

# Presented for CASHRA

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### Drug Testing and Human Rights

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Alberta Human Rights and Citizenship Commission

# The Alberta Experience

## The Alberta environment

- Boom in oilsands plants, upgraders and refinery construction
- Canadian Model for Providing a Safe Workplace
  - 2001 version adopted by Building Trades Council
  - 2005 version not adopted by Building Trades Council

# The Alberta Experience

## Types of Testing:

- pre employment/pre-access
- post incident
- reasonable cause
- random
- return to duty
- follow-up

How – breathalyzer and urinalysis

# The Alberta Experience

## Retention Times (Drugs in Urine):

|              |            |               |
|--------------|------------|---------------|
| Marijuana    | Occasional | 1-7 days      |
|              | Chronic    | 1-4 weeks     |
| Cocaine      |            | 2-4 days      |
| Opiates      |            | 1-2 days      |
| PCP          | Chronic    | up to 30 days |
| Amphetamines |            | 1-2 days      |

# The Alberta Experience

## Scope and breadth of complaints:

- Post-Incident/Reasonable Cause 30%
- Pre-Access 60%
- Other 10%

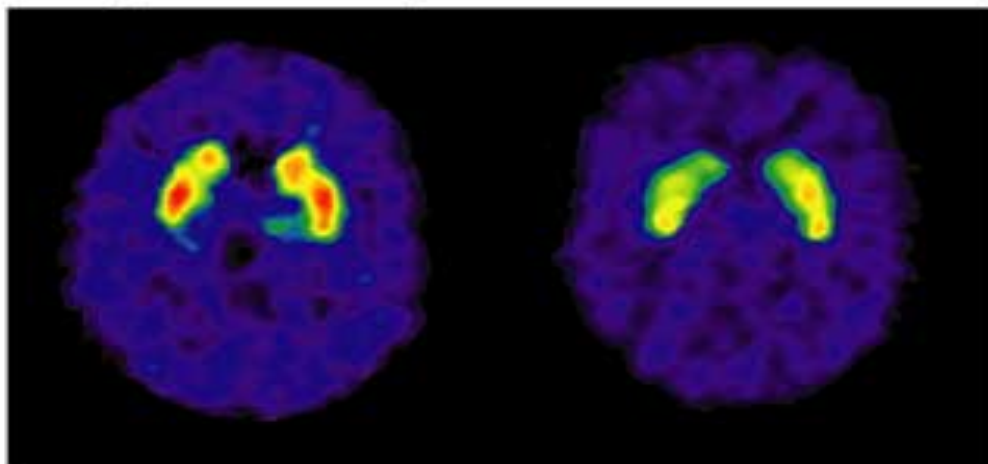
# Addiction

Chronic, relapsing brain disorder that results from the prolonged effects of drugs on the brain, with embedded behavioral and social-context aspects as important parts of the illness itself.

