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Workplace Policies and Canadian Cannabis Rights: A Policy Learning Comparison for Windsor

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Workplace Policies and Canadian Cannabis Rights: A Policy Learning Comparison for Windsor

By

Jesse Market

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Windsor, Ontario, Canada

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Workplace Policies and Canadian Cannabis Rights: A Policy Learning Comparison for Windsor

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January 11, 2019
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ABSTRACT

Although cannabis became a legal recreational drug under federal law in Canada, Windsor has no Fit for Duty or Accommodation policies at the time this paper is being written. Because of this, an opportunity for policy learning emerges. In this policy learning comparison, the policies in the American municipality of Salem, Oregon, will be juxtaposed to those of Essex County. The policies to be examined will be those whose subject matter is most relevant to the issue of cannabis in the workplace, the Fit for Duty policy and the duty to accommodate policy. Salem was chosen due to its location, being in Oregon where recreational cannabis has been legalized, and its population similarity to Windsor, amongst others. Essex County was chosen due to its close proximity to Windsor, in addition to a shared workforce providing a strong case for comparison. This paper finds that Essex County contains accommodation considerations in their policies that would be beneficial for Windsor to consider in the midst of cannabis legalization in Canada. Additionally, Salem’s testing protocols to ensure overall employee and employer safety in the workplace are beneficial for Windsor to consider as well. The transfer of these aspects into Windsor’s workplace policies is recommended based on the research provided.
# TABLE OF CONTENTS

AUTHOR'S DECLARATION OF ORIGINALITY ....................................................... iii

ABSTRACT ........................................................................................................ iv

LIST OF APPENDICES .................................................................................... vi

CHAPTER ONE: INTRODUCTION- SETTING UP THE COMPARISON ................ 1
  Measure 91 ................................................................................................. 8
  The Federal Canadian Cannabis Act .......................................................... 10
  The Ontario Cannabis Control Act .............................................................. 11

CHAPTER TWO: LITERATURE REVIEW- GUIDING THE COMPARISON ........ 13
  Policy Learning Literature Theme: Policy Learning and Transfer .............. 14
  Accommodation Literature Theme: The American and Canadian Divide ...... 16
  Fit for Duty Literature Theme A: Employee Health and Safety ................. 18
  Fit for Duty Literature Theme B: Accommodations and the Workplace Environment. 19

CHAPTER THREE: METHODOLOGY ............................................................... 26
  Comparative Case Selection ........................................................................ 26

CHAPTER FOUR: COMPARING THE POLICIES ........................................... 30
  The City of Salem: Testing Protocols ......................................................... 30
  The City of Salem: Accommodation Considerations ................................ 31
  The County of Essex: Testing Protocols ..................................................... 32
  The County of Essex: Accommodation Considerations ......................... 33

CHAPTER FIVE: ANALYSIS & CONCLUSION .............................................. 35

REFERENCES .................................................................................................. 40

APPENDICES .................................................................................................. 50
  Appendix A ............................................................................................... 50
  Appendix B ............................................................................................... 51
  Appendix C ............................................................................................... 52
  Appendix D ............................................................................................... 57

VITA AUCTORIS ............................................................................................. 58
LIST OF APPENDICES

Appendix A - Oregon Secretary of State: Measure 91

Appendix B - Three Types of learning and policy change, 1992

Appendix C - Fit for Duty Sample- OHS Insider, 2018

Appendix D: Salem’s Drug Testing Protocols
CHAPTER ONE: Introduction- Setting up the Comparison

As of October 17, 2018, recreational cannabis use was legalized in Canada. Provincial legislation regarding recreational cannabis for Ontario was updated on October 29, 2018, and, upon legalization, many concerns arose surrounding the medicinal or recreational use of cannabis, and which type of environment was appropriate for each. Yet, to date, Windsor has not established workplace policies in terms of fitness for duty or accommodation that are often developed to integrate cannabis and its potential use and impact in the workplace. This information is also not yet available on the city’s website.

For many municipalities, by-law and policy information is available on the municipality’s website for all citizens to view, such as on the Town of Tecumseh’s website\(^1\). This is interesting considering the fact that other municipalities have already enacted workplace cannabis policies, prior to or on the exact day recreational cannabis became legalized.

The question that arises is why would a city as large as Windsor not presumably be preemptively prepared in the workplace for a major policy announcement such as the legalization of recreational marijuana? While an answer to this question is beyond the scope of this paper, it nonetheless provides us an opportunity to examine some of these relevant other municipalities to see what Windsor can learn from those examples.

The medical use of marijuana has been legal in Canada since 2014 and has subsequently been available in a variety of forms including smoking, vaporization, edible oils, capsules, liquid drops, edible foods spray oil or cream (Legislative Services Branch, 2018). These methods of consumption and the conditions needed for each employee to

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\(^1\) See for example, The Town of Tecumseh, Frequently Asked Bylaws
have access to medicinal cannabis will vary, bringing the conversation into one of workplace accommodations. According to the Ontario government’s multi-year accessibility plan to address all people with disabilities (including those that are not treated with medicinal cannabis), “by 2035, 40% of our consumer base [(Canadians)] will be people with disabilities” (The Path to 2025: Ontario’s Accessibility Action Plan, 2018). With this growing need for an accessible Ontario, the legalization of recreational cannabis opens the door for many new disability treatment options for employees in the workplace. However, cannabis has historically been considered an illicit drug and is stigmatized for medicinal uses in the workplace, much like the workplace prohibition of alcohol (Brown, 2018). Yet, to treat cannabis similar to alcohol would be to ban it altogether in the workplace environment, and disregard the medical aspect of cannabis that some employees may require. Some employees may have had existing medicinal cannabis prescriptions since before the recreational legalization in 2018.

The ability of the workplace to accommodate an employee is mitigated by the employee’s ability to report to work fit for duty. This is why Windsor would benefit from a recommendation on what exactly constitutes best practice for Fit for Duty and Accommodation policies. Fit for Duty Policies can generally be defined as policies regarding the conduct of an employee that ensures they are in a state of physical and emotional health, and where they are able to perform their duties in a way that is harmless to others (Job Ready Services, 2018). Accommodation policies can be defined as modifications or alternative options to the hiring practices or the work environment for qualified individuals with a disability, to ensure that they are able to perform their duties (Northwest ADA Center, 2018). The need for fitness for duty and accommodation
policies in Ontario arises from the Occupational Health and Safety Act (OHSA) (Ontario Ministry of Labour, 2018). Under section 15, subsection 3, the act states that “a person required to use a drug for a medical purpose and able to perform work may enter and be on [the job] upon establishing medical proof thereof” (Ontario Ministry of Labour, 2018). This subsection deals specifically with prescribed substances, which is the form of cannabis that will be considered in this paper. Of course, recreational use of cannabis is prohibited in the workplace and its prohibited use in certain locations is outlined in the federal and Ontarian legislation. Both levels of Canadian legislation will be examined in greater detail later in the paper.

The Ontario government used the act as a guideline to establish its provincial cannabis regulations and has done so to create a number of policy precedents for workplaces across Canada (Ontario Ministry of Labour, 2018). Believing that impairment due to various substances (including alcohol and medical and non-medical cannabis) in the workplace can often cause a hazard to others in the workplace environment is one of the bases for the existence of Fit for Duty and Accommodation policies (Ontario Ministry of Labour, 2018). According to the Ministry of Labour (2018), “workers performing work when they are unable or unfit to do so safely [will require their employers] to address such hazards under OHSA.” Other issues like substance abuse and addictions are cited in Canada’s OHSA as well to give examples of the situations where accommodations in the workplace may be required due to prescription drug needs or other disabilities (Ontario Ministry of Labour, 2018). The purpose of a fit for duty policy is to ensure that employees in their workplace environment are safe on the job. Hazards can arise due to the nature of the job being performed, or from other employees who may
not have the accommodations they need for their disabilities or their positions, and therefore are a danger to their environment.

