BOOK OF AUTHORITIES FOR SUBMISSIONS OF THE POWER WORKERS' UNION ON THE DRAFT REGULATORY DOCUMENT 2.2.4 TO THE CANADIAN NUCLEAR SAFETY COMMISSION

VOLUME 2

REGARDING REGULATORY DOCUMENT, REGDOC-2.2.4, Fitness for Duty

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COLLINS v. R.

Dickson C.J.C., McIntyre, Chouinard *, Lamer, Wilson, Le Dain and La Forest JJ.

Heard: May 27, 1986
Judgment: April 9, 1987
Docket: No. 17937

* Chouinard J. took no part in the judgment

Counsel: *G.A. Goyer*, for appellant.
S.D. Frankel and *D.J. Avison*, for respondent.

Subject: Criminal; Constitutional; Public

Headnote

Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Charter remedies — Exclusion of evidence

Criminal Law --- Search and seizure — Unreasonable search and seizure

Statutes --- Interpretation — Role of court — Bilingual legislation

Civil liberties and human rights — Enforcement under the Charter of Rights and Freedoms — Remedies — Exclusion of evidence — Police officer grabbing accused by throat in process of searching for drugs — Evidence as to grounds for officer's belief under s. 10(1) of Narcotic Control Act improperly excluded at trial — In absence of evidence as to grounds of officer's belief, search unreasonable and admission of evidence bringing administration of justice into disrepute.

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Criminal law — Search and seizure — Warrantless searches — Police officer grabbing accused by throat in process of searching for drugs — Evidence as to grounds for officer's belief under s. 10(1) of Narcotic Control Act improperly excluded at trial — In absence of evidence as to grounds of officer's belief, search unreasonable and admission of evidence bringing administration of justice into disrepute.

Members of the R.C.M.P. drug squad, who were conducting a surveillance of the accused and her husband, observed the accused in a pub. One of the officers identified himself to the accused as a police officer and then grabbed her by the throat to prevent her from swallowing potential evidence. The officer and the accused fell to the floor. The officer observed an item in the accused's hand which proved to be a balloon containing heroin. At trial, the accused sought to have the evidence of the accused's possession of the heroin excluded on the basis that it had been obtained in violation of the accused's right to be secure against unreasonable search. On a voir dire held to determine the admissibility of the evidence, the accused's counsel objected to the admission of evidence about to be presented by the officer as hearsay and the Crown failed to establish the grounds for the officer's belief that the accused was in possession of drugs. The trial judge held that the officer did not come within s. 10 of the Narcotic Control Act as a belief on reasonable grounds had not been established and, accordingly, that the search was unlawful and in violation of the accused's rights under s. 8 of the Charter. Notwithstanding this finding, he held that the admission of the evidence would not bring the administration of justice into disrepute. The evidence was admitted and the accused convicted. The accused's appeal to the Court of Appeal was dismissed and a further appeal was taken to the Supreme Court of Canada.

Held:

Appeal allowed; new trial ordered.

Per LAMER J. (DICKSON C.J.C., WILSON and LA FOREST JJ. concurring: For evidence to be excluded pursuant to s. 24(2) of the Charter, the applicant must show, on a balance of probabilities, that a right or freedom guaranteed by the Charter has been infringed or denied, that the evidence was obtained in violation of that right and that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

Where the right alleged to have been infringed is the right to be secure against unreasonable search and the applicant establishes that a search was conducted without a warrant, the burden shifts to the Crown to show, on a balance of probabilities, that the search was reasonable. A search will be reasonable only if it was authorized by law, if the law itself was reasonable and if it was carried out in a reasonable manner. As the constitutionality of s. 10(1) of the Narcotic Control Act was not at issue, the questions to be determined in this case were whether the officer was acting under the authority of s. 10 and whether the search itself was reasonable. As the Crown had failed to meet the onus of showing that there were reasonable grounds for the officer's belief as to the presence of drugs, the trial judge was correct in concluding that the search was unreasonable as it was unlawful and carried out with unnecessary violence. However, as the failure of the Crown to adduce evidence of the officer's belief was due to an unfounded objection as to the admissibility of hearsay, a new trial should be ordered on the basis that the judge had either failed to make a ruling or made an incorrect ruling on the admissibility of the officer's evidence. As well, the accused should not receive the benefit of the unfounded objection.

In determining whether the admission of evidence obtained as a result of an unreasonable search would bring the administration of justice into disrepute, the test is whether admission of the evidence would bring the administration of justice into disrepute in the eyes of the reasonable man, dispassionate and fully apprised of the circumstances of the case. The factors to be considered include those which affect the fairness of the trial, those relating to the seriousness of the Charter violation and those which relate to the effect of excluding the evidence. The "community shock" test is not determinative of admissibility of evidence obtained in violation of Charter rights. In the context of a Charter violation, the threshold for exclusion of evidence is lower as it involves a violation of the most important law of the land. In addition, consideration of the French version of s. 24(2) indicates that the section is to be interpreted as requiring the exclusion of evidence that is capable of bringing the administration of justice into disrepute. In this case, although the evidence obtained by the unreasonable search was real evidence and its admission would not result in an unfair trial and the exclusion of the evidence would allow an individual found guilty of a relatively serious offence at trial to evade conviction which itself could bring the administration of justice into disrepute, the search was a flagrant and serious violation of the rights of the

accused. In the absence of an explanation of the officer's grounds, the administration of justice would be brought into greater disrepute by the admission of the evidence than by its exclusion. Accordingly, unless the grounds for a reasonable belief on the part of the officer were established during the new trial, the evidence must be excluded.

Per LE DAIN J.: Assuming that the officer did not have grounds for a reasonable belief that the accused was in possession of a narcotic, in the circumstances of this case the admission of the evidence would bring the administration of justice into disrepute.

Per MCINTYRE J. (dissenting): Even assuming that the search in this case was unreasonable, the evidence obtained should not have been excluded under s. 24(2) of the Charter. Applying the standard of the reasonable man, dispassionate and fully apprised of the circumstances of the case, the admission of the evidence would not bring the administration of justice into disrepute.

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Considered in dissent:

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Canadian Charter of Rights and Freedoms

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Narcotic Control Act, R.S.C. 1970, c. N-1

s. 10(1)

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Morissette, "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do" (1984), 29 McGill L.J. 521, pp. 529-31, 533, 538.

Appeal from British Columbia Court of Appeal, [1983] 5 W.W.R. 43, 33 C.R. (3d) 130, 5 C.C.C. (3d) 141, 148 D.L.R. (3d) 40, 5 C.R.R. 1, affirming 3 C.R.R. 79, [1983] W.C.D. 061, [1983] B.C.W.L.D. 1180, dismissing accused's appeal from conviction on charge of possession of narcotic for purpose of trafficking.

***McIntyre J.* (dissenting):**

1 I have had the advantage of reading the reasons for judgment prepared in this appeal by my colleague, Lamer J. I accept and adopt his statement of facts. I accept as well his statement of the question for decision, that is, was the search conducted by the police officer unreasonable and, if so, having regard to all the circumstances, would the admission of the evidence bring the

administration of justice into disrepute? I am unable, however, with deference to my colleague's views, to reach the same conclusion.

2 For the purposes of this appeal, I will accept with some hesitation the finding of the trial judge that the search was unreasonable [3 C.R.R. 79, [1983] W.C.D. 061, [1983] B.C.W.L.D. 1180]. It then becomes necessary to decide whether the evidence obtained by the search should have been admitted or rejected under the provisions of s. 24(2) of the Canadian Charter of Rights and Freedoms. In deciding this question, I am content to adopt the judgment of Seaton J.A. in the Court of Appeal in the case at bar, now reported in [1983] 5 W.W.R. 43, 33 C.R. (3d) 130, 5 C.C.C. (3d) 141, 148 D.L.R. (3d) 40, 5 C.R.R. 1. In my view, he has correctly stated the principles upon which this issue must be decided. I would, accordingly, adopt his result and dismiss the appeal.

3 With the exception of his conclusion, there is little, if anything, inconsistent in the judgment of Seaton J.A. with what my colleague, Lamer J., has said up to the point where he discusses his approach to the question of how a court should determine, in accordance with s. 24(2) of the Charter, whether the admission of evidence would bring the administration of justice into disrepute. It is with respect to that aspect of my colleague's judgment that a divergence in our views appears. With the very greatest deference to my colleague, I would not approve of a test so formulated. I would prefer the less formulated approach of Seaton J.A., who said at p. 151:

> Disrepute in whose eyes? That which would bring the administration of justice into disrepute in the eyes of a policeman might be the precise action that would be highly regarded in the eyes of a law teacher. I do not think that we are to look at this matter through the eyes of a policeman or a law teacher, or a judge for that matter. I think that it is the community at large, including the policeman and the law teacher and the judge, through whose eyes we are to see this question. It follows, and I do not think this is a disadvantage of the suggestion, that there will be a gradual shifting. I expect that there will be a trend away from admission of improperly obtained evidence.
>
> I do not suggest that the courts should respond to public clamour or opinion polls. I do suggest that the views of the community at large, developed by concerned and thinking citizens, ought to guide the courts when they are questioning whether or not the admission of evidence would bring the administration of justice into disrepute.

In this, I take it that Seaton J.A. in deciding the question has adopted an approach similar to that of the reasonable man, so well known in the law of torts. This is by no means a perfect test, but one which has served well and which has, by its application over the generations, led to the development of a serviceable body of jurisprudence from which has emerged a set of rules generally consistent with what might be termed social attitudes. I would suggest that such an approach, developing rules and principles on a case-by-case basis, will produce an acceptable standard for the application of s. 24(2) of the Charter.

4 This view has judicial support in the words of Seaton J.A., referred to above, and in the words of Esson J.A. in the British Columbia Court of Appeal in *R. v. Strachan* (1986), 49 C.R. (3d) 289, 24 C.C.C. (3d) 205, 25 D.L.R. (4th) 567, 21 C.R.R. 193. Speaking for the court, he said, at p. 236:

> It may be, as some have contended, that the so-called "community shock" test for applying s. 24(2) is not a completely satisfactory basis for deciding whether the admission of evidence will bring the administration of justice into disrepute. But it surely cannot be right to decide that issue without consideration for the concerns of and prevailing views in the community. Some commentators have expressed the view that this will put the decision in the hands of "red necks", which is [sic] in this context seems to mean those who have not studied the subject at a graduate level. By that logic, we should not leave to juries the most serious issues in criminal cases. But we do and the Charter requires that to be done. One of the virtues of the jury system is to require community values to be reflected in the decision-making process. As that ideal way of reflecting community values is not available in relation to the question whether to exclude, it may be appropriate to have regard to such legendary devices as "the reasonable man" or "right thinking people generally". If due regard is had to community values, the remedy of exclusion will likely be confined to those relatively rare cases where there is some real reason for describing a denial as flagrant, and in which exclusion would not unduly prejudice the public interest in law enforcement.

Further support from the academic world may be found in the words of Yves-Marie Morissette, "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do" (1984), 29 McGill L.J. 521, at p. 538:

> Instead of reiterating unconvincing appeals to evanescent community views, Canadian judges should concentrate on what they do best: finding within themselves, with cautiousness and impartiality, a basis for their own decisions, articulating their reasons carefully and accepting review by a higher court where it occurs. A convenient and longstanding legal fiction exists for the purposes of judicial dialectics: the reasonable man, whether it be the man on the Clapham omnibus or, perhaps today in Canada, the career-woman on the Voyageur bus. One commendable feature of this concept is its coherence. Judges may disagree among themselves on what the reasonable man would do in any given case, but in the end the courts never disagree *with* the reasonable man. They are, in reality, the reasonable man. The question should be: "*Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case*?" If in due course the reasonable man takes into account the findings of opinion polls, so be it, but for the time being section 24(2) should remain entirely within the control of the courts. (emphasis added)

5 I do not suggest that we should adopt the "community shock" test or that we should have recourse to public opinion polls and other devices for the sampling of public opinion. I do not suggest that we should seek to discover some theoretical concept of community views or standards on this question. I do suggest that we should adopt a method long employed in the common law courts and, by whatever name it may be called, apply the standard of the reasonable man. The question should be as stated by Yves Morissette, above, "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?" I am aware that the trial judge appeared to apply the community shock test. However, it is clear from the passage quoted above that Seaton J.A., in expressing his approval and dismissing the appeal, was in essence adopting the test of the reasonable man. I would observe as well that Esson J.A. in *Strachan*, supra, in accepting the need for a consideration of community values brought in the reasonable man.

6 Applying this test to the case at bar, I am led to the conclusion that the administration of justice would not fall into disrepute by the admission of this evidence. This is not a case where the search revealed a concealed capsule or two of heroin, such as one might have for personal use. Here, the appellant, with heroin in her hand contained in a balloon, was found in a public bar among other people. In my view, the admission of this evidence on a trial for possession of narcotics for the purpose of trafficking would not — in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case — bring the administration of justice into disrepute. The circumstances of the case include the events described by Nemetz C.J.B.C., at p. 143:

> The facts are not in dispute. Constables Rodine and Woods of the drug section of the R.C.M.P. were on duty at Gibsons, a small community near Vancouver. They took up a surveillance-post near a pub in the village. There they saw the appellant and another woman seated at a table. A short time later the pair were joined by Richard Collins and another man. About 15 minutes later, Collins and the stranger left the pub and drove in a car to a trailer-park a short distance from the pub. The police followed them. They searched the car and there found heroin, some multicoloured balloons and other paraphernalia. Richard Collins was arrested. At 4.15 p.m., Constables Rodine and Woods returned to the pub. The appellant and her companion were still there.

The police then entered the bar and found heroin in the possession of the appellant, not concealed but in her hand in a public place. I express no view as to the cogency or weight of this evidence but, in my view, a reasonable man would not be offended at the thought that on the issue of possession for the purpose of trafficking the trier of fact should be permitted to consider it. I would dismiss the appeal.

***Lamer J.* (*Dickson C.J.C., Wilson* and *La Forest JJ.* concurring):**

7 The appellant, Ruby Collins, was seated in a pub in the town of Gibsons when she was suddenly seized by the throat and pulled down to the floor by a man who said to her "police officer". The police officer, then noticing that she had her hand clenched around an object, instructed her to let go of the object. As it turned out, she had a green balloon containing heroin.

8 It is common knowledge that drug traffickers often keep their drugs in balloons or condoms in their mouths so that they may, when approached by the Narcotics Control Agent, swallow the drugs without harm and recoup them subsequently. The "throat hold" is used to prevent them from swallowing the drugs.

9 The issue is whether the evidence obtained under these circumstances is to be excluded under s. 24(2) of the Charter.

The Facts

10 Constables Rodine and Woods of the R.C.M.P. Drug Squad at Vancouver attended at Gibsons to assist the Gibsons detachment in dealing with a "heroin problem". They commenced a surveillance at 11:00 a.m. at the Ritz Motel. Ruby Collins and her husband Richard were observed moving their belongings from one room to another and going to and from a car parked in front of their room. The officers ceased their surveillance at noon.

11 At 2:50 p.m. the officers entered the Cedars Pub, where they observed Ruby Collins seated at a table with two other people. Richard Collins and another person joined the first group at 3:35 p.m. At 3:50 p.m., Richard Collins and one of the others left the pub and the officers followed them. They arrested Richard Collins and the other man at a nearby trailer court. Richard Collins was searched and was found to be in possession of heroin.

12 The officers returned to the pub at 4:15 p.m. They observed Ruby Collins sitting with another woman at a different table. Constable Woods went directly to Ruby Collins. He testified:

> A. As I approached I quickened my pace. I then grabbed ahold of Mrs. Collins. At that time my impression was that she'd be under arrest. I grabbed her by the throat to prevent her from swallowing any evidence that may be there. In the process we had gone to the floor, taken her off the chair. We had gone to the floor. I observed her at that time move her hand away from her body. I observed a green item in that hand. It was clenched and just a piece of it was showing out. I asked her to open her hand and leave the item on the floor which she did and I subsequently seized a green balloon which had a knot on the top of it. I then picked Mrs. Collins from the floor, handcuffed her, and removed her outside.
>
> Q. Did you say anything to her at the time you seized her by the throat?
>
> A. Police officer. I stated that I was a police officer at that time.

The force used by Constable Woods was "considerable".

Legislation

13 The search of Ruby Collins was purportedly authorized by s. 10(1) of the Narcotic Control Act, R.S.C. 1970, c. N-1, as amended, as that section read prior to the amendments of December 1985:

> 10. (1) A peace officer may, at any time,
>
> (*a*) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed;
>
> (*b*) search any person found in such place; and
>
> (*c*) seize and take away any narcotic found in such place, any thing in such place in which he reasonably suspects a narcotic is contained or concealed, or any other thing by means of or in respect of which he reasonably believes an offence under this Act has been committed or that may be evidence of the commission of such an offence.

14 The relevant provisions of the Canadian Charter of Rights and Freedoms are ss. 8 and 24:

> 8. Everyone has the right to be secure against unreasonable search and seizure.
>
> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The Proceedings

Trial

15 Ruby Collins was charged with possession of heroin for the purpose of trafficking. At the beginning of her trial before Judge Wong of the County Court [3 C.R.R. 79, [1983] W.C.D. 061, [1983] B.C.W.L.D. 1180], her counsel requested that a voir dire be conducted under s. 24

of the Charter to determine whether the fact that heroin was found in her possession should be admitted. He argued that the evidence should be excluded because it was obtained in a manner that infringed her right to be secure against unreasonable search and because, having regard to all of the circumstances of this case, the admission of that evidence into these proceedings would bring the administration of justice into disrepute.

16 Examined in chief, Constable Woods related the observations I have narrated. Under cross-examination, he admitted that nothing he had *observed* had aroused his suspicion that she was handling drugs or that drugs were on her person. The Crown re-examined the constable and sought to establish the basis of his suspicion, but the following exchange occurred:

> MR. WALLACE (appearing for the Crown):
>
> Q. Yes. Constable Woods, you said in answer to a question by Mr. Martin that the object, the sighting of the object in Ruby Collins' hand confirmed your suspicions?
>
> A. That's correct.
>
> Q. Where — when did you formulate those suspicions?
>
> A. They were prior to arriving at Gibsons. We were advised —
>
> MR. MARTIN (appearing for the appellant): That's hearsay, your honour. Anything what [sic] he was advised other than that is hearsay and that's certainly outside the ambit of my cross-examination, your honour.
>
> MR. WALLACE: Q. It was prior to your arrival in Gibsons?
>
> A. That's correct.
>
> MR. WALLACE: No further questions.

The Crown thus did not establish the basis for the constable's suspicion.

17 On this evidence, the trial judge made the following finding of fact [at p. 82]:

> Prior to this date, both accused were not personally known to Constables Rodine and Woods. There was no untoward behaviour on the part of either accused observed by the police during the surveillance, and both officers admit that they only had a suspicion that the accused were carrying heroin.

He thus concluded that Constable Woods did not come within s. 10 of the Narcotic Control Act as this suspicion, because of its lack of footing, did not constitute a belief on reasonable grounds.

He found the search unlawful and therefore unreasonable and in violation of the appellant's rights under s. 8 of the Charter.

18 However, relying mainly on the undersigned's judgment in *Rothman v. R.*, [1981] 1 S.C.R. 640, 20 C.R. (3d) 97, 25 C.R. (3d) 97, 59 C.C.C. (2d) 30, 121 D.L.R. (3d) 578, 35 N.R. 485 [Ont.], he ruled that the accused failed to satisfy him that the evidence should be excluded under s. 24(2). The evidence was admitted and she was found guilty.

The Court of Appeal

19 The British Columbia Court of Appeal unanimously dismissed her appeal: [1983] 5 W.W.R. 43, 33 C.R. (3d) 130, 5 C.C.C. (3d) 141, 148 D.L.R. (4th) 40, 5 C.R.R. 1.

20 Nemetz C.J.B.C. dealt first with the reasonableness of the search. Referring to this court's decision in *Eccles v. Bourque*, [1975] 2 S.C.R. 739, [1975] 1 W.W.R. 609, 27 C.R.N.S. 325, 19 C.C.C. (2d) 129, 50 D.L.R. (3d) 753, 3 N.R. 259 [B.C.] he found that reasonable and probable grounds can be based on hearsay, and he stated at p. 144:

> The judge, if pressed by Crown counsel, could have allowed the constable to state what, aside from his observation, caused his suspicions. However, he was not so pressed. Accordingly, we do not know what this officer had learned from others to arouse his suspicion. In my opinion, it was for the Crown to lay the groundwork to show what knowledge the police had. They failed to do so in direct examination and failed to pursue the point during the re-examination. Accordingly, it cannot now be said on what the constable's suspicion was based.

He then concluded on the first issue [p. 144]:

> The judge found that on the evidence before him this was an unreasonable search. I cannot say that he erred on this point.

21 The Chief Justice also agreed with the trial judge that the evidence should not be excluded. He more or less followed the trial judge's reasoning and concluded at p. 146:

> Without justifying the use of the throat-hold as a general practice, I cannot say that the judge erred in the circumstances of this case.

22 Seaton J.A. doubted the correctness of the finding that the search was unreasonable, but he found the evidence in any event admissible. At the outset he stated (p. 149):

> Section 24(2) of the Charter has rejected extreme answers. No longer is all evidence admissible, regardless of the means by which it was obtained. Nor, on the other hand, is all improperly obtained evidence inadmissible. A middle ground has been chosen, but not the middle ground of discretion that has been chosen in many jurisdictions: see G.L. Peiris' "The

> Admissibility of Evidence Obtained Illegally: A Comparative Analysis", 13 Ottawa L. Rev. 309 (1981). Where has our Charter placed the Canadian law?

He then reviewed the American case law in the field. Chief Justice Nemetz in his judgment has referred to this review as being "admirable". I cannot but agree and I am grateful to Seaton J.A. and unconditionally endorse his analysis of the American experience at pp. 151-54. Drawing on this experience he then made the following statements, with which I am in general agreement:

> — It is not open to the courts in Canada to exclude evidence to discipline the police, but only to avoid having the administration of justice brought into disrepute.
>
> — It is the admission, not the obtaining, that is the focus of the attention under our s. 24(2), though the manner of obtaining the evidence is obviously one of the circumstances.
>
> — Evidence improperly obtained is prima facie admissible. The onus is on the person who wishes the evidence excluded to establish the further ingredient: that the admission of the evidence would bring the administration of justice into disrepute.
>
> — Section 24(2) does not confer a discretion on the judge but a duty to admit or exclude as a result of his finding.

He then upheld the trial judge's finding to admit the evidence.

23 In a short concurring judgment, Craig J.A. simply upheld the trial judge's ruling.

Jurisdiction

24 The trial judge's decision to exclude or not to exclude under s. 24(2) of the Charter is a question of law from which an appeal will generally lie: see *R. v. Therens*, [1985] 1 S.C.R. 613 at 653, [1985] 4 W.W.R. 286, 45 C.R. (3d) 97, 32 M.V.R. 153, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 13 C.R.R. 193, 40 Sask. R. 122, 59 N.R. 122, per Le Dain J. However, where the trial judge's decision is based, for instance, on his assessment of the credibility of the witness, that assessment cannot be challenged by way of appeal: see *R. v. De Bot*, Ont. C.A., 8th October 1986 (not yet reported). The exclusion of the evidence in this case did not depend on any such assessment and the Court of Appeal and this court had jurisdiction to hear the appeals.

The Law

25 The appellant seeks the exclusion of evidence that she was in possession of heroin, alleging that the heroin was discovered pursuant to a search which was unreasonable under s. 8 of the Charter. This court in *Therens* held that evidence cannot be excluded as a remedy under s. 24(1) of the Charter, but must meet the test of exclusion under s. 24(2). At first glance, the wording of

s. 24 leads one to conclude that there are three prerequisites to the exclusion of evidence under s. 24(2) of the Charter:

26 1) that the applicant's rights or freedoms, as guaranteed by the Charter, have been infringed or denied,

27 2) that the evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, and

28 3) that, having regard to all the circumstances, the admission of the evidence in the proceedings would bring the administration of justice into disrepute.

29 However, a closer scrutiny leaves me with some queries I do not think I should like to decide on the facts of this case and without the benefit of argument or the views of the courts below. There are at least two problems: must the rights or freedoms infringed or denied under the second prerequisite be those of the applicant, and must the applicant be the accused? For example, if the admission of evidence obtained as a result of the unreasonable search of a third party's home could bring the administration of justice into disrepute, could the accused (if, for example, his right to a fair hearing was thereby infringed) or the third party move under s. 24(2) for the exclusion of evidence? On the facts of this case, because the evidence was obtained as a result of an alleged violation of the applicant's rights and because the applicant is the accused, there are only two issues to be addressed:

30 1) Was the search conducted by the police officer unreasonable?

31 2) If so, having regard to all the circumstances, would the admission of the evidence bring the administration of justice into disrepute?

The reasonableness of the search

32 The appellant, in my view, bears the burden of persuading the court that her Charter rights or freedoms have been infringed or denied. That appears from the wording of s. 24(1) and (2), and most courts which have considered the issue have come to that conclusion: see *R. v. Lundrigan* (1985), 19 C.C.C. (3d) 499, 15 C.R.R. 256, 33 Man. R. (2d) 286 (C.A.), and the cases cited therein, and Gibson, The Law of the Charter: General Principles (1986), p. 278. The appellant also bears the initial burden of presenting evidence. The stan dard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not.

33 The courts have also developed certain presumptions. In particular, this court held in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at 161, (sub nom. *Dir. of Research & Investigation, Combines*

Investigation Branch v. Southam Inc.) [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 41 C.R. (3d) 97, 27 B.L.R. 297, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 84 D.T.C. 6467, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241:

> In *United States v. Rabinowitz*, 339 U.S. 56 (1950), the Supreme Court of the United States had held that a search without warrant was not *ipso facto* unreasonable. Seventeen years later, however, in *Katz*, Stewart J. concluded that a warrantless search was *prima facie* "unreasonable" under the Fourth Amendment. The terms of the Fourth Amendment are not identical to those of s. 8 and American decisions can be transplanted to the Canadian context only with the greatest caution. Nevertheless, I would in the present instance respectfully adopt Stewart J.'s formulation as equally applicable to the concept of "unreasonableness" under s. 8, and would require the party seeking to justify a warrantless search to rebut this presumption of unreasonableness.

This shifts the burden of persuasion from the appellant to the Crown. As a result, once the appellant has demonstrated that the search was a warrantless one, the Crown has the burden of showing that the search was, on a balance of probabilities, reasonable.

34 A search will be reasonable if it is authorized by law, if the law itself is reasonable and if the manner in which the search was carried out is reasonable. In this case, the Crown argued that the search was carried out under s. 10(1) of the Narcotic Control Act, above. As the appellant has not challenged the constitutionality of s. 10(1) of the Act, the issues that remain to be decided here are whether the search was unreasonable because the officer did not come within s. 10 of the Act or whether, while being within s. 10, he carried out the search in a manner that made the search unreasonable.

35 For the search to be lawful under s. 10, the Crown must establish that the officer believed on reasonable grounds that there was a narcotic in the place where the person searched was found. The nature of the belief will also determine whether the manner in which the search was carried out was reasonable. For example, if a police officer is told by a reliable source that there are persons in possession of drugs in a certain place, the officer may, depending on the circumstances and the nature and precision of the information given by that source, search persons found in that place under s. 10, but surely, without very specific information, a seizure by the throat, as in this case, would be unreasonable. Of course, if he is lawfully searching a person whom he believes on reasonable grounds to be a "drug handler", then the "throat hold" would not be unreasonable.

36 Because of the presumption of unreasonableness, the Crown in this case had to present evidence of the officer's belief and the reasonable grounds for that belief. It may be surmised that there were reasonable grounds based on information received from the local police. However, the Crown failed to establish such reasonable grounds in the examination-in-chief of Constable Woods and, as set out earlier, when it attempted to do so on its re-examination, the appellant's

counsel objected. As a result, the Crown never did establish the constable's reasonable grounds. Without such evidence, it is clear that the trial judge was correct in concluding that the search was unreasonable because unlawful and carried out with unnecessary violence.

37 However, the problem is that the objection raised by the appellant's counsel was groundless: this court has held that reasonable grounds can be based on information received from third parties without infringing the hearsay rule (*Eccles v. Bourque*, supra), and the question put to the constable in this case was not outside the ambit of the ground covered in cross-examination. A further problem is that the record does not disclose why the question was not answered: it is not clear whether the trial judge maintained the objection or whether the Crown had reacted to the objection by withdrawing the question. It is worthy of mention that, because a conviction was entered, the Crown could not in any event appeal against the decision.

38 This court has two options. We could resolve the doubt against the Crown, which had the burden of persuasion, and simply proceed on the basis that there was no such evidence. Alternatively, we could order a new trial. I would order a new trial on the basis that the trial judge either made an incorrect ruling or failed to make a ruling and, in any event, the appellant should not, in the particular circumstances of this case, be allowed to benefit from her counsel's unfounded objection.

39 However, before ordering a new trial, we must decide whether we agree with the trial judge and the Court of Appeal that the evidence of the heroin would be admissible regardless of the constable's grounds for the search, for there then would be no point in a new trial and we should dismiss the appeal. As a result, I must determine whether I would exclude the evidence under s. 24(2) on the assumption that Constable Woods testifies that he had not received any further information, thereby leaving matters in that regard as they stand at present on the record.

Bringing the administration of justice into disrepute

40 On the record as it now stands, the appellant has established that the search was unreasonable and violated her rights under s. 8 of the Charter. As Seaton J.A. pointed out in the Court of Appeal, s. 24(2) has adopted an intermediate position with respect to the exclusion of evidence obtained in violation of the Charter. It rejected the American rule excluding all evidence obtained in violation of the Bill of Rights and the common law rule that all relevant evidence was admissible regardless of the means by which it was obtained. Section 24(2) requires the exclusion of the evidence "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

41 At the outset, it should be noted that the use of the phrase "if it is established that" places the burden of persuasion on the applicant, for it is the position which he maintains which must be established. Again, the standard of persuasion required can only be the civil standard of the balance

of probabilities. Thus, the applicant must make it more probable than not that the admission of the evidence would bring the administration of justice into disrepute.

42 It is whether *the admission of the evidence* would bring the administration of justice into disrepute that is the applicable test. Misconduct by the police in the investigatory process often has some effect on the repute of the administration of justice, but s. 24(2) is not a remedy for police misconduct, requiring the exclusion of the evidence if, because of this misconduct, the administration of justice was brought into disrepute. Section 24(2) could well have been drafted in that way, but it was not. Rather, the drafters of the Charter decided to focus on the admission of the evidence in the proceedings, and the purpose of s. 24(2) is to prevent having the administration of justice brought into *further disrepute* by the admission of the evidence in the proceedings. This further disrepute will result from the admission of evidence that would deprive the accused of a fair hearing, or from judicial condonation of unacceptable conduct by the investigatory and prosecutorial agencies. It will also be necessary to consider any disrepute that may result from the exclusion of the evidence. It would be inconsistent with the purpose of s. 24(2) to exclude evidence if its exclusion would bring the administration of justice into greater disrepute than would its admission. Finally, it must be emphasized that even though the inquiry under s. 24(2) will neces sarily focus on the specific prosecution, it is the long-term consequences of regular admission or exclusion of this type of evidence on the repute of the administration of justice which must be considered: see on this point Gibson, above, p. 245.

43 The concept of disrepute necessarily involves some element of community views, and the determination of disrepute thus requires the judge to refer to what he conceives to be the views of the community at large. This does not mean that evidence of the public's perception of the repute of the administration of justice, which Professor Gibson suggested could be presented in the form of public opinion polls (above, pp. 236-47), will be determinative of the issue (see *Therens*, supra, pp. 653-54). The position is different with respect to obscenity, for example, where the court must assess the level of tolerance of the community, whether or not it is reasonable, and may consider public opinion polls: *R. v. Prairie Schooner News Ltd.* (1970), 75 W.W.R. 585, 12 Cr. L.Q. 462, 1 C.C.C. (2d) 251 at 266 (Man. C.A.), cited in *Towne Cinema Theatres Ltd. v. R.*, [1985] 1 S.C.R. 494 at 513, [1985] 4 W.W.R. 1, 37 Alta. L.R. (2d) 289, 45 C.R. (3d) 1, 18 C.C.C. (3d) 193, 18 D.L.R. (4th) 1, 61 A.R. 35, 59 N.R. 101. It would be unwise, in my respectful view, to adopt a similar attitude with respect to the Charter. Members of the public generally become conscious of the importance of protecting the rights and freedoms of accused only when they are in some way brought closer to the system either personally or through the experience of friends or family. Professor Gibson recognized the danger of leaving the exclusion of evidence to uninformed members of the public when he stated at p. 246:

> The ultimate determination must be with the courts, because they provide what is often the only effective shelter for individuals and unpopular minorities from the shifting winds of public passion.

The Charter is designed to protect the accused from the majority, so the enforcement of the Charter must not be left to that majority.

44 The approach I adopt may be put figuratively in terms of the reasonable person test proposed by Professor Yves-Marie Morissette in his article "The Exclusion of Evidence under the *Canadian Charter of Rights and Freedoms*: What to Do and What Not to Do" (1984), 29 McGill L.J. 521, at p. 538. In applying s. 24(2), he suggested that the relevant question is: "Would the admission of the evidence bring the administration of justice into disrepute in the eyes of a reasonable man, dispassionate and fully apprised of the circumstances of the case?" The reasonable person is usually the average person in the community, but only when that community's current mood is reasonable.

45 The decision is thus not left to the untrammelled discretion of the judge. In practice, as Professor Morissette wrote [at p. 538], the reasonable person test is there to require of judges that they "concentrate on what they do best: finding within themselves, with cautiousness and impartiality, a basis for their own decisions, articulating their reasons carefully and accepting review by a higher court where it occurs." It serves as a reminder to each individual judge that his discretion is grounded in community values and, in particular, long-term community values. He should not render a decision that would be unacceptable to the community when that community is not being wrought with passion or otherwise under passing stress due to current events. In effect, the judge will have met this test if the judges of the Court of Appeal will decline to interfere with his decision, even though they might have decided the matter differently, using the well-known statement that they are of the view that the decision was not unreasonable.

46 In determining whether the admission of evidence would bring the administration of justice into disrepute, the judge is directed by s. 24(2) to consider "all the circumstances". The factors which are to be considered and balanced have been listed by many courts in the country (see in particular Anderson J.A. in *R. v. Cohen* (1983), 33 C.R. (3d) 151, 5 C.C.C. (3d) 156, 148 D.L.R. (3d) 78, 5 C.R.R. 181 (B.C.C.A.); Howland C.J.O. in *R. v. Simmons* (1984), 45 O.R. (2d) 609, 39 C.R. (3d) 223, 26 M.V.R. 168, 11 C.C.C. (3d) 193, 7 D.L.R. (4th) 719, 8 C.R.R. 333, 7 C.E.R. 159, 3 O.A.C. 1 (C.A.); Philp J.A. in *R. v. Pohoretsky; R. v. Ramage; R. v. L.A.R.*, [1985] 3 W.W.R. 289, 45 C.R. (3d) 209, 32 M.V.R. 61, 18 C.C.C. (3d) 104, 17 D.L.R. (4th) 268, 14 C.R.R. 328, 32 Man. R. (2d) 291 (C.A.); MacDonald J. in *R. v. Dyment* (1986), 49 C.R. (3d) 338, 38 M.V.R. 222, 25 C.C.C. (3d) 120, 26 D.L.R. (4th) 399, 20 C.R.R. 82, 57 Nfld. & P.E.I.R. 210, 170 A.P.R. 210 (P.E.I.C.A.), and Lambert J.A. in *R. v. Gladstone*, [1985] 6 W.W.R. 504, 47 C.R. (3d) 289, 22 C.C.C. (3d) 151, 18 C.R.R. 99 (B.C.C.A.)), and by Seaton J.A. in this case. The factors that the courts have most frequently considered include:

— What kind of evidence was obtained?

— What Charter right was infringed?

— Was the Charter violation serious or was it of a merely technical nature?

— Was it deliberate, wilful or flagrant, or was it inadvertent or committed in good faith?

— Did it occur in circumstances of urgency or necessity?

— Were there other investigatory techniques available?

— Would the evidence have been obtained in any event?

— Is the offence serious?

— Is the evidence essential to substantiate the charge?

— Are other remedies available?

I do not wish to be seen as approving this as an exhaustive list of the relevant factors, and I would like to make some general comments as regards these factors.

47 As a matter of personal preference, I find it useful to group the factors according to the way in which they affect the repute of the administration of justice. Certain of the factors listed are relevant in determining the effect of the admission of the evidence on the fairness of the trial. The trial is a key part of the administration of justice, and the fairness of Canadian trials is a major source of the repute of the system and is now a right guaranteed by s. 11(*d*) of the Charter. If the admission of the evidence in some way affects the fairness of the trial, then the admission of the evidence would *tend* to bring the administration of justice into disrepute and, subject to a consideration of the other factors, the evidence generally should be excluded.

48 It is clear to me that the factors relevant to this determination will include the nature of the evidence obtained as a result of the violation and the nature of the right violated and not so much the manner in which the right was violated. Real evidence that was obtained in a manner that violated the Charter will rarely operate unfairly for that reason alone. The real evidence existed irrespective of the violation of the Charter and its use does not render the trial unfair. However, the situation is very different with respect to cases where, after a violation of the Charter, the accused is conscripted against himself through a confession of other evidence emanating from him. The use of such evidence would render the trial unfair, for it did not exist prior to the violation and it strikes at one of the fundamental tenets of a fair trial, the right against self-incrimination. Such evidence will generally arise in the context of an infringement of the right to counsel. Our decisions in *Therens*, supra, and *Clarkson v. R.*, [1986] 1 S.C.R. 383, 50 C.R. (3d) 289, 25 C.C.C. (3d) 207, 26 D.L.R. (4th) 493, 19 C.R.R. 209, 69 N.B.R. (2d) 40, 177 A.P.R. 40, 66 N.R. 114, are illustrative of this. The use of self-incriminating evidence obtained following a denial of the right to counsel will generally go to the very fairness of the trial and should generally be excluded.

Several Courts of Appeal have also emphasized this distinction between pre-existing real evidence and self-incriminatory evidence created following a breach of the Charter: see *Dumas v. R.* (1985), 41 Alta. L.R. (2d) 348, 23 C.C.C. (3d) 366, 66 A.R. 137 (C.A.); *R. v. Strachan* (1986), 49 C.R. (3d) 289, 24 C.C.C. (3d) 205, 25 D.L.R. (4th) 567, 21 C.R.R. 193 (B.C.C.A.), and *R. v. Dairy Supplies Ltd.*, Man. C.A., 13th January 1987 [now reported [1987] 2 W.W.R. 661, 44 Man. R. (2d) 275]. It may also be relevant, in certain circumstances, that the evidence would have been obtained in any event without the violation of the Charter.

49 There are other factors which are relevant to the seriousness of the Charter violation and thus to the disrepute that will result from judicial acceptance of evidence obtained through that violation. As Le Dain J. wrote in *Therens* at p. 652:

> The relative seriousness of the constitutional violation has been assessed in the light of whether it was committed in good faith, or was inadvertent or of a merely technical nature, or whether it was deliberate, wilful or flagrant. Another relevant consideration is whether the action which constituted the constitutional violation was motivated by urgency or necessity to prevent the loss or destruction of the evidence.

I should add that the availability of other investigatory techniques and the fact that the evidence could have been obtained without the violation of the Charter tend to render the Charter violation more serious. We are considering the actual conduct of the authorities and the evidence must not be admitted on the basis that they could have proceeded otherwise and obtained the evidence properly. In fact, their failure to proceed properly when that option was open to them tends to indicate a blatant disregard for the Charter, which is a factor supporting the exclusion of the evidence.

50 The final relevant group of factors consists of those that relate to the effect of excluding the evidence. The question under s. 24(2) is whether the system's repute will be better served by the admission or the exclusion of the evidence, and it is thus necessary to consider any disrepute that may result from the exclusion of the evidence. In my view, the administration of justice would be brought into disrepute by the exclusion of evidence essential to substantiate the charge, and thus the acquittal of the accused, because of a trivial breach of the Charter. Such disrepute would be greater if the offence was more serious. I would thus agree with Professor Morissette that evidence is more likely to be excluded if the offence is less serious (above, pp. 529-31). I hasten to add, however, that if the admission of the evidence would result in an unfair trial, the seriousness of the offence could not render that evidence admissible. If any relevance is to be given to the seriousness of the offence in the context of the fairness of the trial, it operates in the opposite sense: the more serious the offence, the more damaging to the system's repute would be an unfair trial.

51 Finally, a factor which, in my view, is irrelevant is the availability of other remedies. Once it has been decided that the administration of justice would be brought into disrepute by the

admission of the evidence, the disrepute will not be lessened by the existence of some ancillary remedy: see Gibson, above, at p. 261.

52 I would agree with Howland C.J.O. in *Simmons*, supra, that we should not gloss over the words of s. 24(2) or attempt to substitute any other test for s. 24(2). At least at this early stage of the Charter's development, the guidelines set out are sufficient and the actual decision to admit or exclude is as important as the statement of any test. Indeed, the test will only take on concrete meaning through our disposition of cases. However, I should at this point add some comparative comment as regards the test I enunciated in *Rothman*, supra, a pre-Charter confession case dealing with the resort to "tricks", which was coined in the profession as the "community shock test". That test has been applied to s. 24(2) by many courts, including the lower courts in this case. I still am of the view that the resort to tricks that are not in the least unlawful, let alone in violation of the Charter, to obtain a statement should not result in the exclusion of a free and voluntary statement unless the trick resorted to is a dirty trick, one that shocks the community. That is a very high threshold, higher, in my view, than that to be attained to bring the administration of justice into disrepute in the context of a violation of the Charter.

53 There are two reasons why the threshold for exclusion under s. 24(2) is lower. The first, an obvious one, is that, under s. 24(2), there will have been a violation of the most important law in the land, as opposed to the absence of any unlawful behaviour as a result of the resort to tricks in *Rothman*.

54 The second reason is based on the language of s. 24(2). Indeed, while both the English text of s. 24(2) and *Rothman* use the words "*would* bring the administration of justice into disrepute", the French versions are very different. The French text of s. 24(2) provides "*est susceptible de* déconsidérer l'administration de la justice", which I would translate as "*could* bring the administration of justice into disrepute". This is supportive of a somewhat lower threshold than the English text. As Dickson J. (as he then was) wrote in *Hunter v. Southam Inc.*, supra, at p. 157:

> Since the proper approach to the interpretation of the *Charter of Rights and Freedoms* is a purposive one, before it is possible to assess the reasonableness or unreasonableness of the impact of a search or of a statute authorizing a search, it is first necessary to specify the purpose underlying s. 8: in other words, to delineate the nature of the interests it is meant to protect.

As one of the purposes of s. 24(2) is to protect the right to a fair trial, I would favour the interpretation of s. 24(2) which better protects that right, the less onerous French text. Most courts which have considered the issue have also come to this conclusion: see Gibson at pp. 63 and 234-35. Section 24(2) should thus be read as "the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings *could* bring the administration of justice into disrepute". This is a less onerous test than *Rothman*, where the

French translation of the test in our reports, "ternirait l'image de la justice", clearly indicates that the resort to the word "would" in the test "would bring the administration of justice into disrepute" means just that.

Conclusion

55 As discussed above, we must determine in this case whether the evidence should be excluded on the record as it stands at present.

56 The evidence obtained as a result of the search was real evidence and, while prejudicial to the accused as evidence tendered by the Crown usually is, there is nothing to suggest that its use at the trial would render the trial unfair. In addition, it is true that the cost of excluding the evidence would be high: someone who was found guilty at trial of a relatively serious offence will evade conviction. Such a result could bring the administration of justice into disrepute. However, the administration of justice would be brought into greater disrepute, at least in my respectful view, if this court did not exclude the evidence and dissociate itself from the conduct of the police in this case which, always on the assumption that the officer merely had suspicions, was a flagrant and serious violation of the rights of an individual. Indeed, we cannot accept that police officers take flying tackles at people and seize them by the throat when they do not have reasonable and probable grounds to believe that those people are either dangerous or handlers of drugs. Of course, matters might well be clarified in this case if and when the police officer is offered at a new trial an opportunity to explain the grounds, if any, that he had for doing what he did. But if the police officer does not then disclose additional grounds for his behaviour, the evidence must be excluded.

57 I would allow the appeal and order a new trial.

***Le Dain J.*:**

58 I agree with Mr. Justice Lamer that the appeal [from case reported at [1983] 5 W.W.R. 43, 33 C.R. (3d) 130, 5 C.C.C. (3d) 141, 148 D.L.R. (4th) 40, 5 C.R.R. 1, affirming 3 C.R.R. 79, [1983] W.C.D. 061, [1983] B.C.W.L.D. 1180] should be allowed and a new trial ordered. Assuming, as we must on the present record, that the police officer did not have grounds for a reasonable belief that the accused was in possession of a narcotic, I am in agreement with the conclusion that, having regard to all the circumstances, and in particular the relative seriousness of the violation of the right guaranteed by s. 8 of the Charter to be secure against unreasonable search, the admission of the evidence would bring the administration of justice into disrepute. I am also in general agreement with what Mr. Justice Lamer says concerning the nature of the test under s. 24(2) of the Charter and the factors to be weighed, but I do not wish to be understood as necessarily subscribing to what is said concerning the nature and relative importance under s. 24(2) of the factor which he refers to as the effect of the admission of the evidence on the fairness of the trial. Since, as Mr. Justice Lamer indicates, it is not necessary to consider this factor in the present case, I prefer to reserve my opinion with respect to it. I am concerned about the possible implications for such

matters as self-incrimination and confession, aspects of fairness to which Mr. Justice Lamer refers and which are the subject of special provision in the Charter or in well established rules of law. I am also concerned as to whether there is a basis in s. 24(2) for the view that, to the extent this factor is relevant, it should generally lead to the exclusion of the evidence.

Appeal allowed; new trial ordered.

Footnotes

Tab 15

para 78

2009 SCC 32
Supreme Court of Canada

R. v. Grant

2009 CarswellOnt 4104, 2009 CarswellOnt 4105, 2009 SCC 32, [2009] 2 S.C.R. 353, [2009] A.C.S. No. 32, [2009] S.C.J. No. 32, 193 C.R.R. (2d) 1, 245 C.C.C. (3d) 1, 253 O.A.C. 124, 309 D.L.R. (4th) 1, 391 N.R. 1, 66 C.R. (6th) 1, 82 M.V.R. (5th) 1, 84 W.C.B. (2d) 241, 97 O.R. (3d) 318 (note), J.E. 2009-1379, EYB 2009-161617

Donnohue Grant, Appellant and Her Majesty The Queen, Respondent and Director of Public Prosecutions of Canada, Attorney General of British Columbia, Canadian Civil Liberties Association and Criminal Lawyers' Association (Ontario), Interveners

McLachlin C.J.C., Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: April 24, 2008
Judgment: July 17, 2009
Docket: 31892

Proceedings: reversed *R. v. Grant* (2006), 2006 CarswellOnt 3352, 81 O.R. (3d) 1, 209 C.C.C. (3d) 250, 38 C.R. (6th) 58, 143 C.R.R. (2d) 223, 213 O.A.C. 127 ((Ont. C.A.))**Proceedings: affirmed *R. v. Grant* (2004), 2004 CarswellOnt 8783 (Ont. C.J.)Proceedings: affirmed *R. v. Grant* (2004), 2004 CarswellOnt 8779 (Ont. C.J.)**

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Michael Brundrett, Margaret A. Mereigh, for Intervener, Attorney General of British Columbia
Don Stuart, Graeme Norton, for Intervener, Canadian Civil Liberties Association
Marlys A. Edwardh, Jessica R. Orkin, for Intervener, Criminal Lawyers' Association (Ontario)

Subject: Criminal; Constitutional; Human Rights

Headnote

Criminal law --- Charter of Rights and Freedoms — Arbitrary detention or imprisonment [s. 9]

Two plain-clothes police officers, patrolling area with four high schools and known swarmings, robberies and drug activity, saw 18-year-old accused walk past them in manner they considered suspicious — Officers asked uniformed officer in area to speak with accused — Uniformed officer stood in accused's path, told him to keep his hands in front of him, and began questioning him — Plain-clothes officers arrived and stood behind uniformed officer — Accused admitted he had small amount of marijuana and loaded firearm — Accused was charged with five firearms offences — Accused brought motion to exclude firearm from evidence at trial on basis of violation of right not to be arbitrarily detained under s. 9 of Canadian Charter of Rights and Freedoms — Trial judge dismissed motion, finding no detention, and he convicted accused — Accused's appeal was dismissed based on appeal court's finding that trial judge mischaracterized conversation with accused, that accused was in fact detained arbitrarily, but that evidence was properly admitted — Accused appealed — Appeal allowed in part on other grounds — Officer's preliminary questioning was legitimate exercise of police power, but questioning then took on character of interrogation and became inherently intimidating to accused — Evidence supported accused's contention that reasonable person in his position would conclude that his right to choose how to act had been removed by police, therefore accused was detained — Officers agreed that they had no legal grounds or reasonable suspicion to detain accused, therefore detention was arbitrary — While impact of infringement of accused's Charter rights was significant, officers were operating in circumstances of legal uncertainty and mistake was neither deliberate nor egregious, therefore effect of admitting evidence of firearm would not greatly undermine public confidence in rule of law — Evidence was properly admitted.

Criminal law — Charter of Rights and Freedoms — Charter remedies [s. 24] — Exclusion of evidence

Two plain-clothes police officers, patrolling area with four high schools and known swarmings, robberies and drug activity, saw 18-year-old accused walk past them in manner they considered suspicious — Officers asked uniformed officer in area to speak with accused — Uniformed officer stood in accused's path, told him to keep his hands in front of him, and began questioning him — Plain-clothes officers arrived and stood behind uniformed officer — Accused admitted he had small amount of marijuana and loaded firearm — Accused was charged with five firearms offences — Accused brought motion to exclude firearm from evidence at trial on basis of violation of right not to be arbitrarily detained under s. 9 of Canadian Charter of Rights and Freedoms — Trial judge dismissed motion, finding no detention, and he convicted accused — Accused's appeal was dismissed based on appeal court's finding that trial judge mischaracterized conversation with accused, that accused was in fact detained arbitrarily, but that evidence was properly admitted — Accused appealed — Appeal allowed in part on other grounds — In considering s. 24(2) Charter application, court was required to assess and balance effect of admitting evidence on society's confidence in justice system having regard to three factors, including seriousness of Charter-

infringing state conduct, impact of breach on Charter-protected interests of accused, and society's interest in adjudicating case on its merits — Officer's preliminary questioning was legitimate exercise of police power, but questioning then took on character of interrogation and became inherently intimidating to accused — Evidence supported accused's contention that reasonable person in his position would conclude that his right to choose how to act had been removed by police, therefore accused was detained — Officers agreed that they had no legal grounds or reasonable suspicion to detain accused, therefore detention was arbitrary — While impact of infringement of accused's Charter rights was significant, officers were operating in circumstances of legal uncertainty and mistake was neither deliberate nor egregious, therefore effect of admitting evidence of firearm would not greatly undermine public confidence in rule of law — Evidence was properly admitted.

Criminal law --- Offences — Firearms and other weapons — Transfer offences — Transfer without authority

Two plain-clothes police officers, patrolling area with four high schools and known swarmings, robberies and drug activity, saw 18-year-old accused walk past them in manner they considered suspicious — Officers asked uniformed officer in area to speak with accused — Uniformed officer stood in accused's path, told him to keep his hands in front of him, and began questioning him — Plain-clothes officers arrived and stood behind uniformed officer — Accused admitted he had small amount of marijuana and loaded firearm — Accused was charged with five firearms offences, including possession of restricted firearm for purpose of transferring it without legal authority, contrary to s. 100(1) of Criminal Code — Accused appealed — Appeal allowed in part — Parliament did not intend s. 100(1) of Code to address simple movement of firearm from one place to another — Section 100(1) was deemed by Code to be "trafficking offence" — Since conviction under s. 100(1) carried mandatory minimum penitentiary sentence of three years for first-time offender, it was not to be assumed that Parliament intended to deem anyone moving firearm from one place to another without authorization to be weapons trafficker — Accused's offence was serious and potentially dangerous, but evidence did not show that he committed crime of trafficking.

Criminal law --- Offences — Firearms and other weapons — Possession offences — Possession for purpose of weapons trafficking

Droit criminel --- Charte des droits et libertés — Détention ou emprisonnement arbiraire [art. 9]

Deux agents de police en civil, alors qu'ils patrouillaient un quartier où se trouvaient quatre écoles et qui était réputé pour des attaques à main armée en bande, des vols et des activités relatives aux stupéfiants, ont observé l'accusé âgé de 18 ans passer près d'eux d'une manière qui leur semblait suspecte — Agents de police ont demandé à un agent en uniforme des environs de s'adresser à l'accusé — Agent de police en uniforme s'est positionné de façon

à bloquer la route à l'accusé, lui a demandé de garder ses mains devant lui et a commencé à lui poser des questions — Agents de police en civil sont arrivés sur les lieux et se sont placés derrière l'agent de police en uniforme — Accusé a avoué être en possession d'une petite quantité de marijuana et d'une arme à feu chargée — Accusé a été inculpé de cinq infractions relatives aux armes à feu — Accusé a déposé une requête visant à faire exclure l'arme à feu de la preuve déposée lors du procès, alléguant que son droit de ne pas être détenu arbitrairement, prévu à l'art. 9 de la Charte canadienne des droits et libertés, avait été violé — Juge du procès a rejeté la requête, a conclu qu'il n'y avait pas eu de détention et a déclaré l'accusé coupable — Appel interjeté par l'accusé a été rejeté, la cour d'appel en venant à la conclusion que le juge du procès avait commis plusieurs erreurs de qualification au sujet de l'entretien avec l'accusé, que l'accusé avait été, de fait, détenu arbitrairement, mais que l'élément de preuve avait été adéquatement admis — Accusé a formé un pourvoi — Pourvoi accueilli en partie pour d'autres motifs — Interpellation préliminaire de l'agent de police s'inscrivait dans l'exercice légitime des pouvoirs policiers, mais l'interpellation est devenue un interrogatoire et intrinsèquement intimidante pour l'accusé — Preuve étayait l'affirmation de l'accusé qu'une personne raisonnable placée dans sa situation aurait conclu que les policiers l'avaient privée de la liberté de choisir comment agir, par conséquent, l'accusé était en détention — Agents de police ont convenu qu'ils n'avaient pas de motifs légaux ou de soupçons raisonnables pour mettre l'accusé en détention, de sorte que la détention était arbitraire — Incidence de la violation sur les droits garantis à l'accusé par la Charte était importante, mais les agents de police travaillaient dans un contexte d'incertitude juridique, et l'erreur n'était ni délibérée ni inacceptable de sorte qu'admettre l'arme à feu en preuve n'aurait pas pour effet de miner considérablement la confiance du public en la primauté du droit — Élément de preuve a été adéquatement admis en preuve.

Droit criminel --- Charte des droits et libertés — Réparations prévues par la Charte [art. 24] — Exclusion de la preuve

Deux agents de police en civil, alors qu'ils patrouillaient un quartier où se trouvaient quatre écoles et qui était réputé pour des attaques à main armée en bande, des vols et des activités relatives aux stupéfiants, ont observé l'accusé âgé de 18 ans passer près d'eux d'une manière qui leur semblait suspecte — Agents de police ont demandé à un agent en uniforme des environs de s'adresser à l'accusé — Agent de police en uniforme s'est positionné de façon à bloquer la route à l'accusé, lui a demandé de garder ses mains devant lui et a commencé à lui poser des questions — Agents de police en civil sont arrivés sur les lieux et se sont placés derrière l'agent de police en uniforme — Accusé a avoué être en possession d'une petite quantité de marijuana et d'une arme à feu chargée — Accusé a été inculpé de cinq infractions relatives aux armes à feu — Accusé a déposé une requête visant à faire exclure l'arme à feu de la preuve déposée lors du procès, alléguant que son droit de ne pas être détenu arbitrairement, prévu à l'art. 9 de la Charte canadienne des droits et libertés, avait été violé — Juge du procès a rejeté la requête, a conclu qu'il n'y avait pas eu de

détention et a déclaré l'accusé coupable — Appel interjeté par l'accusé a été rejeté, la cour d'appel en venant à la conclusion que le juge du procès avait commis plusieurs erreurs de qualification au sujet de l'entretien avec l'accusé, que l'accusé avait été, de fait, détenu arbitrairement, mais que l'élément de preuve avait été adéquatement admis — Accusé a formé un pourvoi — Pourvoi accueilli en partie pour d'autres motifs — En considérant l'application de l'art. 24(2) de la Charte, le tribunal se devait d'évaluer et de soupeser l'impact qu'aurait l'admission de la preuve sur la confiance de la société envers le système de justice eu égard à trois éléments, y compris la gravité de la conduite attentatoire de l'État, l'incidence de la violation sur les droits de l'accusé garantis par la Charte, et l'intérêt de la société à ce que l'affaire soit jugée au fond — Interpellation préliminaire de l'agent de police s'inscrivait dans l'exercice légitime des pouvoirs policiers, mais l'interpellation est devenue un interrogatoire et intrinsèquement intimidante pour l'accusé — Preuve étayait l'affirmation de l'accusé qu'une personne raisonnable placée dans sa situation aurait conclu que les policiers l'avaient privée de la liberté de choisir comment agir, par conséquent, l'accusé était en détention — Agents de police ont convenu qu'ils n'avaient pas de motifs légaux ou de soupçons raisonnables pour mettre l'accusé en détention, de sorte que la détention était arbitraire — Incidence de la violation sur les droits garantis à l'accusé par la Charte était importante, mais les agents de police travaillaient dans un contexte d'incertitude juridique, et l'erreur n'était ni délibérée ni inacceptable de sorte qu'admettre l'arme à feu en preuve n'aurait pas pour effet de miner considérablement la confiance du public en la primauté du droit — Élément de preuve a été adéquatement admis en preuve.

Droit criminel --- Infractions — Armes à feu et autres types d'armes — Infractions liées au transport — Transport sans autorisation

Deux agents de police en civil, alors qu'ils patrouillaient un quartier où se trouvaient quatre écoles et qui était réputé pour des attaques à main armée en bande, des vols et des activités relatives aux stupéfiants, ont observé l'accusé âgé de 18 ans passer près d'eux d'une manière qui leur semblait suspecte — Agents de police ont demandé à un agent en uniforme des environs de s'adresser à l'accusé — Agent de police en uniforme s'est positionné de façon à bloquer la route à l'accusé, lui a demandé de garder ses mains devant lui et a commencé à lui poser des questions — Agents de police en civil sont arrivés sur les lieux et se sont placés derrière l'agent de police en uniforme — Accusé a avoué être en possession d'une petite quantité de marijuana et d'une arme à feu chargée — Accusé a été inculpé de cinq infractions relatives aux armes à feu, notamment de celle de possession d'une arme à autorisation restreinte en vue de la céder sans autorisation légale, en contravention de l'art. 100(1) du Code criminel — Accusé a formé un pourvoi — Pourvoi accueilli en partie — Il n'était pas dans l'intention du Parlement que l'art. 100(1) du Code ne porte que sur le simple fait de déplacer une arme à feu d'un endroit à un autre — Article 100(1) était considérée en vertu du Code comme créant une « infraction relative au trafic » — Comme une déclaration de culpabilité en vertu de l'art. 100(1) rendait un délinquant dont c'était la première infraction passible d'une

peine minimale obligatoire de trois ans, on ne devait pas supposer que le Parlement avait eu l'intention de considérer tout individu déplaçant une arme à feu d'un endroit à un autre sans autorisation comme un trafiquant d'armes — Infraction reprochée à l'accusé était grave et pouvait présenter un grand danger, mais la preuve n'indiquait pas que ce dernier avait commis l'infraction de trafic.

Droit criminel --- Infractions — Armes à feu et autres armes — Infractions de possession — Possession d'une arme en vue de la céder

The accused was observed by police in an area that was being regularly patrolled due to a history of student assaults, robberies and drug offences occurring over the lunch hour. There were four schools in the area. Two plain-clothes police officers in an unmarked car drove past the accused, who looked at them in an unusually intense manner and "fidgeted" with his coat and pants in a way that aroused their suspicions. A uniformed officer approached the accused, stood on the sidewalk in the accused's direct path, and requested his name and address. The accused provided a provincial health card, and while adjusting his jacket, the officer asked him to keep his hands in front of him. The two plain-clothes officers approached the accused and the uniformed officer, identified themselves as police officers, and stood beside the uniformed officer, further obstructing the accused's way. The uniformed officer then asked the accused if he had anything in his possession that he shouldn't, and the accused admitted to possessing marijuana and a firearm. The officers then arrested and searched the accused, seized the marijuana and loaded revolver, and then advised him of his right to counsel and took him to the police station.

The accused was charged with several firearms offences, including possession of a restricted firearm for the purpose of transferring it without lawful authority, contrary to s. 100(1) of the Criminal Code. At trial, the accused alleged violations of his rights under ss. 8, 9 and 10(b) of the Canadian Charter of Rights and Freedoms. The trial judge held that the officer's inquiries did not amount to a search within the meaning of s. 8 of the Charter, and that the accused was not detained prior to his arrest or, if he was detained, he waived his rights by cooperating. Having found no Charter breach, the trial judge admitted the firearm as evidence, and the accused was convicted of five firearm offences.

On appeal, the court revisited the question of detention, citing several mischaracterizations of events by the trial judge. The appeal judge found the accused was detained before he made his incriminating statements, and since the officers had no reasonable and probable grounds to detain him, the detention was arbitrary and a breach of s. 9 of the Charter. The appeal judge determined that the firearm was derivative evidence, but concluded that the admission of the firearm into evidence would not unduly undermine trial fairness. On the firearms issue, the appeal judge found that the accused's act of moving the gun from one place to another

fell within the definition of "transfer" in s. 84 of the Code, justifying the conviction under s. 100(1) of the Code. The accused appealed.

Held: The appeal was allowed in part.

McLachlin C.J.C., Charron J. (LeBel, Fish, Abella JJ. concurring): The threshold question in this case was whether the accused was detained before he produced the firearm and was arrested. While the accused may not have been physically detained, psychological constraint amounting to detention had been recognized. The officer's preliminary questioning was a legitimate exercise of police powers. Once the encounter changed from ascertaining the accused's identity to determining whether he "had anything he shouldn't", it took on the character of an interrogation and became inherently intimidating. The evidence supported the accused's contention that a reasonable person in his position would conclude that his right to choose how to act had been removed by the police, therefore the accused was detained. The officers agreed at trial that they did not have legal grounds or reasonable suspicion to detain the accused, therefore the detention was arbitrary and in breach of s. 9 of the Charter, as was his s. 10(b) right to counsel. Since the firearm was discovered as a result of statements taken in breach of the Charter, it was derivative evidence. The court was then required to consider whether the evidence was to be excluded under s. 24(2) of the Charter.

The role of the court in considering a s. 24(2) application was to balance three lines of inquiry to determine whether the admission of the evidence would bring the administration of justice into disrepute. While the previous framework had brought a measure of certainty to the s. 24(2) inquiry, the general rule of inadmissibility of all non-discoverable conscriptive evidence was not consistent with the requirement that the court consider "all the circumstances" in determining admissibility. A review of the previous framework led to the conclusion that clarification was required of the criteria relevant to determining when in "all the circumstances", admission of evidence obtained by a Charter breach would bring the administration of justice into disrepute.

Under the revised approach to s. 24(2), the first consideration in whether to exclude evidence was the seriousness of the conduct which led to the discovery of the evidence. The more severe or deliberate the conduct that led to the Charter violation, the more likely the court should be to exclude the evidence to maintain public confidence in the rule of law. This inquiry requires an evaluation of the seriousness of the state conduct that led to the breach. In this case, while the police were in error in detaining the accused, the mistake was understandable, was not done in bad faith, and was neither deliberate nor egregious, therefore the effect of admitting the evidence would not greatly undermine public confidence in the rule of law.

The second consideration was whether the admission of the evidence would bring the administration of justice into disrepute from the perspective of society's interest in respect for Charter rights. The more serious the impact on the accused's interests, the greater the risk that the admission of the evidence could breed public cynicism and bring the administration of justice into disrepute. In this case, the initial Charter violation was arbitrary detention under s. 9, and the second violation was a breach of the accused's s. 10(b) right to counsel. While the impact of the initial breach was not severe, it was more than minimal since it deprived the accused of his freedom to make an informed choice as to how to respond to the police. Furthermore, since discoverability remained a factor in assessing the impact of the breaches on the accused's Charter rights, the fact that the evidence was non-discoverable aggravated the impact of the breach on the accused's interest in being able to make an informed decision on speaking with the police without having the opportunity to seek legal advice. The impact of the infringement of the accused's rights under ss. 9 and 10(b) of the Charter was significant.

The third and final consideration was the effect of admitting the evidence on the public interest in having the case adjudicated on its merits. This required a consideration of the reliability of the evidence and its importance to the proper adjudication of the case. In this case, the gun was highly reliable evidence and was essential to a determination on the merits. Since the officers were operating in circumstances of legal uncertainty, this tipped the balance in favour of admission of the evidence.

On the issue of whether the accused "transferred" the firearm as defined in s. 84 of the Code, it was determined that Parliament did not intend s. 100(1) of the Code to address the simple movement of a firearm from one place to another. While the accused's offence was serious and potentially very dangerous, on the evidence, he did not commit the crime of trafficking, and the appeal on this ground was allowed and an acquittal entered.

Per Binnie J. (concurring in part): The approach by the majority to the definition of "detention" laid too much emphasis on the accused's perception of psychological pressure, and what was also important was an objective assessment of the facts of the encounter divorced from the perception of the parties involved. The finding of detention was not just the product of the accused's perception, filtered through the hypothetical reasonable person, but also of the objective facts of why the encounter was initiated and the other factors surrounding the encounter, whether or not evident to the accused.

Per Deschamps J. (concurring in part): The test for the admission or exclusion of evidence obtained in violation of a Charter right needed to be revisited. A simple test taking into account both the public interest in protection of Charter rights and the public interest in adjudication on the merits was appropriate. Any analysis which focuses on the accused or

the conduct of the state is inappropriate since the purpose is to maintain public confidence in the administration of justice in the long term, and the public interest is best served by the protection of constitutional rights. The proposed changes by the court to the previous s. 24(2) analysis were inconsistent with the purpose of the provision and did not make the rule any clearer or easier to apply, and the objective of the reformulation of the test was not achieved. Furthermore, assessing the seriousness of the offence was as important as determining whether the evidence was reliable or essential.

In this case, since the exchange between the accused and the police lasted only a few minutes, the officers were polite to the accused, and they were motivated by a desire to take a proactive approach in patrolling a school area with problems related to youth crime and safety, the proper conclusion was reached in admitting the gun into evidence.

