FLYING HIGH: THE AVIATION INDUSTRY AND CANNABIS
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WHITE PAPER
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>EXECUTIVE SUMMARY</td>
<td>2</td>
</tr>
<tr>
<td>INTRODUCTION</td>
<td>3</td>
</tr>
<tr>
<td>BACKGROUND</td>
<td>4</td>
</tr>
<tr>
<td>OTHER JURISDICTIONS WITH LEGAL RECREATIONAL CANNABIS</td>
<td>4</td>
</tr>
<tr>
<td>IMPAIRING EFFECTS</td>
<td>5</td>
</tr>
<tr>
<td>MEDICAL VERSUS RECREATIONAL USE</td>
<td>5</td>
</tr>
<tr>
<td>LEGISLATIVE FRAMEWORK</td>
<td>6</td>
</tr>
<tr>
<td>AVIATION INDUSTRY LEGISLATION</td>
<td>8</td>
</tr>
<tr>
<td>LIMITS OF TESTING</td>
<td>9</td>
</tr>
<tr>
<td>CANNABIS AT WORK</td>
<td>10</td>
</tr>
<tr>
<td>THE NEED FOR A STRONG POLICY</td>
<td>12</td>
</tr>
<tr>
<td>TESTING POLICY</td>
<td>13</td>
</tr>
<tr>
<td>CONCLUSION</td>
<td>14</td>
</tr>
<tr>
<td>TESTING RESOURCES</td>
<td>15</td>
</tr>
<tr>
<td>BIBLIOGRAPHY AND FURTHER READING</td>
<td>16</td>
</tr>
<tr>
<td>REFERENCES</td>
<td>19</td>
</tr>
</tbody>
</table>
EXECUTIVE SUMMARY

With Bill C-45, the Cannabis Act, and Bill C-46, An Act to amend the Criminal Code, currently before the Senate for approval, concerns are rising about the potential impact of legal recreational cannabis on the Canadian workplace. For employers in the aviation industry, the safety-sensitive nature of the workplace, coupled with recent incidents involving intoxicated crew members, is driving the need to respond before recreational cannabis becomes a real concern.

This White Paper presents information and recommendations for aviation industry employers, including:

- signs of impairment to watch for;
- employers’ obligations with respect to accommodation and safety;
- information about the current state of the law; and
- dealing with potential substance use or abuse problems through workplace policies.

Many employers may believe that they will be able to treat recreational cannabis in the same way that alcohol is currently treated under existing drug and alcohol policies. While this is true to a certain extent, the fact that cannabis is recognized as having some legitimate medicinal properties, as well as the limits of current testing devices, puts recreational cannabis into its own category, distinct from both alcohol and medical cannabis.

NOTE: This document does not address the legality of possessing, distributing, growing, or selling cannabis. This document is primarily concerned with the consumption of cannabis.

This white paper does not constitute legal advice. The authors and Emond Harnden LLP do not endorse or make a moral statement about the use of cannabis.
INTRODUCTION

Drugs and bad weather caused a deadly plane crash in the Northwest Territories.\(^1\) A cargo plane crash that killed two pilots in 2015 was likely caused by the intoxication of one of the pilots.\(^2\) In Texas, a hot air balloon pilot on a combination of drugs flew the balloon into a power line and killed all 16 passengers.\(^3\) A driver for the Toronto Transit Commission (“TTC”) tested positive for on-duty drug use just six weeks into the TTC’s new random drug testing policy.\(^4\)

In light of headlines such as these, and the impending legalization of cannabis, the Transportation Safety Board has called for the implementation of a mandatory and comprehensive substance-abuse program, including testing.\(^5\) Aviation employers will need to develop or refine their existing drug and alcohol policies and implement procedures to protect against the risks associated with cannabis use in a safety-sensitive workplace by employees responsible for the safe operation of flights and related operations.

This White Paper presents information and recommendations for employers in the aviation industry. It will provide an overview of the impairing effects of cannabis, the issues facing Canadian workplaces relating to cannabis use, and the governing legislative framework. Finally, this White Paper will discuss the need for strong policies and procedures to protect employees, customers, and the public in the Canadian aviation industry.
BACKGROUND

According to the World Health Organization, cannabis is consumed by approximately 2.5% of the world’s population, or some 147 million people annually. It is the most commonly consumed drug, compared to 0.2% of the population consuming cocaine, and 0.2% consuming opiates. In 2012, 10.6% of Canadians reported having used cannabis in the previous year.

