Arbitration Award

IN THE MATTER of an Arbitration re a grievance dated December 5, 2019 – HR - #64-19-85 (Drug Testing)

BETWEEN:

Unifor Local 64

The "Union"

and

Corner Brook Pulp and Paper Limited

The "Employer"

Before:

Sheilagh M. Murphy, Q.C. - Arbitrator
St. John's, NL

Hearing Date: October 22-23, 2020
Date of Decision: May 31, 2021

Appearances:

Monty Fudge on behalf of the Union
Harold M. Smith, Q.C. on behalf of the Employer

ARBITRATION AWARD

Summary

1. A pulp and paper mill's safety supervisor received an anonymous tip that shipping department employees were smoking in a shelter they had erected near their lunchroom between the inward lunch room and the wall separating the sheds and the paper mill. In the course of investigating the allegation, the safety supervisor attended the lunch room and smelled smoke, but it was a "distinct aroma" indicating it was not just cigarette smoke. The manager looked for the source of the smell of smoke and while in the lunch room, he discovered the small "smoke room." In the "smoke room" he found cigarette butts and marijuana roaches on the floor. He also found two soft drink cans, both of which were found to contain both cigarette butts and marijuana roaches.

2. The safety supervisor took photos of the area, removed the cans, photographed their contents, sent them for testing, and reported what he found to management. The employer demanded a drug test of all employees employed in the Shipping Area and having access to that lunch room at that time. All those employees were either operating a modified forklift (a "clamp truck") or were required to be capable of operating the clamp truck at any time during their shift. Twenty-one employees were tested. Those tested included bargaining unit and management personnel working in the area at that time.

3. The union grieved the drug testing, arguing *inter alia* that the drug testing was unreasonable in the circumstances and was random, legally impermissible testing. In the alternative, it argued that even if the testing were permissible, the employer did not discharge its burden of proving that any of the employees subjected to testing was impaired by or had used or possessed drugs on the premises in contravention of any workplace policy.

4. The employer argued *inter alia* that in the circumstances of this case, they were working in a safety-sensitive workplace, with the history of this workplace, the fact that all shipping employees were either operating or could be called upon to operate clamp trucks that day, the clear breach of the Drug and Alcohol Policy, and in light of the onus placed on it by provincial Occupational Health and Safety legislation, the testing was permissible.

5. The sole issue for determination in this arbitration is whether the drug testing was permissible in the circumstances. For the reasons below, I have determined that the drug testing was permissible in the circumstances of this case and the grievance is therefore denied.

Preliminary agreements

6. At the beginning of the hearing, the parties confirmed the following:
   i) The Arbitrator is acceptable to the parties.
   ii) The grievance procedure has been properly followed or requirements have been waived.
   iii) There are no preliminary objections with respect to jurisdiction.
   iv) There are no preliminary issues.

v) The Arbitrator will remain seized of the matter for a period of 60 days following publication of the award and either party can give notice to reconvene on an interpretation issue.

vi) The time limits for filing the award are waived.

vii) Witnesses were not excluded. There was an agreed statement of facts and parties will supplement the facts not agreed to.

viii) If there is a dispute during the hearing as to what was said, the Arbitrator's notes shall prevail.

ix) The "record" shall consist of the Arbitrator's written decision and any exhibits entered at the Arbitration.

7. The parties presented an agreed statement of facts for as many facts as they agreed upon. Witnesses were called to present evidence that was not agreed upon.

8. The Union wanted to bring evidence concerning seven other grievances flowing from this grievance. It was agreed that the within hearing pertained only to the grievance filed. Evidence pertaining to the other grievances was not allowed. The sole issue here is whether the testing was permissible, given the circumstances of this case.

The Grievance

9. On December 9, 2019 the Union brought a grievance on behalf of twenty (20) employees of local 64 who were working in shipping, finishing and inward at Corner Brook Pulp and Paper on December 5, 2019.

10. The union alleges that the Human Resources Department (Amy Hennebury and Blaise Pinsent) tested twenty (20) members of Unifor Local 64 for drug use between 11:00 – 16:00 on December 5, 2019. The grievance states "Union Local 64 grieves the random testing of all workers (20) tested on December 5, 2019 as it constitutes illegal and/ or impermissible random drug testing." The settlement desired was that the employer "Cease and desist from random drug testing."

Agreed Statement of Facts

11. The parties agreed on the following facts:

(i) Corner Brook Pulp and Paper operates a newsprint paper mill at Corner Brook, NL (hereinafter called the "Mill").

(ii) The Mill is a large industrial complex supported by a Wood Yard for the source of fibre for the process (the "Process Area") and a Shipping Area for the storage and shipment of newsprint, which is the product of the mill.

(iii) This matter involves the Shipping Area which comprises the wharf where ships are loaded by employees of the Mill, mostly operating clamp trucks (clamp trucks with clamp apparatus to pick up rolls of paper). The area also includes warehouse

facilities where the rolls of paper can be stacked 4-5 rolls high, commonly referred to as "the sheds". There is also a lunchroom area for the workers who work in the shipping department. During loading, the activities are mostly motorized, only one employee would not be operating mobile equipment. There is also a loading area for loading transport trucks or international shipping containers, and a lunch room for the inward trucker who's [sic] role is to take newly wrapped rolls and store in the proper location to be picked up for shipping.

(iv) The Shipping Area is a restricted access area and workers in that area, other than shipping employees, must be authorized to be in the area. Authorization is a function of being assigned duties in the area. These workers include casual employees who are cross-trained, workers in the core room or wrap line, and maintenance employees working on equipment. Workers who are part of the fire brigade, emergency response and spill response have access when necessary to carry out those duties. People with unrestricted access can access the Shipping Area. It has occurred that workers unassigned without access have accessed the area.

(v) On December 5, 2019 (the day of the discovery), there were 18 authorized shipping employees in the shipping area, plus one inward, and one in the finishing utility who relieves on the inward for breaks. There may have been other people with assigned duties in the area. Of the Shipping employees, nine onboard the ship, 6 in the sheds and a tallyman. Three of whom at any point in time could be on lunchbreak in the Shipping lunchroom.

(vi) At or about 9:00 a.m. on December 5, 2019, Mr. David Murphy, a safety supervisor with the Mill was tipped off that shipping department employees were smoking in a shelter they had erected near their lunchroom between the inward lunch room and the wall separating the sheds and the paper mill. The Union was not told the reason for David Murphy's investigation until this Agreed Statement of Facts.

(vii) Smoking is strictly prohibited, except in designated smoking areas. Mr. Murphy proceeded to investigate, accompanied by G. Fischer and L. Oxford. Mr. Murphy discovered that between structures, one of which housed the inward employees' lunchroom, plywood walls had been installed between the two structures thereby creating a small confined space sheltered partially from the wind and cold.

(viii) Mr. Murphy also discovered when entering the created space, that a small space heater had been installed connected to an extension cord and a light source had also been installed.

(ix) The created space had a distinct aroma which Mr. Murphy thought did not indicate cigarette smoke only and proceeded to continue his investigation. He identified a Coke and a Root Beer can which appeared to have been used as an ashtray as it appeared to contain butts of smoking material, as well as what appeared to be roaches on the ground. The Union claims they were not advised how and where

roaches were found. The Union only became aware of details of discovery when provided with draft of these facts.

(x) Mr. Murphy removed the Root Beer and Coke cans with the contents and took them to his office. He then cut the cans open and discovered what appeared to be marijuana roaches. He then placed the contents in sealed baggies and locked it away in his desk for further investigation, he then reported the results of his investigation to Human Resources. The Union would not have been aware of this. With Mr. Murphy were two other employees present when the cans were opened.

(xi) Mr. Murphy presented via email pictures (see attached) of the contents of the can and the created spaces to Darren Pelley, Craig Power, and Amy Fitzpatrick, which all parties agreed looked to be butts of marijuana cigarettes. The Union were not advised of this fact until this Agreed Statement of Facts were presented to them.

(xii) The work area is a safety sensitive work area given the rolls of paper weighing from 300 to 1300 kg, and is an area of high concentration of mobile vehicles for all paper moving in the warehouse, on the wharf and into the vessel. Clamp trucks are the mobile equipment driven by Shipping Department employees with only one individual not consistently operating mobile equipment (clamp truck). That person is the "tallyman" who is called upon to operate a clamp truck from time to time.

(xiii) Clamp truck operators who operate while impaired create a serious safety risk.

(xiv) The Company believed there was possible violation of the Drug and Alcohol Policy and the Smoking Policy and demanded a drug swab test of all employees on duty in the Shipping Department to that point in the day.

(xv) The testing of 21 employees was performed by Fit for Work (all shipping employees, inward trucker, finishing utility as well as the supervisor). All employees provided a sample through swab, without refusals. They were advised that they would be disciplined if they did not comply and that refusal would be considered evidence of a breach.

(xvi) Following the test, employees were sent back to work after 4 hours beyond the discovery of the roaches. No employee was held out of service.

(xvii) The pop can roaches were treated as evidence and a chain of custody was created with the "roaches" sent to a testing facility with all being confirmed to be the butts of marijuana joints. The photo attached shows what was found in the pop tins and the analysis of the suspected roaches is also attached. [Arbitrator's note - the analysis was not attached].

(xviii) None of the employees tested have availed of the confidential exemption for medication permitted by the Drug and Alcohol Policy.

(xix) The issue for the arbitrator, from the Company's point of view, is whether the Company has the right to demand a sample for the purposes set out above. From the Union's perspective, the issue for the arbitrator is whether the Company was entitled to demand a sample in the circumstances.

12. Attached to the Agreed Statement of Facts were the following documents:

(a) Corner Brook Pulp and Paper Limited Notice to Employees Re the Use, Possession, or Being Under the Influence of Alcohol or Drugs ("the Drug & Alcohol Policy")

(b) October 17, 2018 Notice to All Employees re Cannabis Legalization- updated policy ("Updated Drug and Alcohol Policy")

(c) Corner Brook Pulp and Paper Limited Smoking Policy (the "Smoking Policy")

(d) A copy of a photograph entitled "Roaches found in cans" [By the arbitrator's approximation, there are 10 items identified as "roaches" in the cans and 14 cigarette butts]

(e) A copy of two photographs, entitled "Outside walls framed and plywooded" showing plywood erected between a brick wall and a corrugated metal wall.