Des agents de police ont observé l'accusé dans un quartier faisant régulièrement l'objet de surveillance policière puisqu'il avait été le théâtre d'attaques sur des étudiants, de vols et d'infractions liées aux stupéfiants survenus à l'heure du dîner. Il y avait quatre écoles dans les environs. Deux agents de police en civil à bord d'un véhicule banalisé ont passé à côté de l'accusé qui a jeté vers eux un regard particulièrement intense tout en « tripotant » son blouson et son pantalon, de telle sorte qu'il a éveillé leurs soupçons. Un agent de police en uniforme s'est approché de l'accusé, s'est positionné sur le trottoir de façon à bloquer carrément la route à l'accusé et a demandé le nom et l'adresse de ce dernier. L'accusé a présenté une carte d'assurance-maladie provinciale et, alors que l'accusé rajustait son blouson, l'agent de police lui a demandé de garder ses mains devant lui. Les deux agents de police en civil se sont approchés de l'accusé et de l'agent de police en uniforme, se sont identifiés comme agents de police et se sont placés derrière l'agent de police en uniforme de façon à bloquer encore davantage la route à l'accusé. L'agent de police en uniforme a alors demandé à l'accusé s'il avait quelque chose sur lui qu'il ne devrait pas avoir et l'accusé a avoué être en possession de marijuana et d'une arme à feu. Les agents de police ont alors arrêté et fouillé l'accusé, saisi la marijuana et l'arme à feu chargée, puis l'ont informé de son droit d'avoir recours à l'assistance d'un avocat pour finalement l'emmener au poste de police.

L'accusé a été inculpé de plusieurs infractions reliées aux armes à feu, notamment de celle de possession d'une arme à autorisation restreinte en vue de la céder sans autorisation légale, en contravention de l'art. 100(1) du Code criminel. Lors du procès, l'accusé a fait valoir que les droits qui lui sont garantis en vertu des art. 8, 9 et 10b) de la Charte canadienne des droits et libertés avaient été violés. Le juge du procès a conclu que les questions posées par l'agent de police n'équivalaient pas à une fouille visée par l'art. 8 de la Charte, que l'accusé n'avait pas été mis en détention avant son arrestation et que, s'il l'avait été, il avait renoncé à ses droits en répondant aux demandes des policiers. Ayant conclu qu'il n'y avait pas eu violation de la

Charte, le juge du procès a accepté que l'arme à feu soit produite en preuve, et l'accusé a été déclaré coupable de cinq infractions relatives aux armes à feu.

En appel, la cour est revenue sur la question de la détention, faisant référence à plusieurs erreurs de qualification des événements par le juge du procès. Le juge en appel a conclu que l'accusé se trouvait en détention avant de faire ses déclarations incriminantes et, puisque les agents de police n'avaient aucuns motifs raisonnables et probables de le mettre en détention, que la détention était arbitraire et en violation de l'art. 9 de la Charte. Le juge en appel en est venu à la conclusion que l'arme à feu constituait une preuve dérivée mais que l'admission de l'arme à feu en tant qu'élément de preuve ne compromettrait pas indûment l'équité du procès. Sur la question des armes à feu, le juge en appel a conclu que le transport du revolver d'un endroit à un autre par l'accusé entrait dans la définition de « cession » énoncée à l'art. 84 du Code et justifiait la déclaration de culpabilité fondée sur l'art. 100(1) du Code. L'accusé a formé un pourvoi.

Arrêt: Le pourvoi a été accueilli en partie.

McLachlin, J.C.C., Charron, J. (LeBel, Fish, Abella, JJ., souscrivant à leur opinion) : Il fallait commencer par déterminer si l'accusé était en détention avant que l'arme à feu soit découverte et qu'il soit arrêté. Bien que l'accusé n'ait pas été physiquement placé en détention, une contrainte psychologique assimilable à une détention a été reconnue. L'interpellation préliminaire de l'agent de police s'inscrivait dans l'exercice légitime des pouvoirs policiers. Lorsque l'interpellation, qui visait d'abord à contrôler l'identité de l'accusé, est passée à la question de savoir si ce dernier « avait quelque chose sur lui qu'il ne devrait pas avoir », l'interpellation est devenue un interrogatoire, donc intrinsèquement intimidante. La preuve étayait l'affirmation de l'accusé qu'une personne raisonnable placée dans sa situation aurait conclu que les policiers l'avaient privée de la liberté de choisir comment agir, par conséquent, l'accusé était en détention. Les agents de police ont convenu lors du procès qu'ils n'avaient pas de motifs légaux ou de soupçons raisonnables pour mettre l'accusé en détention, de sorte que la détention était arbitraire et contrevenait à l'art. 9 de la Charte ainsi qu'à son droit à l'assistance d'un avocat prévu à l'art. 10b). Comme l'arme à feu a été découverte à la suite de déclarations faites en contravention de la Charte, il s'agissait d'une preuve dérivée. Le tribunal devait ensuite déterminer si la preuve devait être exclue en vertu de l'art. 24(2) de la Charte.

Le rôle du tribunal appelé à trancher une demande fondée sur l'art. 24(2) consistait à procéder à une mise en balance de trois questions pour déterminer si l'admission de la preuve était susceptible de déconsidérer l'administration de la justice. Bien que le précédant cadre d'analyse ait apporté un certain degré de certitude quant à l'examen requis par l'art. 24(2), la règle générale de l'inadmissibilité de tout élément de preuve ayant été obtenu en mobilisant l'accusé contre lui-même et qui ne pouvait être découvert autrement allait à l'encontre de

l'exigence que le tribunal, statuant sur l'admissibilité, prenne en considération « toutes les circonstances ». Un examen du précédant cadre d'analyse a permis de conclure qu'une clarification des facteurs pertinents pour déterminer quand, « eu égard aux circonstances », l'utilisation d'éléments de preuve obtenus par suite d'une violation de la Charte serait « susceptible de déconsidérer l'administration de la justice » était de mise.

En vertu de la nouvelle méthode pour procéder à l'examen requis par l'art. 24(2), le premier élément à prendre en considération relativement à la question de savoir s'il fallait exclure la preuve était la gravité de la conduite ayant mené à la découverte de celle-ci. Plus les gestes ayant entraîné la violation de la Charte étaient graves ou délibérés, plus il était nécessaire que les tribunaux soient en mesure d'exclure la preuve afin de préserver la confiance du public envers le principe de la primauté du droit. Cet examen requiert l'évaluation de la gravité de la conduite ayant donné lieu à la violation. En l'espèce, bien que les agents de police aient commis une erreur en détenant l'accusé, cette erreur était compréhensible, n'avait pas été commise de mauvaise foi et n'était ni délibérée ni inacceptable, par conséquent, l'utilisation de l'élément de preuve en cause n'aurait pas pour effet de miner considérablement la confiance du public en la primauté du droit.

Le deuxième élément à prendre en considération était la question de savoir si l'utilisation d'éléments de preuve était susceptible de déconsidérer l'administration de la justice, dans la perspective de l'intérêt de la société à ce que les droits garantis par la Charte soient respectés. Plus l'atteinte aux intérêts de l'accusé est marquée, plus grand est le risque que le public devienne cynique et que l'administration de la justice soit déconsidérée. En l'espèce, la première violation de la Charte a découlé de la détention arbitraire au sens où il faut l'entendre en vertu de l'art. 9, et la deuxième violation a été le non-respect du droit de l'accusé d'avoir recours à l'assistance d'un avocat prévu à l'art. 10b). Si l'effet de la première violation n'était pas grave, elle n'était pas non plus négligeable en ce sens qu'elle a privé l'accusé de sa liberté de faire un choix éclairé quant à la façon de répondre à la police. De plus, puisque la possibilité de découvrir les éléments de preuve demeurait un facteur d'appréciation de l'incidence des violations des droits de l'accusé en vertu de la Charte, le fait que la preuve n'était pas susceptible d'être découverte aggravait l'incidence de la violation sur l'intérêt de l'accusé à pouvoir décider de façon éclairée s'il allait parler à la police sans avoir eu l'occasion de solliciter des conseils juridiques. L'incidence de la violation sur les droits garantis à l'accusé par la Charte aux art. 9 et 10b) était importante.

Le troisième et dernier élément à prendre en considération était l'impact de l'utilisation de l'élément de preuve sur l'intérêt du public à ce que l'affaire soit jugée au fond. Cela donnait lieu à un examen de la fiabilité des éléments de preuve et leur importance pour que le litige soit tranché de façon adéquate. En l'espèce, le révolver constituait un élément de preuve très

fiable et essentiel à l'instruction sur le fond. Les agents de police travaillaient dans un contexte d'incertitude juridique et cela a fait pencher la balance pour l'utilisation de l'élément de preuve.

Quant à la question de savoir si l'accusé avait « transporté » l'arme à feu au sens de l'art. 84 du Code, il a été conclu qu'il n'était pas dans l'intention du Parlement que l'art. 100(1) du Code ne porte que sur le simple fait de déplacer une arme à feu d'un endroit à un autre. L'infraction reprochée à l'accusé était grave et pouvait présenter un grand danger, mais la preuve indiquait que ce dernier ne s'était pas livré au trafic, et le pourvoi a été accueilli pour ce motif et un acquittement a été prononcé.

Binnie, J. (souscrivant à l'opinion des juges majoritaires en partie) : L'approche des juges majoritaires pour définir le mot « détention » accordait trop d'importance à la perception d'une pression psychologique par l'accusé, et il était aussi important de procéder à une évaluation objective des éléments factuels de l'interpellation, abstraction faite de la perception des parties impliquées. La conclusion à l'effet qu'il y avait eu détention n'était pas uniquement tributaire des perceptions de l'accusé filtrées par les yeux d'une personne raisonnable hypothétique mais aussi des faits objectifs qui ont motivé l'interpellation et d'autres éléments factuels du contact, qu'ils aient été ou non manifestes pour l'accusé.

Deschamps, J. (souscrivant à l'opinion des juges majoritaires en partie) : La grille d'analyse qui doit guider l'admission ou l'exclusion d'un élément de preuve obtenu en violation d'un droit protégé par la Charte devait être revue. Une grille simple, tenant compte à la fois de l'intérêt du public à la préservation des droits protégés par la Charte et de l'intérêt du public à ce que l'affaire soit jugée au fond était valable. Tout examen qui se concentre sur l'accusé ou la conduite des représentants de l'État est inadéquat puisque le but recherché est de maintenir à long terme la confiance du public dans l'administration de la justice, et l'intérêt public est mieux servi lorsque les droits constitutionnels sont protégés. Les changements proposés par la cour à l'examen précédant portant sur l'art. 24(2) allaient à l'encontre de la raison d'être de cette disposition et ne rendaient pas le droit plus compréhensible ou facile à appliquer, et les objectifs visés dans la reformulation des critères n'étaient pas atteints. De plus, l'examen de la gravité de l'infraction revêtait autant d'importance que l'examen du caractère fiable ou essentiel de la preuve.

En l'espèce, étant donné que l'échange entre l'accusé et les agents de police n'a duré que quelques minutes, que les agents de police se sont montrés polis envers l'accusé et qu'ils étaient mus par le désir d'avoir une attitude proactive dans le contexte de la patrouille d'un quartier scolaire où sévissaient de graves problèmes de criminalité et de sécurité chez les jeunes, la conclusion à laquelle on en était arrivé en l'espèce et qui consistait à admettre le revolver en preuve était valable.

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R. v. Shepherd (2007), 2007 CarswellSask 122, 218 C.C.C. (3d) 113, 45 C.R. (6th) 213, 154 C.R.R. (2d) 38, 2007 SKCA 29, [2007] 4 W.W.R. 659, 289 Sask. R. 286, 382 W.A.C. 286, 44 M.V.R. (5th) 8 (Sask. C.A.) — referred to

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R. v. Simmons (1988), 67 O.R. (2d) 63, (sub nom. *Simmons v. R.)* 18 C.E.R. 227, 1988 CarswellOnt 91, 1988 CarswellOnt 968, 66 C.R. (3d) 297, [1988] 2 S.C.R. 495, 55 D.L.R. (4th) 673, 89 N.R. 1, 30 O.A.C. 241, 45 C.C.C. (3d) 296, 38 C.R.R. 252, (sub nom. *Simmons v. R.)* 2 T.C.T. 4102 (S.C.C.) — referred to

R. v. St. Lawrence (1949), [1949] O.R. 215, 93 C.C.C. 376, 1949 CarswellOnt 4, 7 C.R. 464, [1949] O.W.N. 255 (Ont. H.C.) — referred to

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R. v. Suberu (2009), 2009 SCC 33, 2009 CarswellOnt 4106, 2009 CarswellOnt 4107 (S.C.C.) — considered

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R. v. White (1999), [1999] 2 S.C.R. 417, 63 C.R.R. (2d) 1, 1999 CarswellBC 1224, 1999 CarswellBC 1225, 240 N.R. 1, 135 C.C.C. (3d) 257, 24 C.R. (5th) 201, 174 D.L.R. (4th) 111, 7 B.H.R.C. 120, 42 M.V.R. (3d) 161, 123 B.C.A.C. 161, 201 W.A.C. 161 (S.C.C.) — referred to

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Oregon v. Mathiason (1977), 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (U.S. Or.) — referred to

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R. v. Grafe (1987), 22 O.A.C. 280, 1987 CarswellOnt 117, 60 C.R. (3d) 242, 36 C.C.C. (3d) 267 (Ont. C.A.) — referred to

R. v. Mann (2004), 21 C.R. (6th) 1, 241 D.L.R. (4th) 214, 185 C.C.C. (3d) 308, 122 C.R.R. (2d) 189, 324 N.R. 215, [2004] 3 S.C.R. 59, 2004 SCC 52, 2004 CarswellMan 303, 2004 CarswellMan 304, [2004] 11 W.W.R. 601, 187 Man. R. (2d) 1, 330 W.A.C. 1 (S.C.C.) — referred to

R. v. Moran (1987), 21 O.A.C. 257, 1987 CarswellOnt 1116, 36 C.C.C. (3d) 225 (Ont. C.A.) — considered

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R. v. Suberu (2007), 220 O.A.C. 322, 218 C.C.C. (3d) 27, 45 C.R. (6th) 47, 2007 CarswellOnt 430, 2007 ONCA 60, 151 C.R.R. (2d) 135, 85 O.R. (3d) 127 (Ont. C.A.) — referred to

R. v. Suberu (2009), 2009 SCC 33, 2009 CarswellOnt 4106, 2009 CarswellOnt 4107 (S.C.C.) — considered

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Cases considered by *Deschamps J.*:

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Herring v. United States (2009), 129 S.Ct. 695, 77 U.S.L.W. 4047, 172 L.Ed.2d 496 (U.S. Sup. Ct.) — referred to

R. v. Brown (2008), [2008] 6 W.W.R. 17, 55 C.R. (6th) 240, 87 Alta. L.R. (4th) 1, (sub nom. *R. v. Kang-Brown)* 293 D.L.R. (4th) 99, 2008 CarswellAlta 523, 2008 CarswellAlta 524, 2008 SCC 18, (sub nom. *R v. Kang-Brown)* 230 C.C.C. (3d) 289, (sub nom. *R. v. Kang-Brown)* [2008] 1 S.C.R. 456, (sub nom. *R v. Kang-Brown (G.))* 373 N.R. 67, (sub nom. *R. v. Kang-Brown)* 432 A.R. 1, (sub nom. *R. v. Kang-Brown)* 424 W.A.C. 1 (S.C.C.) — referred to

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R. v. Strachan (1986), 49 C.R. (3d) 289, 1986 CarswellBC 446, 24 C.C.C. (3d) 205, 25 D.L.R. (4th) 567, 21 C.R.R. 193 (B.C. C.A.) — referred to

R. v. Suberu (2009), 2009 SCC 33, 2009 CarswellOnt 4106, 2009 CarswellOnt 4107 (S.C.C.) — considered

R. c. Taillefer (2003), *(*sub nom. *R. v. Taillefer)* [2003] 3 S.C.R. 307, *(*sub nom. *R. v. Taillefer)* 114 C.R.R. (2d) 60, *(*sub nom. *R. v. Taillefer)* 179 C.C.C. (3d) 353, *(*sub nom. *R. v. Taillefer)* 233 D.L.R. (4th) 227, *(*sub nom. *R. v. Taillefer)* 313 N.R. 1, 2003 SCC 70, 2003 CarswellQue 2765, 2003 CarswellQue 2766, 17 C.R. (6th) 57 (S.C.C.) — considered

Statutes considered by *McLachlin C.J.C., Charron J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 7 — considered

s. 8 — considered

s. 9 — considered

s. 10 — considered

s. 10(b) — considered

s. 11(c) — considered

s. 13 — considered

s. 24(2) — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 84 — considered

s. 84(1) "transfer" — referred to

s. 86(2) — referred to

s. 99 — referred to

s. 100 — considered

s. 100(1) — considered

s. 100(1)(a) — considered

s. 100(1)(b) — considered

Firearms Act, S.C. 1995, c. 39
Generally — referred to

s. 21 "transfer" — referred to

Statutes considered by *Binnie J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 9 — considered

s. 10 — considered

s. 10(b) — considered

s. 24(2) — considered

Statutes considered by *Deschamps J.*:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 24 — considered

s. 24(1) — considered

s. 24(2) — considered

Words and phrases considered by *McLachlin C.J.C., Charron J.*:

detention

Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

Termes et locutions cités:

détention

La détention visée aux art. 9 et 10 de la *Charte* s'entend de la suspension du droit à la liberté d'une personne par suite d'une contrainte physique ou psychologique considérable. Il y a détention psychologique quand l'individu est légalement tenu d'obtempérer à une demande

contraignante ou à une sommation, ou quand une personne raisonnable conclurait, compte tenu de la conduite de l'État, qu'elle n'a d'autre choix que d'obtempérer.

APPEAL by accused from judgment reported at *R. v. Grant* (2006), 2006 CarswellOnt 3352, 209 C.C.C. (3d) 250, 81 O.R. (3d) 1, 213 O.A.C. 127, 38 C.R. (6th) 58, 143 C.R.R. (2d) 223 (Ont. C.A.), concerning detention under ss. 9 and 10 of *Canadian Charter of Rights and Freedoms*, and test for exclusion of evidence.

POURVOI de l'accusé à l'encontre d'un jugement publié à *R. v. Grant* (2006), 2006 CarswellOnt 3352, 209 C.C.C. (3d) 250, 81 O.R. (3d) 1, 213 O.A.C. 127, 38 C.R. (6th) 58, 143 C.R.R. (2d) 223 (Ont. C.A.), au sujet d'une détention en vertu des art. 9 et 10 de la *Charte canadienne des droits et libertés* et du critère relatif à l'exclusion d'un élément de preuve.

Editor's note: *This case has significant implications for drinking and driving cases, as explicitly noted by the court. In the principal judgment, co-authored by McLachlin C.J.C. and Charron J., the court noted in its criticism of the earlier framework that the results regarding admissibility varied greatly in the case of real evidence and produced anomalous results. The court noted that the admissibility of bodily substances should not depend solely on whether the evidence was conscripted. The admissibility of bodily substances should not be equated with cases involving statements from the accused. The court noted that breath sample evidence tendered on impaired driving charges often suffered the fate of automatic exclusion even where the breach was minor and would not realistically bring the administration of justice into disrepute. The court concluded that bodily evidence such as breath sample evidence, whose method of collection is relatively non-intrusive, will win the day regarding the third line of inquiry — the effect of admitting evidence on the public interest in having a case adjudicated on its merits.*

The Supreme Court of Canada, in reshaping the test for admissibility under s. 24(2) of the Canadian Charter of Rights and Freedoms, went out of its way to use breath cases as a prominent example of a category of case which would benefit from the new three-part test to determine admissibility. While the changes brought about by Bill C-2 to the drinking and driving provisions will continue to be vigorously challenged, the triers hearing traditional arguments regarding the usual defects have been empowered to admit the breath evidence in most cases.

Note de l'éditeur: *Cette décision entraîne d'importantes répercussions pour les affaires de conduite avec les facultés affaiblies, comme la cour l'a expressément indiqué. Dans le jugement principal, co-rédigé par la juge en chef McLachlin et la juge Charron, la cour a souligné dans sa critique du cadre d'analyse précédant que les résultats eu égard à l'admissibilité étaient imprévisibles dans les cas impliquant des éléments de preuve matériels et produisaient des résultats aberrants. La cour a indiqué que l'admissibilité de substances corporelles ne devrait pas dépendre uniquement de la question de savoir si la preuve avait été obtenue en mobilisant l'accusé contre lui-même. L'admissibilité relativement aux substances corporelles ne devrait pas*

être la même que dans les cas impliquant les déclarations de l'accusé. La cour a fait remarquer que les échantillons d'haleine produits en preuve dans des affaires de conduite avec facultés affaiblies ont souvent été écartés automatiquement alors que la violation était mineure et qu'elle n'était pas réellement susceptible de déconsidérer l'administration de la justice. La cour a conclu que la preuve corporelle, par exemple, une preuve d'échantillons d'haleine, dont la méthode de prélèvement est relativement non-intrusive, devrait satisfaire le troisième critère à prendre en considération, soit l'impact de l'admission de la preuve sur l'intérêt public à ce que l'affaire soit jugée au fond.

La Cour suprême du Canada, en reformulant le test de l'admissibilité applicable en vertu de l'art. 24(2) de la Charte canadienne des droits et libertés, s'est efforcée de référer aux affaires mettant en jeu des échantillons d'haleine afin de les montrer comme étant des types de situation pouvant tirer avantage du nouveau test en trois parties sur l'admissibilité. Bien que les changements mis en place par le projet de loi C-2 aux dispositions relatives à la conduite avec les facultés affaiblies continueront d'être vigoureusement contestés, les juges devant qui l'on plaidera les arguments traditionnels en regard des mêmes lacunes ont maintenant à leur disposition le pouvoir d'admettre les échantillons d'haleine dans la plupart des cas. —Murray D. Segal

McLachlin C.J.C., Charron J.:

I. Overview

1 Mr. Grant appeals his convictions on a series of firearms offences, relating to a gun seized by police during an encounter on a Toronto sidewalk. The gun was entered as evidence against Mr. Grant and formed the basis of his convictions. The question on this appeal is whether that evidence was obtained in breach of Mr. Grant's *Charter* rights, and if so, whether the evidence should have been excluded under s. 24(2) of the *Canadian Charter of Rights and Freedoms.*

2 Resolving these questions requires us to revisit two important and contentious areas of criminal law *Charter* jurisprudence. The first is the definition of "detention" under ss. 9 and 10 of the *Charter.* The second is the test for exclusion of evidence obtained in violation of the *Charter* pursuant to s. 24(2).

3 The submissions before us reveal that existing jurisprudence on the issues of detention and exclusion of evidence is difficult to apply and may lead to unsatisfactory results. Without undermining the principles that animate the jurisprudence to date, we find it our duty, given the difficulties that have been pointed out to us, to take a fresh look at the frameworks that have been developed for the resolution of these two issues. We will also consider the subsidiary issue that arises in this case: the meaning of "transfer" of a weapon for the purposes of ss. 84, 99 and 100 of the *Criminal Code*, R.S.C. 1985, c. C-46.

II. Facts

4 The encounter at the centre of this appeal occurred at mid-day on November 17, 2003, in the Greenwood and Danforth area of Toronto. With four schools in the area and a history of student assaults, robberies, and drug offences occurring over the lunch hour, the three officers involved in the encounter were on patrol for the purposes of monitoring the area and maintaining a safe student environment. Two of the officers, Constables Worrell and Forde, were dressed in plainclothes and driving an unmarked car. Although on patrol, their primary task was to visit the various schools to determine if there were persons on school property who should not have been there — either non-students or students from another school. The third officer, Constable Gomes, was in uniform and driving a marked police car. On "directed patrol", he had been tasked with maintaining a visible police presence in the area in order to provide student reassurance and to deter crime during the high school lunch period.

5 Mr. Grant, a young black man, was walking northbound on Greenwood Avenue when he came to the attention of Constables Worrell and Forde. As the two officers drove past, Cst. Worrell testified that the appellant "stared" at them in an unusually intense manner and continued to do so as they proceeded down the street, while at the same time "fidgeting" with his coat and pants in a way that aroused their suspicions. Given their purpose for being in the area and based on what he had just seen, Cst. Worrell decided that "maybe we should have a chat with this guy and see what's up with him". Cst. Worrell wanted to know whether Mr. Grant was a student at one of the schools they were assigned to monitor, and, if he was not, whether he was headed to one of the schools anyway. Noticing Cst. Gomes parked on the street ahead of Mr. Grant, and in light of his uniformed attire, the two plainclothes officers suggested to Cst. Gomes that he "have a chat" with the approaching appellant to determine if there was any need for concern.

6 Cst. Gomes then got out of his car and initiated an exchange with Mr. Grant, while standing on the sidewalk directly in his intended path. The officer asked the appellant "what was going on", and requested his name and address. In response, the appellant provided a provincial health card. At one point, the appellant, behaving nervously, adjusted his jacket, prompting the officer to ask him to "keep his hands in front of him". By this point, the two other officers had returned and parked on the side of the street.

7 Cst. Worrell testified on cross-examination that he and Cst. Forde pulled up because he got a funny feeling based on Mr. Grant's way of looking over at them, looking around "all over the place", and adjusting himself. On direct examination he said that "[h]e still seemed to be, I don't know, looking a bit nervous the way he was looking around, looking at us, looking around when speaking to Officer Gomes. And at this time, I suggested to my partner, you know, I don't think it would hurt if we just go up to Officer Gomes and just stand by, just to make sure everything was okay". Thus, after a brief period observing the exchange from their car, the two officers approached the pair on the sidewalk, identified themselves to the appellant as police officers by flashing their

badges, and took up positions behind Cst. Gomes, obstructing the way forward. The exchange between Cst. Gomes and Mr. Grant subsequent to the arrival of the two officers was as follows:

> Q. Have you ever been arrested before?
>
> A. I got into some trouble about three years ago.
>
> Q. Do you have anything on you that you shouldn't?
>
> A. No. (Pause.) Well, I got a small bag of weed.
>
> Q. Where is it?
>
> A. It's in my pocket.
>
> Q. Is that it?
>
> A. (Male puts his head down.) Yeah. Well, no.
>
> Q. Do you have other drugs on you?
>
> A. No, I just have the weed, that's it.
>
> Q. Well, what is it that you have?
>
> A. I have a firearm.

8 At this point, the officers arrested and searched the appellant, seizing the marijuana and a loaded revolver. They then advised Mr. Grant of his right to counsel and took him to the police station.

III. Judgments Below

9 At trial, Mr. Grant alleged violations of his rights under ss. 8, 9 and 10(*b*) of the *Charter*. The trial judge held that the officers' inquiries did not amount to a search within the meaning of s. 8. He further concluded that Mr. Grant was not detained prior to his arrest or, if he was detained, he waived his rights by cooperating with the officers' requests. Having found no *Charter* breach, he had no difficulty admitting the firearm: 2004 CarswellOnt 8779 (Ont. C.J.). Mr. Grant was convicted of five firearms offences, including possession of a restricted firearm for the purpose of transferring it without lawful authority (s. 100(1) of the *Criminal Code*).

10 In the Ontario Court of Appeal, Laskin J.A. held that the trial judge's conclusion on the question of detention was undermined by several mischaracterizations as to what had occurred, thereby entitling the court to revisit the issue. He concluded that a detention had crystallized during

the conversation with Cst. Gomes, before the appellant made his incriminating statements. Because the officers had no reasonable grounds to detain the appellant, the detention was arbitrary and a breach of s. 9 was established. Laskin J.A. did not deal with s. 10(*b*) and found no breach of s. 8. On the question of exclusion under s. 24(2), Laskin J.A. determined that the firearm was "derivative" evidence emanating from a self-incriminatory statement and would very often be excluded on that basis alone. However, after a review of recent developments in the s. 24(2) jurisprudence, Laskin J.A. concluded that the admission of the gun would not unduly undermine trial fairness. He held that the repute of the administration of justice would be damaged more by the exclusion of the gun than by its admission. He therefore held that the gun was properly admitted into evidence. On the firearms issue, Laskin J.A. held that Mr. Grant's act of moving the gun from one place to another fell within the definition of "transfer" in s. 84 of the *Code*, justifying the conviction under s. 100(1). He therefore dismissed the appeal: (2006), 81 O.R. (3d) 1 (Ont. C.A.).

IV. Analysis

A. Breach of the Charter

11 The first issue in this case is whether the evidence of the gun was obtained in a manner that breached Mr. Grant's rights under the *Charter*. Mr. Grant argues that the police breached his *Charter* rights by arbitrarily detaining him contrary to s. 9 and by failing to advise him of his right to speak to a lawyer contrary to s. 10(*b*), before the questioning that led to the discovery of the firearm that is the subject of these charges. Alternatively, if the Court finds he was not detained, Mr. Grant argues that the Court of Appeal erred in finding that there was no violation of s. 8's protection against unreasonable search and seizure.

12 The threshold question is whether the appellant was detained before he produced the firearm and was arrested. If he was detained, the detention was arbitrary; all parties are agreed that the police lacked legal grounds to detain the appellant. Further, if detained, Mr. Grant was entitled to be advised of the right to counsel at that point, which would establish breach of s. 10(*b*) of the *Charter*.

1. The Meaning of "Detention" Under the Charter

(a) The Positions of the Parties

13 Mr. Grant argues that he was detained before he made his inculpatory statements and revealed the gun. He contends that his liberty to choose to remain or leave was taken away by the conduct of the police officers in blocking his path, and that this detention was arbitrary because at this point the officers lacked reasonable grounds to detain him under the standard for investigative detention elaborated in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 (S.C.C.). Because he was detained, he argues, the police were required to advise him under s. 10(*b*) that he had the right to speak to a lawyer.

14 The Crown argues that Mr. Grant was not detained until the police arrested him after he disclosed his firearm, at which point they advised him of his right to talk to a lawyer. It says that the officers' prior conduct was not directed at curtailing the appellant's liberty, but rather at protecting their own safety while asking him some questions. The Crown says that the officers were engaging in community policing, which involves a dynamic interaction between the police and the citizens they serve. The Crown contends that preliminary, non-coercive questioning pursuant to police policy is a legitimate exercise of investigative police powers, is essential to the effective fulfilment of the police's duty to enforce the law, and does not amount to detention triggering the right to counsel.

(b) Interpretative Principles

15 As for any constitutional provision, the starting point must be the language of the section. Where questions of interpretation arise, a generous, purposive and contextual approach should be applied.

16 Constitutional guarantees such as ss. 9 and 10 should be interpreted in a "generous rather than . . . legalistic [way], aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protection" (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (S.C.C.), at p. 344). Unduly narrow, technical approaches to *Charter* interpretation must be avoided, given their potential to "subvert the goal of ensuring that right holders enjoy the full benefit and protection of the *Charter*" (*Doucet-Boudreau v. Nova Scotia (Department of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3 (S.C.C.), at para. 23).

17 While the twin principles of purposive and generous interpretation are related and sometimes conflated, they are not the same. The purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose (P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at pp. 36-30 and 36-31). While a narrow approach risks impoverishing a *Charter* right, an overly generous approach risks expanding its protection beyond its intended purposes. In brief, we must construe the language of ss. 9 and 10 in a generous way that furthers, without overshooting, its purpose: *Big M Drug Mart*, at p. 344.

18 To interpret "detention" in ss. 9 and 10 generously, yet purposively, we must consider the context in which it is embedded — in other words, the role it plays in conjunction with related protections in the *Charter*.

(c) The Purpose of the Rights Linked to Detention

19 Detention represents a limit on the broad right to liberty enjoyed by everyone in Canada at common law and by virtue of s. 7 of the *Charter*, which guarantees that liberty will only be curtailed in accordance with the principles of fundamental justice. Section 9 of the *Charter*

establishes that "[e]veryone has the right not to be arbitrarily detained or imprisoned." Section 10 accords certain rights to people who are arrested or detained, including the right to retain and instruct counsel.

20 The purpose of s. 9, broadly put, is to protect individual liberty from unjustified state interference. As recognized by this Court in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 (S.C.C.), "liberty", for *Charter* purposes, is not "restricted to mere freedom from physical restraint", but encompasses a broader entitlement "to make decisions of fundamental importance free from state interference" (para. 49). Thus, s. 9 guards not only against unjustified state intrusions upon physical liberty, but also against incursions on mental liberty by prohibiting the coercive pressures of detention and imprisonment from being applied to people without adequate justification. The detainee's interest in being able to make an informed choice whether to walk away or speak to the police is unaffected by the manner in which the detention is brought about.

21 More specifically, an individual confronted by state authority ordinarily has the option to choose simply to walk away: *R. v. Esposito* (1985), 24 C.C.C. (3d) 88 (Ont. C.A.), at p. 94; *R. v. Dedman*, [1985] 2 S.C.R. 2 (S.C.C.), at p. 11, citing Martin J.A. in the Ontario Court of Appeal ((1981), 32 O.R. (2d) 641 (Ont. C.A.), at p. 653):

> Although a police officer may approach a person on the street and ask him questions, if the person refuses to answer the police officer must allow him to proceed on his way, unless . . . [he] arrests him . . . .

See also *Application Under s. 83.28 of the Criminal Code, Re*, 2004 SCC 42, [2004] 2 S.C.R. 248 (S.C.C.), at para. 131. Where this choice has been removed — whether by physical or psychological compulsion — the individual is detained. Section 9 guarantees that the state's ability to interfere with personal autonomy will not be exercised arbitrarily. Once detained, the individual's choice whether to speak to the authorities remains, and is protected by the s. 10 informational requirements and the s. 7 right to silence.

22 "Detention" also identifies the point at which rights subsidiary to detention, such as the right to counsel, are triggered. These rights are engaged by the vulnerable position of the person who has been taken into the effective control of the state authorities. They are principally concerned with addressing the imbalance of power between the state and the person under its control. More specifically, they are designed to ensure that the person whose liberty has been curtailed retains an informed and effective *choice* whether to speak to state authorities, consistent with the overarching principle against self-incrimination. They also ensure that the person who is under the control of the state be afforded the opportunity to seek legal advice in order to assist in regaining his or her liberty. As this Court observed in *R. v. Hebert*, [1990] 2 S.C.R. 151 (S.C.C.):

> In a broad sense, the purpose of ss. 7 to 14 is two-fold to preserve the rights of the detained individual, and to maintain the repute and integrity of our system of justice. More particularly, it is to the control of the superior power of the state *vis-à-vis* the individual who has been detained by the state, and thus placed in its power, that s. 7 and the related provisions that follow are primarily directed. The state has the power to intrude on the individual's physical freedom by detaining him or her. The individual cannot walk away. This physical intrusion on the individual's mental liberty in turn may enable the state to infringe the individual's mental liberty by techniques made possible by its superior resources and power.
>
> [Emphasis added; pp. 179-80.]

23 By setting limits on the power of the state and imposing obligations with regard to the detained person through the concept of detention, the *Charter* seeks to effect a balance between the interests of the detained individual and those of the state. The power of the state to curtail an individual's liberty by way of detention cannot be exercised arbitrarily and attracts a reciprocal obligation to accord the individual legal protection against the state's superior power.

(d) Defining Detention

24 The word "detention" admits of many meanings. Read narrowly, "detention" can be seen as indicating situations where the police take explicit control over the person and command obedience. Read expansively, "detention" can be read as extending to even a fleeting interference or delay. Neither of these extremes offers an acceptable definition of "detention" as used in ss. 9 and 10 of the *Charter*.

25 The first extreme was rejected by this Court in *R. v. Therens*, [1985] 1 S.C.R. 613 (S.C.C.), which held that detention for *Charter* purposes occurs when a state agent, by way of physical or psychological restraint, takes away an individual's choice simply to walk away. This encompasses not only explicit interference with the subject's liberty by way of physical interference or express command, but any form of "compulsory restraint". A person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (*Therens*, at p. 644). It is clear that a person may reasonably believe he or she has no choice in circumstances where there has been no formal assertion of police control. Thus the first interpretation must be rejected. This comports with the principle that a generous rather than legalistic approach must be applied to the interpretation of *Charter* principles and avoids cramping the purpose of the protections conferred by ss. 9 and 10 of the *Charter*.

26 The second interpretation of "detention", reducing it to any interference, however slight, must also be rejected. As held in *Mann*, at para. 19, *per* Iacobucci J.:

> . . . the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

It is clear that, while the forms of interference s. 9 guards against are broadly defined to include interferences with both physical and mental liberty, not every trivial or insignificant interference with this liberty attracts *Charter* scrutiny. To interpret detention this broadly would trivialize the applicable *Charter* rights and overshoot their purpose. Only the individual whose liberty is meaningfully constrained has genuine need of the additional rights accorded by the *Charter* to people in that situation.

27 Having rejected the extreme positions advanced, the question is where between them the line that marks detention under ss. 9 and 10 is to be traced. This is a question that is not easily answered in the abstract; as in so many areas of the law, the most useful guidance derives from the decided cases. In what follows, we set out the general principle of choice that underlies the determination. We then discuss situations which illustrate where the line should be drawn.

28 The general principle that determines detention for *Charter* purposes was set out in *Therens:* a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (per Le Dain J., at p. 644). This principle is consistent with the notion of choice that underlies our conception of liberty and, as such, shapes our interpretation of ss. 9 and 10 of the *Charter.* When detention removes the "choice to do otherwise" but comply with a police direction, s. 10(*b*) serves an indispensable purpose. It protects, among other interests, the detainee's ability to choose whether to cooperate with the investigation by giving a statement. The ambit of detention for constitutional purposes is informed by the need to safeguard this choice without impairing effective law enforcement. This explains why the extremes of formally asserted control on the one hand and a passing encounter on the other have been rejected; the former restricts detention in a way that denies the accused rights he or she needs and should have, while the latter would confer rights where they are neither necessary or appropriate.

29 The language of ss. 9 and 10 is consistent with this purpose-based approach to detention. The pairing of "detained" and "imprisoned" in s. 9 provides textual guidance for determining where the constitutional line between justifiable and unjustifiable interference should be drawn. "Imprisonment" connotes total or near-total loss of liberty. The juxtaposition of "imprisoned" with "detained" suggests that a "detention" requires significant deprivation of liberty. Similarly, the words "arrest or detention" in s. 10 suggest that a "detention" exists when the deprivation of liberty

may have legal consequences. This linguistic context requires exclusion of police stops where the subject's rights are not seriously in issue.

30 Moving on from the fundamental principle of the right to choose, we find that psychological constraint amounting to detention has been recognized in two situations. The first is where the subject is legally required to comply with a direction or demand, as in the case of a roadside breath sample. The second is where there is no legal obligation to comply with a restrictive or coercive demand, but a reasonable person in the subject's position would feel so obligated. The rationale for this second form of psychological detention was explained by Le Dain J. in *Therens* as follows:

> In my opinion, it is not realistic, as a general rule, to regard compliance with a demand or direction by a police officer as truly voluntary, in the sense that the citizen feels that he or she has the choice to obey or not, even where there is in fact a lack of statutory or common law authority for the demand or direction and therefore an absence of criminal liability for failure to comply with it. Most citizens are not aware of the precise legal limits of police authority. Rather than risk the application of physical force or prosecution for wilful obstruction, the reasonable person is likely to err on the side of caution, assume lawful authority and comply with the demand. The element of psychological compulsion, in the form of a reasonable perception of suspension of freedom of choice, is enough to make the restraint of liberty involuntary. Detention may be effected without the application or threat of application of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist.
>
> [Emphasis added; p. 644.]

31 This second form of psychological detention — where no legal compulsion exists — has proven difficult to define consistently. The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. As held in *Therens*, this must be determined objectively, having regard to all the circumstances of the particular situation, including the conduct of the police. As discussed in more detail below and summarized at para. 44, the focus must be on the state conduct in the context of the surrounding legal and factual situation, and how that conduct would be perceived by a reasonable person in the situation as it develops.

32 The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added protections. However, the subjective intentions of the police are not determinative. (Questions such as police "good faith" may become relevant when the test for exclusion of evidence under s. 24(2) is applied, in cases where a *Charter* breach is found.) While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual

and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.

33 In most cases, it will be readily apparent whether or not an encounter between the police and an individual results in a detention. Making the task easier is the fact that what would reasonably be understood by all concerned is often informed by generally understood legal rights and duties, as a few examples illustrate.

34 At one end of the spectrum of possibilities, detention overlaps with arrest or imprisonment and the *Charter* will clearly apply. Similarly, a legal obligation to comply with a police demand or direction, such as a breath sample demand at the roadside, clearly denotes s. 9 detention. As Le Dain J. observed in *Therens*, "[i]t is not realistic to speak of a person who is liable to arrest and prosecution for refusal to comply with a demand which a peace officer is empowered by statute to make as being free to refuse to comply" (p. 643).

35 At the other end of the spectrum lie encounters between individual and police where it would be clear to a reasonable person that the individual is not being deprived of a meaningful choice whether or not to cooperate with a police demand or directive and hence not detained.

36 We may rule out at the outset situations where the police are acting in a non-adversarial role and assisting members of the public in circumstances commonly accepted as lacking the essential character of a detention. In many common situations, reasonable people understand that the police are not constraining individual choices, but rather helping people or gathering information. For instance, the reasonable person would understand that a police officer who attends at a medical emergency on a 911 call is not detaining the individuals he or she encounters. This is so even if the police in taking control of the situation, effectively interfere with an individual's freedom of movement. Such deprivations of liberty will not be significant enough, to attract *Charter* scrutiny because they do not attract legal consequences for the concerned individuals.

37 Another often-discussed situation is when police officers approach bystanders in the wake of an accident or crime, to determine if they witnessed the event and obtain information that may assist in their investigation. While many people may be happy to assist the police, the law is clear that, subject to specific provisions that may exceptionally govern, the citizen is free to walk away: *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.). Given the existence of such a generally

understood right in such circumstances, a reasonable person would not conclude that his or her right to choose whether to cooperate with them has been taken away. This conclusion holds true even if the person may feel compelled to cooperate with the police out of a sense of moral or civic duty. The Ontario Court of Appeal adverted to this concept in *Grafe*, where Krever J.A. wrote, at p.271:

> The law has long recognized that although there is no legal duty, there is amoral or social duty on the part of every citizen to answer questions put to him or her by the police and, in that way to assist the police: see, for example, *Rice v. Connolly*, [1966] 2 All E.R. 649 at p. 652, *per* Lord Parker C.J. Implicit in that moral or social duty is the right of a police officer to ask questions even, in my opinion, when he or she has no belief that an offence has been committed. To be asked questions, in these circumstances, cannot be said to be a deprivation of liberty or security.

38 In the context of investigating an accident or a crime, the police, unbeknownst to them at that point in time, may find themselves asking questions of a person who is implicated in the occurrence and, consequently, is at risk of self-incrimination. This does not preclude the police from continuing to question the person in the pursuit of their investigation. Section 9 of the *Charter* does not require that police abstain from interacting with members of the public until they have specific grounds to connect the individual to the commission of a crime. Nor does s. 10 require that the police advise everyone at the outset of any encounter that they have no obligation to speak to them and are entitled to legal counsel.

39 Effective law enforcement is highly dependent on the cooperation of members of the public. The police must be able to act in a manner that fosters this cooperation, not discourage it. However, police investigative powers are not without limits. The notion of psychological detention recognizes the reality that police tactics, even in the absence of exercising actual physical restraint, may be coercive enough to effectively remove the individual's choice to walk away from the police. This creates the risk that the person may reasonably feel compelled to incriminate himself or herself. Where that is the case, the police are no longer entitled simply to expect cooperation from an individual. Unless, as stated earlier, the police inform the person that he or she is under no obligation to answer questions and is free to go, a detention may well crystallize and, when it does, the police must provide the subject with his or her s. 10(*b*) rights. That the obligation arises only on detention represents part of the balance between, on the one hand, the individual rights protected by ss. 9 and 10 and enjoyed by all members of society, and on the other, the collective interest of all members of society in the ability of the police to act on their behalf to investigate and prevent crime.

40 A more complex situation may arise in the context of neighbourhood policing where the police are not responding to any specific occurrence, but where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially

coercive police role of investigating crime and arresting suspects so that they may be brought to justice. This is the situation that arises in this case.

41 As discussed earlier, general inquiries by a patrolling officer present no threat to freedom of choice. On the other hand, such inquiries can escalate into situations where the focus shifts from general community-oriented concern to suspicion of a particular individual. Focussed suspicion, in and of itself, does not turn the encounter in a detention. What matters is how the police, based on that suspicion, interacted with the subject. The language of the *Charter* does not confine detention to situations where a person is in potential jeopardy of arrest. However, this is a factor that may help to determine whether, in a particular circumstance, a reasonable person would conclude he or she had no choice but to comply with a police officer's request. The police must be mindful that, depending on how they act and what they say, the point may be reached where a reasonable person, in the position of that individual, would conclude he or she is not free to choose to walk away or decline to answer questions.

42 The length of the encounter said to give rise to the detention may be a relevant consideration. Consider the act of a police officer placing his or her hand on an individual's arm. If sustained, it might well lead a reasonable person to conclude that his or her freedom to choose whether to cooperate or not has been removed. On the other hand, a fleeting touch may not, depending on the circumstances, give rise to a reasonable conclusion that one's liberty has been curtailed. At the same time, it must be remembered that situations can move quickly, and a single forceful act or word may be enough to cause a reasonable person to conclude that his or her right to choose how to respond has been removed.

43 Whether the individual has been deprived of the right to choose simply to walk away will depend, to reiterate, on all the circumstances of the case. It will be for the trial judge to determine on all the evidence. Deference is owed to the trial judge's findings of fact, although application of the law to the facts is a question of law.

44 In summary, we conclude as follows:

1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

a) The circumstances giving rise to the encounter as would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.

c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

2. Was the Appellant Detained Prior to Incriminating Himself?

45 Against this background, we return to the question at hand: was Mr. Grant detained within the meaning of ss. 9 and 10 of the *Charter* before the questions that led him to disclose his firearm? The trial judge held that he was not. An appellate court must approach a trial judge's decision on this issue with appropriate deference. However, we agree with Laskin J.A. that the trial judge's conclusion on the question of detention is undermined by certain key findings of fact that cannot reasonably be supported by the evidence. In the circumstances, it is necessary to revisit the issue.

46 This is not a clear case of physical restraint or compulsion by operation of law. Accordingly, we must consider all relevant circumstances to determine if a reasonable person in Mr. Grant's position would have concluded that his or her right to choose how to interact with the police (i.e. whether to leave or comply) had been removed.

47 The encounter began with Cst. Gomes approaching Mr. Grant (stepping in his path) and making general inquiries. Such preliminary questioning is a legitimate exercise of police powers. At this stage, a reasonable person would not have concluded he or she was being deprived of the right to choose how to act, and for that reason there was no detention.

48 Cst. Gomes then told the appellant to "keep his hands in front of him". This act, viewed in isolation, might be insufficient to indicate detention, on the ground that it was simply a precautionary directive. However, consideration of the entire context of what transpired from this point forward leads to the conclusion that Mr. Grant was detained.

49 Two other officers approached, flashing their badges and taking tactical adversarial positions behind Cst. Gomes. The encounter developed into one where Mr. Grant was singled out as the object of particularized suspicion, as evidenced by the conduct of the officers. The nature of the questioning changed from ascertaining the appellant's identity to determining whether he "had anything that he shouldn't". At this point the encounter took on the character of an interrogation,

going from general neighbourhood policing to a situation where the police had effectively taken control over the appellant and were attempting to elicit incriminating information.

50 Although Cst. Gomes was respectful in his questioning, the encounter was inherently intimidating. The power imbalance was obviously exacerbated by Mr. Grant's youth and inexperience. Mr. Grant did not testify, so we do not know what his perceptions of the interaction actually were. However, because the test is an objective one, this is not fatal to his argument that there was a detention. We agree with Laskin J.A.'s conclusion that Mr. Grant was detained. In our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct.

51 The police conduct that gave rise to an impression of control was not fleeting. The direction to Mr. Grant to keep his hands in front, in itself inconclusive, was followed by the appearance of two other officers flashing their badges and by questioning driven by focussed suspicion of Mr. Grant. The sustained and restrictive tenor of the conduct after the direction to Mr. Grant to keep his hands in front of him reasonably supports the conclusion that the officers were putting him under their control and depriving him of his choice as to how to respond.

52 We conclude that Mr. Grant was detained when Cst. Gomes told him to keep his hands in front of him, the other two officers moved into position behind Cst. Gomes, and Cst. Gomes embarked on a pointed line of questioning. At this point, Mr. Grant's liberty was clearly constrained and he was in need of the *Charter* protections associated with detention.

3. Was the Detention Arbitrary Under Section 9?

53 We have determined that the appellant was detained prior to his arrest. The question at this point is whether the detention was "arbitrary" within the meaning of s. 9.

54 The s. 9 guarantee against arbitrary detention is a manifestation of the general principle, enunciated in s. 7, that a person's liberty is not to be curtailed except in accordance with the principles of fundamental justice. As this Court has stated: "This guarantee expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with the law": *Charkaoui, Re*, 2007 SCC 9, [2007] 1 S.C.R. 350 (S.C.C.), at para. 88. Section 9 serves to protect individual liberty against unlawful state interference. A lawful detention is not arbitrary within the meaning of s. 9 (*Mann*, at para. 20), unless the law authorizing the detention is itself arbitrary. Conversely, a detention not authorized by law is arbitrary and violates s. 9.

55 Earlier suggestions that an unlawful detention was not necessarily arbitrary (see *R. v. Duguay* (1985), 18 C.C.C. (3d) 289 (Ont. C.A.)) have been overtaken by *Mann*, in which this Court

confirmed the existence of a common law police power of investigative detention. The concern in the earlier cases was that an arrest made on grounds falling just short of the "reasonable and probable grounds" required for arrest should not automatically be considered arbitrary in the sense of being baseless or capricious. *Mann*, in confirming that a brief investigative detention based on "reasonable suspicion" was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.

56 This approach mirrors the framework developed for assessing unreasonable searches and seizures under s. 8 of the *Charter*. Under *R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.), and subsequent cases dealing with s. 8, a search must be authorized by law to be reasonable; the authorizing law must itself be reasonable; and the search must be carried out in a reasonable manner. Similarly, it should now be understood that for a detention to be non-arbitrary, it must be authorized by a law which is itself non-arbitrary. We add that, as with other rights, the s. 9 prohibition of arbitrary detention may be limited under s. 1 by such measures "prescribed by law as can be demonstrably justified in a free and democratic society": see *R. v. Hufsky*, [1988] 1 S.C.R. 621 (S.C.C.), and *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 (S.C.C.).

57 Here, the officers acknowledged at trial that they did not have legal grounds or reasonable suspicion to detain the accused prior to his incriminating statements. No issue was taken with this concession on appeal. We therefore conclude that the detention was arbitrary and in breach of s. 9.

4. Was the Appellant's Section 10(b) Right to Counsel Infringed?

58 In *R. v. Suberu*, 2009 SCC 33 (S.C.C.), we conclude that the s. 10(*b*) right to counsel arises immediately upon detention, whether or not the detention is solely for investigative purposes. That being the case, s. 10(*b*) of the *Charter* required the police to advise Mr. Grant that he had the right to speak to a lawyer, and to give him a reasonable opportunity to obtain legal advice if he so chose, before proceeding to elicit incriminating information from him. Because he now faced significant legal jeopardy and had passed into the effective control of the police, the appellant was "in immediate need of legal advice": *R. v. Brydges*, [1990] 1 S.C.R. 190 (S.C.C.), at p. 206. Because the officers did not believe they had detained the appellant, they did not comply with their obligations under s. 10(*b*). The breach of s. 10(*b*) is established.

B. Exclusion of the Evidence

1. Background

59 When must evidence obtained in violation of a person's *Charter* rights be excluded? Section 24(2) of the *Charter* provides the following answer:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the

evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

60 The test set out in s. 24(2) — what would bring the administration of justice into disrepute having regard to all the circumstances — is broad and imprecise. The question is what considerations enter into making this determination. In *Collins* and in *R. v. Stillman*, [1997] 1 S.C.R. 607 (S.C.C.), this Court endeavoured to answer this question. The *Collins / Stillman* framework, as interpreted and applied in subsequent decisions, has brought a measure of certainty to the s. 24(2) inquiry. Yet the analytical method it imposes and the results it sometimes produces have been criticized as inconsistent with the language and objectives of s. 24(2). In order to understand these criticisms, it is necessary to briefly review the holdings in *Collins* and *Stillman*.

61 In *Collins*, the Court (*per* Lamer J., as he then was) proceeded by grouping the factors to be considered under s. 24(2) into three categories: (1) whether the evidence will undermine the fairness of the trial by effectively conscripting the accused against himself or herself; (2) the seriousness of the *Charter* breach; and (3) the effect of excluding the evidence on the long-term repute of the administration of justice. While Lamer J. acknowledged that these categories were merely a "matter of personal preference" (p. 284), they quickly became formalized as the governing test for s. 24(2).

62 *Collins* shed important light on the factors relevant to determining admissibility of *Charter*-violative evidence under s. 24(2). However, the concepts of trial fairness and conscription under the first branch of *Collins* introduced new problems of their own. Moreover, questions arose about what work (if any) remained to be done under the second and third categories, once conscription leading to trial unfairness had been found. Finally, issues arose as to how to measure the seriousness of the breach under the second branch and what weight, if any, should be put on the seriousness of the offence charged in deciding whether to admit evidence.

63 The admission of physical or "real" evidence obtained from the body of the accused in breach of his or her *Charter* rights proved particularly problematic. Ten years after *Collins*, the Court revisited this question in *Stillman*. The majority held that evidence obtained in breach of the *Charter* should, at the outset of the s. 24(2) inquiry, be classified as either "conscriptive" or "non-conscriptive". Evidence would be classified as conscriptive where "an accused, in violation of his *Charter* rights, is compelled to incriminate himself at the behest of the state by means of a statement, the use of the body or the production of bodily samples": *Stillman*, at para. 80, *per* Cory J. The category of conscriptive evidence was also held to include real evidence discovered as a result of an unlawfully conscripted statement. This is known as derivative evidence.

64 *Stillman* held that conscriptive evidence is generally inadmissible — because of its presumed impact on trial fairness — unless if it would have been independently discovered. Despite reminders that "all the circumstances" must always be considered under s. 24(2) (see

R. v. Burlingham, [1995] 2 S.C.R. 206 (S.C.C.), *per* Sopinka J., *R. v. Orbanski*, 2005 SCC 37, [2005] 2 S.C.R. 3 (S.C.C.), *per* LeBel J.), *Stillman* has generally been read as creating an all-but-automatic exclusionary rule for non-discoverable conscriptive evidence, broadening the category of conscriptive evidence and increasing its importance to the ultimate decision on admissibility.

65 This general rule of inadmissibility of all non-discoverable conscriptive evidence, whether intended by *Stillman* or not, seems to go against the requirement of s. 24(2) that the court determining admissibility must consider "all the circumstances". The underlying assumption that the use of conscriptive evidence always, or almost always, renders the trial unfair is also open to challenge. In other contexts, this Court has recognized that a fair trial "is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness to the accused": *R. v. Harrer*, [1995] 3 S.C.R. 562 (S.C.C.), at para. 45. It is difficult to reconcile trial fairness as a multifaceted and contextual concept with a near-automatic presumption that admission of a broad class of evidence will render a trial unfair, regardless of the circumstances in which it was obtained. In our view, trial fairness is better conceived as an overarching systemic goal than as a distinct stage of the s. 24(2) analysis.

66 This brief review of the impact of *Collins* and *Stillman* brings us to the heart of our inquiry on this appeal: clarification of the criteria relevant to determining when, in "all the circumstances", admission of evidence obtained by a *Charter* breach "would bring the administration of justice into disrepute".

2. Overview of a Revised Approach to Section 24(2)

67 The words of s. 24(2) capture its purpose: to maintain the good repute of the administration of justice. The term "administration of justice" is often used to indicate the processes by which those who break the law are investigated, charged and tried. More broadly, however, the term embraces maintaining the rule of law and upholding *Charter* rights in the justice system as a whole.

68 The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

69 Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

70 Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

71 A review of the authorities suggests that whether the admission of evidence obtained in breach of the *Charter* would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the *Charter*-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

(a) Seriousness of the Charter-Infringing State Conduct

72 The first line of inquiry relevant to the s. 24(2) analysis requires a court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts, as institutions responsible for the administration of justice, effectively condone state deviation from the rule of law by failing to dissociate themselves from the fruits of that unlawful conduct. The more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct, by excluding evidence linked to that conduct, in order to preserve public confidence in and ensure state adherence to the rule of law.

73 This inquiry therefore necessitates an evaluation of the seriousness of the state conduct that led to the breach. The concern of this inquiry is not to punish the police or to deter *Charter* breaches, although deterrence of *Charter* breaches may be a happy consequence. The main concern is to preserve public confidence in the rule of law and its processes. In order to determine the effect of admission of the evidence on public confidence in the justice system, the court on a s. 24(2) application must consider the seriousness of the violation, viewed in terms of the gravity of the offending conduct by state authorities whom the rule of law requires to uphold the rights guaranteed by the *Charter*.

74 State conduct resulting in *Charter* violations varies in seriousness. At one end of the spectrum, admission of evidence obtained through inadvertent or minor violations of the

Charter may minimally undermine public confidence in the rule of law. At the other end of the spectrum, admitting evidence obtained through a wilful or reckless disregard of *Charter* rights will inevitably have a negative effect on the public confidence in the rule of law, and risk bringing the administration of justice into disrepute.

75 Extenuating circumstances, such as the need to prevent the disappearance of evidence, may attenuate the seriousness of police conduct that results in a *Charter* breach: *R. v. Silveira*, [1995] 2 S.C.R. 297 (S.C.C.), *per* Cory J. "Good faith" on the part of the police will also reduce the need for the court to disassociate itself from the police conduct. However, ignorance of *Charter* standards must not be rewarded or encouraged and negligence or wilful blindness cannot be equated with good faith: *R. v. Genest*, [1989] 1 S.C.R. 59 (S.C.C.), at p. 87, *per* Dickson C.J.; *R. v. Kokesch*, [1990] 3 S.C.R. 3 (S.C.C.), at pp. 32-33, *per* Sopihka J.; *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631 (S.C.C.), at para. 59. Wilful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established *Charter* standards tends to support exclusion of the evidence. It should also be kept in mind that for every *Charter* breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the *Charter*-infringing conduct was part of a pattern of abuse tends to support exclusion.

(b) Impact on the Charter-Protected Interests of the Accused

76 This inquiry focuses on the seriousness of the impact of the *Charter* breach on the *Charter*-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

77 To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests. For example, the interests engaged in the case of a statement to the authorities obtained in breach of the *Charter* include the s. 7 right to silence, or to choose whether or not to speak to authorities (*Hebert*) — all stemming from the principle against self-incrimination: *R. v. White*, [1999] 2 S.C.R. 417 (S.C.C.), at para. 44. The more serious the incursion on these interests, the greater the risk that admission of the evidence would bring the administration of justice into disrepute.

78 Similarly, an unreasonable search contrary to s. 8 of the *Charter* may impact on the protected interests of privacy, and more broadly, human dignity. An unreasonable search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans his or her dignity, is more serious than one that does not.

(c) Society's Interest in an Adjudication on the Merits

79 Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law": *R. v. Askov*, [1990] 2 S.C.R. 1199 (S.C.C.), at pp. 1219-20. Thus the Court suggested in *Collins* that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence.

80 The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained (see *R. v. Wray* (1970), [1971] S.C.R. 272 (S.C.C.)) is inconsistent with the *Charter*'s affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.

81 This said, public interest in truth-finding remains a relevant consideration under the s. 24(2) analysis. The reliability of the evidence is an important factor in this line of inquiry. If a breach (such as one that effectively compels the suspect to talk) undermines the reliability of the evidence, this points in the direction of exclusion of the evidence. The admission of unreliable evidence serves neither the accused's interest in a fair trial nor the public interest in uncovering the truth. Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

82 The fact that the evidence obtained in breach of the *Charter* may facilitate the discovery of the truth and the adjudication of a case on its merits must therefore be weighed against factors pointing to exclusion, in order to "balance the interests of truth with the integrity of the justice system": *Mann*, at para. 57, *per* Iacobucci J. The court must ask "whether the vindication of the specific Charter violation through the exclusion of evidence extracts too great a toll on the truth-seeking goal of the criminal trial": *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), at para. 47, per Doherty J.A.

83 The importance of the evidence to the prosecution's case is another factor that may be considered in this line of inquiry. Like Deschamps J., we view this factor as corollary to the

inquiry into reliability, in the following limited sense. The admission of evidence of questionable reliability is more likely to bring the administration of justice into disrepute where it forms the entirety of the case against the accused. Conversely, the exclusion of highly reliable evidence may impact more negatively on the repute of the administration of justice where the remedy effectively guts the prosecution.

84 It has been suggested that the judge should also, under this line of inquiry, consider the seriousness of the offence at issue. Indeed, Deschamps J. views this factor as very important, arguing that the more serious the offence, the greater society's interest in its prosecution (para. 226). In our view, while the seriousness of the alleged offence may be a valid consideration, it has the potential to cut both ways. Failure to effectively prosecute a serious charge due to excluded evidence may have an immediate impact on how people view the justice system. Yet, as discussed, it is the long-term repute of the justice system that is s. 24(2)'s focus. As pointed out in *Burlingham*, the goals furthered by s. 24(2) "operate independently of the type of crime for which the individual stands accused" (para. 51). And as Lamer J. observed in *Collins*, "[t]he *Charter* is designed to protect the accused from the majority, so the enforcement of the *Charter* must not be left to that majority" (p. 282). The short-term public clamour for a conviction in a particular case must not deafen the s. 24(2) judge to the longer-term repute of the administration of justice. Moreover, while the public has a heightened interest in seeing a determination on the merits where the offence charged is serious, it also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high.

85 To review, the three lines of inquiry identified above — the seriousness of the *Charter*-infringing state conduct, the impact of the breach on the *Charter*-protected interests of the accused, and the societal interest in an adjudication on the merits — reflect what the s. 24(2) judge must consider in assessing the effect of admission of the evidence on the repute of the administration of justice. Having made these inquiries, which encapsulate consideration of "all the circumstances" of the case, the judge must then determine whether, on balance, the admission of the evidence obtained by *Charter* breach would bring the administration of justice into disrepute.

86 In all cases, it is the task of the trial judge to weigh the various indications. No overarching rule governs how the balance is to be struck. Mathematical precision is obviously not possible. However, the preceding analysis creates a decision tree, albeit more flexible than the *Stillman* self-incrimination test. We believe this to be required by the words of s. 24(2). We also take comfort in the fact that patterns emerge with respect to particular types of evidence. These patterns serve as guides to judges faced with s. 24(2) applications in future cases. In this way, a measure of certainty is achieved. Where the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.

3. Application to Different Kinds of Evidence

87 We have seen that a trial judge on a s. 24(2) application for exclusion of evidence obtained in breach of the *Charter* must consider whether admission would bring the administration of justice into disrepute, having regard to the results of the three lines of inquiry identified above.

88 We now turn to some of the types of evidence the cases have considered.

(a) Statements by the Accused

89 Statements by the accused engage the principle against self-incrimination, "one of the cornerstones of our criminal law": *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 (S.C.C.), at para. 2. This Court in *White*, at para. 44, *per* Iacobucci J., described the principle against self-incrimination as "an overarching principle within our criminal justice system, from which a number of specific common law and *Charter* rules emanate, such as the confessions rule, and the right to silence". The principle also informs "more specific procedural protections such as, for example, the right to counsel in s. 10(*b*), the right to non-compellability in s. 11(*c*), and the right to use immunity set out in s. 13". Residual protection for the principle against self-incrimination is derived from s. 7.

90 This case concerns s. 24(2). However, it is important to note at the outset that the common law confessions rule, quite apart from s. 24(2), provides a significant safeguard against the improper use of a statement against its maker. Where a statement is made to a recognized person in authority, regardless of whether its maker is detained at the time, it is inadmissible unless the Crown can establish beyond a reasonable doubt that it was made voluntarily. Only if such a statement survives scrutiny under the confessions rule and is found to be voluntary, does the s. 24(2) remedy of exclusion arise. Most commonly, this will occur because of added protections under s. 10(*b*) of the *Charter*.

91 There is no absolute rule of exclusion of *Charter*-infringing statements under s. 24(2), as there is for involuntary confessions at common law. However, as a matter of practice, courts have tended to exclude statements obtained in breach of the *Charter*, on the ground that admission on balance would bring the administration of justice into disrepute.

92 The three lines of inquiry described above support the presumptive general, although not automatic, exclusion of statements obtained in breach of the *Charter*.

93 The first inquiry focusses on whether admission of the evidence would harm the repute of justice by associating the courts with illegal police conduct. Police conduct in obtaining statements has long been strongly constrained. The preservation of public confidence in the justice system requires that the police adhere to the *Charter* in obtaining statements from a detained accused.

94 The negative impact on the justice system of admitting evidence obtained through police misconduct varies with the seriousness of the violation. The impression that courts condone serious police misconduct is more harmful to the repute of the justice system than the acceptance of minor or inadvertent slips.

95 The second inquiry considers the extent to which the breach actually undermined the interests protected by the right infringed. Again, the potential to harm the repute of the justice system varies with the seriousness of the impingement on the individual's protected interests. As noted, the right violated by unlawfully obtained statements is often the right to counsel under s. 10(*b*). The failure to advise of the right to counsel undermines the detainee's right to make a meaningful and informed choice whether to speak, the related right to silence, and, most fundamentally, the protection against testimonial self-incrimination. These rights protect the individual's interest in liberty and autonomy. Violation of these fundamental rights tends to militate in favour of excluding the statement.

96 This said, particular circumstances may attenuate the impact of a *Charter* breach on the protected interests of the accused from whom a statement is obtained in breach of the *Charter*. For instance, if an individual is clearly informed of his or her choice to speak to the police, but compliance with s. 10(*b*) was technically defective at either the informational or implementational stage, the impact on the liberty and autonomy interests of the accused in making an informed choice may be reduced. Likewise, when a statement is made spontaneously following a *Charter* breach, or in the exceptional circumstances where it can confidently be said that the statement in question would have been made notwithstanding the *Charter* breach (see *R. v. Harper*, [1994] 3 S.C.R. 343 (S.C.C.)), the impact of the breach on the accused's protected interest in informed choice may be less. Absent such circumstances, the analysis under this line of inquiry supports the general exclusion of statements taken in breach of the *Charter*.

97 The third inquiry focusses on the public interest in having the case tried fairly on its merits. This may lead to consideration of the reliability of the evidence. Just as involuntary confessions are suspect on grounds of reliability, so may, on occasion, be statements taken in contravention of the *Charter*. Detained by the police and without a lawyer, a suspect may make statements that are based more on a misconceived idea of how to get out of his or her predicament than on the truth. This danger, where present, undercuts the argument that the illegally obtained statement is necessary for a trial of the merits.