From police work to municipal workers in the social services or child-care center, city workers have a variety of positions and responsibilities (Canadian Union of Public Employees, n.d.). The degree of their responsibilities, and their necessity to report to work fit for duty, varies with those positions. A police officer’s position requires much more diligence in testing to ensure that they perform their duties proficiently than someone who works in a town hall. The risk behind impaired actions while they are on duty is much greater. Therefore, if they require accommodations to perform their duties appropriately, it is vital that they receive the aid they require to continue working, or be deemed unable to accommodate and unfit for work through such testing. Recreational cannabis is not permitted in an enclosed workplace; this has not changed with the recent legalization of recreational cannabis (Government of Ontario, Cannabis legalization, par. 30). The balance between the need for accommodation for those who are prescribed medicinal cannabis that must be consumed during work hours, alongside the need to also ensure that employees are fit for duty in the workplace, presents some policy challenges. For the purposes of this paper, I have chosen to review policies from one jurisdiction in the US – Salem, Oregon – that has had workplace policies in place since recreational cannabis use was legalized there in 2014. I have also included policy review from a closer jurisdiction – Essex County – that has recently enacted workplace policies to cover the recreational use of cannabis in the hopes of providing best practice recommendations for the City of Windsor. In particular, the policies adopted by Salem and the County of
Essex will be assessed for their possibility of transfer to the City of Windsor, based on the assessments provided in the literature review and the paper itself.

For some employers, allowing the use of medicinal cannabis in the workplace may seem challenging because it may introduce another potential workplace issue - substance abuse by employees. In 1995, it was reported that “ten million persons [were] addicted to alcohol and three million persons [were] addicted to drugs” in the United States (Callery & Schepis-Mallon, 1995, p. 522). Of those individuals, about seven million are in the workforce (Callery & Schepis-Mallon, 1995, p. 522). As of 2016 those percentages have not improved, as “positive oral drug tests [for cannabis in the workforce] increased nearly 75 percent” from 5.1 percent in 2013 to 8.9 percent in 2016 (Valentic, 2017). Despite illegal drug use being a fear in the workplace, the misuse of prescription drugs can also be classified as substance abuse. These problems can cost businesses “billions of dollars each year […] and employees’ risk behaviours can negatively benefit the competitive advantages of a firm” (Lee & Ross, 2011, p. 185). This is a reason for workplaces to have clear policies against drugs and alcohol in the workplace, while being sensitive to a large sector of their workforce who may be struggling with addiction. The potential risk of substance abuse is high; especially if employees are employed in safety-sensitive positions like those that operate heavy machinery regularly.

In addition to the complexity of the conceptual utility of medicinal cannabis in workplace policies, no accurate blood testing of intoxication levels for cannabis exists at the present time (Marijuana and the Workplace, 2018). Delta-9 tetrahydrocannabinol (THC) is the chemical present in the cannabis plant that elicits the impairing effect
(Measure 91, Section 7 (4)). A device typically conceived for the purpose of testing the presence of impairment in one’s system would be similar in function to the Breathalyzer, and such a device has not been developed for detecting cannabis (Thiffeault, 2018). Yet, the Association of Municipal Clerks and Treasurers of Ontario (AMCTO) states that THC levels that would indicate impairment can remain in a subject’s bloodstream long after the cognitive impairment wears off (Thiffeault, 2018). If a workplace found an employee’s THC blood content was too high, this could be a reason for termination due to a violation of workplace employment contracts and policies. However, according to AMCTO’s statements, an employee who may test positive for impairment today may have, for example, only been under the influence the previous week, and on the day of testing would in fact not be under the influence (Thiffeault, 2018). Evidence of impairment in the blood is not definitive of current impairment.

To determine whether or not testing is appropriate at any given time, Callery and Schepis-Mallon (1995) suggest using the grounds of reasonable suspicion. Reasonable grounds for suspicion of being unfit for duty or for testing might be characterized as “gradual increase of errors, tardiness, or absenteeism” (Callery & Schepis-Mallon, 1995, p. 523). Other indicators of an employee being unfit may be dilated pupils, drowsiness, or a having a staggering gait (Callery & Schepis-Mallon, 1995, p. 523). These physical or behavioural conditions are the scenarios that are unforeseen in policies that promote generalized testing protocols and without such protocols, may result in wrongful dismissal and litigation. Fit for Duty policies and workplace accommodations are designed to “address the personal problems of employees which could lead to work impairment, absenteeism, accidents, conflicts in the work setting, or a threat of job
termination” (Callery & Schepis-Mallon, 1995, p. 525). If an employee is terminated and this could be construed as wrongful dismissal, then this may result in litigation against the workplace. This is just one situation where accommodations can help an employee thrive in the workplace, and highlights one situation where the need for a set of workplace policies that provide a framework for explicit expectations are vital. These are the reasons why policies that cover this area of testing as well as workplace medical accommodations are key and why they will be the measures used to examine the case studies as potential learning examples for the City of Windsor.

The argument that this paper asserts is that policy learning can occur on two fronts, assessing the successful nature of a policy as well as understanding the failures of a policy and avoiding them. Through my research, I have identified useful aspects from Salem and the County of Essex’s workplace policies that Windsor might want to consider when their workplace policies are edited to address this new era of legal recreational cannabis in Canada. The jurisdictions in this paper are not the only municipal jurisdictions that could have been compared but they serve the purposes of this paper and provide some important policy context.

In the absence of Fit for Duty and Accommodation policies for the City of Windsor that have integrated cannabis in an effective way, the puzzle that remains has been identified in the following research questions:

1) What can be best practice for Windsor’s Fit for Duty and Accommodation workplace policies?
2) How much can be learned by examining other workplace policies that exist such as those in Salem, Oregon and Essex County? Are these examples beneficial policy learning/transfer opportunities for Windsor?

Salem, Oregon is used as a comparator for this paper even though there are key differences in workplace culture between Canada and the US. This paper has found through the literature review that the American workplace culture places more emphasis on the rights of the employer, while the Canadian workplace culture highlights the rights of the employee and places their rights in equal esteem to that of the employer. This can lead towards a tendency for American workplaces to not include as many accommodation considerations as Canadian workplaces. To illustrate this difference, the legislation legalizing cannabis in Oregon and at the provincial and federal levels in Canada will be considered, which is also why the County of Essex is in this comparator group. In this examination the contents of these pieces of legislation and their connection to workplace policies at the municipal level will be discussed. Measure 91 is the ballot measure that enacted the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act of 2014, which legalized recreational cannabis in Oregon (Ballotpedia, n.d.). The federal and provincial legislations are what legalized recreational cannabis in Canada and Ontario and they will also be examined.
As mentioned, it is important to note the difference in American and Canadian employment culture. This difference begins with the variance in the type of governments that exist in the United States and Canada. The American system allows for individual states to dictate what is a criminal offence in their jurisdiction in an effort to gain “adequate recognition to their particular [state] interests” from the federal government, which has its own federal jurisdiction on criminal law (Hueglin, 2003, p. 289). This is the motivation behind criminal law being a state as well as a federal responsibility (Farber, 2001, p. 13). However, once the Canadian federal government legalizes recreational cannabis, the provincial governments will adhere to it and regulate it for their province (Government of Canada, Department of Justice, 2018, par. 1). This means that criminal law is dictated at the national level and is simply administered by the provinces in Canada. This difference is an important aspect to note because it is one that manifests itself in workplace policies and helps to clarify the distinction between the two cases selected for this paper.

In the US, federally, the possession and use of cannabis for recreational purposes are illegal (Richardson, n.d.) However, as states have their own powers to act, some states have already legalized recreational cannabis. Oregon for example, is one of the states that have recently made recreational cannabis legal for persons within their own homes in 2014 (Ballotpedia, n.d.). Oregon utilizes ballot processes in order to gauge public opinion and the legalization of cannabis use came about as a result of a referendum titled Measure 91 (Richardson, n.d.). The referendum held on November 4, 2014, polled citizens concerning their preferences regarding the manufacturing, sale, and
availability of marijuana for personal possession. The particular legislation that was in question was the Control, Regulation, and Taxation of Marijuana and Industrial Hemp Act of 2014 (Ballotpedia, n.d.). According to the Oregon Secretary of State’s Official Abstract of Votes, about 54% of voters approved of this measure (Oregon Secretary of State, 2014). The resulting act allows for citizens to produce small amounts of cannabis for personal use and to possess certain amounts in public (Oregon Liquor Control Commission, n.d.). The motivation behind implementing this act, and posing the question on the ballot measure, was to prevent the youth of Oregon from consuming products that were possibly very dangerous, prevent criminals from gaining the profits of sale, clarify the distinction between medicinal and recreational cannabis use, and prevent impaired driving as much as possible (Measure 91, Section 1. (2)). The Canadian legislation will now be considered.