(f) A copy of two photographs entitled, "Door cut into shed wall. Directly behind inward lunchroom" depicting a corrugated metal wall with a door frame cut out of it and 2 x 4 wood framing, with a plywood panel in the place of a door in one photograph and a corrugated "door" in the other.

(g) A copy of two photographs entitled "inside room. Complete with bench, garbage can, heater, light." Photos show two benches, one is a plank of wood over a bucket and the other is black topped with green supports. On the benches is a Coca-Cola can and a Mug Root Beer can. There is a space heater on the floor and there are two extension cords going up the brick wall

13. In addition to the consent statement of facts, with attached photos (all of which were entered into evidence as "Consent 4"), the parties also entered the following consent exhibits into evidence:

- Consent 1 – Grievance.
- Consent 2 - Response to the grievance
- Consent 3 - Collective Agreement

14. As well, the employer entered the following documents:

- DM 1 – Photo showing stacks of paper in the paper shed
- DM 2 - Photo of clamp truck

- DM 3 - Photo of marijuana plant that had been cultivated on the roof of the Mill and confiscated and destroyed approximately 2 years prior to this hearing

Union's additional evidence

15. The union did not call any witnesses at the hearing. Rather, the union relied on the Agreed Statement of Facts. The Union did not file any further exhibits.

16. As to the agreed statement of facts, the union agreed that it had been drafted by the employer for the union's review. The union was given sufficient time to review and make comments on or amendments to the agreed statement of facts before presenting them to the arbitrator. The Union confirmed that what is in the agreed statement of facts is agreed to by both parties.

Employer's additional evidence

17. The employer called three witnesses to provide additional evidence. The first was Mr. David Murphy, safety supervisor.

18. Mr. Murphy confirmed the contents of the agreed statement of facts and described the contents of the photographs. The photos were taken by him on the date the testing took place.

19. Mr. Murphy also provided the photo in DM # 3 – a photo taken on the roof of the mill where it was discovered that marijuana plants had been cultivated on the roof of the mill. This occurred approximately two years prior to this hearing (I note that the hearing took place in October 2020. If the marijuana plants were found two years before the hearing, that would have been October 2018, approximately one year prior to the incident). The Royal Newfoundland Constabulary was called and they disposed of the plants. Mr. Murphy confirmed that December 2019 and the time they found the plant growing on the roof, were not the first time there was a 'marijuana issue' in this facility. The union objected to the evidence of prior issues with marijuana in the workplace being presented because the area in which the plant was being grown was "nowhere near" the impugned area of the within grievance. The employer stated that it was relevant because it involved this workplace and showed that there was a history of another incident where marijuana had been brought onto the property. The evidence was allowed. I find as a fact that this at least the second instance within a two-year period where marijuana was found in this facility.

20. Mr. Murphy provided evidence as to how he found the cans with the marijuana in them. He had received an anonymous telephone call reporting to him that employees were smoking in this particular shed. He did an immediate investigation by going to the shed and the lunchroom and came across the odour of something in addition to cigarettes being smoked. He suspected marijuana. He found the temporary smoke room when following the smell. Mr. Oxford went to the smoke room with him. In that room, he found the soda

cans in which the cigarette butts and marijuana joints were located (Referred to as "roaches" throughout the testimony.)

21. Mr. Murphy testified that the temporary room (hereinafter "the smoke room") in which he found the cans was not part of the Corner Book Pulp and Paper building and had not been built by the employer. The employer was unaware of its existence until December 5, 2019, the date of the testing. One cannot see the door that enters into the smoke room from the building. Mr. Murphy needed to use the flashlight on his cellular telephone in order to look at what was inside the room. The pictures were taken after he entered the room. It appeared to him that someone had cut a hole in one building in order to build the temporary smoke room.

22. Mr. Murphy described the presence of two benches in the room and two cans in which the butts were found. One of the benches looks like a typical bench that is found in the Mill employee locker rooms.

23. In addition to this being a safety-sensitive work site, Mr. Murphy testified that fire in the shed is one of the biggest fire risks at the Mill. That is why he immediately went in search of the allegedly illicit cigarette smoking. The Mill's insurance provider had previously advised him that a fire in the paper shed is the worst fire that could happen at the facility, because of the ventilation in the shed – a fire in there would "likely take out half the Mill."

24. When Mr. Murphy entered the smoke room and then found cigarette butts and roaches on the floor, and smelled that someone had been smoking marijuana and cigarettes there, he immediately became concerned that someone could be impaired driving the clamp trucks. The people who use the lunchroom off which the smoke room was located were the same people driving clamp trucks that day.

25. As a safety supervisor, Mr. Murphy testified that if he becomes aware of a hazard, he is not able or permitted to ignore it. Part of his general duty under the *Occupational Health and Safety Act,* as he understands it, is that he has to deal with any hazard he is aware of.

26. Mr. Murphy's understanding of the Act is that the consequences for a company or supervisors who fail to deal with safety violations is that they could face fines, court cases, jail time, and worse: having to live with the fact that someone was run over or injured by a clamp truck at the workplace.

27. When Mr. Murphy found the discarded roaches, he immediately reported it to his Senior manager, Mr. Pelley, to the general director, Mr. Power, and to the HR Supervisor, Ms. Amy Fitzpatrick (now Hennebury). He told them what he saw, smelled, and found, and then returned to his office and put together a power point presentation including the photographs for his senior management.

28. As part of his investigation, Mr. Murphy immediately took the cans from the smoke room into his office, cut them open and dumped them out. In them, he found cigarette butts and the roaches. These matched the cigarettes and roaches he found mixed with the crushed

stone on the floor of the smoke room when he had entered it. He poured the contents of the cans into a plastic baggie, taped it up, and locked it in his drawer.

29. He understands that Mr. Brisson, superintendent of shipping, had the shipping employees "knock down" the smoke room.

30. Mr. Murphy confirmed that the marijuana that had been found growing on the roof on a previous occasion was not there by accident. It had been cultivated: the ground was "pushed up", there was a water jug under the condenser, and marijuana was growing in the "pushed up" earth.

31. Mr. Murphy confirmed that the sheds are approximately 750 feet long. The smoke room dimensions were approximately 10- 15 feet long by 8 feet wide and the smoke room was 800 feet from the ship onto which the clamp trucks transporting paper were being driven.

32. Mr. Murphy confirmed that the shippers who were tested on the date in question were not the only people who were working onboard the ship that day. They were the employees on duty in the shipping department that day and they were the employees who were assigned to use that lunch room and they were the employees operating the clamp trucks.

33. In the large #2 shed, there were lanes for clamp trucks. Pedestrians also walk in that shed while clamp trucks are being operated.

34. Mr. Murphy didn't see anyone that he thought was impaired that day. He didn't assess anyone for impairment and didn't receive any reports of impairment that day. He is not trained to identify impairment from marijuana. At some point in the day, he became aware of the fact that the drug testing was occurring.

35. Mr. Murphy admitted that risk of impairment was not the initial reason for his search – "smoking" had been reported. Initially, he was concerned that there was someone smoking in the shed and this is a huge fire risk. There is fire protection in the shed in the form of a sprinkler system, but that system is shut down in the winter because the sprinkler lines freeze; therefore, there is no fire suppression in the shed in winter, when the incident took place.

Ms. Amy Fitzpatrick's evidence

36. Ms. Amy Fitzpatrick is the Corner Brook Pulp and Paper human resources supervisor. She's the "AF" Mr. Murphy spoke to with respect to the smoke room. [Amy Hennebury is named in the grievance – Amy Fitzpatrick is that same person.]

37. Ms. Fitzpatrick testified that she, on behalf of the company, demanded to have the employees drug tested on the day in question after being advised by Mr. Murphy of what he had found. She immediately contacted FIT for Work, a company who provides pre-employment drug testing for the employer, who advised that they could provide on-site testing that day. She picked the person up at their facility and brought them to the Mill.

38. Ms. Fitzpatrick called the shipping supervisor and asked them to gather the entire shipping room personnel, whether bargaining unit or management, and anyone working in that shed area up to the time the roaches had been discovered that morning. She advised that no one was to eat or drink or use the washroom under advisement of FIT for Work. This was to ensure that there was no compromising the drug testing swab.

39. The affected employees were assembled in the shipping lunch room, which was the largest enclosed area in that workspace. Ms. Fitzpatrick advised the employees that they were going to be drug tested.

40. Ms. Fitzpatrick is not trained in detecting impairment due to marijuana. Only the FIT for Work employee was trained.

41. The supervisor and all employees gathered in the shipping room. Each test took 15 minutes from start to finish – taking identification, testing, and completion. Not everyone followed the rules with respect to not eating or drinking while waiting for a test. The first test occurred at approximately 11:30 and the last one was between 15:30-16:00.

42. Ms. Fitzpatrick could not give evidence as to which employees had their lunch breaks at what time that day. The agreed statement of facts states that three people were in the lunch room at any given time that day, rotating throughout their shifts. Because the ship was in port, workers all took a rotating lunch that day so that loading could continue uninterrupted. Therefore, some people had eaten earlier than usual and some were scheduled to eat later.

43. Ms. Fitzpatrick testified that anyone who said they had to use the bathroom or who had a medical condition requiring them to eat was permitted to be tested first. She said, "We tried to be as reasonable as we could in the circumstances." One person refused to abide by the rules, so the tester required that the person wait a sufficient time after they broke the rule to take an accurate test.

44. The FIT for work tester ("the "tester") said she "could not say for certain" whether any of the employees was intoxicated. She tested all assembled employees. Ms. Fitzpatrick asked the tester to notify the employer if she noticed anything "alarming or noteworthy" during the testing. She did not advise of anything alarming or noteworthy. They would need test results to confirm whether anyone was intoxicated.