While cannabis has been accessible for medical use with authorization since 2001, it is currently considered an illicit drug under the Controlled Drugs and Substances Act, such that possessing, distributing, growing, and selling cannabis is illegal, on penalty of fines and/or imprisonment. On April 13, 2017, the Government of Canada introduced two bills to legalize and regulate recreational cannabis. If passed by the Senate, the proposed legislation is currently slated to take effect in the summer of 2018.

OTHER JURISDICTIONS WITH LEGAL RECREATIONAL CANNABIS

In 2013, Colorado and Washington became the first jurisdictions in the United States to legalize recreational cannabis. Since then, a number of other states have followed suit.

In the United States, a group called Smart Approaches to Marijuana (“SAM”), comprised of scientists and doctors from across the country, issued a report in 2016, which examined the impacts of legalization in Colorado, including the impact on Colorado’s workforce. Based largely on data from a drug testing company, the report noted the following trends:

- from 2011 to 2015, the number of positive workplace oral cannabis test results increased by 178%; and
- over the previous three years, there had been a steady increase in the percentage of employees in the U.S. workforce testing positive for drugs.

While the impact of legalizing recreational cannabis on the Canadian workplace is unknown, there appears to be a general prediction that use will increase, even if only temporarily, once there is a legal, regulated market for recreational use. This conclusion is supported by the data from Colorado, which showed an initial increase in consumption after cannabis was legalized. Since that initial increase, consumption rates have gone down and stabilized around the pre-legalization consumption rates.

DEFINITIONS

Cannabis is the generic term used to refer to the plant cannabis sativa in its psychoactive form. For the purposes of this discussion, cannabis refers to the plant and its by-products, including the flowers, leaves, stems, seeds, and oils.

A safety-sensitive position is defined by the Canadian Human Rights Commission as “one that, if not performed in a safe manner, can cause direct and significant damage to property and/or injury to the employee, others around them, the public and/or the immediate environment.”
IMPAILING EFFECTS

The primary psychoactive compound found in cannabis is Δ9 tetrahydrocannabinol (“THC”). Other compounds found in cannabis with similar structures to THC are known as “cannabinoids.”

While it is widely known that cannabis causes impairment, the intensity of the impairing effects differ widely from person to person, and depend largely on the method of ingestion. When cannabis is inhaled, its psychoactive effects are typically experienced within a matter of minutes, and peak intoxication is reached after approximately half an hour. In comparison, when cannabis is ingested orally, its effects can take anywhere from half an hour to three or four hours to manifest, and peak intoxication varies depending on a variety of factors, including what else the individual has eaten. While the acute effects of cannabis inhalation generally fade after two to four hours, they can last as long as twenty-four hours. When ingested, the acute effects of cannabis generally fade after eight hours but can last as long as twenty-four hours.

Regardless of the method of consumption, the impairing effects are largely the same. While different strains of cannabis may produce a variety of effects, the short-term impairing effects can include:

- confusion;
- sleepiness or fatigue;
- impaired ability to remember, concentrate, or pay attention;
- anxiety, fear, or panic;
- a reduced ability to react quickly;
- decreased blood pressure, which may lead to fainting;
- increased heart rate; and
- paranoia, delusions, or hallucinations.

Studies have also shown that long-term cannabis users tend to experience impairing effects in executive functions over a longer period of time, even after long periods of abstaining from using the drug. Frequent and long-term users are also vulnerable to developing a tolerance to cannabis, requiring higher doses in order to obtain the same effects. These users are also at risk of developing a cannabis dependence.

MEDICAL VERSUS RECREATIONAL USE

Because medical use of cannabis has been legal since 2001, scientists and physicians have had ample time to study the impact of use and potential therapeutic effects. While legalization is likely to encourage researchers to study recreational cannabis more closely, little is yet known about the differences, if any, between the cannabis used medicinally, and that used recreationally.