98 In summary, the heightened concern with proper police conduct in obtaining statements from suspects and the centrality of the protected interests affected will in most cases favour exclusion of statements taken in breach of the *Charter*, while the third factor, obtaining a decision on the merits, may be attenuated by lack of reliability. This, together with the common law's historic

tendency to treat statements of the accused differently from other evidence, explains why such statements tend to be excluded under s. 24(2).

(b) Bodily Evidence

99 Bodily evidence is evidence taken from the body of the accused, such as DNA evidence and breath samples. Section 8 of the *Charter* protects against unreasonable search and seizure, and hence precludes the state from obtaining such evidence in a manner that is unreasonable.

100 The majority in *Stillman*, applying a capacious definition of conscription, held that bodily evidence is "conscriptive" and that its admission would affect trial fairness. This resulted in a near-automatic exclusionary rule for bodily evidence obtained contrary to the *Charter*.

101 *Stillman* has been criticized for casting the flexible "in all the circumstances" test prescribed by s. 24(2) into a straight-jacket that determines admissibility solely on the basis of the evidence's conscriptive character rather than all the circumstances; for inappropriately erasing distinctions between testimonial and real evidence; and for producing anomalous results in some situations: see, e.g., *Burlingham*, *per* L'Heureux-Dubé J.; *R. v. Schedel* (2003), 175 C.C.C. (3d) 193 (B.C. C.A.), at paras. 67-72, *per* Esson J.A.; D. M. Paciocco, "*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)" (1997), 2 *Can. Crim. L.R.* 163; R. Mahoney, "Problems with the Current Approach to s. 24(2) of the Charter: An Inevitable Discovery" (1999), 42 *Crim. L.Q.* 443; S. Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section24(2) of the *Charter*" (2004), 49 *McGill L.J.* 105; D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at p. 581. We will briefly review each of these criticisms.

102 The first criticism is that the *Stillman* approach transforms the flexible "all the circumstances" test mandated by s. 24(2) into a categorical conscriptive evidence test. Section 24(2) mandates a broad contextual approach rather than an automatic exclusionary rule: D. M. Paciocco, "The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule" (1989-90), 32 *Crim. L.Q.* 326; A. McLellan and B. P. Elman, "The Enforcement of the Canadian Charter of Rights and Freedoms: An Analysis of Section 24" (1983), 21 *Alta. L. Rev.* 205, at pp. 205-8; *Orbanski*, at para. 93. As stated in *Orbanski*, *per* LeBel J., the inquiry under s. 24(2) "amounts to finding a proper balance between competing interests and values at stake in the criminal trial, between the search for truth and the integrity of the trial . . . All the *Collins* factors remain relevant throughout this delicate and nuanced inquiry" (para. 94).

103 A flexible, multi-factored approach to the admissibility of the evidence is required, not only by the wording of s. 24(2) but by the wide variation between different kinds of bodily evidence. The seriousness of the police conduct and the impact on the accused's rights of taking the bodily evidence, may vary greatly. Plucking a hair from the suspect's head may not be intrusive, and the accused's privacy interest in the evidence may be relatively slight. On the other hand, a body cavity or strip search may be intrusive, demeaning and objectionable. A one-size-fits-all conscription

test is incapable of dealing with such differences in a way that addresses the point of the s. 24(2) inquiry — to determine if the admission of the evidence will bring the administration of justice into disrepute.

104 Recent decisions suggest a growing consensus that the admissibility of bodily samples should not depend solely on whether the evidence is conscriptive: *R. v. Richfield* (2003), 178 C.C.C. (3d) 23 (Ont. C.A.), *per* Weiler J.A.; *R. v. Dolynchuk* (2004), 184 C.C.C. (3d) 214 (Man. C.A.), *per* Steel J.A.; *R. v. Banman*, 2008 MBCA 103, 236 C.C.C. (3d) 547 (Man. C.A.), *per* MacInnes J.A. This Court in *R. v. B. (S.A.)*, 2003 SCC 60, [2003] 2 S.C.R. 678 (S.C.C.), dealing with the constitutionality of DNA warrant provisions in the *Criminal Code*, acknowledged that the *Charter* concerns raised by the gathering of non-testimonial evidence are better addressed by reference to the interests of privacy, bodily integrity and human dignity, than by a blanket rule that by analogy to compelled statements, such evidence is always inadmissible. See also: L. Stuesser, "*R. v. S.A.B.*: Putting 'Self-incrimination' in Context" (2004), 42 *Alta. L. Rev.* 543.

105 The second and related objection to a simple conscription test for the admissibility of bodily evidence under s. 24(2) is that it wrongly equates bodily evidence with statements taken from the accused. In most situations, statements and bodily samples raise very different considerations from the point of view of the administration of justice. Equating them under the umbrella of conscription risks erasing relevant distinctions and compromising the ultimate analysis of systemic disrepute. As Professor Paciocco has observed, "in equating intimate bodily substances with testimony we are not so much reacting to the compelled participation of the accused as we are to the violation of the privacy and dignity of the person that obtaining such evidence involves" ("*Stillman*, Disproportion and the Fair Trial Dichotomy under Section 24(2)", at p. 170). Nor does the taking of a bodily sample trench on the accused's autonomy in the same way as may the unlawful taking of a statement. The pre-trial right to silence under s. 7, the right against testimonial self-incrimination in s. 11(*c*), and the right against subsequent use of self-incriminating evidence in s. 13 have informed the treatment of statements under s. 24(2). These concepts do not apply coherently to bodily samples, which are not communicative in nature, weakening self-incrimination as the sole criterion for determining their admissibility.

106 A third criticism of the conscription test for admissibility of bodily evidence under s. 24(2) is that from a practical perspective, the conscriptive test has sometimes produced anomalous results, leading to exclusion of evidence that should, in principle and policy, be admitted: see *Dolynchuk*; *R. v. Shepherd*, 2007 SKCA 29, 218 C.C.C. (3d) 113 (Sask. C.A.), *per* Smith J.A. dissenting, aff'd 2009 SCC 35 (S.C.C.) (released concurrently); and *R. v. Padavattan* (2007), 223 C.C.C. (3d) 221 (Ont. S.C.J.), *per* Ducharme J. Notably, breath sample evidence tendered on impaired driving charges has often suffered the fate of automatic exclusion even where the breach in question was minor and would not realistically bring the administration of justice into disrepute. More serious breaches in other kinds of cases — for instance, those involving seizures of illegal

drugs in breach of s. 8 — have resulted in admission on the grounds that the evidence in question was non-conscriptive. This apparent incongruity has justifiably raised concern.

107 We conclude that the approach to admissibility of bodily evidence under s. 24(2) that asks simply whether the evidence was conscripted should be replaced by a flexible test based on all the circumstances, as the wording of s. 24(2) requires. As for other types of evidence, admissibility should be determined by inquiring into the effect admission may have on the repute of the justice system, having regard to the seriousness of the police conduct, the impact of the *Charter* breach on the protected interests of the accused, and the value of atrial on the merits.

108 The first inquiry informing the s. 24(2) analysis — the seriousness of the *Charter*-infringing conduct — is fact-specific. Admission of evidence obtained by deliberate and egregious police conduct that disregards the rights of the accused may lead the public to conclude that the court implicitly condones such conduct, undermining respect for the administration of justice. On the other hand, where the breach was committed in good faith, admission of the evidence may have little adverse effect on the repute of the court process.

109 The second inquiry assesses the danger that admitting the evidence may suggest that *Charter* rights do not count, thereby negatively impacting on the repute of the system of justice. This requires the judge to look at the seriousness of the breach on the accused's protected interests. In the context of bodily evidence obtained in violation of s. 8, this inquiry requires the court to examine the degree to which the search and seizure intruded upon the privacy, bodily integrity and human dignity of the accused. The seriousness of the intrusion on the accused may vary greatly. At one end of the spectrum, one finds the forcible taking of blood samples or dental impressions (as in *Stillman*). At the other end of the spectrum lie relatively innocuous procedures such as fingerprinting or iris-recognition technology. The greater the intrusion on these interests, the more important it is that a court exclude the evidence in order to substantiate the *Charter* rights of the accused.

110 The third line of inquiry — the effect of admitting the evidence on the public interest in having a case adjudicated on its merits — will usually favour admission in cases involving bodily samples. Unlike compelled statements, evidence obtained from the accused's body is generally reliable, and the risk of error inherent in depriving the trier of fact of the evidence may well tip the balance in favour of admission.

111 While each case must be considered on its own facts, it may be ventured in general that where an intrusion on bodily integrity is deliberately inflicted and the impact on the accused's privacy, bodily integrity and dignity is high, bodily evidence will be excluded, notwithstanding its relevance and reliability. On the other hand, where the violation is less egregious and the intrusion is less severe in terms of privacy, bodily integrity and dignity, reliable evidence obtained from

the accused's body may be admitted. For example, this will often be the case with breath sample evidence, whose method of collection is relatively non-intrusive.

(c) Non-bodily Physical Evidence

112 The three inquiries under s. 24(2) will proceed largely as explained above. Again, under the first inquiry, the seriousness of the *Charter*-infringing conduct will be a fact-specific determination. The degree to which this inquiry militates in favour of excluding the bodily evidence will depend on the extent to which the conduct can be characterized as deliberate or egregious.

113 With respect to the second inquiry, the *Charter* breach most often associated with non-bodily physical evidence is the s. 8 protection against unreasonable search and seizure: see, e.g., *Buhay*. Privacy is the principal interest involved in such cases. The jurisprudence offers guidance in evaluating the extent to which the accused's reasonable expectation of privacy was infringed. For example, a dwelling house attracts a higher expectation of privacy than a place of business or an automobile. An illegal search of a house will therefore be seen as more serious at this stage of the analysis.

114 Other interests, such as human dignity, may also be affected by search and seizure of such evidence. The question is how seriously the *Charter* breach impacted on these interests. For instance, an unjustified strip search or body cavity search is demeaning to the suspect's human dignity and will be viewed as extremely serious on that account: *R. v. Simmons*, [1988] 2 S.C.R. 495 (S.C.C.), at pp. 516-17, *per* Dickson C.J.; *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679 (S.C.C.). The fact that the evidence thereby obtained is not itself a bodily sample cannot be seen to diminish the seriousness of the intrusion.

115 The third inquiry, whether the admission of the evidence would serve society's interest in having a case adjudicated on its merits, like the others, engages the facts of the particular case. Reliability issues with physical evidence will not generally be related to the *Charter* breach. Therefore, this consideration tends to weigh in favour of admission.

(d) Derivative Evidence

116 The class of evidence that presents the greatest difficulty is evidence that combines aspects of both statements and physical evidence — physical evidence discovered as a result of an unlawfully obtained statement. The cases refer to this evidence as derivative evidence. This is the type of evidence at issue in this case.

117 We earlier saw that at common law, involuntary confessions are inadmissible. The common law's automatic exclusion of involuntary statements is based on a sense that it is unfair to conscript a person against himself or herself and, most importantly, on a concern about the unreliability of

compelled statements. However, the common law drew the line of automatic inadmissibility at the statements themselves and not the physical or "real" evidence found as a result of information garnered from such statements. Because reliability was traditionally the dominant focus of the confessions rule, the public interest in getting at the truth through reliable evidence was seen to outweigh concerns related to self-incrimination: *Wray* and *R. v. St. Lawrence*, [1949] O.R. 215 (Ont. H.C.).

118 Section 24(2) of the *Charter* implicitly overruled the common law practice of always admitting reliable derivative evidence. Instead, the judge is required to consider whether admission of derivative evidence obtained through a *Charter* breach would bring the administration of justice into disrepute.

119 The s. 24(2) jurisprudence on derivative physical evidence has thus far been dominated by two related concepts — conscription and discoverability. Physical evidence that would not have been discovered but for an inadmissible statement has been considered conscriptive and hence is inadmissible: *R. v. Feeney*, [1997] 2 S.C.R. 13 (S.C.C.), and *Burlingham*. The doctrine of "discoverability" has been developed in order to distinguish those cases in which the accused's conscription was necessary to the collection of the evidence, from those cases where the evidence would have been obtained in any event. In the former cases, exclusion was the rule, while in the latter, admission was more likely.

120 The conscription-discoverability doctrine has been justifiably criticized as overly speculative and capable of producing anomalous results: D. Stuart, "Questioning the Discoverability Doctrine in Section 24(2) Rulings" (1996), 48 C.R. (4th) 351; Hogg, at section 41.8(d). In practice, it has proved difficult to apply because of its hypothetical nature and because of the fine-grained distinctions between the tests for determining whether evidence is "derivative" and whether it is "discoverable": see *Feeney*, at paras. 69-71.

121 The existing rules on derivative evidence and discoverability were developed under the *Collins* trial fairness rationale. They gave effect to the insight that if evidence would have been discovered in any event, the accused's conscription did not truly *cause* the evidence to become available. The discoverability doctrine acquired even greater importance under *Stillman* where the category of conscriptive evidence was considerably enlarged. Since we have concluded that this underlying rationale should no longer hold and that "trial fairness" in the *Collins/Stillman* sense is no longer a determinative criterion for the s. 24(2) inquiry, discoverability should likewise not be determinative of admissibility.

122 Discoverability retains a useful role, however, in assessing the actual impact of the breach on the protected interests of the accused. It allows the court to assess the strength of the causal connection between the *Charter*-infringing self-incrimination and the resultant evidence. The more likely it is that the evidence would have been obtained even without the statement,

the lesser the impact of the breach on the accused's underlying interest against self-incrimination. The converse, of course, is also true. On the other hand, in cases where it cannot be determined with any confidence whether evidence would have been discovered in absence of the statement, discoverability will have no impact on the s. 24(2) inquiry.

123 To determine whether the admission of derivative evidence would bring the administration of justice into disrepute under s. 24(2), courts must pursue the usual three lines of inquiry outlined in these reasons, taking into account the self-incriminatory origin of the evidence in an improperly obtained statement as well as its status as real evidence.

124 The first inquiry concerns the police conduct in obtaining the statement that led to the real evidence. Once again, the extent to which this inquiry favours exclusion will depend on the factual circumstances of the breach: the more serious the state conduct, the more the admission of the evidence derived from it tends to undermine public confidence in the rule of law. Were the police deliberately and systematically flouting the accused's *Charter* rights? Or were the officers acting in good faith, pursuant to what they thought were legitimate policing policies?

125 The second inquiry focuses on the impact of the breach on the *Charter*-protected interests of the accused. Where a statement is unconstitutionally obtained, in many cases the *Charter* right breached is the s. 10(*b*) right to counsel, which protects the accused's interest in making an informed choice whether or not to speak to authorities. The relevant consideration at this stage will be the extent to which the *Charter* breach impinged upon that interest in a free and informed choice. Where that interest was significantly compromised by the breach, this factor will strongly favour exclusion. In determining the impact of the breach, the discoverability of the derivative evidence may also be important as a factor strengthening or attenuating the self-incriminatory character of the evidence. If the derivative evidence was independently discoverable, the impact of the breach on the accused is lessened and admission is more likely.

126 The third inquiry in determining whether admission of the derivative evidence would bring the administration into disrepute relates to society's interest in having the case adjudicated on its merits. Since evidence in this category is real or physical, there is usually less concern as to the reliability of the evidence. Thus, the public interest in having a trial adjudicated on its merits will usually favour admission of the derivative evidence.

127 The weighing process and balancing of these concerns is one for the trial judge in each case. Provided the judge has considered the correct factors, considerable deference should be accorded to his or her decision. As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused's protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused's protected interests may result in exclusion, notwithstanding that the evidence may be reliable.

128 The s. 24(2) judge must remain sensitive to the concern that a more flexible rule may encourage police to improperly obtain statements that they know will be inadmissible, in order to find derivative evidence which they believe may be admissible. The judge should refuse to admit evidence where there is reason to believe the police deliberately abused their power to obtain a statement which might lead them to such evidence. Where derivative evidence is obtained by way of a deliberate or flagrant *Charter* breach, its admission would bring the administration of justice into further disrepute and the evidence should be excluded.

4. Application to this Case

129 The issue is whether the gun produced by Mr. Grant after Toronto police stopped and questioned him should be excluded from the evidence at his trial. The trial judge held that had a *Charter* breach been established, he would not have excluded the evidence. While the trial judge's s. 24(2) conclusion may not command deference where an appellate court reaches a different conclusion on the breach itself (see *R. v. Grant*, [1993] 3 S.C.R. 223 (S.C.C.), at pp. 256-57, *per* Sopinka J.; *R. v. Harris*, 2007 ONCA 574, 225 C.C.C. (3d) 193 (Ont. C.A.), at p. 212), the trial judge's underlying factual findings must be respected, absent palpable and overriding error.

130 Here, the admissibility of Mr. Grant's incriminatory statements is not in issue, the statements having no independent evidentiary value. The only issue is the admission or exclusion of the gun. This falls to be determined in accordance with the inquiries described earlier.

131 At the outset, it is necessary to consider whether the gun was "obtained in a manner" that violated Mr. Grant's *Charter* rights: see *R. v. Strachan*, [1988] 2 S.C.R. 980 (S.C.C.), and *R. v. Goldhart*, [1996] 2 S.C.R. 463 (S.C.C.). As explained above, we have concluded that Mr. Grant's rights under ss. 9 and 10(*b*) of the *Charter* were breached. The discovery of the gun was both temporally and causally connected to these infringements. It follows that the gun was obtained as a result of a *Charter* breach.

132 Because the gun was discovered as a result of statements taken in breach of the *Charter*, it is derivative evidence. The question, as always, is whether its admission would bring the administration of justice into disrepute. To answer this question, it is necessary to consider the concerns that underlie the s. 24(2) analysis, as discussed above, in "all the circumstances" of the case, including the arbitrary detention and the breach of the right to counsel.

133 We consider first the seriousness of the improper police conduct that led to the discovery of the gun. The police conduct here, while not in conformity with the *Charter*, was not abusive. There was no suggestion that Mr. Grant was the target of racial profiling or other discriminatory police practices. The officers went too far in detaining the accused and asking him questions. However, the point at which an encounter becomes a detention is not always clear, and is something with which courts have struggled. Though we have concluded that the police were in error in detaining

the appellant when they did, the mistake is an understandable one. Having been tinder a mistaken view that they had not detained the appellant, the officers' failure to advise him of his right to counsel was similarly erroneous but understandable. It therefore cannot be characterized as having been in bad faith. Given that the police conduct in committing the *Charter* breach was neither deliberate nor egregious, we conclude that the effect of admitting the evidence would not greatly undermine public confidence in the rule of law. We add that the Court's decision in this case will be to render similar conduct less justifiable going forward. While police are not expected to engage in judicial reflection on conflicting precedents, they are rightly expected to know what the law is.

134 The second inquiry under the s. 24(2) analysis focuses on whether the admission of the evidence would bring the administration of justice into disrepute from the perspective of society's interest in respect for *Charter* rights. This inquiry focuses on the impact of the breach on the accused's protected interests. Because the two infringed *Charter* rights protect different interests, it is necessary to consider them separately at this stage.

135 The initial *Charter* violation was arbitrary detention under s. 9 of the *Charter*, curtailing Mr. Grant's liberty interest. This interaction, beginning as a casual conversation, quickly developed into a subtly coercive situation that deprived Mr. Grant of his freedom to make an informed choice as to how to respond. This is so, notwithstanding the fact that the detention did not involve any physical coercion and was not carried out in an abusive manner. We therefore conclude that the impact of this breach, while not severe, was more than minimal.

136 The second *Charter* violation was breach of Mr. Grant's s. 10(*b*) right to counsel. Cst. Gomes, by his own admission, was probing for answers that would give him grounds for search or arrest. Far from being spontaneous utterances, the appellant's incriminating statements were prompted directly by Cst. Gomes' pointed questioning. The appellant, in need of legal advice, was not told he could consult counsel.

137 As discussed, discoverability remains a factor in assessing the impact of *Charter* breaches on *Charter* rights. The investigating officers testified that they would not have searched or arrested Mr. Grant but for his self-incriminatory statements. Nor would they have had any legal grounds to do so. Accordingly, the fact that the evidence was non-discoverable aggravates the impact of the breach on Mr. Grant's interest in being able to make an informed choice to talk to the police. He was in "immediate need of legal advice" (*Brydges*, at p. 206) and had no opportunity to seek it.

138 Considering all these matters, we conclude that the impact of the infringement of Mr. Grant's rights under ss. 9 and 10(*b*) of the *Charter* was significant.

139 The third and final concern is the effect of admitting the gun on the public interest in having a case adjudicated on its merits. The gun is highly reliable evidence. It is essential to a determination on the merits. The Crown also argues that the seriousness of the offence weighs in favour of admitting the evidence of the gun, so that the matter may be decided on its merits,

asserting that gun crime is a societal scourge, that offences of this nature raise major public safety concerns and that the gun is the main evidence in the case. On the other hand, Mr. Grant argues that the seriousness of the offence makes it all the more important that his rights be respected. In the result, we do not find this factor to be of much assistance.

140 To sum up, the police conduct was not egregious. The impact of the *Charter* breach on the accused's protected interests was significant, although not at the most serious end of the scale. Finally, the value of the evidence is considerable. These effects must be balanced in determining whether admitting the gun would put the administration of justice into disrepute. We agree with Laskin J.A. that this is a close case. The balancing mandated by s. 24(2) is qualitative in nature and therefore not capable of mathematical precision. However, weighing all these concerns, in our opinion the courts below did not err in concluding that the admission of the gun into evidence would not, on balance, bring the administration of justice into disrepute. The significant impact of the breach on Mr. Grant's *Charter*-protected rights weighs strongly in favour of excluding the gun, while the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission. Unlike the situation in *R. v. Harrison*, 2009 SCC 34 (S.C.C.), the police officers here were operating in circumstances of considerable legal uncertainty. In our view, this tips the balance in favour of admission, suggesting that the repute of the justice system would not suffer from allowing the gun to be admitted in evidence against the appellant.

C. The Meaning of "Transfer" in Sections 84, 99 and 100 of the Criminal Code

141 Mr. Grant argues that his conviction of possession of a firearm for the purposes of weapons trafficking under s. 100(1) of the *Criminal Code* should be quashed on the grounds that he did not "transfer" the firearm within the meaning of that section. Section 100(1) states:

> **100.** (1) Every person commits an offence who possesses a firearm, a prohibited weapon, a restricted weapon, a prohibited device, any ammunition or any prohibited ammunition for the purpose of
>
> (a) transferring it, whether or not for consideration, or
>
> (b) offering to transfer it,
>
> knowing that the person is not authorized to transfer it under the *Firearms Act* or any other Act of Parliament or any regulations made under any Act of Parliament.

142 In the Court of Appeal, Laskin J.A. noted that "[t]he word 'transfer' is defined in s. 84 to mean 'sell, provide, barter, give, lend, rent, send, *transport*, ship, distribute or deliver'" (para. 72 (italics in original, underlining added)). He observed that the dictionary definition of "transport" is to "carry, convey or remove from *one place or person to another*" (para. 72 (emphasis in original)). He also noted that ss. 84 and 100 of the *Code* were enacted with reference to the *Firearms Act*, S.C.

1995, c. 39, and he considered this wider context. Laskin J.A. was not persuaded that there was any reason to depart from the plain meaning of the word. On this definition, Mr. Grant's admission that he was "dropping off" the gun somewhere "up the road" entailed moving the gun from one place to another and was therefore sufficient to establish all elements of the offence defined by s. 100(1).

143 Mr. Grant submits that a contextual reading of s. 100 and the related provisions reveals that Parliament intended to reserve the stiffest penalties for transfers that amount to weapons trafficking, not the mere movement of a firearm from place to place. Since the trial judge did not find that he was in possession of the gun for the purpose of transferring it to another person, Mr. Grant argues that the s. 100(1) conviction cannot stand.

144 We agree with Mr. Grant that Parliament did not intend s. 100(1) to address the simple movement of a firearm from one place to another. First, according to the "associated meaning" principle of statutory interpretation, "when two or more words linked by 'and' or 'or' serve an analogous grammatical and logical function within a provision, they should be interpreted with a view to their common features": *McDiarmid Lumber Ltd. v. God's Lake First Nation*, 2006 SCC 58, [2006] 2 S.C.R. 846 (S.C.C.), at para. 30, *per* McLachlin C.J. See also R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 227-31. Once again, the definition of "transfer" is given in s. 84 as "sell, provide, barter, give, lend, rent, send, transport, ship, distribute or deliver." Of these words, only "transport" can plausibly be said to include moving a thing from place to place without the thing actually changing hands. The common element is the notion of a *transaction.* This suggests a more restrictive meaning than indicated by the dictionary definition of "transport".

145 It should also be noted that s. 100(1)(*a*) applies to the transfer of a firearm, "whether or not for consideration". Even if "transfer" is equated with "transport", the underlined words suggest that the import of the provision is to criminalize the transfer of firearms for purposes that implicate others. In other words, the inclusion of the phrase "whether or not for consideration" in s. 100(1)(*a*) suggests that Parliament did not intend to criminalize simple movement of firearms by this provision, but rather transport for purposes that implicate another person. Further, the criminalization of an "offer" to transfer a firearm under s.100(1)(*b*) suggests that a "transfer" is transactional in nature.

146 We do not accept, as did Laskin J.A., the proposition that the more restrictive reading of s. 100(1) would "destroy the cohesion between the *Criminal Code* provisions on firearms and the *Firearms Act*" (para. 77). While it is undoubtedly true that Parliament intended to place tight restrictions on the movement of firearms, there are other provisions in both regimes that deal specifically with "transfers" that fall short of trafficking. Moving a firearm in an unauthorized manner could result in prosecution under s. 86(2) of the *Criminal Code*, which penalizes the transportation of a firearm in contravention of the regulations made pursuant to the *Firearms Act.* Moreover, the *Firearms Act* defines "transfer" differently from the *Criminal Code*, so their cohesion should not be overstated: see s. 21 of the Act.

147 Finally, s. 100(1)appears in the *Code*under the heading "Trafficking Offences". As the Court held in *R. v. Davis*, [1999] 3 S.C.R. 759 (S.C.C.), at para. 53, *per* Lamer C.J., headings 'should be considered part of the legislation and should be read and relied on like any other contextual feature' (quoting R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 269). Firearms trafficking offences are extremely serious, carrying substantial penalties. Indeed, since amendments to the *Code* in 2008, a conviction under s. 100(1) now carries a mandatory minimum penitentiary sentence of three years for a first-time offender, up from one year when Mr. Grant was convicted. It should not be lightly assumed that Parliament intended to deem anyone moving a firearm from place to place without authorization to be a weapons trafficker, liable to at least three years' imprisonment on a first offence. In our view, a contextual reading of the applicable provisions suggests the contrary. Mr. Grant's offence was serious and potentially extremely dangerous, but on the evidence he did not commit the crime of trafficking.

148 We would therefore allow the appeal on Count 4.

V. Conclusion

149 We would allow the appeal on Count 4 (the trafficking charge) and enter an acquittal. On all other counts, we would dismiss the appeal.

***Binnie J.*:**

150 I concur with the disposition of the appeal proposed by my colleagues the Chief Justice and Charron J. and with their modified framework for determinations under s. 24(2) of the *Canadian Charter of Rights and Freedoms* regarding the admission or rejection of evidence obtained in a manner that violates the *Charter*. I differ, with respect, on their approach to the definition of "detention" in ss. 9 and 10 of the *Charter*. In particular, I believe their approach lays too much emphasis on the *claimant's* perception of psychological pressure, albeit as filtered through the eyes of the hypothetical reasonable person in the claimant's situation. My colleagues summarize their position on this point as follows:

> 1. Detention under ss. 9 and 10 of the *Charter* refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
>
> [Emphasis added; para. 44.]

My colleagues then set out a number of factors to help "determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice" (*ibid*).

151 The Court's continued embrace of a wholly claimant-centred approach may lead to the impression that it is more important to enquire whether the hypothetical reasonable person "in the individual's circumstances" would *think* himself or herself to be detained than whether he or she *is* detained. The perspective of the person stopped (or a "reasonable person" caught in that particular situation) is important because it is *that* person's liberty that is at issue, but, in my view, the claimant's perspective does not exhaust the relevant considerations. I agree there can be no detention unless the liberty of the person stopped is (or is reasonably perceived by that person to be) significantly constrained, but there may be much happening of which the person stopped is unaware, and this other context ought potentially to affect the legal characterization of the encounter. I agree with Professor Stuart when he writes that

> the focus should not be exclusively on the state of mind of the accused. As Courts of Appeal have persuasively suggested, detention should also take into account the perceptions of the police. . . . [Otherwise] those perhaps most in need of Charter protection against coercive police practices will have none. On the other hand, it would be unfortunate if preliminary police questioning of any suspect would have to be peppered with Charter warnings.
>
> (Don Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at p. 327)

My colleagues do take into account some police-related factors (e.g., whether the individual is singled out for "focussed investigation" (para. 44(2)(a)) but, as will be seen, they do so only to the extent this information is made evident to the person stopped.

152 Also important, in my view, is an *objective* assessment of the facts of the encounter divorced from the perception of both parties, neither of whom may have a very clear idea of what is going on in the rush of events.

A. When Does a "Stop" Become a Detention?

153 While the uniformed police embody society's collective desire for public order and livable and safe communities, they also present a serious and continuing risk to the individual's right to be left alone by the state in the absence of objective justification for the state's intervention. Interactions between the police and members of the public are not only rich in diversity but exceedingly common. Quite apart from police assistance offered to the general public, a traditional part of the daily routine of the "cop on the beat" is to check out "suspicious persons". Clear guidance on the rules governing such encounters is, or ought to be, an important part of police training: C. D. Shearing and P. C. Stenning, *Police Training in Ontario: An Evaluation of Recruit and Supervisory*

Courses (1980), at p. 41. This case is about a pedestrian. No one doubts the importance of being able to determine at what moment an *interaction* between the police and a pedestrian is converted into a *detention* of that individual, thereby triggering the rights subsidiary to detention, including the right to involve his or her lawyer who can generally be expected to advise his or her client not to say anything further. In the first instance it is the police who must decide if a detention exists because they are the people who administer the caution and inform the person detained about the right to counsel. Their intentions and perceptions will inevitably be factored into their determinations whether disclosed to the claimant or not, and should be taken into account in the legal test for detention when the matter eventually comes before a judge.

154 A growing body of evidence and opinion suggests that visible minorities and marginalized individuals are at particular risk from unjustified "low visibility" police interventions in their lives: *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679 (S.C.C.), at para. 83. See also A. Young, "All Along the Watchtower: Arbitrary Detention and the Police Function" (1991), 29 *Osgoode Hall L. J.* 329, at p. 390; D. M. Tanovich, "Using the Charter to Stop Racial Profiling: The Development of an Equality-Based Conception of Arbitrary Detention" (2002), 40 *Osgoode Hall L. J.* 145; Ontario Human Rights Commission, Inquiry Report, *Paying the Price: The Human Cost of Racial Profiling* (2003); *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System* (1995), at p. 337. The appellant, Mr. Grant, is black. Courts cannot presume to be colour-blind in these situations.

155 At the same time, members of visible minorities may, as much as anyone else, be approached and asked questions by police. While, even more so than others, they may feel unable to choose to walk away, the perspective of the police and the information (if any) the police possess when they initiate an encounter would help assess whether the liberty interest of the person stopped is truly at issue, even if the police perspective on the encounter is not made known by words or conduct to the person stopped.

B. A Brief History of the "Reasonable Perception" Test

156 Our approach to detention, as with so much of this area of the law, draws heavily on the U.S. Fourth Amendment jurisprudence. Both societies, Canada and the United States, place a high value on the right of citizens to go about their business without being arbitrarily stopped by the police and told to give an account of activities that they consider to be none of the police's affair. We therefore want a definition of detention that protects our liberty. Accordingly, in *R. v. Therens*, [1985] 1 S.C.R. 613 (S.C.C.), Le Dain J. held, and subsequent cases have agreed, that a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (p. 644). This approach corresponded to earlier decisions of the U.S. Supreme Court establishing that "a person has been 'seized' [i.e. detained] within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave":

United States v. Mendenhall, 446 U.S. 544 (U.S. Sup. Ct. 1980), at p. 554, endorsed in *Florida v. Royer*, 460 U.S. 491 (U.S. S.C. 1983), and subsequent cases.

157 Stewart J. in *Mendenhall* stated quite categorically that the "subjective intention" of the state authority (a drugs enforcement officer) "to detain the respondent, had she attempted to leave, is irrelevant except insofar as that may have been conveyed to the respondent" (emphasis added; p. 554, fn. 6). The approach of excluding from consideration information not reasonably evident to the person stopped is endorsed by my colleagues at numerous points in their judgment, for example:

> The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand. [para. 31]
>
> . . . . .
>
> Accordingly, we must consider all relevant circumstances to determine if a reasonable person in Mr. Grant's position would have concluded that his or her right to choose how to interact with the police (i.e. whether to leave or comply) had been removed. [para. 46]
>
> . . . . .
>
> In our view, the evidence supports Mr. Grant's contention that a reasonable person in his position (18 years old, alone, faced by three physically larger policemen in adversarial positions) would conclude that his or her right to choose how to act had been removed by the police, given their conduct. [para. 50]

158 The *Mendenhall* approach to detention adopted in *Therens* and affirmed in this case by my colleagues has different consequences in the U.S. than it does here. In relation to the right to counsel, for example, that right does not arise in the U.S. "without delay" upon a psychological detention ("or seizure"), but only where there is "a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest": *California v. Beheler*, 463 U.S. 1121 (U.S. Sup. Ct. 1983), at p. 1125; *Oregon v. Mathiason*, 429 U.S. 492 (U.S. Or. 1977), at p. 495. See also *Escobedo v. Illinois*, 378 U.S. 478 (U.S. Sup. Ct. 1964), at pp. 490-91; *Miranda v. Arizona*, 384 U.S. 436 (U.S. Sup. Ct. 1966), at p. 444; *Thompson v. Keohane*, 516 U.S. 99 (U.S. Sup. Ct. 1995), at p. 112. Whether such a situation of formal restraint exists under U.S. law "depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned": *Stansbury v. California*, 511 U.S. 318 (U.S. Sup. Ct. 1994), at p. 323 (emphasis added). In other words, in the U.S. psychological detention does not, without more, invoke entitlement to the assistance of counsel. The U.S. courts take a generous view of when "psychological detention" occurs because it triggers scrutiny under the Fourth Amendment of police conduct that would otherwise lie outside judicial oversight under their Constitution. In practical terms, the U.S. can live with such a broad claimant-centred definition because it does not have the effect of bringing in the lawyers at an early stage in encounters between

the police and the citizen. The significant effect of a finding of detention in the U.S., as under our decision in *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 (S.C.C.), is to require the police to meet the standard of reasonable suspicion. Thus the *Mendenhall* doctrine of psychological detention, when imported into Canada, raises a complication under s. 10(*b*) not present in the United States.

C. Recognizing an "Obvious Tension"

159 In this case, Laskin J.A., speaking for the Ontario Court of Appeal, recognized that:

> The definition of "psychological detention" reflects a judicial balance between competing values. On the one hand, the police have the duty and the authority to investigate and prevent crime in order to keep our community safe. In carrying out their duty, they must interact daily with ordinary citizens. Not every such encounter between the police and a citizen amounts to a constitutional "detention". This court and other courts have recognized that police must be able to speak to a citizen without triggering that citizen's *Charter* rights.
>
> On the other hand, ordinary citizens must have the right to move freely about their community.
>
> ((2006), 81 O.R. (3d) 1, at paras. 10 and 12)

160 In the companion case of *R. v. Suberu*, 2009 SCC 33 (S.C.C.), where the police intercepted an individual as he tried to leave an Ontario liquor store where a fraud had just been committed, Doherty J.A., also speaking for the Ontario Court of Appeal, recognized the "obvious tension between the requirement to inform detained persons of their right to counsel and the proper and effective use of brief investigative detentions" (2007 ONCA 60, 85 O.R. (3d) 127 (Ont. C.A.), at para. 41).

161 Having found a breach of s. 9, Laskin J.A. did not go on in this case to deal with the s. 10(*b*) right to counsel. However, as my colleagues treat *Suberu* in this Court as a more or less straightforward application of their analysis of detention in *Grant*, I propose to deal with both ss. 9 and 10(*b*) here.

162 The Crown's argument is that by introducing a right to legal counsel (and "to be informed of that right") prematurely into commonplace interactions between police and members of the public, the Court would hamstring essential police services and unduly tilt the constitutional balance against the public interest in effective law enforcement. For the police, in Professor Uviller's mellifluous phrase, "[t]he confession is the 'queen of the evidentiary chessboard'" (quoted in *Young*, at pp. 365-66). When lawyers are on the scene, the potential for obtaining confessions tends to dry up.

163 The defence, on the other hand, supports a broad definition of detention and quick access to legal advice because under a less generous *Charter* approach a member of the public risks serious prejudice to his or her defence before the lawyer can get involved, since few members of the public are clear about their *Charter* rights. The solution to this dilemma offered by the Ontario Court of Appeal in *Suberu* was to read down s. 10(*b*) so that the concept of "without delay" is stretched more readily to accommodate the reasonable needs of law enforcement (which in practice might well result in a situation similar to that prevailing in the U.S.). The problem with the Ontario court's solution, as my colleagues note, is that the interpretation does not sit easily with what those words mean, whether interpreted purposefully, textually or contextually with the *Charter*.

164 The appellant, supported by the Criminal Lawyers' Association (Ontario) and the Canadian Civil Liberties Association, suggests that the "obvious tension" could be eased by declaring inadmissible any incriminating statements made by an accused between the moment the detention crystallized and the subsequent notification to the accused of the right to retain and instruct counsel. However, this presupposes that the s. 9 detention has indeed crystallized, which is the point in issue.

165 Another way to ease the "obvious tension" (other than resort to s. 1) would be for the courts to re-examine the concept of "psychological detention" with a view to broadening the perspectives from which the encounter is viewed. This would help obviate some of the problems with a purely claimant-centred approach, in my opinion.

D. Problems with the Claimant-Centred Approach

166 I believe there are a number of problems with the Court's continuing endorsement of the *Therens/Mendenhall* approach to determine when a simple interaction crystallizes into a detention. Insistence that the claimant's circumstances be viewed from the more detached perspective of a "reasonable person" provides in some cases a welcome corrective, but in other cases, by exaggerating the ability of ordinary people to stand up to police assertion of authority, that approach may compel the conclusion that the claimant had the choice to walk away whereas in reality no such choice existed.

1. The Perception of the Police May Be of Significance

167 My colleagues refer to the "complex situation", for example,

> where the non-coercive police role of assisting in meeting needs or maintaining basic order can subtly merge with the potentially coercive police role of investigating crime and arresting suspects so that they may be brought to justice. [para. 40]

I agree that this "subtle" change of police perspective is relevant to the analysis but it will not always be made apparent to a person who is unambiguously stopped but remains unsure whether the encounter is benign or perilous. Police investigators assemble a mosaic of facts. Apparent "general inquiries" (para. 41) may be designed, unknown to the person stopped, to elicit the missing piece of self-incrimination. The success of the police investigation may indeed depend on the police skill in *masking* their information and intentions from the person stopped.

168 Of relevance in this respect is the judgment of Martin J.A. in *R. v. Moran* (1987), 36 C.C.C. (3d) 225 (Ont. C.A.), leave to appeal refused, [1988] 1 S.C.R. xi (S.C.C.), setting out some of the considerations he thought relevant to finding a detention, including

> the stage of the investigation, that is, whether the questioning was part of the general investigation of a crime or possible crime or whether the police had already decided that a crime had been committed and that the accused was the perpetrator or involved in its commission and the questioning was conducted for the purpose of obtaining incriminating statements from the accused; [p. 259]

These are matters that would certainly be known to the police but not necessarily communicated to the person stopped. Perhaps, as mentioned, the stage of the investigation will be intentionally concealed with a view to a more productive interrogation. Other *Moran* considerations would be apparent to the person stopped, e.g.

> the nature of the questions: whether they were questions of a general nature designed to obtain information or whether the accused was confronted with evidence pointing to his or her guilt; [p. 259]

If, for example, the police arrive at a street disturbance and it is not clear to them whether the occurrence is a crime or an accident, and they tell everyone to stay put until the situation is clarified, such a "stay put" direction should carry a different legal consequence than if used at what is clearly a crime scene to hold an individual they believe is a likely suspect. In the former case, the situation may be explicable by reference to police responsibilities for public safety and order. In the latter case, the police are attempting to gather evidence about (and from) a particular individual in relation to a particular crime. The reality is that in *both* cases, to borrow Laskin J.A.'s formulation in the court below, "any reasonable person hearing these words from a uniformed officer three feet away would treat them not as a request that might be ignored, but as a command that must be obeyed" (para. 24). Although in both cases the police command to "stay put" will likely constrain psychologically the individuals subject to the police direction from walking away, only in the latter instance ought the *Charter* right to be triggered because it is only in that instance that "a person may reasonably require the assistance of counsel" (*Therens*, at pp. 641-42).

2. The Uncertain Characteristics of the "Reasonable Person"

169 In a useful commentary on the U.S. *Mendenhall* test, Professor Butterfoss writes:

> Application of the test has created a broad "nonseizure" category of police-citizen encounters that permits officers substantial leeway in approaching and questioning citizens without being required to show objective justification for such conduct. This has been accomplished both by constructing a highly artificial "reasonable person," who is much more assertive in encounters with police officers than is the average citizen, and by ignoring the subjective intentions of the officer. The result is that fourth amendment rights of citizens are determined through a legal fiction.
>
> [Emphasis added.]
>
> (E. J. Butterfoss, "Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins" (1988-1989), 79 *J. Crim. L. & Criminology* 437, at p. 439)

In other words, encounters with police that average citizens would consider left them with no choice but to comply are denied the status of "detentions" through the device of putting in their place an artificially robust and assertive "reasonable person". Self-incriminatory conduct may also be rationalized in the state's favour by the attributed sense of "moral or social duty on the part of every citizen to answer questions put to him or her by the police" (see *R. v. Grafe* (1987), 36 C.C.C. (3d) 267 (Ont. C.A.), at p. 271). This gap between the reality on the street and the court constructed "reasonable person" is of particular relevance to visible minorities who may, because of their background and experience, feel especially unable to disregard police directions, and feel that assertion of their right to walk away will itself be taken as evasive and later be argued by the police to constitute sufficient grounds of suspicion to justify a *Mann* detention.

170 Leaving aside the issue of visible minorities, is the concept of the reasonable person intended to describe average cooperative members of the public? If so, the Canadian reality is that such people will almost always regard a direction from a police officer as a demand that must be complied with. This was recognized in *Therens* (and adopted in this case by my colleagues) when Le Dain J. acknowledged that "[m]ost citizens are not aware of the precise legal limits of police authority" and the reasonable person is therefore "likely to err on the side of caution, assume lawful authority and comply with the demand" (p. 644). Viewed in this way, police instructions or demands readily constrain a claimant's choice to leave and, therefore, on that interpretation, even the less intrusive encounters between the police and citizens ought frequently to be declared detentions despite the fact that at that stage such people do not reasonably require the assistance of counsel.

171 On the other hand, perhaps the "reasonable person" is to be invested with a higher level of legal sophistication, leading to a more robust attitude towards the police. My colleagues refer to the reasonable person's assessment being informed by "generally understood legal rights and

duties" (para. 33; see also para. 37). This more érudite version of the "reasonable person" might know that apart from some statutory exceptions, he or she ordinarily has the right to walk away from the encounter regardless of what the police officer says, unless and until the police possess reasonable grounds to suspect involvement in a criminal offence and therefore grounds for a *Mann-type* investigative detention. If the test envisages the perception of this more knowledgeable type of "reasonable person", then anything short of an investigative detention as described in *Mann* would fail to constrain freedom of choice, and whatever is said in those critical early moments of an encounter will be presumed to be "voluntary" and based on consent.

172 A further problem with the "reasonable person" device is to define exactly what information this fictional person possesses. While "the factors" identified by my colleagues include "whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation" (para. 44(2)(a)), it is not suggested that the "reasonable person" is a mind-reader. On their view, this information can only affect the "reasonable person" assessment to the extent it is made manifest to the claimant, whose perception would otherwise remain oblivious and unaffected.

173 Yet, another difficulty with calibrating the "reasonable person" approach is that it is not at all clear what experience this hypothetical individual brings to the assessment of the encounter and what criteria this individual applies in deciding whether or not the person stopped is free to choose to break off the encounter. There is a difference between the listing of a broad range of factors to be considered by a court and identifying their relative weight and importance.

174 In the absence of explicit criteria, various judges will tend to read into the "reasonable person" their own projections of the moment at which, in *their* view, the person stopped *ought* to be able to call a lawyer. This creates the risk of a very results-oriented analysis. Perceptions will vary depending on the personality of the judge seized with the case. My colleagues emphasize at different places the need for deference to the assessment of the trial judges (e.g., para. 43) which may further complicate the task of developing a consistent approach. In other words, continued reliance on the "reasonable person" whose attributed experience and choice of criteria are unspecified except for a presumed commitment to "reasonableness" helps to mask rather than clarify the actual criteria being applied by the Court.

E. Broader Approach

175 As a majority of the Court is satisfied with the *Therens/Mendenhall* claimant-centred approach, I will not belabour the existence of alternatives. However, I believe more attention should be paid to the *objective* facts of the encounter between a police officer and members of the public, whether or not such facts are made apparent to the person stopped.

176 There is, of course, an important continuing role for psychological detention as perceived by the person stopped, but in that respect serious weight should be given to the values and experience

of the person *actually* stopped, including the experience of visible minorities, and less emphasis on the hypothetical opinion of the "reasonable person" insofar as the latter is presumed to be able to handle such stressful encounters without sensing "significant . . . psychological restraint" (*Mann*, at para. 19). As mentioned, Mr. Grant is black. In determining whether he (or a reasonable person in his position) would feel free to choose to walk away from three policemen, contrary to their wishes in the circumstances here, his ethnicity raises a significant issue. As the above-mentioned studies show, trial judges differ in the weight they are willing to accord to ethnicity in such "low visibility" encounters, despite the over-representation of Aboriginals and other visible minorities in encounters with police patrols. That is why, from my point of view, the police perspective and the information (if any) the police possessed when they initiated the encounter is important to shed light on whether or not the liberty interest of the person stopped was truly compromised.

177 I agree with my colleagues that a claim of psychological detention must meet the three-fold test of (i) a police command or direction (ii) compliance by the person now claiming a s. 9 detention and (iii) grounds for a reasonable belief that there was no choice but to comply. However, in my view, police words and conduct should be interpreted in light of the *purpose* of the encounter from the police perspective — whether disclosed to the person from whom cooperation is requested or not. The U.S. *Model Code of Pre-Arraignment Procedure* (A.L.I. 1975), s. 110.1(2), for instance, includes special provisions for questioning suspects as opposed to seeking cooperation from citizens and requires warnings to suspects that no legal obligation exists to respond to questioning. See also the English *Judges' Rules*, Rules I and II (*Practice Note (Judges' Rules)*, [1964] 1 W.L.R. 152, at p. 153). The police know, but the claimant does not know, the point at which a person of interest begins to emerge as a suspect and ceases to be, as my colleagues put it, a person whose "rights are not seriously in issue" (para. 29).

178 A central problem with the *Therens/Mendenhall* claimant-centred approach, as I see it, is that it does not take adequately into account what the police know and when they knew it except insofar as this information is conveyed to the person stopped, but which the police may not consider to be in their interest to convey. Police may know (as in *Suberu*) if a crime has allegedly been committed and whether they are making the approach to an individual with a view to obtaining general information or, on the other hand, corralling a suspect and collecting admissible evidence to bring him or her to justice. Possession of such knowledge may in fact place the police in an adversarial relationship to the person approached whether that person is aware of the jeopardy or not. It is the adversarial relationship together with the "stop" that generates the need for counsel. At that point, the power imbalance is significant. The unsuspecting suspect may fatally compromise his or her position simply through ignorance of his or her rights and the fact the police have now adopted an adversarial position. At that point, as Le Dain J. put it in *Therens*, "a person may reasonably require the assistance of counsel" (pp. 641-42), but may not have any idea of the perilous turn of events.

179 On the other hand, a more benign police purpose may deprive even an unambiguous police command of the legal effect of a detention, and thereby enure to the benefit of the Crown. Had Constable Roughley in the *Suberu* case, for example, come rushing up to Mr. Suberu in the parking lot of the liquor store saying "Wait a minute. I need to talk to you before you go anywhere" because police had just received information, unknown to Mr. Suberu, that Mr. Suberu's van had been wired with an explosive device by a local member of the Hell's Angels, the detention analysis ought to be quite different although the constable's words and the forcefulness of their expression may be the same.

180 It is not controversial that in the early stages of a criminal investigation the police must be afforded some flexibility before the lawyers get involved. The police do have the right to ask questions and they need to seek the co-operation of members of the public, including those who turn out to be miscreants. The question is how to accommodate that need within a plausible framework of s. 9 analysis. In my view, without wishing to prolong this discussion, a better and broader approach to detention would explicitly take into account (i) the objective facts of such encounters, whether or not evident to the person stopped, as well as (ii) the perception of the police in initiating the encounter, whether or not evident to the person stopped, and (iii) whatever information the police possess at the time, which may or may not be known to the person stopped, as well as whatever change in the police perception occurs as the encounter develops. These matters should all be factored into a more comprehensive analysis of when a "detention" occurs for *Charter* purposes than is provided in the *Therens/Mendenhall* claimant-centred approach affirmed today by the Court.

F. Application to the Facts

181 In this case, I agree with my colleagues that Mr. Grant was arbitrarily detained. The safety of school neighbourhoods is of great importance but under our system of law it cannot be achieved by random detention of pedestrians on the off-chance that some of them might (or might not) be implicated in criminal activity.

182 The purpose of these police officers, whether or not couched in terms of community policing, was to investigate crime, whether actual or anticipated. Constable Worrell testified that when the officers drove past in an unmarked car, Mr. Grant "stared" at them in an unusually intense manner and continued to do so as they proceeded down the street. He wore a "big jacket" and was "fidgeting" with his coat and pants. Staring at an unmarked car and fidgeting are lawful activities but it was enough to cause three police officers to converge on Mr. Grant. The police purpose for initiating the encounter is important, I believe, and Constable Worrell testified:

> Q. Well, when you stop these people, I take it, the object of the exercise in light of what you said about the nature of the area is to find out if perhaps they might be involved in swarmings or robberies or drugs?

A. That's correct.

Q. And when you and your partner talked about potentially stopping Mr. Grant yourselves and what you had in mind was having a chat with him —

A. Mm-hmm.

Q. — to determine whether he might be involved in swarmings or robberies or drugs, correct?

A. It's possible he may have been, but we didn't know for sure.

The police had no information whatsoever that Mr. Grant may have been implicated in criminal activity or even whether a crime had been committed, but Mr. Grant's further "fidget" with his jacket convinced Constable Gomes to take charge of the situation (whether or not Mr. Grant was aware of how his fidgets were being interpreted by Constable Gomes) and to order Mr. Grant to "keep his hands in front of him". That command crystallized the detention.

183 However, in my view, the finding of a detention is properly the product not only of Mr. Grant's perception (filtered through the hypothetical reasonable person) but also of the objective facts of why the encounter was initiated (crime detection) and the other facts surrounding the encounter whether or not evident to Mr. Grant, e.g., the agreement among the three officers (unknown to Mr. Grant) to converge on him and thereafter effectively to form "a small phalanx blocking the path in which the appellant was walking" (Laskin J.A., at para. 29). As Mr. Grant did not testify, we do not have any first-hand evidence of *his* perception, although his lack of choice must have been manifest when every time he moved Constable Gomes, who was standing only three feet away, moved in a corresponding way to maintain the nose-to-nose impasse. What we do have in considerable detail is the perception of each of the three police officers. Their forthright account of their own intentions and their acknowledged lack of any information that any crime was or was about to be committed, apart from a "hunch", none of which was conveyed to Mr. Grant, give rise to the conclusion that Mr. Grant *was* arbitrarily detained.

184 I therefore concur in the conclusion of the Chief Justice and Charron J. that Mr. Grant was detained. I also agree with their analysis under s. 24(2) and the consequent disposition of the appeal.

***Deschamps J.*:**

185 The difficulty in resolving the problems related to detention and to the exclusion of evidence in three appeals now before the Court reveals a number of deficiencies in the applicable rules. These three cases show that it is sometimes hard to reconcile the protection of constitutional rights with the public interest in bringing cases to trial. I have read the reasons of the majority, and I

agree with them that the tests for determining whether a person was actually detained and whether evidence should be excluded need to be reformulated. With respect, however, I must comment further on the application of the new rules concerning detention to the facts of this case. As for the factors to consider in deciding whether to admit or exclude evidence obtained in violation of constitutional rights, I find that the test proposed by the majority is problematic, and that it is inconsistent with the purpose of the constitutional provision that applies to such decisions. Although my analysis differs from the majority's, I reach the same conclusion as them.

1. Test for Determining Whether a Person was Detained

186 Where the state interacts with citizens in a criminal law context, be it in the streets or in a courtroom, the applicable rules must be clear so that all those involved in the criminal justice system know the scope of their respective rights and powers. I agree with the majority that the police cannot do their work effectively without the co-operation of the public (para. 39). The applicable rules must therefore take into account the fact that the police need to act so as to foster public co-operation, not to discourage it.

187 In the instant case, the trial judge stressed the fact that the police officers, who were patrolling an area around four schools where numerous disturbances had been reported, had conducted themselves politely and seemed to have been conscientious in doing their work. On whether the law prohibits or should prohibit this type of police action, the trial judge quoted with approval the following comment by one of his colleagues:

> We do not expect the police to sit in their station houses waiting for those who commit offences to walk in and confess. We expect them to be out in the community and when suspicious events occur to make inquiries. The Charter is not a barrier to those inquiries.
>
> (2004 CarswellOnt 8779 (Ont. C.J.), quoting *R. v. Orellana*, [1999] O.J. No. 5746 (Ont. C.J.))

This approach is the very one on which the majority of this Court are basing the test adopted today to guide the public, law enforcement agencies and judges in determining at what point a person is "detained" in the legal sense of this term.

188 In the companion case of *R. v. Suberu*, 2009 SCC 33 (S.C.C.), the majority of the Court acknowledge that police officers may interact with the public and that not every contact between a police officer and a member of the public constitutes detention. There is a clear distinction between the nature of the police action in the case at bar and that of the action in *Suberu*. *Suberu* concerns a targeted action by officers who had received specific information. In the case at bar, the action was one of prevention, and the officers' approach was necessarily different. It will be helpful to consider the trial judge's findings of fact.

189 Constables Worrell and Forde were on patrol, in plainclothes in an unmarked car, in an area where four high schools are located. The area was experiencing problems related to intimidation, robberies and drug offences involving students. The two officers had been ordered to maintain a presence there for purposes of prevention. They drove past an individual, Mr. Grant, and noted that he was staring at them. After they had passed him, Constable Worrell turned around and saw that he was still watching them and that he was fidgeting with his clothes at his waist and pulling on his pants with his right hand. At this point, the officers felt that it would be appropriate to speak with him. As they continued along their way, they saw another officer, Constable Gomes, who was on patrol in a marked cruiser. They suggested that he go speak with Mr. Grant, which he did. While speaking with Constable Gomes, Mr. Grant behaved nervously and touched his clothes at his waist, which prompted Constable Gomes to ask him to keep his hands in front of him. At first, constables Worrell and Forde stayed apart from Mr. Grant and Constable Gomes, but on seeing that Mr. Grant still appeared nervous and continued to look at them, they decided to move closer to make sure everything was all right. They identified themselves, showing their badges, and then stood behind Constable Gomes. I will not repeat the exchange that took place between Constable Gomes and Mr. Grant. The relevant passages are reproduced in the majority's reasons. All I need say here is that Mr. Grant made an incriminating statement.

190 In analysing all these facts, the trial judge found that Mr. Grant had not been detained. The following is his own lengthy summary of his reasons for so finding:

> (1) The Location being the sidewalk of a main street in the City of Toronto in full view of the public.
>
> (2) The means by which the police spoke to the accused; i.e., on the street, and the accused not being required to stay or get into any vehicle or any closed type of situation.
>
> (3) The time of day. It was broad daylight. It was approximately 12:30 p.m., the usual noon hour for students.
>
> (4) There was no physical force. There was no pat down search and there was no grabbing where someone, especially the accused, in any situation might feel intimidated.
>
> (5) There was no actual search or physical search, of course. There were just some questions put.
>
> (6) There was an absence of reasonable and probable grounds to conduct an arrest and there was no reason to take physical control of the accused until, of course, the marijuana and firearm surfaced.

> (7) What would Police Constable Gomes have done if the accused, for example, left the scene? He may have followed him. He may have asked him further questions. There again, that is subject to speculation.
>
> (8) The length of the interaction. It was short. It consisted of minutes. This was not a one-half hour or hour interrogation. It wasn't off the street or in a police cruiser.
>
> (9) The response of the other police officers. These officers stood behind Gomes, but they were not involved in the discussion. They didn't surround the accused nor did they detain him. And I may address that issue further in due course.
>
> (10) The nature of the conversation with Gomes. It was not in aggressive language. There were no demands or directions. The only request was that he keep his hands in front of him. There was no demand to enter a cruiser, and nothing was said that I find would be compelling. There were no threats or inducements. This officer just asked some general questions and in response to those questions the accused produced identification as to who he was, where he lived, and he even gave his phone number.
>
> (11) The accused could have walked away. He could have walked around the one police officer or the three police officers and could have kept going. All he had to do, in my view, is say, "Excuse me". To suggest for one moment that he couldn't or they wouldn't permit it is speculation. There was no evidence that the accused felt compelled or had a subjective belief in relation to anything. The inference is, that the accused decided to cooperate all the way with the police. The quantity of time spent was referred to.
>
> I conclude very easily that this was a conversation of an extremely short duration, lasting no more than several moments, but no more than three or four minutes. So much so, that I find the ultimate crime, the solving of the crime and the arrest and search incidental to the arrest took some four minutes more or less.
>
> I also find that the limited conversation between Police Constable Gomes and the accused was no more than that, a conversation and an attempt to chit chat or make chit chat. Here again, I find it was all meant to check on the temperature of the community.

191 Unlike the trial judge, the Court of Appeal concluded that Mr. Grant had been detained. I agree with this conclusion: viewed as a whole, the facts support the conclusion that there was indeed a detention. However, I wish to point out that the detention came to a head when the officers asked Mr. Grant certain direct questions that, viewed objectively, might have caused a reasonable person to feel singled out, cornered and, therefore, detained. Owing to the nature of the questions asked by Constable Gomes, the line between prevention and suppression was crossed. Constable Gomes asked Mr. Grant if he had committed a crime. Once such a question had been asked of a

person who had known he was being watched from the time he had crossed paths with constables Worrell and Forde — who had since arrived on the scene — the encounter could no longer be described simply as an interaction between a police officer and a member of the public. I agree with the Court of Appeal's conclusion that the exchange was no longer an impromptu conversation that a young man such as Mr. Grant would think he could walk away from as he pleased.

192 In light of the conclusion that Mr. Grant was detained, I must consider the power of the police to detain a person for investigation purposes in performing their crime prevention function. Unlike in the context of crime suppression, police officers who are charged with preventing crime — in particular, as in the instant case, in an area near schools experiencing problems related to violence — know that unlawful acts have been or will be committed, but do not know when, where or by whom a specific crime will be committed. They must therefore have some leeway to be able to perform this function adequately.

193 Although I cannot conclude that the officers in the case at bar had a reasonable suspicion that an offence had been committed, I would not want what is said in this judgment to discourage them from intervening. As can be seen from the trial judge's reasons, the officers were calm and polite. Even though their actions may, viewed objectively, have constituted detention, that was most likely not intentional. It would therefore be best in future for police officers to avoid asking incriminating questions of people who are likely to be viewed as suspects. The direct questions in the instant case can be compared with the circumspect approach taken by the officers in *R. v. Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456 (S.C.C.). If, in the course of an exchange of words in which officers act circumspectly, the behaviour of the person they are speaking with changes, the next question is whether the facts are sufficient to give rise to a reasonable suspicion that an offence has been or will be committed. If they are sufficient, it will then be open to the officers to exercise their power of investigative detention.

194 In short, I believe it is important to educate the police about how their conduct affects members of the public. If they do not really intend to detain a person, they should — by their deeds and their words — let the person know that he or she is not being singled out.

2. Factors Supporting the Admission or Exclusion of Evidence Obtained in Violation of the Charter

195 The majority propose revising the test developed in *R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.), for admitting or excluding evidence obtained in violation of a right protected by the *Canadian Charter of Rights and Freedoms*. I agree with them that the test needs to be revised, but in my view, the formulation they propose is inconsistent with the purpose of s. 24(2). I will be proposing a simpler rule that focusses the analysis on two aspects: the societal interest in protecting constitutional rights and the societal interest in the adjudication of the case on the merits. On the basis of these two aspects, it will be possible to consider all the relevant circumstances in order

to determine whether the exclusion or admission of the evidence would bring the administration of justice into disrepute.

A) Purpose of s. 24(2) of the Charter

196 The identification of the purpose of s. 24(2) of the *Charter* is of prime importance for the determination of the factors to be considered in applying this provision. According to Professor David M. Paciocco, "[r]ecent experience in the United States has demonstrated that the vitality of the exclusionary rule depends entirely on the purposes that are identified for exclusion. This is because each of the rationales has its own level of vulnerability and its own sphere of operation" ("The Judicial Repeal of s. 24(2) and the Development of the Canadian Exclusionary Rule" (1989-90), 32 *Crim. L.Q.* 326, at p. 334). However, Professor Kent Roach cautions that "[i]f none of the approaches is in a preferred position, the choice of which rationale will prevail in a particular case is likely to be inconsistent and result-oriented" ("Constitutionalizing Disrepute: Exclusion of Evidence after *Therens*" (1986), 44 *U.T. Fac. L. Rev.* 209, at p. 228).

197 *Collins* had the merit of setting out the first test for applying s. 24(2). But neither in that case nor in those that followed can the Court be said to have identified a guiding principle or taken a clear position ranking the various purposes that are often cited for the provision and can be drawn — sometimes implicitly and sometimes explicitly — from the case law. The failure to do so is surprising, given the importance the Court has attached to contextual analysis and to the need, in interpreting any provision, to consider its purpose.

198 I accordingly agree with the majority that the purpose of s. 24(2) of the *Charter* is found in the words of the provision. Section 24 reads as follows:

> **24.** (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The purpose of s. 24(2) is to maintain public confidence in the administration of justice.

199 Since this purpose is a general one, it makes it possible to take the various functions of the criminal justice system into account. This purpose also makes it possible to identify a common denominator between ss. 24(1) and (2). It is clear that one of the purposes of the remedy provided for in s. 24(1), more specifically a stay of proceedings for abuse of process, is to maintain the

repute of the administration of justice: *R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667. Although a stay of proceedings can be granted only in the clearest of cases because it allows the accused to go free, the comparison with s. 24(2) is not without interest, especially in a case where the exclusion of evidence would in practice lead to the discharge of the accused by resulting in his or her acquittal.

200 A court that must decide under s. 24(1) whether to order a stay of proceedings may consider the "balance . . . between the public interest in having all charges dealt with on their merits [and] the public interest in having all charges stayed to show the court's determination to ensure the continued vigour of checks and balances in the criminal justice system" (*R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), dissent, at para. 231 (emphasis omitted); see also the majority's reasons, at para. 57). This balancing exercise is also essential to the analysis required by s. 24(2). Under s. 24(2), the judge must decide whether the best way to maintain the repute of the administration of justice would be to admit the evidence or to exclude it.

201 I also agree with the majority's proposition that the exclusionary rule has, primarily, a prospective societal role and that the judge's analysis must focus on systemic concerns (para. 70). The court cannot consider the case of the accused person who is on trial without addressing the long-term impact of its decision on the administration of justice in general. If, where the stay of proceedings and the admission or exclusion of evidence are concerned, the point of convergence between the first and second subsections of s. 24 is the balancing of two factors, what distinguishes these provisions is that the purpose of the first is to provide for an individual remedy, whereas the ultimate purpose of the second lies in the societal interest in maintaining public confidence in the administration of justice. The first is focussed on the individual, the second on society.

202 The statement that s. 24(2) has a long-term societal purpose is of great significance for the identification of the factors to considered in the analysis. In my view, the test proposed by the majority, by focussing the analysis on the conduct of the police in the first branch and on the interest of the accused in the second, and by attaching less importance to the seriousness of the offence in the third, does not give sufficient consideration to the long-term societal interest that must guide the judge in reaching a decision.

B) The Test: Branches and Factors

203 Since *Collins*, the courts have generally applied a test under which the factors relevant to the analysis to be conducted in applying s. 24(2) were grouped in three broad branches. This Court has applied this test in many subsequent decisions, including *R. v. Greffe*, [1990] 1 S.C.R. 755 (S.C.C.), at pp. 783-84, in which Lamer J. (as he then was) summarized the test as follows:

> The first set of factors are those relevant to the fairness of the trial. The second set of factors concerns the seriousness of the *Charter* violations as defined by the conduct of the law enforcement authorities. The third set of factors recognizes the possibility that the

administration of justice could be brought into disrepute by excluding the evidence despite the fact that it was obtained in a manner that infringed the *Charter*.

204 First, the courts had to determine the nature of the evidence obtained in violation of the rights of the accused. Where real evidence was adduced, admitting it rarely led to a finding that trial fairness had been impaired. Second, they had to assess the seriousness of the violation in light of both the interests protected by the infringed right and the state conduct. Third, the courts considered the consequences of excluding the evidence and determined, more specifically, whether the evidence was essential, having regard to the seriousness of the offence (*Greffe, per* Dickson C.J., at pp. 762-63).

205 In the case at bar, the majority propose to reformulate the test. The new version continues to have three branches: a review of the state conduct, the impact of the violation on the *Charter*-protected interests and the public interest in an adjudication on the merits.

206 It is appropriate that trial fairness is no longer a cornerstone of the test. One of the problems with the reliance on trial fairness in the first branch of the *Collins* test was that it is a concept with several possible meanings and can accordingly lead to confusion.

207 Trial fairness is sometimes defined narrowly and sometimes more broadly. Defined narrowly, it concerns solely the reliability of the evidence. More broadly, trial fairness corresponds to "courtroom fairness" (P. Mirfield, "The Early Jurisprudence of Judicial Disrepute" (1987-88), 30 *Crim. L.Q.* 434, at pp. 444 and 452). In the latter sense, fairness is related to the concept of "conscriptive evidence". Its purpose is to safeguard certain fundamental rights of the accused at trial, such as the right against self-incrimination. This interpretation is essentially the same as the one in *R. v. Stillman*, [1997] 1 S.C.R. 607 (S.C.C.). Finally, trial fairness has been defined very broadly by certain commentators and in certain judgments (see the dissent in *R. v. Burlingham*, [1995] 2 S.C.R. 206 (S.C.C.), at para. 86). According to this approach, any use of evidence obtained in violation of constitutional rights is — regardless of the quality of the evidence (reliable, conscriptive, derivative, etc.) — a breach of trial fairness. It is clear that, although the concept of fairness seems to go hand in hand with any system of justice worthy of that name, it is not precise enough to serve as a reliable guide.