45. Ms. Fitzpatrick's evidence was that the discovery of the roaches was the incident that prompted the testing.

The Union's Argument

46. The Union is the exclusive bargaining agent for all employees tested that day, with the exception of the supervisor, who is a management employee.

47. The union argued that the Drug and Alcohol Policy implemented by the employer and attached to the agreed statement of facts was a "unilateral" policy, meaning that the

employer introduced the drug and alcohol policy in 2017 without input from the union. It was not part of the negotiated collective agreement.

48. Both parties agreed that the results of the drug tests and any subsequent discipline was not the subject of the within grievance and it was outside the Arbitrator's jurisdiction in the within matter to consider the suspensions. Those were the subject of other grievances and were not to be considered herein. I agree. They are outside the scope of my mandate.

49. As part of its argument that the testing was illegal, the union argued that cannabis is not illegal in Canada. Respectfully, that is not relevant to this matter. The drug and alcohol policy makes a blanket statement that "the use, possession or being under the influence of alcohol or drugs, whether illicit or prescribed is strictly forbidden on Company premises …" There is no distinction between legal or illegal drugs.

50. It is the Union's position that the employer's decision to require the employees to submit to drug testing was an unreasonable exercise of managerial authority and an unlawful intrusion upon the dignity and privacy rights of members of the bargaining unit. Unifor says drug testing required by employer was unreasonable in the circumstances and amounted to random legally-impermissible testing. The union argued that if the employer suspected its employees were impaired that day, it begs the question why the employees were permitted to return to work after they were tested.

Alternative argument

51. The union argued in the alternative, that even if the testing were permissible (which it denied) the employer has failed to discharge its burden to prove that any of the employees subjected to the testing was impaired, had used drugs at work or brought drugs into work in violation of the drug and alcohol policy.

52. Unifor asked that the arbitrator allow the grievance, find the employer did not have reasonable cause for testing the workers, void the discipline and make the affected employees whole by providing full compensation for lost wages. The arbitrator reiterated that this request was outside the scope of the arbitration and involved grievances that were not before her. The only matter before the arbitrator was whether the testing was permissible in the circumstances of this case.

53. The union argued that there is no legislated right in Canada for employers to implement drug and alcohol policies and, to the contrary, privacy legislation protects employee privacy. (*Access to Information and Protection of Privacy Act*, SNL 2015, c. A-1.2; Personal Information Protection and Electronic Documents Act, SC 200, c.5.)

54. The Supreme Court of Canada has recognized that use of a person's body without their consent to obtain information about them "invades an area of personal privacy essential to human dignity." The seizure of bodily samples is "highly intrusive", it argued, and must be subject to stringent standards and safeguards. (*R. v. Dymen*t, [1988] 2 SCR 417 at pp 431-31; *R. v. Shoker*, 2006 SCC 44 [2006] 2 SCR 399 at para 23; *Communications, Energy*

and Paperworkers Union of Canada local 30 v. Irving Pulp & Paper Ltd. 2013 SCC 34, [2013] 2 SCR 458 ("Irving") at para 50.)

55. The union argued that the approach adopted by Canadian arbitrators and courts with respect to workplace drug and alcohol testing accords with the concern of the legislatures and courts to give "robust protection to the privacy and dignity interests of individuals." The union further argued that drug and alcohol testing in a workplace is "an extraordinary and intrusive measure justified only where it is reasonable in the circumstances." (*Canadian National Railway Co. v. CAW-Canada (re:), 95 LAC (4th) 341 (Picher) ("CN Rail")).*

56. The union argued that, under *Irving* and *CN Rail,* when the employer requires an employee to submit to drug testing, the decision to test must reasonably reconcile the competing interests of an individual's right to privacy and dignity with the employer's legitimate business and safety concerns. Therefore, the union argued that the employee can only be disciplined for reasonable cause and the employer can only impose a rule or make a decision that has disciplinary consequences for the employee if the need for that rule outweighs the harmful impact on the employee's privacy rights (*Irving*, *Supra*, at para 4).

57. The jurisprudence, the union argued, sets out distinctions between what is required to justify drug and alcohol testing in each of three different situations: situations where there has been random testing, reasonable cause testing, and post-incident testing. (*Irving* at para 5, *Supra*; *Imperial Oil Ltd. v. CEO local 900, 157 LAC (4th) 225 (Ont. Arb) ("Nanticoke"); Vancouver Shipyards Co. and CMAW, Local 506 (Bohun), Re, 2020 CarswellBC 2158 ("Vancouver Shipyards") at para 48.)*

58. The union agreed that in a workplace that is dangerous, employers are generally entitled to test employees who occupy safety-sensitive positions without having to show that alternate measures have been exhausted as long as there is "reasonable cause" to believe an employee is impaired while on duty, where the employee has been directly involved in a significant workplace incident or accident, or where the employee is returning to work after treatment for substance abuse (*Irving, Supra,* at para 30). In this case, the union argued that this was not a dangerous safety-sensitive position and the employer used a unilaterally-imposed policy of mandatory, random and unannounced testing for all employees, which has been rejected by arbitrators as "an unjustified affront to the dignity and privacy interests of employees unless there is a demonstrated workplace problem with workplace substance abuse," (*Irving, Supra, at para 6).*

59. The employer argued that this was a dangerous, safety sensitive workplace, in keeping with the decision in *Irving* dealing with a Mill in New Brunswick. The employees who were tested were using clamp trucks, which are forklifts i.e., motorized conveyances, inside a building, near pedestrians, and onto a ship and carrying rolls of paper that weighed up to 1300 kg. The reasonable cause arose when the employer smelled smoke and found the marijuana roaches among cigarette butts, indicating that someone had been smoking marijuana as well as cigarettes in the facility that morning and had then potentially returned to operating their clamp truck.

60. The union cited *Irving* (para 33) and *Nanticoke* (para 101) in its rebuke of "universal random testing", which it alleged is what occurred in the within case. In particular, the union cited the following passage from *Irving, citing Nanticoke*

> Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside the context of a rehabilitation plan for an employee with an acknowledged problem is beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated it is not to be inferred solely from general language describing management rights or from language in a collective agreement which enshrines safety and safe practices.

Irving at para 33; *Nanticoke* at para 101.

61. The union provided four examples of arbitrators and courts having either permitted or not outright rejected an employer's attempt to perform random testing. *Greater Toronto Airports Authority v. PSAC, Local 0004, [2007] CLAD No 245 (Ont Arb.) (Devlin) ("GTAA"); CEP, Local 7777 v. Imperial Oil Ltd [May 27, 2007, Christian Member (Alta Arb)] (Christian) ("Strathcona"); ATU Local 113 v. Toronto Transit Commission, 2017 ONSC 2078 (Ont. S.C.J.) ("TTC") (interlocutory injunction); Unifor Local 707A v Suncor Energy Inc, 2017 ABCA 313 ("Suncor"), leave to appeal dismissed (2018) CanLII 53457 (SCC)).*

62. The union argued that the legitimacy of demanding a drug or alcohol test is fact-driven and is addressed on a case-by- case basis, with the emphasis being on the reasonableness of the investigative procedures of the employer. The union recognized that the employer may test employees in safety sensitive positions if there is reasonable cause to believe that the employee is impaired while on duty, with the focus being based on the employee's actions, conduct, or demeanour and there is a reasonable basis to suspect the employee may be impaired. In the within case, the union argued there was no suspicion that a specific employee was impaired on that basis.

63. While there was no evidence that a specific employee was impaired that day, I note that it was well established that an employee or employees in that area had been smoking marijuana on that morning, shortly before the testing occurred.

64. The union argued that the preponderance of arbitral authority follows the *Weyerhaeuser I* decision, which identified three elements necessary to justify post-incident testing:

(i) The threshold level of the incident's significance needed to justify testing, though a near miss may suffice if there is sufficient gravity to the event;

(ii) The degree of inquiry necessary before the decision to test is made; and

(iii) The necessary link between the incident and the employee's situation to justify testing.

(*Weyerhaeuser Co v CEP Local 447,* [2006] AGAA NO 48, 154 LAC (4th) 3 at paras 162-163)

65. The union further cited *Weyerhaeuser II,* which provided supplementary insight into what constitutes a reasonable demand for a drug test.

66. The "incident" that triggered the initial investigation was the report of employees smoking in the lunchroom in the #2 shed, then the subsequent discovery of the presence of marijuana and evidence of it having been recently smoked in the workplace.

67. The jurisprudence surrounding post-incident testing is helpful in providing discussion surrounding the employee's right to privacy and where the employee's rights and interests must yield to the employer's rights or interests in order for drug or alcohol testing to be justified (*Compass Minerals*, paragraph 62). In *Compass*, the arbitrator found the following:

> It is equally inappropriate for an employer to require any employee to undergo a drug or alcohol test in order to rule out impairment in any circumstances where there is no reasonable basis for suspecting impairment. Similarly, "worst- case scenario" or "remote possibility" considerations will rarely have any place in the inquiry which must be undertaken. Otherwise, it all too easily becomes testing in every case by another name.
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> *Compass Minerals Canada Corp and Unifor, Local* 16-0 (Walden) Re (2016), 127 L.A.S. 286, 269 L.A.C (4th) 88 at para 64

68. The employer is required to balance the employer's interest in investigating an incident and the privacy and bodily integrity interests of the employees who are to be tested. The need to test needs to outweigh the employee's privacy interests. (*CN Rail* at page 383).

69. The jurisprudence shows that it may be appropriate to consider whether there was the potential for serious injury or damage, and whether such potential was proximate to the demand (*Weyerhaeuser I* at para 176. *Elk Valley Coal* at para 26, *Fording Coal* at paras 41-42, *Compass Minerals* at para 62, and *Atco* at paras 50-52.)