The Federal Canadian Cannabis Act

The Cannabis Act is the title of the federal document, which nationally legalizes the “production, distribution, sale, and possession of cannabis” for individuals (Department of Justice, 2018, par. 1). The act has similar goals as Measure 91: to prevent youth exposure, limit criminal profits, and protect public safety (Department of Justice, par. 1). The Act prohibits individuals under the age of 18 from consuming the drug as well as provides penalties for those who do and for those who distribute cannabis to someone under the age restriction (Department of Justice, par. 10).

Most notably, the act divides powers between the federal legislation and the mandatory provincial legislation that is to follow. The federal government is responsible
for creating safety standards for producers, tracking cannabis seeds to prevent criminal profits, and prohibiting the use of certain ingredients, etc. (Department of Justice, par. 12). Herein lies the constitutional distinction between criminal law and its administration in the provinces. The provincial government’s powers vary from the federal legislation’s initial guidelines in that the province may increase their age restriction but cannot lower it, they may lower the quantities permitted for personal possession, create additional regulations for home-grown cannabis, and further restrict where adults can consume cannabis (Department of Justice, par. 13). After the federal legislation, the provinces were required to create their specific regulations.

The Ontario Cannabis Control Act

Ontario’s provincial legislation complies with the federal law and utilizes its powers in the areas given. The original legislation by Kathleen Wynne’s Liberal government set the minimum age at 19 and restricted the consumption of cannabis in the workplace, in motorized vehicles, or any public space (Government of Ontario, Cannabis legalization, 2018, par. 7). Fines for its use in a public place were $1,000 for the first offence, and $5,000 for every offence thereafter (Government of Ontario, Cannabis legalization, par. 7). The provincial legislation states that recreational cannabis use in the enclosed workplace is illegal (Government of Ontario, Cannabis legalization, par. 30). However, Doug Ford’s Progressive Conservatives revised this legislation after their election in October 2018 (Cohn, 2018, par. 5). The Ford government’s legislation, as of October 29, 2018, differs from the original in that it allows consumption of cannabis in non-enclosed public spaces (Cohn, 2018, par. 5). Additionally, the act formerly restricted the purchasing of cannabis to the Ontario Cannabis Store and deems all other sources of
cannabis to be illegal until a private retail model can be established (Government of Ontario, Cannabis legalization, par. 33-35). Now, the Ford government’s legislation will allow many privately operated stores to sell their own cannabis products (Cohn, 2018, par. 5).

Relating these pieces of legislation back to my cases, although Salem is a municipality having a similar population and demography to Windsor, there still remains a difference in employment culture between Canada and the United States. The specifics of these pieces of legislation help explain that in most cases that arise in Salem and other American municipalities, state law often defers to American federal law. For example, in April of 2017, it was reported that a bill designed to “prohibit Oregon employers from restricting or penalizing off duty marijuana consumption” was defeated by strong influences from people who believed the bill would violate federal law (Canna Law Blog, 2017). The supporters of the bill contend that the people in Oregon are being denied the ability to act within their lawful right, since the bill is not proposing that employers could smoke during work hours (Canna Law Blog, 2017). Despite some differences, the legislation legalizing cannabis in Oregon, the Canadian Federal government, and Ontario are indeed, quite similar. With similar goals, this further aligns Salem, Windsor, and Essex County as useful comparative cases.

Future studies may decide to incorporate other American or Canadian municipalities to fill some gaps of this research. Issues such as the County of Essex being a county rather than a city, or the potential that an alternative American municipality may provide a more appropriate comparison to Windsor are possible. These issues will be explored in the Methodology section, where the case selection will be discussed. For
now, the literature review will be used to aid in setting up the comparison and outlining key factors for the cases chosen.
CHAPTER TWO: Literature Review- Guiding the Comparison

There are three topics that are central to this comparison: Policy Learning/Transfer, Accommodation, and Fit for Duty. Academics like Dunlop (2017), Stone (1999), and Bennett & Howlett (1992) discuss policy learning and transfer. These are the academics that have moulded my research and my cases to help me select the best comparators available and to compare them effectively for this study. Martel (2011), Schartz, Hendricks, and Blanck (2006) are academics that have written on workplace accommodations. They will help me frame my discussion of accommodation in the workplace around the municipality and county I have chosen and help me navigate the cultural differences that come with comparing cases from different countries. Finally, McLellan (2017), Vila, Morrison, and Kenney (2012), Cowell (1986), Solovieva, Dowler, and Walls (2011), and Miller (1996) are academics that have written on the concept of Fit for Duty. McLellan, Vila, Morrison, and Kenney have articles that discuss Fit for Duty with the idea of the health and safety of employees in mind. Cowell, Solovieva, Dowler, Walls, and Miller write in more intersectional ways in that they discuss how accommodations can factor in to an employee being put into a position to be fit for the workplace. Once these articles are discussed, they will develop the themes that will dictate how the analysis of this paper will be done.

Specifically, this paper will now examine the concepts of Fit for Duty, Accommodation, and policy learning in some detail. Various scholarly articles will be considered and essential themes in both Canadian and American workplace policy literature will be identified. These themes are identified based on their prevalence in the
literature considered and will be used to establish a base of knowledge from which the
comparison and analysis will build. Whether or not Salem and Essex County’s policies
are replicable in Windsor will be discussed in the policy learning comparison and
analysis section of the paper.

*Policy Learning Literature Theme: Policy Learning and Transfer*

Policy learning can be defined as the updating, creating, or editing “of [policies]
based on lived or witnessed experiences, analysis or social interaction” post-policy
implementation (Dunlop, 2017, p. 5). Learning, regarding policies specifically, can also
be viewed in a frame of conflict and power in that “it must always take place within
structures that have won, or maintained, the authority to allocate values within the
community” (Bennett & Howlett, 1992, p. 290). A policy can still be defined as policy
failure “even if it is successful in some minimal respects, [but] it does not fundamentally
achieve the goals that proponents set out to achieve” (Dunlop, 2017, p. 5). It can also fail
if the consequences of that policy result in a regime change or a loss of power, even if the
policy achieved its objectives. An example of this may be Gorbachev’s Glasnost and
Perestroika policies in Soviet Russia, which did achieve their goals and benefit society,
even though society’s progress sent them on a trajectory towards the end of the USSR
(Lieven & McCauley, 2018). In this example, if communist leaders in the future wished
to learn from previous policy errors, those two would be viewed as failures and thus
avoided. Learning typically occurs when a policy is examined in a particular context from
various policy instruments, societal views of policy problems, and/or how feasible policy
objectives were for that government body (Dunlop, 2017, p. 6).
The process of policy transfer is described as the transfer of “knowledge about policies, administrative arrangements, or institutions used across time or space in the development of policies, administrative arrangements, and institutions elsewhere” (Stone, 1999, p. 51). This is exactly what this policy learning comparison attempts to do; assess each set of workplace policies in order to determine the transferability of the concepts they contain. Policy transfer can occur between two nation-states as well as two non-governmental organizations (NGOs), although it most typically occurs between local governments and municipalities (Stone, 1999, p. 53).

Stone (1999) believes that if the states in comparison do not have compatible “time, institutional architecture, political culture, and state structures” then a comparison is difficult to legitimize (Stone, 1999, p. 54). This “diffusion of ideas” occurs best when the two agents in comparison are what Stone (1999) calls “psychologically proximate” (p. 55-57). Stone (1999) believes “some agents are more attuned to the potential opportunities for transfer and/or better able at facilitating certain types of transfer as opposed to others” (p. 55). In this context, Canada and the United States are appropriate agents to consider a policy transfer due to their location in North America (Stone, 1999, p. 53). Transferring these policies and ideas externally or importing ideas for policy from states or organizations that are foreign to the host-agent do not create equivalent measures of comparison and therefore are not effective comparisons.

Accommodation Literature Theme: The American and Canadian Divide

Martel (2011) states the origin of reasonable accommodation is the United Nations Convention on the Rights of Persons with Disabilities, with the intention of
analyzing reasonable accommodation and its place in the Brazilian constitution (p. 86-87). Martel’s stance, when comparing American and Canadian accommodation principles, seems to favour Canada’s understanding of a larger emphasis on employee rights and what follows as their interpretation of the United Nations’ Convention (Martel, 2011, p. 89). The American interpretation, as demonstrated in a variety of workplace policies, is centered on employer rights and abilities for their workplace and is an example of “how not to read the convention” in her eyes (Martel, 2011, p. 89).