\*Definition used with permission from Dr. Charl Els\*

*MBCChB, FCPsych, MMed Psych (cum laude) Cert. ASAM, MRO*

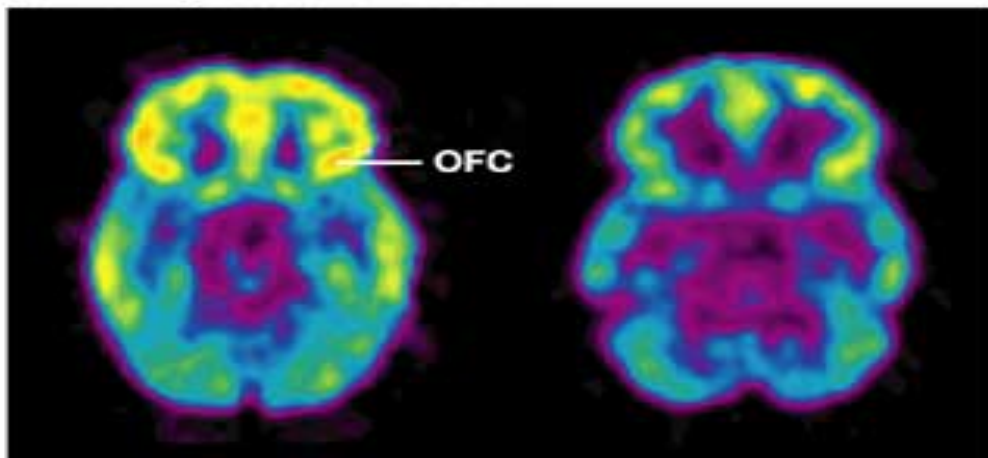
**a Dopamine D2 receptors**



Control

Cocaine abuser

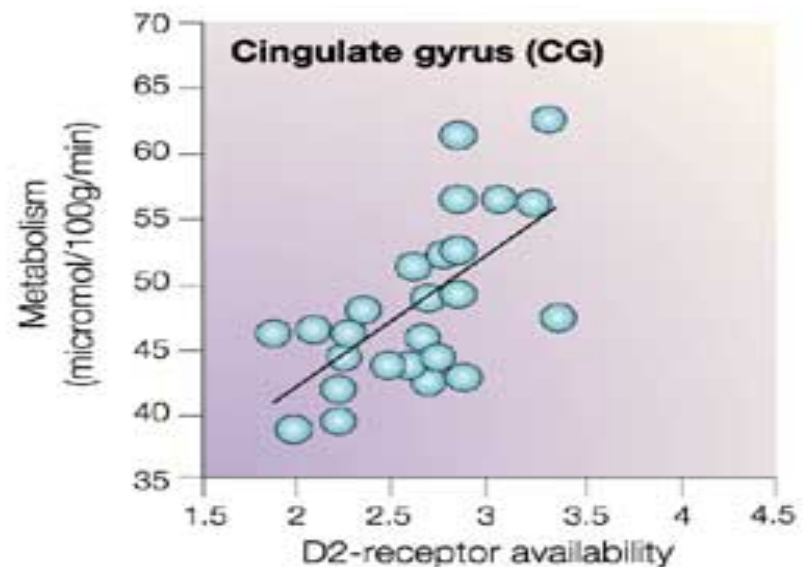
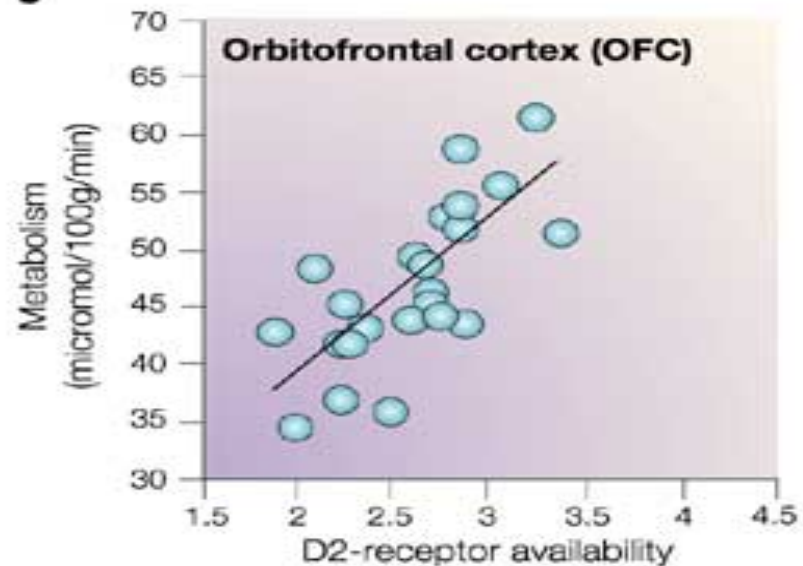
**b Brain glucose metabolism**