70. The Union's argument is that the drug and alcohol policy and the duty to provide a safe workplace still has to have a level of accountability to the employees being tested. It was the union's argument that the presence of cannabis in the workplace does not mean that the employees were impaired, it doesn't mean that someone used it on site, and it doesn't mean that someone brought it to this site. Respectfully, the union's argument on this point does not accord with the facts. The uncontroverted evidence was that Mr. Murphy smelled smoke, it was not tobacco smoke, it had a "distinct odour" that led him to believe cannabis was being smoked on the premises. He then discovered the room off the lunch room, and

in that room, he found evidence that marijuana had been brought into the workplace and smoked there - there were marijuana roaches on the floor of the smoke room and in the soda can ashtrays. Testing of the roaches confirmed that they were indeed marijuana. Marijuana does not appear at a workplace by magic. In this case, it was brought in by someone who knew of the existence of the clandestine smoke room off the inward #2 lunch room and smoked there on more than one occasion, based on the sheer number of butts and roaches found in the cans and on the floor. (By my count, there were approximately 10 roaches and 17 cigarettes butts in the photograph of the cans' contents).

71. The union brought evidence of the test results. This is not relevant to this arbitration and I have not included this evidence. This is strictly an analysis of whether the testing was permissible under the policy, given the facts of this case. I can find as a fact that the employees, when tested, did not show such outward signs of impairment as to warrant the drug tester from FIT for Work to alert the employer of something "alarming or noteworthy", and that all employees were sent back to return to work after the tests, i.e., at least 4 hours following the smell that marijuana had been smoked.

72. The Union argued that it does not know who brought the marijuana into the workplace or who was impaired on the date. To test 21 people at the worksite, it argued, was an impermissible random test at this worksite. Given the size of the warehouse, the fact that there were employees on the ship, over 800 feet through one warehouse, across a companionway and aboard the ship, there was no reason to check this particular space and everyone who worked in that area.

73. The employer reiterated that the reason these particular employees were tested was clear and undisputed: the employer received an anonymous tip that someone was smoking in that lunch room, the employer then found evidence of marijuana having been smoked there. This was the reason for checking employees who were working in or were scheduled to have access to this particular space on this date.

74. There was no evidence put forward by the union to suggest that anyone but the 21 employees tested that day had entered this restricted access area. There was no evidence of an incident requiring fire brigade or emergency response, spill response or other personnel in the area that day. There was no evidence put forward by the union or any of the grievors that anyone had seen any person without access to the restricted access area in which the employees were working that day present that day.

75. The Union argued that we cannot conclude who was smoking, who brought it in, whether they smoked it at the workplace. Even the tester did not make any on-site determination of whether anyone was intoxicated. [I note that Ms. Fitzpatrick's evidence was that the tester said that they "couldn't say for certain" whether any of the employees was intoxicated and they would have to wait for test results.] While the Union agrees that the Employer has to provide a safe workplace, that same Employer has to be respectful of the employees' privacy and the policies in place have to be reasonable for everyone. Therefore, the Union argued that the testing was unreasonable and the grievance ought to be allowed.

The Employer's arguments

76. The employer noted that the union's argument is entirely its allegation that this is a random test and the test was not reasonable or post-incident testing. The employer notes that the union has not argued that this is improper post-incident testing or unreasonable testing. The jurisprudence presented by the union is the jurisprudence on determining reasonableness of drug testing, but the reasonableness has only been determined in the context of determining the reasonableness of an individually required test. One needs to demonstrate the reasonableness of testing the individual facts of each case.

This is not random testing

77. The Employer does not disagree with the arbitral cases presented by the Union in this case or its statement of the law to date. The difference between past incidents and past arbitral jurisprudence was that in the past, hearings tended to be based on an individual's right to privacy or right to not be drug tested. This case is different, according to the Employer, because they are dealing with what could have been a very serious safety issue where they employer acquired knowledge that someone had just smoked marijuana on the premises. It is from the safety perspective that the Employer brings its argument herein and urges the arbitrator to consider the testing demand through the lens of workplace safety and occupational health and safety legislation. If one were to peruse all 20 cases put forward by the Union, and if one considered random testing, the Employer agrees that random testing is frowned upon by the Courts. The Supreme Court of Canada in *Irving* discussed the fact that random testing without any foundation or basis for testing is not supportable. In the within matter, however, this is not a random testing case. The Employer argues that there is a history of drug use and drug problems in the workplace, and this was not a random test.

78. The employer's Drug & Alcohol Policy is not specific as to when testing ought to occur. What the policy does say, however, is that drug and alcohol use on the premises is prohibited on its face and the consequences of a breach are dire: termination. The language of the Drug and Alcohol Policy is clear:

> **THE USE, POSESSION, OR BEING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, whether illicit or prescribed, is strictly forbidden on Company premises. Violation of this work rule will ordinarily result in termination of employment.**
>
> Employees who have medical prescriptions for medication to treat an existing condition may use or possess such drugs or substances only where they have received clearance from the Company nurse that such legally obtained drugs or substances will not impair the employee's ability to work safely. New positions will not be created to accommodate employees who are unable to continue to work safely in their position.
> …

"Alcohol" - Means any intoxicating agent in an alcoholic beverage.

"Drugs" - Means any substance, the use of which has the potential to change or adversely affect the way a person thinks, feels, or acts and in particular for the purpose of this Rule: any substance that may inhibit an employee's ability to perform his/her job safely and/or meet the Company's performance expectations. …

79. None of the shipping inward employees had requested or received clearance from the company nurse to possess or use such substances at this workplace.

80. In addition to the drug and alcohol policy, the employer also provided its employees with a memo from October 17, 2018 updating the policy in light of cannabis legalization. The Memo states:

> In anticipation of the Cannabis Legalization, we updated our Policy.
>
> Mainly, it remains the same. **It is strictly forbidden,** while you are at Kruger's service or in the workplace:
>
> - To report to work or perform work without being **fit for work**, regardless of the cause.
> - To use, possess, consume, manufacture, store, distribute, offer or sell **alcohol or lawful or illicit drug** or related accessories;
> - To inadequately use medication;
> - Distribute, offer or sell prescription drugs.
>
> The legalization of cannabis for recreational purposes **does not confer** any right to perform your duties while unfit for work.
>
> You have the **obligation to inform** a manager or use the services offered by the EAP in the event of a substance abuse disorder susceptible of affecting your state of being fit to work. The company will, as far as possible, provide assistance and reasonable accommodation to those employees.
>
> Employees who **drive a company vehicle** or **drive a vehicle or mobile equipment** during the performance of their duties must:
>
> - Hold a **valid** driver's license;
> - **Immediately report** to their supervisor any revocation or suspension of their driver's license even if it occurs for personal reasons;
> - Immediately inform their supervisor when they are accused of impaired driving while driving a company's vehicle or while driving at the company's service even if they challenge the accusation. …

A violation of this rule or Policy is a violation of the Employee's Terms of Employment.

81. The employer also has a smoking policy. As discussed above, a fire in a paper mill, and in the paper sheds in particular, could prove catastrophic for the entire premises and for the lives and safety of employees working in the space. The Smoking Policy is clear and unequivocal:

> **IMPORTANT NOTICE TO EMPLOYEES**
> **SMOKING POLICY**
>
> On July 1st, 2011, the Newfoundland and Labrador Smoke Free Environment Act was amended and gave rise to the elimination of indoor smoking room in the workplace. Consequently, all buildings on company property are smoke free.
>
> Corner Brook Pulp and Paper Limited's smoking policy covers cigarettes and tobacco products, as well as E-Cigarettes and Vaporizers.
>
> Smoking will only be permitted outdoors in designated areas only. Individuals must refrain from smoking within a 20' radius of building entrances and doorways. Under such legislation, company vehicles and mobile equipment are also smoke free environments.
>
> The designated areas for smoking are:
> - Shack outside Mechanical shop Entrance
> - Corner of parade Square
> - Outside Engineering Entrance
> - Bridge outside Shipping Entrance
> - Outside TMP Maintenance Shop
> - Outside Main Entrance of Wood Room
> - Outside Guard Office for Guards Only
>
> Employees and visitors to the site must adhere to this Company policy and Provincial legislation, and must properly dispose of their cigarette buttes in a safe manner. Failure to do so will result in disciplinary action and possible government-issued fines.

The security of our employees and our property is of the utmost importance, violations of this policy will be considered serious in nature. …

82. The employer argues that the employees' work is safety sensitive: they are driving machinery around a very large shed where there are other machines operating and pedestrians walking, other drivers operating vehicles, through narrow laneways and onto a ship. Because they are moving and maneuvering heavy rolls of paper, safety is paramount. I agree with this analysis. As discussed in *Irving, supra*, a pulp and paper mill is a safety-sensitive workplace.

83. The employer argued that it takes worker safety very seriously. Someone impaired by drugs or alcohol poses a safety risk when they are operating a clamp truck. There could be catastrophic injuries to fellow employees or to property. No one from the Union in this case made any argument to say that employee impairment by drugs at this workplace is not a serious safety issue.

84. The Employer argues that operating a conveyance or driving a motor vehicle while impaired is an offence under the *Criminal Code of Canada*. One cannot have more than 2 nanograms of cannabis/THC present in the blood stream without violating the *Criminal Code of Canada* laws concerning operation of a conveyance. As the Criminal Code states, as the concentration of THC in the blood increases, so does the fine and license suspension increase.

85. In the instant case, there were 16 vehicles operated in one area. There were 3 people on break at any given time. Of the 21 employees tested, 18 people were operating the clamp trucks that morning. There are roadways which include turns inside the building, onto the gangway and into the paper ship. If impaired, the employer argued that an employee can make a serious safety breach whether driving the clamp truck or walking in the area of a clamp truck.

86. In addition to the fines and offences listed under the Criminal Code of Canada, the *Occupational Health and Safety Act ("*OHSA*")* also has strict provisions concerning employee safety and criminal sanctions in the event of a breach. None of the cases that were presented by the Union or referred to by the union in its submissions refers to the Occupational Health & Safety legislation. All of the cases have been founded on the intrusion into privacy because the Employer is balancing the employer's right to direct work and set policy in accordance with management rights versus the employees' privacy rights. However, in this case, there was strong evidence that drugs were being used in the workplace and the Employer could not find out who was using those drugs at the workplace and operating vehicles without performing drug tests.