Martel’s summary of the American understanding of accommodation policies is the root of the variance in accommodation practices in the United States and Canada. Martel (2011) asserts that the United States commonly places more emphasis on the employer and their rights whilst placing the responsibilities for accommodation and the burden of proof of the need for accommodation on the employee (p. 90). This perspective is very important in terms of the cannabis conversation regarding accommodations because as far as implementing policy, the medical use of cannabis should be allotted a place in the workplace from a legal standpoint. The dangers of an employee being unfit for duty due to a lack of accommodation in the workplace is arguably something that employers understand as the significant risks in the workplace, as previously mentioned (Lee & Ross, 2011, p. 185). However, this cultural difference in American and Canadian workplaces also puts Salem in an interesting position. With the absence of accurate testing for cannabis in an individual’s bloodstream, the stricter tone against impairment in the workplace in the form of effective testing protocols that are found in American workplaces could prove useful. With the emphasis on the rights of the employer, this gives the employer more power to keep the workplace safe and hazard free through
extensive testing measures. Later in the paper I will discuss testing protocols as a key factor for the transferability of Salem’s policies.

Although Salem’s policies have had time to be adjusted since recreational cannabis was legalized in their state, these attitudes in American employment culture provide all the more justification in utilizing the County of Essex’s workplace policies. For Canada, the rights of individuals with physical and mental disabilities and their right to work is protected in the 1982 Charter of Rights and Freedoms (Williams, 2006, p. 21). Williams references a Canadian Abilities Foundation study where the average cost of accommodation per worker was found to be less than $500 (Williams, 2006, p. 21). Although the exchange rate must be considered, when Helen Schartz, D. J. Hendricks, and Peter Blanck (2006) discussed their reports of American employers investing $300-$400 in employees without disabilities (p. 351). It was implied that the inquiries of American managers into accommodation costs for employees “may result in a substantial overestimate” for those accommodations, as much as an additional $300-$400 (Schartz et al., 2006, p. 351). This lack of investment in employees requiring accommodations amongst American employers may be the reason for lack of accommodation language in their policies (p. 351-352). This information outlines Martel’s differentiation in workplace accommodation culture, which is prevalent in the analysis portion of this paper. The next concept in the literature, Fit for Duty, will be examined.

*Fit for Duty Literature Theme A: Employee Health and Safety*

The health and safety of the employee is what initially began discussions around how employees should balance their work and home-life to maintain health and
productivity at work (McLellan, 2017, p. 1). This relationship between the worker and their health in their workplace has been “documented since the Edwin Smith Surgical Papyrus (1600 BCE), Hippocrates (circa 400 BCE) and Bernardino Ramazzini (1700 BCE)” (McLellan, 2017, p. 1). More modern concepts of Fit for Duty however, revolve around legal and medical issues such as those included in the Canadian Occupational Health and Safety Act (OHSA) and the American Occupational Health and Safety Administration (AOHSA will be used for the latter to avoid confusion and refer to the American body). AOHSA has recorded a decline in injuries since its record-keeping began in 1971, yet McLellan (2017) believes that it has “undercounted” the health risks that persist in the workplace (p. 2). Issues such as “access to healthy food, the opportunity for physical activity, shift work, and occupational stress” add complications to health problems that may be more work-related than previously realized (McLellan, 2017, p. 2). Fatigue is also a major concern in terms of maintaining a standard of excellence in the workplace. Policies that manage fatigue for police officers for example, can have a significant impact on the safety of a community (Vila et al., 2012, p. 21). Despite the “well-understood, long-standing, and profound influences that round-the-clock schedules have on worker health, safety, performance, job satisfaction, and family life”, management practices still do not have competent methods for preventing fatigue (Vila et al., 2012, p. 4).

Employees may be subject by their employers to undergo fit for work examinations in order to ensure that they are not a danger to themselves or others, especially in occupations where they are operating machines or devices that dictate their positions to be safety-sensitive (whether stipulated in their employment contracts or
understood in established policies for the workplace) (Cowell, 1986, p. 985).

Circumstances that require fitness-to-work examinations include: pre-placement, return to work, continuing disability, and employees’ health assistance program amongst others (Cowell, 1986, p. 986). The side effects of the previously mentioned issues, if left untreated, could result in serious conditions like mental disorders, metabolic syndrome, or even cancer (McLellan, 2017, p. 2). This is where McLellan (2017) believes that some workers may then be susceptible to impaired vocational functioning (p. 2). If they succumb to this, this is where legal recreational cannabis can cause a major concern and why this policy learning comparison is being enacted for Windsor’s benefit. Impaired vocational functioning is a serious possibility for many workplaces where employees experience high amounts of stress and pressure to perform. Any employee may succumb to it, without the employer even realizing. This places much more necessity and utility in developing policies that keep the workplace safe.

*Fit for Duty Literature Theme B: Accommodations and the Workplace Environment*

Another prevalent theme that exists within the Fit for Duty literature is the idea that employees may still be eligible to work and function in a healthy manner in the workplace with accommodations or modifications to their work stations. In “Guidelines for fitness-to-work examinations”, John W.F. Cowell (1986) classifies employees as being Fit for Duty in two out of three scenarios: “Fit for Duty,” “Fit for Duty provided accommodations,” and “unfit for duty” (p. 987). So long as the employee and the employer maintain open communication, proper accommodations can be developed and implemented for the benefit of the employee and the employer. One study from the US National Library of Medicine - National Institutes of Health confirmed this relationship
between workplace accommodations and mutual benefit (Solovieva, Dowler, & Walls, 2011). Their findings showed that workplace accommodations demonstrated benefits such as retaining quality employees, increased productivity and company morale, as well as eliminating the costs of training new employees (Solovieva, Dowler, & Walls, 2011). Schartz et al (2006) also found this to be true in their empirical study. They attempted to determine why there are people with disabilities who are unemployed. Their findings that “workplace accommodations [in the United States] typically are effective and inexpensive”, lead to their questioning of the attitudes of employers regarding workplace accommodations and the utility of the implementation (Schartz et al., p. 351-352). In this respect, American employers should be open to accommodation requests not for legal purposes, but for their own interests and the interests of the employee- so long as those accommodations are supported by a prescription from a medical professional. The argument of Fit for Duty policies being beneficial for employers helps explain their significance and the logic behind their creation.

Miller (1996) would describe successful drug testing protocols for Fit for Duty policies as those where cooperation and participation are shared equally between the managers and the workers to obtain “true test results” (p. 14-15). If an employee’s test results are such that they are Fit for Duty, even with accommodations, then it is at the discretion of the place of employment, as well as the agreement of accommodation that was reached between the employer and the employee, as to how the employee returns to work (Miller, 1996, p. 14-15). If they do, the employer and employee reach an acceptable agreement where the employee only engages in activities that their disability allows (Miller, 1996, p. 14-15). Both the employer and the employee ought to participate in
proper testing to assess whether the employee is fit for the position they hold, or if accommodations can be made to allow the employee to continue in that role effectively.

The themes from this literature review are employee health/safety, accommodations and the workplace environment, and the Canadian/American dichotomous views on accommodation practices. According to the Ontario Health Study Insider (OHS Insider) the sample Fit for Duty policy drafted by the Ontario government is a quality model to adopt as it addresses these themes. Considering the academic endorsement of Canadian interpretations of accommodation and employee rights, this sample serves as an acceptable starting point for references purposes (OHSInsider, 2018). Their Fit for Duty policy sample establishes a medicinal and recreational distinction. Recreational cannabis is to be treated as other impairing drugs and its legalization "is not justification for being unfit for work" (OHS Insider, 2018). Toward the bottom of the sample policy, and in keeping with the Fit for Duty theme in the literature, this sample policy provides some guidance on accommodation possibilities, acknowledging, “drug and alcohol addictions [are] deemed [disabilities] under the Ontario Human Rights Code” (OHS Insider, 2018).