Dr. Danial Schecter, the Executive Director and Co-Founder of the Cannabinoid Medical Clinic, has acknowledged that there are some differences between medical and recreational uses of cannabis. Most notably, medical use is meant to alleviate symptoms, such that medical cannabis is often less potent than the cannabis used recreationally to get high. The analgesic and therapeutic benefits of cannabis occur before a user becomes intoxicated, meaning that medical users may be able to experience symptom relief from lower doses before reaching the point of experiencing the psychoactive effects.
LEGISLATIVE FRAMEWORK

MEDICAL CANNABIS

The Marihuana Medical Access Regulations (“MMAR”),24 introduced in 2001, made it legally permissible to possess and use cannabis with medical authorization. The MMAR allowed users to purchase cannabis from Health Canada, or to purchase a license to produce their own cannabis at home or designate a producer to grow it on their behalf. In 2014, the Marihuana for Medical Purposes Regulations (“MMPR”)25 replaced the MMAR, and required that all medical cannabis users purchase cannabis from an authorized producer. The MMPR expressly prohibited users from producing cannabis in their own homes. Both the MMAR and MMPR limited access to medical cannabis to dried cannabis, which had to be inhaled.26

The Access to Cannabis for Medical Purposes Regulations (“ACMPR”)27 came into effect on August 24, 2016, replacing the MMAR and MMPR. The ACMPR created a framework for commercial production by licensed producers, and introduced a provision allowing individuals with medical authorizations to produce a limited amount of cannabis for their personal use, or to designate an individual to produce it for them. The ACMPR also allows for patients to access cannabis oil and fresh cannabis, in addition to dried cannabis which was allowed under the previous regulatory regimes. Under the ACMPR, cannabis is only “legal” with authorization from an authorized healthcare practitioner. To obtain authorization under the ACMPR, a patient need only consult an authorized healthcare practitioner, such as a physician or nurse practitioner, who will provide them with a “medical document.”28 The “medical document” must indicate the daily quantity of dried cannabis the patient is required to use, and the period of use.29

RECREATIONAL CANNABIS

Bill C-45, the Cannabis Act,30 and Bill C-46, An Act to Amend the Criminal Code,31 were introduced on April 13, 2017. Bill C-45 would make it legal for individuals over 18 to possess a small amount of cannabis, and Bill C-46 would create new offences for impaired driving, which would address individuals driving under the influence of cannabis. Both bills have been passed by the House of Commons, and recently passed in the Senate. The Bills will now face scrutiny by the Senate committees, and return for final debate and vote. The anticipated date for this vote is June 7, 2018.32 Although the original plan was to have recreational cannabis available for sale as of July 1, 2018, the government has revised its target and is now aiming for late July or August 2018.33

In its current form, Bill C-45 will, among other things:

- establish criminal prohibitions on the unlawful distribution of cannabis, including sale and distribution to young persons (under the age of 18);
- prohibit promotion, packing, and labelling that appeals to young persons or encourages consumption by individuals of any age;
- repeal the Criminal Code provisions relating to manufacturing, promoting, or selling tools and/or printed materials intended to encourage the consumption of illicit drug use; and
- prohibit smoking and vaping in federally regulated places, which will include aviation-industry workplaces, and vehicles.
Bill C-46 will, as its name suggests, amend the *Criminal Code* to create three new offences for having specified levels of a drug in the blood (known as a “blood drug concentration” or “BDC”) while driving or within **two hours** after having driven. The Bill will also:

- authorize peace officers who suspect a driver of having drugs in their system to demand that the driver provide a sample of a bodily substance for analysis by drug screening equipment;
- authorize mandatory roadside screening for **alcohol**; and
- authorize the Governor in Council to establish the permitted BDC.

Currently, no amendments to the *Canada Labour Code* or the *Canadian Aviation Regulations* are under consideration as a result of the Bills. Although a public consultation process took place in November 2017, the Government of Canada’s proposal regarding regulation falls short in terms of addressing potential implications of the Bills in Canadian workplaces.
At the “Fit to Fly” workshop presented by Transport Canada in June of 2017, one presenter indicated that there will be no similar “Toke to Yoke” policies for the consumption of cannabis as there are too many factors, including how much food an individual has eaten, the level of fat in their body, and the corresponding consumption of alcohol, that contribute to the rate at which cannabis metabolizes. At this same workshop, a Transport Canada representative discussed the possibility of random alcohol and drug testing for pilots following an incident in Calgary in which a Sunwing pilot reported for duty so intoxicated that his wing pin was upside down and he passed out in the cockpit.

Despite the proposed changes under Bills C-45 and C-46, there are currently no proposed amendments to CARs with respect to cannabis consumption.