87. The workplace policy clearly addresses substance use disorder, as does the Cannabis legalization updated policy of October 17, 2018, which states:

> You have the **obligation to inform** a manager or use the services offered by EAP in the event of a substance use disorder susceptible of affecting your state of bring fit to work. The company will, as far as possible, provide assistance and reasonable accommodation to those employees.

88. The earlier policy also states:

> Employees suffering with addiction issues are encouraged to seek support for the company Employee Assistance Program (EAP). This program is part of Corner Brook Pulp and Paper Ltd.'s commitment to the overall wellness of our employees to request an EAP referral simply call 1-877 xxx-xxxx [number redacted herein].

89. The employer argued that having found roaches on the floor in the illicit smoke room, and having smelled marijuana smoke in that area, and having found the soda cans containing cigarette butts and roaches, there was too much danger to the workers and the members of the workforce to allow work to continue without an assessment of the employees and drug testing. The entire line of jurisprudence, up to the Supreme Court of Canada in *Irving,* considers the balancing of privacy rights and the employer's right to test. However, none of the cases considers the regulations and requirements of the *Occupational Health and Safety Act*, which came into force after that jurisprudence was written, and the employer's obligation to ensure the workplace is safe for employees when it has reasonable grounds to suspect that someone has been consuming cannabis and operating a motorized vehicle while under its influence. The *Occupational Health and Safety Act [OHSA]* is binding on everyone, including the employer and the employees and puts a positive onus on them with respect to employee safety. In particular, Section 4 of the OHSA states:

> 4. An Employer shall ensure, where it is reasonably practicable, the health, safety and welfare of his or her workers…

90. The employer also noted that there was no evidence of how long THC lasts in the bloodstream and when employees can return to work after consuming cannabis. The last of the drug tests was taken four hours after the testing had begun, which began after the smoke had been smelled, roaches found, and the matter reported to management – approximately seven hours after the smoking was reported to Mr. Murphy.

91. The *Occupational Health and Safety Act* further states at Section 67:

> 67 (1) A person who:
>
> (a) contravenes this Act or the Regulations;
> (b) fails to comply with an order made under this Act or the Regulations; or
> (c) fails to follow a code of practice adopted or established under Section 36, is guilty of an offence.
>
> (2) Where a person, other than a corporation, is convicted of an offence under subsection (1), he or she is liable to a fine of not less than $500.00 and not more than $250,000.00 or to a term of imprisonment not exceeding 12 months or to both a fine and imprisonment.
>
> (3) Where a corporation is convicted of an offence under subsection (1), the Corporation is liable to a fine of not less than $2,000.00 and not more than $250,000.00.

(4) In addition to a fine imposed under subsection (2) or (3), the Court may impose a fine not exceeding $25,000.00 for each day during which the offence continues.

92. The employer argued that these provisions of the OHSA show a direct statutory obligation on the employer to ensure safety in the workplace. Therefore, the employer, in order to show that it is in compliance with Occupational Health & Safety Legislation, must show due diligence in trying to prevent harm or accident or injury from occurring to its employees at work. Part of this due diligence, the employer argues, is testing employees for drugs when it suspects that some employees are using drugs and operating a conveyance, as defined in the *Criminal Code*.

93. Mr. Murphy's evidence was that he took very seriously his obligations as a safety supervisor. When he smelled marijuana smoke and found used joints on the floor and in the soda cans of the smoke room, he understood he had a duty to ensure that the workplace was safe for all employees. Indeed, the employer argued pursuant to Section 5.2 of the OHSA that he did owe such a duty. Section 5.2 states:

5.2 A supervisor shall

(a) Advise workers under his or her supervision of the health or safety hazards that may be met by them in the workplace;

(b) Provide proper written or oral instructions regarding precautions to be taken for the protection of all workers under his or her supervision; and

(c) Ensure that a worker under his or her supervision uses or wears protective equipment, devices other than apparel that in this *Act*, the Regulations or the workers' employer requires to be used or worn

94. Furthermore, the worker has a duty, pursuant to Section 6 of the *OHSA*, which states:

6. A worker, while at work, shall take reasonable care to protect his or her own health and safety and that of workers and other persons at or near the workplace.

95. The employer argued that having become aware that there was marijuana being smoked in this workplace on that morning in that area, and recognizing that the employees who had access to the space in which the marijuana was being smoked were also responsible for operating moving vehicles throughout the day, Mr. Murphy was under a duty to report to the employer and the employees the hazard the employees may have met while working in inward shipping that day; namely, that one or some of their colleagues may have been operating a clamp truck while impaired.

96. The Employer paired this section of the *OHSA* with Section 320.144 of the Criminal Code of Canada, which deals with negligence causing serious physical harm or death, to argue

that the supervisor has both a civil and a Criminal Code responsibility to ensure there is no negligence that causes serious physical harm or death at the workplace.

97. In this case, the Criminal Code provisions with respect to blood concentrations of THC in the bloodstream has a low threshold, particularly when having this concentration in the bloodstream while operating a motor vehicle. In particular, the Criminal Code states as follows:

> **320.14(1) Everyone commits an offence who**
>
> **(a) Operates a conveyance while the person's ability to operate it is impaired to any degree by alcohol or a drug or by a combination of alcohol and a drug;**
>
> ...
>
> (c) Subject to subsection (6) has, within 2 hours after ceasing to operate a conveyance, a blood drug concentration that is equal to or exceeds the blood drug concentration for the drug that is prescribed by regulation ... (emphasis added)

98. The Employer noted that the 2009 amendments to the *Occupational Health and Safety Act* place a positive onus on supervisors. Supervisors have been charged under the *Criminal Code of Canada* for failing to meet their duty under the statute. The Employer reiterated that none of the cases cited by the Union were based on facts that occurred after the amendments to the *Occupational Health and Safety Act*. Given the Employer's ongoing statutory obligations under the *Criminal Code of Canada* and the *Occupational Health and Safety Act*, including Section 6 as cited above, the Employer had a duty, in the circumstances of this case, to test.

99. The employer argued that the large body of arbitral law dealing with privacy of the individual remains, but not one of those cases considered the statutory Occupational Health & Safety obligations in that context.

100. The Employer agrees that this fact scenario does not fit with any of the jurisprudence so far because none of that jurisprudence has considered the balance in the context of the legislative framework surrounding obligations under Occupational Health & Safety on all parties: employers, employees and supervisors. I would add that a distinguishing feature is that the employer had definitive knowledge that someone was smoking

101. In this workplace, the Drug and Alcohol Policy is clear: the use or possession of alcohol and drugs in the workplace is strictly forbidden on company premises. Smoking cigarettes was significantly limited to only specified areas by the smoking policy. The employer argued that as part of its due diligence, it needed to have a method to determine who had been smoking cannabis in the workplace once it discovered that cannabis had been used at the workplace. The paper shed was a safety sensitive environment in which employees were operating clamp trucks and

/ or walking near such moving clamp trucks being operated by workers who likely used cannabis at work that morning.

102. The Employer argued that it has an obligation, it "shall" where reasonably practicable, ensure the safety of the workers. Finding a hidden smoke room hideaway in the building, where there was evidence of smoking marijuana on the premises, in a workplace where the Employer had previously found marijuana plants being cultivated on the roof of the Mill, shows that there was a serious potential that there were individuals at that workplace and particularly individuals operating clamp trucks, who were impaired on the date in question and thereby posing a safety risk to their co-workers.

103. The Employer agreed that the test results were not available on the date of testing. The tests were conducted by Fit for Work whose representatives were experts in testing for drug and alcohol use. The expert, as told by Ms. Fitzpatrick in the hearing, said that she "could not say for certain" that anyone was impaired - they would need to wait for the test results to determine that. Because no one, at the time the testing had been completed, was able to observe the level of impairment of any employee who had been tested, and because there was no employee so obviously intoxicated as to have been "alarming or noteworthy" during the testing, the employees were permitted to return to work after the testing. The employer argued that it is important to note the level of impairment prohibited by the *Criminal Code* for operating a vehicle or conveyance is 4 nanograms of THC. Such an amount may have been too small for the employer or Fit for Work to observe immediately without drug testing, in much the same way as the level of alcohol in the blood required to be present for a conviction under the *Code* may not be detectable without a test for presence of alcohol (a breathalyzer).

104. The policy here states clearly:

> **THE USE, POSSESSION, OR BEING UNDER THE INFLUENCE OF ALCOHOL OR DRUGS, whether illicit or prescribed, is strictly forbidden while on Company premises. Violation of this work rule will ordinarily result in termination of employment.**

105. Likewise, the update to the policy, of October 17, 2018 entitled "Cannabis legalization: updated policy," clearly and unequivocally states the following:

> It is strictly forbidden, while you are at Kruger's service or in the workplace … to use, possess, consume, manufacture, store, distribute, offer or sell **alcohol or lawful or illicit drug** or related accessories; (emphasis added)

106. The policy here, though broad, is also specific. An employee in this case is prohibited from bringing alcohol or drugs to the workplace, buying it at the workplace, selling it at the workplace, using it at the workplace, or being under its

influence at the workplace. The employer argued that it has a statutory obligation to use drug testing to ensure that persons are not intoxicated in the workplace.

107. The employer argued that question in this case becomes what falls under the heading of "reasonable testing". In this case, there were people moving equipment, driving equipment, and that is who the Employer chose to test in this workplace, because they were the ones who were operating the moving vehicles at the workplace. While the employer did not witness anyone exhibit the demeanor of impairment, there was "a lot of evidence", such as the cubbyhole, the cigarettes, the roaches on the floor and the smell of marijuana smoke, that lead the employer to be reasonably certain that there was drug use on the premises, particularly in light of the fact that a year earlier, someone at the worksite had been cultivating marijuana plants on the roof. What the employer was not certain of was who in this group was using it and who, at the time of testing, was impaired. Therefore, the Employer argues it was reasonable for the Employer to ask for a drug test in these unique circumstances.

108. The fines and ramifications of imprisonment pursuant to *OHSA* are so high against the employer and the supervisor that the supervisor or the employer had to test once they became aware of the fact that there was drug use on the premises that morning because it was incumbent upon the employer to test to determine who was impaired at work for the safety of the employees in the workplace.