208 The reformulation of the first of the criteria from *Collins* so as to exclude the trial fairness concept and take *Charter*-protected interests into account in the second branch of the new test is a refinement that may help judges refer to concrete and objective factors. I am in complete agreement that the greater the impact of the violation on the *Charter*-protected interests, the more likely it is that there will be negative consequences for public confidence in the administration of justice. For example, interference with bodily integrity and a search of a rented car will not have the same impact on the confidence an objective person with good knowledge of the circumstances of the case will have in the administration of justice (*Collins*, at p. 282).

209 However, I cannot agree with focussing the analysis on the accused, as the purpose remains at all times to maintain public confidence in the administration of justice in the long term, and what is important is the public interest in the protection of constitutional rights. Nor can I accept that one of the factors — state conduct — formerly taken into account when analysing the seriousness of a violation is now a separate branch of the test. In pursuing the purpose of maintaining confidence in the administration of justice, the courts must dissociate themselves from violations of protected rights, regardless of whether or not they were intentional. Although state conduct is of course the source of the violation, it is but one of the factors to be considered in analysing the impact of the violation on *Charter*-protected interests.

210 I find the majority's emphasis on state conduct puzzling in view of the purpose of s. 24(2). Although the majority acknowledge that the purpose of the s. 24(2) rule is neither to punish the police officers nor to compensate the accused, the importance they attach to this factor places the judge on a slippery slope. Since any distinction between the role of the exclusion of evidence as a way for a court to dissociate itself from a violation and its role as a deterrent — which has been sharply criticized — will be a fine one, I wonder what role this factor will actually play. The Court's attitude in this respect has already been criticized as being one of "doublespeak" (D. Stuart, *Charter Justice in Canadian Criminal Law* (4th ed. 2005), at pp. 543-44). I fear that the same word will also be used to refer to the new test. Moreover, by making state conduct a separate branch of the test, the Court is drawing closer to the rules applied in the United States, which are based on very different constitutional provisions and a very different socio-political context (see the reasons of Esson J.A. in *R. v. Strachan* (1986), 25 D.L.R. (4th) 567 (B.C. C.A.)).

211 It might have been thought that the courts would over time have understood that it is unhelpful to begin the constitutional analysis by considering state conduct. The main problem with the importance attached to this factor is that the deterrent effect of the exclusion of evidence has never been proved empirically (S. Penney, "Taking Deterrence Seriously: Excluding Unconstitutionally Obtained Evidence Under Section 24(2) of the Charter" (2004), 49 *McGill L.J.* 105, at p. 114).

212 In the United States, many commentators have attempted to demonstrate that the exclusionary rule is either effective or ineffective as a deterrent, and the question is still open to debate: L. T. Perrin, H. M. Caldwell, C. A. Chase and R. W. Pagan, *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule*, 83 *Iowa L.R.* 669 (1998); W. R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004), vol. 1, at pp. 32-37; *Herring v. United States* [129 S.Ct. 695 (U.S. Sup. Ct. 2009)], 555 U.S. 1; Law Reform Commission of Canada, Working Paper 10, *Evidence — The Exclusion of Illegally Obtained Evidence* (1974), at pp. 19-20. The question has also been the subject of debate in Canada. According to Paciocco, at p. 340, s. 24(2) cannot have a deterrent effect, because it does not establish a clear and predictable rule requiring the exclusion of evidence. To other commentators, from the perspective of the conduct of state

agents, exclusion is not an effective sanction. The police certainly have an interest in the conviction of an accused, but that interest is above all one of society as a whole. Administrative or disciplinary measures may have a greater deterrent effect on the police (Law Reform Commission, at pp. 20-22; *R. v. Duguay*, [1989] 1 S.C.R. 93 (S.C.C.), at pp. 123-24, and *Burlingham*, at para. 104, *per* L'Heureux-Dubé J., dissenting). In my view, the reservations expressed regarding the effectiveness of the exclusion of evidence as a deterrent are an invitation to be very prudent as regards the importance attached to state conduct.

213 Furthermore, a parallel can be drawn with the order for a stay of proceedings for abuse of process, which also has as its purpose the maintenance of public confidence in the administration of justice. As the Court pointed out in *Canada (Minister of Citizenship & Immigration) v. Tobiass*, [1997] 3 S.C.R. 391 (S.C.C.), at para. 91, and in *R. c. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307 (S.C.C.), at para. 119, the purpose of such an order is not to punish state misconduct. In my view, there is no justification for attributing this role, even indirectly, to s. 24(2). Although I agree that the exclusion of evidence may have a deterrent *effect*, I do not think state conduct should be considered separately in the determination of what must be done to maintain public confidence in the administration of justice. If a judge must decide whether to admit or exclude evidence, a violation of rights must already have been proved. It is therefore the impact of that violation that needs to be examined, not the inherent seriousness of the state conduct.

214 In sum, I agree with incorporating into the assessment of the impact of the violation a broader perspective according to which all *Charter*-protected interests are taken into account. However, this new approach should be focussed not on the accused, but on the public interest in the protection of constitutional rights. Moreover, even though this approach may permit the courts to examine state conduct in order to determine its impact on the protected interests and, if necessary, to dissociate themselves from it, the purpose being pursued is to maintain public confidence in the administration of justice. The need for the courts to dissociate themselves from state conduct is at most one factor to be considered in relation to the overall purpose. Furthermore, in applying the *Collins* test, the courts have considered both state conduct and the seriousness of the infringement of the interests protected by the violated right in their review of the seriousness of the violation. In my view, therefore, the proposed change incorporates into the test a branch that is in itself inconsistent with the purpose of the provision and that does not make the rule any clearer or easier to apply. I accordingly find that the objective of the reformulation has not been achieved.

215 At the third stage of the *Collins* analysis, the judge had to determine the effect that excluding the evidence would have on the repute of the administration of justice. The third branch of the new test proposed by the majority requires the judge to assess the "public interest in an adjudication on the merits". Although this formulation is clearly broad enough that it will be possible to consider the factors formerly regarded as important in the third branch of the *Collins* test, certain factors are unduly de-emphasized or simply disregarded in the new test.

216 In this regard, the majority's position on the seriousness of the offence being prosecuted is ambiguous. Although the majority describe this factor as a "valid consideration", they mention that it "has the potential to cut both ways", that is, in favour of either excluding or admitting evidence. Their justification for this position is that although the public has a heightened interest in an adjudication on the merits where the crime is a serious one, it also has a heightened interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high (para. 84). I note that they also consider the heightened interest of the accused in having a justice system that is above reproach, especially where the crime with which he or she is charged is a serious one. These comments by the majority help me put the problem in context, and they suggest that the interest of the accused is equal to that of society where the charge is serious. In addition to my doubts about how the seriousness of the offence actually fits into the majority's test, I must say that I disagree with the proposition that in the analysis relating to the maintenance of the repute of the administration of justice, this factor is neutral.

217 First of all, the third branch of the majority's test requires the judge to consider the factors that weigh in favour of or against proceeding to trial. At first glance, it is hard to imagine how the seriousness of the offence, and even the harshness of the sentence, could weigh against proceeding to trial. However, it is conceivable that when the factor of the seriousness of the offence is combined with other circumstances — where, for example, the evidence is unreliable — the accused might claim to have a greater interest in not standing trial if he or she could face a harsher sentence owing to the seriousness of the charge. But this interest is subsumed in the public's interest, which is of course opposed to having an accused convicted on the basis of unreliable evidence. Moreover, a well-informed person who is objective and is apprised of all the circumstances would surely be shocked if unreliable evidence were used in any criminal trial (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.), at para. 62).

218 What the majority suggest is in reality that, on the one hand, the interest of the accused in having the evidence excluded increases with the seriousness of the offence and the harshness of the potential sentence and, on the other hand, the societal interest in an adjudication on the merits increases with the seriousness of the offence. The result is that this factor is considered to be neutral. But I find it unacceptable to place value in the benefit derived by the accused from the exclusion of reliable evidence. The accused has a legitimate interest in having his or her rights protected, but not in having the evidence truncated to his or her advantage. In other words, the outcome of the analysis cannot be factored into the analysis itself. Moreover, the protection of the interests of the accused is considered in the first and second branches of the test proposed by the majority, not in the third.

219 The analysis to be conducted under s. 24(2) should not be more likely to result in the exclusion of evidence where the charge is murder than where it is theft. To the extent that the majority's approach has the effect of including, in the third branch of the test, factors related to

the consequences of the charges for the accused, it is inconsistent with the analysis required at this stage.

220 The suggestion that the effect of the factor of the seriousness of the offence is neutral because of the heightened societal interest in having a system of justice that is above reproach is also problematic. What might be criticized is the admission of evidence obtained in violation of constitutional rights. This implies that the violation is taken into account at this stage of the analysis. In other words, the violation will have been taken into account at every stage: at the first, in reviewing the conduct of the police; at the second, in assessing the impact of the violation on the protected interests; and lastly, at the third, in considering the interest in maintaining a system of justice that is above reproach. Furthermore, this approach evokes the broad concept of trial fairness even though that concept is not formally included in the test proposed by the majority. Thus, trial fairness would be reintroduced indirectly, but in a more diffuse sense that is potentially much broader than the one in which it was used in the approach developed in *Collins* and *Stillman.*

221 In my view, assessing the seriousness of the offence is as important as determining whether the evidence is reliable or essential. To disregard this factor would make as little sense as to disregard the fact that an accused who is granted a stay of proceedings will not be prosecuted.

222 If the role of the courts is to conduct trials to seek the truth about the commission of crimes, the importance of this role reaches its apogee where the crime is a particularly serious one. I think it goes without saying that society has a greater interest in an adjudication on the merits where the crime is a serious one, such as murder, sexual assault or importing hard drugs, than where it is less serious, as in the case of shoplifting, possession of cannabis or assault.

C) Proposed Test

223 In short, I agree that the time has come for the Court to revisit the test for the admission or exclusion of evidence obtained in violation of a *Charter* right. I am proposing a simple test that takes into account both the public interest in protecting *Charter* rights and the public interest in an adjudication on the merits. I agree with the majority that the judge's approach should be to foster the maintenance of public confidence in the administration of justice in the long term, but I would add that it is by striking a fair balance between these two societal interests that this result will be attained. These are the only two aspects that a judge should consider in determining whether the maintenance of confidence in the administration of justice would be better served by admitting the evidence or by excluding it.

224 On the branch related to the protection of constitutional rights, I would suggest that any facts that help show the effect of the violation on the protected rights be considered. In this respect, the state conduct that gave rise to the violation is obviously a relevant factor. However, the purpose of the judge's review is not to punish the police officers or to compensate the accused for the violation. Rather, it is to assess the impact of that conduct on the protected interests with a view

to ultimately balancing the societal interest in the protection of constitutional rights against the role of the judicial system as the institution responsible for holding trials. There may be cases in which conduct is so serious that the courts feel a need to dissociate themselves from it and, in the end, to attach paramount importance to it in their analysis. In the test I am proposing, however, state conduct is but one of the factors to be considered in assessing the impact of the violation on the protected rights.

225 The impact of a violation on protected interests will vary with the circumstances, and it would be impossible here to list all the circumstances that might be relevant. Suffice it to mention the place of the search, the nature of the evidence, the nature of the violated right, the urgency of the situation for the police officers, the availability of other less intrusive investigation methods, the officers' knowledge of the applicable law, their training, and the clarity of the law. In short, the judge must take into account all the facts that may be used to assess the long-term impact of his or her decision on the repute of the administration of justice, that is, not on the rights of the accused being tried, but rather on those of every individual whose rights might be violated in a similar way.

226 As for the branch related to the public interest in an adjudication on the merits, I would suggest taking the reliability of the evidence into account. In my view, this consideration is crucial to the maintenance of public confidence. On the one hand, unreliable evidence will invariably undermine public confidence in the courts' ability to determine whether accused persons are guilty or innocent. On the other hand, a decision to exclude reliable evidence without good reason is also likely to be seen as an abdication by the court of its institutional role. As a corollary, whether the evidence in issue is essential or peripheral is highly significant. Similarly, the importance of the factor of the seriousness of the offence must be recognized, given society's strong interest in being protected from the commission of serious crimes. I have already explained why I feel this factor cannot reasonably be excluded without causing the test itself to bring the administration of justice into disrepute. This is why I would make it an important factor in the analysis.

227 The question the judge must answer is whether the repute of the administration of justice would be better protected by admitting the evidence or by excluding it. In some cases, the impact on constitutional rights will be the determining factor because, owing to certain circumstances of the violation, the long-term effect of admitting the evidence would be to bring the administration of justice into disrepute. But the converse is also true. Thus, there will be other cases in which it is the public interest in an adjudication on the merits that should prevail: see, for example, the companion case of *R. v. Harrison*, 2009 SCC 34 (S.C.C.). Absent an error in principle, the decision is a matter for the trier of fact.

3. Application of the Principles to the Facts of the Case

228 On whether admitting the weapon in evidence would have a positive effect on the repute of the administration of justice, I agree with the majority's conclusion. I refer to the following

findings of fact made by the trial judge: the exchange lasted only a few minutes, the officers were polite to Mr. Grant, and they were motivated by a desire to take a proactive approach in patrolling an area near schools with serious problems related to youth crime and safety. On the protection of the public, it should be noted that the charge here is firearms-related, that it would be impossible to establish guilt without the evidence and that the evidence is eminently reliable.

229 When balanced against each other, the limited impact of the violation on the protected interests and the great importance of the evidence for the purposes of the trial favour admitting the physical evidence. Furthermore, on the charge of possession of a firearm for the purposes of trafficking, I am in complete agreement with the majority.

230 For these reasons, I reach the same conclusion as the majority.

Appeal allowed in part.

Pourvoi accueilli en partie.

Tab 16

paras 73-74

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1986 CarswellOnt 1001, 1986 CarswellOnt 95, [1986] 1 S.C.R. 103, [1986] S.C.J. No. 7, 14 O.A.C. 335, 19 C.R.R. 308, 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, 50 C.R. (3d) 1, 53 O.R. (2d) 719 (note), 65 N.R. 87, J.E. 86-272, EYB 1986-67556

R. v. OAKES

Dickson C.J.C., Estey, McIntyre, Chouinard, Lamer, Wilson and Le Dain JJ.

Heard: March 12, 1985
Judgment: February 28, 1986
Docket: No. 17550

Counsel: *J. Isaac, Q.C., M.R. Dambrot* and *D.C. McGillis*, for the Crown.
G.A. Beasley, for respondent.

Subject: Criminal; Constitutional; Civil Practice and Procedure

Headnote

Constitutional Law --- Charter of Rights and Freedoms — General principles of interpretation

Constitutional Law --- Procedure in constitutional challenges — Notice to Attorney General

Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Principles of interpretation

Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — What constitutes guarantee of rights and freedoms

Criminal Law --- Constitutional issues in criminal law — Charter of Rights and Freedoms — Rights and freedoms — Life, liberty and security of person — Presumption of innocence

Narcotic and Drug Control --- Offences — Possession for purpose of trafficking — Narcotic Control Act — Reverse onus — Constitutional validity

Civil liberties — Presumption of innocence — Presumptions and reverse onus provisions — Section 11(d) of Charter of Rights and Freedoms offended by provision requiring accused to disprove on balance of probabilities important element of offence — Narcotic Control Act provision concerning possession for purpose of trafficking being unconstitutional in requiring that accused prove that possession not for purpose of trafficking once possession proved.

Civil liberties — Scope of interpretation of Charter of Rights and Freedoms — Section 1 requiring object of limit to be sufficiently important to warrant overriding Charter right and requiring that means of limiting right satisfy proportionality test — Narcotics reverse onus not justifiable, as no rational connection between fact of possession and presumed fact of possession for purpose of trafficking.

The accused was charged with unlawful possession of a narcotic for the purposes of trafficking, contrary to s. 4(2) of the Narcotic Control Act. After the trial judge had found that there had been proof beyond a reasonable doubt of possession, the accused brought a motion to challenge the constitutional validity of s. 8, which provides that, if the court finds the accused in possession of a narcotic, the accused is presumed to be in possession for the purpose of trafficking unless he establishes that he had no intent to traffic. The trial judge ruled that s. 8 was inoperative because it violated the presumption of innocence in s. 11(*d*) of the Canadian Charter of Rights and Freedoms, and convicted the accused only of unlawful possession. This was confirmed on a Crown appeal by the Ontario Court of Appeal, which held that the reason for the unconstitutionality was the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic). The Crown appealed.

Held:

Appeal dismissed.

Per Dickson C.J.C. (Chouinard, Lamer, Wilson and Le Dain JJ. concurring)

The presumption of innocence lies at the very heart of the criminal law and is protected expressly by s. 11(*d*), but is also integral to the general protection of life, liberty and security of the person in s. 7. The presumption of innocence has enjoyed long-standing recognition at common law and in major international human rights documents. The right to be presumed innocent until proven guilty requires, at a minimum, that an individual be

proven guilty beyond a reasonable doubt, that the state bear the burden of proof and that criminal prosecutions be carried out in accordance with lawful procedures and fairness. A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence violates the presumption of innocence in s. 11(*d*). Here, s. 8 infringed s. 11(*d*) in requiring the accused to prove no purpose of trafficking once the basic fact of possession is proven.

The rational connection test of whether there is a rational connection between the basic fact and the presumed fact is not appropriate in considering whether s. 11(*d*) has been violated. A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence. The appropriate stage for invoking the rational connection test was under s. 1. It was vital to keep s. 1 and s. 11(*d*) analytically distinct.

Section 1 has two functions: it guarantees the rights and freedoms set out in the provisions which follow it; and it states explicitly the exclusive justificatory criteria (outside of s. 33) against which limitations on those rights and freedoms may be measured. The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. The standard of proof is a preponderance of probabilities.

Two central criteria must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective to be served by the measures limiting a Charter right must be sufficiently important to warrant overriding a constitutionally-protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important. Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportion ality test involving three important components. To begin with, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question, and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective — the more severe the deleterious effects of a measure, the more important the objective must be.

Parliament's concern with decreasing drug trafficking was substantial and pressing. Its objective of protecting society from the grave ills of drug trafficking was self-evident, for the purposes of s. 1, and could potentially in certain cases warrant the overriding of a

constitutionally-protected right. There was, however, no rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. The possession of a small or negligible quantity of narcotics would not support the inference of trafficking.

Per Estey J. (McIntyre J. concurring)

The reasons of Dickson C.J.C. were adopted with respect to the relationship between s. 11(*d*) and s. 1 of the Charter, but the reasons of Martin J.A. in the court below for the disposition of all other issues.

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Co. Ct. of Ulster v. Allen, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979) — *considered*

Dubois v. R., [1985] 2 S.C.R. 350, 48 C.R. (3d) 193, [1986] 1 W.W.R. 193, 41 Alta. L.R. (2d) 97, 22 C.C.C. (3d) 513, 66 A.R. 202, 62 N.R. 50 — *applied*

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R. v. Babcock, [1967] 2 C.C.C. 235 (B.C.C.A.) — *applied*

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 85 C.L.L.C. 14,023, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81 — *applied*

R. v. Carroll (1983), 32 C.R. (3d) 235, 4 C.C.C. (3d) 131, 147 D.L.R. (3d) 92, 40 Nfld. & P.E.I.R. 147, 115 A.P.R. 147 (P.E.I. C.A.) — *followed*

R. v. Cook (1983), 4 C.C.C. (3d) 419, 147 D.L.R. (3d) 687, 56 N.S.R. (2d) 449, 117 A.P.R. 449 (C.A.) — *followed*

R. v. Erdman (1971), 24 C.R.N.S. 216 (B.C.C.A.) — *referred to*

R. v. Fraser (1982), 68 C.C.C. (2d) 433, 138 D.L.R. (3d) 488, 21 Sask. R. 227 (Q.B.) — *not followed*

R. v. Holmes (1983), 41 O.R. (2d) 250, 32 C.R. (3d) 322, 4 C.C.C. (3d) 440, 145 D.L.R. (3d) 689, 4 C.R.R. 222 (C.A.) — *referred to*

R. v. Kowalczuk, [1983] 3 W.W.R. 694, 5 C.C.C. (3d) 25, 147 D.L.R. (3d) 735, 20 Man. R. (2d) 379 (C.A.) — *referred to*

R. v. Kupczyniski, Ont. Co. Ct., 23rd June 1982 (unreported) — *not followed*

R. v. Landry, [1983] Que. C.A. 408, 7 C.C.C. (3d) 555, 2 D.L.R. (4th) 518 — *followed*

R. v. Lee's Poultry Ltd. (1985), 43 C.R. (3d) 289, 17 C.C.C. (3d) 539, 12 C.R.R. 125, 7 O.A.C. 100 (C.A.) — *referred to*

R. v. O'Day (1983), 5 C.C.C. (3d) 227, 148 D.L.R. (3d) 371, 46 N.B.R. (2d) 77, 121 A.P.R. 77 (C.A.) — *followed*

R. v. Sault Ste. Marie, [1978] 2 S.C.R. 1299, 3 C.R. (3d) 30, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295 [Ont.] — *referred to*

R. v. Schwartz (1983), 10 C.C.C. (4th) 34, 5 D.L.R. (4th) 524, 25 Man. R. (2d) 295 (C.A.) [leave to appeal to S.C.C. granted 5 D.L.R. (4th) 524n, 26 Man. R. (2d) 159] — *referred to*

R. v. Sharpe, [1961] O.W.N. 261, 35 C.R. 375, 131 C.C.C. 75 (C.A.) — *not followed*

R. v. Shelley, [1981] 2 S.C.R. 196, 21 C.R. (3d) 354, 26 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.E.R. 217, 59 C.C.C. (2d) 292, 123 D.L.R. (3d) 748, 9 Sask. R. 338, 37 N.R. 320 — *not followed*

R. v. Silk, 9 C.R.N.S. 277, 71 W.W.R. 481, [1970] 3 C.C.C. (2d) 1 (B.C.C.A.) — *not followed*

R. v. Stanger, [1983] 5 W.W.R. 331, 26 Alta. L.R. (2d) 193, 7 C.C.C. (3d) 337, 2 D.L.R. (4th) 121, (sub nom. *R. v. Bramwell; R. v. Kerr; R. v. Leskosek)* 46 A.R. 241 (C.A.) — *followed*

R. v. Stock (1983), 10 C.C.C. (3d) 319 (B.C.C.A.) — *referred to*

R. v. T. (S.D.) (1985), 43 C.R. (3d) 307, 33 M.V.R. 148, 18 C.C.C. (3d) 125, 16 D.L.R. (4th) 753, 68 N.S.R. (2d) 311, 152 A.P.R. 311 (C.A.) — *referred to*

R. v. Therens, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 32 M.V.R. 153, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 40 Sask. R. 122, 59 N.R. 122 [Sask.] — *referred to*

R. v. Therrien (1982), 67 C.C.C. (2d) 31 (Ont. Co. Ct.) — *not followed*

R. v. Whyte (1983), 38 C.R. (3d) 24, 25 M.V.R. 22, 10 C.C.C. (3d) 277, 6 D.L.R. (4th) 263, leave to appeal to S.C.C. granted 43 C.R. (3d) xxvii, 10 C.C.C. (3d) 277n, 6 D.L.R. (4th) 263n [B.C.] — *referred to*

Smith v. Smith, [1952] 2 S.C.R. 312, [1952] 3 D.L.R. 449 [B.C.] — *considered*

Singh v. Min. of Employment & Immigration; Thandi v. Min. of Employment & Immigration; Mann v. Min. of Employment & Immigration, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1 [Fed.] — *referred to*

Tot v. U.S.; U.S. v. Delia, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1943) — *considered*

Winship, Re, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) — *considered*

Woolmington v. D.P.P., [1935] A.C. 462, 25 Cr. App. R. 72 (H.L.) — *considered*

X v. U.K., Application 5124/71, Collection of Decisions of E.C.H.R. 135 — *considered*

Statutes considered:

Canadian Bill of Rights, R.S.C. 1970, App. III, s. 2(*f*).

Canadian Charter of Rights and Freedoms, ss. 1, 7, 11(*d*), 33.

Criminal Code, 1953-54 (Can.), c. 51 [now R.S.C. 1970, c. C-34], s. 224A(1)(*a*) [en. 1968-69, c. 38, s. 16; now s. 237(1)(*a*)].

Criminal Code, R.S.C. 1970, c. C-34, s. 237(1)(*a*).

Food and Drugs Act, 1952-53 (Can.), c. 38 [now R.S.C. 1970, c. F-27], s. 33 [en. 1960-61, c. 37, s. 1; am. 1968-69, c. 41, s. 8; now s. 35].

Food and Drugs Act, R.S.C. 1970, c. F-27, s. 35.

Misuse of Drugs Act, 1971 (Eng.), c. 38.

Misuse of Drugs Act, 1975 (New Zealand), no. 116.

Narcotic Control Act, R.S.C. 1970, c. N-1, ss. 3, 4, 8.

Opium and Narcotic Drug Act, R.S.C. 1952, c. 201 [Act repealed 1960-61, c. 35, s. 20].

United States Constitution, Fifth and Fourteenth Amendments.

Authorities considered:

Commission of Inquiry into the Non-Medical Use of Drugs, Final Report (1973).

Cross on Evidence, 5th ed. (1979), pp. 122-23, 124.

Cross, "The Golden Thread of the English Criminal Law: The Burden of Proof" (1976), pp. 11, 13.

Jacobs, The European Convention on Human Rights (1975), pp. 113-14.

MacKay and Cromwell, "*Oakes*: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, p. 233.

Report of the Special Committee on Traffic in Narcotic Drugs (1955).

Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), p. 385.

Words and phrases considered:

establish

mandatory presumption

permissive presumption

presumption of fact

presumption of law

Appeal by Crown from judgment of Ontario Court of Appeal, 40 O.R. (2d) 660, 32 C.R. (3d) 193, 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123, affirming accused's acquittal in Provincial Court, 38 O.R. (2d) 598, of possession of narcotic for purpose of trafficking.

International conventions considered:

European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), art. 6(2).

International Covenant on Civil and Political Rights (1966), art. 14(2).

Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium (1953).

Single Convention on Narcotic Drugs (1961), preamble.

Universal Declaration of Human Rights (1948), art. 11(1).

***Dickson C.J.C. (Chouinard, Lamer, Wilson* and *Le Dain JJ.* concurring):**

1 This appeal [from 40 O.R. (2d) 660, 32 C.R. (3d) 193, 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123, affirming 38 O.R. (2d) 598] concerns the constitutionality of s. 8 of the Narcotic Control Act, R.S.C. 1970, c. N-1. The section provides, in brief, that if the court finds the accused in possession of a narcotic he is presumed to be in possession for the purpose of trafficking. Unless the accused can establish the contrary, he must be convicted of trafficking. The Ontario Court of Appeal held that this provision constitutes a "reverse onus" clause and is unconstitutional because it violates one of the core values of our criminal justice system, the presumption of innocence, now entrenched in s. 11(*d*) of the Canadian Charter of Rights and Freedoms. The Crown has appealed.

I. Statutory and Constitutional Provisions

2 Before reviewing the factual context, I will set out the relevant legislative and constitutional provisions:

Narcotic Control Act

3

> 3. (1) Except as authorized by this Act or the regulations, *no person shall have a narcotic in his possession.*

(2) *Every person who violates subsection (1) is guilty of an indictable offence and is liable*

(*a*) upon summary conviction for a first offence, to a fine of one thousand dollars or to imprisonment for six months or to both fine and imprisonment, and for a subsequent offence, to a fine of two thousand dollars or to imprisonment for one year or to both fine and imprisonment; or

(*b*) *upon conviction on indictment, to imprisonment for seven years.*

4. (1) No person shall traffic in a narcotic or any substance represented or held out by him to be a narcotic.

(2) *No person shall have in his possession a narcotic for the purpose of trafficking.*

(3) *Every person who violates subsection (1) or (2) is guilty of an indictable offence and is liable to imprisonment for life ...*

8. *In any prosecution for a violation of subsection 4(2)*, if the accused does not plead guilty, *the trial shall proceed as if it were a prosecution for an offence under section 3*, and after the close of the case for the prosecution and after the accused has had an opportunity to make full answer and defence, *the court shall make a finding as to whether or not the accused was in possession of the narcotic contrary to section 3*; if the court finds that the accused was not in possession of the narcotic contrary to section 3, he shall be acquitted but *if the court finds that the accused was in possession of the narcotic contrary to section 3, he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose of trafficking*, and thereafter the prosecutor shall be given an opportunity of adducing evidence to establish that the accused was in possession of the narcotic for the purpose of trafficking; *if the accused establishes that he was not in possession of the narcotic for the purpose of trafficking, he shall be acquitted of the offence* as charged but he shall be convicted of an offence under section 3 and sentenced accordingly; and *if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged and sentenced accordingly*. [The italics are mine.]

Canadian Charter of Rights and Freedoms

4

11. Any person charged with an offence has the right ...

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

II. Facts

5 The respondent, David Edwin Oakes, was charged with unlawful possession of a narcotic for the purpose of trafficking, contrary to s. 4(2) of the Narcotic Control Act. He elected trial by magistrate without a jury. At trial, the Crown adduced evidence to establish that Mr. Oakes was found in possession of eight 1-gram vials of cannabis resin in the form of hashish oil. Upon a further search conducted at the police station, $619.45 was located. Mr. Oakes told the police that he had bought ten vials of hashish oil for $150 for his own use, and that the $619.45 was from a workers' compensation cheque. He elected not to call evidence as to possession of the narcotic. Pursuant to the procedural provisions of s. 8 of the Narcotic Control Act, the trial judge proceeded to make a finding that it was beyond a reasonable doubt that Mr. Oakes was in possession of the narcotic.

6 Following this finding, Mr. Oakes brought a motion to challenge the constitutional validity of s. 8 of the Narcotic Control Act, which he maintained imposes a burden on an accused to prove that he or she was not in possession for the purpose of trafficking. He argued that s. 8 violates the presumption of innocence contained in s. 11(*d*) of the Charter.

III. Judgments

(a) Ontario Provincial Court

7 At trial, Walker Prov. J. borrowed the words of Laskin C.J.C. in *R. v. Shelley*, [1981] 2 S.C.R. 196 at 202, 21 C.R. (3d) 354, 26 C.R. (3d) 150, [1981] 5 W.W.R. 481, 3 C.E.R. 217, 59 C.C.C. (2d) 292, 123 D.L.R. (3d) 748, 9 Sask. R. 338, 37 N.R. 320, and found that there was no rational or necessary connection between the fact proved, i.e., possession of the drug, and the conclusion asked to be drawn, namely, possession for the purpose of trafficking. Walker Prov. J. held that, to the extent that s. 8 of the Narcotic Control Act requires this presumption and the resultant conviction, it is inoperative as a violation of the presumption of innocence contained in s. 11(*d*) of the Charter.

8 Walker Prov. J. added that the reverse onus in s. 8 would not be invalid if the Crown had adduced evidence of possession as well as evidence from which it could be inferred beyond a reasonable doubt that the possession was for the purpose of trafficking. If this were done, there would be a sufficient rational connection between the fact of possession and the presumed fact of trafficking.

(b) Ontario Court of Appeal

9 Martin J.A., writing for a unanimous court, dismissed the appeal and held the reverse onus provision in s. 8 of the Narcotic Control Act unconstitutional.

10 Martin J.A. stated that, as a general rule, a reverse onus clause which places a burden on the accused to disprove on a balance of probabilities an essential element of an offence contravenes the right to be presumed innocent. Nevertheless, he held that some reverse onus provisions may be constitutionally valid provided they constitute reasonable limitations on the right to be presumed innocent and are demonstrably justified in a free and democratic society.

11 To determine whether a particular reverse onus provision is legitimate, Martin J.A. outlined a two-pronged inquiry. First, it is necessary to pass a threshold test, which he explained as follows, at p. 146:

> The threshold question in determining the legitimacy of a particular reverse onus provision is whether the reverse onus clause is justifiable in the sense that it is reasonable for Parliament to place the burden of proof on the accused in relation to an ingredient of the offence in question. In determining the threshold question consideration should be given to a number of factors, including such factors as: (a) the magnitude of the evil sought to be suppressed, which may be measured by the gravity of the harm resulting from the offence or by the frequency of the occurrence of the offence or by both criteria; (b) the difficulty of the prosecution making proof of the presumed fact, and (c) the relative ease with which the accused may prove or disprove the presumed fact. Manifestly, a reverse onus provision placing the burden of proof on the accused with respect to a fact which it is not rationally open to him to prove or disprove cannot be justified.

12 If the reverse onus provision meets these criteria, due regard having been given to Parliament's assessment of the need for the provision, a second test must then be satisfied. This second test was described by Martin J.A. as the "rational connection test". According to it, to be reasonable, the proven fact (e.g., possession) must rationally tend to prove the presumed fact (e.g., an intention to traffic). In other words, the proven fact must raise a probability that the presumed fact exists.

13 In considering s. 8 of the Narcotic Control Act, Martin J.A. focussed primarily on the second test at p. 147:

> I have reached the conclusion that s. 8 of the *Narcotic Control Act* is constitutionally invalid because of the lack of a rational connection between the proved fact (possession) and the presumed fact (an intention to traffic) ... Mere possession of a small quantity of a narcotic drug does not support an inference of possession for the purpose of trafficking or even tend to prove an intent to traffic. Moreover, upon proof of possession, s. 8 casts upon the accused

> the burden of disproving not some formal element of the offence but the burden of disproving the very essence of the offence.

14 Martin J.A. added that it is not for courts to attempt to rewrite s. 8 by applying it on a case-by-case basis. Furthermore, where a rational connection does exist between possession and the presumed intention to traffic, such as [pp. 147-48]:

> Where the possession of a narcotic drug is of such a nature as to be indicative of trafficking, the common sense of a jury can ordinarily be relied upon to arrive at a proper conclusion.

There would not, therefore, be any need for a statutory presumption.

15 One final note should be made regarding Martin J.A.'s judgment. In assessing whether or not s. 8 was a reasonable limitation on the constitutional protection of the presumption of innocence, Martin J.A. combined the analysis of s. 11(*d*) with s. 1. He held that the requirements of s. 1, that a limitation be reasonable and demonstrably justified in a free and democratic society, provided the standard for interpreting the phrase "according to law" in s. 11(*d*).

IV. The Issues

16 The constitutional question in this appeal is stated as follows:

> Is s. 8 of the *Narcotic Control Act* inconsistent with s. 11(d) of the *Canadian Charter of Rights and Freedoms* and thus of no force and effect?

Two specific questions are raised by this general question: (1) Does s. 8 of the Narcotic Control Act violate s. 11(*d*) of the Charter?; and (2) If it does, is s. 8 a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society for the purpose of s. 1 of the Charter? If the answer to Q. 1 is affirmative and the answer to Q. 2 negative, then the constitutional question must be answered in the affirmative.

V. Does S. 8 of the Narcotic Control Act Violate S. 11(d) of the Charter?

17

(a) The Meaning of S. 8

18 Before examining the presumption of innocence contained in s. 11(*d*) of the Charter, it is necessary to clarify the meaning of s. 8 of the Narcotic Control Act. The procedural steps contemplated by s. 8 were clearly outlined by Branca J.A. in *R. v. Babcock*, [1967] 2 C.C.C. 235 at 247 (B.C.C.A.):

> (A) The accused is charged with possession of a forbidden drug for the purpose of trafficking.

(B) The trial of the accused on this charge then proceeds as if it was a prosecution against the accused on a simple charge of possession of the forbidden drug ...

(C) When the Crown has adduced its evidence on the basis that the charge was a prosecution for simple possession, the accused is then given the statutory right or opportunity of making a full answer and defence to the charge of simple possession ...

(D) When this has been done the Court must make a finding as to whether the accused was in possession of narcotics contrary to s. 3 of the new Act. (Unlawful possession of a forbidden narcotic drug).

(E) Assuming that the Court so finds, it is then that an onus is placed upon the accused in the sense that an opportunity must be given to the accused of establishing that he was not in possession of a narcotic for the purpose of trafficking.

(F) When the accused has been given this opportunity the prosecutor may then establish that the possession of the accused was for the purpose of trafficking ...

(G) It is then that the Court must find whether or not the accused has discharged the onus placed upon him under and by the said section.

(H) If the Court so finds, the accused must be acquitted of the offence as charged, namely, possession for the purpose of trafficking, but in that event the accused must be convicted of the simple charge of unlawful possession of a forbidden narcotic.

(I) If the accused does not so establish he must then be convicted of the full offence as charged.

Branca J.A. then added at pp. 247-48:

It is quite clear to me that under s. 8 of the new Act the trial must be divided into two phases. In the first phase the sole issue to be determined is whether or not the accused is guilty of simple possession of a narcotic. This issue is to be determined upon evidence relevant only to the issue of possession. In the second phase the question to be resolved is whether or not the possession charged is for the purpose of trafficking.

19 Against the backdrop of these procedural steps, we must consider the nature of the statutory presumption contained in s. 8 and the type of burden it places on an accused. The relevant portions of s. 8 read:

8. ... if the court finds that the accused was in possession of the narcotic ... he shall be given an opportunity of establishing that he was not in possession of the narcotic for the purpose

> of trafficking, ... if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged ...

20 In determining the meaning of these words, it is helpful to consider in a general sense the nature of presumptions. Presumptions can be classified into two general categories: presumptions *without* basic facts and presumptions *with* basic facts. A presumption without a basic fact is simply a conclusion which is to be drawn until the contrary is proved. A presumption with a basic fact entails a conclusion to be drawn upon proof of the basic fact: see Cross on Evidence, 5th ed. (1979), at pp. 122-23.

21 Basic fact presumptions can be further categorized into permissive and mandatory presumptions. A permissive presumption leaves it optional as to whether the inference of the presumed fact is drawn following proof of the basic fact. A mandatory presumption requires that the inference be made.

22 Presumptions may also be either rebuttable or irrebuttable. If a presumption is rebuttable, there are three potential ways the presumed fact can be rebutted. First, the accused may be required merely to raise a reasonable doubt as to its existence. Secondly, the accused may have an evidentiary burden to adduce sufficient evidence to bring into question the truth of the presumed fact. Thirdly, the accused may have a legal or persuasive burden to prove on a balance of probabilities the non-existence of the presumed fact.

23 Finally, presumptions are often referred to as either presumptions of law or presumptions of fact. The latter entail "frequently recurring examples of circumstantial evidence" (Cross on Evidence at p. 124), while the former involve actual legal rules.

24 To return to s. 8 of the Narcotic Control Act, it is my view that, upon a finding beyond a reasonable doubt of possession of a narcotic, the accused has the legal burden of proving on a balance of probabilities that he or she was not in possession of the narcotic for the purpose of trafficking. Once the basic fact of possession is proven, a mandatory presumption of law arises against the accused that he or she had the intention to traffic. Moreover, the accused will be found guilty of the offence of trafficking unless he or she can rebut this presumption on a balance of probabilities. This interpretation of s. 8 is supported by the courts in a number of jurisdictions: *R. v. Carroll* (1983), 32 C.R. (3d) 235, 4 C.C.C. (3d) 131, 147 D.L.R. (3d) 92, 40 Nfld. & P.E.I.R. 147, 115 A.P.R. 147 (P.E.I. C.A.); *R. v. Cook* (1983), 4 C.C.C. (3d) 419, 147 D.L.R. (3d) 687, 56 N.S.R. (2d) 449, 117 A.P.R. 449 (C.A.); *R. v. O'Day* (1983), 5 C.C.C. (3d) 227, 148 D.L.R. (3d) 371, 46 N.B.R. (2d) 77, 121 A.P.R. 77 (C.A.) ; *R. v. Landry*, [1983] Que. C.A. 408, 7 C.C.C. (3d) 555, 2 D.L.R. (4th) 518; *R. v. Stanger*, [1983] 5 W.W.R. 331, 26 Alta. L.R. (2d) 193, 7 C.C.C. (3d) 337, 2 D.L.R. (4th) 121, (sub nom. *R. v. Bramwell; R. v. Kerr; R. v. Leskosek)* 46 A.R. 241 (C.A.).

25 In some decisions it has been held that s. 8 of the Narcotic Control Act is constitutional because it places only an evidentiary burden rather than a legal burden on the accused. The ultimate

legal burden to prove guilt beyond a reasonable doubt remains with the Crown and the presumption of innocence is not offended: *R. v. Therrien* (1982), 67 C.C.C. (2d) 31 (Ont. Co. Ct.); *R. v. Fraser* (1982), 68 C.C.C. (2d) 433, 138 D.L.R. (3d) 488, 21 Sask. R. 227 (Q.B.); *R. v. Kupczyniski*, Ont. Co. Ct., 23rd June 1982 (unreported).

26 This same approach was relied on in *R. v. Sharpe*, [1961] O.W.N. 261, 35 C.R. 375, 131 C.C.C. 75 (C.A.), a Canadian Bill of Rights decision on the presumption of innocence. In that case, a provision in the Opium and Narcotic Drug Act, R.S.C. 1952, c. 201, similar to s. 8 of the Narcotic Control Act, was interpreted as shifting merely the secondary burden of adducing evidence onto the accused. The primary onus remained with the Crown. In *R. v. Silk*, 9 C.R.N.S. 277, 71 W.W.R. 481, [1970] 3 C.C.C. (2d) 1, the British Columbia Court of Appeal held that s. 2(*f*) of the Canadian Bill of Rights had not been infringed because s. 33 [of the Food and Drugs Act, 1952-53 (Can.), c. 38] (now s. 35 of the Food and Drugs Act, R.S.C. 1970, c. F-27), required only that an accused raise a reasonable doubt that the purpose of his or her possession was trafficking. This decision, however, was not followed in *R. v. Appleby*, [1972] S.C.R. 303, 16 C.R.N.S. 35, [1971] 4 W.W.R. 601, 3 C.C.C. (2d) 354, 21 D.L.R. (3d) 325 [B.C.], or in *R. v. Erdman* (1971), 24 C.R.N.S. 216 (B.C.C.A.).

27 Those decisions which have held that only the secondary or evidentiary burden shifts are not persuasive with respect to the Narcotic Control Act. As Ritchie J. found in *R. v. Appleby* (though addressing a different statutory provision), the phrase "to establish" is the equivalent of "to prove". The legislature, by using the word "establish" in s. 8 of the Narcotic Control Act, intended to impose a legal burden on the accused. This is most apparent in the words "if the accused fails to establish that he was not in possession of the narcotic for the purpose of trafficking, he shall be convicted of the offence as charged".

28 In the *Appleby* case, Ritchie J. also held that the accused is required to disprove the presumed fact according to the civil standard of proof, on a balance of probabilities. He rejected the criminal standard of beyond a reasonable doubt, relying, inter alia, upon the following passage from the House of Lords' decision in *Pub. Prosecutor v. Yuvaraj*, [1970] A.C. 913, [1970] 2 W.L.R. 226 at 232 (P.C.):

> Generally speaking, no onus lies upon a defendant in criminal proceedings to prove or disprove any fact: it is sufficient for his acquittal if any of the facts which, if they existed, would constitute the offence with which he is charged are "not proved". But exceptionally, as in the present case, an enactment creating an offence expressly provides that if other facts are proved, a particular fact, the existence of which is a necessary factual ingredient of the offence, shall be presumed or deemed to exist "unless the contrary is proved". In such a case the consequence of finding that that particular fact is "disproved" will be an acquittal, whereas the absence of such a finding will have the consequence of a conviction. Where this is the consequence of a fact's being "disproved" there can be no grounds in public policy for

> requiring that exceptional degree of certainty as excludes all reasonable doubt that that fact does not exist. In their Lordships' opinion the general rule applies in such a case and it is sufficient if the court considers that upon the evidence before it it is more likely than not that the fact does not exist. The test is the same as that applied in civil proceedings: the balance of probabilities.

29 I conclude that s. 8 of the Narcotic Control Act contains a reverse onus provision imposing a legal burden on an accused to prove on a balance of probabilities that he or she was not in possession of a narcotic for the purpose of trafficking. It is therefore necessary to determine whether s. 8 of the Narcotic Control Act offends the right to be "presumed innocent until proven guilty" as guaranteed by s. 11(*d*) of the Charter.

(b) The Presumption of Innocence and S. 11(d) of the Charter

30 Section 11(*d*) of the Charter constitutionally entrenches the presumption of innocence as part of the supreme law of Canada. For ease of reference, I set out this provision again:

> 11. Any person charged with an offence has the right ...
>
> (*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal ...

31 To interpret the meaning of s. 11(*d*), it is important to adopt a purposive approach. As this court stated in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 344, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97, 85 C.L.L.C. 14,023, 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, 13 C.R.R. 64, 60 A.R. 161, 58 N.R. 81:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the *purpose* of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect.
>
> In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable to the meaning and purpose of the other specific rights and freedoms.

To identify the underlying purpose of the Charter right in question, therefore, it is important to begin by understanding the cardinal values it embodies.

32 The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(*d*) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person

contained in s. 7 of the Charter: see *Ref. re S. 94(2) of Motor Vehicle Act*, S.C.C., 17th December 1985 (unreported) [now reported [1985] 2 S.C.R. 486, 48 C.R. (3d) 289, (sub nom. *Ref. re Constitutional Question Act)* [1986] 1 W.W.R. 481, 69 B.C.L.R. 145, 36 M.V.R. 240, 63 N.R. 266], per Lamer J. The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the state of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that, until the state proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.

33 The presumption of innocence has enjoyed long-standing recognition at common law. In the leading case, *Woolmington v. D.P.P.*, [1935] A.C. 462, 25 Cr. App. R. 72 (H.L.), Viscount Sankey L.C. wrote at pp. 481-82:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.

Subsequent Canadian cases have cited the *Woolmington* principle with approval: see, for example, *Manchuk v. R.*, [1938] S.C.R. 341 at 349, 70 C.C.C. 161, [1938] 3 D.L.R. 693 [Ont.]; *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299 at 1316, 3 C.R. (3d) 30, 7 C.E.L.R. 53, 40 C.C.C. (2d) 353, 85 D.L.R. (3d) 161, 21 N.R. 295 [Ont.].

34 Further evidence of the widespread acceptance of the principle of the presumption of innocence is its inclusion in the major international human rights documents. Article 11(1) of the Universal Declaration of Human Rights, adopted 10th December 1948 by the General Assembly of the United Nations, provides:

> 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

In the International Covenant on Civil and Political Rights (1966), art. 14(2) states:

> (2) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Canada acceded to this covenant, and the optional protocol which sets up machinery for implementing the covenant, on 19th May 1976. Both came into effect on 19th August 1976.

35 In light of the above, the right to be presumed innocent until proven guilty requires that s. 11(*d*) have, at a minimum, the following content. First, an individual must be proven guilty beyond a reasonable doubt. Second, it is the state which must bear the burden of proof. As Lamer J. stated in *Dubois v. R.*, S.C.C., 21st November 1985 (unreported) [now reported [1985] 2 S.C.R. 350, 48 C.R. (3d) 193, [1986] 1 W.W.R. 193, 41 Alta. L.R. (2d) 97, 22 C.C.C. (3d) 513, 66 A.R. 202, 62 N.R. 50], at p. 6 [p. 215 (C.R.)]:

> Section 11(*d*) imposes upon the Crown the burden of proving the accused's guilt beyond a reasonable doubt as well as that of making out the case against the accused before he or she need respond, either by testifying or calling other evidence.

Third, criminal prosecutions must be carried out in accordance with lawful procedures and fairness. The latter part of s. 11(*d*), which requires the proof of guilt "according to law in a fair and public hearing by an independent and impartial tribunal", underlines the importance of this procedural requirement.

(c) Authorities on Reverse Onus Provisions and the Presumption of Innocence

36 Having considered the general meaning of the presumption of innocence, it is now, I think, desirable to review briefly the authorities on reverse onus clauses in Canada and other jurisdictions.

(i) The Canadian Bill of Rights Jurisprudence

37 Section 2(*f*) of the Canadian Bill of Rights, which safeguards the presumption of innocence, provides:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to ...
>
> (*f*) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal ...

The wording of this section closely parallels that of s. 11(*d*). For this reason, one of the Crown's primary contentions is that the Canadian Bill of Rights jurisprudence should be determinative of the outcome of the present appeal.

38 The leading case decided under s. 2(*f*) of the Canadian Bill of Rights and relied on by the Crown is *R. v. Appleby*, supra. In that case, the accused had challenged s. 224A(1)(*a*) [of the Criminal Code, 1953-54 (Can.), c. 51] (now s. 237(1)(*a*) of the Criminal Code, R.S.C. 1970, c. C-34), which imposes a burden upon an accused to prove that he or she, though occupying the driver's seat, did not enter the vehicle for the purpose of setting it in motion and did not, therefore, have care and control. This court rejected the arguments of the accused that s. 2(*f*) had been violated; it relied on the *Woolmington* case, supra, which held that the presumption of innocence was subject to "statutory exceptions". As Ritchie J. stated in his judgment for the majority at pp. 315-16:

> It seems to me, therefore, that if *Woolmington's* case is to be accepted, the words "presumed innocent until proved guilty according to law ..." as they appear in s. 2(*f*) of the *Bill of Rights*, must be taken to envisage a law which recognizes the existence of statutory exceptions reversing the onus of proof with respect to one or more ingredients of an offence in cases where certain specific facts have been proved by the Crown in relation to such ingredients.

39 In a concurring opinion, Laskin J. put forward an alternative test. He chose not to follow Ritchie J.'s approach of reading a statutory exception limitation into the phrase "according to law" in s. 2(*f*) of the Canadian Bill of Rights, and said at p. 317:

> I do not construe s. 2(*f*) as self-defeating because of the phrase "according to law" which appears therein. Hence, it would be offensive to s. 2(*f*) for a federal criminal enactment to place upon the accused the ultimate burden of establishing his innocence with respect to any element of the offence charged. The "right to be presumed innocent", of which s. 2(*f*) speaks, is, in popular terms, a way of expressing the fact that the Crown has the ultimate burden of establishing guilt; if there is any reasonable doubt at the conclusion of the case on any element of the offence charged, an accused person must be acquitted. In a more refined sense, the presumption of innocence gives an accused the initial benefit of a right of silence and the ultimate benefit (after the Crown's evidence is in and as well any evidence tendered on behalf of the accused) of any reasonable doubt: see *Coffin v. U.S.* (1895), 156 U.S. 432 at 452.

Nevertheless, Laskin J. went on to hold (at p. 318) that the presumption of innocence is not violated by "any statutory or non-statutory burden upon an accused to adduce evidence to neutralize, or counter on a balance of probabilities, the effect of evidence presented by the Crown". The test, according to Laskin J., is whether the legislative provision calls for a finding of guilt even though there is a reasonable doubt as to the culpability of the accused. This would seem to prohibit the

imposition of any legal burden on the accused; however, Laskin J. upheld a statutory provision which would appear to have done precisely that.

40 In a subsequent case, *R. v. Shelley*, supra, involving a reverse onus provision regarding unlawful importation, Laskin C.J.C. discussed further the views he had articulated in *Appleby*, supra, at p. 200:

> This Court held in *R. v. Appleby* that a reverse onus provision, which goes no farther than to require an accused to offer proof on a balance of probabilities, does not necessarily violate the presumption of innocence under s. 2(*f*). It would of course, be clearly incompatible with s. 2(*f*) for a statute to put upon an accused a reverse onus of proving a fact in issue beyond a reasonable doubt. In so far as the onus goes no farther than to require an accused to prove a essential fact upon a balance of probabilities, the essential fact must be one which is rationally open to the accused to prove or disprove, as the case may be. If it is one which an accused cannot reasonably be expected to prove, being beyond his knowledge or beyond what he may reasonably be expected to know, it amounts to a requirement that is impossible to meet.

In addition, Laskin C.J.C. sowed the seeds for the development of a "rational connection test" for determining the validity of a reverse onus provision when he stated at p. 202:

> It is evident to me in this case that there is on the record no rational or necessary connection between the fact proved, *i.e.* possession of goods of foreign origin, and the conclusion of unlawful importation which the accused under s. 248(1) must, to avoid conviction, disprove.

41 Although there are important lessons to be learned from the Canadian Bill of Rights jurisprudence, it does not constitute binding authority in relation to the constitutional interpretation of the Charter. As this court held in *R. v. Big M Drug Mart Ltd.*, supra, the Charter, as a constitutional document, is fundamentally different from the statutory Canadian Bill of Rights, which was interpreted as simply recognizing and declaring existing rights: see also *Singh v. Min. of Employment & Immigration; Thandi v. Min. of Employment & Immigration; Mann v. Min. of Employment & Immigration*, [1985] 1 S.C.R. 177, 12 Admin. L.R. 137, 14 C.R.R. 13, 17 D.L.R. (4th) 422, 58 N.R. 1 [Fed.], per Wilson J.; *R. v. Therens*, [1985] 1 S.C.R. 613, 45 C.R. (3d) 97, [1985] 4 W.W.R. 286, 38 Alta. L.R. (2d) 99, 32 M.V.R. 153, 13 C.R.R. 193, 18 C.C.C. (3d) 481, 18 D.L.R. (4th) 655, 40 Sask. R. 122, 59 N.R. 122 [Sask.], per Le Dain J. In rejecting the Canadian Bill of Rights religion cases as determinative of the meaning of freedom of religion under the Charter in *Big M Drug Mart*, supra, the court had occasion to say at pp. 343-44 [S.C.R.]:

> I agree with the submission of the respondent that the *Charter* is intended to set a standard upon which *present as well as future* legislation is to be tested. Therefore the meaning of the concept of freedom of conscience and religion is not to be determined solely by the degree to which that right was enjoyed by Canadians prior to the proclamation of the *Charter*. For this reason, *Robertson and Rosetanni, supra*, cannot be determinative of the meaning

> of "freedom of conscience and religion" under the *Charter*. We must look rather to the distinctive principles of constitutional interpretation appropriate to expounding the supreme law of Canada.

42 With this in mind, one cannot but question the appropriateness of reading into the phrase "according to law" in s. 11(*d*) of the Charter the statutory exceptions acknowledged in *Woolmington*, supra, and in *Appleby*, supra. The *Woolmington* case was decided in the context of a legal system with no constitutionally-entrenched human rights document. In Canada, we have tempered Parliamentary supremacy by entrenching important rights and freedoms in the Constitution. Viscount Sankey L.C.'s statutory exception proviso is clearly not applicable in this context and would subvert the very purpose of the entrenchment of the presumption of innocence in the Charter. I do not, therefore, feel constrained in this case by the interpretation of s. 2(*f*) of the Canadian Bill of Rights presented in the majority judgment in *Appleby*. Section 8 of the Narcotic Control Act is not rendered constitutionally valid simply by virtue of the fact that it is a statutory provision.

(ii) Canadian Charter Jurisprudence

43 In addition to the present case, there have been a number of other provincial appellate level judgments addressing the meaning of the presumption of innocence contained in s. 11(*d*). This jurisprudence provides a comprehensive and persuasive source of insight into the questions raised in this appeal. In particular, six appellate level courts in addition to the Ontario Court of Appeal have held that s. 8 of the Narcotic Control Act violates the Charter: *R. v. Carroll*, supra; *R. v. Cook*, supra; *R. v. O'Day*, supra; *R. v. Stanger*, supra; *R. v. Landry*, supra; and *R. v. Stock* (1983), 10 C.C.C. (3d) 319 (B.C.C.A.).

44 Following the decision of the Ontario Court of Appeal in the present case, the Prince Edward Island Supreme Court (in banco) rendered its decision in *R. v. Carroll*. Writing for the majority, MacDonald J. held at p. 105:

> Unless a provision falls within s. 1 of the Charter, there cannot be a requirement that an accused must prove an essential positive element of the Crown's case other than by raising a reasonable doubt. The presumption of innocence cannot be said to exist if by shifting the persuasive burden the court is required to convict even if a reasonable doubt may be said to exist.

In a concurring judgment, Mitchell J. commented at pp. 107-108:

> Section 11(*d*) gives an accused person the right to be presumed innocent until proven guilty. It follows that, if an accused is to be presumed innocent until proven guilty, he must not be convicted unless and until the Crown has proven each and all of the elements necessary to constitute the crime.

Applying these legal conclusions to s. 8 of the Narcotic Control Act, the court held that s. 11(*d*) had been violated. As Mitchell J. stated at p. 108:

> Under s. 8 an accused is not presumed innocent until proven guilty. He is only presumed innocent until found in possession. Once the Crown proves the accused had possession of the narcotic, he is presumed to be guilty of an intention to traffic until he proves otherwise.

45 The Nova Scotia Supreme Court, Appellate Division, also concluded that s. 8 is an unconstitutional violation of the s. 11(*d*) presumption of innocence, in its decision in R. v. Cook, supra. After reviewing *R. v. Oakes* and *R. v. Carroll*, supra, Hart J.A. concluded at pp. 435-36:

> Section 8 of the *Narcotic Control Act* is a piece of legislation that attempts to relieve the Crown of its normal burden of proof by use of what is known as a reverse onus. Different types of reverse onus have been known to the law and proof of a case with the aid of a reverse onus can in my opinion, fall into the wording of s. 11(*d*) of the Charter as being proof "according to law" ... I know of no justification, however, for holding that it would be "according to law" to allow use of a reverse onus clause which permitted the Crown the assistance of a provision which relieved it from calling any probative evidence to establish one of the essential elements of an offence.

Although concurring in the result, Jones J.A. maintained that the reasonableness test should be applied with respect to s. 1 and not with respect to the words "according to law" in s. 11(*d*). At p. 439:

> The test of reasonableness should be available in considering the secondary question under s. 1 of the Charter. It is important that the burden of proof should be on the Crown to show that a statute which violates s. 11(*d*) of the Charter is demonstrably justified in a free and democratic society.

46 In *R. v. O'Day*, supra, the New Brunswick Court of Appeal struck down s. 8 of the Narcotic Control Act and registered its agreement with the three earlier provincial appellate level courts.

47 The Alberta Court of Appeal in *R. v. Stanger*, supra, also found s. 8 unconstitutional; however, the court was not unanimous in this conclusion. On the meaning of s. 11(*d*), Stevenson J.A., writing for the majority, paraphrased Martin J.A.'s comment in *Oakes* and stated at p. 351 [C.C.C.] that the presumption of innocence meant "first, that an accused is innocent until proven guilty in accordance with established procedure, and secondly, that guilt must be proven beyond a reasonable doubt". Stevenson J.A. also cited MacDonald J.'s comment in *Carroll*, supra, at p. 98, that the presumption of innocence is maintained "as long as the prosecution has the final burden of establishing guilt, on any element of the offence charged, beyond a reasonable doubt".

48 I should add that the majority in *Stanger* correctly rejected the applicability of the Privy Council decision in *Ong Ah Chuan v. Pub. Prosecutor; Koh Chai Cheng v. Pub. Prosecutor*, [1981] A.C. 648. That case concerned constitutional provisions of Singapore which are significantly different from those of the Charter; in particular, they do not contain an explicit endorsement of the presumption of innocence. Moreover, the Privy Council did not read this principle into the general due process protections of the constitution of Singapore.

49 In *R. v. Landry*, supra, the Quebec Court of Appeal invalidated s. 8 of the Narcotic Control Act and extended its conclusions to s. 2(*f*) of the Canadian Bill of Rights. As Malouf J.A. stated at p. 561:

> Both the *Bill of Rights* and the Charter recognize the right of an accused to be presumed innocent until proven guilty according to law. I cannot accept that such a basic and fundamental principle can be set aside by such a reverse onus provision.

50 Finally, in a very brief judgment, *R. v. Stock*, supra, the British Columbia Court of Appeal concurred with the Court of Appeal decisions reviewed above, endorsing in particular the Ontario Court of Appeal decision in *Oakes*. An earlier British Columbia Court of Appeal opinion, *R. v. Anson*, 35 C.R. (3d) 179, [1983] 3 W.W.R. 366, 42 B.C.L.R. 282, 4 C.C.C. (3d) 114, 146 D.L.R. (3d) 661, (sub nom. *Anson v. A.G. Can.)* 4 C.R.R. 337, had dismissed an appeal from a ruling which had upheld the constitutionality of s. 8 of the Narcotic Control Act; however, the basis for the denial of the appeal was procedural. The court did not assess the constitutionality of s. 8 in relation to the presumption of innocence.

51 There have also been a number of cases in which the meaning of s. 11(*d*) has been considered in relation to other legislative provisions: see, for example, *R. v. Holmes* (1983), 41 O.R. (2d) 250, 32 C.R. (3d) 322, 4 C.C.C. (3d) 440, 145 D.L.R. (3d) 689, 4 C.R.R. 222 (C.A.); *R. v. Whyte* (1983), 38 C.R. (3d) 24, 25 M.V.R. 22, 10 C.C.C. (3d) 277, 6 D.L.R. (4th) 263, leave to appeal to S.C.C. granted 43 C.R. (3d) xxvii, 10 C.C.C. (3d) 277n, 6 D.L.R. (4th) 263n [B.C.]; *R. v. Lee's Poultry Ltd.* (1985), 43 C.R. (3d) 289, 17 C.C.C. (3d) 539, 12 C.R.R. 125, 7 O.A.C. 100 (C.A.); *R. v. S.P.T.* (1985), 43 C.R. (3d) 307, 33 M.V.R. 148, 18 C.C.C. (3d) 125, 16 D.L.R. (4th) 753, 66 N.S.R. (2d) 311, 152 A.P.R. 311 (C.A.); *R. v. Kowalczuk*, [1983] 3 W.W.R. 694, 5 C.C.C. (3d) 25, 147 D.L.R. (3d) 735, 20 Man. R. (2d) 379 (C.A.); *R. v. Schwartz* (1983), 10 C.C.C. (3d) 34, 5 D.L.R. (4th) 524, 25 Man. R. (2d) 295 (C.A.); *Re Boyle and R.* (1983), 41 O.R. (2d) 713, 35 C.R. (3d) 34, 5 C.C.C. (3d) 193, 148 D.L.R. (3d) 449 (C.A.).

52 To summarize, the Canadian Charter jurisprudence on the presumption of innocence in s. 11(*d*) and reverse onus provisions appears to have solidly accorded a high degree of protection to the presumption of innocence. Any infringements of this right are permissible only when, in the words of s. 1 of the Charter, they are reasonable and demonstrably justified in a free and democratic society.

(iii) United States Jurisprudence

53 In the United States, protection of the presumption of innocence is not explicit. Rather, it has been read into the "due process" provisions contained in the Fifth and Fourteenth Amendments of the American Bill of Rights. An extensive review of the United States case law is provided in Martin J.A.'s judgment for the Ontario Court of Appeal. I will therefore merely highlight the major jurisprudential developments.

54 In *Tot v. U.S.; U.S. v. Delia*, 319 U.S. 463, 87 L. Ed. 1519, 63 S. Ct. 1241 (1943), Roberts J. outlined the following test at pp. 467-68:

> ... a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience.

The comparative convenience of producing evidence was also acknowledged as a corollary test. The case involved a presumption to be drawn, from the possession of firearms by a person convicted of a previous crime of violence, that the firearms were illegally obtained through interstate or foreign commerce. Of note was Roberts J.'s comment that, even if a rational connection had been proved, the statutory presumption could not be sustained because of the prejudical reliance on a past conviction as part of the basic fact. The accused would be discredited in the eyes of the jury even before he attempted to disprove the presumed fact.

55 In *Leary v. U.S.*, 395 U.S. 6, 23 L. Ed. 2d 57, 89 S. Ct. 1532 (1969), Harlan J. articulated a more stringent test for invalidity at p. 36:

> ... a criminal statutory presumption must be regarded as "irrational" or "arbitrary," and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.

Harlan J. also noted [at p. 36, note 64] that, since the statutory presumption was invalid under the above test:

> ... we need not reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal "reasonable doubt" standard if proof of the crime charged or an essential element thereof depends upon its use.

56 The United States Supreme Court did answer this question in *Co. Ct. of Ulster v. Allen*, 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979). It held that, where a mandatory criminal presumption was imposed by statute, the state may not "rest its case entirely on a presumption unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt" (p. 167). A mere rational connection is insufficient. This case illustrates the high

degree of constitutional protection accorded the principle that an accused must be found guilty beyond a reasonable doubt. The rationale for this is well stated by Brennan J. in *Re Winship*, 397 U.S. 358 at 363-64, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970):

> The requirement of proof beyond a reasonable doubt has this vital role in our criminal procedure for cogent reasons. The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt.

(iv) European Convention on Human Rights Jurisprudence

57 As mentioned above, international developments in human rights law have afforded protection to the principle of the presumption of innocence. The jurisprudence on the European Convention on Human Rights includes a consideration of the legitimacy of reverse onus provisions. Article 6(2) of the European Convention on Human Rights reads:

> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

The meaning of art. 6(2) was clarified in the *Pfunders Case (Austria v. Italy)* (1963), 6 Yearbook of E.C.H.R. 740 at 782 and 784:

> This text, according to which everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law, requires firstly that court judges in fulfilling their duties should not start with the conviction or assumption that the accused committed the act with which he is charged. In other words, the onus to prove guilt falls upon the Prosecution, and any doubt is to the benefit of the accused. Moreover, the judges must permit the latter to produce evidence in rebuttal. In their judgment they can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt.

58 Although the commission has endorsed the general importance of the requirement that the prosecution prove the accused's guilt beyond a reasonable doubt, it has acknowledged the permissibility of certain exceptions to this principle. For example, the commission upheld a statutory reverse onus provision in which a man living with or habitually in the company of a prostitute is presumed to be knowingly living on the earnings of prostitution unless he proves otherwise: *X v. U.K.*, Application 5124/71, Collection of Decisions of E.C.H.R. 135. The commission noted the importance of examining the substance and effect of a statutory reverse onus. It concluded, however, at p. 135:

> The statutory presumption in the present case is restrictively worded ... The presumption is neither irrebuttable nor unreasonable. To oblige the prosecution to obtain direct evidence of "living on immoral earnings" would in most cases make its task impossible.

See discussion in Francis Jacobs, The European Convention on Human Rights (Oxford, 1975), pp. 113-14.

(d) Conclusion regarding S. 11(d) of Charter and S. 8 of Narcotic Control Act

59 This review of the authorities lays the groundwork for formulating some general conclusions regarding reverse onus provisions and the presumption of innocence in s. 11(*d*). We can then proceed to apply these principles to the particulars of s. 8 of the Narcotic Control Act.

60 In general one must, I think, conclude that a provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence in question violates the presumption of innocence in s. 11(*d*). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt. This would arise if the accused adduced sufficient evidence to raise a reasonable doubt as to his or her innocence but did not convince the jury on a balance of probabilities that the presumed fact was untrue.

61 The fact that the standard is only the civil one does not render a reverse onus clause constitutional. As Sir Rupert Cross commented in the Rede lecture "The Golden Thread of the English Criminal Law: The Burden of Proof", delivered in 1976 at the University of Toronto, at p. 11:

> It is sometimes said that exceptions to the Woolmington rule are acceptable because, whenever the burden of proof on any issue in a criminal case is borne by the accused, he only has to satisfy the jury on the balance of probabilities, whereas on issues on which the Crown bears the burden of proof the jury must be satisfied beyond a reasonable doubt.