The Chair of the Transportation Safety Board (“TSB”) has indicated that the TSB is calling for Transport Canada to collaborate with aviation industry and employee representatives to develop and implement requirements for a comprehensive substance-abuse program, which would include drug and alcohol testing, to reduce the risk of impairment for those in safety-sensitive positions.
LIMITS OF TESTING

There are a variety of ways to test for the presence of drugs in an individual’s system, including testing urine, saliva, and blood. Each method has a different window of detection. Blood, saliva, and urine testing are all able to detect most drugs one to four days after use. Urine testing is the least effective at detecting recent use because it requires that the drug has passed through the body before it will appear in a urine sample. Blood and saliva tests are both able to detect drug use within the first moments of consumption; however, the consensus seems to be that saliva testing is the best method for testing present impairment.40

Since 2008, Canadian police have had the ability to test drivers suspected of drug-impaired driving with a Standardized Field Sobriety Test and a drug influence evaluation by way of a Drug Recognition Evaluator, and by requiring drivers to provide a blood, urine, or saliva sample to test for the presence of impairing substances.41 Because of concerns relating to the length of time required to obtain a drug influence evaluation, police are calling for more effective ways to test for drug-impairment.42 If the proposed amendments to the Criminal Code are passed, police will be authorized to use oral fluid screening devices at roadside to detect the presence of drugs including THC, cocaine, and methamphetamine.43

Oral fluid (saliva) screening devices are currently the most advanced and frequently used devices for testing and are able to detect recent use. However, unlike blood testing, saliva testing that returns a positive result is not necessarily a clear indication of impairment as the tests will only return a positive result where the cannabis has been consumed recently. However, unlike the roadside devices used to detect alcohol impairment, the oral fluid screening devices will not be able to convert the sample to a blood drug concentration, meaning that observations about the individual’s demeanour and behaviour will have to play a role in determining impairment.44

Because blood drug concentration has a more direct correlation with impairment, countries such as Australia and the United Kingdom, where oral fluid devices are already used for roadside screening, will often follow-up on a positive screening test with a confirmatory blood test.45

There are a few companies in North America working towards developing breathalyzer devices to test for cannabis impairment; however, these devices require further beta-testing before they will become available for use. While these breathalyzer devices are expected to detect THC in breath samples, the presence of THC in a breath sample is not necessarily reflective of the amount of the substance present in the individual’s blood or brain.46

Because of the limits in determining impairment through cannabis testing, employers will need to have additional evidence to support taking action against an employee with a positive test. Employers should ensure that supervisors are well-trained in signs of cannabis impairment, not only to detect situations where a test is required, but to ensure there is support for any decision to remove an individual from duty or take other disciplinary or administrative action.
CANNABIS AT WORK

Employers have competing obligations when it comes to the risks associated with impairment in the workplace. While on one hand, employers have a duty to accommodate employees who have a legitimate need to use cannabis for medical reasons or who have a dependency, they also have a duty to ensure employees are safe at work.

HUMAN RIGHTS

When it comes to alcohol and drugs, the law is clear that an employer’s duty to accommodate is engaged where an employee discloses that they have an alcohol addiction, a disability for which they use medical cannabis as a treatment, or a demonstrated drug dependency.

While substance dependency, whether it involves drugs or alcohol, is considered a disability under the Canadian Human Rights Act, recreational use of drugs does not attract the protections of the Act. Drawing a distinction, however, between recreational use and addiction may prove challenging in practice.

The duty to accommodate employees using cannabis for medical or disability-related reasons is no different than the duty to accommodate any other employee in the workplace. In some instances, an employer may be able to demonstrate that the employee cannot be accommodated because of a bona fide occupational requirement (“BFOR”). A BFOR is a skill or characteristic that is essential to a job, without which the job cannot be performed. The test for demonstrating that a discriminatory standard is a BFOR, as established by the Supreme Court of Canada, is:

1. the standard must be rationally connected to job performance;
2. the employer must have an honest and good faith belief that it is necessary; and
3. the standard must be reasonable and necessary for a legitimate purpose. To show that a standard is reasonably necessary, it must be impossible to accommodate the individual employee(s) without imposing undue hardship.

For example, the requirement that a pilot not use cannabis within the twenty-four hours before a flight would likely be a BFOR, even if it is medical cannabis used in relation to a disability.