109. In *Weyerhaeuser # 2*, the arbitrator held that the employer's decision to test four employees was not reasonable in the circumstances because *inter alia* it took no account of the ease of access by other employees from the outside, those interviewed showed no signs of impairment, and there was no evidence anyone consumed any of the drugs on site. The conclusion in that case was held to have been one where of all the possible owners of the paraphernalia the likely owner was the persons who worked closest to the washroom. The arbitrator concluded:

> My conclusion, even after considering the need for deference to a difficult managerial decision, is that she was simply considered the most proximate to the drug kit, but beyond that there was no additional information that led to any reasonable conclusion that she might be in violation of the policy. Again, her proximity or opportunity does not justify any individualized suspicion sufficient to test. I find that all four tests lacked justification under this policy. In all cases, the Employer has failed to establish the necessary nexus between what was admittedly a very disturbing find and the grievors.
>
> (*Weyerhaeuser #2* at para 106)

110. In contrast to *Weyerhaeuser #2*, we have evidence that the drugs were both brought onto the premises and used on the premises. The drugs were present on the floor

and in the soda cans. Mr. Murphy smelled that the drugs had recently been smoked. If I follow the reasoning in *Weyerhaeuser #2*, the employer testing those employees who were closest in proximity to that clandestine smoke room, absent any other information that these employees were the ones using the drugs, would necessitate a decision that the testing lacked justification under the drug and alcohol policy. In this case, however, there was more information: Unlike in Weyerhaeuser, there was evidence of the level of difficulty in accessing this lunch room and clandestine smoke room – it was in the back of a long paper shed, where very few, if any, workers other than the ones tested on the date in question, would have had reason to enter. It was in a restricted area and there was no evidence whatsoever put forward that anyone actually did enter other than the shipping, finishing & inward workers working that shift on that day.

111. The additional facts in the within case are the exposure to the *Occupational Health and Safety Act* and *Criminal Code of Canada* provisions that would have been triggered should someone have been injured. The employer was deeply concerned that there was drug use occurring on the premises. Had the employer done nothing, in the face of actual knowledge that drugs had been brought in and used, to try and reasonably ascertain who had brought the drugs to the premises and used them, the Employer, the Supervisor and other employees would be liable under the *OHSA*. The Employer argued that it has a positive obligation to show whether it took steps to ensure that no one would be injured once the employer became aware of the workplace hazard, being drugs being used on the premises and the potential of intoxicated employees operating clamp trucks.

112. In the *Suncor, Hibernia* and *Weyerhaeuser* decisions, each of those cases turned on the elaborate Drug and Alcohol Policies in place at those specific workplaces. The employer noted that Corner Brook Pulp & Paper's policy follows the advice from the *Newfoundland and Labrador Human Rights Act* which recommends employers bring a straight-forward drug and alcohol policy that applies to everyone: no alcohol is permitted on the premises and no drugs are permitted on the premises and employees are prohibited from using alcohol or drugs while at work or from being impaired at work. There was no exception to the policy requested by the union on behalf of any individual who may have had needed to breach it.

Conclusion of Employer's Case

113. The Employer argued that given the circumstances of this particular case, the involvement of the *Criminal Code of Canada,* and the *Occupational Health and Safety Act,* the employer's demand that it test the employees who were operating or were required to be capable of operating motorized vehicles in the area in which the smell of marijuana smoke and the presence of the marijuana cigarette butts was found was reasonable. The employer highlighted that the union's argument is that it is not reasonable that the safety risk of a potentially impaired driver outweighs that driver's expectation of privacy to not submit to a drug test. In other words, it seems that the Union's argument is that privacy supersedes the Employer's duty to

the Corporation and the individual's duty to his fellow Employees to not be intoxicated in the safety sensitive workplace. The *Occupational Health and Safety Act,* however, places a positive duty on all Employees to assist in ensuring that the workplace is safe for himself and others.

114. The Employer argues it has the right and the obligation to determine or to try to determine whether any of the people on any of those machines were impaired at that workplace. An employer has an obligation to demand a sample to ensure its drivers are not intoxicated in cases where they have reasonable grounds to suspect they may be.

Analysis

The Collective agreement and the Policies

115. The union argued that the drug and alcohol policies should not apply to the employees because the policies are not part of the collective agreement and were unilaterally implemented by the employer without input from the union. The collective agreement does not specifically reference the drug and alcohol policy.

116. The employer responded by citing article 2.04 of the Collective agreement, which articulates management rights. I agree with the employer's position that the employer has the right to establish rules, regulations, and instructions in the workplace in accordance with the management rights clause of the Collective Agreement, which states:

> 2.04 It is management's right to establish all rules, regulations, and instructions that it sees fit as long as it does not conflict with the provisions of the Agreement, or with the laws of Newfoundland.

117. A rule unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites:

1. It must not be inconsistent with the collective agreement.
2. It must not be unreasonable.
3. It must be clear and unequivocal.
4. It must be brought to the attention of the employee affected before the company can act on it.
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.
6. Such rule should have been consistently enforced by the company from the time it was introduced.

(*KVP*, supra, at para 34)

118. The Smoking Policy and the Drug and Alcohol Policy, as well as the 2018 update to the Drug and Alcohol policy are "rules, regulations and instructions" for the workplace, in keeping with the management rights provision at article 2.04 of the Collective Agreement. There was no suggestion – no evidence and no argument - that the policies were in conflict with the provisions of the Collective Agreement or with the laws of Newfoundland and Labrador. To the contrary, the employer argued that the polices were implemented in accordance with the *Newfoundland and Labrador Smoke Free Environment Act,* 2011 (as stated on the smoking policy itself), as well as the *Criminal Code of Canada* (*vis a vis* the prohibition of operating a motor vehicle while under the influence of cannabis or alcohol and the regulations thereunder dealing with penalties for operating a conveyance while under the influence of alcohol or cannabis, as the case may be), as well as *OHSA* provisions in effect in the Province, as articulated above.

119. The employer drew my attention to the Criminal Code. Motor vehicle is defined in the CCC as "***motor vehicle*** means a vehicle that is drawn, propelled or driven by any means other than muscular power, but does not include railway equipment." Under such a definition, being a vehicle that is propelled or driven by a means other than muscular power and not being railway equipment, a clamp truck meets the definition of motor vehicle for the purposes of the requirement of that *Code.* The union brought no argument to the contrary.

120. The union did not bring any evidence or argument to counter the employer's assertion that the policies were within management's rights and do not conflict with the provisions of the Agreement or with the laws of Newfoundland and Labrador. The only argument was that they had been unilaterally implemented and therefore unenforceable. Respectfully, that is not the test.

121. The rule we are dealing with here, namely the drug and alcohol policy, is clear and unambiguous. It was brought to the attention of all employees when implemented and posted in the workplace. There has been no evidence brought to suggest that the rule has been inconsistently applied since it was brought in.

122. The question then becomes whether the rule is unreasonable, thereby making it invalid as being outside the jurisdiction of the company to impose unilaterally under its management rights provisions of the collective agreement. Intoxication and the use and possession of drugs in a safety-sensitive workplace is not a "mere trifle" (per 1 Halsbury's, 2nd ed. P. 23, as cited in KVP at para 50). This was not an example of a *de minimus* breach of a trivial policy.

123. There was no evidence or argument brought to allege that the policies are inconsistent with the collective agreement. There was no evidence or argument brought by the union that the policy itself was unreasonable. The union's argument was that the testing was unreasonable, not the policy.

124. For the reasons above, I find that the policy is reasonable.

125. *Irving Pulp and Paper Ltd. v. CEP Local 30.2013 SCC 34 [2013] 2 S.C.R. 458* dealt with a random drug testing policy. The court took note that there is "a consistent arbitral jurisprudence whereby arbitrators have found that when a workplace is dangerous, an employer can test an individual employee if there is reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace incident or accident, or was returning to work after treatment for substance abuse," (at para 5).

126. The court in *Irving* further noted that "a unilaterally imposed policy of mandatory, random and unannounced testing for all employees in a dangerous workplace has been overwhelmingly rejected by arbitrators as an unjustified affront to the dignity and privacy of employees unless there is reasonable cause, such as a general problem of substance abuse in the workplace," (at para 6). It bears repeating that that this was not a unilaterally-imposed policy of mandatory, random and unannounced testing for all employees.

127. In *Irving*, the Supreme Court of Canada reiterated that consistent arbitral jurisprudence requires a balancing of safety versus privacy in a dangerous workplace to make a reasonableness determination (at para 16). As cited in *Irving*, determining reasonableness requires labour arbitrators to apply their labour relations expertise, consider all of the surrounding circumstances, and determine whether the employer's policy strikes a reasonable balance. The Supreme Court of Canada acknowledged:

> In a workplace that is dangerous, employers are generally entitled to test individual employees who occupy safety sensitive positions without having to show that alternative measures have been exhausted if there is "reasonable cause" to believe that the employee is impaired while on duty, where the employee has been involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse. (*Irving*, at para 30)

128. While I respect the employer's argument that there have been significant changes in occupational health and safety legislation since *Irving* and the arbitral jurisprudence discussed therein, the court in *Irving* was alive to the issue of the balance between workplace safety versus employee privacy, as articulated here. This is not a new concept that only came to light with changes in the OHSA since *Irving*. It is, however, a codified onus placed on the employer and managers to comply with OHS legislation and it clearly articulates the penalties that can be levied against companies and their managers who do not comply.

129. The court in *Irving* (at para 33) took note of the reasoning behind why universal random testing is not automatic:

> Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so…is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices. In a unionized workplace, such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated (citing Picher, in *Nanticoke* para 101)

130. The question becomes whether the employer had reasonable cause to believe that the employees were impaired while on duty in order to conduct the testing. In *Irving* the court also took note that arbitrator Picher acknowledged that the application of the balancing of interests approach could permit general random testing "in some extreme circumstances." Arbitrator Picher noted:

> It may well be that the balancing of interests approach … would allow for general random, unannounced drug testing in some extreme circumstances. If, for example, an employer could marshal evidence which compellingly demonstrates an out-of-control drug culture taking hold in a safety sensitive workplace, such a measure might well be shown to be necessary for a time to ensure workplace safety. That might well constitute a form of "for cause" justification" (Nanticoke, at para 127, cited by SCC in Irving at para 34).