The Canadian Human Rights Commission (CHRC) also supports the notion of employer responsibilities towards employees to arrive to work Fit for Duty and with proper accommodations. They have compiled a document detailing common concerns and FAQs with the duty to accommodate. In this document, the duty to accommodate is defined as “the obligation to meaningfully incorporate diversity into the workplace [and] involves eliminating or changing rules, policies, practices and behaviours that discriminate against persons based on a group characteristic” (race, ethnicity, religion,
sexual orientation, etc.) (CHRC, 2005, p. 2). The duty to accommodate can be found in sections 2 and 15 of the Canadian Human Rights Act (CHRC, 2005, p. 2). Although this policy is not required for businesses to have by law, it is explained that adopting one can “reduce confusion by providing clear information on training on accommodation and […] doing so states a commitment to […] the delivery of services” that can aid people in any situation to be successful in the workplace (CHRC, 2005, p. 2-3). Therefore, when considering cannabis for medicinal use as an accommodation in the workplace, according to the CHRC, Windsor should strongly consider including accommodation provisions on this front.

Additionally, a 2010 Human Rights Tribunal of Ontario case illuminated that compliance with the Accessibility for Ontarian’s Disabilities Act (AODA) does not necessarily mean that duty to accommodate has been achieved. When a consumer desired an automatic door to aid in entering a 7-Eleven, and demanded one for multiple years, the consumer pursued a human rights application against 7-Eleven (Humphrey, 2011, p. 14). The Tribunal ruled in favour of the customer, despite 7-Eleven’s claims that they “believed that the accessibility issue fell within the compliance requirements of the AODA, and that they had until 2012 to achieve compliance” (Humphrey, 2011, p. 14). This means that “compliance demands under the AODA do not delay or modify duty to accommodate under Ontario’s Human Rights Code”, and further emphasizes the need for employers and employees to communicate effectively in order to ensure accommodation acceptance by the employee, as well as by the Code (Humphrey, 2011, p. 14).

Cannabis is not a new aspect of Canadian life, particularly when considering workplace accommodations. However, many issues can arise in the form of lawsuits
originating from wrongful dismissals based on the vagueness surrounding recreational use of cannabis in or around the workplace, although it is beyond the scope of this paper to fully address the issues surrounding wrongful dismissal. Generally, recreational cannabis cannot be used in the workplace unless it is understood by the employer that the employee has an addiction (Humphrey, 2011). Otherwise, the regulations surrounding medicinal cannabis in the Controlled Drug and Substances Act are clear regarding the accommodations required by employers for their employees (Legislative Services Branch, 2018). However, employers may be tempted to tell their employees that cannabis use may have a negative effect on their reputation or image if the employee uses cannabis at work, medicinal or not (Green Relief, 2018). The key for a successful workplace environment where a diverse workforce can thrive relies on good workplace policies, and this considers the needs of the employees and their accommodations over issues of reputation and where they may conflict. This necessitates the need for effective policy learning analysis. The testing protocols of a municipality place a central role in maintaining the fitness for duty in a workplace. In addition, the accommodations that may be available to a workforce can also enhance the level of fitness for duty in a workplace.

The policy learning literature regarding policy learning and policy transfer and the concepts similar to “psychological proximate” agents are all useful for a policy transfer analysis, especially in legitimizing the comparability of Salem and Essex County. It is also important to recognize that some aspects of Salem and Essex County’s policies may be unfit to transfer to the City of Windsor. Yet, examining the contents of policies from Salem and Essex County can be a fruitful way to begin to answer the previously posed
research questions particularly in beginning to point to some best practice examples for the City of Windsor as it moves toward developing its own cannabis policies.
CHAPTER THREE: Methodology

This paper will comparatively examine the workplace policies relating to the concepts of fitness for duty and accommodation from Salem, Oregon, and the County of Essex, Ontario. This will be completed with a policy learning analysis, where the goal is to determine where potential policy transfer could occur—that is to what extent could aspects of each set of policies from Salem and Essex County hold utility for similar policy creation for the City of Windsor. To do this, the components of each set of policies will be analyzed for their applicability for transfer to Windsor and those that are notable will be discussed. The presence or absence of various components to these Fit for Duty and Accommodation policies will be noted, to see if cultural trends need be considered. The theme of employee health and safety has illuminated a need for testing employees to ensure their safety. In order for policy transfer, or the transfer of certain aspects from each set of policies to apply to Windsor, workplace policies for Salem and Essex County need to be assessed using these two factors: testing protocols and available accommodations.

Comparative Case Selection

The case studies of the City of Salem and the County of Essex have been chosen for a variety of reasons. Each case choice was due to the similarities that exist between each case and Windsor. Even though it is not a city, The County of Essex has a population of about 190,000 people, which excludes Windsor’s population from its total number despite Windsor being located in the County (Windsor-Essex Economic Development Corporation, 2019). The County utilizes its own police force and fire
department, which encompasses the fire departments of many municipalities including Windsor, LaSalle, Tecumseh, and Amherstburg (City of Windsor Fire Department, 2018). The difference between a city and a county is that a county can encompass a city. It is a larger area that is created by a provincial or state government that can include cities and towns and can act as administrative units for those larger governmental bodies (Candela: Lumen Learning, 2016). City governments rather, “oversee the operation and functions of cities and towns” (Candela: Lumen Learning, 2016). Additionally, cities will have elected officials such as mayors, while a county does not. A county government is elected by mayors in the area the county encompasses (Association of Municipalities of Ontario, 2016). Cities also elect their councils, and the head of council is elected as well (Association of Municipalities of Ontario, 2016). A county council designates various members (who are still elected officials) from its municipalities. The head of a county council will have a warden (Association of Municipalities of Ontario, 2016). These organizational and governmental reasons are why the County of Essex and the City of Windsor may share some employees in certain sectors and thus be more useful comparators rather than other cities like Chatham or Sarnia. Salem, as a city, is useful for comparison because of its characteristics as a city as well as its history with cannabis legalization. The City of Salem and the County of Essex both took time to edit their policies when recreational cannabis became legalized. The City of Salem has had more time to edit their policies since their policies were enacted. Essex amended their Fit for Duty and Accommodation policies for the 2018 legalization. These similarities make both of these quality cases to use in the comparison.
Despite city and county differences, the County of Essex is one of the better choices for comparison (with other possible comparators to be discussed). The City of Windsor and the County of Essex share additional personnel services with the Windsor Fire Department (City of Windsor Fire Department, 2018). With shared EMS and fire department personnel between the City of Windsor and County of Essex, the comparison of their policies is further validated. The City of Windsor and Essex County share the same media and entertainment (FM and AM radio stations and TV channels shared from Detroit in addition to local options) and the same weather due to their close proximity. The two also experience an overlap in their population’s day-to-day experiences. Just as the two share EMS and fire department personnel on a municipal level, businesses also draw from each other’s resident populations for employment. These people experience both the county and the city, and move across jurisdictional boundaries daily. They are also both in the same province with the same federal legal structure and the same cannabis laws from the Canadian and provincial levels. Thus, a culture is intimately shared between the City of Windsor and the County of Essex, as their residents experience similar lifestyles. This is something that Salem does not share with Windsor.

Along with this cultural connection between Windsor and Essex County is the divide on employment cultural practices in Canada and the United States. Salem falls on the opposite side of Windsor in this divide. Salem remains an important aspect of this policy learning analysis however, because without it there would be no municipality that has had sufficient amount of time to experience the transition of adjusting to recreational cannabis. Another factor that ties Salem to Windsor is their similarity in population. Although, Salem’s population is over 169,000 (World Population Review, Dec. 7, 2018)
while Windsor’s population is larger at about 220,000 people, their demography is nearly identical in percentages (Statistics Canada: Windsor, 2017). Salem’s population consists of about 79% Caucasian people with just over 20% of an Hispanic population, while Windsor has about a 77% Caucasian population with just over 20% of a South Asian population (World Population Review, Dec. 7, 2018) (Statistics Canada: Focus on Geography Series, 2017). This makes the occurrences for addressing workplace religious or ethnic diversity and accommodations in the workplace similar and creates a comparable population base for each municipality concerning their citizens reaction to new policies.