The duty to accommodate persists until an employer reaches the point of undue hardship. There is no cut and dry definition of what amounts to undue hardship, and it is a difficult threshold to meet. On balance, when the negative effects on the employer outweigh the benefits to the employee, undue hardship will have occurred and the employer is no longer expected to provide the accommodation. However, the fact that the employer has to incur costs or is otherwise inconvenienced is generally not sufficient. Financial costs and health and safety risks, along with other relevant considerations, will be taken into account in determining whether the high threshold for undue hardship has been met.

Generally, there will be no obligation to accommodate an employee claiming that they require medical cannabis in the absence of an authorization, where the employee is self-medicating, or where the employer is not and could not reasonably be aware of the employee’s need for medical cannabis. Employers are entitled to ask for confirmation of the risk of impairment associated with an employee’s medical cannabis use, and to confirm whether or not non-impairing alternatives are available.
Employees requiring accommodation have an obligation to disclose that requirement and their restrictions and/or limitations. Where an employee fails to do so, the employer will not be expected to accommodate an employee who breaches the employer’s policies by not disclosing cannabis use, medical or otherwise, prior to an accident or incident in the workplace. However, where an employer is aware that an employee has a condition that may require accommodation, employers have a duty to inquire into whether or not accommodation is required. Employers also have a duty to consider all possible accommodations before determining that an employee’s needs cannot be met.

**OCCUPATIONAL HEALTH AND SAFETY**

Under Part II of the *Canada Labour Code*, employers have a general duty to ensure that the health and safety of all employees is protected. Where an employee’s medical cannabis use raises legitimate safety concerns, the employer has an obligation to seek additional information from the employee, including medical information relating to the authorization for cannabis and its potential effects on the employee, including the extent and nature of any impairment.

Employers are required to take all reasonable precautions to protect employees and others in the workplace, and this obligation is heightened where a position is safety-sensitive.

With respect to drug and alcohol testing in the workplace, testing in safety-sensitive workplaces is more likely to withstand scrutiny from a human rights perspective because of the employer’s obligations to ensure safety.

**PRIVACY**

There are a number of privacy implications associated with requiring employees to undergo drug and/or alcohol testing in the workplace. Federally regulated employers, such as aviation-industry employers, have obligations under the *Personal Information Protection and Electronic Documents Act* with respect to the personal information of employees. These obligations include not collecting any more personal information than is reasonably necessary.

In unionized environments, when determining whether or not an employer is entitled to require an employee to undergo drug testing, arbitrators will consider the privacy interests of employees and balance those interests against the benefits of testing for the employer. Where the benefit to the employer outweighs the possible harms to employees, the employer will likely be entitled to require drug testing.
THE NEED FOR A STRONG POLICY

Safety is paramount in the aviation industry and is the responsibility of all workplace parties, including employers, employees, and unions. A strong policy is an invaluable tool for aviation industry employers to define expectations around the use of cannabis, whether for medical or recreational use, other drugs, and alcohol in the workplace.

A robust policy will provide employees with a clear understanding of what is not acceptable at work, and will allow employers to take necessary action where employees fail to abide by the policy.

In safety-sensitive environments, such as airports, aerodromes, air traffic control towers, landing pads, hangars, etc., it is appropriate to have a stricter and more comprehensive drug and alcohol policy than one might find in, for example, an accounting firm. Strong policies should include a prohibition on using impairing drugs and alcohol in the workplace or showing up to work while under the influence of any impairing drug, including cannabis, or alcohol.

An effective drug and alcohol policy should include the following, among other things:
- definitions, including what positions are considered safety-sensitive;
- the duties of the company, management, supervisors, and employees with respect to ensuring that the drug and alcohol policy is followed;
- prohibitions on reporting to work under the influence of alcohol or drugs;
- the circumstances in which an employee may be required to submit to a drug or alcohol test;
- the duty to report use of medically authorized or prescribed drugs that have the potential to impair the employee;
- “bottle to throttle” and “toke to yoke” rules stipulating how soon before reporting to work an employee may consume impairing substances and still be deemed fit to perform their duties;
- consequences of non-compliance with the policy;
- rules relating to return to work following a positive test result;
- “peer-to-peer” support program; and
- an accommodation procedure for employees who have a drug- or alcohol-related disability, or who require the use of a potentially impairing drug for medical reasons.

