the Supreme Court of Canada, have confirmed that a court of law is notoriously ill equipped to decide public policy issues. A court must deal with the legislation as they find it. The intrusion of human rights legislation into workplace safety has created a situation where employers are unable to effectively manage safety for their workers.

It is only through the efforts of courageous employers that the courts are forced to re-visit previously adopted beliefs and interpretations; the results are encouraging, the law is changing. Each case opens new opportunities for employers to better manage the safety of their employees and demonstrates how the law has the flexibility to adapt to the needs of society and to find an equilibrium that best serves justice. ☐

*Peter L Miller is a lawyer for Imperial Oil Limited*



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