Each case has similarities that validate its comparison to the City of Windsor. However, some limitations also exist. One limitation is that other cases could have been chosen that may have been better suited for the comparison. For example, Chatham and Sarnia are both cities that could be options in this comparison. They both are cities in proximity to Windsor, unlike the use of the County of Essex, which is a county and not a city. However, with Chatham and Sarnia’s policies unavailable and each case not as comparable as Essex County, they will be dismissed. In addition, the County of Essex’s budget for 2018 was reported as nearly $650 million less than Windsor’s, at about $160 million compared to about $807.7 million for Windsor (County of Essex, Budget, 2017) (City of Windsor, 2018). The City of Salem similarly has a much smaller budget than

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2 Chatham has not developed a fit for duty policy that is available for comparison (Shreve, 2018). Additionally, Chatham and Sarnia’s populations are less than Windsor’s, making the scope of fit for duty and accommodation policies for smaller municipalities inapplicable for larger municipalities (Statistics Canada: Chatham-Kent, 2016) (Statistics Canada: Sarnia, 2016). If a municipality has a larger population size, this means that it operates with a larger budget and policies may be inapplicable to a smaller municipality. Essex County’s policies also have a greater likelihood of being transferrable to Windsor due to the similar sectors of employment (many times a shared workforce), and population than other municipalities (for example Chatham or Sarnia).
Windsor, at about $300 million less than Windsor (about $500 million for 2018 (City of Salem, 2018). This places the policies of the County of Essex and the City of Salem within the City of Windsor’s scope, with budget to spare, making any recommendations possible.

The shared culture mentioned previously between the County of Essex and the City of Windsor is another reason why Chatham and Sarnia are not as comparable to Windsor. With respect to Salem, another municipality that may be considered is Aurora, Colorado. It legalized cannabis two years earlier than Salem, Oregon (in 2012 compared to 2014) (Berke, 2018). However, Aurora has a population that is larger in size than Windsor, about 300,000 people compared to Windsor’s approximate 220,000 people. (City-Data, 2016). The choice of Salem, as opposed to other American municipalities, was due to the ease of access to information and time constraints for this paper, among other factors³. For further research purposes, the City of Aurora may be used as a comparator.

In communications with various municipalities surrounding the City of Windsor, the County of Essex was found to have established its workplace policies in preparation for the legalization of cannabis. Other surrounding smaller municipalities, such as LaSalle and Lakeshore, had no policies available as well. With the County’s pre-emptive actions in establishing workplace policies, it is that nearby municipalities will adopt a

³ Additionally, Aurora has had some trouble properly managing their municipality in the post-legalization era. Media sources report a black market of cannabis production occurring in multiple neighbourhoods in Aurora (Mitchell & Tabachnik, 2018). Federal and local law enforcement agents successfully conducted multiple raids “to search suspected illegal marijuana grow houses” (Mitchell & Tabachnik, 2018). Evidently, there is evidence to illustrate this is an example to avoid. The State of Colorado is responsible to uphold these Accessibility Standards and ensure that their documents are available online to all, especially for “people with learning and cognitive disabilities” (Colorado Official Web Portal, n.d.) (Web Accessibility Initiative, 2018). Aurora’s policies are not easily accessible online, and not doing so is in violation of the WCAG (2.0) Online Accessibility Standards (Web Accessibility Initiative, 2018). This makes the City of Aurora a case study that is both not available to use and one that does not fit as well as the City of Salem.
similar form of policies from the County’s. Combined with the proximity of the County of Essex to Windsor, as well as its Canadian nature, this sufficiently bridges the gap of comparison between Salem and Windsor and the American/Canadian divide mentioned. With these two sets of workplace policies, the policy learning analysis can take place and will strive to offer tangible policy suggestions for Windsor based on transferable aspects of each set of policies from the cases.

The aspects of each policy compared will be the testing policies in both jurisdictions, and then the accommodation policies in each jurisdiction. Salem will be examined first for its available testing protocols and the accommodation language in the documents provided in this paper. The strengths and weaknesses of these sections will be assessed. Then, the County of Essex will be considered and its workplace policies will be examined in a similar way (testing protocols and then level of accommodation language in the policies). Finally, when the strengths and weaknesses of each policy in for these criteria of measurement are completed, the analysis and conclusion section will begin.
CHAPTER FOUR: Comparing the Policies

The workplace policies to review for Salem are their Drug Free Workplace Notice, as well as their Drug and Alcohol Testing documents from their Human Resources Rules. Salem does not have particular policies against cannabis instead they amend their current policies in their HR handbook as new issues arise. Their Drug and Alcohol Testing documents are what will be examined first.

City of Salem: Testing Protocols

Their testing procedures dictate that an employee may be subject to testing if they have a commercial driver’s license, are engaged in prohibited conduct, are post-accident, are seen using illicit substances on property, or if there is reasonable suspicion of use (City of Salem, Human Resources Rules, 2018, p. 57). Employee refusal to undergo testing has penalties up to and including termination (City of Salem, Human Resources Rules, 2018, p. 58). Salem’s testing protocols dictate “a Department of Health and Human Services certified laboratory that demonstrates experience and capacity of quality control, appropriate documentation, a secure chain of custody, technical expertise and demonstrated proficiency testing” (City of Salem, Human Resources Rules, 2018, p. 58). If a physician, or healthcare provider, has directed the substance in question to an employee, then it will not be included in Salem’s definition of a Controlled Substance (City of Salem, Human Resources Rules, 2018, p. 57). However, all other substances that are considered prohibited (including alcohol and cannabis) will be tested for all employees (City of Salem, Human Resources Rules, 2018, p. 57).
Not only does the City of Salem attempt to use the best testing methods to indicate impairment levels, but Salem also enlists the services of Certified Breath Alcohol Technicians and Certified Medical Review Officers for alcohol and drug testing respectively (City of Salem, Human Resources Rules, 2018). The City of Salem takes extensive measures to ensure their workplace is free of any substances that may harm their employees (United States of America, City of Salem, Human Resources, 2018). Their policies allow them to go so far as to search that employee’s workspace, as well as common areas and vehicles, or other spaces that are accessible to the employee (City of Salem, Human Resources Rules, 2018, p. 60). Salem’s Drug Free Workplace notice reiterates this notion of prohibiting unlawful substances on City property. It adds that should an employee violate any drug statute as a result of conduct in the workplace, they must notify their city employer within five (5) business days of the conviction (City of Salem, Drug Free Workplace Notice, 2016, p. 1).

*The City of Salem: Accommodation Considerations*

The details that would facilitate accommodating employees with medical needs, including potentially prescribed use of cannabis, in the workplace seem to be absent in Salem’s policies, except for a small section stating that “the City will not discriminate against qualified individuals with disabilities, on the basis of their disability, in employment or employment practices” (City of Salem, Human Resources Rules, 2018, p. 34). Regarding the trend in American workplace culture, Salem’s lack of extensive accommodation details in comparison to testing protocols in their policies is not surprising. Recall, the notion that American employers invest more financially into employees without disabilities than those with disabilities, due to much hesitation from
management to accommodate employees for reasons of cost (Schartz et al., 2006, p. 351-352). This is a notion that once again explains their lack of accommodation language in their policies.

The County of Essex: Testing Protocols

Essex County’s drug and alcohol testing documents in their Fit for Duty policy, states that safety-sensitive employees (those in positions such as policemen or construction workers for example), employees under “reasonable suspicion” (exhibiting behaviour described as reasonable suspicion as previously mentioned), post-incident or “near miss” situations (incidents resulting in or nearly injuries at work), and those returning to work will be tested (from rehabilitation services or time off) (The County of Essex, 2018, p. 7). While the circumstances under which employees would be tested are detailed, the testing process is not extensive in the County’s Fit for Duty policy itself, like it is in Salem’s testing policy. In its absence, there are no protocols to recommend to Windsor in order to combat the vague nature of testing for cannabis in the workplace, as previously noted. This is where the employer-oriented workplace culture in the US benefits and protects other employees and their work environment. Windsor could therefore benefit from Salem’s stricter protocols to protect their employees in the absence of accurate impairment tests. The County of Essex does state that a positive drug test, or a failure to participate in a test, “may constitute grounds for immediate termination of employment” (The County of Essex, 2018, p. 9). This policy does not deviate significantly from policies we have seen from Salem in terms of expectations from employees arriving fit to work. However, with the health and safety of employees in mind, Essex County is not as ideal of an example for testing protocols as it could be. The
OHS Insider’s sample Fit for Duty guidelines also do not have as extensive testing protocol specifications as Salem (OHSInsider, n.d.).

The County of Essex: Accommodation Considerations

The County of Essex’s policies observes employee disabilities, possible time off required for religious observance, and employment accommodations that would enable an employee to continue to work (The County of Essex, 2015, p. 4-5). Their Fit for Duty policy places an emphasis on employee considerations and begins with the phrase "the health and safety of our employees and the public we serve" (The County of Essex, 2018, p. 2). Continuing on in their “Statement of Policy”, the County of Essex acknowledges that their duty to accommodate disabilities should be to be balanced by their duty to ensure employees are not arriving to work impaired (The County of Essex, 2018, p. 2). This aligns with the spirit of Canadian accommodation policy considerations thus far (Martel, 2011, p. 89).