131. Again, this case does not involve general random unannounced drug testing. It involves specific testing of a specific group of people. It is arguable whether, if the employer had tested everyone at the workplace in a generalized random unannounced drug test the test would be found to have been reasonable. There was substantial evidence of a substance abuse problem at the Mill. Someone or more than one member of the workforce using the inside lunch room had been smoking marijuana on site that morning. The number of roaches found on the floor and in the soda cans in the clandestine smoke room indicated that there could have been more than one person smoking marijuana on site that day and previous days or weeks. Given the sheer number of roaches on the floor and in the can, it was evident that smoking marijuana on site had been occurring on more than one occasion, and potentially by a number of people. Combined with the evidence of someone having cultivated marijuana on site in the previous year, that provides some evidence of a drug culture taking hold in this safety-sensitive workplace. However, without further evidence of the cultivator of the marijuana, (see *Suncor: (Suncor Energy Inc. v. Unifor Local 707A*, 2017 CarswellAlta 1761, 2017 ABCA 313, [2017] A.W.L.D. 5244, [2017] A.W.L.D. 5293) and to the union's point that it was grown "nowhere near" the paper shed, and that it was grown a year or more previously, I am not convinced that this compellingly demonstrates an "out-of-control drug culture taking hold" in the entire Mill. It does demonstrate a significant drug culture taking hold in this restricted area of the Mill.

132. I am convinced that there was significant and sufficient evidence in this controlled-access portion of the workplace of clandestine consumption of cannabis on site,

including on the day in question, to warrant testing those specific employees who both had access to the area and were operating or were expected to be operating clamp trucks that day. Operating the clamp trucks is a *bona fide* occupational requirement of this group of workers. One can go a step further, recognizing that the clamp trucks are motor vehicles, and say that it is also a *bona fide* occupational requirement that they not be intoxicated while operating these clamp trucks.

133. To the extent that the testing in this case was characterized by the union as generalized and random, given the extreme circumstance that all the employees in this area were either operating or were required to be able to operate motorized conveyances in the paper shed and onto the ship, and the evidence of the sheer number of roaches in the workplace and the presence of the smoke from someone or people having been smoking the marijuana on site, I would uphold the testing as "for cause" justification that was reasonable in the circumstances. (*Greater Toronto Airports Authority v. P.S.A.C. local 0004*, [2007] C.L.A.D. 243 (Ont. arb.)(Devlin) "GTAA").

134. The court noted in *Irving* that the evidence of alcohol use in the workplace was "dated" and went back eight years. In the within case, there was evidence of drug use that morning – from the smell – and in recent times – with the roaches in the cans sitting on the benches in the smoke room. The past example of someone in the workplace having cultivated marijuana plants on the roof of the mill was within a year – 18 months of this incident. This is not "dated" information.

135. I recognize that an employee's right to privacy is a core workplace value, albeit one that is not absolute. (*Trimac, at p 260, cited in Irving, at para 83 (dissent.).* The jurisprudence is clear that I need to balance the interests between the employer's need to test and the employee's right to privacy.

136. The employer's goal in the testing was deterrence, as well as compliance with occupational health and safety legislation. Not all employees at the Mill were tested that day. Only those employees who were on shift, were operating or were required to be capable of operating the clamp trucks, and had access to that smoke room on that day and in that time-frame were tested. The company made the decision to proceed with post-incident / reasonable cause testing of those employees. The employees were only tested for marijuana, as it was only marijuana use that was suspected. The supervisor made his report and investigation and the testing followed.

137. Those making the decision to test must be accorded a degree of deference and not held to a standard of perfection (*Weyerhaeuser 2*), and the employer needs to be given "substantial latitude" to investigate a safety event. What is reasonable to investigate must be judged based on the circumstances of each case and what was realistic at the time.

138. Some practical considerations of what constitutes a "reasonable decision to test" include whether testing can take place within the window period that tells us the sample will provide useful results (*Elk Valley)* In *Weyerhaeuser # 2*, drug

paraphernalia and drugs were found on site, but the decision to test was set aside. In *Weyerhaeuser 2*, the arbitrator held that circumstantial evidence, including the presence of drugs and drug paraphernalia, can establish reasonable cause to test, but in the specific circumstances of that case, the arbitrator held that finding drugs or paraphernalia s*implicter* didn't justify testing employees absent some other evidence that it can corroborate in respect to the likelihood of a person's drug use or possession (at para 78). In the within case however, there was further evidence in addition to the presence of the drugs and drug paraphernalia on site: (i) the anonymous call to Mr. Murphy that someone was smoking in the #2 paper shed; (2) the smell that marijuana had been smoked recently and (3) the presence of roaches in the clandestine smoke room.

139. A similar scenario was spelled out in *Canadian National Railway v CAW* and cited in *Weyerhaeuser*. There, arbitrator Picher provided an example of circumstantial evidence that could provide a factual basis upon which meaningful inferences could be drawn. He said,

> Suppose, for example, that a supervisor enters a warehouse where four individuals are working. The smell of marijuana is clearly detectable and an extinguished "roach" is found. All four employees deny any use of the drug while at work. If, the following day or perhaps even the following week, each of the employees concerned takes a drug test by urinalysis, and one produces a positive result, the combination of circumstantial evidence including the odour, the finding of a discarded "roach" and the positive drug test of only one of the four employees would, at a minimum, constitute a factual basis upon which meaningful inferences could be drawn, on the civil standard of probabilities."
>
> (*Weyerhaeuser 2* citing *Canadian National Railway v. CAW – Canada* – Picher arb (2000) 95 lac (4TH) 341 (Can Arb) at para 194)

140. Having determined that the policies themselves are not a breach of any provision of the collective agreement, the next question is whether the drug testing done pursuant to the policies was a breach of the agreement or the laws of the province, so as to make them "illegal" and whether they were impermissible random drug testing.

141. Much of the argument brought forward by the union in its submissions was by way of written submission read aloud at the hearing. The submissions appear to have been written based on facts alleged by the union, but not supported by the agreed statement of facts or the evidence presented by the employer at the hearing. The union noted in its submissions that the facts as the union saw them when drafting its arguments differed significantly from some of the agreed facts put forward jointly by the parties at the commencement of the hearing. Where there was any dispute between the facts relied upon by the union in its submissions and the agreed

statement of facts, I have accepted the agreed facts as the facts upon which this decision is based and not on facts alleged in its representations.

142. Additionally, the employer brought further evidence, through Mr. Murphy and Ms. Hennebury which contradicted many of the assertions brought forward in the union's arguments in support of its allegations that this was "random" drug testing and that it was impermissible or illegal.

143. The union did not bring evidence that contradicted the evidence of those individuals called by the employer. Where there was a question or clarification on cross-examination, such was made by the witnesses. The witnesses appeared truthful, thorough, and candid in their evidence. They did not contradict themselves, each other, or the agreed facts. Their evidence served to supplement the agreed facts.

144. The union brought no argument or facts to counter the employer's assertion that the shipping section is a safety-sensitive workplace. All employees in that area either operated, or, in the case of the one individual who was not operating a clamp truck, could be called upon to operate the clamp truck at any time during their shift. There was no question in this hearing that all employees who were tested were working in a safety-sensitive area.

145. The union's jurisprudence pertaining to post-incident testing is helpful in providing discussion surrounding the employee's right to privacy and where the employee's rights and interests must yield to the employer's rights or interests in order for drug or alcohol testing to be justified (*Compass Minerals*, paragraph 62). The test becomes whether there was a reasonable basis for suspecting impairment (*Compass Minerals).* While the union argued the employer failed to balance the employer's interest in investigating an incident and the privacy and bodily integrity interests of the employees who are to be tested, I disagree. The incident the employer was investigating was the report of smoking in the paper shed. To investigate, the safety supervisor and a witness attended the space where the smoking had been reported and smelled cigarette smoke and marijuana. Then, they found roaches on the floor and in soft drink cans, intermingled with cigarette butts. There was no specific evidence of how many roaches were found, but the photograph of the contents of the cans shows the presence of at least ten roaches in the cans. As testified by Mr. Murphy, and confirmed by FIT for Work, they contained marijuana.

146. The employer did not know if one roach or part of one had been smoked, or if all had been smoked. The employer did know that it was responsible, under OHS legislation, to ensure the safety of its employees while they were working. None of the witnesses who testified a had any training in recognizing signs of impairment from marijuana. They called FIT for Work

147. The jurisprudence articulates that it may be appropriate to consider whether there was the potential for serious injury or damage, and whether such potential was proximate to the demand in order to test (*Weyerhaeuser I* at para 176. *Elk Valley*

Coal at para 26, *Fording Coal* at paras 41-42, *Compass Minerals* at para 62, and *Atco* at paras 50-52.). In this case, the employer knew someone was using marijuana at the workplace contrary to the drug and alcohol policy. Eighteen of the total 21 shipping employees who were assigned work in that area on that day were also assigned duties on a clamp truck to drive and load paper onto a ship that day. The potential for serious injury or damage from an intoxicated driver driving a clamp truck was therefore proximate to the demand to test.

148. The Union's argument is that the drug and alcohol policy and the duty to provide a safe workplace still has to have a level of accountability to the employees being tested. It was the union's argument that the presence of cannabis in the workplace does not mean that the employees were impaired, it doesn't mean that someone used it on site, and it doesn't mean that someone brought it to this site. Respectfully, the union's argument on this point does not accord with the facts. The uncontroverted evidence was that Mr. Murphy smelled smoke, it was not just tobacco smoke, it had a "distinct odour" that led him to believe cannabis was being smoked on the premises. He then discovered the room off the lunch room, and in that room, he found evidence that marijuana had been brought into the workplace and smoked there - there were marijuana cigarettes on the floor of the smoke room and in the soda can ashtrays. This is not a case of an employer finding drugs in the workplace and random testing all employees. This is a case where the employer smelled very recent use of drugs and found the remains of drugs that had been used in the workplace and tested those employees who had use of that particular lunch room on that particular day at that particular time and who were operating motor vehicles. The employer had a reasonable basis for suspecting impairment.