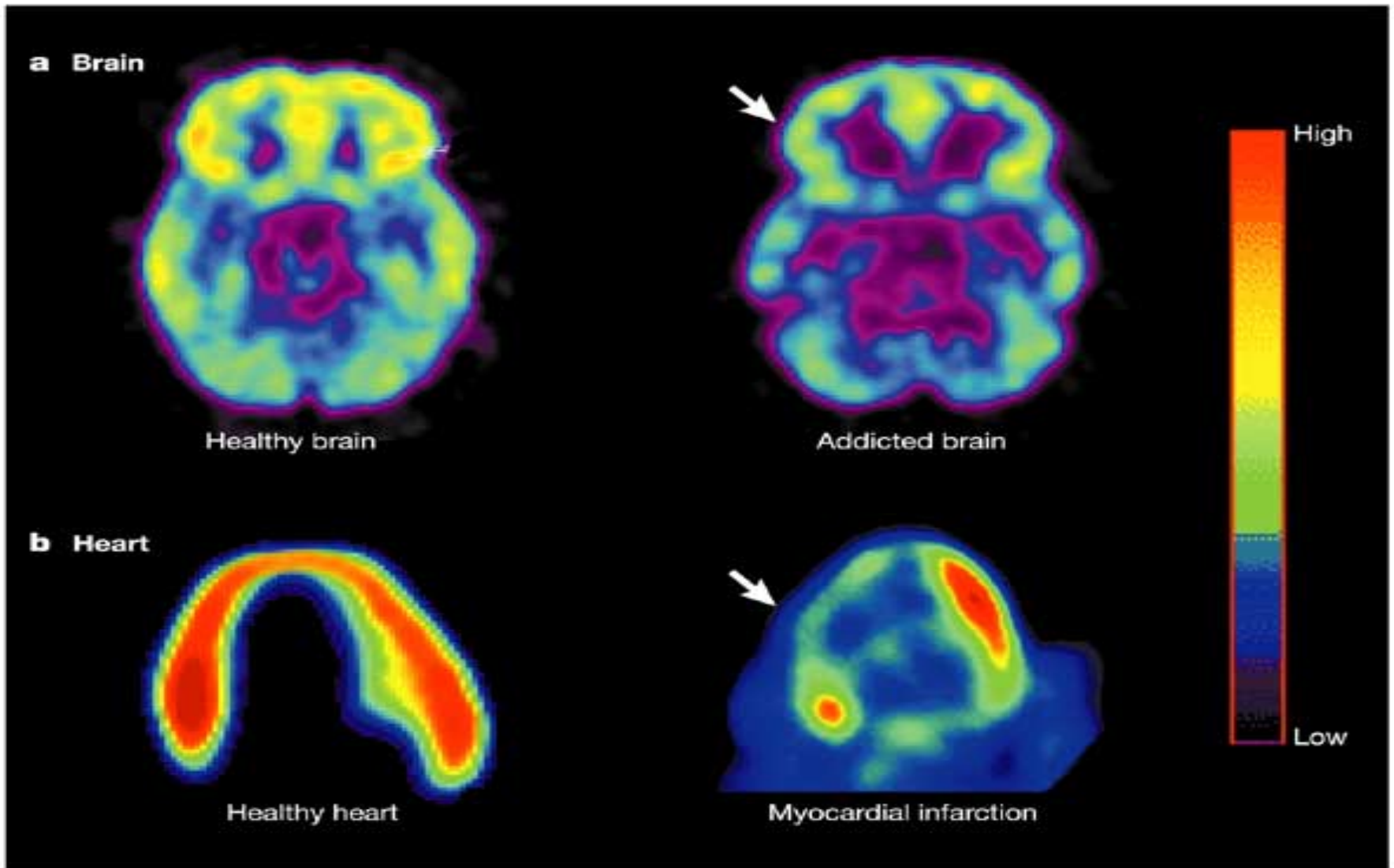
Control

Cocaine abuser

**c**

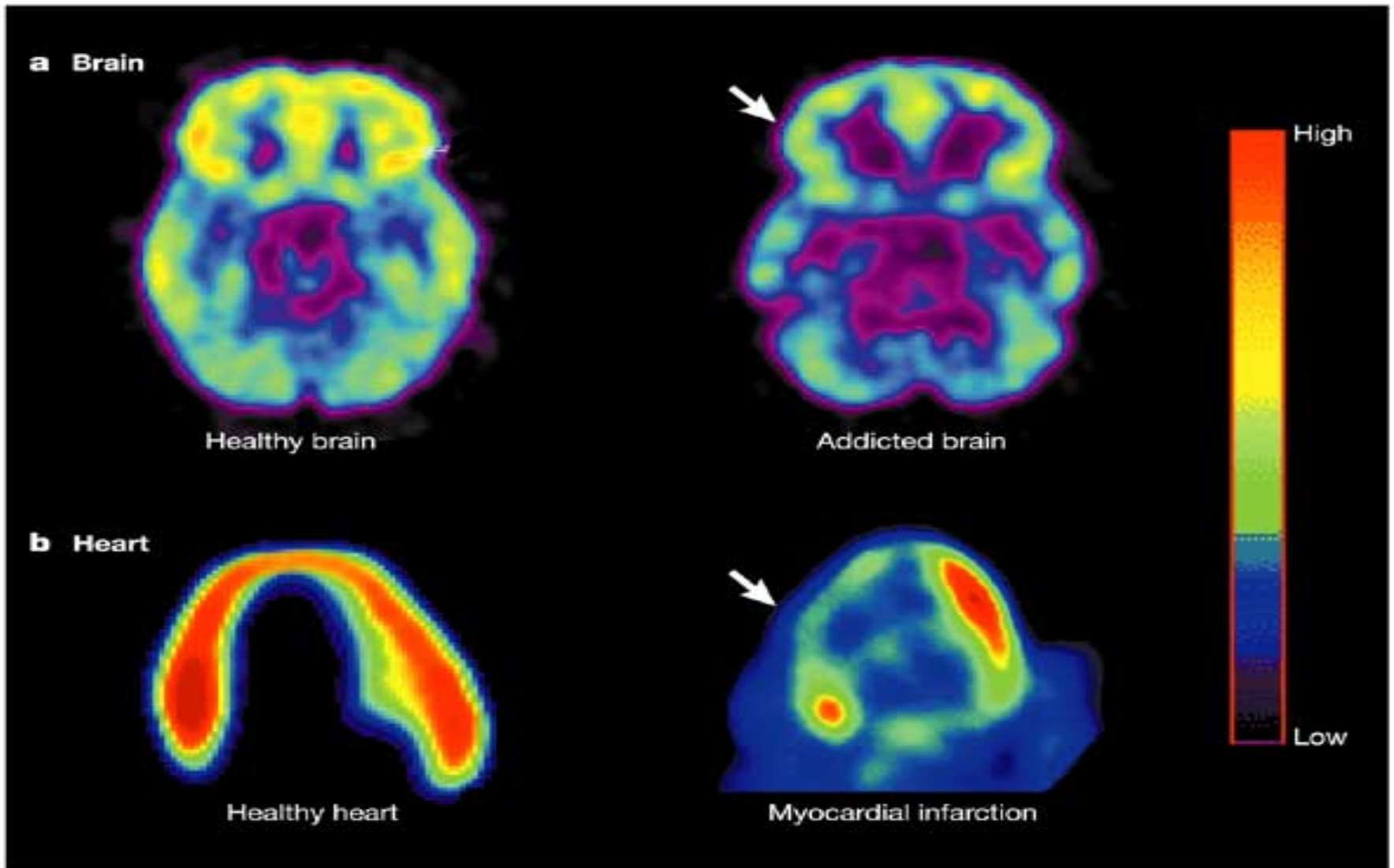


Nature Reviews | Neuroscience



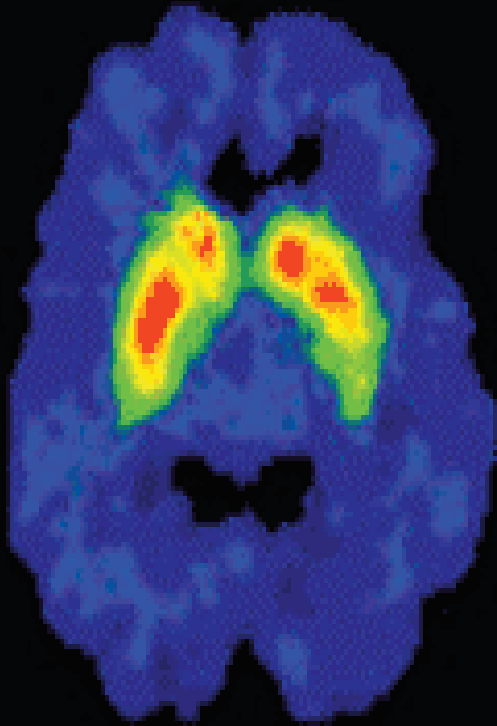
Nature Reviews | **Neuroscience**



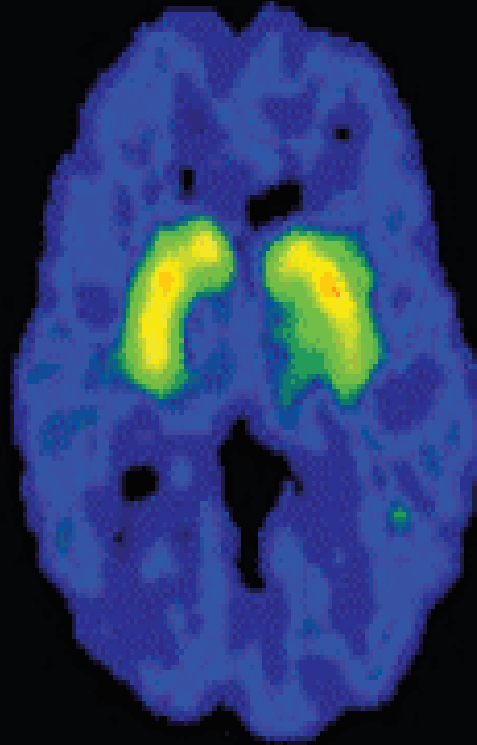


Nature Reviews | Neuroscience

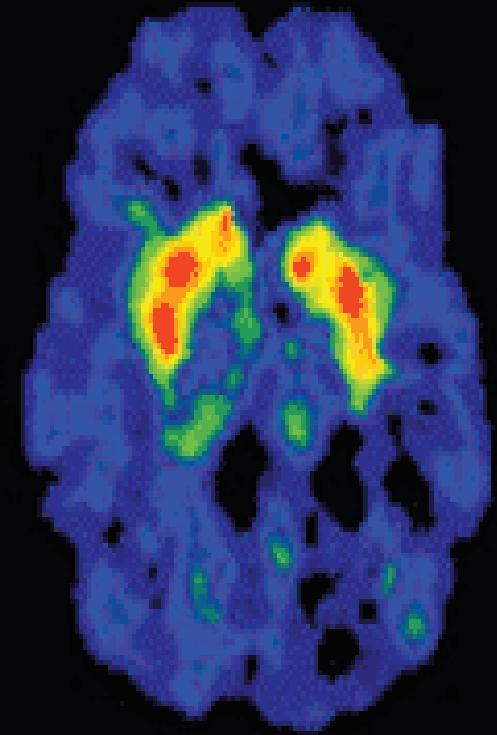
# RECOVERY OF BRAIN FUNCTION WITH PROLONGED ABSTINENCE



Healthy Control



METH Abuser  
1 month abstinence



METH Abuser  
14 months abstinence



# Summary

- Addiction is prevalent
- Addiction is a chronic relapsing disease
- <sup>\*</sup>Addiction is (potentially) disabling
- Addiction is treatable

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# The Human Rights Approach to Drug Testing

- Addiction as a disability

# The Human Rights Approach to Drug Testing

- Dignity and privacy interests

# Discrimination Analysis

- Prima Facie Discrimination- differential, adverse treatment
- On a prohibited ground (disability or perceived disability)
- Is the discrimination reasonable and justifiable?