And at p. 13:

> The fact that the standard is lower when the accused bears the burden of proof than it is when the burden of proof is borne by the prosecution is no answer to my objection to the existence of exceptions to the Woolmington rule as it does not alter the fact that a jury or bench of magistrates may have to convict the accused although they are far from sure of his guilt.

62 As we have seen, the potential for a rational connection between the basic fact and the presumed fact to justify a reverse onus provision has been elaborated in some of the cases discussed above and is now known as the "rational connection test". In the context of s. 11(*d*), however, the following question arises: if we apply the rational connection test to the consideration of

whether s. 11(*d*) has been violated, are we adequately protecting the constitutional principle of the presumption of innocence? As Professors MacKay and Cromwell point out in their article "*Oakes*: A Bold Initiative Impeded by Old Ghosts" (1983), 32 C.R. (3d) 221, at p. 233:

> The rational connection test approves a provision that *forces* the trier to infer a fact that may be simply rationally connected to the proved fact. Why does it follow that such a provision does not offend the constitutional right to be proved guilty beyond a reasonable doubt?

A basic fact may rationally tend to prove a presumed fact, but not prove its existence beyond a reasonable doubt. An accused person could thereby be convicted despite the presence of a reasonable doubt. This would violate the presumption of innocence.

63 I should add that this questioning of the constitutionality of the "rational connection test" as a guide to interpreting s. 11(*d*) does not minimize its importance. The appropriate stage for invoking the rational connection test, however, is under s. 1 of the Charter. This consideration did not arise under the Canadian Bill of Rights because of the absence of an equivalent to s. 1. At the Court of Appeal level in the present case, Martin J.A. sought to combine the analysis of s. 11(*d*) and s. 1 to overcome the limitations of the Canadian Bill of Rights jurisprudence. To my mind, it is highly desirable to keep s. 1 and s. 11(*d*) analytically distinct. Separating the analysis into two components is consistent with the approach this court has taken to the Charter to date: see *R. v. Big M Drug Mart Ltd.*, supra; *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, *(*sub nom. *Dir. of Investigation & Research, Combines Investigation Branch v. Southam Inc.)* 41 C.R. (3d) 97, [1984] 6 W.W.R. 577, 33 Alta. L.R. (2d) 193, 27 B.L.R. 297, 84 D.T.C. 6467, 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, 2 C.P.R. (3d) 1, 9 C.R.R. 355, 55 A.R. 291, 55 N.R. 241; *L.S.U.C. v. Skapinker*, [1984] 1 S.C.R. 357, 11 C.C.C. (3d) 481, 9 D.L.R. (4th) 161, 8 C.R.R 193, 3 O.A.C. 321, 53 N.R. 169.

64 To return to s. 8 of the Narcotic Control Act, I am in no doubt whatsoever that it violates s. 11(*d*) of the Charter by requiring the accused to prove on a balance of probabilities that he was not in possession of the narcotic for the purpose of trafficking. Mr. Oakes is compelled by s. 8 to prove that he is *not* guilty of the offence of trafficking. He is thus denied his right to be presumed innocent and subjected to the potential penalty of life imprisonment unless he can rebut the presumption. This is radically and fundamentally inconsistent with the societal values of human dignity and liberty which we espouse, and is directly contrary to the presumption of innocence enshrined in s. 11(*d*). Let us turn now to s. 1 of the Charter.

V. Is S. 8 of the Narcotic Control Act a Reasonable and Demonstrably Justified Limit Pursuant to S. 1 of the Charter?

65 The Crown submits that, even if s. 8 of the Narcotic Control Act violates s. 11(*d*) of the Charter, it can still be upheld as a reasonable limit under s. 1, which, as has been mentioned, provides:

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The question whether the limit is "prescribed by law" is not contentious in the present case, since s. 8 of the Narcotic Control Act is a duly-enacted legislative provision. It is, however, necessary to determine if the limit on Mr. Oakes' right, as guaranteed by s. 11(*d*) of the Charter, is "reasonable" and "demonstrably justified in a free and democratic society" for the purpose of s. 1 of the Charter, and thereby saved from inconsistency with the Constitution.

66 It is important to observe at the outset that s. 1 has two functions: first, it constitutionally guarantees the rights and freedoms set out in the provisions which follow; and second, it states explicitly the exclusive justificatory criteria (outside of s. 33 of the Constitution Act, 1982) against which limitations on those rights and freedoms must be measured. Accordingly, any s. 1 inquiry must be premised on an understanding that the impugned limit violates constitutional rights and freedoms — rights and freedoms which are part of the supreme law of Canada. As Wilson J. stated in *Singh v. Min. of Employment & Immigration*, supra, at p. 218:

> ... it is important to remember that the courts are conducting this inquiry in light of a commitment to uphold the rights and freedoms set out in the other sections of the *Charter*.

67 A second contextual element of interpretation of s. 1 is provided by the words "free and democratic society". Inclusion of these words as the final standard of justification for limits on rights and freedoms refers the court to the very purpose for which the Charter was originally entrenched in the Constitution: Canadian society is to be free and democratic. The court must be guided by the values and principles essential to a free and democratic society, which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.

68 The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance. For this reason, s. 1 provides criteria of justification for limits on the rights and freedoms guaranteed by the Charter.

69 These criteria impose a stringent standard of justification, especially when understood in terms of the two contextual considerations discussed above, namely, the violation of a

constitutionally-guaranteed right or freedom and the fundamental principles of a free and democratic society.

70 The onus of proving that a limit on a right or freedom guaranteed by the Charter is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. It is clear from the text of s. 1 that limits on the rights and freedoms enumerated in the Charter are exceptions to their general guarantee. The presumption is that the rights and freedoms are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria which justify their being limited. This is further substantiated by the use of the word "demonstrably", which clearly indicates that the onus of justification is on the party seeking to limit: *Hunter v. Southam Inc.*, supra.

71 The standard of proof under s. 1 is the civil standard, namely, proof by a preponderance of probability. The alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous on the party seeking to limit. Concepts such as "reasonableness", "justifiability" and "free and democratic society" are simply not amenable to such a standard. Nevertheless, the preponderance of probability test must be applied rigorously. Indeed, the phrase "demonstrably justified" in s. 1 of the Charter supports this conclusion. Within the broad category of the civil standard, there exist different degrees of probability depending on the nature of the case: see Sopinka and Lederman, The Law of Evidence in Civil Cases (Toronto, 1974), at p. 385. As Denning L.J. explained in *Bater v. Bater*, [1951] P. 35, [1950] 2 All E.R. 458 at 459 (C.A.):

> The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a standard as a criminal court, even when considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

This passage was cited with approval in *Hanes v. Wawanesa Mut. Ins. Co.*, [1963] S.C.R. 154 at 161, [1963] 1 C.C.C. 321, 36 D.L.R. (2d) 718 [Ont.]. A similar approach was put forward by Cartwright J. in *Smith v. Smith*, [1952] 2 S.C.R. 312 at 331-32, [1952] 3 D.L.R. 449 [B.C.]:

> I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be satisfied, and that whether or not it will be so satisfied must depend on the totality of the circumstances on which its judgment is formed including the gravity of the consequences ...

72 Having regard to the fact that s. 1 is being invoked for the purpose of justifying a violation of the constitutional rights and freedoms the Charter was designed to protect, a very high degree of probability will be, in the words of Denning L.J., "commensurate with the occasion".

Where evidence is required in order to prove the constituent elements of a s. 1 inquiry, and this will generally be the case, it should be cogent and persuasive and make clear to the court the consequences of imposing or not imposing the limit: see *L.S.U.C. v. Skapinker*, supra, at p. 384; *Singh v. Min. of Employment & Immigration*, supra, at p. 217. A court will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decisions. I should add, however, that there may be cases where certain elements of the s. 1 analysis are obvious or self-evident.

73 To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

74 Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, supra, at p. 352. Third, there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of "sufficient importance".

75 With respect to the third component, it is clear that the general effect of any measure impugned under s. 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s. 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious

effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.

76 Having outlined the general principles of a s. 1 inquiry, we must apply them to s. 8 of the Narcotic Control Act. Is the reverse onus provision in s. 8 a reasonable limit on the right to be presumed innocent until proven guilty beyond a reasonable doubt as can be demonstrably justified in a free and democratic society?

77 The starting point for formulating a response to this question is, as stated above, the nature of Parliament's interest or objective which accounts for the passage of s. 8 of the Narcotic Control Act. According to the Crown, s. 8 of the Narcotic Control Act is aimed at curbing drug trafficking by facilitating the conviction of drug traffickers. In my opinion, Parliament's concern that drug trafficking be decreased can be characterized as substantial and pressing. The problem of drug trafficking has been increasing since the 1950s, at which time there was already considerable concern: see Report of the Special Committee on Traffic in Narcotic Drugs, Appendix to Debates of the Senate of Canada, session of 1955, pp. 690-700; see also Final Report, Commission of Inquiry into the Non-Medical Use of Drugs (Ottawa, 1973). Throughout this period, numerous measures were adopted by free and democratic societies, at both the international and national levels.

78 At the international level, on 23rd June 1953, the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, to which Canada is a signatory, was adopted by the United Nations Opium Conference held in New York. The Single Convention on Narcotic Drugs (1961), was acceded to in New York on 30th March 1961. This treaty was signed by Canada on 30th March 1961. It entered into force on 13th December 1964. As stated in the preamble, "addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind".

79 At the national level, statutory provisions have been enacted by numerous countries which, inter alia, attempt to deter drug trafficking by imposing criminal sanctions: see, for example, Misuse of Drugs Act, 1975 (New Zealand), no. 116; Misuse of Drugs Act, 1971 (Eng.), c. 38.

80 The objective of protecting our society from the grave ills associated with drug trafficking is, in my view, one of sufficient importance to warrant overriding a constitutionally-protected right or freedom in certain cases. Moreover, the degree of seriousness of drug trafficking makes its acknowledgement as a sufficiently important objective for the purposes of s. 1 to a large extent self-evident. The first criterion of a s. 1 inquiry, therefore, has been satisfied by the Crown.

81 The next stage of inquiry is a consideration of the means chosen by Parliament to achieve its objective. The means must be reasonable and demonstrably justified in a free and democratic society. As outlined above, this proportionality test should begin with a consideration of the rationality of the provision: Is the reverse onus clause in s. 8 rationally related to the objective of

curbing drug trafficking? At a minimum, this requires that s. 8 be internally rational; there must be a rational connection between the basic fact of possession and the presumed fact of possession for the purpose of trafficking. Otherwise the reverse onus clause could give rise to unjustified and erroneous convictions for drug trafficking of persons guilty only of possession of narcotics.

82 In my view, s. 8 does not survive this rational connection test. As Martin J.A. of the Ontario Court of Appeal concluded, possession of a small or negligible quantity of narcotics does not support the inference of trafficking. In other words, it would be irrational to infer that a person had an intent to traffic on the basis of his or her possession of a very small quantity of narcotics. The presumption required under s. 8 of the Narcotic Control Act is overinclusive and could lead to results in certain cases which would defy both rationality and fairness. In light of the seriousness of the offence in question, which carries with it the possibility of imprisonment for life, I am further convinced that the first component of the proportionality test has not been satisfied by the Crown.

83 As I have concluded that s. 8 does not satisfy this first component of proportionality, it is unnecessary to consider the other two components.

VI. Conclusion

84 The Ontario Court of Appeal was correct in holding that s. 8 of the Narcotic Control Act violates the Canadian Charter of Rights and Freedoms and is therefore of no force or effect. Section 8 imposes a limit on the right guaranteed by s. 11(*d*) of the Charter which is not reasonable and is not demonstrably justified in a free and democratic society for the purpose of s. 1. Accordingly, the constitutional question is answered as follows:

Question:

85 Is s. 8 of the Narcotic Control Act inconsistent with s. 11(*d*) of the Canadian Charter of Rights and Freedoms and thus of no force and effect?

Answer:

86 Yes.

87 I would therefore dismiss the appeal.

***Estey J. (McIntyre J.* concurring):**

88 I would dismiss this appeal [from 40 O.R. (2d) 660, 32 C.R. (3d) 193, 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123, affirming 38 O.R. (2d) 598]. I agree with the conclusions of the Chief Justice with reference to the relationship between s. 11(*d*) and s. 1 of the Charter of Rights. For the disposition of all other issues arising in this appeal, I would adopt the reasons given by Martin J.A. in the court below.

Appeal dismissed.

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Tab 17

para 65

2006 ABQB 302
Alberta Court of Queen's Bench

Chiasson v. Kellogg Brown & Root (Canada) Co.

2006 CarswellAlta 621, 2006 C.L.L.C. 230-017, 2006 ABQB 302, [2006] 8 W.W.R. 730, [2006] A.W.L.D. 2274, [2006] A.J. No. 583, 267 D.L.R. (4th) 639, 399 A.R. 85, 50 C.C.E.L. (3d) 6, 56 C.H.R.R. D/470, 59 Alta. L.R. (4th) 314

In the Matter of The Decision of the Human Rights Panel Dated June 7, 2005, in Regards to Complaint Number N2002/10/0224

The Director of the Alberta Human Rights and Citizenship Commission and John Chiasson (Appellants) and Kellogg Brown & Root (Canada) Company (Respondent)

S.L. Martin J.

Heard: November 8, 2005; December 19, 2005
Judgment: May 11, 2006 *
Docket: Edmonton 0503-11428

* A corrigendum issued by the court on May 29, 2006 has been incorporated herein.

Counsel: Ms Janice Ashcroft for Appellants
Mr. Andrew Robertson for Respondent

Subject: Constitutional; Civil Practice and Procedure; Employment; Human Rights

Headnote

Human rights --- What constitutes discrimination — Substance abuse

Complainant was hired to work as receiving inspector at oil plant — Complainant failed pre-employment drug test, as result of smoking marijuana approximately two weeks before beginning work — Complainant's human rights complaint was dismissed — Panel found that complainant's drug use was only recreational, and therefore he had no disability — Complainant appealed — Appeal allowed — Complainant had been discriminated against on basis of disability — Employer ordered to cease contravening Human Rights Code — Panel did not address issue of prima facie disability — Any person testing positive under drug testing was entitled to protection of Act — Employer's drug policy treated recreational drug users as drug addicts, and further assumed they would be likely to work

while impaired — Whether employer believed complainant was habitual drug user or not was not relevant — Terms and impact of drug policy were more important consideration than whether employer believed that complainant was actually drug addicted — Employer not free to enact policies which treat complainant as if disabled as long as not making assertion to such effect — Drug testing was not reasonably necessary — Employer made no attempt at accommodation — Complainant's position was safety sensitive to some extent — Complainant did not consume drugs while employed, and did not work while under influence of drugs — Employer put complainant to work before results of drug test were known, calling into question test's necessity — Method of testing was not as reliable as other methods — Complainant not required to disclose his drug use in order to trigger need for accommodation, especially as policy provided for no accommodation — Complainant sufficiently communicated his circumstances in medical interview and termination meeting to trigger need for accommodation.

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Government & Service Employees' Union) 127 B.C.A.C. 161, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 207 W.A.C. 161, 46 C.C.E.L. (2d) 206, 35 C.H.R.R. D/257, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 68 C.R.R. (2d) 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU)* [1999] 3 S.C.R. 3, 7 B.H.R.C. 437 (S.C.C.) — followed

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& des droits de la jeunesse) v. Montréal (City)) 74 C.R.R. (2d) 80, 37 C.H.R.R. D/271 (S.C.C.) — followed

Renaud v. Central Okanagan School District No. 23 (1992), [1992] 6 W.W.R. 193, (sub nom. *Central Okanagan School District No. 23 v. Renaud)* 95 D.L.R. (4th) 577, (sub nom. *Renaud v. Board of Education of Central Okanagan No. 23)* 24 W.A.C. 245, (sub nom. *Central Okanagan School District No. 23 v. Renaud)* 92 C.L.L.C. 17,032, 141 N.R. 185, 71 B.C.L.R. (2d) 145, (sub nom. *Central Okanagan School District No. 23 v. Renaud)* [1992] 2 S.C.R. 970, (sub nom. *Renaud v. Board of Education of Central Okanagan No. 23)* 13 B.C.A.C. 245, 1992 CarswellBC 257, 16 C.H.R.R. D/425, 1992 CarswellBC 910 (S.C.C.) — considered

Ryan v. Law Society (New Brunswick) (2003), (sub nom. *Law Society of New Brunswick v. Ryan)* [2003] 1 S.C.R. 247, 2003 SCC 20, 2003 CarswellNB 145, 2003 CarswellNB 146, 223 D.L.R. (4th) 577, 48 Admin. L.R. (3d) 33, 302 N.R. 1, 257 N.B.R. (2d) 207, 674 A.P.R. 207, 31 C.P.C. (5th) 1 (S.C.C.) — followed

Saskatchewan (Department of Finance) v. Saskatchewan (Human Rights Commission) (2002), 2002 SKQB 501, 2002 CarswellSask 757, [2003] 2 W.W.R. 366, 22 C.C.E.L. (3d) 91, 34 C.C.P.B. 98, 45 C.H.R.R. D/260, (sub nom. *Saskatchewan v. Human Rights Commission (Sask.))* 229 Sask. R. 115, 2003 C.L.L.C. 230-015 (Sask. Q.B.) — referred to

Suncor Energy Inc. v. C.E.P., Local 707 (2004), 128 L.A.C. (4th) 48, 2004 CarswellAlta 1247 (Alta. Arb.) — referred to

Tetarenko v. Tetarenko (2005), 2005 ABQB 325, 2005 CarswellAlta 588 (Alta. Q.B.) — considered

Trimac Transportation Services - Bulk Systems v. T.C.U. (1999), [2000] L.V.I. 3090-2, 1999 CarswellNat 2995, 88 L.A.C. (4th) 237 (Can. Arb.) — referred to

University of Alberta v. Alberta (Human Rights Commission) (1992), (sub nom. *Dickason v. University of Alberta)* 4 Alta. L.R. (3d) 193, (sub nom. *Dickason v. University of Alberta)* 127 A.R. 241, (sub nom. *Dickason v. University of Alberta)* [1992] 2 S.C.R. 1103, (sub nom. *Dickason v. University of Alberta)* [1992] 6 W.W.R. 385, (sub nom. *Dickason v. University of Alberta)* 92 C.L.L.C. 17,033, (sub nom. *Dickason v. University of Alberta)* 141 N.R. 1, (sub nom. *Dickason v. University of Alberta)* 11 C.R.R. (2d) 1, (sub nom. *Dickason v. University of Alberta)* 95 D.L.R. (4th) 439, (sub

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Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Canadian Human Rights Act, R.S.C. 1985, c. H-6

s. 7 — referred to

s. 10 — referred to

s. 25 — referred to

Charte des droits et libertés de la personne, L.Q. 1975, c. 6

art. 10 — referred to

Human Rights Code, R.S.O. 1990, c. H.19

Generally — referred to

Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14

Generally — referred to

Preamble — referred to

s. 1(1) — referred to

s. 7 — referred to

s. 7(1) — considered

s. 7(3) — referred to

s. 11 — referred to

s. 16(1) — referred to

s. 17 — referred to

s. 32 — referred to

s. 37 — referred to

s. 44 — referred to

s. 44(1)(h) "mental disability" — referred to

s. 44(1)(l) "physical disability" — referred to

Occupational Health and Safety Act, R.S.A. 2000, c. O-2

s. 2 — referred to

s. 2(1) — referred to

APPEAL by complainant from determination of Human Rights Commission, rejecting complaint of discrimination arising from substance abuse.

***S.L. Martin J.*:**

A. Introduction

1 When Mr. Chiasson was interviewed for employment as a receiving inspector at the Syncrude plant in Fort McMurray he was told that as a non-unionized employee he was required to take and pass a pre-employment drug test. He took the required urine test, began work and worked for approximately nine days, when his employer learned that he tested positive for cannabis and immediately terminated his employment. Mr. Chiasson challenged the practice of mandatory pre-employment drug testing as discrimination on the basis of disability before a Human Rights Panel. His evidence was that his use of marijuana is recreational, outside of work and is not the product of an addiction. The Panel determined that there was no accommodation offered to Mr. Chiasson, but that did not give rise to an infringement or remedy because Mr. Chiasson did not suffer from a disability or perceived disability and there was therefore no discrimination. This appeal raises important issues for employers and employees concerning the human rights implications of pre-employment drug testing.

B. History of Proceedings

2 In June 2002, Mr. Chiasson was employed at the Shell Scotsford Oil Refinery Upgrader in Fort Saskatchewan. He was contacted by Ms. Leanne Aysan, a recruiting specialist, who informed him of an offer of employment with Kellog, Root and Brown (Canada) Company ("KBR") as a receiving inspector at the Syncrude UE-1 project in Fort McMurray. The employer KBR was engaged in project based work as a contractor to expand the Syncrude upgrader refinery at Fort McMurray.

3 On or about Saturday June 22, 2002, Mr. Chiasson smoked marijuana.

4 On June 25, 2002, Mr. Chiasson was interviewed by Gary Fowler, Quality Assurance Manager at KBR and a letter dated June 26, 2002, was sent to Mr. Chiasson confirming the employment. The employment contract was to last for 21 months.

5 The parties agree that Mr. Chiasson was informed of the medical and drug screen, but they do not agree on when this requirement was first raised. However, by June 27, 2002, Mr. Chiasson knew a pre-employment medical and drug screening would be conducted in Edmonton on June 28, 2002. He attended as directed and provided urine samples.

6 The June 26, 2002, letter stated that the offer of employment "is subject to the results of your pre-employment medical and drug screen." An attachment to the letter added the following "Terms and Conditions of Employment":

> 1. Compliance with the Halliburton KBR policies and procedures which may be reasonably amended from time to time.
>
> 2. Successful completion of the Company pre-employment medical and drug screen.
>
> 4. A ninety (90) day probationary period.
>
> 8. ... In the event of termination for cause or during the probationary period, no notice will be provided.

7 July 8, 2002, was set as the hire date and that is when Mr. Chiasson started work for KBR.

8 On July 17, 2002, the results of his pre-employment drug screen were received and they showed a positive test for tetrahydrocannabinol ("THC"), the active ingredient in marijuana. He was interviewed by the employer's medical officer concerning this result and admitted that he had used marijuana on the Saturday five days before the drug screen was conducted, but he did not expect to fail the test.

9 On the same day, Mr. Chiasson contacted Ms. Leanne Aysan to inform her of the result and seek advice. Two hours later she called him back and told him to leave the plant site. He was directed to fly to Calgary the following day in order to sign some documents at the KBR head office. On arrival, he met with Ms. Aysan and Mr. Doug Dickie, the administrative manager, who told him that his employment had been terminated. Mr. Dickie told him that drug use was not allowed on site.

10 Mr. Chiasson subsequently received a letter from Ms. Aysan, dated July 17, 2002, confirming that his employment had been terminated effective July 18, 2002. The letter stated:

> When offered the position with KBR, it was a condition of employment to *successfully* pass a pre-employment medical and drug screen. KBR received the results from your drug screen on July 18 and the results were *positive* for drugs; consequently the organization has no choice but to terminate your employment.

11 There is no allegation that Mr. Chiasson used marijuana while at work for KBR. Mr. Chiasson testified that he did not take drugs at work and told that to Mr. Dickie at the termination interview. He said that he had not had a workplace accident in his twenty plus years in the workforce. The uncontradicted evidence is that Mr. Chiasson was never impaired at work, there were no reported accidents or incidents and the written evaluation of his performance while at KBR placed him in the above average to outstanding range.

12 Mr. Chiasson states that he is not, and has never been, dependent on any drug. He classifies his use of marijuana as social and recreational and the employer does not dispute this. Ms. Judy Caul, the Human Resources Manager for KBR Canada testified that "there was never any consideration, suspicion or discussion that the complainant might be addicted to marijuana."

13 Mr. Chiasson was hired as a non-union employee. In 2002, according to Ms. Caul, KBR had about nine hundred union personnel and one hundred non-union employees on the UE-1 site. Those figures had risen to about two thousand union and four hundred non-union personnel at the time of the hearing. Union employees worked under a different regime: they were hired from a union hall and there was no mandatory pre-employment drug screening required of them. Drug screening for unionized employees was managed under the "Canadian Model for a Safe Workplace" published by the Construction Owners' Association of Alberta and this policy does not require pre-employment testing.

14 Mr. Chiasson's recruitment as a non-union employee was pursuant to two documents: the 2002 KBR Alcohol and Controlled Substances Policy ("Policy"), in conjunction with the Halliburton Drug and Alcohol Testing Procedures. KBR was once part of Halliburton but became a separate corporation in 2002. The KBR Policy is dated effective July 6, 1999, and is four pages in length. The Halliburton document is a twenty-four page policy manual. The offer of employment does not particularize what the "Company" pre-employment medical and drug screen is and there is no evidence Mr. Chiasson received copies of either or both documents.

15 KBR situates its Policy in the framework of its obligation to provide a healthy and safe work environment both generally and pursuant to s. 2(1) of the *Occupational Health and Safety Act*. RSA 2000, c.O-2. It also seeks a drug and alcohol free workplace culture. While KBR was obliged to have a suitable drug and alcohol policy in place, one that conformed with the Canadian Model Guidelines, neither those Guidelines nor Syncrude required KBR to conduct pre-employment drug testing.

16 The stated purpose of the written KBR Policy is "to establish Company rules and procedures concerning abuse of drugs and alcohol in the workplace in order to maintain a work environment safe for Employees, for others with whom the Company Employees work, and for the public whom our work may affect, and which is conducive to high work standards."

17 The intent of the KBR Policy is:

> to prohibit impairment from the use of alcohol, controlled or prohibited substances by Company Employees or Contractors while engaged in company activities, and to prohibit the possession and sale of prohibited and controlled substances. Prohibition from impairment is enforced through testing. As the use of alcohol or prohibited or controlled substances may adversely affect the ability of a person to work in a safe manner, the presence of them in the body is prohibited as set out in this policy.

18 The prohibitions are said to apply to "all covered persons while on duty or while in, on or using Company Property or Customer's Property." All covered persons refers to non-unionized employees. It is equally applicable to all such employees, and not merely employees in safety sensitive positions.

19 The focus of these provisions is clearly on workplace behavior: drug use in the workplace, the prohibition of impairment while engaged in company activities, and the application of the Policy to those on duty or using company property.

20 The written Policy allows for various forms of drug testing, including post offer and pre-employment, post incident, random and unit sweep testing, and for reasonable cause and rehabilitation.

21 The section on confirmed test results states that "the presence of a prohibited substance in an Employee's urine, blood or breath are considered sufficient evidence of a violation of this policy to result in the termination of the Employee or preclude the hiring of the Employee." The employer interpreted its Policy as requiring the automatic termination of Mr. Chiasson as a result of his positive test result.

22 The Policy provides that employees consent as a condition of employment to drug testing and in the absence of a signed consent to that effect, the "continued employment constitutes consent." Mr. Chiasson did not sign the consent form.

23 Ms. Caul testified that the employer was not following the written Policy in all details, even for those to whom it applied: no random testing was conducted at the Syncrude site and certain accommodations were made for non-probationary employees with drug or alcohol dependencies.

24 The evidence was that new recruits who do not pass the pre-employment drug screen are allowed to re-apply after six months have passed. Mr. Chiasson was never informed of this possibility.

25 Mr. Chiasson was not offered any form of accommodation at the time of his dismissal.

26 Mr. Chiasson filed a complaint with the Alberta Human Rights and Citizenship Commission ("HRCC") on October 22, 2002, alleging discrimination in employment practices on the grounds of physical and mental disability. He was joined in his submission by the Director of the Alberta Human Rights and Citizen Commission.

C. Legislation

27 The *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000 c. H-14 (the "Act") protects human rights in the province, provides for a code of conduct and establishes the Alberta Human Rights and Citizenship Commission.

28 A two step approach is contemplated by the Act for human rights complaints. First, the complainant has the burden of establishing discrimination on a prohibited ground. If successful, the burden then shifts to the employer to show that any violation was reasonable and justifiable or a *bona fide* occupational requirement ("BFOR") (*Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.); *Berry v. Farm Meats Canada Ltd.*, [2000] A.J. No. 1179, 2000 ABQB 682 (Alta. Q.B.)).

29 The claimant argued that pre-employment drug testing constituted *prima facie* discrimination under s. 7 (1) of the Act:

> No employer shall
>
> (a) refuse to employ or refuse to continue to employ any person, or
>
> (b) discriminate against any person with regard to employment or any term or condition of employment,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income or family status of that person or of any other person.

30 The prohibited ground of discrimination alleged was real or perceived disability, defined in s. 44 of the Act as:

> (h) "mental disability" means any mental disorder, developmental disorder or learning disorder, regardless of the cause or duration of the disorder;
>
> . . . . .
>
> (l) "physical disability" means any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes epilepsy, paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, and physical reliance on a guide dog, wheelchair or other remedial appliance or device;

31 If the claimant satisfies this burden, then the employer may justify its policy according to ss. 7(3) and 11. Section 7(3) states that subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement. Section 11 provides that "a contravention of this Act shall be deemed not to have occurred if the person who is alleged to have contravened the Act shows that the alleged contravention was reasonable and justifiable in the circumstances."

32 This burden of proof of justification is considered pursuant to a three part test established by the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) ("*Meiorin*").

D. Evidence Before the Human Rights Panel

33 The Panel received an Agreed Statement of Facts and heard extensive evidence. Mr. Chiasson testified on his own behalf and led the evidence of two experts: Dr. Scott MacDonald, a scientist at the Centre for Addiction and Mental Health in London, Ontario and Dr. William Jacyk, a staff physician in the area of special psychiatry. The following individuals testified for the employer: Dr. Jean-Pierre Chiasson (no relation to the complainant) the medical director of the Clinique du Nouveau Depart in Montreal, Quebec; Mr. Luc Chabot, the executive director and international consultant for Relais-Expert Conseil; Ms. Judith Caul, the Human Resources Manager for Canada for KBR; Mr. Chuck William, the Health Safety & Environment ("HSE") Manager Record Keeping at KBR; Mr. Peter Dunfield., the Loss Management Advisor in the Corporate loss Management Group at Syncrude Canada in Fort McMurray; Ms. Leanne Ayson, a recruitment specialist for KBR; Mr. Gary Fowler, a Quality Assurance Manager on the UE-1 project; and Mr. Neil Tidsbury, as the President of an Alberta association, Construction Labour Relations. Mr. Dickie no longer works for the company and was not called as a witness.

34 All experts agreed that drug testing by urinalysis does not measure actual impairment levels. A urine test measures only the presence of inactive cannabis metabolites rather than active substances (by comparison a breathalyzer test for alcohol measures the active substance at the

time of an event). As a result, drug testing by urinalysis cannot measure whether an employee was under the influence of drugs at a particular time. Cannabis metabolites remain in a person's system for an extended period of time following use of the drug. In the case of heavy users, Dr. Macdonald testified that cannabis metabolites can be detected for up to 30 days or more. Dr. Chiasson agreed that even in moderate users traces can be detected even after someone has abstained for four days. In cases of occasional use of marijuana, the "Report of the Special Senate Committee on Illegal Drugs" indicates that the inactive components of THC can be detected up to a maximum period of seven days.

35 Dr. Chiasson, the employer's expert, said that a positive drug test cannot pin-point when the drug was consumed, discriminate between isolated or recreational use, abuse or dependence of the drug, quantify the amount of the drug consumed, determine the degree to which the user was intoxicated, confirm or allow diagnosis of any drug abuse or dependance, evaluate the general health condition of the donor, or evaluate the donor's present capability to perform a certain task or any task whatsoever.

36 Dr. Jacyk agreed that urinalysis only measures the broken down metabolites, but did not give any indication of when the drug was consumed (time lag), chronicity of use, how the individual reacted to the drug and what other factors might cause or effect the nature of the drug use. He also stated that one weaknesses of pre-employment drug testing was it was only an indicator of use, but did not give any indication of whether a work-related problem was developing. Dr. Jacyk testified that a negative urine test cannot reassure the employer that a workplace injury or incident will not take place, and a positive drug test cannot predict that a workplace injury or incident will occur. In his view the mere fact that a person had used a drug such as cannabis was insufficient to establish that that person was an enhanced risk to workplace safety. He stated that there is no basis for the assumption that a positive test will in any way predict the risk of a work place incident. Whether a site was safety-sensitive or not, he was of the opinion that pre-employment drug testing attempted to exclude people on a statistical basis, but it was not really effective because it was indirect. He stated that, while clinicians may use statistical data to give generic information on illness, individual cases required considerably more observation before decisions regarding the nature of any problem could be made. He pointed out that drug testing is not carried out to catch the casual user. Rather it is carried out to catch those individuals who use on the job, and those who use on the job that are substance abusers. He was of the view that the inaccuracy of drug testing may also be compounded by individual variability based on differences in weight, body mass and fat content, liver and kidney function as well as the consumption of other nutrients and substances that are metabolized by the same enzyme system in the liver.

37 KBR acknowledges that there is no reliable, easy and inexpensive method to measure THC and its metabolites in the blood. However, it claims that despite its limitations, a positive drug test is useful in several ways. First, a positive drug test result indicates that the cognitive potential of the person may have been altered in the more or less recent past. Second, a positive test is a signal

or "red flag" that the person has been in contact with a potentially dangerous drug. Third, a positive test indicates that the person may have a problem with drug abuse or dependence. In particular, where job applicants are informed about pre-employment drug testing and the consequences of a negative test-result, then a positive test result may reflect an applicant's inability to control his or her usage of the drug. The evidence submitted and relied upon by KBR was that between nine and ten per cent of people who use cannabis exhibit symptoms of addiction. Therefore, according to their calculations there was a ten per cent chance that Mr. Chiasson was addicted to marijuana, which could present a greater risk of getting "high" at work, in what they claimed was a safety-critical position. Fourth, it shows a person is willing to break the law to become intoxicated.

38 While there is a dispute concerning the residual effects of marijuana use, there are two recognized phases of intoxication. Phase 1 consists of a feeling of euphoria or what is commonly referred to as the "high." This involves a feeling of intoxication, with decreased anxiety, alertness, depression and tension and increased sociability, self-confidence and talkativeness. A person will also experience a sensation of satisfaction and well-being, a feeling of calmness and relaxation, a lack of inhibition, a changed perception of time, increased sense perceptions, and magical thoughts such as a false impression of being able to fulfill a task or responsibility. This phase is noticed within minutes of smoking and reaches a plateau lasting two to four hours, depending on strength and dose. Phase 2 or "coming down" involves physical and mental slowness, which generally occurs after an hour or more. During one or the other of the intoxication phases, some people also experience weaker short and medium term memory, decrease in attentiveness and concentration, weakening of reflexes, weakening of reaction time, low capacity to accomplish certain complex tasks, movement coordination troubles, and impaired driving capability. Most of the effects of cannabis on behaviour usually last less than four hours.

E. Decision of the Human Rights Panel

39 At the hearing, held February 14, 15, 16 and March 1, 2005, the one person Panel identified four issues to be addressed (*Chaisson v. Kellogg, Brown & Root (Canada) Co.* (June 7, 2005), Doc. N2002/10/0224 (Alta. H.R. & Cit. Comm.) at 4):

> (a) Did the complainant suffer from real physical and mental disabilities with regard to this situation as stated in the complaint and as defined by appropriate legislation?
>
> (b) Was there a "perceived disability" on the part of the respondent?
>
> (c) Was the complainant subject to discrimination on the part of the respondent?
>
> (d) What is the appropriate remedy, if any, that should be applied?

40 The Panel adopted the correct two step approach. On the issue of discrimination, the Panel acknowledged that the Respondent's drug testing policy is *prima facie* discriminatory against drug

dependent individuals. However, there was no discrimination against Mr. Chiasson. The Panel focused on Mr. Chiasson's statement that he was only a recreational drug user to find that his drug use was "a matter of personal, voluntary choice, and not a disability." There was no perceived disability concerning Mr. Chiasson because his work was considered excellent and there was nothing to show that the employer suspected him of serious drug use or on site impairment. The finding that there was no disability, real or perceived, led to the dismissal of Mr. Chiasson's claim.

41 The Panel also canvassed the three part test in *Meiorin* to determine if a work place policy is justifiable. The parties agreed that the first and second elements were met: the policy was directed towards a legitimate goal and enacted in good faith. The real issue concerned the third part of the test and whether mandatory pre-employment drug testing under this Policy was reasonably necessary to accomplish the employer's work related purpose and was it impossible to accommodate the individual employee without imposing undue hardship on the employer. The Panel found that the employer had not met its burden. The Panel accepted at para. 20 that the policy was reasonably necessary because cannabis use impairs workplace performance and Mr. Chiasson's employment included "safely operating a motor vehicle in an extremely congested and inherently dangerous, heavy equipment environment, as well as physical dexterity in inspecting load material. The complainant was also required to inspect critical material such as pressure vessels for flaws or shipping damage." However, the Panel found insufficient accommodation. Ms. Caul testified that the employer offered no accommodation to new or probationary employees. The Panel concluded at para. 21: "Had the complainant established evidence of a disability, real or perceived, the Panel finds that the withdrawal of the employment offer to the complainant would have been discriminatory, in spite of the financial benefits that were provided to him when the offer was withdrawn."

F. Grounds of Appeal

42 This appeal is taken jointly by Mr. Chiasson and the HRCC, pursuant to section 37 of the Act. They argue that the Panel erred in law for failing to find that Mr. Chiasson was perceived to be disabled by the operation of this drug testing policy, the comments of Mr. Dickie and the actions of KBR in terminating Mr. Chiasson's employment, and erred in both fact and law in finding that the pre-employment drug testing met the *Meiorin* test.

43 The respondent says the appellants have failed to make out a case of *prima facie* discrimination. The evidence before the Court shows that Mr. Chiasson has repeatedly and continuously asserted that he is not drug-dependent and that he is not therefore disabled. As such, the Panel was correct to find that there was no disability on which to ground the complaint. If there is discrimination, KBR argues that it met the *Meiorin* test.

44 This appeal raises the following issues:

(a) What is the standard of review to be applied by this Court?

(b) Did the Panel err in finding that there was no perceived disability?

(c) If so, did the Panel err in finding that the violation was not reasonable and justifiable as a BFOR?

(d) What remedy, if any, should be applied by this Court?

G. Standard of Review on Appeal

45 All parties agree that the general standard of review from the decision of the Panel on both questions of law and fact is correctness, with some deference given on issues of credibility. See *University of Alberta v. Alberta (Human Rights Commission)*, [1992] 2 S.C.R. 1103 (S.C.C.); *Gwinner v. Alberta (Human Resources & Employment)*, 245 D.L.R. (4th) 158, 2004 ABCA 210 (Alta. C.A.) (*Gwinner*); *Calgary (City) Electric System v. Weitmann*, 292 A.R. 295, 2001 ABQB 181 (Alta. Q.B.).

46 Under the Act there is no privative clause and s. 37 allows extensive appeal rights, including an appeal without leave under which the Court may confirm, reverse or vary the Panel's decision. This appeal focuses on the highly specialized and technical area of pre-employment drug testing and relies on the interpretation of legislation, the application of case law and comparison of expert testimony; all matters of expertise for the courts under *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.).

H. *Prima Facie* Violation

47 Section 7(1) states that no employer shall refuse to employ or refuse to continue to employ an individual because of a physical or mental disability. The case at bar involves a human rights challenge to KBR's pre-employment drug testing policy and how it was applied to Mr. Chiasson.

48 Various decisions from courts, arbitration panels and human rights panels that speak to different aspects of drug testing were cited to me: *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 2689 (Ont. C.A.); *Alberta (Human Rights & Citizenship Commission) v. Elizabeth Metis Settlement*, [2003] 11 W.W.R. 309, 2003 ABQB 342 (Alta. Q.B.) and [2005] 6 W.W.R. 268, 2005 ABCA 173 (Alta. C.A.) (*Elizabeth Metis Settlement*) *Tetarenko v. Tetarenko*, [2005] A.J. No. 498, 2005 ABQB 325 (Alta. Q.B.); *Halter v. Ceda-Reactor Ltd.* (May 16, 2005), Bryant Member (Alta. Human Rights Bd. of Inquiry); *Canadian Civil Liberties Assn. v. Toronto Dominion Bank*, [1998] 4 F.C. 205 (Fed. C.A.); *Milazzo v. Autocar Connaisseur Inc.*, [2003] C.H.R.D. No. 24, 2003 CHRT 37 (Can. Human Rights Trib.) (MacTavish); *Trimac Transportation Services - Bulk Systems v. T.C.U.* (1999), 88 L.A.C. (4th) 237 (Can. Arb.) (Burkett); *I.U.O.E., Local 793 v. Sarnia Cranes Ltd.*, [1999] O.L.R.D. No. 1282 (Ont. L.R.B.) (Shouldice, Knight, McMenemy);

Canadian National Railway v. U.T.U. (1989), 6 L.A.C. (4th) 381 (Can. Arb.); *Construction Labour Relations v. I.U.O.E., Local 955* [2004 CarswellAlta 1522 (Alta. Arb.)] (Graham) (October 26, 2004) (Beattie); *Construction Labour Relations v. H.F.I.A., Local 110* (October 26, 2004), Beattie Member (Alta. L.R.B.); *Suncor Energy Inc. v. C.E.P., Local 707* (2004), 128 L.A.C. (4th) 48 (Alta. Arb.); and *Canadian National Railway v. CAW-Canada*, [2000] C.L.A.D. No. 465 (Can. Arb.) (Picher).

49 This is the first time this court has been asked to address pre-employment drug testing under the Act. Any new inquiry benefits from a return to first principles and a reminder that the Court is considering only the particular policy before it.

50 In terms of first principles, the starting point is that human rights legislation is to be given a broad, purposive interpretation which is to be adapted to "changing social conditions" and evolving "conceptions of human rights" [endorsing *Driedger* at para. 29 in *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Montréal (Ville)*, [2000] 1 S.C.R. 665, 2000 SCC 27 (S.C.C.) "*Boisbriand.*" Protected rights are to receive a broad interpretation and exceptions and defenses are to be narrowly construed.

51 Human rights legislation is also quasi constitutional legislation; the Act(s. 1(1)) contains a paramountcy clause in s. 1(1)which means that in cases of conflict between statutes, human rights legislation will govern. So while employers have a duty to maintain a healthy and safe work environment under s. 2 of the *Occupational Safety Act*, they must do so in a way which respects human rights.

52 Human rights legislation sets out a floor beneath which the parties cannot contract. *N.A.P.E. v. Newfoundland*, [1996] 2 S.C.R. 3 (S.C.C.) at para. 26. See also *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42 (S.C.C.), at para.. 32.

53 The general purpose of Canadian human rights legislation is to protect against discrimination and to guarantee rights and freedoms: *Broisband* at para.. 36. The specific objective in the employment context is "to eliminate exclusion that is arbitrary and based on preconceived ideas concerning personal characteristics which, when the duty to accommodate is taken into account, do not affect a person's ability to do a job."

54 A classic and oft quoted statement concerning workplace discrimination comes from the *Abella Report* (Abella, Rosalie S. *Report of the Commission on Equality in Employment* (Ottawa: Supply and Services Canada, 1984)) at 2, where the Commission explained:

> Equality in employment means that no one is denied opportunities for reasons that have nothing to do with inherent ability. It means equal access free from arbitrary obstructions. Discrimination means that an arbitrary barrier stands between a person's ability and his or

> her opportunity to demonstrate it. If the access is genuinely available in a way that permits everyone who so wishes the opportunity to fully develop his or her potential, we have achieved a kind of equality. It is equality defined as equal freedom from discrimination.
>
> Discrimination in this context means practices or attitudes that have, whether by design or impact, the effect of limiting an individual's or group's right to the opportunities generally available because of attributed rather than actual characteristics. What is impeding the full development of the potential is not the individual's capacity but an external barrier that artificially inhibits growth.

55 There is a long and strong history of interchange between Charter and human rights analyses and human rights legislation is interpreted in conformity with Charter rights and values. The purpose, meaning and content of equality rights in both instruments is similar. In speaking of constitutionally entrenched equality rights, L'Heureux- Dube J. stated in *Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.), at 545-546:

> To summarize, at the heart of s. 15 is the promotion of a society in which all are secure in the knowledge that they are recognized at law as equal human beings, equally capable, and equally deserving. A person or group of persons has been discriminated against within the meaning of s. 15 of the Charter when members of that group have been made to feel, by virtue of the impugned legislative distinction, that they are less capable, or less worthy of recognition or value as human beings or as members of Canadian society, equally deserving of concern, respect, and consideration. These are the core elements of a definition of "discrimination" — a definition that focuses on impact (i.e. discriminatory effect) rather than on constituent elements (i.e. the grounds of the distinction).

This passage was subsequently adopted by the full Court in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.) at para. 56.

56 In *Law* the court explained the concept of human dignity behind equality rights at para. 53:

> What is human dignity? ...s.15(1) is concerned with the realization of personal autonomy and self-determination. Human worth means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits. It is enhanced by laws which are sensitive to the needs, capacities and merits of different individuals, taking into account the context underlying their differences.

57 This approach is perfectly consistent with the purposes and provisions of the Act. The preamble confirms the inherent dignity and the equal and inalienable rights of all persons,

recognizes that all people are equal in dignity, rights and responsibilities, and provides norms for employment behavior in s. 7.

58 In *Meiorin* the Supreme Court adopted a unified approach that looks for *prima facie* discrimination, without the need to classify it as direct discrimination or adverse affects discrimination. The Court was mindful that the distinction between direct and adverse effect discrimination may, in practice, serve to legitimize systemic discrimination. Under the single standard of *prima facie* discrimination the court is to examine the effect of the impugned policy irrespective of whether it was discriminatory on its face or in its effect, irrespective of whether or not the employer intended to discriminate, or even whether or not the employer had turned its mind to the possibility of discrimination.

59 In *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 (S.C.C.) McLachlin J recognized at 880-881 that the unified approach meant that employers are now required in all cases to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics.

60 On numerous occasions the Supreme Court has said it is the effect, rather than the intention, of an impugned policy which determines whether it is discriminatory. The focus of the analysis is on the validity of the policies that impact upon the individual.

61 Applying these principles to the KBR Policy, I find *prima facie* discrimination. The KBR Policy combines mandatory pre-employment testing for all covered employees, automatic termination for a positive result and no accommodation. By purpose and effect it screens individuals from the work force based on a risk assessment that a positive drug test increases the chance an individual may be impaired at work some time in the future. The employer said "testing at the time of hiring is the best way to determine if the new employee is a user of the narcotic, and to reduce significantly the risk of employing a worker who is or may later be impaired by the drug." In relying on general statistics to weed out a particular person, the Policy relies upon presumed personal traits and does not take into account the capacity, needs, merits and circumstances of the individual job applicant. The Policy imposes an automatic, singular and absolute sanction in all cases of a positive result. The Policy creates a class of people, those who test positive, and then treats them all the same way by denying them employment. By doing so it fails to assess each prospective employee according to her or his own personal abilities, and instead judges them against presumed group characteristics.

62 The recognized limits of urine tests also mean that an individual may be screened from the workforce based on behavior that took place not only off-site but well before the employment

commenced. In the case at bar the drug use took place before the job interview. This kind of retroactivity judges the fitness of an employee based on an employment norm unknown at the time the party engaged in the prohibited behavior. Further, this Policy of pre-employment drug testing does not give a prospective employee any chance to comply with company policy. The Court in *Law* asked "does the law treat him or her unfairly, taking into account all of the circumstances regarding the individual affected and excluded by the law?" The KBR Policy treats prospective employees unfairly by grounding a total exclusion from the workforce on a test which yields such limited information.

63 The purpose of s. 7(1) is to prevent people from being denied employment opportunities on the basis of attributes that are unrelated to their ability to perform the job. Being kept from the labor force is an especially pernicious form of employment barrier which strikes at the heart of s. 7(1). This Policy denies employment opportunity based on a generalized risk assessment of what certain pre-employment behavior may portend for future workplace behavior. When KBR refused to hire Mr. Chiasson it breached this part of s. 7(1) and the KBR Policy differentiates, indeed discriminates, between individuals on the basis of a positive drug test. However, the main issue dividing the parties is whether the Policy discriminates on the prohibited ground of disability.

J. Discrimination on the Basis of Real or Perceived Disability

1. The policy discriminates against drug dependent individuals

64 The Panel accepted that pre-employment drug testing is *prima facie* discriminatory against drug dependent persons in para. 18. This position is well supported in case law: *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 2689 (Ont. C.A.) at para. 89 (*Entrop*), *Elizabeth Metis Settlement*; *Saskatchewan (Department of Finance) v. Saskatchewan (Human Rights Commission)*, 22 C.C.E.L. (3d) 91, 2002 SKQB 501 (Sask. Q.B.); *Fraser Lake Sawmills Ltd. v. IWA-Canada, Local 1-424* [2002 CarswellBC 3554 (B.C. L.R.B.)] (December 16, 2002) and *Milazzo*.

65 A policy that prohibited hiring individuals who are drug dependent infringes s. 7(1), and its ultimate legality would depend upon whether the employer could satisfy the terms of ss. 7(3), 11 and *Meiorin*. The KBR expert evidence is that approximately ten percent of those who test positive on drug tests are drug dependent. A policy prohibiting the hiring of anyone who fails a pre-employment drug test is also *prima facie* discriminatory on the ground of disability because it equally prevents drug addicted individuals from obtaining employment contrary to s. 7(1). In *Canadian Civil Liberties Assn. v. Toronto Dominion Bank*, [1998] 4 F.C. 205 (Fed. C.A.), the Federal Court of Appeal held that mandatory drug testing of all new and returning employees, providing for dismissal for refusal, was *prima facie* discrimination and could not be justified. The Court stated at para.134 that "an employment policy aimed at achieving a drug free work environment should not be deemed neutral when by design it is directed at all those who use illegal drugs and, by necessity, those who are drug dependent."

66 While the Panel does not explain the implications of its finding of *prima facie* discrimination, the result must be to impeach KBR's Policy because of disability at the first step of the inquiry. At a minimum, the Policy refuses employment to a class of persons, approximately ten percent of whom have an addiction. Counsel for KBR argues that there is no evidence to suggest what would happen if a substance dependent user applied for a job at KBR. However, the Policy makes no distinction between recreational users and dependent users and job termination is avoided only in the event of a negative drug screen and the Policy is *prima facie* discriminatory. However, Mr. Chiasson did not suffer from an addiction and his claim cannot be determined on the basis of an actual disability.

2. Does the Policy discriminate against recreational users like Mr. Chiasson

67 The case law states that employees may also claim the protection of human rights legislation if adverse employment action is taken against them due to perceived, rather than actual disabilities. The leading authority on perceived discrimination is *Boisbriand*, in which the Supreme Court considered 2 parallel cases. In the first, the City of Montreal refused to hire an individual as a gardener-horticulturalist because a pre-employment medical revealed an anomaly in his spinal column. In the second, the City of Boisbriand dismissed an individual from his position as a police officer when it was revealed that he had Crohn's Disease. In both cases, the medical evidence before the Court indicated that the individuals could perform the duties normally expected for the positions and that they therefore had no functional limitations. Both individuals brought claims under s. 10 of the *Québec Charter of Human Rights and Freedoms* alleging that they had been discriminated against on the grounds of "handicap." In both cases the Court found a perceived handicap or disability and *prima facie* discrimination

68 The Court said that what qualifies as a handicap is to receive a broad, liberal and purposive interpretation, as befits *quasi*-constitutional legislation. At paras. 39-41:

> The objectives of the [Québec] Charter, namely the right to equality and protection against discrimination, cannot be achieved unless we recognize that discriminatory acts may be based as much on perception and myths and stereotypes as on the existence of actual functional limitations. Since the very nature of discrimination is often subjective, assigning the burden of proving the objective existence of functional limitations to a victim of discrimination would be to give that person a virtually impossible task. Functional limitations often exist only in the mind of other people, in this case that of the employer.
>
> It would be strange indeed if the legislature had intended to enable persons with handicaps that result in functional limitations to integrate into the job market, while excluding persons whose handicaps do not lead to functional limitations. Such an approach appears to undermine the very essence of discrimination.

> I am, therefore, of the view that the Charter's objective of prohibiting discrimination requires that "handicap" be interpreted so as to recognize its subjective component. A "handicap", therefore, includes ailments which do not in fact give rise to any limitation or functional disability.

69 A "handicap" may be the result of a physical limitation, an ailment, a social construct, a perceived limitation or a combination of all of these factors. Indeed, it is the combined effect of all these circumstances that determines whether the individual has a "handicap" for the purposes of the Charter. Courts are asked to consider not only an individual's biomedical condition, but also the circumstances in which a distinction is made. The Court concluded at para. 81:

> It is important to note that a "handicap" may exist even without proof of physical limitations or the presence of an ailment. The "handicap" may be actual or perceived and, because the emphasis is on the effects of the distinction, exclusion or preference rather than the precise nature of the handicap, the cause and origin of the handicap are immaterial. Further, the Charter also prohibits discrimination based on the actual or perceived possibility that an individual may develop a handicap in the future.

70 An important case on drug testing in the workplace is the Ontario Court of Appeal's decision in *Entrop*. In that case Imperial Oil instituted a drug and alcohol policy that allowed unannounced random testing of employees in safety-sensitive positions. The policy required those with current or past addiction problems to disclose them to the company, upon which the employee would be reassigned to a non-safety-sensitive position. Reinstatement to safety-sensitive positions could be achieved following an extensive series of rehabilitation measures. A positive test on a random test, however, resulted in automatic dismissal. The complainant had a previous alcohol addiction, but had remained sober for seven years. He disclosed his past condition and was immediately assigned out of his safety-sensitive position. Although he was subsequently reassigned to his old position, the Ontario Human Rights Commission impugned the drug and alcohol policy. The Board found that the policy was *prima facie* discriminatory and could not be justified as a BFOR. The Ontario Divisional Court dismissed Imperial Oil's appeal, and leave was given to the Court of Appeal.

71 The Court of Appeal considered the issue of whether the impugned policy violated the Ontario *Human Rights Code*, and confirmed that it did, despite some jurisdictional questions. Laskin J found *prima facie* discrimination based on the following reasoning at para. 92:

> Thus, though the social drinker and casual drug user are not substance abusers and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the policy. In other words, Imperial Oil believes that any person testing positive on a pre-employment drug test or a random drug or alcohol test is a substance abuser. Because perceived as well as actual substance abuse is included in the definition of handicap under the Code, anyone testing positive under the alcohol and drug testing provisions of the policy

> is entitled to the protection of s. 5 of the Code. Imperial Oil applies sanctions to any person testing positive — either refusing to hire, disciplining or terminating the employment of that person — on the assumption that the person is likely to be impaired at work currently or in the future, and thus not "fit for duty." Therefore, persons testing positive on an alcohol or drug test — perceived or actual substance abusers — are adversely affected by the policy. The policy provisions for pre-employment drug testing and for random alcohol and drug testing are, therefore, *prima facie* discriminatory.

Laskin J went on to find that the policy could not be justified as a BFOR as it failed to accommodate the needs of those who tested positive and therefore failed the third step of the *Meiorin* analysis.

72 The case of *Elizabeth Métis Settlement* is also of assistance: it is from this province, addresses drug testing under the Act, is recent, relevant and the decisions of the Courts of Queen's Bench and Appeal were released over the period in which the case at bar was under consideration by the Panel. Two employees were dismissed from their jobs with the band council in a relatively remote Métis settlement in Alberta because they refused to submit to a new policy that allowed random testing and testing for cause. The settlement had a substance abuse problem and the employees were in allegedly safety sensitive positions. Violation of the policy resulted in a possible range of disciplinary actions that included dismissal for cause, but these employees were terminated. Both entered complaints of wrongful dismissal on the basis of discrimination under the Act. At the Panel hearing, one employee, Ms. Jacknife, led evidence that she had previously been treated for alcoholism, and the other, Ms. Collins, led no evidence of disability. The Panel dismissed both of their claims. In the case of the employee previously treated for alcoholism, the Panel found a breach of the *Act*, but found the breach to be justified as a BFOR. In the case of Ms. Collins, the Panel found no disability or perception of disability, just like the Panel did in relation to Mr. Chiasson. Both employees appealed the decision.

73 Bielby J. held there was *prima facie* discrimination in both cases. She distinguished the discussion of perceived handicap from *Broisbriand* on the basis that perceptions concerning alcohol or drug use do not arise from irrelevant physical ailments, but rather on a possible addiction which may or may not bear on job performance, at para. 37-39. Nevertheless, she placed significant emphasis on *Entrop* to conclude at paras. 33, 36 and 42 respectively:

. . . . .

> While the Alberta legislation contains no provision that its protections extend to those believed to have any degree of physical disability, the analysis in Entrop, which turns on the effect of the consequences of application of a drug and alcohol policy, suggests that Ms. Collins meets the test of physical or mental disability. Her employer treated her as if she was an alcoholic or drug dependant when it fired her because of her failure to take the test, the

same consequence as if she took it and failed. It therefore perceived her to be disabled by alcohol or drugs.

. . . . .

An interpretation of s. 7(1) to include those perceived to have an alcohol or drug problem also logically falls within the goals of this legislation. There is no reason to differentiate between those who an employer knows to be alcoholic or drug-addicted and those it believes to be alcoholic or drug-addicted.

. . . . .

Nonetheless, following the rationale in *Entrop*, and finding that the goals of the Act are the same as the goals of the Ontario legislation notwithstanding differences in wording, I conclude that an employee who loses her job for refusing to undergo random drug and alcohol testing, being treated in the same fashion as if she was an alcoholic or addict, is entitled to the protection of s. 7(1) of the Act. For that reason I respectfully conclude that the Panel erred in determining that Ms. Collins had not shown a disability under the Act.

A policy which requires current [or potential] employees to undergo testing for drug or alcohol use where potential consequences for testing positive include the loss of employment, treats those employees as if they were disabled by drugs or alcohol. It is thus in *prima facie* violation of s. 7(1) of the Human Rights, Citizenship and Multiculturalism Act, R. S. A. 2000, c. H-14.

74 The employees appealed the decision to the Court of Appeal, who remitted the case back to the Human Rights Panel to determine whether the policy even applied to the claimants because the claimants held administrative posts and the policy was limited to those in safety sensitive positions. The Court of Appeal did not therefore address any of the substantive issues in the Queen's Bench judgment.

75 Many arbitration decisions involving individual grievances for workplace behaviour were cited.

76 In *Milazzo*, Mr. Milazzo was a seasonal bus driver with Autocar Connaisseur Inc., operating a 40 foot motor coach on a variety of shuttle routes in the city of Montreal during the tourist season. The evidence was that the motor coach industry operated on an "on demand basis," meaning that a typical operator in the bus industry operates 24 hours a day, 7 days a week. During the course of his employment he tested positive for cannabis and was terminated. He was tested because he was to drive into the United States and the policy provided for testing in those circumstances. Canadian operators driving into the United States are required by American law to undergo drug testing. If drivers are untested, the company faced penalties under American law, including fines,

impounding of motor coaches and loss of the American licence. Further, the company was taken over in 1997 by an American company, who found out that there were problems with the Quebec Transport Commission. At a hearing before such Commission, the new owners made certain commitments in order to retain its operating licence, including a review of the drug testing policy.

77 In *Milazzo* the claimant attacked his dismissal under s. 7 of the Canadian Human Rights Act and impugned the employer's policy under s.10. There was no evidence as to the frequency of Mr. Milazzo's cannabis use and the Tribunal found that expert testimony had not established that recreational users had a disability *per se*. The Panel held that the wording of s. 25 of the Canadian Human Rights Act did not preclude reliance on *Broisband* and the concept of perceived disability. They concluded that the evidence did not establish that the employer perceived him to be disabled because no one had suspicions he was using drugs and found no discrimination under s. 7 because:

> When Autocar Connaisseur became aware that Mr. Milazzo had tested positive for the presence of cannabis metabolites, Mr. Milazzo was summarily fired. There is no suggestion that any questions were asked, or any investigation carried out in order to determine whether Mr. Milazzo was drug dependent. Mr. Milazzo was fired because he failed his drug test. No one at Autocar Connaisseur knew, or cared, whether Mr. Milazzo was dependent on drugs. Indeed, there is nothing before us to suggest that anyone at Autocar Connaisseur ever turned their mind to the issue.

78 Regarding the s. 10 claim, the Tribunal found that the Policy was *prima facie* discriminatory as it had a "differential effect on a protected class of individuals;" being substance-dependent users. Both pre-employment testing and random testing failed the third step of the *Meiorin* analysis because of the Company's failure to provide reasonable accommodation.

79 In *Imperial Oil Ltd. v. C.E.P., Local 777* [2001 CarswellAlta 1962 (Alta. Arb.)] (November 27, 2001), Chanley, Neuman, Sims, the arbitrator required an individual complainant to at least assert that he or she was a member of a protected class at 60-61:

> In *Entrop*, it was common ground that Mr. Entrop fell within the protected class or was perceived to do so. Therefore, in their analysis of whether a *prima facie* case had been made out they did not need to question whether the policy was discriminatory in respect to Mr. Entrop. In addition, *Entrop* involved a policy of general application, catching him as a member of its protected class within its net. Despite the Union's argument we find we agree with the decision in Gabriel, that for an individual complaint (which a grievance over specific discipline involves), the requirement to prove *prima facie* discrimination includes the obligation to at least assert that the person involved is a member of a protected class. We recognize that the decision in the *Meiorin* case has refocused the analysis away from the individual and towards the validity of the policies that impact upon the individual. However, we do not believe this change goes so far as to allow a person not in a protected class to avoid

> the disciplinary consequences of a policy because that same policy, if applied to a person within a protected class, might challenge its impact on them.

Mr. Pearson told his employer he used drugs but said he was a casual user. The employer offered assistance and received no reply and was not obliged to accommodate the employee.

80 This reasoning was adopted and applied in *Suncor Energy Inc. v. C.E.P., Local 707* (2004), 128 L.A.C. (4th) 48 (Alta. Arb.). The griever worked in a large scale mining operation north of Fort McMurray and operated a variety of equipment including backhoes, cats and loaders. His position was safety sensitive. In March 2002, the employee was suspended after the newspaper reported he was charged by the police with possession of marijuana and psilocybin. The employee grieved and mediation produced a settlement under which the employee consented to drug testing. After a minor car accident at work in February 2003, he tested positive for marijuana metabolites at 20 times the standard threshold. The company said when terminating the employee that his level "would indicate recent usage but in any case is unacceptable." He subsequently admitted to smoking two to three joints per day on his days off, but denied ever using immediately prior to or at work. His employment was terminated. The Arbitrator did not consider the wider validity of the employer's drug testing policy and dismissed the grievance. The Arbitrator held it does not lie in the Griever's mouth to complain of discrimination when he states that his use of marijuana does not constitute a substance abuse problem.

81 A similar approach and result was obtained in *Middlemiss v. Norske Canada Ltd.*, [2002] B.C.H.R.T.D. No. 5, 2002 BCHRT 5 (B.C. Human Rights Trib.), where the British Columbia Human Rights Panel held that there was no discrimination against a recreational drug user who was impaired on the job.

82 In *Halter v. Ceda-Reactor Ltd.* (May 16, 2005), Bryant Member (Alta. Human Rights Bd. of Inquiry) a Human Rights Panel referred to and followed the precedent laid out in *Entrop* in a case involving random drug testing. The company conducted a random blanket drug test to all members of a particular work crew after the police found drugs in the rooms of two of its members. The complainant tested positive for cannabis metabolites, was fired and brought a human rights complaint based on disability. The evidence was that the complainant performed his duties well. The Panel proceeded on the basis that the complainant was not drug dependent, but applied *Entrop* at para. 139 and 140:

> It is the finding of this Panel that Ceda perceived Mr. Halter to be disabled when they administered the random blanket drug test. After testing positive, Mr. Halter was further perceived to be a substance abuser and was terminated on the assumption that he was likely to be impaired on the job and not fit for work.

> As perceived disabilities are forms of disabilities within the meaning of the Act, the Panel finds that the complainant did face discrimination by Ceda as a result of testing positive on a random blanket drug test. The testing in itself was discriminatory.

83 Certain other cases cited dealt with challenges to the employer's implementation of a drug testing policy as violations of the collective agreement and/or applicable human rights legislation. In *Trimac Transportation Services - Bulk Systems v. T.C.U.*, [1999] C.L.A.D. No. 750 (Can. Arb.), the arbitrator lacked jurisdiction to hear the challenge to pre-employment drug and alcohol testing. Other cases involved grievances involving disciplinary sanctions for refusal to take a drug test. In *Canadian National Railway v. U.T.U.* (1989), 6 L.A.C. (4th) 381 (Can. Arb.); the griever was reinstated, as were the grievers in *Construction Labour Relations v. I.U.O.E., Local 955* (October 26, 2004) (Beattie) and *Construction Labour Relations v. H.F.I.A., Local 110* (October 26, 2004), Beattie Member (Alta. L.R.B.) where, in both cases, the investigations were found to be perfunctory and unfair. In *I.U.O.E., Local 793 v. Sarnia Cranes Ltd.*, [1999] O.L.R.D. No. 1282 (Ont. L.R.B.), the Ontario Relations Board held that the employer's policy contravened the collective agreement because it is unreasonable to impose testing to identify on the job impairment when the drug test does not measure impairment (para. 177). The Board also found an infringement of the human rights legislation on the basis of disability because the technology available to the employer cannot, and does not, in fact establish incapability.

84 This brief review illustrates a difference of opinion over perceived disability, non-addicted recreational drug users, employer policies and employer actions among arbitration decisions and between these decisions and those of the courts and human rights panels.

85 In its decision on the KBR Policy, the Panel relied upon Mr. Chiasson's evidence that he was a recreational user of cannabis to find that "this was a matter of personal, voluntary choice, and not a disability." He found that there was no perceived disability on the part of the employer because Mr. Chiasson's workplace performance was excellent and he was employed in a safety sensitive position. With respect, this is not the appropriate focus or measure at this stage of the analysis. The Panel did not refer to or discuss the *Entrop* or *Broisband* decisions and while it mentioned *Elizabeth Metis Settlement* for another point, it did not address the court's finding of *prima facie* disability based discrimination in relation to post-employment drug testing.

86 I adopt the approach taken by the Ontario Court of Appeal in *Entrop* such that anyone testing positive under the KBR Policy is entitled to the protection of the Act. I do not agree with the respondent's submission that *Entrop* is an anomaly and is out of step with industry developments and expectations. The reasoning in *Entrop* is persuasive, applies to both pre-employment and random testing, incorporates the approach in *Meiorin* and *Grismer* and accords most fully with the purposes behind s. 7(1). Nor do I believe *Entrop* can be distinguished on the basis that Mr. Entrop previously had an addiction problem. The Court established principles of general application and

its analysis and conclusion did not turn on the fact that some seven years prior the complainant was actually disabled by alcoholism.