A provision relating to prescription drugs, including medically-authorized cannabis, should indicate that, even where an employee has a medical prescription or authorization to use the drug, whether or not the employee is safe to perform the duties of their job will have to be evaluated in consultation with their physician. For pilots and flight crew, CARs provides the zero tolerance policy for all impairing drugs, and regardless of medical authorization, this will remain the same.
TESTING POLICY

Many drug and alcohol policies will also include rules regarding testing. While the TSB recognizes the need for a comprehensive program, unions have traditionally opposed random drug and alcohol testing, even where there is a demonstrated need for it in the workplace.

Arbitrators have found drug and alcohol testing to be appropriate where:

• there is reasonable cause to believe that an employee is impaired while on duty;
• the employee has been directly involved in a workplace accident or significant incident; and/or
• the employee is returning to work after treatment for substance abuse.  

To implement random testing, employers will be required to demonstrate particular risks in the workplace, or a general problem of substance abuse among employees. However, arbitrators are reluctant to find that a workplace has a general problem of substance abuse, making proving such a problem a difficult task. In one case, evidence of three fatalities related to drug or alcohol consumption in the workplace within a four-year period was not sufficient for the arbitrator to find the employer’s drug and alcohol testing appropriate.
CONCLUSION

While employers are essentially powerless to stop the legalization of recreational cannabis at this point, their obligation to protect the health and safety of their employees remains paramount. As members of the aviation industry, employers’ obligations with respect to safety are even more significant because of the dangerous nature of the work employees do, and the possible harm to customers, the general public, and the environment.

Employers who do not already have a drug and alcohol policy in effect should take the necessary steps to put a policy in place, ideally before the Cannabis Act takes effect in the summer. Employers who do have a policy should take the time to review and update the policy, and to make sure all employees are aware of the expectations.

There are many unknowns as the recreational cannabis scheme takes effect. Employers in any industry will not be expected to tolerate impaired employees and, when dealing with safety, it is better to increase scrutiny and restrictions at the outset than to wait and see how it plays out. However, employers will continue to be expected to abide by their obligations under the Canadian Human Rights Act while dealing with effects of the legislative changes.

The best way to prepare for the new laws is to sit down with a lawyer. For more information, or help with your drug and alcohol policy, contact Steven Williams or Larissa Volinets Schieven at Emond Harnden LLP.

The authors are grateful to Lauren Jamieson, articling student, for her significant contributions to this White Paper.
TESTING RESOURCES

The authors are not affiliated with, nor do they endorse any of the companies listed below.

CANN/AMM Drug & Alcohol Testing
- DOT and Non-DOT testing
- Urine drug testing
- Oral fluid/saliva drug testing
- Breath alcohol testing
- Emergency/after-hours testing
- Mobile drug testing

Locations
- Vancouver
- Yellowknife
- Whitehorse
- Edmonton
- Ottawa
- Montreal

Sure Hire Drug & Alcohol Testing
- Alcohol testing
- Workplace urine drug testing
- Oral fluid drug testing
- Hair follicle testing
- Random drug & alcohol testing
- Substance abuse professional services
- Medical review officer services
- Supervisor reasonable suspicion training
- Drug and alcohol awareness training
- Fentanyl testing
- GHB testing

Locations
- Vancouver
- Edmonton (East and West)
- Whitehorse
- Ottawa

DriverCheck Medical Testing & Assessments
- DOT and Non-DOT testing

Locations
- Vancouver
- Whitehorse
- Yellowknife
- Edmonton
- Ottawa
- Montreal

Dynamic Testing Solutions
- DOT testing
- Breath alcohol testing
- Urine alcohol testing
- Saliva alcohol testing
- Urine drug testing
- Saliva drug testing
- Lab-based drug testing

Locations
- Edmonton
- Ottawa
- West Montreal

Life Labs
- DOT and Non-DOT testing

Locations
- Vancouver
- Ottawa

Ultima Medical Services – Vancouver Airport
- DOT and Non-DOT testing

** Two other Vancouver locations as well

Fleming Protection – Whitehorse
- DOT testing
- Random drug and alcohol testing
- Pre-employment testing
- Post-incident testing

Gerico Testing – Edmonton
- Drug screening
- Alcohol testing
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**LEGISLATION**


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*Controlled Drugs and Substances Act*, SC 1996, c 19.


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