# Meiorin Analysis & Accommodation

Is the discrimination reasonable and justifiable?

- Rational connection
- Good faith
- Reasonable necessity

# The Jurisprudence

*Canada (Human Rights Commission) v. Toronto-Dominion Bank (CA.) [1998]*  
4 F.C. 205 (Fed. C.A.)

- Prima facie discrimination
- Impact of “neutral” conditions of employment



# The Jurisprudence

*Imperial Oil Ltd. v. Entrop*, 2000 O.J. No. 2689; Reported at 37 C.H.R.R. D/481 (Ont. C.A.)

- Opens the door for concept of perceived disability through policy
- Emphasis on inability of test to determine present impairment
- Is Entrop still good law?

# Perception of disability – Two Approaches

- Admitted addiction, subjective beliefs of employer or supervisor
- Policy wording, automatic sanctions and actions, effect or impact on the employee

# The Jurisprudence

*Milazzo v. Autocar Connaisseur Inc. (No. 2)*  
(2003), 2003 CHRT 37; Reported at (2003) 47  
C.H.R.R. D/468

- Individual complaint required admission of disability or subjective perception of disability under federal human rights legislation
- Examination of policy generally, however, resulted in a finding of failure to accommodate

# The Jurisprudence

*Alberta (Human Rights and Citizenship Commission) v. Kellogg, Brown and Root (Canada) Ltd.* 2006 ABQB 302 (KBR) Appeal to Alta. Court of Appeal pending

- Different approaches to perception of disability in Panel and Court decisions
- Similar approaches to reasonable and justifiable defense (accommodation)
- Court held impact of automatic sanction and wording of policy created perception of disability
- Some helpful analysis with respect to accommodation, limits of the policy and evidence in the case

# The Jurisprudence

*Alberta (Human Rights and Citizenship Commission) v. Elizabeth Metis Settlement* 2003 ABQB 342; reversed 2005 ABCA 173; Reported at 53 C.H.R.R. D/94 (2003); 46 C.H.R.R. D/283 (2005); *Jackknife and Collins v. Elizabeth Metis Settlement No. 2 (A.H.R.P.)* (May 15, 2006)

- Context of aboriginal community facing drug and alcohol issues
- Emphasizes importance of wording of any policy used for justification

# The Jurisprudence

*Weyerhaeuser Co. (c.o.b. Trus Joist) v. Ontario (Human Rights Commission), [2007] O.J. No. 640 (Ont. Superior Court of Justice) (Leave sought by Ontario Commission to Ontario Court of Appeal)*

*The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry et.al. v. Bantrel Constructors Co. (March 21, 2007, Smith)*

# The Alberta Experience

## Issues in Investigation:

- Who can make a complaint?
- Who is an employer?
- Union involvement?
- What is the purpose of the policy?

# The Alberta Experience

## Issues in Investigation (cont.):

- Prima facie discrimination?
  - consequences/sanction
- BFOR/reasonable and justifiable
  - Meiorin analysis



# Meiorin Analysis & Accommodation

The arguments and the evidence:

- Statistical and expert
- Safety sensitive concerns
- Big and small employers
- Short and long term employee or job
- Supervision options to detect impairment
- Drug use in community, on worksites
- Assessments

# The Alberta Experience

## Assessment Based Model



# The Alberta Experience

## Update on KBR