The County of Essex possesses an actual Accommodation policy that is available for examination, unlike the City of Salem. Their “preamble” mimics the exact wording in the CHRC document with regards to employment without discrimination based on race, ancestry, sex, creed, (The County of Essex, 2015, p. 1). To meet the accommodation needs of employees, the County’s principles of accommodation are individualization, partnership, consultation, inclusion, and respect (The County of Essex, 2015, p. 2). These principles once again illustrate the divide in national accommodation considerations, showing Canadian inclusionary values in all employment documents. Once more, the County of Essex’s Accommodation policy states “the process of accommodating
individuals is a shared responsibility of the Corporation, the employee, and unions representing employees” (The County of Essex, 2015, p. 5). Salem’s policy has very limited accommodation details and certainly no statements placing responsibility of accommodation on the employer, as the County of Essex has done. This establishes why Salem’s lack of accommodation is not a desirable characteristic for transfer to Windsor, and why the County’s policies must be included. For Salem, their testing is what proved useful and therefore, when used in tandem with the County of Essex’s extensive accommodation language, it can be a comprehensive policy recommendation for Windsor.

Regarding cannabis, the County of Essex’s Accommodation policy’s Appendix C includes what are considered health and safety risks as well as what constitutes undue hardship (The County of Essex, 2015). Here, the status of the workplace and the safety of other employees are considered and may place limits on the extent to which employers can limit their accommodations. For Salem, those accommodations are reversed, limited for the worker and emphasized for the right of the employer to run their workplace as they see fit. These aspects of the County’s policies are protective measures designed to insulate the employer and their rights to operate and protect their business. This would allow for the County to interact with the employee about what possible cannabis accommodations they require and work with them to maintain the integrity of the workplace. The employer and the employee need to have communication to ensure that the accommodation has relevant input from the employee and is effective, as well as appropriate for the workplace (Humphrey, 2011, p. 14).
CHAPTER FIVE: Analysis & Conclusion

Employers are not able to legislate every possible scenario into policy or prevent unforeseeable situations. This creates the need for strict testing protocols that are better able to prevent hazards in the workplace. It has been established that Salem’s exemption of detailed accommodation considerations is not an aberration in terms of American workplace policy culture. Their policies compared directly to those of the County of Essex with greater emphasis on testing their employees to ensure safety in the workplace for all employees.

Strong testing policies are evident in Salem and can serve as a good example in this vein for the City of Windsor. Canadian political culture and legislative precedence include accommodations that help ensure workers are able to make a livelihood and be safe on the job from other employees who may have disabling conditions requiring medicinal cannabis and have arranged accommodations that require monitoring in the workplace. Accommodation needs are becoming greater, especially when taking into account that 40% of Canadians may require general accommodations in 2035 (The Path to 2025: Ontario’s Accessibility Action Plan, 2018). These statistics, in addition to those provided by Callery & Schepis-Mallon regarding substance abuse risks in the workplace, create the need for effective workplace policies and therefore highlight the importance of accommodations for employees as a key aspect of Fit for Work and Duty workplace policies.

This paper finds that the optimal policies regarding fitness for duty and accommodation considerations would be to adapt or learn from Salem’s more fulsome
testing protocols as well as the recognition of Essex County’s accommodation language. These cases draw our attention to the fact that best practices include a combination of testing and accommodations – something from both comparative examples. These recommendations benefit the workplace by ensuring employee safety, and consequently productivity, which is beneficial for the employer as (Solovieva, Dowler, & Walls, 2011). Although the recommendation is for testing protocols that are stricter, managers ought to be cautious to label an employee as unfit for duty as a result of a test result, and even more cautious to terminate an employee on these grounds. One example, which shows why this may be troublesome, is the company Imperial Oil based out of Calgary, Alberta. Imperial Oil amended their Alcohol and Drug Policy in October of 1991 and integrated random testing and a change of position via unilateral top-down decision making if they deemed an employee to be at risk of a relapse (re-using drugs or alcohol after undergoing rehabilitation treatment) (Taras, 1992, p. 712). A case arose against Imperial Oil resulting in a $20,000 award to an employee who had been found by an Ontario Board of Inquiry to be discriminated against due to his past alcohol abuse (Canadian Human Rights Reporter). If Windsor were to adopt a policy that pre-determined an employee’s fitness for duty and did not allow for conversations of proper accommodation to take place, they may run the risk of litigation such as this. Additionally, the safety of other employees may be at risk if the employer is not made aware of an employee’s medicinal needs, placing a responsibility on the employee to initiate the accommodation process. Essentially, the strict testing protocols must be balanced by thoughtful and thorough accommodation policies, which can mitigate risks caused by substance abuse as well as lawsuits (such as the example above).
The themes found in the literature review, American and Canadian divide and Employee Health and Safety considerations have proved useful in framing the analysis and depicting the necessity of quality accommodation for employees and testing protocols to maintain the safety of the workplace. The situations that require testing in Salem’s policies and their extensive nature, as well as Essex County’s diverse accommodation considerations, would fully cover the scope of ideal workplace policies. This is the avenue that Windsor could be directed towards when revising their current workplace policies.

A potential limitation of this study may be that only one city was chosen for policy learning purposes. Salem’s policies do not meet some accommodation norms in the Canadian context. It is possible that “cultural differences and the tendency to generalize from limited data are […] dangers which can hamper efforts to learn from one nation for the benefit of another” (Cyr & deLeon, 1975, p. 7). Perhaps this may be true, although despite a limited sample grouping or political differences, suggestions for policy transfer can still occur and “insights to be gained from pertinent experience in other environments should not be ignored” (Cyr & deLeon, 1975, p. 7). To mitigate this for future studies, and perhaps after recreational cannabis has been legal for a longer period of time in Windsor, multiple municipalities could be examined alongside Windsor to see how they fair-and to provide a better most similar systems comparison.

Windsor could look to adopt policies that integrate cannabis in an effective way, allowing for various accommodation plans that may suit various employee needs. However, this is just the entry point of research for accommodation needs and ensuring fitness for duty of Windsor employees. More research should be pursued once
recreational cannabis has been legalized for some time in order to determine if Windsor’s policies have protected the rights of the employee and employer. Windsor’s future policies ought not discount the responsibilities of the employee or the rights of the employer, but they should promote an understanding of what a successful relationship between the worker and the work environment looks like.
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APPENDICES

Appendix A- Oregon Secretary of State: Measure 91 Vote

Measure 91

Allows possession, manufacture, sale of marijuana by/to adults, subject to state licensing, regulation, taxation

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<th>County</th>
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https://sos.oregon.gov/elections/Documents/results/results-2014-general
election.pdf
Appendix B- Three Types of learning and policy change

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<th>LEARNING TYPE</th>
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Retrieved from [https://doi.org/10.1007/BF00138786](https://doi.org/10.1007/BF00138786)
FITNESS FOR DUTY & SUBSTANCE ABUSE POLICY (ONTARIO VERSION)

This is a basic policy that can be adapted for any workplace or jurisdiction.

Policy Statement

ABC Company recognizes that employees who use or are impaired by drugs or alcohol while performing work endanger not only themselves but their co-workers and others affected by the work. ABC Company’s policy with regard to such conduct is one of zero tolerance and employees must be aware that any violations they commit may result in disciplinary action up to and including termination.

However, ABC Company also recognizes that addiction to drugs or alcohol is a serious health problem. The intent of this Policy is to accomplish the health and safety goal in a manner that is fair, humane and consistent with employees’ accommodation rights under discrimination laws. The ultimate goal is not to punish but help employees identify and get help for their substance abuse issues so that they can return to work healthy, safe, happy and productive.

Purpose

The objective of this substance abuse policy is to ensure that all employees report to work Fit for Duty. Adopting this Policy is a reasonable precaution that ABC Company is required to take to protect the health and safety of workers under Section 25(2)(h) of the Ontario Occupational Health and Safety Act (OHS Act).

Scope

This Policy applies to all individuals that work for ABC Company including but not limited to full-time, part-time, temporary and contract employees, independent contractors, volunteers and employees of third party contractors or subcontractors that ABC Company engages to perform work at its facilities.