87 The definition of "handicap" in the Ontario Act considered in *Entrop* is also identical to the definition of physical disability in s. 44 of the Act, save for the examples of disability provided. Laskin J. held that the section protects those who have, or have had, an actual or perceived disability. An employer can perceive employees to be disabled through the operation of a drug testing policy which fires or refuses to continue to hire individuals who test positive on drug tests: *Entrop*, *Halter* and *Halter v. Ceda-Reactor Ltd.* (May 16, 2005), Bryant Member (Alta. Human Rights Bd. of Inquiry), June 6, 2005.

88 Like the policy found to be *prima facie* discriminatory in *Entrop*, recreational users are adversely affected by the KBR Policy. The Policy imposes a pre-employment barrier, with zero tolerance, automatic termination and no accommodation. It bars individuals from the workforce and a positive test result negatively affects their livelihood. KBR sanctions any person testing positive by the removal of employment on the assumption that the person is likely to be impaired at work in the future and thus not "fit for duty." The Policy not only treats all prospective employees who test positive for drugs the same, it treats them as if they were drug dependent and further assumes that they are likely to report to work impaired. Even though Mr. Chiasson may not be drug dependent, the policy operates to treat him as such, and the requirement that he be tested for drugs with an automatic sanction for a positive test is *prima facie* discriminatory.

89 I find the approach in *Broisband* helpful even though the Court did not expressly address drug testing. In my view, the principles outlined were intended to provide guidance on all forms of perceptions based on physical conditions, understanding that perception of disability is a potentially wide category which spans the full range of what one person may think about another. In some instances perceptions of disability may have some basis in fact and in some they may not. Perceptions may be over broad, based on stereotype, or simply erroneous. They are to be measured, in part, by the result the employer seeks when creating and crafting a policy. The perceptions of an employer can create a class of persons, as it did here: all persons who test positive on the pre-employment urine test are deemed not fit for work. Such employees are kept from the workforce because the employer believes they will be unable to do their job because of their physical condition. This is not simply different treatment because the grounds for differentiation involve physical attributes and the motivating perception is linked to an assessment of the ability of the employee to do the job. The perception and assumption is tied to illness, drug use and incapacity. The penalty attached is also relevant to whether or not the employer perceives a disability and in the case at bar a person is precluded from employment. This sends the clear message that such prospective employees are not wanted.

90 The reasoning in *Broisband* can be applied to the KBR Policy. Mr. Chiasson is being treated as an addict, even though the employer's evidence is that only ten percent of those who test positive

are likely to be impaired at work. Not only does that mean that there is discrimination against those who are addicted, it treats the other ninety percent as if they were addicted and would be impaired at work. While an analogy between illness such as Crohn's Disease or spinal deformity on the one hand, and recreational drug use one the other, is not perfect, both concern perceived limitations based on extraneous extrapolations from known facts and ungrounded assumptions with regard to work-related limitations. In *Boisbriand* the assumptions concerned physical/medical conditions that were proven to be non-limiting in their actual effect, but were treated by the employers, out of ignorance of their true nature, as if they fit within the category of work-limiting medical conditions. The stated purpose of the KBR Policy is to prohibit workplace impairment and yet under its terms, Mr. Chiasson is made to suffer severe employment related consequence, notwithstanding that he attended work in an unimpaired state.

91 KBR submits that there can be no perceived disability in the case at bar because KBR did not perceive Mr. Chiasson as drug dependent. There is a dispute about what KBR perceived in the circumstances. KBR says that Ms. Ayson never turned her mind to whether Mr. Chiasson was drug dependent. Ms. Caul had no direct contact with him but testified that she did not consider Mr. Chiasson to be addicted. The appellants argue that KBR did in fact perceive Mr. Chiasson to be drug dependent based on Mr. Chiasson's uncontradicted evidence that when terminating Mr. Chiasson's employment Mr. Dickie stated that "drug use was not allowed on site." Mr. Dickie did not testify. It is argued that this statement suggests that Mr. Dickie subjectively believed that Mr. Chiasson was a substance abuser and was using drugs on the site some two weeks after the drug screen. If Mr. Dickie believed that Mr. Chiasson was impaired at work he would have made a significant factual error and there is some evidence that KBR employees subjectively believed Mr. Chiasson was drug dependent.

92 However, I do not choose to rest my decision on this point alone. In my view, KBR's argument is flawed because it places undue emphasis on the subjective beliefs of certain employees when the Supreme Court has stated that the terms and impact of the Policy are major considerations. In this regard I do not follow the reasoning in *Milazzo*. Speaking through this Policy KBR demonstrates its belief that any person testing positive on a pre-employment drug test is a substance abuser. Further, the unified approach in *Meiorin* does more than collapse the distinction between direct and adverse effects discrimination, it affects the distinction between intentional and unintentional discrimination (para. 49). The focus should not be on whether particular employees thought Mr. Chiasson to be drug dependent, but whether, by the plain reading and clear operation of the company policy, KBR assumes him to be. In other words, the test is not whether these employees intended to discriminate, but whether the Policy operates with that effect. The intention of the employer may make something discriminatory, but the absence of intention will not save an otherwise discriminatory act.

93 An employer should not be better off when assessing the existence of perceived disability if its policy purports to be self executing and does not require the consideration of the individual

circumstances of applicants. On its face the policy is clear and categorical: a positive test leads to dismissal and contravention produces an automatic sanction. The employees who terminated Mr. Chiasson acted in conformity with company policy. The letter sent by Ms. Ayson to Mr. Chiasson states that the employer "has no choice but to terminate your employment." It would work against the goals of human rights legislation if an employer could invoke its discriminatory use of a single standard to avoid a finding of perceived disability.

94 A similar criticism exists in relation to KBR's attempt to distinguish *Entrop* and *Boisbrand* on the basis that they involved particular allegations of disability against the employees, whereas KBR made no such allegations. In *Boisbriand* there was a verbal assertion of disability and in *Entrop* the wording of the policy explicitly linked recreational users with dependent users. KBR interprets the arbitration cases of *Parsons, Pearson and Milazzo* as accepting that *Boisbriand* and *Entrop* establish that without some positive assertion of disability by either the employer or the employee, a disability claim is not *prima facie* discrimination. I also reject this argument. Even if not contradicted by the statement of Mr. Dickie, this argument prioritizes intention over action, places form over effect and misapprehends discrimination. In a case where an employer asserts a disability where none exists, that may be evidence of a perception of disability. However, the absence of that evidence does not mean there is no *prima facie* discrimination. What an employer intends, thinks or says may be evidence of discrimination, but it is the exclusion from employment opportunities, not labeling or name calling, which is the gravamen of a breach of s. 7. The workplace consequences imposed for a breach of policy and the conduct of an employer in terminating the individual may speak louder and stronger than any particular allegation.

95 It cannot be that an employer is free to enact policies that treat the employee as if they were disabled, as long as the employer does not make any verbal or personal assertion to that effect. This type of thinking was rejected by the Supreme Court of Canada in *Meiorin* by McLachlin C.J. where she stated at paras. 28 and 29 that the traditional bifurcation between direct and adverse effects discrimination "gives employers with a discriminatory intention and the forethought to draft the rule in neutral language an undeserved cloak of legitimacy." There should be no similar cloak based on what certain employees may think or say, when the effect of the chosen policy adversely affects a protected class of persons. Even if some assertion of disability is required, I find such an assertion encoded in the underlying assumptions of the Policy and demonstrated by the employer's actions in terminating the employee.

96 I distinguish the arbitration decisions on the basis that none involved pre-employment drug testing and the creation of a barrier to employment based on a statistical risk of future impairment. While the employer in *Milazzo* attempted to characterize the testing as "pre-employment" drug testing, Mr. Milazzo had been working with the company for many years. Further, the Act contains no equivalent to s. 10 of the Federal Act considered in *Milazzo*. Based on the purpose of the Alberta Act and its terms, I do not believe that this gives greater leeway to employers in Alberta in respect of discriminatory employment policies. Rather, our Legislature intended that all claims against

discriminatory policies and practices in employment be brought pursuant to s. 7. The Act would provide poor protection if a person excluded from the job force because of a positive urine test lacks standing to challenge his termination and the policy because he is a recreational user and even less likely to be impaired than a chronic user.

97 Unlike *Parsons*, *Pearsons* and *Middlemass*, the case at bar does not involve an employee who was impaired at work and who tries to use any discriminatory aspects in the employer's drug policy as a shield from discipline for post-employment behavior. Further, although Mr. Pearson asserted he was not addicted to marijuana, the arbitrator said the issue in that case was not one of discrimination because of an actual or perceived disability but rather whether the employer had just cause to terminate the griever's employment in the circumstances. The arbitrator made it perfectly clear that he was addressing only the particular facts of that case and specifically noted at p. 14:

> At the outset it is important to remember that the present case does not involve the validity of whether a workplace wide policy of the employer to randomly test any employee for drugs or a policy to terminate the employment of all employees who test positively for drugs regardless of when ingested and regardless of any evidence about the effect of those drugs on the employee's ability to safely perform his or her job.

With respect, that is the issue in the case at bar, as applied to the pre-employment context.

98 There are two further reasons which support a finding of perceived disability. First, is the admonition that human rights must evolve to new realities. The grounds of prohibited discrimination are part of what is to be given a large, liberal and remedial interpretation and they are to be interpreted and applied in accordance with the purposes they serve. What constitutes a perceived disability must be considered in light of the paramount concern for human dignity and respond to changing social needs, especially when the issue is a total refusal to hire everyone in the chosen class. Medical technologies now provide a means to gather information on individuals which may be used in various ways, some of which may impair equal opportunity in employment. In *Broisbriand* the information obtained from the pre-employment medical was used to say that the employees could not do the job, without an assessment of individual ability. The urinalysis in the case at bar was used to terminate an employee on the basis of a perceived and general statistical risk that he may be impaired on the job sometime in the future. The Courts need to be concerned with the extent to which employers will be permitted to segregate out classes of people based on their perceptions of a physical condition which may or may not limit workplace capacity.

99 Second, the issues associated with mandatory drug testing engage and straddle both individual rights and equality rights. Many of the authorities cited concerned whether employers could impose drug testing on unwilling unionized workers. That is not the issue in the case at bar, although KBR argues that Mr. Chiasson consented to the drug test, knew the risks, should have known about the probability of testing positive and did not have to leave his former employment.

Consent answers any physical invasion and has implications for contract issues, privacy rights and security against unreasonable search and seizure. However, parties may not contract out s. 7 (1) of the Act. In that regard, some may argue that s. 7 should not do the work of privacy rights. However, equality rights, human rights and privacy rights do not exist in compartments. In *Law* the Supreme Court stated that a primary purpose of equality rights is the protection of the essential human dignity of each individual. The Act identifies human dignity and equality as fundamental principles to be cherished and protected in Alberta. This is illustrated in both the preamble and s.16(1). Human dignity is therefore at the core of both privacy rights and equality rights. To extend the protection of perceived disability to individuals who test positive on this type of drug test within this type of policy promotes the protection of human dignity and strengthens rather than dilutes anti-discrimination norms.

100 It is most important to remember that a finding that a practice or policy is *prima facie* discriminatory does not end the inquiry. The Act allows reasonable limitations. The burden shifts to the employer who created the policy to explain why its policy is a *bona fide* occupational requirement. In *Law* the court accepted the notion, introduced in *Egan* that the impacts of discrimination may sometimes be more important than the constituent elements of discrimination. In such cases a purposive approach operates to recognize such condition as *prima facie* discrimination and shift the burden to the employer who knows why they chose the policy, its terms and conditions and when accommodate creates undue hardship.

101 In summary the effect of the KBR Policy on pre-employment drug testing is to exclude addicted individuals on the basis of actual disability and non-addicted and non-impaired employees from employment based on perceived disability. I find that the KBR Policy constitutes *prima facie* discrimination based on disability, both in general and as applied to Mr. Chiasson. With respect, the Panel erred on this point.

K. Justification and the Meiorin Test

1. The Meiorin Test

102 The proper way to determine whether drug testing policies can be justified pursuant to the Act is the *Meiorin* analysis. The Court outlined a three part inquiry:

> 1. The employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> 2. The employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
>
> 3. 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 accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship.

103 The component parts of this inquiry may be referred to as the rational connection test, the good faith test and the reasonable necessity/accommodation test. The burden of proof is on the employer to meet each test on the balance of probabilities.

104 The parties in the case at bar agree that the first two tests are satisfied and contest the third. It is conceded that the employer adopted pre-employment drug testing for a purpose rationally connected to the performance of the job: the goal of the Policy is to prohibit workplace impairment and thereby increase safety and efficiency. It is also clear that KBR adopted pre-employment drug testing in an honest and good faith belief that it was necessary to the fulfillment of its legitimate goal of preventing workplace impairment.

105 KBR provided useful evidence on the workplace for which this Policy was intended. The plant is in Fort McMurray, where there are significant drug and alcohol abuse problems due to the transient nature of the oil sands workforce, the young age and relative wealth of the population, and the absence of social activities in what was described as a "frontier" environment. Mr. Dunfield indicated that the social conditions prevalent in Fort McMurray make the "camps" particularly susceptible to drug and alcohol use. KBR is concerned with the increased use of marijuana and how the marijuana currently in use is significantly more concentrated and has greater and more lasting effects than marijuana from a decade ago. The working environment at the Syncrude plant involves petroleum products, heavy equipment and many potential dangers for all involved. There is also a great deal of employee movement from project to project.

106 I accept that prohibiting impairment at work is a valid and compelling safety and security concern to KBR. Employers have a responsibility to maintain a safe and healthy work environment for the benefit of all employees. Employers have a legitimate interest in prohibiting drug use at work because it is dangerous and exposes employees to increased risk of accident or injury. It is very easy to see why sobriety is a BFOR in such circumstances and why employers have the right to assess whether employees are capable of performing their essential duties safely.

107 At this stage of the analysis it bears repeating that Mr. Chiasson was never impaired at work. Many cases cited by KBR involved employees who were so impaired. For example, in *Middlemiss*, an employee was terminated because he was impaired on the job, and while I do not accept the reasoning in that case as applied to this Policy and the pre-employment context, the result can be justified as the employee contravened the BFOR of non-impairment at work.

108 While there was conflicting evidence concerning the nature of Mr. Chiasson's job responsibilities, I am prepared to classify his position as safety sensitive for the purposes of the following analysis. As a receiving inspector he was required to verify the quality of materials and equipment to be used by others and exercise due diligence in checking for safety-related defects.

This was a supervisory position, in which he frequently worked alone, and even if his inspection existed within a larger system of checks and balances, it is reasonably foreseeable that his actions could jeopardize the health and safety of himself and others if he was impaired at work.

109 On the issue of accommodations, in *Meiorin* the Court adopted the words of Sopinka J. In *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.) that the use of the term'undue' infers that some hardship is acceptable; it is only undue hardship that satisfies the test. It went on to comment at para.. 60:

> It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard, if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capacities and inherent worth and dignity of every individual, up to the point of undue hardship.

110 KBR has a zero tolerance policy for positive drug tests, coupled with automatic termination and no accommodation. Such a stringent approach may be easy to enforce, but it takes no steps to accommodate the capacities and inherent worth of those applying for positions and does not satisfy the requirements set out by the Supreme Court. The Policy is too severe, more stringent than needed for a safe workplace and not sufficiently sensitive to individual capabilities.

111 Even in *Milazzo* at para. 187 the arbitrator recognized that employers are not automatically entitled to withdraw offers of employment without addressing the issue of accommodation:

> In the case of prospective employees suffering from drug-related disabilities who test positive in pre-employment tests, employers are not entitled to automatically withdraw offers of employment, without first addressing the issue of accommodation. It may be that in some cases no accommodation will not be possible where, for example, the candidate is being hired to meet an immediate, short-term need, and the period of time off of work required to complete a program of rehabilitation would be longer than the term of the employment. In other situations, some form of accommodation may be possible. Each situation would have to be carefully assessed on a case-by-base basis.

112 KBR did not believe that it had any obligation to accommodate Mr. Chiasson and the Panel found an absence of any accommodation on the facts. There is no reason to disturb this finding: the evidence is clear that KBR fired Mr. Chiasson pursuant to its Policy and did not consider any other options. Although the KBR Policy was said to permit such a person to re-apply in six months, this is not in the written KBR Policy, but only in the Halliburton document and Mr. Chiasson was never informed of this possibility.

113 Further, after the positive result, KBR conducted an interview and learned that Mr. Chiasson had smoked marijuana before the job interview and five days before the test. At that point, knowing the origins of the positive test, the employer did not inquire further or offer any accommodation.

114 The duty to accommodate is circumstantial, flexible and is to be judged in context. Given that there was no accommodation in fact, KBR may only succeed if it can demonstrate that no accommodation is required in the circumstances. In *British Columbia (Superintendent Motor Vehicles)* McLachlin J. stated at para. 32 that in order to prove that it is "reasonably necessary" the "defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk, or excessive cost." I find that KBR did not meet this standard.

115 The fact that Mr. Chiasson worked for nine days creates difficulties for KBR. Various inferences flow from his actual employment on site. First, the link between a positive drug test and impairment at work is called into question, both generally and in relation to this particular employee. Despite the positive drug test from weeks before he commenced employment, he was not impaired at work, the employer rated his work highly and the Panel recognized his work as excellent.

116 Second, the employer chose to allow this employee to work without receipt of the results of a drug test, calling into question its claim that such testing is essential and that Mr. Chiasson worked in a safety sensitive position. Not only is testing not required for the majority of workers on site, being all unionized employees, the employer appears to have dispensed with what it claims is a mandatory precondition to employment when it had a pressing need to fill a position. Even though it was unusual and against Company norms for Mr. Chiasson to have been employed at the work site prior to the results of his drug test being known, Ms. Caul testified that she thought that the exception had probably been made as a result of the urgency to get the UE-1 project into operation. The testimony of Mr. Fowler indicated that the lack of a receiving inspector for the short period of time would merely have resulted in stockpiling of some materials until the receiving inspector arrived on site. KBR was, according to its reasoning, prepared to risk a drug affected employee to avoid stockpiling.

117 Third, Mr. Chiasson could be treated as an existing employee for the purposes of determining the level of accommodation required. Ms. Caul confirmed that non-unionized KBR employees who test positive following testing after an incident or on reasonable cause are not fired, but be kept on salary and referred to the employment assistance program for assessment.

118 In *Meiorin* at para.. 65 McLachlin J. (as she then was) posed a series of questions to help determine whether this third part of the test is met. Most of these questions focus on accommodation for the affected employee and alternatives to the discriminatory standard:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?

(b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?

(c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?

(d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles?

119 On the facts KBR admits that it did not consider accommodation and has not therefore investigated alternative approaches that do not have a discriminatory effect. Dr. Jacyk testified that a urine test is not a good measure for likely impairment at work and it may encourage employers to be less vigilant because it may cause them to believe any problems have been eliminated at the hiring stage.

120 There was also evidence that other means of testing for workplace impairment are more reliable and individual. The evidence of the experts demonstrated that blood or saliva analysis and supervisor training could be used in place of, or in concert with, urinalysis to make the testing more effective. According to Dr. Macdonald and the Senate Report, saliva testing can detect the active component of THC up to ten hours after use. Supervisor training involves teaching supervisors how to spot signs of impairment at work. While not infallible, this approach was endorsed as useful by Dr. Jacyk and Dr. McDonald for the appellants and Dr. Chiasson and Mr. Chabot for the respondents. There was no evidence that the respondent considered any of these measures at the time it implemented its Policy or anytime before it was questioned at the hearing. When asked, Ms. Caul thought supervisor training would not work at the UE-1 site because of the transitory nature of the work teams and the fact that the supervisors were primarily "technical people" or engineers who would not want to take on a personal responsibility of that nature. When questioned on this by the Panel, she stated that while they did do performance evaluation, something like monitoring for substance abuse would be outside of their "comfort zone." This is a curious response for a company which professes to be committed to a drug free workplace culture.

121 KBR argued that it would be too costly to require employers to provide counseling and programs for prospective employees who tested positive but no evidence was led on the relative

costs of different forms of accommodation. However, doing nothing falls well short of the standard of "every possible accommodation to the point of undue hardship."

122 Both case law and expert evidence indicate a number of other measures that KBR could reasonably have considered or employed as part of its pre-employment drug policy in concert with urinalysis including:

> (a) full disclosure of pre-employment drug policies to all prospective employees as early as possible;
>
> (b) allowing a wash-out period as an initial screen to separate recreational users from potential substance dependent users by either:
>
> > (1) combining mandatory disclosure of current drug use with a washout period between warning of drug screening and the actual test; or
> >
> > (2) warning prospective employees that a positive result will automatically be followed by a second test after the first;
>
> (c) conducting independent analysis (psychological screening/work records review) of prospective employees who test positive to assess whether they represent a high risk of being a substance abuser;
>
> (d) conditional employment (probation) of employees who test positive, but are medically assessed as low risk for substance dependency (admitted recreational users/ negative second test/negative follow-up assessment) under enhanced supervision by drug-awareness trained supervisors and including random impairment tests (saliva testing) for a period of time; and
>
> (e) withdrawing the offer of employment from those admitting to or medically assessed as high risk for substance dependency on the condition that the offer may be renewed if the individual voluntarily enters and successfully completes a recognized drug rehabilitation program at their own expense.

123 These are suggestions only and not guidelines and could, if properly framed, also contribute to the educational components of KBR's Policy. For example, Mr. Chiasson was not told of the scope of the drug test and that it could disclose trace amounts for use up to 30 days prior to the test. Giving fair warning of an upcoming test, with information about the length of time for which a person must abstain to ensure a negative drug test result, gives prospective employees the opportunity to adhere to company policy and contributes to informed consent. It also allows individuals to make better decisions about their employment options: like the decision which

confronted Mr. Chiasson over whether to leave an existing job and move elsewhere for a new position with KBR.

124 Mr. Chabot, testifying for KBR, recommended that employers use pre-employment drug testing where an applicant for a safety-sensitive job position was informed of the test and its consequences on the basis that "their awareness of the consequences of a positive result could lead one to infer that such a test outcome reflect[ed] an inability to control their usage of such a substance." While the inference to be drawn may be open to debate, Mr. Chabot assumes fair warning is supplied and in this case it was not.

125 While the employer said the only leeway was in the timing of the test, Mr. Chiasson was not informed that he could ask for a postponement. The evidence of Ms. Caul on this point was confusing. At one point she stated that where a new recruit has advised the Human Resources department, prior to the test, that he has used cannabis a week or so previously, Ms. Caul has asked the individual if he wanted to take the test, and the Company has sometimes postponed the test. However, she also stated that had Mr. Chiasson asked to postpone the test he would have been refused. Dr. Jacyk suggested that employees should be given a "washout" period of 30 days so that the recreational user has an opportunity for his or her body to eliminate the cannabis metabolites before taking the test. In some cases it may not be possible for the employer to do so because of undue hardship, but such an option was not considered by KBR.

126 To allow the retaking of the test after a positive result is also a form of accommodation which could be considered in appropriate circumstances. However, care must be taken so that the time gap between tests is not arbitrary and information about this possibility needs to be communicated to applicants.

127 KBR argued, based on the decision of Sopinka J. in *Renaud*, that Mr. Chiasson shared a responsibility for accommodation and failed in his responsibility because he did not disclose his drug use. This argument fails on a number of grounds. Like the duty to accommodate, any obligation placed on employees to request accommodation is also contextual and is assessed on a case by case basis. Had Mr. Chiasson been informed of the scope of the test and how far it goes back in time he may have asked for some form of accommodation. However, HRCC argued that it is difficult to request accommodation when none is provided on the face of the Policy and the only known consequence of a positive test is termination. To the extent any request for accommodation was required in these circumstances, I find sufficient communication of information by Mr. Chiasson in the medical interview and the termination meeting.

128 In summary, I have considered the questions posed in *Meiorin* and find that KBR has failed to demonstrate compliance with the procedural or substantive components of the duty to accommodate. Given the absence of accommodation, KBR has failed to justify its Policy or treatment of Mr. Chiasson. This ends the inquiry as KBR has not discharged its burden.

129 However, the Appellants also challenge the Panel's conclusion that the pre-employment drug testing in the Policy was reasonably necessary in para. 20:

> The first portion of the third element of the *Meiorin* test had been met, and that the pre-employment drug test was a reasonable requirement for the complainant's employment from the standpoint of both personal safety, and the safety of others, as well as from the standpoint of potential for personnel environmental disaster from damaged or defective pressure vessels or other material.

130 They argue that the Policy fails the third step of the *Meiorin* analysis because urine testing can only indicate whether the drug has been ingested in the past 30 days and does not measure impairment. They also claim an absence of clear and cogent evidence to support the view that drug testing increases safety in the workplace.

131 These arguments are made under the reasonable necessity/accommodation test. There is some overlap between the first and third tests in *Meiorin*, and these arguments indirectly impugn the rationality of the connection between a pre-employment drug test and the goal of prohibiting workplace impairment as well as attack the necessity of a single standard without accommodation. This aspect of *Meiorin* was well expressed by Laskin, J in *Entrop*. He explained at para. 97 that:

> An employer's workplace rule may fail to satisfy the third step in the *Meiorin* test in several ways. For example the rule may be arbitrary in the sense that it is not linked to or does not further the employer's legitimate purpose; the rule may be too broad or stricter than reasonably necessary to achieve the employer's purpose; the rule may unreasonably not provide for individual assessment; or the rule may not be reasonably necessary because other means, less intrusive of individual human rights, are available to achieve the employer's purpose.

132 The Panel did not refer to *Entrop* and did not benefit from this analysis. Taking these factors into account, in my view KBR did not demonstrate the reasonable necessity of having all employees meet the single standard of a pre-employment drug test. While there is a rational connection between impairment and job performance, the link between a positive pre-employment urine test and workplace impairment is tenuous and uses predictions based on statistical risk to bar particular people. Pre-employment urine tests do not test for non-impairment at work and to the extent they may provide some information about the risk of such impairment, there are other much more direct, effective, efficient and individual methods for employers to monitor impairment at work.

133 KBR argued that the residual effects of marijuana allow it to screen out prior users through pre-employment drug testing because even though the employee may not be in the intoxication phase, there may be residual impairment or flashbacks at work from off site drug use. I do not believe the evidence tendered is sufficiently strong to support such a conclusion, either as applied

to Mr. Chiasson or generally. Any assertion that Mr. Chiasson was residually impaired at work between July 8 and 17, 2002, from the marijuana he smoked on June 22, 2002, has not been established.

134 Generally, Dr. Chiasson talked briefly of an alleged hangover effect, but his opinion is not supported by the weight of the literature. The Senate Committee Report to the Federal Government on the decriminalization of marijuana (Canada, Senate Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy* (Ottawa: Senate, 2002)(Chair: Pierre Claud Nolin)), found ninety-five percent of users to be recreational users and concluded at 165, "that the state of knowledge supports the belief that for the vast majority of recreational users, cannabis presents no harmful consequences for physical, psychological or social well-being, either in the short or long term". Even Dr. Chiasson agreed that research by the National Research Council could not conclude occasional marihuana use produces measurable next day performance effects. The Leirer study, the only study which documented any residual effect, studied nine pilots and has not been replicated. In addition, KBR failed to establish the level of risk associated with these alleged residual effects and compare them to risks associated with employees who are hung over from alcohol, sleep deprived, taking over the counter cold medications or distracted by personal problems or workplace tensions. It is interesting to note that in *Trimac*, the arbitrator rejected delayed or residual effects as a basis to support mandatory random drug testing (para. 74).

135 The evidence in the case at bar also supports the approach used in *Entrop*. The Court of Appeal of Ontario found at para. 99 that:

> ...urinalysis is a reliable method of showing the presence of drugs or drug metabolites in a person's body. But drug testing suffers from one fundamental flaw. It cannot measure present impairment. A positive drug test shows only past drug use. It cannot show how much was used or when it was used. Thus, the Board found that a positive drug test provides no evidence of impairment or likely impairment on the job. It does not demonstrate that a person is incapable of performing the essential duties of the position. The Board also found on the evidence that no tests currently exist to accurately assess the effect of drug use on job performance and that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems. On these findings, random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment.

136 The flaws in pre-employment testing derive from the fact that a positive test does not show future impairment, or even likely future impairment on the job, yet the applicant who tests positive once is not hired. The reasonable necessity of this standard is also called into question because KBR proposes a single standard of pre-employment testing for all employees, whether in safety sensitive positions or not.

137 In *Entrop* the Court said at para. 115 that "alcohol and drug testing for safety-sensitive positions and post-reinstatement may be permissible if Imperial Oil can establish that testing is necessary as one facet of a larger process of assessment of alcohol or drug abuse." KBR argued that its pre-employment drug testing was a necessary facet of a wider drug and alcohol strategy to counter the pressing danger of the growing drug culture in Fort McMurray. Given the context in which the statement is made, I am not sure Laskin J.A. intended to mean that pre-employment drug testing can be justified as part of a larger process, being the overall company policy. In this passage Laskin J. was addressing whether the provisions for mandatory disclosure, reassignment, reinstatement and certification violated the Ontario Code. These were the provisions that surrounded and modified the company's drug testing provisions and these were the "larger process of assessment" that the employer used to justify its accommodation standards. These were policies that acted together on the complainant as an integrated scheme.

138 KBR's expert Mr. Chabot recommended that employers develop comprehensive "substance abuse strategies" that combined strong awareness programs, employee assistance, treatment programs, medication and testing. In the case at bar, drug testing is the only facet of the pre-employment test and the fact that KBR has a series of related post employment policies that have no application to the complainant should not bear on the issue of reasonable necessity and accommodation. However, even if this dicta includes the larger employer policy, while KBR has a genuine concern with workplace impairment, none of the nine hundred unionized employees take pre-employment drug tests and there is no random testing.

139 KBR concedes that it is difficult to provide statistical proof that pre-employment testing is successful, but points to Syncrude's safety record following the introduction of pre-access testing. The evidence is that Syncrude has reduced its loss time by the implementation of a multifaceted workplace safety policy.

140 Mr. Dunfield testified as Loss Management Advisor in the Corporate Loss Management Group at Syncrude Canada in Fort McMurray. He explained that concern over lost time claim rates in Alberta, which stood at 3.4 per 100 person years in 2000/2001 as opposed to an international average of 0.5 to 1.0, led to co-operation between industry and the Alberta Government to develop *Work Safe Alberta* - an action plan designed to bring the lost time claim rate down to 2.0 by 2004. Substance abuse was a concern addressed in this larger process. He testified that Syncrude is recognized as a Provincial leader in lost time claim reduction (0.11 in 2004) and safety performance and production reliability. He believed Syncrude's drug and alcohol policy formed a significant part of this overall effort. Such policy included new employee drug testing, reasonable cause testing, and post-incident testing.

141 Mr. Williams, the manager who recorded workplace health, safety and environment incidents for KBR, presented a chart titled Shaping Accident Free Environments. In 1986, several

initiatives were implemented to reduce workplace injuries and while the Chart shows an overall reduction in injuries, it is not reliable. First, the period between 1986 - 1993 suffers from a flaw pointed out by the American Safety Health Association about how incidents were reported. The increase or spike in 1993 shows that there are problems with these figures. Second, drug and alcohol testing was only one of many significant other safety programs instituted.

142 Mr. Tidsbury testified as President of Construction Labour Relations with respect to access to employee assistance providers. He noted an abnormal spike in employee assistance requests in August 2004 that coincided with the introduction of the pre-access drug and alcohol testing across Syncrude facilities. He also testified that, following introduction of the testing, positive results on post-incident testing had dropped by half.

143 While impressive, it is not clear what portion of Syncrude's improvement, if any, is the result of drug and alcohol testing. Mr. Dunfield testified that the Committee recommended a multi-pronged approach, with 6 major objectives with 32 recommendations from increased public awareness to legislative change. Syncrude adopted an audit protocol developed by International Loss Control Initiative. It is a comprehensive program, with 21 elements with multiple levels of performance assessed during audits that range from leadership issues to looking for ways to identify critical activities with high losses to communications. It is even less clear what, if any safety consequences can be attributed to pre-employment drug testing because the statistics are composites and result from a wide range of workplace behavior changes. As the KBR Policy is different from that at Syncrude, it is also difficult to extrapolate between the two. However, Dr. Jacyk opined and I agree that, while there were significant omissions in the statistical data, the documents presented by KBR relating to workplace safety and use of the Employee Assistance Program did not reasonably support the hypothesis that pre-employment drug screening reduced the risk of workplace accidents or increased workplace safety.

144 I have found that this Policy, which applies pre-employment testing to all covered employees and provides for automatic termination without accommodation, breaches s. 7(1) of the Act and it is not justified under the available standards. My comments are directed to the KBR Policy and whether other policies may qualify as a BFOR is an open question for another time.

Remedy

145 The Appellants ask that KBR revise its drug and alcohol Policy to eliminate pre-employment drug testing, or in the alternative, if pre-employment drug testing is found to be reasonably necessary for deterring impairment on the job, the Court order the Respondent to offer a process of assessment or accommodation to individuals failing pre-employment drug test.

146 Under s. 37 of the Act the powers given to the Court are broad. I order KBR to cease the contravention of the Act and to refrain in the future from committing the same or any similar contravention.

147 It was agreed by the parties that they would return before me on the question of damages for Mr. Chiasson if agreement could not be reached between them.

Appeal allowed.

Footnotes

Tab 18

paras 26 and 81

2005 SCC 30, 2005 CSC 30
Supreme Court of Canada

Canada (House of Commons) v. Vaid

2005 CarswellNat 1272, 2005 CarswellNat 1273, 2005 SCC 30, 2005 CSC 30, [2005] 1 S.C.R. 667, [2005] S.C.J. No. 28, 135 C.R.R. (2d) 189, 139 A.C.W.S. (3d) 529, 2005 C.L.L.C. 230-016, 252 D.L.R. (4th) 529, 28 Admin. L.R. (4th) 1, 333 N.R. 314, 41 C.C.E.L. (3d) 1, 52 C.H.R.R. D/294, J.E. 2005-976, EYB 2005-90618

House of Commons and the Honourable Gilbert Parent (Appellants) v. Satnam Vaid and Canadian Human Rights Commission (Respondents) and Attorney General of Canada, the Honourable Senator Serge Joyal, the Honourable Senator Mobina S.B. Jaffer, Canadian Association of Professional Employees, Communication, Energy and Paperworkers Union of Canada and Speaker of the Legislative Assembly of Ontario (Interveners)

McLachlin C.J.C., Major, Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron JJ.

Heard: October 13, 2004
Judgment: May 20, 2005
Docket: 29564

Proceedings: reversing on other grounds *Canada (House of Commons) v. Vaid* (2002), 2002 FCA 473, 2002 CarswellNat 3381, 2002 CAF 473, 2002 CarswellNat 3503, 22 C.C.E.L. (3d) 1, 296 N.R. 305, 2003 C.L.L.C. 230-011, 222 D.L.R. (4th) 339, [2003] 1 F.C. 602, 46 Admin. L.R. (3d) 200, 45 C.H.R.R. D/1, 235 F.T.R. 159 (note) (Fed. C.A.); affirming *Canada (House of Commons) v. Vaid* (2001), 2001 FCT 1332, 2001 CarswellNat 2720, 14 C.C.E.L. (3d) 125, (sub nom. *House of Commons v. Vaid)* 208 D.L.R. (4th) 749, 203 F.T.R. 175, 38 Admin. L.R. (3d) 252, [2002] 2 F.C. 583, 2001 CarswellNat 3531, 42 C.H.R.R. D/173 (Fed. T.D.); affirming *Canada (House of Commons) v. Vaid* (2001), (sub nom. *Vaid v. Canada (House of Commons))* 40 C.H.R.R. D/229, 2001 CarswellNat 3548, 20 C.C.E.L. (3d) 295 (Can. Human Rights Trib.)

Counsel: Neil Finkelstein, Jacques Emond, Lynne J. Poirier for Appellants
Andrew Raven, David Yazbeck for Respondent, Vaid
Philippe Dufresne, R. Daniel Pagowski for Respondent, Canadian Human Rights Commission
Anne M. Turley for Intervener, Attorney General of Canada

Dale Gibson for Interveners, Honourable Senator Serge Joyal and the Honourable Senator Mobina S.B. Jaffer
Peter Engelmann, Raija Pulkkinen for Interveners, Canadian Association of Professional Employees and the Communication, Energy and Paperworkers Union of Canada
Catherine Beagan Flood for Intervener, Speaker of the Legislative Assembly of Ontario

Subject: Constitutional; Civil Practice and Procedure; Labour; Employment

Headnote

Human rights --- Practice and procedure — Commissions and boards of inquiry — Jurisdiction — General principles

V worked as chauffeur to successive Speakers of House of Commons between 1984 and 1994 — In 1995, V was dismissed for purportedly refusing to assume new duties — V grieved successfully under Parliamentary Employment and Staff Relations Act ("PESRA") and was reinstated — In 1997, V was dismissed purportedly due to reorganization of Speaker's office — V filed complaint with Canadian Human Rights Commission, claiming that former Speaker and House of Commons discriminated against him — Speaker and House raised preliminary objection of parliamentary privilege — Tribunal dismissed objection — Speaker and House applied unsuccessfully for judicial review — Speaker and House appealed unsuccessfully to Federal Court of Appeal — Speaker and House appealed to Supreme Court of Canada — Appeal allowed on other grounds — Speaker and House failed to establish that employee management with respect to V fell within parliamentary privilege — PESRA ousted human rights legislation with respect to grievances of federal employees such as V — Consequently, V's workplace complaints ought to have been considered in 1997 by way of grievance under PESRA.

Constitutional law --- Nature and status of Dominion and provinces — Status and constitution of Parliament — Members of Parliament — Privileges of members — General principles

V worked as chauffeur to successive Speakers of House of Commons between 1984 and 1994 — In 1995, V was dismissed for purportedly refusing to assume new duties — V grieved successfully under Parliamentary Employment and Staff Relations Act ("PESRA") and was reinstated — In 1997, V was dismissed purportedly due to reorganization of Speaker's office — V filed complaint with Canadian Human Rights Commission, claiming that former Speaker and House of Commons discriminated against him — Speaker and House raised preliminary objection of parliamentary privilege — Tribunal dismissed objection — Speaker and House applied unsuccessfully for judicial review — Speaker and House appealed unsuccessfully to Federal Court of Appeal — Speaker and House appealed to Supreme Court of Canada — Appeal allowed on other grounds — Speaker and House failed to establish that employee management with respect to V fell within parliamentary privilege — PESRA

ousted human rights legislation with respect to grievances of federal employees such as V — Consequently, V's workplace complaints ought to have been considered in 1997 by way of grievance under PESRA.

Labour and employment law --- Public service employees — Employment contracts — Rights of employee under contract — Right of employee against Crown

V worked as chauffeur to successive Speakers of House of Commons between 1984 and 1994 — In 1995, V was dismissed for purportedly refusing to assume new duties — V grieved successfully under Parliamentary Employment and Staff Relations Act ("PESRA") and was reinstated — In 1997, V was dismissed purportedly due to reorganization of Speaker's office — V filed complaint with Canadian Human Rights Commission, claiming that former Speaker and House of Commons discriminated against him — Speaker and House raised preliminary objection of parliamentary privilege — Tribunal dismissed objection — Speaker and House applied unsuccessfully for judicial review — Speaker and House appealed unsuccessfully to Federal Court of Appeal — Speaker and House appealed to Supreme Court of Canada — Appeal allowed — Speaker and House failed to establish that employee management with respect to V fell within parliamentary privilege — PESRA ousted human rights legislation with respect to grievances of federal employees such as V — Consequently, V's workplace complaints ought to have been considered in 1997 by way of grievance under PESRA.

Droits de la personne --- Procédure — Commissions et tribunaux — Compétence — Principes généraux

V a travaillé comme chauffeur pour plusieurs présidents successifs de la Chambre des communes, entre 1984 et 1994 — En 1995, V a été congédié parce qu'il aurait refusé d'assumer de nouvelles fonctions — V a déposé un grief avec succès sous le régime de la Loi sur les relations de travail au Parlement (« LRTP ») et a été réintégré dans ses fonctions — En 1997, V a été congédié supposément en raison d'une réorganisation au sein du bureau du président de la Chambre — V a déposé une plainte auprès de la Commission canadienne des droits de la personne, alléguant avoir fait l'objet de discrimination de la part de l'ancien président et de la Chambre des communes — Président et Chambre ont soulevé comme objection préliminaire l'existence du privilège parlementaire — Tribunal a rejeté l'objection — Président et Chambre ont demandé sans succès le contrôle judiciaire — Président et Chambre ont interjeté appel sans succès devant la Cour d'appel fédérale — Président et Chambre ont interjeté appel devant la Cour suprême du Canada — Pourvoi accueilli pour d'autres motifs — Président et Chambre n'ont pas réussi à démontrer que la gestion du personnel en ce qui concernait V relevait du privilège parlementaire — LRTP a exclu l'application de la loi sur les droits de la personne relativement aux griefs des employés fédéraux tels que V — Par conséquent, V aurait dû, en 1997, soumettre ses plaintes en matière de relations de travail par voie de grief sous le régime de la LRTP.

Droit constitutionnel --- Nature et statut du Dominion et des provinces — Statut et constitution du Parlement — Membres du Parlement — Privilèges des membres — Principes généraux

V a travaillé comme chauffeur pour plusieurs présidents successifs de la Chambre des communes, entre 1984 et 1994 — En 1995, V a été congédié parce qu'il aurait refusé d'assumer de nouvelles fonctions — V a déposé un grief avec succès sous le régime de la Loi sur les relations de travail au Parlement (« LRTP ») et a été réintégré dans ses fonctions — En 1997, V a été congédié supposément en raison d'une réorganisation au sein du bureau du président de la Chambre — V a déposé une plainte auprès de la Commission canadienne des droits de la personne, alléguant avoir fait l'objet de discrimination de la part de l'ancien président et de la Chambre des communes — Président et Chambre ont soulevé comme objection préliminaire l'existence du privilège parlementaire — Tribunal a rejeté l'objection — Président et Chambre ont demandé sans succès le contrôle judiciaire — Président et Chambre ont interjeté appel sans succès devant la Cour d'appel fédérale — Président et Chambre ont interjeté appel devant la Cour suprême du Canada — Pourvoi accueilli pour d'autres motifs — Président et Chambre n'ont pas réussi à démontrer que la gestion du personnel en ce qui concernait V relevait du privilège parlementaire — LRTP a exclu l'application de la loi sur les droits de la personne relativement aux griefs des employés fédéraux tels que V — Par conséquent, V aurait dû, en 1997, soumettre ses plaintes en matière de relations de travail par voie de grief sous le régime de la LRTP.

Droit du travail individuel --- Fonctionnaires — Droits de l'employé contractuel — Droit de l'employé contre la Couronne

V a travaillé comme chauffeur pour plusieurs présidents successifs de la Chambre des communes, entre 1984 et 1994 — En 1995, V a été congédié parce qu'il aurait refusé d'assumer de nouvelles fonctions — V a déposé un grief avec succès sous le régime de la Loi sur les relations de travail au Parlement (« LRTP ») et a été réintégré dans ses fonctions — En 1997, V a été congédié supposément en raison d'une réorganisation au sein du bureau du président de la Chambre — V a déposé une plainte auprès de la Commission canadienne des droits de la personne, alléguant avoir fait l'objet de discrimination de la part de l'ancien président et de la Chambre des communes — Président et Chambre ont soulevé comme objection préliminaire l'existence du privilège parlementaire — Tribunal a rejeté l'objection — Président et Chambre ont demandé sans succès le contrôle judiciaire — Président et Chambre ont interjeté appel sans succès devant la Cour d'appel fédérale — Président et Chambre ont interjeté appel devant la Cour suprême du Canada — Pourvoi accueilli — Président et Chambre n'ont pas réussi à démontrer que la gestion du personnel en ce qui concernait V relevait du privilège parlementaire — LRTP a exclu l'application de la loi sur les droits de la personne relativement aux griefs des employés fédéraux tels que V — Par

conséquent, V aurait dû, en 1997, soumettre ses plaintes en matière de relations de travail par voie de grief sous le régime de la LRTP.

V worked as a chauffeur to successive Speakers of the House of Commons between 1984 and 1994. He was initially terminated on January 11, 1995, because it was said he refused to assume new duties under a changed job description and then refused alternative employment. He grieved the termination pursuant to the Parliamentary Employment and Staff Relations Act ("PESRA"). The matter was referred to adjudication and on July 27, 1995, and the Board of Adjudication found in favour of V and ordered that he be reinstated to his position as chauffeur. V returned to work on August 17, 1995, at which time he was told that the chauffeur's position had been designated "bilingual imperative". Lacking the necessary French language skills to resume his former post, he was sent for French language training. In a letter dated April 8, 1997, V advised the House of Commons that he wished to come back to work. The Speaker's office replied on May 12, 1997, that, because of reorganization, his former position would be made surplus effective May 29, 1997. V filed two complaints dated July 10, 1997, alleging separately that the Speaker and the House of Commons discriminated against him on the basis of his race, colour and national or ethnic origin. He also complained of workplace harassment. With respect to the House of Commons, he alleged refusal of continued employment. The tribunal dismissed the parliamentary privilege objection of the former Speaker and the House of Commons. The application for judicial review by the former Speaker and the House of Commons was dismissed. Their appeal was dismissed. The former Speaker and the House of Commons appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency. At the hearing of this appeal, the appellants identified the claimed privilege as "management of employees". While privilege attaches to the House's relations with some of its employees, the appellants have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity, or a lesser immunity, or indeed any evidence of necessity at all. The appellants having failed to establish the privilege in the broad and all-inclusive terms asserted, the respondents are entitled to have the appeal disposed of according to the ordinary employment and human rights law that Parliament has enacted with respect to employees within federal legislative jurisdiction.

The Canadian Human Rights Act applies to employees of the Senate and House of Commons. However, PESRA confers labour relations jurisdiction over employees like V, the subject matter of his grievance (discrimination) and the remedial powers to resolve such a grievance. PESRA's system of redress, which runs parallel to the enforcement machinery provided under the Canadian Human Rights Act, manifests a parliamentary intention to oust the dispute resolution machinery of the Canadian Human Rights Commission. In the result, V's workplace complaints ought to have been considered in 1997, as they were with partial success in 1995, by way of a grievance under PESRA.

V a travaillé comme chauffeur pour plusieurs présidents successifs de la Chambre des communes, entre 1984 et 1994. Il a été initialement congédié le 11 janvier 1995, parce qu'il aurait refusé d'assumer de nouvelles fonctions selon une nouvelle description d'emploi, puis aurait refusé un autre emploi. Il a déposé un grief contestant son congédiement sous le régime de la Loi sur les relations de travail au Parlement (« LRTP »). L'affaire a été renvoyée à l'arbitrage et, le 27 juillet 1995, le conseil d'arbitrage a tranché en faveur de V et a ordonné qu'il soit réintégré dans son poste de chauffeur. V est retourné au travail le 17 août 1995, date à laquelle on lui a dit que le poste de chauffeur avait été désigné « bilingue à nomination impérative ». V n'ayant pas les connaissances nécessaires en français pour reprendre son ancien emploi, on l'a envoyé suivre des cours de français. Dans une lettre datée du 8 avril 1997, V a informé la Chambre des communes qu'il désirait revenir au travail. Le bureau du président lui a répondu, le 12 mai 1997, que, en raison d'une réorganisation, son ancien poste deviendrait excédentaire à partir du 29 mai 1997. V a déposé deux griefs le 10 juillet 1997, dans lesquels il alléguait avoir fait l'objet de discrimination de la part du président et de la Chambre des communes, en raison de sa race, de sa couleur ou de son origine nationale ou ethnique. Il s'est aussi plaint d'avoir fait l'objet de harcèlement au travail. Il a allégué que la Chambre des communes refusait de continuer à l'employer. Le tribunal a rejeté l'objection sur le privilège parlementaire qu'avaient soulevée l'ancien président et la Chambre des communes. Le pourvoi de ces derniers a été rejeté. Ils ont interjeté appel devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Pour justifier la revendication d'un privilège parlementaire, l'assemblée ou le membre qui cherche à bénéficier de l'immunité qu'il confère doit démontrer que la sphère d'activité à l'égard de laquelle le privilège est revendiqué est si étroitement et directement liée à l'exercice, par l'assemblée ou son membre, de leurs fonctions d'assemblée législative et délibérante, y compris leur tâche de demander des comptes au gouvernement, qu'une intervention externe saperait l'autonomie dont l'assemblée ou son membre ont besoin pour accomplir leur travail dignement et efficacement. À l'audition du présent pourvoi, les appelants ont indiqué que le

privilège invoqué appartenait à la catégorie « gestion du personnel ». Bien que le privilège protège les relations entre la Chambre et certains de ses employés, les appelants ont tenu à invoquer le privilège le plus large possible, et ce, sans présenter de preuve justifiant une immunité aussi générale, ou de moindre portée, ni même, en fait, quelque preuve que ce soit de l'élément de nécessité. Puisqu'ils n'avaient pas établi l'existence du privilège étendu et englobant qu'ils revendiquaient, les intimés avaient droit à ce que le pourvoi soit tranché sur le fondement des lois ordinaires que le Parlement a édictées en matière de relations de travail et de droits de la personne pour les employés relevant de la compétence législative fédérale.

La Loi canadienne sur les droits de la personne s'applique aux employés du Sénat et de la Chambre des communes. Cependant, la LRTP est la loi attributive de compétence en matière de relations de travail relativement aux employés comme V, à l'objet de son grief (la discrimination) et à l'octroi d'une réparation permettant de régler un tel différend. Le mécanisme de règlement des différends prescrit par la LRTP, qui coexiste avec le mécanisme de règlement prévu par la Loi canadienne sur les droits de la personne, témoigne de l'intention du législateur d'écarter le processus relevant de la Commission canadienne des droits de la personne. Par conséquent, V aurait dû, en 1997, soumettre ses plaintes en matière de relations de travail par voie de grief sous le régime de la LRTP, comme il l'avait fait en 1995 alors qu'il avait obtenu partiellement gain de cause.

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Auclair v. Library of Parliament (2002), 2002 FCT 777, 2002 CarswellNat 1678, 2002 CFPI 777, 2002 CarswellNat 3363, 43 Admin. L.R. (3d) 312, 222 F.T.R. 124 (Fed. T.D.) — referred to

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P.S.A.C. v. Canada (House of Commons) (1986), 27 D.L.R. (4th) 481, 66 N.R. 46, 86 C.L.L.C. 14,034, [1986] 2 F.C. 372, (sub nom. *Chambre des Communes c. Conseil Canadien des relations du Travail)* 1986 CarswellNat 48F, 1986 CarswellNat 48 (Fed. C.A.) — distinguished

Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324 (2003), (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324)* 230 D.L.R. (4th) 257, (sub nom. *Social Services Administration Board (Parry Sound) v. Ontario Public Service Employees Union, Local 324)* 308 N.R. 271, (sub nom. *Social Services Administration Board (Parry Sound District) v. Ontario Public Service Employees Union, Local 324)* 177 O.A.C. 235, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324)* [2003] 2 S.C.R. 157, 31 C.C.E.L. (3d) 1, 47 C.H.R.R. D/182, 2003 SCC 42, 2003 CarswellOnt 3500, 2003 CarswellOnt 3501, 2003 C.L.L.C. 220-062, 7 Admin. L.R. (4th) 177 (S.C.C.) — referred to

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Penikett v. R. (1987), 21 B.C.L.R. (2d) 1, [1988] N.W.T.R. 18, 45 D.L.R. (4th) 108, [1988] 2 W.W.R. 481, 2 Y.R. 314, 1987 CarswellYukon 3 (Y.T. C.A.) — referred to

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240 D.L.R. (4th) 577, (sub nom. *Commission des droits de la personne & des droits de la jeunesse (Que.) v. Quebec (Attorney General))* 321 N.R. 290, 128 L.A.C. (4th) 1, 15 Admin. L.R. (4th) 1, 2004 SCC 39, 2004 CarswellQue 1343, 2004 CarswellQue 1344, (sub nom. *Quebec (Morin) v. Quebec (Attorney General))* 2004 C.L.L.C. 230-023 (S.C.C.) — distinguished

Québec (Procureure générale) c. Québec (Tribunal des droits de la personne) (2004), [2004] 2 S.C.R. 223, 121 C.R.R. (2d) 89, (sub nom. *Quebec (Attorney General) v. Quebec (Human Rights Tribunal))* 240 D.L.R. (4th) 609, (sub nom. *Commission des droits de la personne & des droits de la jeunesse (Que.) v. Quebec (Attorney General))* 321 N.R. 335, 2004 SCC 40, 2004 CarswellQue 1345, 2004 CarswellQue 1346, (sub nom. *Quebec (Charette) v. Quebec (Attorney General))* 2004 C.L.L.C. 230-024 (S.C.C.) — distinguished

R. v. Atlantic Sugar Refineries Co. (1976), 67 D.L.R. (3d) 73, (sub nom. *Ouellet (No. 1), Re)* 34 C.R.N.S. 234, 28 C.C.C. (2d) 338, 1976 CarswellQue 9 (C.S. Que.) — referred to

R. v. Behrens (2004), 2004 ONCJ 327, 2004 CarswellOnt 5315 (Ont. C.J.) — referred to

R. v. Bunting (1885), 7 O.R. 524 (Ont. C.A.) — considered

R. v. Graham-Campbell (1934), [1935] 1 K.B. 594 (Eng. K.B.) — not followed

R. v. Richards (1955), 92 C.L.R. 157, [1955] A.L.R. 705 (Australia H.C.) — referred to

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Regina Police Assn. Inc. v. Regina (City) Police Commissioners (2000), (sub nom. *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners)* 183 D.L.R. (4th) 14, [2000] 4 W.W.R. 149, 2000 SCC 14, 2000 CarswellSask 90, 2000

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Stockdale v. Hansard (1839), 112 E.R. 1112, 3 State Tr. N.S. 723, 9 Ad. & El. 1 (Eng. Q.B.) — followed

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s. 9 — referred to

Canada Labour Code, R.S.C. 1985, c. L-2
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Generally — referred to

s. 2(b) — referred to

s. 32(1) — referred to

Canadian Human Rights Act, R.S.C. 1985, c. H-6
Generally — referred to

Pt. I — considered

Pt. II — considered

Pt. III — considered

Pt. IV — considered

s. 2 — considered

s. 11 — referred to

s. 41 — referred to

s. 41(1) — referred to

s. 43(2) — considered

s. 47(1) — considered

s. 48.9 [en. 1998, c. 9, s. 27] — referred to

s. 54.1(2) [en. 1995, c. 44, s. 50] — considered

s. 54.1(2)(a) [en. 1995, c. 44, s. 50] — considered

s. 54.1(2)(b) [en. 1995, c. 44, s. 50] — considered

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted R.S.C. 1985, App. II, No. 5
Generally — referred to

Preamble — referred to

s. 18 — considered

House of Commons (Offices) Act, 1812 (52 Geo. 3), c. 11
Generally — referred to

Internal Economy of the House of Commons, Act respecting the, S.C. 1868, c. 27
Generally — referred to

Interpretation Act, R.S.C. 1985, c. I-21
s. 12 — referred to

Parliamentary Employment and Staff Relations Act, R.S.C. 1985, c. 33 (2nd Supp.)
Generally — referred to

s. 2 — referred to

s. 2(a) — considered

s. 2(b) — considered

s. 4 — referred to

s. 4(1) — considered

s. 5(1) — considered

s. 14 — referred to

s. 62(1) — considered

s. 62(1)(a)(i) — considered

Parliament of Canada Act, R.S.C. 1985, c. P-1
Generally — referred to

s. 4 — considered

Public Service Staff Relations Act, R.S.C. 1985, c. P-35
Generally — referred to

United States Constitution
Generally — referred to

Article I, s. 6, clause 1 — referred to

APPEAL by former Speaker of House of Commons and House of Commons from judgment reported at *Canada (House of Commons) v. Vaid* (2002), 2002 FCA 473, 2002 CarswellNat 3381, 2002 CAF 473, 2002 CarswellNat 3503, 22 C.C.E.L. (3d) 1, 296 N.R. 305, 2003 C.L.L.C. 230-011, 222 D.L.R. (4th) 339, [2003] 1 F.C. 602, 46 Admin. L.R. (3d) 200, 45 C.H.R.R. D/1, 235 F.T.R. 159 (note) (Fed. C.A.), with respect to parliamentary immunity objection to jurisdiction of Canadian Human Rights Tribunal.

POURVOI de l'ancien président de la Chambre des communes et de la Chambre des communes à l'encontre de l'arrêt publié à *Canada (House of Commons) v. Vaid* (2002), 2002 FCA 473, 2002 CarswellNat 3381, 2002 CAF 473, 2002 CarswellNat 3503, 22 C.C.E.L. (3d) 1, 296 N.R. 305, 2003 C.L.L.C. 230-011, 222 D.L.R. (4th) 339, [2003] 1 F.C. 602, 46 Admin. L.R. (3d) 200, 45 C.H.R.R. D/1, 235 F.T.R. 159 (note) (C.A. Féd.), qui portait sur l'objection de privilège parlementaire soulevée à l'encontre de la compétence du Tribunal canadien des droits de la personne.

***Binnie J.*:**

1 The former Speaker of the House of Commons, the Honourable Gilbert Parent, is accused of constructively dismissing his chauffeur, Mr. Satnam Vaid, for reasons that amount to workplace discrimination and harassment under the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. The issue on this appeal is whether it is open to the Canadian Human Rights Tribunal to investigate Mr. Vaid's complaint.

2 The former Speaker denies any impropriety, but he joins the House of Commons in a preliminary objection that the hiring and firing of House employees are "internal affairs" which may not be questioned or reviewed by any tribunal or court outside the House itself. This immunity, the appellants say, emerged from the struggle for independence by the House of Commons from the prerogatives of the King, the authority of the Royal courts of law, and the special rights of the House of Lords reaching back in part to the time of the Tudor Kings and Queens in the 16th century. The appellants contend that these hard-won powers and immunities, collectively referred to as the privileges of Parliament, permit the Senate and the House to conduct their employee relations free from interference from the Canadian Human Rights Commission or any other body outside Parliament itself.

3 The respondent Canadian Human Rights Commission, which seeks to investigate Mr. Vaid's allegations, says it is unthinkable that Parliament would seek to deny its employees the benefit of labour and human rights protections which Parliament itself has imposed on every other federal employer.

4 There are few issues as important to our constitutional equilibrium as the relationship between the legislature and the other branches of the State on which the Constitution has conferred

powers, namely the executive and the courts. The resolution of this issue is especially important when the action of the Speaker sought to be immunized from outside scrutiny is directed against a stranger to the House (i.e. not a Member or official) who is remote from the legislative functions that parliamentary privilege was originally designed to protect. The courts below held that parliamentary privilege does not include the freedom to discriminate on grounds prohibited by the *Canadian Charter of Rights and Freedoms* or the *Canadian Human Rights Act* because such discrimination is not necessary to the *proper* functioning of the Senate or House of Commons. On this view, an allegation of discrimination destroys any privilege that might otherwise immunize the Speaker's conduct from external review. I do not agree. The purpose of privilege is to recognize Parliament's *exclusive* jurisdiction to deal with complaints within its privileged sphere of activity. The proper focus, in my view, is not the grounds on which a particular privilege is exercised, but the prior question of the existence and scope of the privilege asserted by Parliament in the first place.

5 Focussing, then, on the scope of the claimed privilege, the respondents argue that the duties of the Speaker's chauffeur appear too remote from the legislative function of the House and that the respondent Vaid's dismissal is not immunized from external review by virtue of parliamentary privilege. I will deal with this issue at some length in the reasons that follow. My conclusion is that the onus was on the appellants to establish a privilege that immunizes their conduct from the ordinary law governing the resolution of disputes with support staff such as Mr. Vaid, and that the appellants have failed to do so. I would therefore reject the appellants' first ground of appeal based on an alleged parliamentary privilege. I would hold that the language used by Parliament in the *Canadian Human Rights Act* is wide enough to cover its own employees and that the sweeping exemption now asserted by the appellants has not been shown to be intended by Parliament nor, on general principles, is it necessary or justifiable as parliamentary privilege.

6 The appellants also put forward a narrower administrative law objection. They contend that the respondent Vaid falls within the group of employees for whom Parliament has enacted a special labour relations regime under the *Parliamentary Employment and Staff Relations Act*, R.S.C. 1985, c. 33 (2nd Supp.) ("PESRA"). Mr. Vaid, on this view, is entitled to invoke the principles of the *Canadian Human Rights Act*, but he must do so by the special procedure governing the bulk of parliamentary employees. I agree that the respondent Vaid's workplace complaints could have been adjudicated under PESRA (as indeed his earlier complaints were dealt with in 1995) and that the appellant House of Commons is entitled to require him to utilize the statutory machinery that Parliament has enacted, which is clearly stated to be the exclusive method of dispute resolution for employees such as the respondent Vaid. This conclusion, which rests entirely on administrative law principles and has nothing to do with parliamentary privilege, entitles the appellants to succeed. The appeal is therefore allowed.

I. Facts

7 Satnam Vaid worked as a chauffeur to successive Speakers of the House of Commons between 1984 and 1994. He was initially terminated on January 11, 1995 because it was said he refused to assume new duties under a changed job description and then refused alternative employment. He grieved the termination pursuant to PESRA. The matter was referred to adjudication and on July 27, 1995, the Board of Adjudication found in favour of Mr. Vaid and ordered that he be reinstated to his position as chauffeur ([1995] C.P.S.S.R.B. No. 74 (Can. P.S.S.R.B.)). The Board also concluded that there was evidence insufficient to support a finding of discrimination:

> Mr. Vaid has alleged discrimination and suggested that he might have been asked to clean dishes because of the colour of his skin. The evidence presented certainly does not permit me to reach that conclusion.

8 Mr. Vaid returned to work on August 17, 1995, at which time he was told that the chauffeur's position had been designated "bilingual imperative". Lacking the necessary French language skills to resume his former post, he was sent for French language training.

9 In a letter dated April 8, 1997, Mr. Vaid advised the appellant House of Commons that he wished to come back to work. The Speaker's office replied on May 12, 1997 that, because of reorganization, his former position would be made surplus effective May 29, 1997.

10 Mr. Vaid then filed two complaints with the respondent Commission, both dated July 10, 1997, alleging separately that the appellant Speaker and the appellant House of Commons discriminated against him on the basis of his race, colour and national or ethnic origin. He also complained of workplace harassment. With respect to the appellant House of Commons, he alleged refusal of continued employment.

II. Judicial History

11 In response to these complaints, the appellants challenged the jurisdiction of the Canadian Human Rights Tribunal to inquire into their conduct. The issue was heard by the Tribunal which, by a majority decision on April 25, 2001, ruled in favour of Mr. Vaid and the Commission ([2001] C.H.R.D. No. 15 (Can. Human Rights Trib.)). The appellants then sought a judicial review of this ruling. Their application was refused by the Federal Court - Trial Division, (2001), [2002] 2 F.C. 583, 2001 FCT 1332 (Fed. T.D.), and this refusal was affirmed by a unanimous Federal Court of Appeal, (2002), [2003] 1 F.C. 602, 2002 FCA 473 (Fed. C.A.).

12 Létourneau J.A., with whom Linden J.A. concurred, noted the quasi-constitutional status of the *Canadian Human Rights Act* and the fully constitutional status of parliamentary privilege. In his view, however, the parliamentary privilege claimed by the appellants did not exist.

13 He defined such privilege as "the powers of the House necessary to ensure its proper functioning and maintain its dignity and integrity" (para. 34). Létourneau J.A. stated that both the existence *and the exercise* of any power asserted by the legislature must be shown to be necessary.

> The Courts' review function, in cases like the present where a parliamentary privilege is claimed, I believe, involves two steps: the first one to determine that the powers claimed need to exist and the second, when satisfied as to the necessity of their existence, to determine that their exercise was necessary to ensure the proper functioning of the House and maintain its dignity and integrity. [Emphasis added; para. 36.]

14 In the majority view, an allegation of discrimination contrary to the *Charter or the Canadian Human Rights Act* was not immunized by parliamentary privilege because such discriminatory conduct, if proven, would actually diminish the integrity and dignity of the House, without improving its ability to fulfill its constitutional mandate. The enactment by Parliament of PESRA would, in any event, prevent privilege from applying.

15 On the administrative law point, Létourneau J.A. held that a clear legislative enactment is required to exempt an employer from the application of human rights obligations. In his view, PESRA is not such a clear legislative enactment. Consequently, parliamentary employees are entitled to invoke the assistance of the Canadian Human Rights Commission.

16 Rothstein J.A., concurring in the result, disagreed that the courts could review each *exercise* of a claimed privilege. "[I]t is the particular exercise of a valid privilege that is immune from the Court's scrutiny. However, what constitutes the scope of a valid privilege is a preliminary jurisdictional question" (para. 76). The appellants claimed that the right of the House of Commons to appoint and control its staff was immunized from any external review, but Rothstein J.A. concluded that no evidence or argument had been "put forward as to why a right to discriminate, contrary to the provisions of the CHRA" met the necessity test (para. 81). Accordingly, "parliamentary privilege does not displace application of the CHRA to employees of Parliament" (para. 84).

17 On the administrative law point, Rothstein J.A. noted that s. 2 of PESRA displaces other tribunals that might otherwise have concurrent jurisdiction. However, he was of the view that PESRA does not provide the comprehensive rights regarding human rights complaints that the *Canadian Human Rights Act* does, and as a result, the two statutes do not provide for "matters similar". As a matter of statutory interpretation, therefore, PESRA would not exclude application of the *Canadian Human Rights Act.*

18 In the result, Rothstein J.A. agreed with the majority that neither parliamentary privilege nor PESRA precluded the application of the *Canadian Human Rights Act* to employees of either Chamber.

III. Constitutional Question

19 On December 2, 2003, the Chief Justice stated the following constitutional question:

1. Is the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, constitutionally inapplicable as a consequence of parliamentary privilege to the House of Commons and its Members with respect to parliamentary employment matters?	1. La *Loi canadienne sur les droits de la personne*, L.R.C. 1985, ch. H-6, est-elle, du fait d'un privilège parlementaire, constitutionnellement inapplicable à la Chambre des communes et à ses membres en ce qui a trait aux relations de travail au Parlement ?

IV. Analysis

20 It is a wise principle that the courts and Parliament strive to respect each other's role in the conduct of public affairs. Parliament, for its part, refrains from commenting on matters before the courts under the *sub judice* rule. The courts, for their part, are careful not to interfere with the workings of Parliament. None of the parties to this proceeding questions the pre-eminent importance of the House of Commons as "the grand inquest of the nation". Nor is doubt thrown by any party on the need for its legislative activities to proceed unimpeded by any external body or institution, including the courts. It would be intolerable, for example, if a member of the House of Commons who was overlooked by the Speaker at question period could invoke the investigatory powers of the Canadian Human Rights Commission with a complaint that the Speaker's choice of another member of the House discriminated on some ground prohibited by the *Canadian Human Rights Act*, or to seek a ruling from the ordinary courts that the Speaker's choice violated the member's guarantee of free speech under the *Charter*. These are truly matters "internal to the House" to be resolved by its own procedures. Quite apart from the potential interference by outsiders in the direction of the House, such external intervention would inevitably create delays, disruption, uncertainties and costs which would hold up the nation's business and on that account would be unacceptable even if, in the end, the Speaker's rulings were vindicated as entirely proper.

