



# Drugs and Alcohol in the Workplace

Stephen F. Penney

# Muskrat Falls & medical cannabis

- International Brotherhood of Electrical Workers, Local 1620 v. Lower Churchill Transmission Construction Employers' Association Inc., 2019 NLSC 48 (Justice Boone)
- On judicial review from consensual arbitral tribunal (John F. Roil, Q.C., Sole Arbitrator) dated April 30, 2018

# Arbitrator's decision

- Dismissed grievance on April 30, 2018.
- Grievor held out of service because of his authorized use of medical cannabis
- Cannabis use created risk of impairment at the jobsite.
- Employer was unable to readily measure impairment from cannabis, based on currently available technology and resources.
- Consequently, inability to measure and manage risk of harm constituted undue hardship for the Employer.

# Justice Boone's decision



- Judicial review of Labour Arbitrator's decision involving limits of accommodation that ought to be considered for use of medically prescribed cannabis by an employee working in safety-sensitive workplace;
- Arbitrator accurately identified the issue as a question of Employer's duty to accommodate use of medical cannabis by worker in safety sensitive position, found that duty to accommodate did not extend to requirement that Employer accept risk resulting from possibility, as that met onus of undue hardship;
- Applicant's argument that Award was based on stigma or stereotype attaching to cannabis users was without sufficient foundation to support a finding that Arbitrator's Award was unreasonable;
- Arbitrator based his findings on resolution of the evidence before him and his decision was within the range of reasonable outcomes;
- Application to quash the Award dismissed.

# Hibernia Platform Employers' Organization v. Unifor, Local 2121

- 2018 NLCA 45
- Helicopter baggage-related safety incident on the Hibernia offshore oil platform led to investigation per collective agreement and drug testing of 8 employees;
- One employee, the Grievor, was terminated upon positive results for benzodiazapines;
- Union submitted grievance, and arbitration board reinstated the employee;
  - The Board denied Union's claim that the post-incident testing amounted to random testing; but
  - The Board concluded that the testing was ordered without consideration of the Grievor's explanation of the errors and their correction, and without sufficient reason to link the Grievor's actions to the incident or to establish a possible link between substance use by the Grievor and the incident, and so did not comply with Drug/Alcohol Policy. Thus, termination grievance was allowed.
- Employer's application for judicial review was dismissed;
- Employer appealed the dismissal;

# Hibernia Platform Employers' Organization v. Unifor, Local 2121

- The Court of Appeal determined the issue on appeal was:
  - “whether the Board’s interpretation of the Policy was unreasonable on the basis that it resulted in an interference with management’s right to order drug testing in accordance with the Policy under the collective agreement, and that the decision altered from collective agreement by adding language and factors taken from arbitral authorities”;
- The Court emphasized that while drug testing is an investigative tool available to management, not unreasonable for Board to interpret Policy to require management to take initial steps to be satisfied that ordering certain employees to undergo testing was indicated;
- The Court dismissed the Appeal.

# Suncor's random drug testing

- Long legal history:
  - In 2012, Suncor began randomly drug testing staff in safety-sensitive jobs, prompting Unifor – which represents approximately 3000 workers at the site – to file a grievance claiming the tests infringe privacy;
  - Arbitration tribunal allowed the union's grievance, concluding the testing policy was an unreasonable exercise of management rights;
  - Alberta Court of Queen's Bench quashed that decision and sent it back to the arbitrator;
  - Unifor appealed, Alberta Court of Appeal upheld the decision, and Unifor appealed to Supreme Court of Canada;
  - In 2018, the Supreme Court of Canada refused to hear the case.

# Suncor's random drug testing

- In late 2018, Unifor dropped the legal battle and agreed to the random alcohol and drug testing;
- Soon after, Suncor announced that workers in safety-sensitive positions will be subject to random alcohol and drug testing, beginning the first quarter of 2019;
- Workers interviewed cited to concerns about the accuracy of marijuana testing;
- Suncor asserts its Denver, Colorado site, where random drug testing already underway, shows impact of random drug testing, as site has had significant improvement in safety performance, due in part to testing.



# Howe v SureHire, 2018 CanLII 116132 (NL HRC)

- In January 2013, Mr. Howe applied for temporary employment with Talon Energy Services Inc., and in February 2013 he applied for a position with KBAC Constructors; both employers directed Mr. Howe to undergo drug and alcohol and medical testing with SureHire;
- Mr. Howe was denied employment based on the test results;
- Mr. Howe alleged that he was the victim of discrimination by SureHire, which resulted in loss of employment, and filed a complaint with the NL Human Rights Commission
- Conclusion:
  - The Court agreed with the Commission that the categories of relationships which may be classified as a party acting “on behalf of an employer”, per Section 14(1) of the Human Rights Act, are not closed, the language could not be extended to capture a party who merely performs a service for an employer but does not otherwise have the authority to make decision affecting the employee;
  - The central issue was that authority, if any, that was vested in the party and the nature of its relationship with the employer;
  - SureHire was merely performing a service for the employers by report the test findings, and the effect of these results was due to the standards set by the employers for what they did with the information;
  - Thus, the Court found there was no evidence to suggest that SureHire acted on behalf of the employers within the meaning of the Human Rights Act, and granted SureHire’s motion for non-suit



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