A. Union Employees

This Policy applies to both union and non-union employees but is not intended to supersede or circumvent the provisions of any current collective agreement that ABC has negotiated with an employee’s union. In the event of a conflict between this Policy and a collective agreement, the latter shall control.
B. Contractor Employees

This Policy applies to individuals employed by contractors and subcontractors that perform work at ABC Company facilities but is not intended to supersede or circumvent the provisions of any current collective agreements that those contractors or subcontractors have negotiated with their own workers and their unions. In the event of a conflict between this Policy and a contractor employment agreement or collective agreement covering the worker, the latter shall control.

Definitions

For the purposes of this Policy:

• “Drugs” includes:
  o Narcotics and illegal drugs;
  o Marijuana whether used or obtained legally or illegally; and
  o Legal prescription and over-the-counter medications and drugs that cause or have the potential to cause impairment and render an employee not Fit for Duty.

  • “Fit for Duty” means a state of physical and mental that allows an individual to perform his or her job duties safely and effectively without impairment due to the use of or after-effects of alcohol, illegal drugs, legal medications or other health conditions.
  • “On duty” includes reporting for and performing work, including:
    o Scheduled work;
    o Unscheduled call-in work;
    o Work performed on ABC Company facilities;
    o Work performed for ABC Company away from Company facilities, including but not limited to driving or traveling to and from work.

  • “Safety-sensitive job” means positions that have a direct and substantial impact on the health and safety of the employee, other workers, customers, visitors, the public, property and/or the environment, including but not limited to those involving driving, operation of machinery or equipment, handling of toxic substances and others determined by ABC Company.
  • “Substance abuse” means the use of alcohol, illegal drugs, legal marijuana and medications and other substances that can impair a person’s judgment, clarity and functioning and render him/her not Fit for Duty.

Requirements for Employees

All employees and workers covered by this Policy are required to:
i. Come to work Fit for Duty;

ii. Work safely in accordance with Section 28 of the OHS Act;

iii. Refrain from using or being impaired by alcohol or drugs while they are on duty;

iv. Refrain from possessing, purchasing, selling, distributing or engaging in any other conduct involving are on duty;

v. Refrain from misusing or being impaired by prescription or non-prescription drugs while they are on duty;

vi. Notify their supervisor if they suspect that a co-worker is unFit for Duty; and

vii. Submit for drug and alcohol testing in accordance with the ABC Company Testing Policy.

Legal Marijuana

A. No Exemption for Legal Marijuana Use

All employees must understand that marijuana is an impairing drug and that using it at work or coming to work high renders them unFit for Duty in violation of this Policy. This is true regardless of whether their use of marijuana is legal under federal drug laws.

Legal marijuana use is not a justification for being unfit for work! B. Employee Duty to Notify

Employees must notify their supervisor if they are using legally prescribed medical marijuana or other legal prescription and non-prescription drugs that may cause impairment for the treatment of a medical condition. Off-duty and legal use of such drugs does not violate this Policy as long as employees are Fit for Duty at all times when they are on duty.

Support for Employees with Substance Abuse Issues

Although ABC Company reserves the right to discipline, it also recognizes that addiction and substance abuse is a health problem. ABC Company is prepared to help employees get the counselling, treatment, rehabilitation and support they need to overcome those problems. [Describe your organization’s Employee Assistance Program or other resources or programs for helping employees with substance abuse issues.]

Self-Reporting

ABC Company strongly encourages employees with substance abuse problems to step forward and request help voluntarily. [Describe your organization’s procedures for
responding to self-report requests for help.] Employees who do self-report will not be subject to discipline as long as they have complied with their obligation to be Fit for Duty under this Policy.

Fitness for Duty Medical Assessments

Employees must undergo medical assessments to ensure they are Fit for Duty before being placed in a safety-sensitive job. Assessments will address substance abuse and be performed:

- Prior to employment when individuals are applying for safety-sensitive jobs;
- Before current employees are transferred from non-safety-sensitive to safety-sensitive jobs; and
- Periodically for as long as the employee remains in a safety-sensitive job.

Medical assessments will be performed by qualified healthcare professionals following appropriate medical practices and results will be kept confidential to the extent required by personal privacy laws.

Disciplinary Investigations

ABC Company may open a disciplinary investigation to check whether an employee is engaged in substance abuse or otherwise in violation of his/her fitness for duty obligations under this Policy in response to:

- Complaints or concerns by co-workers, supervisors, etc.;
- Declining performance;
- Erratic behaviour;
- Involvement in safety incidents including near misses;
- Arrests for impaired driving, drug offences and similar violations; and
- Other indications that the employee has substance abuse issues or is otherwise not Fit for Duty.

Investigations will be carried out in accordance with ABC Company’s Disciplinary Investigation Procedures.

Drug & Alcohol Testing

Employees may be tested for alcohol and drugs in accordance with ABC Company’s testing policies. [List the conditions for testing under your organization’s own testing policies. Be sure to address: i. Alcohol and drug testing; ii. Safety-sensitive and non-safety-sensitive employees; and iii. Random and for-cause/post-incident testing.] Supervisors will escort employees to the screening site for testing. Refusal to submit to testing will be grounds for immediate termination under this Policy.
Privacy

ABC Company recognizes that test results and related information is protected personal information under privacy laws and will keep it confidential and secure and refrain from using or disclosing it except as permitted or required by law.

Consequences of Violations

Violation of this Policy is grounds for discipline up to and including termination in accordance with the ABC Company Progressive Discipline Policy. Employees with substance abuse issues on administrative leave may also be referred for counselling or assistance through the ABC Company Employee Assistance Program or outside agencies.

Assistance & Reinstatement

ABC Company reserves the right to place employees with substance abuse issues on administrative leave and enter into Last Chance Agreements offering them the opportunity to return to work if they successfully complete the terms of their treatment and rehabilitation program, pass drug and alcohol tests and meet other conditions of reinstatement.

Employee Right to Accommodations

ABC Company recognizes that drug and alcohol addiction is deemed a disability under the Ontario Human Rights Code. Accordingly, in administering the disciplinary and other provisions of this Policy, addictions and other substance abuse related to disabilities, such as use of medical marijuana or prescription drugs for chronic pain and debilitating conditions, will be treated as non-culpable violations and employees will be offered reasonable accommodations based on their individual circumstances and capabilities to the point of undue hardship.

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Appendix D: Salem’s Drug Testing Protocols

13.03 TESTING

An employee may be tested for drugs and alcohol under the following circumstances:

A. Employees who have a Commercial Driver License (CDL) shall be tested as required by state and/or federal Department of Transportation (DOT) law in addition to any other testing required by these Rules.

B. Engaging in prohibited conduct.

C. Employees in positions or classifications that are required by law, licensing, or grant funding to be tested.

D. Following an on-the-job or motor vehicle accident which results in death or serious physical injury or extensive property damage.

E. The employee was observed using alcohol, drugs, or other controlled substances while on duty or on City property.

F. Based on a reasonable suspicion that the employee is under the influence. Reasonable suspicion exists when the employer holds a belief that it is reasonable under the totality of the circumstances existing at the time and place that the employee is more likely than not under the influence of drugs and/or alcohol as those terms are defined in these Rules.

Circumstances which constitute a basis for determining reasonable suspicion may include, but are not limited to:

1. A pattern of abnormal or erratic behavior;

2. Direct observation of drug or alcohol use; or information provided by a reliable and credible source;

3. Presence of the mental or physical symptoms of drug or alcohol use (e.g., glassy or bloodshot eyes, alcohol odor on breath, slurred speech, poor coordination and/or reflexes);

4. A work related accident in conjunction with other facts which together support reasonable suspicion.

An employee is considered under the influence when reasonable suspicion has been demonstrated and confirmed with a drug test and/or alcohol test.

Supervisors may require an employee to be drug and/or alcohol tested on the basis of reasonable suspicion only after consultation with a second trained City supervisor, or the appropriate department director, or the Human Resources Director or designee. An employee required to test due to reasonable suspicion shall be transported by a supervisor to the testing location.

VITA AUCTORIS

NAME:                Jesse Market

PLACE OF BIRTH:     Essex, ON

YEAR OF BIRTH:      1995

EDUCATION:

Assumption High School, Windsor, ON, 2009

University of Windsor, B.A.H, Windsor, ON, 2013

University of Windsor, M.A., Windsor, ON, 2017