21 Parliamentary privilege, therefore, is one of the ways in which the fundamental constitutional separation of powers is respected. In Canada, the principle has its roots in the preamble to our *Constitution Act, 1867* which calls for "a Constitution similar in Principle to that of the United Kingdom". Each of the branches of the State is vouchsafed a measure of autonomy from the others. Parliamentary privilege was partially codified in art. 9 of the U.K. *Bill of Rights* of 1689, 1 Will. & Mar., sess. 2, c. 2, but the freedom of speech to which it refers was asserted at least as early as 1523 (*Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament* (23rd ed. 2004), at p. 80). Parliamentary privilege is a principle common to all countries based on the Westminster system, and has a loose counterpart in the Speech or Debate Clause of the United States Constitution, art. 1, § 6, cl. 1.

22 The respondent Vaid does not quarrel either with the existence or the importance of parliamentary privilege. His argument is that the Speaker's attempt to treat his dismissal from his job as chauffeur as an expression of such lofty doctrine is to overreach, if not trivialize, its true role and function. Even if the employment arrangements of some employees closely connected to the legislative process are covered by privilege, the respondents argue that the Speaker goes too far in attempting to throw the mantle of this ancient doctrine over the dealings of the House with such support staff as chauffeurs, picture framers, locksmiths, car park administrators, catering staff and others who play comparable supporting roles on Parliament Hill.

23 Over the years, the assertion of parliamentary privilege has varied in its scope and extent. In the leading English case of *Stockdale v. Hansard* (1839), 9 Ad. & El. 1, 112 E.R. 1112 (Eng. Q.B.), the court was advised that "[t]he most trifling civil injuries to members [of Parliament], even trespasses committed upon their servants, though on occasions unconnected with the discharge of any Parliamentary duty, have been repeatedly the subject of enquiry [by either Chamber of Parliament] under the head of privilege" (pp. 1116-17) including "[k]illing Lord Galway's rabbits" and "[f]ishing in Mr. Joliffe's pond" (p. 1117). The court in *Stockdale v. Hansard* commented on this evidence that privilege "did not and could not extend to such a case" (p. 1156). On the other hand, a leading Canadian authority, *Beauchesne's Rules & Forms of the House of Commons of Canada* (6th ed. 1989), records at pp. 11-12 a ruling of the Speaker of the Canadian House of Commons on April 29, 1971 asserting a much narrower concept of privilege, as follows:

> On a number of occasions I have defined what I consider to be parliamentary privilege. Privilege is what sets Hon. Members apart from other citizens giving them rights which the public does not possess. I suggest that we should be careful in construing any particular circumstance which might add to the privileges which have been recognized over the years and perhaps over the centuries as belonging to members of the House of Commons. In my view, parliamentary privilege does not go much beyond the right of free speech in the House of Commons and the right of a Member to discharge his duties in the House as a member of the House of Commons. [Emphasis added.] (*House of Commons Debates*, vol. V, 3rd Sess., 28th Parl., April 29, 1971, at p. 5338)

24 It is evident that there have been variations in the extent of privilege asserted by Parliament over the years, as well as a difference on occasion between the scope of a privilege asserted by Parliamentarians and the scope of a privilege the courts have recognized as justified (as in *Stockdale v. Hansard*). In resolving such conflicts it is important that both Parliament and the courts respect "the legitimate sphere of activity of the other":

> Our democratic government consists of several branches: the Crown, as represented by the Governor General and the provincial counterparts of that office; the legislative body; the executive; and the courts. It is fundamental to the working of government as a whole that all

> these parts play their proper role. It is equally fundamental that no one of them overstep its bounds, that each show proper deference for the legitimate sphere of activity of the other. (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*), [1993] 1 S.C.R. 319 (S.C.C.), *per* McLachlin J., at p. 389)

To this, I would add the observation of Dickson C.J. in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at p. 91:

> There is an array of issues which calls for the exercise of judicial judgment on whether the questions are properly cognizable by the courts. Ultimately, such judgment depends on the appreciation by the judiciary of its own position in the constitutional scheme.

25 At the same time, relations between Parliament and its employees are clearly matters within the legislative authority of Parliament. The statutory language of the *Canadian Human Rights Act*, on its face, is broad enough to cover labour relations on Parliament Hill. There is much to be said for the respondents' view that Parliament should not be thought to intend to exempt its employees from access to human rights guarantees which Parliament itself has declared applicable to all "matters coming within the legislative authority of Parliament" (*Canadian Human Rights Act*, s. 2).

26 At this stage, a further constitutional point arises. The appellants say it is a well-established principle that an express provision of a statute is necessary to abrogate a privilege of Parliament or its members (*Duke of Newcastle v. Morris* (1870), L.R. 4 H.L. 660 (U.K. H.L.)). The respondents reply that human rights law is to be broadly interpreted, and that short of "[the] legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supersede all other laws when conflict arises", *per* Lamer J. in *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.), at p. 158; see also *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.); *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 (S.C.C.), at p. 339. In my view, for the reasons to be explained, the *Canadian Human Rights Act* does apply to the employees of the Senate and House of Commons of Canada.

27 In order to resolve the issues raised by this appeal, it is first necessary to discuss whether or not the privilege asserted by the appellants is well founded, and if so, whether it precludes resort by the respondent Vaid to independent adjudication.

A. General Principles of Parliamentary Privilege

28 The contours of parliamentary privilege, and the relationship between Parliament and the courts relative to its exercise, have been dealt with by this Court in a number of cases, most recently in connection with the "inherent" privileges of provincial legislative assemblies in *New Brunswick Broadcasting* and *Harvey v. New Brunswick (Attorney General)*, [1996] 2 S.C.R. 876 (S.C.C.).

29 While there are some significant differences between privilege at the federal level, for which specific provision is made in s. 18 of the *Constitution Act, 1867*, and privilege at the provincial level, which has a different constitutional underpinning, many of the relevant issues concerning privilege were resolved in *New Brunswick Broadcasting* and earlier cases, and there is no need to repeat the analysis here. For present purposes, it is sufficient to state a number of propositions that are now accepted both by the courts and by the parliamentary experts.

1. Legislative bodies created by the *Constitution Act, 1867* do not constitute enclaves shielded from the ordinary law of the land. "The tradition of curial deference does not extend to everything a legislative assembly might do, but is firmly attached to certain specific activities of legislative assemblies, i.e., the so-called privileges of such bodies" (*New Brunswick Broadcasting*, at pp. 370-71). Privilege "does not embrace and protect activities of *individuals*, whether members or non-members, simply because they take place within the precincts of Parliament." (U.K., Joint Committee on Parliamentary Privilege, vol. I, *Report and Proceedings of the Committee* (1999) ("British Joint Committee Report"), at para. 242 (emphasis in original).

2. Parliamentary privilege in the Canadian context is the sum of the privileges, immunities and powers enjoyed by the Senate, the House of Commons and provincial legislative assemblies, and by each member individually, without which they could not discharge their functions (*Beauchesne's Rules & Forms, at p. 11; Erskine May*, at p. 75; *New Brunswick Broadcasting*, at p. 380).

3. Parliamentary privilege does not create a gap in the general public law of Canada but is an important part of it, inherited from the Parliament at Westminster by virtue of the preamble to the *Constitution Act, 1867* and in the case of the Canadian Parliament, through s. 18 of the same Act. (*New Brunswick Broadcasting*, at pp. 374-78; *Telezone Inc. v. Canada (Attorney General)* (2004), 69 O.R. (3d) 161 (Ont. C.A.), at p. 165; and *Samson Indian Nation & Band v. Canada* (2003), [2004] 1 F.C.R. 556, 2003 F.C. 975 (F.C.)).

4. Parliamentary privilege includes

> ...the necessary immunity that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces ... in order for these legislators to do their legislative work. [Emphasis added.]

(J. P. J. Maingot, *Parliamentary Privilege in Canada* (2nd ed. 1997), at p. 12; *New Brunswick Broadcasting*, at p. 341; see *Fielding v. Thomas*, [1896] A.C. 600 (Nova Scotia P.C.), at pp. 610-11; *Kielley v. Carson* (1843), 4 Moo. P.C. 63, 13 E.R. 225 (Newfoundland P.C.), at pp. 235-36). The idea of necessity is thus linked to the autonomy required by legislative assemblies and their members to do their job.

5. The historical foundation of every privilege of Parliament is necessity. If a sphere of the legislative body's activity could be left to be dealt with under the ordinary law of the land without interfering with the assembly's ability to fulfill its constitutional functions, then immunity would be unnecessary and the claimed privilege would not exist (*Beauchesne's Rules & Forms*, at p. 11; Maingot, at p. 12; *Erskine May*, at p. 75; *Stockdale v. Hansard*, at p. 1169; *New Brunswick Broadcasting*, at pp. 343 and 382.

6. When the existence of a category (or sphere of activity) for which inherent privilege is claimed (at least at the provincial level) is put in issue, the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege *continues* to be necessary to the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive:

> The fact that this privilege has been upheld for many centuries, abroad and in Canada, is some evidence that it is generally regarded as essential to the proper functioning of a legislature patterned on the British model. However, it behooves us to ask anew: in the Canadian context of 1992, is the right to exclude strangers necessary to the functioning of our legislative bodies? [Emphasis added.] (*New Brunswick Broadcasting, per* McLachlin J., at p. 387)

7. "Necessity" in this context is to be read broadly. The time-honoured test, derived from the law and custom of Parliament at Westminster, is what "the dignity and efficiency of the House" require:

> If a matter falls within this necessary sphere of matters without which the dignity and efficiency of the House cannot be upheld, courts will not inquire into questions concerning such privilege. All such questions will instead fall to the exclusive jurisdiction of the legislative body. [Emphasis added.] (*New Brunswick Broadcasting*, at p. 383)

(In my view, the references to "dignity" and "efficiency" are also linked to autonomy. A legislative assembly without control over its own procedure would, said Lord Ellenborough C.J. almost two centuries ago, "sink into utter contempt and inefficiency" (*Burdett v. Abbott* (1811), 14 East 1, 104 E.R. 501 (Eng. Ex. Div.), at p. 559). "Inefficiency" would result from the delay and uncertainty would inevitably accompany external intervention. Autonomy is therefore not conferred on Parliamentarians merely as a sign of respect but because such autonomy from outsiders is *necessary* to enable Parliament and its members to get their job done.)

8. Proof of necessity may rest in part in "shewing that it has been long exercised and acquiesced in" (*Stockdale v. Hansard*, at p. 1189). The party who seeks to rely on the immunity provided by parliamentary privilege has the onus of establishing its existence.

> ...The onus of shewing that it is so lies upon the defendants; for it is certainly primâ facie contrary to the common law. [*Ibid.*, at p. 1189.]
>
> The burthen of proof is on those who assert it; and, for the purposes of this cause, the proof must go to the whole of the proposition... [*Ibid.*, at p. 1201.]

9. Proof of necessity is required only to establish the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is established, it is for Parliament, not the courts, to determine whether in a particular case the *exercise* of the privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts: "Each specific instance of *the exercise* of a privilege need not be shown to be necessary" (*New Brunswick Broadcasting*, p. 343 (emphasis added)).

See also *Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (2001), 54 O.R. (3d) 595 (Ont. C.A.); *Samson Indian Nation & Band*, at para. 13; *Martin v. Ontario*, [2004] O.J. No. 2247 (Ont. S.C.J.), at para. 13); *R. v. Richards* (1955), 92 C.L.R. 157 (Australia H.C.), at p. 162; *Egan v. Willis* (1998), 158 A.L.R. 527 (Australia H.C.); and *Huata v. Prebble*, [2004] 3 N.Z.L.R. 359, [2004] N.Z.C.A. 147 (New Zealand C.A.).

10. "Categories" include freedom of speech (*Stopforth v. Goyer* (1979), 23 O.R. (2d) 696 (Ont. C.A.), at p. 700; *Clark v. Canada (Attorney General)* (1977), 17 O.R. (2d) 593 (Ont. H.C.); U.K. *Bill of Rights* of 1689, art. 9; *Prebble v. Television New Zealand Ltd.* (1994), [1995] 1 A.C. 321 (New Zealand P.C.); *Hamilton v. Al-Fayed (No.1)*, [2000] 2 All E.R. 224 (U.K. H.L.)); control by the Houses of Parliament over "debates or proceedings in Parliament" (as guaranteed by the *Bill of Rights* of 1689) including day-to-day procedure in the House, for example the practice of the Ontario legislature to start the day's sitting with the Lord's Prayer (*Ontario (Speaker of the Legislative Assembly)*, at para. 23); the power to exclude strangers from proceedings (*New Brunswick Broadcasting*; *Zündel v. Liberal Party of Canada* (1999), 46 O.R. (3d) 410 (Ont. C.A.), at para. 16; *R. v. Behrens*, [2004] O.J. No. 5135, 2004 ONCJ 327 (Ont. C.J.))); disciplinary authority over members (*Harvey*; see also *Tafler v. British Columbia (Commissioner of Conflict of Interest)* (1998), 161 D.L.R. (4th) 511 (B.C. C.A.), at paras. 15-18; *Morin v. Crawford* (1999), 29 C.P.C. (4th) 362 (N.W.T. S.C.); and non-members who interfere with the discharge of parliamentary duties (*Payson v. Hubert* (1904), 34 S.C.R. 400 (S.C.C.), at p. 413; *Behrens*) including immunity of members from subpoenas during a parliamentary session (*Telezone Inc.*; *Ainsworth Lumber Co. v. Canada*

(Attorney General) (2003), 226 D.L.R. (4th) 93, 2003 BCCA 239 (B.C. C.A.); *Samson Indian Nation & Band*). Such general categories have historically been considered to be justified by the exigencies of parliamentary work.

11. The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege (*R. v. Atlantic Sugar Refineries Co.* (1976), 67 D.L.R. (3d) 73 (C.S. Que.), at p. 87). Thus in 1839, almost three decades before Confederation in Canada, the English courts rejected the authority of a formal resolution of the House of Commons that the court believed overstated the true limits of the privilege claimed (*Stockdale v. Hansard*, at p. 1156, *per* Denman C.J.; p. 1177, *per* Littledale J.; p. 1192, *per* Patteson J.; p. 1194, *per* Coleridge J.). The jurisdiction of the courts in adjudicating claims of privilege has since been accepted by authorities on British parliamentary practice (see *Erskine May*, at pp. 185-86). The same division of jurisdiction between the courts and the House was accepted by this Court in *Landers v. Woodworth* (1878), 2 S.C.R. 158 (S.C.C.), where Richards C.J., our first Chief Justice, had this to say at p. 196:

> [T]he courts will see whether what the House of Commons declares to be its privileges really are so, the mere affirmance by that body that a certain act is a breach of their privileges will not oust the courts from enquiring and deciding whether the privilege claimed really exists.

This jurisdictional rule has been accepted by authorities on the law and custom of the Canadian Parliament as well (see Maingot, at p. 66) and is not challenged in this appeal.

12. Courts are apt to look more closely at cases in which claims to privilege have an impact on persons outside the legislative assembly than at those which involve matters entirely internal to the legislature (*New Brunswick Broadcasting*, at p. 350; *Bear v. State of South Australia* (1981), 48 S.A.I.R. 604 (Australia Indus. Rel. Ct.); *Thompson v. McLean* (1998), 37 C.C.E.L. (2d) 170 (Ont. Gen. Div.)), at para. 21; *Stockdale v. Hansard*, at p. 1192).

30 It should be emphasized that a finding that a particular area of parliamentary activity is covered by privilege has very significant legal consequences for non-members who claim to be injured by parliamentary conduct, including those whose reputations may suffer because of references to them in parliamentary debate, for whom the ordinary law will provide no remedy. In *New Brunswick Broadcasting* itself, it was held that the press freedom guaranteed by s. 2(*b*) of the *Charter* did not prevail over parliamentary privilege, which was held to be as much part of our fundamental constitutional arrangements as the *Charter* itself. One part of the Constitution cannot abrogate another part of the Constitution (*Reference re Roman Catholic Separate High Schools Funding*, [1987] 1 S.C.R. 1148 (S.C.C.); *New Brunswick Broadcasting*, at pp. 373 and 390). In matters of privilege, it would lie within the exclusive competence of the legislative assembly itself

to consider compliance with human rights and civil liberties. The House, "with one voice, accuses, condemns and executes": *Stockdale v. Hansard*, at p. 1171.

B. Questions Left Open in the Earlier Cases

31 As mentioned earlier, *New Brunswick Broadcasting* and *Harvey* dealt with the inherent privilege of provincial legislatures, i.e. the measure of autonomy that is "inherent" in the creation of a legislative body under the *Constitution Act, 1867*. There was little doubt on the facts that the activity under review in those cases fell within the privilege claimed. The real dispute was over the legal status and effect of "inherent" privilege.

32 This case raises two new considerations. Firstly, does the "necessity" test apply to privilege enacted into law by Parliament pursuant to s. 18 of the *Constitution Act, 1867*, or are such laws, by reason of their enactment under a specific constitutional power, conclusive proof of necessity? In *Harvey*, McLachlin J., speaking for herself and L'Heureux-Dubé J., thought there was "much to recommend" such a necessity test in the provincial context (para. 73) but the Court was not called upon to decide the point and a majority of the judges decided the *Harvey* case on grounds unrelated to privilege. Secondly, in the case of an acknowledged category of privilege, to what extent can the courts, rather than the legislative assembly, define its scope and limits without embarking on an impermissible review of the exercise of the privilege itself?

1. Inherent Versus Legislated Privilege

33 The ruling in *New Brunswick Broadcasting*, read narrowly, affirmed constitutional status for privileges "inherent" in the creation of a provincial legislature. However, unlike the provinces, the federal Parliament has an express legislative power to enact privileges which may exceed those "inherent" in the creation of the Senate and the House of Commons, although such legislated privileges must not "exceed" those "enjoyed and exercised" by the U.K. House of Commons and its members at the date of the enactment. Section 18 of the *Constitution Act, 1867* (as amended in 1875) provides:

> 18. The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

In *New Brunswick Broadcasting*, Lamer C.J., writing separate concurring reasons, considered that such "legislated privilege" would lack the constitutional status of "inherent" privilege, and its exercise would be subject to *Charter* review (p. 364). His reasoning was that s. 32(1) of the *Charter*

itself provides that "[t]his Charter applies ... to the Parliament and government of Canada in respect of all matters within the authority of Parliament". As s. 18 of the *Constitution Act, 1867* places privilege within the authority of Parliament, therefore legislation affecting privilege, as any other legislation, will be subject to *Charter* review. However, the logic of the separate judgments written by McLachlin J. and La Forest J. point away from such a conclusion, their view was accepted as correct by a majority of the Court, and the point must now be taken as settled.

34 Historically, the legislative source of some privileges (e.g., art. 9 of the *Bill of Rights* of 1689) did not diminish the jurisdictional immunity they attracted. In *Bradlaugh v. Gossett* (1884), 12 Q.B.D. 271 (Eng. Q.B.), Stephen J. stated, at p. 278:

> I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings... [Emphasis added.]

The same rule was adopted in Canada (*Temple v. Bulmer*, [1943] S.C.R. 265 (S.C.C.); *Carter v. Alberta* (2002), 222 D.L.R. (4th) 40, 2002 ABCA 303 (Alta. C.A.), at para. 20, leave to appeal refused, [2003] 1 S.C.R. vii (S.C.C.)). The immunity from external review flowing from the doctrine of privilege is conferred by the nature of the function (the Westminster model of parliamentary democracy), not the source of the legal rule (i.e. inherent privilege versus legislated privilege). The doctrine of privilege attaching to a constitution "similar in Principle to that of the United Kingdom" under the preamble to the *Constitution Act, 1867* is not displaced by the wording of s. 32(1) of the *Charter*. As was pointed out in *New Brunswick Broadcasting*, parliamentary privilege enjoys the *same* constitutional weight and status as the *Charter* itself.

2. Section 4 of the Parliament of Canada Act

35 Parliament has conferred on the Senate and House of Commons the full extent of the privileges permitted under the Constitution. In doing so, however, our Parliament neither enumerated nor described the categories or scope of those privileges except by general incorporation by reference of whatever privileges were "held, enjoyed and exercised" by the U.K. House of Commons. Section 4 reads in its entirety as follows:

Parliament of Canada Act, R.S.C. 1985, c. P-1 **4.** The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise (*a*) such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members	*Loi sur le Parlement du Canada*, L.R.C. 1985, ch. P-1 **4.** Les privilèges, immunités et pouvoirs du Sénat et de la Chambre des communes, ainsi que de leurs membres, sont les suivants : *a*) d'une part, ceux que possédaient, à l'adoption de la *Loi constitutionnelle de 1867*, la Chambre des communes du Parlement du Royaume-Uni ainsi que ses membres, dans la mesure de leur compatibilité avec cette loi;

thereof, in so far as is consistent with that Act; and
(*b*) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

b) d'autre part, ceux que définissent les lois du Parlement du Canada, sous réserve qu'ils n'excèdent pas ceux que possédaient, à l'adoption de ces lois, la Chambre des communes du Parlement du Royaume-Uni et ses membres.

36 The main body of the privileges of our Parliament are therefore "legislated privileges", and according to s. 4 of the *Parliament of Canada Act* must be ascertained by reference to the law and customs of the U.K. House of Commons which are themselves composed of both legislated (including the *Bill of Rights* of 1689) and inherent privileges.

37 The task of defining such privileges is not straightforward. The scope of parliamentary privilege in the U.K. is a matter of controversy in the U.K. itself (as described at some length in the British Joint Committee Report). Parliamentary privilege in that country has evolved over time, and continues to evolve within a society, institutions, and constitutional arrangements different from our own. As an Australian parliamentary committee noted, the privileges of the Parliament at Westminster are "a mirror of the times when they were gained" (*Final Report of the Joint Select Committee on Parliamentary Privilege*, Parliamentary Paper No. 219/1984, at para. 3.9). Nevertheless the framers of the *Constitution Act, 1867* thought it right to use Westminster as the benchmark for parliamentary privilege in Canada, and if the existence and scope of a privilege at Westminster is authoritatively established (either by British or Canadian precedent), it ought to be accepted by a Canadian court without the need for further inquiry into its necessity. This result contrasts with the situation in the provinces where legislated privilege, without any underpinning similar to s. 18 of the *Constitution Act, 1867*, would likely have to meet the necessity test (*Harvey*, at para. 73).

38 Nevertheless, while s. 18 of the *Constitution Act, 1867* provides that the privileges of the Canadian Parliament and its members should not "exceed" those of the U.K., our respective Parliaments are not necessarily in lock step. It seems likely that there could be "differences"consisting of parliamentary practices inherent in the Canadian system, or legislated in relation to our own experience, which would fall to be assessed under the "necessity" test defined by the exigencies and circumstances of our own Parliament. This point would have to be explored if and when it arises for decision.

39 Accordingly, the first step a Canadian court is required to take in determining whether or not a privilege exists within the meaning of the *Parliament of Canada Act* is to ascertain whether the existence and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster (*Ainsworth Lumber*, para. 44).

In some matters, free speech in the House for example, the answer will readily be conceded. Other claims to privilege are less well established. Much of the U.K. law of privilege remains unwritten. Being unwritten, it retains a good deal of flexibility to meet changing circumstances, which is considered by some commentators to be a virtue (G. F. Lock, "Labour Law, Parliamentary Staff and Parliamentary Privilege" (1983), 12 *Indust. L. J.* 28, at p. 34). There has been little formal adjudication of the boundaries of U.K. privilege in the British courts, and Canadian courts are no more bound by a unilateral assertion of privilege by the British House of Commons than, as discussed earlier, would be the courts in Britain itself. In that jurisdiction, the courts exercise due diligence when examining a claim of parliamentary privilege that would immunize the exercise by either House of Parliament of a power that affects the rights of non-Parliamentarians. As stated in *Stockdale v. Hansard*, at p. 1192:

> All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. [Emphasis added.]

See also W. R. Anson, *The Law and Custom of the Constitution* (5th ed. 1922), vol. I., at p. 196. No less is expected of the courts in Canada.

40 Thus, when a claim to privilege comes before a Canadian court seeking to immunize Parliamentarians from the ordinary legal consequences of the exercise of powers in relation to non-Parliamentarians, and the validity and scope of the privilege in relation to the U.K. House of Commons and its members have not been authoritatively established, our courts will be required (as the British courts are required in equivalent circumstances) to test the claim against the doctrine of necessity, which is the foundation of all parliamentary privilege. Of course in relation to these matters, the courts will clearly give considerable deference to our own Parliament's view of the scope of autonomy it considers necessary to fulfill its functions. In the *Telezone* case, for example, the Ontario Court of Appeal stated:

> The views of the two Speakers are not binding on this court. However, given the experience and high reputation of these two parliamentarians, and in the context of a legal dispute that centres on the definition of a parliamentary privilege, it seems obvious that their careful and considered rulings should be accorded substantial respect. I do so. [MacPherson J.A., at para. 32.]

Having said that, if a dispute arises between the House and a stranger to the House, as in the present appeal, it will be for the courts to determine if the admitted category of privilege has the scope

claimed for it. This adjudication, it must again be emphasized, goes to the *existence* and *scope* of the House's jurisdiction, not to the propriety of its *exercise* in any particular case.

3. The Necessity Test

41 Parliamentary privilege is *defined* by the degree of autonomy necessary to perform Parliament's constitutional function. Sir Erskine May's leading text on the subject defines parliamentary privilege as

> ...the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. [Emphasis added; p. 75.]

Similarly, Maingot defines privilege in part as "the *necessary immunity* that the law provides for Members of Parliament, and for Members of the legislatures of each of the ten provinces and two territories, *in order for these legislators to do their legislative work*" (emphasis added; p. 12). To the question "necessary in relation to what?", therefore, the answer is necessary to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business. To the same effect, see R. Marleau and C. Montpetit, *House of Commons Procedure and Practice* (2000), where privilege is defined as "the rights and immunities that are *deemed necessary* for the House of Commons, as an institution, and its Members, as representatives of the electorate, *to fulfil their functions*" (emphasis added; p. 50). Reference may also be made to J. G. Bourinot, *Parliamentary Procedure and Practice in the Dominion of Canada* (4th ed. 1916), at p. 37:

> It is obvious that no legislative assembly would be able to discharge its duties with efficiency or to assure its independence and dignity unless it had adequate powers to protect itself and its members and officials in the exercise of their functions. [Emphasis added.]

42 The British Joint Committee Report adopted a similar approach:

> Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished. [Emphasis added; para. 3.]

43 While much latitude is left to each House of Parliament, such a purposive approach to the definition of privilege implies important limits. There is general recognition, for example, that privilege attaches to "proceedings in Parliament". Nevertheless, as stated in *Erskine May* (19th ed.

1976), at p. 89, not "*everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament.* Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more general sense before the House as having been ordered to come before it in due course" (emphasis added). (This passage was referred to with approval in *Clark.*) Thus in *R. v. Bunting* (1885), 7 O.R. 524 (Ont. C.A.), for example, the Ontario Court of Appeal held that a conspiracy to bring about a change in the government by bribing members of the provincial legislature was not in any way connected with a proceeding in Parliament and, therefore, the court had jurisdiction to try the offence. *Erskine May* (23rd ed.) refers to an opinion of "the Privileges Committee in 1815 that the re-arrest of Lord Cochrane (a Member of the Commons) in the Chamber (the House not sitting) was not a breach of privilege. Particular words or acts may be entirely unrelated to any business being transacted or ordered to come before the House in due course" (p. 116).

44 The purposive connection between necessity and the legislative function is also emphasized in the British Joint Committee Report:

> The dividing line between privileged and non-privileged activities of each House is not easy to define. Perhaps the nearest approach to a definition is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly. [Emphasis added; para. 247.]

45 Parliament's sovereignty when engaged in the performance of its legislative duties is undoubted (*Penikett v. R.* (1987), 45 D.L.R. (4th) 108 (Y.T. C.A.); *Sibbeston v. Northwest Territories (Attorney General)*, [1988] 2 W.W.R. 501 (N.W.T. C.A.); *British Railways Board v. Picken*, [1974] A.C. 765 (U.K. H.L.), at pp. 788-90). While the British Joint Committee Report may not yet have been formally adopted by the U.K. Parliament, its reasoning in these passages reflects a considered parliamentary view of the appropriate limits to claims of privilege, which seems to me also to reflect the underlying principles of the common law.

46 All of these sources point in the direction of a similar conclusion. In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.

4. Once a Claim to Privilege Is Made Out, the Court Will Not Enquire Into the Merits of its Exercise

47 The distinction between defining the scope of a privilege, which is the function of the courts, and judging the appropriateness of its exercise, which is a matter for the legislative assembly, may sometimes be difficult to draw in practice, but can nevertheless, be illustrated on the facts of this case. The appellants claim privilege in respect of relations with *all* employees. If the claim of privilege were justified, no court or body external to the House of Commons could enquire into the appellant Speaker's reasons for the constructive dismissal of the respondent Vaid. Such outside bodies would have no *jurisdiction* to do so. Nevertheless the courts are required to determine the *scope* of the privilege claimed. In this case, the inquiry is directed to whether the privilege extends to dealings with *all* categories of employees or just those categories of employees whose work is connected with the legislative and deliberative functions of the House. More specifically, the issue is whether the privilege extends to the ranks of service employees (such as catering staff) who support MPs in a general way, but play no role in the discharge of their constitutional functions.

48 Once the issue of scope is resolved, it will be for the House to deal with the categories of employees who are covered by the privilege, and the courts will not enquire into its *exercise* in a particular case. The limitation is of great practical importance. If the courts below were correct about a "human rights exception", for example, any person dealing with the House of Commons could circumvent the jurisdictional immunity conferred by privilege simply by alleging discrimination on grounds contrary to the *Canadian Human Rights Act*. Such a rule would amount to an invitation to an outside body to review the reasons behind *the exercise* of the privilege in each particular case. This would effectively defeat the autonomy of the legislative assembly which is the *raison d'être* for the doctrine of privilege in the first place.

49 On the other hand, the respondents' *preliminary* objection that the appellants have overstated the scope of their privilege by claiming exclusive and unreviewable authority over the hiring and firing of *all* employees working for the House of Commons goes to the scope of activity covered by the privilege, and as Rothstein J.A. pointed out in the court below, is a preliminary issue properly cognizable by the courts.

C. Description of the Category of Privilege Claimed in this Case

50 At the hearing of this appeal, the appellants identified the claimed privilege as "management of employees". I agree that this is a more appropriate category than one of the other terms suggested, "internal affairs". The latter is a term of great elasticity. If interpreted precisely it refers "especially to [the House's] control of its own agenda and proceedings" (Marleau and Montpetit, at p. 103). This is also the view taken by the British Joint Committee Report:

> ...the privilege of each House to administer its own internal affairs in its precincts applies only to activities directly and closely related to proceedings in Parliament. [para. 251]

51 On the other hand, if the term "internal affairs" were interpreted broadly as suggested by some of the interveners, it would duplicate most of the matters recognized independently as privileges, including the right to exclude strangers from the House (*New Brunswick Broadcasting*), the discipline of members (*Harvey*) and matters of day-to-day procedure in the House itself (*Ontario (Speaker of the Legislative Assembly) v. Ontario (Human Rights Commission)* (the "Lord's Prayer" case). The danger of dealing with a claim of privilege at too high a level of generality was also noted in the British Joint Committee Report:

> "Internal affairs" and equivalent phrases are loose and potentially extremely wide in their scope.... [It] would be going too far if it were to mean, for example, that a dispute over the ... dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way. [para. 241]

In light of the explicit link made in s. 18 of our *Constitution Act, 1867* to the "privileges, immunities, and powers ... enjoyed, and exercised by the Commons House of Parliament of the United Kingdom ... and by the members thereof", these words of disclaimer by a joint committee of British Parliamentarians deserve careful consideration.

52 I therefore turn to the appellants' contention that "the power of the Speaker of the House of Commons to hire, manage and dismiss House employees is among the constitutionally entrenched parliamentary privileges over which the House has exclusive jurisdiction. This exclusive jurisdiction extends to the investigation and adjudication of workplace discrimination claims" (appellants' factum, at para. 2). The appellants' position goes well beyond the more limited privilege outlined in the British Joint Committee Report and would cover with immunity *all* dealings with *all* employees without exception who work for the legislative branch of government.

D. Proof of the Category of Privilege Claimed in this Case

53 The onus lies on the appellants to establish that the category and scope of privilege they claim do not exceed those that "at the passing of [the *Parliament of Canada*] Act [were] held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom ... and by the members thereof".

54 I will examine first whether this issue has been authoritatively resolved in the courts of Canada or the United Kingdom and, if not, I will proceed to measure the appellants' claim against the test of necessity in relation to what is required "in order for these legislators to do their legislative work" (Maingot, at p. 12).

E. Step One: Has the Existence of a General Privilege in Relation to the "Management of Employees" Been Established by Prior Authority?

1. Canadian Authority

55 The appellants rely on the decision of the Federal Court of Appeal in *P.S.A.C. v. Canada (House of Commons)*, [1986] 2 F.C. 372 (Fed. C.A.). In that case, the court set aside a decision of the Canada Labour Relations Board that had certified a union as the bargaining agent for a unit comprising employees of the House of Commons that included elevator operators and catering employees. However the decision of the Federal Court of Appeal was based on an interpretation of the text of the *Canada Labour Code*. Pratte J.A., for the majority, observed that "parliamentarians, *rightly or wrongly*, consider the right of the House and the Senate to appoint and control their staff as one of their privileges" (emphasis added; p. 384). In the court's view, however, the Houses of Parliament simply did not fall within the statutory definition of an "employer". (The statutory language of the *Canadian Human Rights Act* presents no such obstacle.)

56 The appellants can show that historically both the House of Commons in Britain and in Canada had the *power* to hire and fire employees, but this is not proof of the necessity that such hiring and firing be *immunized* from judicial review by the doctrine of parliamentary privilege. Both s. 18 of the *Constitution Act, 1867* and s. 4 of the *Parliament of Canada Act* differentiate among the "privileges, immunities and powers" of Parliament.

57 Counsel referred the Court to several historical documents which, it was alleged, established the existence of such a privilege in Britain prior to 1867, as well as the existence of that privilege here in Canada. In particular, the *House of Commons (Offices) Act*, 1812 (U.K.), 52 Geo. III, c. 11, allows for complaints as to the "Misconduct or Unfitness of any Clerk, Officer, Messenger or other Person attendant on the House of Commons" to be made to the Speaker, and provides the Speaker with the power to suspend or remove those individuals found to be guilty of such misconduct. This statute is said to codify the practice of the time. In the Canadian context, we were referred to *An Act respecting the internal Economy of the House of Commons*, S.C. 1868, c. 27, which incorporates much of the same language as the British Act just mentioned.

58 Standing Order 151 of the House of Commons, which has remained unchanged since its adoption in 1867, provides:

> The Clerk of the House is responsible for the safe-keeping of all papers and records of the House, and has the direction and control over all the officers and clerks employed in the offices, subject to such orders as the Clerk may, from time to time, receive from the Speaker or the House. [Emphasis added.]

While the appellants cite this in support of their claim, the intervenors Senators Joyal and Jaffer point out that Standing Orders are not acts "of the Parliament of Canada" within s. 18 of the *Constitution Act, 1867* and, in any event, Standing Order 151 refers to powers, not immunities.

59 In any event, the powers conferred by this legislation and Standing Order 151 are equivalent to the sort of authority routinely conferred on Deputy Ministers to enable them to manage the departments of government. There is nothing here that purports to *immunize* the exercise of those powers from the constraints imposed by the ordinary law of the land (which in the case of federally regulated employees is largely the creature of Parliament itself).

60 The appellants argue that the "privilege" respecting labour relations is recognized and affirmed by s. 4(1) of PESRA which states:

> 4.(1) Nothing in this Part abrogates or derogates from any of the privileges, immunities and powers referred to in section 4 of the *Parliament of Canada Act*.

But, as I see it, s. 4(1) simply begs the question of privilege. If no privilege can be shown to exist, there is nothing from which PESRA can abrogate or derogate.

2. British Authority

61 We were not referred to any judicial authority in the U.K. on this point, and the British Joint Committee Report does not support the existence of a compendious privilege over "management of employees". On the contrary, the Joint Committee of Parliamentarians at Westminster writes:

> The Palace of Westminster is a large building; it requires considerable maintenance; it provides an extensive range of services for members; it employs and caters for a large number of staff and visitors. These services require staff and supplies and contractors. For the most part, and rightly so, these services are not treated as protected by privilege. [Emphasis added; para. 246]...
>
> It follows that management functions relating to the provision of services in either House are only exceptionally subject to privilege. [Emphasis added; para. 248.]

I have already referred to the British Joint Committee's view that it "would be going too far" to hold that "a dispute over the ... dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way" (para. 241).

62 It is clear from these observations that, in the U.K., the management of *some* employees would be covered by privilege but only if a connection were established between that category of employees and the exercise by the House of its functions as a legislative and deliberative assembly, including its role in holding the government to account. A privilege in those terms would be considerably narrower than that claimed by the appellants.

63 The appellants also rely on the opinion of the English Court of King's Bench in *R. v. Graham-Campbell* (1934), [1935] 1 K.B. 594 (Eng. K.B.). In that case, the satirist A. P. Herbert (author of

Uncommon Law and other parodies) laid an information against fifteen Members of Parliament, and a House employee, for serving alcohol in the Palace of Westminster without a licence. In a brief five paragraph judgment, Lord Hewart stated that the "internal affairs" of the House included the service of alcohol and that in any event the Licensing Acts were, in their terms "quite inapplicable to the House of Commons" (p. 602). In so holding, Lord Hewart "departed", as he admitted at p. 602, from the "observations of my illustrious predecessor, Lord Russell C.J., in *Williamson v. Norris*, [1899] 1 Q.B. 7 (Eng. Q.B.), 12". The facts of the case are readily distinguishable, of course. The impact of liquor services would be felt only by members of Parliament and their guests. The *R. v. Graham-Campbell* case did not involve the exercise of powers to the disadvantage of non-members, where *Stockdale v. Hansard*, at p. 1192, requires more careful scrutiny.

64 The appellants read *R. v. Graham-Campbell* as authority for treating the precincts of Parliament as an "enclave" or "statute-free zone" immune, at least for purposes of the liquor licensing laws, from the ordinary laws of the land. I think this goes too far. The "enclave" theory was explicitly rejected by this Court in *Harvey*, as well as by the British Joint Committee Report, at para. 242.

65 Nevertheless, it is the decision of the Court of King's Bench in the *R. v. Graham-Campbell* case that is cited by Maingot as the basis for his assertion that parliamentary privilege covers the management of all employees. Maingot writes:

> The courts, however, accept that they do not have any jurisdiction over the "internal proceedings" of the House of Commons or of the Senate or of a legislature. Apart from what takes place officially in the House and in committee, this also includes areas of administrative concern, such as the sale of liquor on the premises and the rights of employees in their relations with the House of Commons or Senate... [p. 301]

66 In my view, with respect, Maingot's statement is too broad. It overgeneralizes from a case dealing with the authority of Members of Parliament to make their own arrangements for drinking alcohol, which is really of concern only to themselves, to an immunity in relation to the exercise of powers of dismissal over *all* categories of employees, whether in violation of the human rights standards established by Parliament itself, or otherwise. As noted in the British Joint Committee Report, while privilege is said to extend to the "internal affairs" of the House, "[t]his heading of privilege best serves Parliament if not carried to extreme lengths" (para. 241).

67 Lord Hewart's judgment has been the subject of considerable criticism. Professor R. F. V. Heuston calls the decision a "somewhat unsatisfactory judgment". (*Essays in Constitutional Law* (2nd ed. 1964), at p. 94). *Erskine May* comments that "Lord Hewart CJ took a much more liberal view of the proper extent of the internal proceedings of the House than his predecessor in 1899" (23rd ed., p. 189). The British Joint Committee Report itself commented as follows:

> This decision, which has not escaped criticism, has spawned difficulties and anomalies, mainly but not solely in the field of employment.... Parliamentary privilege exists to enable members to discharge their duties to the public. It cannot be right that this privilege should have the effect that Parliament itself, within the place it meets, is not required to comply with its own laws on matters such as health and safety, employment, or the sale of alcohol. [para. 250]
>
> . . . . .
>
> Whether the decision in the *A.P. Herbert* case was in accordance with earlier cases is not a matter we need pursue. The decision has never been considered in a higher court. For the purposes of this review, it is the practical consequences that matter. We consider the practical consequences of this decision are not satisfactory. [para. 251]

(It is useful at this point to note that the Chairman of the British Joint Committee was Lord Nicholls of Birkenhead, one of the Law Lords.)

68 An earlier Commons Privileges Committee looking into the showing of a film at Westminster, that was said to be banned on national security grounds (the *Zircon* affair) took a similarly dim view of the enclave theory:

> It might be thought ... that the fact that something is done within the precincts of the House might afford that action some kind of immunity or protection of privilege. This would mean that the precincts of the House would somehow be treated as a sanctuary from the operation of the law, irrespective of whether the activities concerned were a proceeding in Parliament.... Your Committee can find no precedent for the House affording its Members any privileges on the *sole* ground that their activities were within the precincts.... The fact that the Zircon film was to be shown in the precincts therefore gave those responsible no privileged protection. (First Report from the Committee of Privileges, House of Commons, Session 1986-87, Speaker's Order of 22 January 1987 on a Matter of National Security, at para. 17)

69 In my view, with respect, we should not accept as authoritative the *R. v. Graham-Campbell* case as establishing an immunity covering all rights of all employees "in their relations with the House of Commons or Senate" as Maingot contends (p. 301). This is a point that Lord Hewart did not purport to decide and, given the criticism the *R. v. Graham-Campbell* decision has received in the U.K. by Parliamentarians themselves (in some sense an admission against interest), I do not think it should be accepted here as resolving the point in dispute.

70 I conclude that British authority does not establish that the House of Commons at Westminster is immunized by privilege in the conduct of *all* labour relations with *all* employees irrespective

of whether those categories of employees have any connection (or nexus) with its legislative or deliberative functions, or its role in holding the government accountable.

F. Step Two: Can the Privilege Claimed by the Appellants Be Supported as a Matter of Principle Under the Necessity Test?

71 I have already discussed the necessity test in an earlier section of this judgment and will not repeat that discussion here.

72 The employment roster of the House of Commons in 2005 is very different from that of 1867. In the early period, the House of Commons had only 66 permanent staff and 67 sessional employees. At present, according to the Human Resources Section of the House of Commons, there are 2377 employees. These include many departments and services unknown in 1867. The Library of Parliament alone employs 298 people, more than twice the total number of House employees in 1867. The Information Services for the House now has 573 employees. Not all of these greatly expanded services relate directly to the House's function as a legislative and deliberative body. Parliamentary Precinct Services employs over 800 staff including a locksmith, an interior designer, various curators, five carpenters, a massage therapist, two picture framers, a chief of parking operations and two traffic constables. Parliamentary Corporate Services includes several kitchen chefs, lesser cooks and helpers, three dishwashers/potwashers and other catering support staff. There is no doubt that the House of Commons regards *all* of its employees as helpful but the question is whether that definition of the scope of the privilege it asserts is too broad. Is the management of *all* employees, to use the words of the British Joint Committee Report, "so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly"? (para. 247) In other words, can it be said that immunity from outside scrutiny in the management of *all* service employees is such that without it, in the words of *Erskine May*, the House and its members "could not discharge their functions"? (23rd ed. p. 75) As stated earlier, this is not the view from Westminster where the British Joint Committee Report said that "...[It] would be going too far if [privilege] were to mean, for example, that a dispute over the ... dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way" (para. 241).

73 Nor is it the view from Australia where it was held that an injury to a waitress in a parliamentary restaurant was not part of the internal business of Parliament and was not protected by privilege: *Bear*.

74 Nor is it the view in the United States, whose Constitution guards the separation of powers at *least* as strictly as does our own. In *Walker v. Jones* (1984), 733 F.2d 923 (U.S. Dist. Col. App. 1984), the U.S. Court of Appeals for the District of Columbia Circuit considered the application of the Speech or Debate Clause of the United States Constitution in the context of an employment-related discrimination complaint. Ms. Walker managed the House of Representatives' restaurants

and claimed that she was terminated on the basis of sex discrimination. Ginsburg J., now of the U.S. Supreme Court, writing for the majority of the Federal Court of Appeals, stated that the purpose of the Speech or Debate Clause is "to secure against executive or judicial interference the processes of the nation's elected representatives leading up to the formulation of legislative policy and the enactment of laws" (p. 928). In finding that Ms. Walker's claim could proceed, the majority found that personnel actions relating to the management of congressional food services were "too remote from the business of legislating to rank 'within the legislative sphere'" (p. 928). Ginsburg J. pointed out that the work of this category of employees may advance a member's general welfare, but did not relate to his or her legislative functions. One must make due allowance, of course, for the fact that the United States has a congressional rather than a parliamentary system, but the conclusion that the claim exceeded what was necessary to a legislative body is consistent with the view taken in parliamentary jurisdictions.

75 I have no doubt that privilege attaches to the House's relations with *some* of its employees, but the appellants have insisted on the broadest possible coverage without leading any evidence to justify such a sweeping immunity, or a lesser immunity, or indeed any evidence of necessity at all. We are required to make a pragmatic assessment but we have been given no evidence on which a privilege of more modest scope could be delineated. As pointed out 166 years ago in *Stockdale v. Hansard*:

> The burden of proof is on those who assert [the privilege] and, for the purposes of this cause, the proof must go to the whole of the proposition. [Emphasis added; p. 1201.]

In any event, it would not be fair to the respondent Vaid to substitute at this stage a description of a narrower privilege that he was not called upon to address.

76 The appellants having failed to establish the privilege in the broad and all-inclusive terms asserted, the respondents are entitled to have the appeal disposed of according to the ordinary employment and human rights law that Parliament has enacted with respect to employees within federal legislative jurisdiction.

G. Do Parliamentary Employees Fall Within the Scope of the Canadian Human Rights Act?

77 The *Canadian Human Rights Act* is the Act dealing with prohibitions and enforcement and is divided into four parts. Part I sets out the prohibited grounds of discrimination. Part II establishes the Canadian Human Rights Commission. Part III describes discriminatory practices and sets out general provisions for investigation, conciliation, settlement, adjudication, compensation and punishment. Part IV makes the Act "binding on Her Majesty in right of Canada".

78 Part III is of particular relevance, because it is these investigative and enforcement provisions that give rise to the appellants' concern about the potential intrusion of strangers into the workings of the House of Commons. Under s. 43(2), an investigator is designated to investigate

the complaint. If the investigator is unable to resolve the issues, the Commission may refer the dispute to a "conciliator" under s. 47(1). If there is no settlement, the matter then goes on to a Canadian Human Rights Tribunal which has broad powers under s. 48.9 to enforce an employer's participation in its hearings. Under s. 54.1(2), a tribunal could require the House of Commons "to adopt a special program, plan or arrangement" containing "(*a*) positive policies and practices designed to ensure that members of designated groups achieve increased representation in the employer's workforce; or (*b*) goals and timetables for achieving that increased representation".

79 On the face of it, the *Canadian Human Rights Act* applies to all employees of the federal government including those working for Parliament. Section 2 provides as follows:

> **2.** The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> **2.** La présente loi a pour objet de compléter la législation canadienne en donnant effet, dans le champ de compétence du Parlement du Canada, au principe suivant : le droit de tous les individus, dans la mesure compatible avec leurs devoirs et obligations au sein de la société, à l'égalité des chances d'épanouissement et à la prise de mesures visant à la satisfaction de leurs besoins, indépendamment des considérations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'état matrimonial, la situation de famille, la déficience ou l'état de personne graciée.

80 The appellants argue that the *Canadian Human Rights Act* "has no application to the House of Commons and its members because it does not so expressly provide" (*Duke of Newcastle v. Morris*). This argument cannot be accepted for a number of reasons. Firstly, the argument presupposes the prior establishment of a parliamentary privilege, which has not been done. Secondly, the "presumption" suggested by Lord Hatherley 135 years ago is out of step with modern principles of statutory interpretation accepted in Canada, as set out in Driedger's *Construction of Statutes* (2nd ed. 1983):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [p. 87]

This approach was recently affirmed in *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26, and *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2 (S.C.C.), at para. 33, and is reinforced by s. 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, which

provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". Such interpretative principles apply with special force in the application of human rights laws.

81 There is no indication in the language of s. 2 that the *Canadian Human Rights Act* was *not* intended to extend to employees of Parliament. There is no reason to think that Parliament "intended" to impose human rights obligations on every federal employer except itself. There is no indication that Parliament intended to exclude its own employees when it stated, in s. 2 of the *Canadian Human Rights Act*, that

> ...all individuals should have an opportunity equal with other individuals to make for themselves the lives that they are able and wish to have and to have their needs accommodated, consistent with their duties and obligations as members of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

As stated earlier, the *Canadian Human Rights Act* is a quasi-constitutional document and we should affirm that any exemption from its provisions must be clearly stated.

82 I conclude therefore that the *Canadian Human Rights Act* does apply to employees of the Senate and House of Commons. That is not an end to the matter, of course. The appellant contends that Parliament has created a specific regime governing the labour relations of its own employees under PESRA. The appellants argue that the complaint of the respondent Vaid falls within the terms of PESRA, to which Parliament has granted exclusive authority in such matters. This is what I referred to earlier as the administrative law argument.

H. Application of the Parliamentary Employment and Staff Relations Act

83 PESRA confers labour relations' jurisdiction over employees like the respondent Vaid, the subject matter of his grievance (discrimination) and the remedial powers to resolve such a grievance. The issue is whether PESRA's system of redress, which runs parallel to the enforcement machinery provided under the *Canadian Human Rights Act*, manifests a parliamentary intention to oust the dispute resolution machinery of the Canadian Human Rights Commission. I conclude that it does.

1. Jurisdiction Over Parliamentary Employees in the Position of Mr. Vaid

84 Section 2 of PESRA in its terms applies to all parliamentary employees with some exceptions (s. 4) not here relevant. Section 2 provides:

2. Subject to this Act, this Act applies to and in respect of every person employed	2. La présente loi, sous réserve de ses autres dispositions, s'applique,

by, and applies to and in respect of, — (*a*) the Senate, the House of Commons or the Library of Parliament, and —(*b*) a Member of Parliament who, in that capacity, employs that person or has the direction or control of staff employed to provide research or associated services to the caucus members of a political party represented in Parliament,

d'une part, aux personnes attachées dans leur travail, comme employés, au Sénat, à la Chambre des communes, à la Bibliothèque du Parlement ou à des parlementaires, d'autre part à ces institutions et aux parlementaires qui, ès qualités, les emploient ou qui ont sous leur direction ou leur responsabilité des documentalistes ou des personnes chargées de fonctions similaires affectés au service des membres de groupes parlementaires, ainsi qu'à ces documentalistes ou personnes;

The respondent Vaid is such an employee.

2. PESRA Applies to the Subject Matter of the Respondent Vaid's grievance

85 PESRA is intended to enforce a full range of employee rights and benefits. Section 5(1) announces that

> 5.(1) The purpose of this Part is to provide to certain persons employed in Parliamentary service collective bargaining and other rights in respect of their employment.

86 Section 62(1)(*a*)(i) of PESRA permits any employee who feels aggrieved by the interpretation or application of "a provision of a statute" to present a grievance. Reference to a "provision of a statute" would include the human rights norms set out in the *Canadian Human Rights Act*. For ease of reference, s. 62(1) in its entirety reads as follows:

> 62.(1) Where any employee feels aggrieved
>
> (a) by the interpretation or application, in respect of the employee, of
>
> (i) a provision of a statute, or of a regulation, by-law, direction or other instrument made or issued by the employer, dealing with terms and conditions of employment, or
>
> (ii) a provision of a collective agreement or an arbitral award, or
>
> (b) as a result of any occurrence or matter affecting the employee's terms and conditions of employment, other than a provision described in subparagraph (*a*)(i) or (ii),

> the employee is entitled, subject to subsection (2), to present the grievance at each of the levels, up to and including the final level, in the grievance process provided for by this Part.

87 It was therefore open to the respondent Vaid to submit a grievance under PESRA in 1997 as did in 1995 (with partial success) to pursue his workplace complaints.

3. The Remedial Powers of a PESRA Adjudicator

88 While the respondent Vaid's complaints do not specify the relief he seeks (appellants' record, at pp. 247-50), PESRA adjudicators are invested with broad powers to resolve workplace grievances. The relief sought by the respondent Vaid in 1995 was reinstatement. The PESRA adjudicator ordered reinstatement once. If the respondent Vaid's complaint of constructive dismissal is well-founded, a PESRA adjudicator has authority to do so again. The PESRA adjudicator also considered (and rejected) the respondent Vaid's earlier complaints of discrimination and harassment, as mentioned above. Those, too, were issues that could be *and were* dealt with under PESRA.

4. PESRA Jurisdiction Is Exclusive

89 Section 2 of PESRA provides that where other federal legislation deals with "matters similar to those provided under" PESRA, PESRA prevails, i.e.

> ...except as provided in this Act, nothing in any other Act of Parliament that provides for matters similar to those provided for under this Act ... shall apply....

I. Does Labour Adjudication Under PESRA Oust the Investigative and Dispute Resolution Machinery of the Canadian Human Rights Act on the Facts of this Case?

90 I have concluded, as stated, that the *Canadian Human Rights Act* anti-discrimination norms are applicable to parliamentary employees. The remaining question is whether the investigatory and adjudicatory *Canadian Human Rights Act* procedures also apply as the respondents contend, or whether the respondent Vaid is obliged to seek relief under PESRA.

91 The Court has in a number of cases been required to examine competing legislative schemes to determine which of the potential adjudicative bodies is intended by the legislature to resolve a dispute. Mr. Vaid's claim of workplace discrimination and harassment could potentially fall under both PESRA and the *Canadian Human Rights Act*. The allegation of jurisdiction in such circumstances is a familiar administrative law problem, even in the context of human rights tribunals (see *Québec (Procureure générale) c. Québec (Tribunal des droits de la personne)*, [2004] 2 S.C.R. 223, 2004 SCC 40 (S.C.C.), (hereafter "*Charette*"), and *Québec (Commission des*

droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale), [2004] 2 S.C.R. 185, 2004 SCC 39 (S.C.C.), (hereafter "*Morin*")).

92 In the *Morin* case, the Chief Justice said, at para. 14:

> ...the question in each case is whether the relevant legislation applied to the dispute at issue, taken in its full factual context, establishes that the labour arbitrator has exclusive jurisdiction over the dispute.

93 The fact that the respondent Vaid claims violations of his human rights does not automatically steer the case to the Canadian Human Rights Commission because "one must look not to the legal characterization of the wrong, but to the facts giving rise to the dispute" (*Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 (S.C.C.), at para. 49; *St. Anne Nackawic Pulp & Paper Co. v. C.P.U., Local 219*, [1986] 1 S.C.R. 704 (S.C.C.), at p. 721).

94 In this case, the complaint against the House of Commons alleges dismissal and discrimination. The "facts giving rise to the dispute", as set out in the complaint, make only one explicit reference to the respondent Vaid's ethnic origin, namely that "[the Speaker] initiated a conversation about the caste system in India. He pressed me to tell him into which caste I had been born" (appellants' record, at p. 247). Other than that, the respondent Vaid relates a number of events in the course of his employment which, on the face of it, allege demeaning or unreasonable treatment inconsistent with the alleged terms of employment. The respondent Vaid takes the view that this behaviour was *motivated* by racial prejudice. His allegations are specific to the former Speaker and his Executive Assistant, i.e.:

> • [The appellant Speaker] suggested that I was overqualified for the position.
>
> • [The appellant Speaker] questioned my wife regarding her employment and made her feel as though he was trying to assess whether she could financially support me in the event that I lost my job.
>
> • While I was driving the [appellant Speaker] in February 1994, [he] initiated a conversation about the caste system in India. He pressed me to tell him into which caste I had been born.
>
> • The Speaker's Executive Assistant indicated that because of budgetary cuts, he wanted to place me on a split shift and asked me to take on additional duties, including washing dishes. I responded that I would work a split shift, and I would wash dishes if he could demonstrate that other chauffeurs were also asked to take on this duty.
>
> • In March 1994, I started wearing a soft cervical collar on the job, necessitated by a whiplash injury suffered earlier in the year. On March 25, 1994, the Executive Assistant

> advised me that I was not to drive the [appellant Speaker] while wearing the collar. My driving duties were taken away and assigned to a white, unilingual (English) employee.
>
> • On October 14, 1994, the [appellant House of Commons] contacted me to offer me work as a photocopier operator, a messenger or a mini-van operator. Alternatively, I was offered a severance package. I advised the [appellant House of Commons] that I wished to be reinstated to my position as chauffeur to the Speaker immediately.
>
> • Since my driving duties were taken away from me in March 1994, they have been carried out by two other employees, both of whom are white.
>
> • I believe that my right to equal treatment in employment has been infringed upon by the respondent because of my race, colour and ethnic or national origin. [Appellants' record, at pp. 247-50]

There is nothing here, in my respectful opinion, to lift these complaints out of their specific employment context.

95 It is true, as the respondents submit, that PESRA is essentially a collective bargaining statute rather than a human rights statute. The substantive human rights norms set out in the *Canadian Human Rights Act* are not set out in PESRA. Nevertheless, PESRA permits employees who complain of discrimination to file a grievance and to obtain substantive relief. I do not suggest that all potential claims to relief under the *Canadian Human Rights Act* would be barred by s. 2 of PESRA, but in the present type of dispute, there is clearly a measure of duplication in the two statutory regimes and the purpose of s. 2 is to avoid such duplication. Parliament has determined that grievances of employees covered by PESRA are to be dealt with under PESRA. A grievance that raises a human rights issue is nevertheless a grievance for purposes of employment or labour relations (see *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157, 2003 SCC 42 (S.C.C.)).

96 The respondents point out some drawbacks, from the employee's perspective, in PESRA. For example, while judicial review is available, see e.g. *Auclair v. Library of Parliament* (2002), 222 F.T.R. 124, 2002 FCT 777 (Fed. T.D.), enforcement of a valid award is done by filing a copy of the adjudicator's or Board's order, a report of the circumstances and all pertinent documents with the relevant House of Parliament (PESRA, s. 14). It is ultimately up to that House to enforce such orders. A similar system operates for federal public servants generally (see *Public Service Staff Relations Act*, R.S.C. 1985, c. P-35). This may be considered an unsatisfactory arrangement by the respondents but Parliament has provided in PESRA how it intends its staff employment grievances to be dealt with. Under our jurisprudence, Parliament is entitled to have that assignment of jurisdiction respected (*Weber*; *Regina Police Assn. Inc. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.); *Parry Sound (District) Welfare Administration Board*; *Goudie v. Ottawa (City)*, [2003] 1 S.C.R. 141, 2003 SCC 14 (S.C.C.)).

97 The respondents also contend that while PESRA may be able to respond to Mr. Vaid's particular complaint of workplace discrimination and harassment, the Canadian Human Rights Tribunal is better placed than a PESRA adjudicator to address broader issues such as systemic discrimination, including compliance with the pay equity requirements of s. 11 of the *Canadian Human Rights Act*. They cite *C.U.P.E. v. Canadian Airlines International Ltd.*, [2004] 3 F.C.R. 663, 2004 FCA 113 (F.C.A.), where this provision of the *Canadian Human Rights Act* was considered. That is not this case. Such an argument raises a different issue in a different context. In *Morin* itself, the terms of the collective agreement were under attack as discriminatory. The dispute was therefore allowed to proceed before the Quebec Human Rights Tribunal. In *Charette*, the nature of the dispute was different, the statutory language more specific, and the proceedings before the Quebec Human Rights Tribunal were stopped. Instead, the dispute was referred to the *Commission des affaires sociales*. This is not an area of the law that lends itself to overgeneralization.

98 In this case, we are not dealing with an allegation of systemic discrimination. We are dealing with a single employee who says he was wrongfully dismissed against a background of alleged discrimination and harassment. A different dispute may involve different considerations that may lead to a complaint properly falling under the jurisdiction of the Canadian Human Rights Commission. But that is not this case.

99 The respondents also submit that, under s. 41(1) of the *Canadian Human Rights Act*, it is for the Commission not Parliament to determine whether "the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act". However, this approach presupposes that the enforcement machinery of the *Canadian Human Rights Act* applies. If, as I conclude, it has been ousted by s. 2 of PESRA with respect to this dispute, then s. 41, along with the other enforcement mechanisms of the *Canadian Human Rights Act* simply do not apply to the respondent Vaid's present complaint.

100 In the result Mr. Vaid's workplace complaints ought to have been considered in 1997 as they were (with partial success) in 1995, by way of a grievance under PESRA.

V. Disposition

101 The appeal is allowed without costs. The constitutional question is answered as follows:

> Q. Is the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, constitutionally inapplicable as a consequence of parliamentary privilege to the House of Commons and its members with respect to parliamentary employment matters?
>
> A. Given the broad terms in which this question is put, the answer is No. The definition of a more limited category of privilege, and the extent to which it may provide immunity from

the *Canadian Human Rights Act*, if at all, must await a case in which the question truly arises for a decision.

Appeal allowed.

Pourvoi accueilli.

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para 19

1999 CarswellBC 1907
Supreme Court of Canada

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.

1999 CarswellBC 1907, 1999 CarswellBC 1908, [1999] 10 W.W.R. 1, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46, 127 B.C.A.C. 161, 176 D.L.R. (4th) 1, 207 W.A.C. 161, 244 N.R. 145, 35 C.H.R.R. D/257, 46 C.C.E.L. (2d) 206, 66 B.C.L.R. (3d) 253, 68 C.R.R. (2d) 1, 7 B.H.R.C. 437, 90 A.C.W.S. (3d) 764, 99 C.L.L.C. 230-028, J.E. 99-1807

The British Columbia Government and Service Employees' Union, Appellant v. The Government of the Province of British Columbia as represented by the Public Service Employee Relations Commission, Respondent, and The British Columbia Human Rights Commission, the Women's Legal Education and Action Fund, the Disabled Women's Network Canada and the Canadian Labour Congress, Interveners

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: February 22, 1999
Judgment: September 9, 1999 *
Docket: 26274

* On October 15, 1999, the court issued a corrigendum. The changes have been incorporated herein.

Proceedings: reversing (1997), 149 D.L.R. (4th) 261, [1997] 9 W.W.R. 759, 37 B.C.L.R. (3d) 317, (sub nom. Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union) 94 B.C.A.C. 292, (sub nom. Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union) 152 W.A.C. 292, 30 C.H.R.R. D/83, (sub nom. Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union) 97 C.L.L.C. 230-037, [1997] B.C.J. No. 1630 (B.C. C.A.); reversing (1996), 58 L.A.C. (4th) 159 (B.C. Arb.)

Counsel: *Kenneth R. Curry*, *Gwen Brodsky*, *John Brewin* and *Michelle Alman*, for the appellant.
Peter A. Gall, *Lindsay M. Lyster* and *Janine Benedet*, for the respondent.
Deirdre A. Rice, for the intervener British Columbia Human Rights Commission.
Kate A. Hughes and *Melina Buckley*, for the interveners the Women's Legal Education and Action Fund, the Disabled Women's Network Canada, and the Canadian Labour Congress.

Subject: Constitutional; Public; Human Rights

Headnote

Human rights — What constitutes discrimination — Sex — Employment — Miscellaneous issues

Female forest firefighter was dismissed for failing to pass aerobic test imposed by provincial government — Grievance brought by union on behalf of grievor was allowed — Firefighter was reinstated with compensation — Government appealed — Appeal was allowed on ground that no discrimination based on sex arose from firefighter's individual inability to pass test — Union appealed — Appeal allowed — Prima facie case of adverse effect discrimination — Men and women may require different levels of aerobic capacity to perform firefighter's job — Government failed to discharge burden of proving, on balance of probabilities, that applying different standard on women gave rise to undue hardship — Order of arbitrator restored — Canadian Charter of Rights and Freedoms, s. 15(1) — Human Rights Code, R.S.B.C. 1996, c. 210.

Droits de la personne --- Éléments constitutifs de la discrimination — Sexe — Emploi — Questions diverses

Femme pompier forestier a été congédiée après avoir échoué un test aérobique imposé par le gouvernement provincial — Grief a été accueilli — Pompier a été réintégrée avec une indemnité — Gouvernement a formé un pourvoi — Pourvoi a été accueilli au motif qu'aucune discrimination en raison du sexe n'a résulté de l'incapacité individuelle du pompier à satisfaire le test — Syndicat a formé un pourvoi — Pourvoi a été accueilli — Preuve prima facie de l'existence de discrimination par suite d'un effet préjudiciable — Hommes et femmes peuvent posséder un niveau différent d'endurance aérobique pour effectuer le travail de pompier — Gouvernement n'a pas réussi à démontrer que, selon la balance des probabilités, le fait d'appliquer un critère différent aux femmes donnerait lieu à une contrainte excessive — Ordonnance de l'arbitre a été rétablie — Charte canadienne des droits et libertés, art. 15(1) — Human Rights Code, R.S.B.C. 1996, c. 210.

The British Columbia government established a minimum aerobic fitness standard for its forest firefighters. The claimant, a female firefighter, failed to meet the aerobic standard after four attempts. She was dismissed. She had performed her work satisfactorily in the past. A grievance brought by the claimant's union on her behalf was allowed on the basis that a prima facie case of adverse effect discrimination was established and that the government failed to show that it had accommodated the claimant to the point of undue hardship. The arbitrator found that most women have a lower aerobic capacity than most men and cannot increase this capacity with training to meet the aerobic standard. On appeal from that decision to the Court of Appeal, the appeal was allowed. The Court of Appeal held that there can be no adverse

discrimination unless the distinction at issue is related to an individual's association with a group. Since the distinction complained of was the claimant's own inability to pass a test, there was no discrimination based on sex. The union appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

The conventional approach of categorizing discrimination as either "direct," meaning discriminatory on its face, or "adverse effect," meaning discriminatory in effect, should be replaced by a unified approach. Few cases can be neatly categorized as direct or adverse effect discrimination. The remedies available for each category widely differ and depend on how the case is categorized at the initial stage. The assumption that a test is a neutral standard so long as its adverse effects are felt only by a numerical minority is questionable. The aerobics standard was discriminatory because it treated some individuals differently from others on the basis of a prohibited ground. The distinctions between the elements required to rebut a prima facie case of direct or adverse effect discrimination are difficult to apply in practice. The conventional analysis draws a distinction between direct and adverse effect discrimination which may serve to legitimize systemic discrimination. A bifurcated approach may compromise the broad purposes and the specific terms of the *Human Rights Code*. The conventional analysis is undesirable from a practical standpoint, as it differs from the approach taken to s. 15(1) of the *Charter*.