149. A thorough review of the 20 cases submitted by the employer and similar quantity submitted by the union reveals that none of them has discussed the balance between the employer trying to maintain a safe workplace under the provisions of the OHSA and the individual employee's right to privacy. The OHSA mandates a safe workplace. That legislation is binding on all involved – the employer and the employees. Section 4 states that an Employer "shall ensure, where it is reasonably practicable, the health, safety and welfare of his or her workers." As discussed above, they have discussed the balance between the employer's right to maintain a safe workplace with an employee's right to privacy, albeit the liability attributed to supervisors and employers, including personal consequences such as hefty fines and potential jail time for supervisors and companies who fail to abide by the provisions of OSHA and associated regulations more clearly articulate the dire consequences faced by employers and their managers who do fail to ensure the workplace is safe for all employees.

150. This was not a random test of all employees at corner brook pulp and paper. It was specific testing of the 18 shipping employees plus one inward and one in finishing utility who were authorized to be in that shipping area in that shed using that lunchroom on that day, and their supervisor. While the agreed statement of facts noted "there may have been other people assigned duties in the area" there was no

evidence brought to suggest any other employees were assigned duties in that area on that morning or that anyone else was seen in the area. The testing demand was for all employees on duty in the shipping department up to the point that the marijuana smoke and roaches had been found that day.

151. As discussed above, the union cited *Irving* (para 33) and *Nanticoke* (para 101) in its rebuke of "universal random testing" and reiterated that subjecting employees to a drug test when there is no reasonable cause to do so or in the absence of an incident is outside any legitimate employer interest, including deterrence and the enforcement of safe practices. I find this argument difficult to reconcile with the circumstances in the within case for the reasons articulated above. The employer has a legitimate interest in ensuring the safety of its employees and is duty-bound under the OHS legislation to do so. It is a criminal offence, codified in the Criminal Code, to operate a motorized vehicle, such as a clamp truck, while containing levels of THC in the blood stream of specified levels. This is to protect the public from impaired drivers.

152. The occupational health and safety act and its regulations put a heavy onus on the employer, on the supervisor, and on fellow employees: they shall ensure, where it is reasonably practicable, the health, safety and welfare of the workers. I fail to see how the employer, in such circumstances, would not have a legitimate interest in ensuring that its employees were not working alongside at least one fellow employee who, on a balance of probabilities, had been smoking marijuana prior to driving a clamp truck in the workplace.

153. As highlighted by the union, there is one part of the evidence and argument presented by the employer that is a loose end: the employer returned the workers to work once all employees had been tested. There was little evidence given at the hearing as to why the employees were returned to work after the last test was conducted at approximately 16:00 that afternoon. We are able to conclude from the evidence that seven hours had passed from the time the smoke was reported to Mr. Murphy to the time the last test was concluded at 16:00. We also know that while the employees were being tested, they were being observed by the individual who was trained in testing for intoxication as a result of drugs or alcohol. The only evidence we were given as to any outward signs of intoxication of the employees was that the tester did not notify the employer's representatives of anything that was "alarming or noteworthy" in her observations of the employees being tested, knowing that they were being returned to work.

154. The union argued that the employer ought to have taken statements from the employees prior to testing. Presumably, the argument is that the employees should have been asked questions or given post incident interviews instead of being tested, arguing that using drug testing as an investigative tool does not justify post-incident testing. However, the incident in this case was the report of the smell of smoke, and then the discovery that someone had been smoking drugs on the premises. No one individual was caught "red handed", but the employer was able to narrow the

group to the 21 individuals in shipping. While it has been held that it is unlawful for an employer or substance abuse policy to require drug or alcohol testing of every employee at a workplace following an incident in a workplace, this case is again different on its facts. There were a limited number of employees who were authorized to be in that space at the time the cigarette and marijuana smoke was smelled there and they were almost all either operating a motor vehicle or required to be capable of operating one at all times material to the discovery. The testing was not overly broad – it was limited to only those individuals who were authorized to be there, had access to the lunch room, and were operating or required to be able to step in an operate the clamp trucks. This gives close spatial and temporal proximity between when and where the cannabis was consumed and the workers who were tested.

155. Testing demands are fact-driven and done in accordance with the circumstances presented on a case-by-case basis and in some cases, testing is a reasonable response, and a permissible line of inquiry as part of the investigative process. There is no doubt that the employer has to establish on a balance that the drug and alcohol policy is a *bona fide* occupational requirement. The standard for adjudicating workplace human rights claims has been articulated by the Supreme Court of Canada in *BCGSEU v. British Columbia* [1993] 3 S.C.R. 3 ("Meiorin"). It must be shown:

(1) That the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) That the employer adopted a particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and

(3) That the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

(*Meiorin*, at paragraph 54)

156. The performance of the job here requires being able to safely drive a clamp truck and carry rolls of paper up to 1300kg through the paper shed onto a ship. A standard that an employee is not to be driving while intoxicated is a purpose rationally connected to the performance of driving a motor vehicle and a *bona fide* occupational requirement.

157. This was not a case where the employer is trying to alter off-duty non-work- related drug use in order to reduce or eliminate risk of accident in the workplace. Such attempts have been held to have been unlawful by Labor Relations Boards, Arbitrators, and courts (see *Sarnia Cranes Ont LRB, [1999] OLRB rep May June*

479] and others). In this case, there was a real suggestion that someone had been using drugs at the workplace, and that use was recent enough that Mr. Murphy could smell the smoke when he went to the lunch room.

158. The employer disputes the union's allegation that post-incident testing amounts to *de facto* random testing. The arbitral jurisprudence has upheld workplace policies that do not contain a precise definition of incident or accident that would trigger drug testing. Arbitrator Picher in *Imperial Oil* provides an analysis of the reality of this workplace:

> The Company is responsible for administering a highly safety sensitive working environment. Arbitral jurisprudence recognizes that it can legitimately utilize drug testing in post-accident or post-incident situations, as a means of investigating what may have occurred… (at para 132)

159. In *HPEO* (*Hibernia Platform Employers' Organization v. CEP Local 2021* 2018 C.L.L.C. 220-054, 295 ACWS (3d) 164 (NLCA) the arbitrator had concluded that there were reasonable explanations for an incident involving errors on a helicopter manifest (the incident) without the need to conduct alcohol and drug testing as a reasonable line of inquiry. The board's decision was clear that an individualized assessment must occur before testing. The court of appeal upheld the decision that extent of investigation necessary before ordering testing would depend on individual circumstances of the incident. The arbitrator held, and the court of appeal upheld the reasoning, that the employer "could have and should have conducted a minimal investigation as to the likely cause and whether the employee's actions contributed to the incident." Part of that "minimal investigation" was suggested by the arbitrator to ask the employees about the discrepancy in the passenger manifest first.

160. The facts of this case are much different than those of *HPEO*. Here, the employer investigated the incident by immediately attending the site where the anonymous tip indicated someone had been smoking contrary to the smoking policy, smelled marijuana smoke and cigarette smoke, found the clandestine room, searched the room, took samples of what was in the room and sent them for testing, and then gathered all employees who had been required to operate clamp trucks and had access to that room that shift for testing. The employer's investigation here determined that there was marijuana in the workplace and that it had been smoked in the workplace that morning by someone working that shift. If an employee has smuggled marijuana onto a worksite where they have been clearly and unequivocally advised by the drug and alcohol policy that there is zero tolerance for such substances (except noting "employees who have medical prescriptions for medication to treat an existing condition may use or possess such drugs or substances only where they have received clearance from the Company nurse…"), and have been clearly and unequivocally advised by the policy that "violation of such rule will ordinarily result in termination of employment," is it reasonable to

expect that that same employee will simply admit in an interview that they were the one who had done so? I agree with the employer that it is impractical to expect any answer than "no" to the question" did you smoke dope before you hopped on your clamp truck this morning?" Having engaged in the level of deception necessary to build the clandestine smoke room in which to smoke the cannabis away from the sanctioned smoking areas on site, to have then installed a heater and a light and extension cords and two benches, one would expect the deception to carry through any inquiry asking the employees whether they had brought cannabis onto the site and smoked it. There was no video surveillance on site, so there was no video to review. The person who reported the smoking remained anonymous, so there was no witness evidence to interview. The only way the employer could ascertain whether any of is drivers was potentially intoxicated while driving on the premises was to test the drivers.

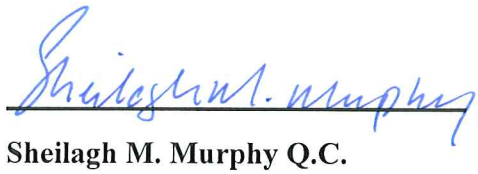
CONCLUSION

161. The employees' right to privacy is well settled. However, this right to privacy must be balanced with the rights of the other workers on shift to go to work in a safety sensitive worksite without the added risk that someone among them is driving while intoxicated when the employer has reasonable suspicion that they are.

162. The drug and alcohol policy, while unilaterally implemented and not part of the collective agreement, satisfies the requirements of *KVP (supra)* and is a rule, regulation, and instruction for the workplace, in keeping with the management rights provision of the Collective Agreement. It therefore applies to these employees.

163. The employer balanced its duty to use its due diligence under *OHSA* to ensure that the employees would be safe in the workplace with the privacy rights of the employees. Only those employees in the restricted area where the marijuana was smoked that day and who were operating or were required to be able to operate motor vehicles in that area of the workplace were tested. They were tested for THC only. The testing was done after the employer had reasonable grounds to test. Given the specific circumstances of this case, I would deny the grievance and uphold the employer's decision to test these employees in this circumstance.

Dated this 31st day of May, 2021



Sheilagh M. Murphy Q.C.
Arbitrator