The claimant established a prima facie case of discrimination. A three-step test should be used for determining whether a prima facie discriminatory standard is a bona fide occupational requirement. The employer must show that the purpose of the standard is rationally connected to the performance of the job, the standard was adopted in a bona fide belief that it was necessary to fulfil a legitimate work-related purpose, and the standard is reasonably necessary to the accomplishment of that purpose. The employer failed to discharge its burden of showing, on a balance of probabilities, that it would experience undue hardship if a different standard were used.

The researchers who developed the aerobic standard took a primarily descriptive approach. Merely describing characteristics of a test subject does not necessarily allow one to identify the minimal job performance standard. The studies failed to distinguish female test subjects from male test subjects. Men constituted the majority of the sample groups. Men and women may require different levels of aerobic capacity to perform a forest firefighter's job.

The evidence fell short of establishing that the claimant posed a serious safety risk. If it was possible to perform the tasks of a forest firefighter without meeting the aerobic standard, the rights and morale of other forest firefighters would not be affected by allowing the claimant

to continue performing her job. The order of the arbitrator reinstating the claimant with compensation for lost wages and benefits was restored.

Le gouvernement de la Colombie-Britannique a établi une norme minimale de condition aérobique pour ses pompiers forestiers. L'appelante, une femme pompier, a échoué à l'examen de condition aérobique à quatre reprises et a été congédiée. Dans le passé, elle avait toujours accompli ses tâches de façon satisfaisante. Le syndicat a déposé un grief au nom de l'appelante et l'arbitre y a fait droit, au motif qu'une preuve *prima facie* de discrimination par suite d'un effet préjudiciable avait été faite et que le gouvernement n'avait pas réussi à démontrer qu'il avait tenté d'accommoder l'appelante tant qu'il n'en avait pas résulté pour lui une contrainte excessive. L'arbitre a jugé que la plupart des femmes ont une capacité aérobique inférieure à celle de la majorité des hommes et qu'elles ne peuvent accroître cette capacité à l'aide d'un entraînement de façon à satisfaire la norme aérobique. La Cour d'appel a fait droit à l'appel interjeté devant elle, estimant que l'on ne pouvait conclure à la discrimination par suite d'un effet préjudiciable à moins qu'il ne soit démontré que la distinction vise une personne faisant partie d'un groupe particulier. Compte tenu que la distinction faisant l'objet de la plainte était liée à l'incapacité de l'appelante de réussir l'examen, il ne s'agissait pas de discrimination fondée sur le sexe. Le syndicat a formé un pourvoi à l'encontre de cette décision devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Il y aurait lieu de remplacer la méthode traditionnelle qui consiste à classer la discrimination selon qu'il s'agit de discrimination « directe », c'est-à-dire, discriminatoire à sa face même, ou de discrimination « par suite d'une effet préjudiciable », c'est-à-dire, dont les effets sont discriminatoires, par une approche unifiée. Rares sont les cas de discrimination que l'on peut clairement qualifier de discrimination directe ou de discrimination par suite d'un effet préjudiciable. Les voies de réparation offertes à l'égard de chacune de ces deux catégories diffèrent largement et dépendent de la classification du cas au stade initial. La présomption selon laquelle un critère constitue une norme neutre dans la mesure où ses effets préjudiciables ne sont subis que par un petit nombre de personnes est discutable. La norme portant sur la condition aérobique était discriminatoire puisqu'elle traitait certains individus différemment des autres en raison d'un motif prohibé. Les distinctions existant entre les éléments exigeant que l'on réfute une preuve *prima facie* de discrimination directe ou de discrimination par suite d'un effet préjudiciable sont difficilement applicables en pratique. L'analyse conventionnelle trace une distinction entre la discrimination directe et la discrimination par suite d'un effet préjudiciable qui peut servir à légitimer la discrimination systémique. La méthode à deux volets peut compromettre les objectifs généraux et le libellé particulier du *Human Rights Code*. D'un point de vue pratique, l'analyse conventionnelle n'est

pas souhaitable étant donné qu'elle diffère de la méthode utilisée pour interpréter l'art. 15(1) de la Charte.

La demanderesse avait établi une preuve *prima facie* de discrimination. Un critère à trois volets devrait être utilisé pour déterminer si une norme à première vue discriminatoire constitue une exigence professionnelle justifiée. L'employeur doit démontrer que l'objectif de la norme est rationnellement lié à l'exécution du travail, que son adoption était fondée sur la croyance sincère qu'elle était nécessaire à l'atteinte d'un but légitime lié au travail et qu'elle est raisonnablement nécessaire à la réalisation de l'objectif poursuivi. L'employeur n'a pas réussi à démontrer, suivant la prépondérance des probabilités, qu'il subirait une contrainte excessive en raison de l'utilisation d'une norme différente.

Les chercheurs ayant développé la norme aérobique avaient adopté une approche essentiellement descriptive. La simple description des caractéristiques de l'objet d'un test ne permet pas nécessairement à une personne d'identifier la norme minimale relative à l'accomplissement du travail. Les études n'avaient pas établi de distinction entre les sujets féminins et les sujets masculins visés par le test. Les hommes représentaient la majorité des groupes-échantillons. Les hommes et les femmes peuvent avoir besoin de niveaux de capacité aérobique différents pour accomplir le travail de pompier forestier.

La preuve n'a pas démontré que la demanderesse présentait un risque grave pour la sécurité. Permettre à la demanderesse de continuer à accomplir son travail n'aurait pas d'incidence sur les droits et le moral des autres pompiers forestiers, dans la mesure où il était possible d'accomplir les tâches d'un pompier forestier sans satisfaire à la norme aérobique. La décision de l'arbitre ordonnant la réintégration de la demanderesse avec une indemnisation pour le salaire et les avantages perdus a été rétablie.

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Saskatchewan (Human Rights Commission) v. Saskatoon (City), 90 C.L.L.C. 17,001, [1989] 2 S.C.R. 1297, [1990] 1 W.W.R. 481, 103 N.R. 161, 65 D.L.R. (4th) 481, 11 C.H.R.R. D/204, 81 Sask. R. 263, 45 C.R.R. 363, C.E.B. & P.G.R. 8092 (S.C.C.) — applied

Thwaites v. Canada (Canadian Armed Forces) (1993), (sub nom. *Thwaites v. Canadian Armed Forces)* 93 C.L.L.C. 17,025, 19 C.H.R.R. D/259 (Can. Human Rights Trib.) — considered

Zurich Insurance Co. v. Ontario (Human Rights Commission), 39 M.V.R. (2d) 1, (sub nom. *Ontario (Human Rights Commission) v. Zurich Insurance Co.)* [1992] I.L.R. 1-2848, (sub nom. *Ontario (Human Rights Commission) v. Zurich Insurance Co.)* 138 N.R. 1, 93 D.L.R. (4th) 346, [1992] 2 S.C.R. 321, 16 C.H.R.R. D/255, 12 C.C.L.I. (2d) 206, (sub nom. *Ontario (Human Rights Commission) v. Zurich Insurance Co.)* 55 O.A.C. 81, 9 O.R. (3d) 224 (note) (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms/Charte canadienne des droits et libertés, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11/ Partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R.-U.), 1982, c. 11

s. 15(1) — considered

Canadian Human Rights Act/Loi canadienne sur les droits de la personne, R.S.C./L.R.C. 1985, c. H-6

Generally/en général — referred to

s. 15(2) [en./ad. 1998, c. 9, s.10] — considered

Human Rights Act, S.Y. 1987, c. 3

s. 7 — referred to

Human Rights Code, R.S.B.C. 1996, c. 210

Generally — considered

s. 3 [en. R.S.B.C. 1996, c. 210 (Supp.), s. 2] — considered

s. 13(1) — considered

s. 13(1)(b) — considered

s. 13(4) — considered

Human Rights Code/Code des droits de la personne, S.M./L.M. 1987-88, c. 45; C.C.S.M./ C.P.L.M., c. H175

s. 12 — referred to

Human Rights Code/Code des droits de la personne, R.S.O./L.R.O. 1990, c. H.19

s. 24(2) — referred to

APPEAL by union from judgment reported at (1997), 37 B.C.L.R. (3d) 317, 149 D.L.R. (4th) 261, [1997] 9 W.W.R. 759, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union)* 94 B.C.A.C. 292, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and*

Service Employees' Union) 152 W.A.C. 292, 30 C.H.R.R. D/83, (sub nom. *Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union)* 97 C.L.L.C. 230-037 (B.C. C.A.), allowing appeal by employer from decision of arbitrator reported at (1996), 58 L.A.C. (4th) 159 (B.C. Arb.) that aerobics testing for forest firefighters adversely discriminated against women.

POURVOI formé par le syndicat à l'encontre du jugement publié à (1997), 37 B.C.L.R. (3d) 317, 149 D.L.R. (4th) 261, [1997] 9 W.W.R. 759, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union)* 94 B.C.A.C. 292, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union)* 152 W.A.C. 292, 30 C.H.R.R. D/83, (sub nom. *Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union)* 97 C.L.L.C. 230-037 (B.C. C.A.), accueillant le pourvoi de l'employeur contre la décision de l'arbitre publié à (1996), 58 L.A.C. (4th) 159 (B.C. Arb.) selon laquelle le test aérobique pour les pompiers forestiers constituait de la discrimination par suite d'un effet préjudiciable.

The judgment of the court was delivered by *McLachlin J.*:

I. Introduction

1 Seven years ago Tawney Meiorin was hired as a forest firefighter by the Province of British Columbia (the "Government"). Although she did her work well, she lost her job three years later when the Government adopted a new series of fitness tests for forest firefighters. She passed three of the tests but failed a fourth one, a 2.5 kilometre run designed to assess whether she met the Government's aerobic standard, by taking 49.4 seconds longer than required.

2 The narrow issue in this case is whether the Government improperly dismissed Ms. Meiorin from her job as a forest firefighter. The broader legal issue is whether the aerobic standard that led to Ms. Meiorin's dismissal unfairly excludes women from forest firefighting jobs. Employers seeking to maintain safety may err on the side of caution and set standards higher than are necessary for the safe performance of the work. However, if men and women do not have an equal ability to meet the excessive standard, the effect may be to exclude qualified female candidates from employment for no reason but their gender. Like human rights legislation throughout Canada, the British Columbia *Human Rights Code* seeks to counter this by requiring employers to justify their standards where *prima facie* discrimination is established. The question in this case is whether the Government has done so.

3 Although this case may be resolved on the basis of the conventional bifurcated analysis this Court has applied to claims of workplace discrimination under human rights statutes, the parties have invited us to reconsider that approach. Accepting this invitation, I propose a revised approach to what an employer must show to justify a *prima facie* case of discrimination. On this approach, I conclude that Ms. Meiorin has demonstrated that the Government's aerobic standard is *prima*

facie discriminatory and the Government has failed to establish on the record before this Court that it is a *bona fide* occupational requirement ("BFOR"). I would therefore allow the appeal and restore the arbitrator's decision to reinstate Ms. Meiorin.

II. Facts

4 Ms. Meiorin was employed for three years by the British Columbia Ministry of Forests as a member of a three-person Initial Attack Forest Firefighting Crew in the Golden Forest District. The crew's job was to attack and suppress forest fires while they were small and could be contained. Ms. Meiorin's supervisors found her work to be satisfactory.

5 Ms. Meiorin was not asked to take a physical fitness test until 1994, when she was required to pass the Government's "Bona Fide Occupational Fitness Tests and Standards for B.C. Forest Service Wildland Firefighters" (the" Tests"). The Tests required that the forest firefighters weigh less than 200 lbs. (with their equipment) and complete a shuttle run, an upright rowing exercise, and a pump carrying/hose dragging exercise within stipulated times. The running test was designed to test the forest firefighters' aerobic fitness and was based on the view that forest firefighters must have a minimum" VO_2 max" of 50 ml x kg^{-1} x min^{-1} (the" aerobic standard"). "VO_2 max" measures" maximal oxygen uptake," or the rate at which the body can take in oxygen, transport it to the muscles, and use it to produce energy.

6 The Tests were developed in response to a 1991 Coroner's Inquest Report that recommended that only physically fit employees be assigned as front-line forest firefighters for safety reasons. The Government commissioned a team of researchers from the University of Victoria to undertake a review of its existing fitness standards with a view to protecting the safety of firefighters while meeting human rights norms. The researchers developed the Tests by identifying the essential components of forest firefighting, measuring the physiological demands of those components, selecting fitness tests to measure those demands and, finally, assessing the validity of those tests.

7 The researchers studied various sample groups. The specific tasks performed by forest firefighters were identified by reviewing amalgamated data collected by the British Columbia Forest Service. The physiological demands of those tasks were then measured by observing test subjects as they performed them in the field. One simulation involved 18 firefighters, another involved 10 firefighters, but it is unclear from the researchers' report whether the subjects at this stage were male or female. The researchers asked a pilot group of 10 university student volunteers (6 females and 4 males) to perform a series of proposed fitness tests and field exercises. After refining the preferred tests, the researchers observed them being performed by a larger sample group composed of 31 forest firefighter trainees and 15 university student volunteers (31 males and 15 females), and correlated their results with the group's performance in the field. Having concluded that the preferred tests were accurate predictors of actual forest firefighting performance

— including the running test designed to gauge whether the subject met the aerobic standard — the researchers presented their report to the Government in 1992.

8 A follow-up study in 1994 of 77 male forest firefighters and 2 female forest firefighters used the same methodology. However, the researchers this time recommended that the Government initiate another study to examine the impact of the Tests on women. There is no evidence before us that the Government has yet responded to this recommendation.

9 Two aspects of the researchers' methodology are critical to this case. First, it was primarily descriptive, based on measuring the average performance levels of the test subjects and converting this data into minimum performance standards. Second, it did not seem to distinguish between the male and female test subjects.

10 After four attempts, Ms. Meiorin failed to meet the aerobic standard, running the distance in 11 minutes and 49.4 seconds instead of the required 11 minutes. As a result, she was laid off. Her union subsequently brought a grievance on her behalf. The arbitrator designated to hear the grievance was required to determine whether she had been improperly dismissed.

11 Evidence accepted by the arbitrator demonstrated that, owing to physiological differences, most women have lower aerobic capacity than most men. Even with training, most women cannot increase their aerobic capacity to the level required by the aerobic standard, although training can allow most men to meet it. The arbitrator also heard evidence that 65% to 70% of male applicants pass the Tests on their initial attempts, while only 35% of female applicants have similar success. Of the 800 to 900 Initial Attack Crew members employed by the Government in 1995, only 100 to 150 were female.

12 There was no credible evidence showing that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter satisfactorily. On the contrary, Ms. Meiorin had in the past performed her work well, without apparent risk to herself, her colleagues or the public.

III. The Rulings

13 The arbitrator found that Ms. Meiorin had established a *prima facie* case of adverse effect discrimination by showing that the aerobic standard has a disproportionately negative effect on women as a group. He further found that the Government had presented no credible evidence that Ms. Meiorin's inability to meet the aerobic standard meant that she constituted a safety risk to herself, her colleagues, or the public, and hence had not discharged its burden of showing that it had accommodated Ms. Meiorin to the point of undue hardship. He ordered that she be reinstated to her former position and compensated for her lost wages and benefits.

14 The Court of Appeal ((1997), 37 B.C.L.R. (3d) 317 (B.C. C.A.)) did not distinguish between direct and adverse effect discrimination. It held that so long as the standard is *necessary* to the safe and efficient performance of the work and is applied through individualized testing, there is no discrimination. The Court of Appeal (mistakenly) read the arbitrator's reasons as finding that the aerobic standard was necessary to the safe and efficient performance of the work. Since Ms. Meiorin had been individually tested against this standard, it allowed the appeal and dismissed her claim. The Court of Appeal commented that to permit Ms. Meiorin to succeed would create" reverse discrimination," i.e., to set a lower standard for women than for men would discriminate against those men who failed to meet the men's standard but were nevertheless capable of meeting the women's standard.

IV. Statutory Provisions

15 The following provisions of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, are at issue on this appeal:

> **Discrimination in employment**
>
> **13** (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
>
> . . . . .
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

V. The Issues

16 The first issue on this appeal is the test applicable to s. 13(1) and (4) of the British Columbia *Human Rights Code*. The second issue is whether, on this test, Ms. Meiorin has established that the Government violated the Code.

VI. Analysis

17 As a preliminary matter, I must sort out a characterisation issue. The Court of Appeal seems to have understood the arbitrator as having held that the ability to meet the aerobic standard is necessary to the safe and efficient performance of the work of an Initial Attack Crew member. With respect, I cannot agree with this reading of the arbitrator's reasons.

18 The arbitrator held that the standard was one of the appropriate measurements available to the Government and that there is generally a reasonable relationship between aerobic fitness and the ability to perform the job of an Initial Attack Crew member. This falls short, however, of an affirmative finding that the ability to meet the aerobic standard chosen by the Government is necessary to the safe and efficient performance of the job. To the contrary, that inference is belied by the arbitrator's conclusion that, despite her failure to meet the aerobic standard, Ms. Meiorin did not pose a serious safety risk to herself, her colleagues, or the general public. I therefore proceed on the view that the arbitrator did not find that an applicant's ability to meet the aerobic standard is necessary to his or her ability to perform the tasks of an Initial Attack Crew member safely and efficiently. This leaves us to face squarely the issue of whether the aerobic standard is unjustifiably discriminatory within the meaning of the Code.

A. The Test

1. The Conventional Approach

19 The conventional approach to applying human rights legislation in the workplace requires the tribunal to decide at the outset into which of two categories the case falls: (1) "direct discrimination," where the standard is discriminatory on its face, or (2) "adverse effect discrimination," where the facially neutral standard discriminates in effect: *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.) (hereinafter "*O'Malley*") at p. 551, *per* McIntyre J. If a *prima facie* case of either form of discrimination is established, the burden shifts to the employer to justify it.

20 In the case of direct discrimination, the employer may establish that the standard is a BFOR by showing: (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation (the subjective element); and (2) that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies (the objective element). See *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.), at pp. 208-9, *per* McIntyre J.; *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 (S.C.C.), at pp. 622-23, *per* McIntyre J.; *Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 (S.C.C.), at pp. 310-12, *per* Beetz J. It is difficult for an employer to justify a standard as a BFOR where individual testing of the capabilities of the employee or applicant is a reasonable alternative: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.),

at pp. 513-14, *per* Wilson J.; *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297 (S.C.C.), at pp. 1313-14, *per* Sopinka J.

21 If these criteria are established, the standard is justified as a BFOR. If they are not, the standard itself is struck down: *Etobicoke, supra*, at pp. 207-08, *per* McIntyre J.; *O'Malley*, *supra*, at p. 555, *per* McIntyre J.; *Saskatoon, supra*, at pp. 1308-10, *per* Sopinka J.; *Central Alberta Dairy Pool*, *supra*, at p. 506, *per* Wilson J.; *Large v. Stratford (City) Police Department*, [1995] 3 S.C.R. 733 (S.C.C.), at para. 33, *per* Sopinka J.

22 A different analysis applies to adverse effect discrimination. The BFOR defence does not apply. *Prima facie* discrimination established, the employer need only show: (1) that there is a rational connection between the job and the particular standard, and (2) that it cannot further accommodate the claimant without incurring undue hardship: *O'Malley*, *supra*, at pp. 555-59, *per* McIntyre J.; *Central Alberta Dairy Pool*, *supra*, at pp. 505-6 and 519-20, *per* Wilson J. If the employer cannot discharge this burden, then it has failed to establish a defence to the charge of discrimination. In such a case, the claimant succeeds, but the standard itself always remains intact.

23 The arbitrator considered the aerobic standard to be a neutral standard that adversely affected Ms. Meiorin. The Court of Appeal, on the other hand, did not distinguish between direct and adverse effect discrimination, simply holding that it is not discriminatory to test individuals against a standard demonstrated to be necessary to the safe and efficient performance of the work. Approaching the case purely on the conventional bifurcated approach, the better view would seem to be that the standard is neutral on its face, leading one to the adverse effect discrimination analysis. On the conventional analysis, I agree with the arbitrator that a case of *prima facie* adverse effect discrimination was made out and that, on the record before him and before this Court, the Government failed to discharge its burden of showing that it had accommodated Ms. Meiorin to the point of undue hardship.

24 However, the divergent approaches taken by the arbitrator and the Court of Appeal suggest a more profound difficulty with the conventional test itself. The parties to this appeal have accordingly invited this Court to adopt a new model of analysis that avoids the threshold distinction between direct discrimination and adverse effect discrimination and integrates the concept of accommodation within the BFOR defence.

2. Why is a New Approach Required?

25 The conventional analysis was helpful in the interpretation of the early human rights statutes, and indeed represented a significant step forward in that it recognized for the first time the harm of adverse effect discrimination. The distinction it drew between the available remedies may also have reflected the apparent differences between direct and adverse effect discrimination. However well this approach may have served us in the past, many commentators have suggested that it ill-serves the purpose of contemporary human rights legislation. I agree. In my view, the complexity

and unnecessary artificiality of aspects of the conventional analysis attest to the desirability of now simplifying the guidelines that structure the interpretation of human rights legislation in Canada.

26 I will canvass seven difficulties with the conventional approach taken to claims under human rights legislation. Taken cumulatively, they make a compelling case for revising the analysis.

(a) Artificiality of the Distinction Between Direct and Adverse Effect Discrimination

27 The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify, simply because there are few cases that can be so neatly characterized. For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterized as either *directly* discriminatory (because it means that no workers whose religious beliefs preclude working on Fridays may be employed there) or as a neutral rule that merely has an *adverse effect* on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays). On the same reasoning, it could plausibly be argued that forcing employees to take a mandatory pregnancy test before commencing employment is a neutral rule because it is facially applied to all members of a workforce and its special effects on women are only incidental.

28 Several courts and commentators have observed that it seems perverse to have a threshold classification that is so malleable, indeed "chimerical": see, for example, *Canadian Civil Liberties Assn. v. Toronto Dominion Bank*, [1998] 4 F.C. 205 (Fed. C.A.), paras 114 and 145, *per* Robertson J.A.; S. Day and G. Brodsky," The Duty to Accommodate: Who Will Benefit?" (1996), 75 *Can. Bar Rev.* 433, at pp. 447-57; A. Molloy, "Disability and the Duty to Accommodate" (1993), 1 *Can. Lab. L. J.* 23, at pp. 36-37. Given the vague boundaries of the categories, an adjudicator may unconsciously tend to classify the impugned standard in a way that fits the remedy he or she is contemplating, be that striking down the standard itself or requiring only that the claimant's differences be accommodated. If so, form triumphs over substance and the broad purpose of the human rights statutes is left unfulfilled.

29 Not only is the distinction between direct and indirect discrimination malleable, it is also unrealistic: a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect — or an even broader effect — could be easily realized by couching it in neutral language: D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993), 1 *Can. Lab. L. J.* 1, at pp. 8-9. Dickson C.J., for one, recognized that this more subtle type of discrimination, which rises in the aggregate to the level of systemic discrimination, is now much more prevalent than the cruder brand of openly direct discrimination: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.), at p. 931. See also the classic case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (U.S. S.C. 1971). The bifurcated analysis gives employers with a discriminatory intention and the forethought to draft the rule in neutral language an undeserved cloak of legitimacy.

(b) Different Remedies Depending on Method of Discrimination

30 The malleability of the initial classification under the conventional approach would not matter so much if both routes led to the same result. But, as indicated above, the potential remedies may differ. If an employer cannot justify a directly discriminatory standard as a BFOR, it will be struck down in its entirety. However, if the rule is characterized as a neutral one that adversely affects a certain individual, the employer need only show that there is a rational connection between the standard and the performance of the job and that it cannot further accommodate the claimant without experiencing undue hardship. The general standard, however, remains in effect. These very different results flow directly from the stream into which the initial inquiry shunts the analysis.

31 The proposition that dramatically different results should follow from a tenuous initial classification of the method of discrimination is disconcerting because the effect of a discriminatory standard does not substantially change depending on how it is expressed: see M. C. Crane, "Human Rights, *Bona Fide* Occupational Requirements and the Duty to Accommodate: Semantics or Substance?" (1996), 4 *C.L.E.L.J.* 209, at pp. 226-29. Kenneth Watkin therefore observes that the question should not be whether the discrimination is direct or indirect, but rather "whether the individual or group discriminated against receives the same protection regardless of the manner in which that discrimination is brought about": K. Watkin, "The Justification of Discrimination Under Canadian Human Rights Legislation and the *Charter*: Why So Many Tests?" (1993), 2 *N.J.C.L.* 63, at p. 88. These criticisms are compelling. It is difficult to justify conferring more or less protection on a claimant and others who share his or her characteristics, depending only on how the discriminatory rule is phrased.

(c) Questionable Assumption that Adversely Affected Group Always a Numerical Minority

32 From a narrowly utilitarian perspective, it could be argued that it is sometimes appropriate to leave an ostensibly neutral standard in place if its adverse effects are felt by only one or, at most, a few individuals. This seems to have been the original rationale of this Court's adverse effect discrimination jurisprudence. In *O'Malley*, *supra*, McIntyre J. commented, at p. 555:

> Where there is adverse effect discrimination on account of creed the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered.

In *Central Alberta Dairy Pool*, *supra*, Wilson J. held at p. 514, that "the group of people who are adversely affected ... is always smaller than the group to which the rule applies." More recently, in *Chambly (Commission scolaire régionale) c. Bergevin*, [1994] 2 S.C.R. 525 (S.C.C.), at p. 544, Cory J. made the more modest observation that "[a]lmost invariably, those adversely affected will be members of a minority group."

33 To the extent that the bifurcated analysis relies on a comparison between the relative demographic representation of various groups, it is arguably unhelpful. First, the argument that an apparently neutral standard should be permitted to stand because its discriminatory effect is limited to members of a minority group and does not adversely affect the majority of employees is difficult to defend. The standard itself is discriminatory precisely because it treats some individuals differently from others, on the basis of a prohibited ground: see generally *Toronto Dominion Bank*, *supra*, at paras. 140-41, *per* Robertson J.A. As this Court held in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 66, if a rule has a substantively discriminatory effect on a prohibited ground, it should be characterized as such regardless of whether the claimant is a member of a majority or minority group.

34 Second, the size of the "affected group" is easily manipulable: see Day and Brodsky, *supra*, at p. 453. For example, in *Toronto Dominion Bank*, *supra*, the Bank instituted a policy of having returning employees submit to drug tests. Was the affected group the small minority of returning employees who were drug-dependent, leading to a characterization of the policy as adverse effect discrimination? Or was the affected group all returning employees who were required to submit to invasive drug-testing on the assumption that some of them were drug-dependent, lending itself to a characterization of the policy as direct discrimination? "It is possible for a policy to be characterized as direct discrimination, or adverse effect discrimination, or both, depending on how 'neutrality' and the group affected are defined by the adjudicator": Day and Brodsky, *supra*, at p. 453. Because the size of the affected group is so manipulable, it is difficult to justify using it as the foundation of the entire analysis.

35 Third, the emphasis on whether the claimant is a member of a majority or a minority group is clearly most unhelpful when the affected group actually constitutes a *majority* of the workforce: see B. Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993), 1 *Can. Lab. L.J.* 311, at pp. 324-25. The utilitarian arguments about the minority's having to abide by the practices of the majority for reasons of economic efficiency or safety fade in strength as the affected group nears the status of the majority.

36 At this point, which exists where women constitute the adversely affected group, the adverse effect analysis may serve to entrench the male norm as the" mainstream" into which women must integrate. Concerns about economic efficiency and safety, shorn of their utilitarian cloaks, may well operate to discriminate against women in a way that is direct in every way except that contemplated by the legal nomenclature. An analysis that does not acknowledge this reality fails to give full effect to the purpose of the human rights legislation at issue.

(d) Difficulties in Practical Application of Employers' Defences

37 The conventional analysis developed by this Court has also been criticized for drawing difficult distinctions between the elements an employer must establish to rebut a *prima facie* case

of direct discrimination and the elements an employer must establish to rebut a *prima facie* case of adverse effect discrimination. For example, a distinction has been drawn between the obligation to explore "reasonable alternatives," applicable to direct discrimination, and the obligation to consider "individual accommodation," applicable to adverse effect discrimination: see *Large*, *supra*, at paras. 30-34, *per* Sopinka J.

38 In practice, however, there may be little difference between the two defences: see, for example, *Canada (Attorney General) v. Levac* (1992), 22 C.H.R.R. D/259 (Fed. C.A.); *Large v. Stratford (City) Police Department* (1992), 92 D.L.R. (4th) 565 (Ont. Div. Ct.), *per* Campbell J., at pp. 577-79; *Saran v. Delta Cedar Products Ltd.* (January 25, 1995), Attafuah (B.C. Human Rights Comm.); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1994), 25 C.H.R.R. D/296 (B.C. Human Rights Council). In *Thwaites v. Canada (Canadian Armed Forces)* (1993), 19 C.H.R.R. D/259 (Can. Human Rights Trib.), it was recognized, at p. D/282, that,

> [t]he logical conclusion from this analysis is that there is very little, if any, meaningful distinction between what an employer must establish by way of a defence to an allegation of direct discrimination and a defence to an allegation of adverse effect discrimination. The only difference may be semantic. In both cases, the employer must have regard to the particular individual in question. In the case of direct discrimination, the employer must justify its rule or practice by demonstrating that there are no reasonable alternatives and that the rule or practice is proportional to the end being sought. In the case of adverse effect discrimination, the neutral rule is not attacked but the employer must still show that it could not otherwise reasonably accommodate the individual disparately affected by that rule. In both cases, whether the operative words are "reasonable alternative" or "proportionality" or "accommodation," the inquiry is essentially the same: the employer must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.

Parties, tribunals and courts are therefore compelled to frame their arguments and decisions within the confines of definitions that are themselves blurred. The broad purpose of human rights legislation may be obscured in the process. If the ultimate practical question is common to both the direct and adverse effect discrimination analyses, it may fairly be argued that there is little reason to distinguish between either the two analyses or the available remedies.

(e) Legitimizing Systemic Discrimination

39 It has also been argued that the distinction drawn by the conventional analysis between direct and adverse effect discrimination may, in practice, serve to legitimize systemic discrimination, or "discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination": *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (S.C.C.)

(hereinafter "*Action Travail*"), at p. 1139, *per* Dickson C.J. See generally I. B. McKenna," Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997-98), 29 *Ottawa L. Rev.* 153, and P. Phillips and E. Phillips, *Women and Work: Inequality in the Canadian Labour Market* (1993), at pp. 45-95.

40 Under the conventional analysis, if a standard is classified as being" neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream," represented by the standard.

41 Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself. Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it, Day and Brodsky, *supra*, write at p. 462:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated."
>
> Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different," rather than abandoning the idea of "normal" and working for genuine inclusiveness.
>
> In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.

I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination, as this Court acknowledged in *Action Travail, supra.*

42 This case, where Ms. Meiorin seeks to keep her position in a male-dominated occupation, is a good example of how the conventional analysis shields systemic discrimination from scrutiny. This analysis prevents the Court from rigorously assessing a standard which, in the course of regulating entry to a male-dominated occupation, adversely affects women as a group. Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.

(f) Dissonance Between Conventional Analysis and Express Purpose and Terms of Human Rights Code

43 Although the various human rights statutes have an elevated legal status (*Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.); *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 (S.C.C.)), they remain legislative pronouncements and, in the absence of a constitutional challenge, this Court must interpret them according to their terms, and in light of their purposes. As I suggested earlier, the conventional analysis may compromise both the broad purposes and the specific terms of the Code.

44 In British Columbia, the relevant purposes are stated in s. 3 of the Code:

> **3.** ...
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code;
>
> . . . . .

This Court has held that, because of their status as "fundamental law," human rights statutes must be interpreted liberally, so that they may better fulfill their objectives: *O'Malley*, *supra*, at p. 547, *per* McIntyre J.; *Action Travail, supra*, at pp. 1134-36, *per* Dickson C.J.; *Robichaud v. Brennan*, [1987] 2 S.C.R. 84 (S.C.C.), at pp. 89-90, *per* La Forest J. An interpretation that allows the rule itself to be questioned only if the discrimination can be characterized as "direct" does not allow these statutes to accomplish their purposes as well as they might otherwise do.

45 Furthermore, the terms of the British Columbia Code do not contemplate one type of employment-related discrimination being treated differently from another. Section 13(1) generally prohibits discriminating "against a person regarding employment or any term or condition of employment." Section 13(4) states that the general rule does not apply "with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement." The BFOR defence thus applies to all types of discrimination. There is no presumption that an ostensibly neutral rule is not discriminatory in itself, nor is there any statement in the Code that a discriminatory rule can be allowed to stand as long as the group or individual against whom it discriminates constitutes a minority of the workforce and it would be prohibitively difficult to accommodate them.

46 Most of the other Canadian human rights statutes that refer to a BFOR do not confine it or the duty to accommodate to certain types of discrimination. Indeed, some statutes expressly foreclose such reasoning, as I will discuss below. Stated simply, there is no statutory imperative in this case to perpetuate different categories of discrimination and provide different remedies for their respective breaches.

(g) Dissonance Between Human Rights Analysis and Charter Analysis

47 The conventional analysis differs in substance from the approach this Court has taken to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the *effect* of the impugned law, it has little legal importance. As Iacobucci J. noted at para. 80 of *Law*, *supra*:

> While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews, supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1),

> such that the onus may be satisfied by showing only a discriminatory effect. [Emphasis in original.]

48 Where s. 15(1) of the *Charter* is concerned, therefore, this Court has recognized that the negative effect on the individual complainant's dignity does not substantially vary depending on whether the discrimination is overt or covert. Where it is possible to make a *Charter* claim in the course of an employment relationship, the employer cannot dictate the nature of what it must prove in justification simply by altering the *method* of discrimination. I see little reason for adopting a different approach when the claim is brought under human rights legislation which, while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the *Charter*.

49 It has been suggested that the distinction between direct and adverse effect discrimination in human rights analysis may be attributable, at least in part, to a sense that "unintentional" discrimination occasioned by "neutral" rules is less deserving of legal censure: see Etherington, *supra*, at pp. 324-25. At p. 457, Day and Brodsky, *supra*, argue that,

> It seems apparent that the distinction between direct and adverse effect discrimination is based on the need to maintain that there is a difference between intentional discrimination and unintentional discrimination, even though tribunals and courts, including the Supreme Court of Canada, have repeatedly ruled that unintentional discrimination is no less a violation of human rights law, and that it is the effects of discrimination which matter. There remains a holdover sense that direct discrimination is more loathsome, morally more repugnant, because the perpetrator *intends* to discriminate or has discriminated *knowingly*. By contrast, adverse effect discrimination is viewed as "innocent," unwitting, accidental, and consequently not morally repugnant. [Emphasis in original.]

I acknowledge that there may in some cases be differences in the respective origins of directly discriminatory standards and neutral standards with adverse effects. However, this Court long ago held that the fact that a discriminatory effect was unintended is not determinative of its general *Charter* analysis and certainly does not determine the available remedy: *Law*, *supra*, at para. 80, *per* Iacobucci J.; *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at pp. 174-175, *per* McIntyre J.; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 62, *per* La Forest J. In cases such as *O'Malley*, *supra*, and *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561 (S.C.C.), this Court endeavoured to entrench the same principle in its analysis of human rights legislation. In my view, care should be taken to ensure that this goal is not compromised by a bifurcated method of analysing claims made pursuant to such legislation.

3. Toward a Unified Approach

50 Whatever may have once been the benefit of the conventional analysis of discrimination claims brought under human rights legislation, the difficulties discussed show that there is much

to be said for now adopting a unified approach that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives.

51 Many of those who have studied the issue and written on it have advocated such a unified approach: see W. Pentney, "Belonging: The Promise of Community, Continuity and Change in Equality Law 1995-96" (1996), 25 C.H.R.R. C/6; Day and Brodsky, *supra*, at pp. 459-60 and 472; Lepofsky, *supra*, at pp. 16-17; Crane, *supra*, at pp. 231-32; Molloy, *supra*, at pp. 36-37; Watkin, *supra*, at pp. 86-93; M. F. Yalden, "The Duty to Accommodate: A View From the Canadian Human Rights Commission" (1993), 1 *Can. Lab. L.J.* 283, at pp. 286-93; Canadian Human Rights Commission, *The Effects of the Bhinder Decision on the Canadian Human Rights Commission: A Special Report to Parliament* (1986).

52 Furthermore, some provinces have revised their human rights statutes so that courts are now required to adopt a unified approach: see s. 24(2) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19; s. 12 of the Manitoba *Human Rights Code*, S.M. 1987-88, c. 45, and, in a more limited sense, s. 7 of the Yukon *Human Rights Act*, S.Y. 1987, c. 3. Most recently, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, was amended (S.C. 1998, c. 9) so that s. 15(2) of the Act now expressly provides that an otherwise discriminatory practice will only constitute a BFOR if the employer establishes that the needs of the individual or class of individuals cannot be accommodated without imposing undue hardship.

53 Finally, judges of this Court have not infrequently written of the need to adopt a simpler, more common-sense approach to determining when an employer may be justified in applying a standard with discriminatory effects. See *Bhinder*, *supra*, at pp. 567-68, *per* Dickson C.J. (dissenting); *Central Alberta Dairy Pool*, *supra*, at pp. 528-29, *per* Sopinka J. (dissenting); *Large*, *supra*, at para. 56, *per* L'Heureux-Dubé J. It is noteworthy that even Wilson J., writing for the majority of this Court in *Central Alberta Dairy Pool*, *supra*, arguably recognized that a form of accommodation — the search for proportionate, reasonable alternatives to a general rule — had a certain place within the BFOR analysis, then applicable only to cases of direct discrimination. See in particular her references, at pp. 518-19, to *Brossard, supra*, and *Saskatoon, supra*.

4. Elements of a Unified Approach

54 Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

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

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment 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 accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

55 This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool*, *supra*, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]." It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

56 Having set out the test, I offer certain elaborations on its application.

Step One

57 The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. The initial task is to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases but there may well be other reasons for imposing particular standards in the workplace. In *Brossard, supra*, for example, the general purpose of the town's anti-nepotism policy was to curb actual and apparent conflicts of interest among public employees. In *Caldwell*, *supra*, the Roman Catholic high school sought to maintain the religious integrity of its teaching environment and curriculum. In other circumstances, the employer may seek to ensure that qualified employees are present at certain times. There are innumerable possible reasons that an employer might seek to impose a standard on its employees.

58 The employer must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job. For example, turning again to *Brossard, supra*, Beetz J. held, at p. 313, that because of the special character of public employment, "[i]t is appropriate and indeed necessary to adopt rules

of conduct for public servants to inhibit conflicts of interest." Where the general purpose of the standard is to ensure the safe and efficient performance of the job — essential elements of all occupations — it will likely not be necessary to spend much time at this stage. Where the purpose is narrower, it may well be an important part of the analysis.

59 The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose. This inquiry is necessarily more general than determining whether there is a rational connection between the performance of the job and the *particular standard* that has been selected, as may have been the case on the conventional approach. The distinction is important. If there is no rational relationship between the general purpose of the standard and the tasks properly required of the employee, then there is of course no need to continue to assess the legitimacy of the particular standard itself. Without a legitimate general purpose underlying it, the standard cannot be a BFOR. In my view, it is helpful to keep the two levels of inquiry distinct.

Step Two

60 Once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. This addresses the subjective element of the test which, although not essential to a finding that the standard is not a BFOR, is one basis on which the standard may be struck down: see *O'Malley*, *supra*, at pp. 547-50, *per* McIntyre J.; *Etobicoke, supra*, at p. 209, *per* McIntyre J. If the imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory *animus*, then it cannot be a BFOR.

61 It is important to note that the analysis shifts at this stage from the general purpose of the standard to the particular standard itself. It is not necessarily so that a particular standard will constitute a BFOR merely because its general purpose is rationally connected to the performance of the job: see *Brossard, supra*, at pp. 314-15, *per* Beetz J.

Step Three

62 The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the performance of the job. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship," it is important to recall the words of Sopinka J. who observed in *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.) , at p. 984, that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test." It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard,

if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

63 When determining whether an existing standard is reasonably necessary for the employer to accomplish its purpose, it may be helpful to refer to the jurisprudence of this Court dealing both with the justification of direct discrimination and the concept of accommodation within the adverse effect discrimination analysis. For example, dealing with adverse effect discrimination in *Central Alberta Dairy Pool*, *supra*, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also *Renaud*, *supra*, at p. 984, *per* Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in *Chambly, supra*, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case."

64 Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.

65 Some of the important questions that may be asked in the course of the analysis include:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
>
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud, supra*, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the *procedure*, if any, which was adopted to assess the issue of accommodation and, second, the *substantive content* of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, *supra*.

67 If the *prima facie* discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. The employer has failed to establish a defence to the charge of discrimination. Although not at issue in this case, as it arose as a grievance before a labour arbitrator, when the standard is not a BFOR, the appropriate remedy will be chosen with reference to the remedies provided in the applicable human rights legislation. Conversely, if the general purpose of the standard is rationally connected to the performance of the particular job, the particular standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is a BFOR. If all of these criteria are established, the employer has brought itself within an exception to the general prohibition of discrimination.

68 Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard *itself* is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.

B. Application of the Reformed Approach to the Case on Appeal

1. Introduction

69 Ms. Meiorin has discharged the burden of establishing that, *prima facie*, the aerobic standard discriminates against her as a woman. The arbitrator held that, because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard. While the Government's expert witness testified that most women can achieve the aerobic standard with training, the arbitrator rejected this evidence as "anecdotal" and" not supported by scientific data." This Court has not been presented with any reason to revisit this characterization. Ms. Meiorin has therefore demonstrated that the aerobic standard is *prima facie* discriminatory, and has brought herself within s. 13(1) of the Code.

70 Ms. Meiorin having established a *prima facie* case of discrimination, the burden shifts to the Government to demonstrate that the aerobic standard is a BFOR. For the reasons below, I conclude that the Government has failed to discharge this burden and therefore cannot rely on the defence provided by s. 13(4) of the Code.

2. Steps One and Two

71 The first two elements of the proposed BFOR analysis, that is (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; and (2) that the employer adopted the particular standard in an honest and good-faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, have been fulfilled. The Government's general purpose in imposing the aerobic standard is not disputed. It is to enable the Government to identify those employees or applicants who are able to perform the job of a forest firefighter safely and efficiently. It is also clear that there is a rational connection between this general characteristic and the performance of the particularly strenuous tasks expected of a forest firefighter. All indications are that the Government acted honestly and in a good faith belief that adopting the particular standard was necessary to the identification of those persons able to perform the job safely and efficiently. It did not intend to discriminate against Ms. Meiorin. To the contrary, one of the reasons the Government retained the researchers from the University of Victoria was that it sought to identify non-discriminatory standards.

3. Step Three

72 Under the third element of the unified approach, the employer must establish 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 accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. In the case on appeal, the contentious issue is whether the Government has demonstrated that this particular aerobic standard is reasonably necessary in order to identify those persons who are able to performthe tasks of a forest firefighter safely

and efficiently. As noted, the burden is on the government to demonstrate that, in the course of accomplishing this purpose, it cannot accommodate individual or group differences without experiencing undue hardship.

73 The Government adopted the laudable course of retaining experts to devise a non-discriminatory test. However, because of significant problems with the way the researchers proceeded, passing the resulting aerobic standard has not been shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter. The Government has not established that it would experience undue hardship if a different standard were used.

74 The procedures adopted by the researchers are problematic on two levels. First, their approach seems to have been primarily a descriptive one: test subjects were observed completing the tasks, the aerobic capacity of the test subjects was ascertained, and that capacity was established as the minimum standard required of every forest firefighter. However, merely describing the characteristics of a test subject does not necessarily allow one to identify the standard *minimally* necessary for the safe and efficient performance of the task. Second, these primarily descriptive studies failed to distinguish the female test subjects from the male test subjects, who constituted the vast majority of the sample groups. The record before this Court therefore does not permit us to say whether men and women require the same minimum level of aerobic capacity to perform safely and efficiently the tasks expected of a forest firefighter.

75 While the researchers' goal was admirable, their aerobic standard was developed through a process that failed to address the possibility that it may discriminate unnecessarily on one or more prohibited grounds, particularly sex. This phenomenon is not unique to the procedures taken towards identifying occupational qualifications in this case: see generally K. Messing and J. Stevenson, "Women in Procrustean Beds: Strength Testing and the Workplace" (1996), 3 *Gender, Work and Organization* 156; K. Messing, *One-Eyed Science: Occupational Health and Women Workers* (1998). Employers and researchers should be highly mindful of this serious problem.

76 The expert who testified before the arbitrator on behalf of the Government defended the original researchers' decision not to analyse separately the aerobic performance of the male and female, experienced and inexperienced, test subjects as an attempt to reflect the actual conditions of firefighting. This misses the point. The polymorphous group's average aerobic performance is irrelevant to the question of whether the aerobic standard constitutes a minimum threshold that cannot be altered without causing undue hardship to the employer. Rather, the goal should have been to measure whether members of all groups require the same minimum aerobic capacity to perform the job safely and efficiently and, if not, to reflect that disparity in the employment qualifications. There is no evidence before us that any action was taken to further this goal before the aerobic standard was adopted.

77 Neither is there any evidence that the Government embarked upon a study of the discriminatory effects of the aerobic standard when the issue was raised by Ms. Meiorin. In fact, the expert reports filed by the Government in these proceedings content themselves with asserting that the aerobic standard set in 1992 and 1994 is a minimum standard that women can meet with appropriate training. No studies were conducted to substantiate the latter assertion and the arbitrator rejected it as unsupported by the evidence.

78 Assuming that the Government had properly addressed the question in a procedural sense, its response — that it would experience undue hardship if it had to accommodate Ms. Meiorin — is deficient from a substantive perspective. The Government has presented no evidence as to the cost of accommodation. Its primary argument is that, because the aerobic standard is necessary for the safety of the individual firefighter, the other members of the crew, and the public at large, it would experience undue hardship if compelled to deviate from that standard in any way.

79 Referring to the Government's arguments on this point, the arbitrator noted that, "other than anecdotal or 'impressionistic' evidence concerning the magnitude of risk involved in accommodating the adverse-effect discrimination suffered by the grievor, the employer has presented no cogent evidence ... to support its position that it cannot accommodate Ms. Meiorin because of safety risks." The arbitrator held that the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Accordingly, he held that the Government had failed to accommodate her to the point of undue hardship. This Court has not been presented with any reason to interfere with his conclusion on this point, and I decline to do so. The Government did not discharge its burden of showing that the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used.

80 This leaves the evidence of the Assistant Director of Protection Programs for the British Columbia Ministry of Forests, who testified that accommodating Ms. Meiorin would undermine the morale of the Initial Attack Crews. Again, this proposition is not supported by evidence. But even if it were, the attitudes of those who seek to maintain a discriminatory practice cannot be reconciled with the Code. These attitudes cannot therefore be determinative of whether the employer has accommodated the claimant to the point of undue hardship: see generally *Renaud, supra*, at pp. 984-85, *per* Sopinka J.; *Chambly, supra*, at pp. 545-46, *per* Cory J. Although serious consideration must of course be taken of the "objection of employees based on well-grounded concerns that their rights will be affected," discrimination on the basis of a prohibited ground cannot be justified by arguing that abandoning such a practice would threaten the morale of the workforce: *Renaud, supra*, at p. 988, *per* Sopinka J.; *Cranston v. Canada* (1997), 97 C.L.L.C. 230-008 (Can. Human Rights Trib.). If it were possible to perform the tasks of a forest firefighter safely and efficiently without meeting the prescribed aerobic standard (and the Government has

not established the contrary), I can see no right of other firefighters that would be affected by allowing Ms. Meiorin to continue performing her job.

81 The Court of Appeal suggested that accommodating women by permitting them to meet a lower aerobic standard than men would constitute "reverse discrimination." I respectfully disagree. As this Court has repeatedly held, the essence of equality is to be treated according to one's own merit, capabilities and circumstances. True equality requires that differences be accommodated: *Andrews*, *supra*, at pp. 167-69, *per* McIntyre J.; *Law*, *supra*, at para. 51, *per* Iacobucci J. A different aerobic standard capable of identifying women who could perform the job safely and efficiently therefore does not necessarily imply discrimination against men." Reverse" discrimination would only result if, for example, an aerobic standard representing a minimum threshold for *all* forest firefighters was held to be inapplicable to men simply because they were men.

82 The Court of Appeal also suggested that the fact that Ms. Meiorin was tested individually immunized the Government from a finding of discrimination. However, individual testing, without more, does not negate discrimination. The individual must be tested against a realistic standard that reflects his or her capacities and potential contributions. Having failed to establish that the aerobic standard constitutes the minimum qualification required to perform the job safely and efficiently, the Government cannot rely on the mere fact of individual testing to rebut Ms. Meiorin's *prima facie* case of discrimination.

VII. Conclusion

83 I conclude that Ms. Meiorin has established that the aerobic standard is *prima facie* discriminatory, and the Government has not shown that it is reasonably necessary to the accomplishment of the Government's general purpose, which is to identify those forest firefighters who are able to work safely and efficiently. Because it has therefore not been established that the aerobic standard is a BFOR, the Government cannot avail itself of the defence in s. 13(4) of the Code and is bound by the prohibition of such a discriminatory standard in s. 13(1)(b). The Code accordingly prevents the Government from relying on the aerobic standard as the basis for Ms. Meiorin's dismissal. As this case arose as a grievance before a labour arbitrator, rather than as a claim before the Human Rights Tribunal or its predecessor, relief of a more general nature cannot be claimed. No challenge was made to the other components of the Government's Tests.

84 I would allow the appeal and restore the order of the arbitrator reinstating Ms. Meiorin to her former position and compensating her for lost wages and benefits. Ms. Meiorin's union, the appellant on this appeal, shall have its costs in this Court and in the court below.

Appeal allowed.

Pourvoi accueilli.

Footnotes

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Tab 19

para 29, 54-55

1999 CarswellBC 1907
Supreme Court of Canada

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.

1999 CarswellBC 1907, 1999 CarswellBC 1908, [1999] 10 W.W.R. 1, [1999] 3 S.C.R. 3, [1999] S.C.J. No. 46, 127 B.C.A.C. 161, 176 D.L.R. (4th) 1, 207 W.A.C. 161, 244 N.R. 145, 35 C.H.R.R. D/257, 46 C.C.E.L. (2d) 206, 66 B.C.L.R. (3d) 253, 68 C.R.R. (2d) 1, 7 B.H.R.C. 437, 90 A.C.W.S. (3d) 764, 99 C.L.L.C. 230-028, J.E. 99-1807

The British Columbia Government and Service Employees' Union, Appellant v. The Government of the Province of British Columbia as represented by the Public Service Employee Relations Commission, Respondent, and The British Columbia Human Rights Commission, the Women's Legal Education and Action Fund, the Disabled Women's Network Canada and the Canadian Labour Congress, Interveners

Lamer C.J.C., L'Heureux-Dubé, Gonthier, Cory, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: February 22, 1999
Judgment: September 9, 1999 *
Docket: 26274

* On October 15, 1999, the court issued a corrigendum. The changes have been incorporated herein.

Proceedings: reversing (1997), 149 D.L.R. (4th) 261, [1997] 9 W.W.R. 759, 37 B.C.L.R. (3d) 317, (sub nom. Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union) 94 B.C.A.C. 292, (sub nom. Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union) 152 W.A.C. 292, 30 C.H.R.R. D/83, (sub nom. Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union) 97 C.L.L.C. 230-037, [1997] B.C.J. No. 1630 (B.C. C.A.); reversing (1996), 58 L.A.C. (4th) 159 (B.C. Arb.)

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Deirdre A. Rice, for the intervener British Columbia Human Rights Commission.
Kate A. Hughes and *Melina Buckley*, for the interveners the Women's Legal Education and Action Fund, the Disabled Women's Network Canada, and the Canadian Labour Congress.

Subject: Constitutional; Public; Human Rights

Headnote

Human rights --- What constitutes discrimination — Sex — Employment — Miscellaneous issues

Female forest firefighter was dismissed for failing to pass aerobic test imposed by provincial government — Grievance brought by union on behalf of grievor was allowed — Firefighter was reinstated with compensation — Government appealed — Appeal was allowed on ground that no discrimination based on sex arose from firefighter's individual inability to pass test — Union appealed — Appeal allowed — Prima facie case of adverse effect discrimination — Men and women may require different levels of aerobic capacity to perform firefighter's job — Government failed to discharge burden of proving, on balance of probabilities, that applying different standard on women gave rise to undue hardship — Order of arbitrator restored — Canadian Charter of Rights and Freedoms, s. 15(1) — Human Rights Code, R.S.B.C. 1996, c. 210.

Droits de la personne --- Éléments constitutifs de la discrimination — Sexe — Emploi — Questions diverses

Femme pompier forestier a été congédiée après avoir échoué un test aérobique imposé par le gouvernement provincial — Grief a été accueilli — Pompier a été réintégrée avec une indemnité — Gouvernement a formé un pourvoi — Pourvoi a été accueilli au motif qu'aucune discrimination en raison du sexe n'a résulté de l'incapacité individuelle du pompier à satisfaire le test — Syndicat a formé un pourvoi — Pourvoi a été accueilli — Preuve prima facie de l'existence de discrimination par suite d'un effet préjudiciable — Hommes et femmes peuvent posséder un niveau différent d'endurance aérobique pour effectuer le travail de pompier — Gouvernement n'a pas réussi à démontrer que, selon la balance des probabilités, le fait d'appliquer un critère différent aux femmes donnerait lieu à une contrainte excessive — Ordonnance de l'arbitre a été rétablie — Charte canadienne des droits et libertés, art. 15(1) — Human Rights Code, R.S.B.C. 1996, c. 210.

The British Columbia government established a minimum aerobic fitness standard for its forest firefighters. The claimant, a female firefighter, failed to meet the aerobic standard after four attempts. She was dismissed. She had performed her work satisfactorily in the past. A grievance brought by the claimant's union on her behalf was allowed on the basis that a prima facie case of adverse effect discrimination was established and that the government failed to show that it had accommodated the claimant to the point of undue hardship. The arbitrator found that most women have a lower aerobic capacity than most men and cannot increase this capacity with training to meet the aerobic standard. On appeal from that decision to the Court of Appeal, the appeal was allowed. The Court of Appeal held that there can be no adverse

discrimination unless the distinction at issue is related to an individual's association with a group. Since the distinction complained of was the claimant's own inability to pass a test, there was no discrimination based on sex. The union appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

The conventional approach of categorizing discrimination as either "direct," meaning discriminatory on its face, or "adverse effect," meaning discriminatory in effect, should be replaced by a unified approach. Few cases can be neatly categorized as direct or adverse effect discrimination. The remedies available for each category widely differ and depend on how the case is categorized at the initial stage. The assumption that a test is a neutral standard so long as its adverse effects are felt only by a numerical minority is questionable. The aerobics standard was discriminatory because it treated some individuals differently from others on the basis of a prohibited ground. The distinctions between the elements required to rebut a prima facie case of direct or adverse effect discrimination are difficult to apply in practice. The conventional analysis draws a distinction between direct and adverse effect discrimination which may serve to legitimize systemic discrimination. A bifurcated approach may compromise the broad purposes and the specific terms of the *Human Rights Code*. The conventional analysis is undesirable from a practical standpoint, as it differs from the approach taken to s. 15(1) of the *Charter*.

The claimant established a prima facie case of discrimination. A three-step test should be used for determining whether a prima facie discriminatory standard is a bona fide occupational requirement. The employer must show that the purpose of the standard is rationally connected to the performance of the job, the standard was adopted in a bona fide belief that it was necessary to fulfil a legitimate work-related purpose, and the standard is reasonably necessary to the accomplishment of that purpose. The employer failed to discharge its burden of showing, on a balance of probabilities, that it would experience undue hardship if a different standard were used.

The researchers who developed the aerobic standard took a primarily descriptive approach. Merely describing characteristics of a test subject does not necessarily allow one to identify the minimal job performance standard. The studies failed to distinguish female test subjects from male test subjects. Men constituted the majority of the sample groups. Men and women may require different levels of aerobic capacity to perform a forest firefighter's job.

The evidence fell short of establishing that the claimant posed a serious safety risk. If it was possible to perform the tasks of a forest firefighter without meeting the aerobic standard, the rights and morale of other forest firefighters would not be affected by allowing the claimant

to continue performing her job. The order of the arbitrator reinstating the claimant with compensation for lost wages and benefits was restored.

Le gouvernement de la Colombie-Britannique a établi une norme minimale de condition aérobique pour ses pompiers forestiers. L'appelante, une femme pompier, a échoué à l'examen de condition aérobique à quatre reprises et a été congédiée. Dans le passé, elle avait toujours accompli ses tâches de façon satisfaisante. Le syndicat a déposé un grief au nom de l'appelante et l'arbitre y a fait droit, au motif qu'une preuve *prima facie* de discrimination par suite d'un effet préjudiciable avait été faite et que le gouvernement n'avait pas réussi à démontrer qu'il avait tenté d'accommoder l'appelante tant qu'il n'en avait pas résulté pour lui une contrainte excessive. L'arbitre a jugé que la plupart des femmes ont une capacité aérobique inférieure à celle de la majorité des hommes et qu'elles ne peuvent accroître cette capacité à l'aide d'un entraînement de façon à satisfaire la norme aérobique. La Cour d'appel a fait droit à l'appel interjeté devant elle, estimant que l'on ne pouvait conclure à la discrimination par suite d'un effet préjudiciable à moins qu'il ne soit démontré que la distinction vise une personne faisant partie d'un groupe particulier. Compte tenu que la distinction faisant l'objet de la plainte était liée à l'incapacité de l'appelante de réussir l'examen, il ne s'agissait pas de discrimination fondée sur le sexe. Le syndicat a formé un pourvoi à l'encontre de cette décision devant la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Il y aurait lieu de remplacer la méthode traditionnelle qui consiste à classer la discrimination selon qu'il s'agit de discrimination « directe », c'est-à-dire, discriminatoire à sa face même, ou de discrimination « par suite d'une effet préjudiciable », c'est-à-dire, dont les effets sont discriminatoires, par une approche unifiée. Rares sont les cas de discrimination que l'on peut clairement qualifier de discrimination directe ou de discrimination par suite d'un effet préjudiciable. Les voies de réparation offertes à l'égard de chacune de ces deux catégories diffèrent largement et dépendent de la classification du cas au stade initial. La présomption selon laquelle un critère constitue une norme neutre dans la mesure où ses effets préjudiciables ne sont subis que par un petit nombre de personnes est discutable. La norme portant sur la condition aérobique était discriminatoire puisqu'elle traitait certains individus différemment des autres en raison d'un motif prohibé. Les distinctions existant entre les éléments exigeant que l'on réfute une preuve *prima facie* de discrimination directe ou de discrimination par suite d'un effet préjudiciable sont difficilement applicables en pratique. L'analyse conventionnelle trace une distinction entre la discrimination directe et la discrimination par suite d'un effet préjudiciable qui peut servir à légitimer la discrimination systémique. La méthode à deux volets peut compromettre les objectifs généraux et le libellé particulier du *Human Rights Code*. D'un point de vue pratique, l'analyse conventionnelle n'est

pas souhaitable étant donné qu'elle diffère de la méthode utilisée pour interpréter l'art. 15(1) de la Charte.

La demanderesse avait établi une preuve *prima facie* de discrimination. Un critère à trois volets devrait être utilisé pour déterminer si une norme à première vue discriminatoire constitue une exigence professionnelle justifiée. L'employeur doit démontrer que l'objectif de la norme est rationnellement lié à l'exécution du travail, que son adoption était fondée sur la croyance sincère qu'elle était nécessaire à l'atteinte d'un but légitime lié au travail et qu'elle est raisonnablement nécessaire à la réalisation de l'objectif poursuivi. L'employeur n'a pas réussi à démontrer, suivant la prépondérance des probabilités, qu'il subirait une contrainte excessive en raison de l'utilisation d'une norme différente.

Les chercheurs ayant développé la norme aérobique avaient adopté une approche essentiellement descriptive. La simple description des caractéristiques de l'objet d'un test ne permet pas nécessairement à une personne d'identifier la norme minimale relative à l'accomplissement du travail. Les études n'avaient pas établi de distinction entre les sujets féminins et les sujets masculins visés par le test. Les hommes représentaient la majorité des groupes-échantillons. Les hommes et les femmes peuvent avoir besoin de niveaux de capacité aérobique différents pour accomplir le travail de pompier forestier.

La preuve n'a pas démontré que la demanderesse présentait un risque grave pour la sécurité. Permettre à la demanderesse de continuer à accomplir son travail n'aurait pas d'incidence sur les droits et le moral des autres pompiers forestiers, dans la mesure où il était possible d'accomplir les tâches d'un pompier forestier sans satisfaire à la norme aérobique. La décision de l'arbitre ordonnant la réintégration de la demanderesse avec une indemnisation pour le salaire et les avantages perdus a été rétablie.

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s. 13(1)(b) — considered

s. 13(4) — considered

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APPEAL by union from judgment reported at (1997), 37 B.C.L.R. (3d) 317, 149 D.L.R. (4th) 261, [1997] 9 W.W.R. 759, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union)* 94 B.C.A.C. 292, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and*

Service Employees' Union) 152 W.A.C. 292, 30 C.H.R.R. D/83, (sub nom. *Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union)* 97 C.L.L.C. 230-037 (B.C. C.A.), allowing appeal by employer from decision of arbitrator reported at (1996), 58 L.A.C. (4th) 159 (B.C. Arb.) that aerobics testing for forest firefighters adversely discriminated against women.

POURVOI formé par le syndicat à l'encontre du jugement publié à (1997), 37 B.C.L.R. (3d) 317, 149 D.L.R. (4th) 261, [1997] 9 W.W.R. 759, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union)* 94 B.C.A.C. 292, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government and Service Employees' Union)* 152 W.A.C. 292, 30 C.H.R.R. D/83, (sub nom. *Public Service Employee Relations Commission v. British Columbia Government and Service Employees' Union)* 97 C.L.L.C. 230-037 (B.C. C.A.), accueillant le pourvoi de l'employeur contre la décision de l'arbitre publié à (1996), 58 L.A.C. (4th) 159 (B.C. Arb.) selon laquelle le test aérobique pour les pompiers forestiers constituait de la discrimination par suite d'un effet préjudiciable.

The judgment of the court was delivered by *McLachlin J.*:

I. Introduction

1 Seven years ago Tawney Meiorin was hired as a forest firefighter by the Province of British Columbia (the "Government"). Although she did her work well, she lost her job three years later when the Government adopted a new series of fitness tests for forest firefighters. She passed three of the tests but failed a fourth one, a 2.5 kilometre run designed to assess whether she met the Government's aerobic standard, by taking 49.4 seconds longer than required.

2 The narrow issue in this case is whether the Government improperly dismissed Ms. Meiorin from her job as a forest firefighter. The broader legal issue is whether the aerobic standard that led to Ms. Meiorin's dismissal unfairly excludes women from forest firefighting jobs. Employers seeking to maintain safety may err on the side of caution and set standards higher than are necessary for the safe performance of the work. However, if men and women do not have an equal ability to meet the excessive standard, the effect may be to exclude qualified female candidates from employment for no reason but their gender. Like human rights legislation throughout Canada, the British Columbia *Human Rights Code* seeks to counter this by requiring employers to justify their standards where *prima facie* discrimination is established. The question in this case is whether the Government has done so.

3 Although this case may be resolved on the basis of the conventional bifurcated analysis this Court has applied to claims of workplace discrimination under human rights statutes, the parties have invited us to reconsider that approach. Accepting this invitation, I propose a revised approach to what an employer must show to justify a *prima facie* case of discrimination. On this approach, I conclude that Ms. Meiorin has demonstrated that the Government's aerobic standard is *prima*

facie discriminatory and the Government has failed to establish on the record before this Court that it is a *bona fide* occupational requirement ("BFOR"). I would therefore allow the appeal and restore the arbitrator's decision to reinstate Ms. Meiorin.

II. Facts

4 Ms. Meiorin was employed for three years by the British Columbia Ministry of Forests as a member of a three-person Initial Attack Forest Firefighting Crew in the Golden Forest District. The crew's job was to attack and suppress forest fires while they were small and could be contained. Ms. Meiorin's supervisors found her work to be satisfactory.

5 Ms. Meiorin was not asked to take a physical fitness test until 1994, when she was required to pass the Government's "Bona Fide Occupational Fitness Tests and Standards for B.C. Forest Service Wildland Firefighters" (the" Tests"). The Tests required that the forest firefighters weigh less than 200 lbs. (with their equipment) and complete a shuttle run, an upright rowing exercise, and a pump carrying/hose dragging exercise within stipulated times. The running test was designed to test the forest firefighters' aerobic fitness and was based on the view that forest firefighters must have a minimum" VO_2 max" of 50 ml x kg^{-1} x min^{-1} (the" aerobic standard"). "VO_2 max" measures" maximal oxygen uptake," or the rate at which the body can take in oxygen, transport it to the muscles, and use it to produce energy.

6 The Tests were developed in response to a 1991 Coroner's Inquest Report that recommended that only physically fit employees be assigned as front-line forest firefighters for safety reasons. The Government commissioned a team of researchers from the University of Victoria to undertake a review of its existing fitness standards with a view to protecting the safety of firefighters while meeting human rights norms. The researchers developed the Tests by identifying the essential components of forest firefighting, measuring the physiological demands of those components, selecting fitness tests to measure those demands and, finally, assessing the validity of those tests.

7 The researchers studied various sample groups. The specific tasks performed by forest firefighters were identified by reviewing amalgamated data collected by the British Columbia Forest Service. The physiological demands of those tasks were then measured by observing test subjects as they performed them in the field. One simulation involved 18 firefighters, another involved 10 firefighters, but it is unclear from the researchers' report whether the subjects at this stage were male or female. The researchers asked a pilot group of 10 university student volunteers (6 females and 4 males) to perform a series of proposed fitness tests and field exercises. After refining the preferred tests, the researchers observed them being performed by a larger sample group composed of 31 forest firefighter trainees and 15 university student volunteers (31 males and 15 females), and correlated their results with the group's performance in the field. Having concluded that the preferred tests were accurate predictors of actual forest firefighting performance

— including the running test designed to gauge whether the subject met the aerobic standard — the researchers presented their report to the Government in 1992.

8 A follow-up study in 1994 of 77 male forest firefighters and 2 female forest firefighters used the same methodology. However, the researchers this time recommended that the Government initiate another study to examine the impact of the Tests on women. There is no evidence before us that the Government has yet responded to this recommendation.

9 Two aspects of the researchers' methodology are critical to this case. First, it was primarily descriptive, based on measuring the average performance levels of the test subjects and converting this data into minimum performance standards. Second, it did not seem to distinguish between the male and female test subjects.

10 After four attempts, Ms. Meiorin failed to meet the aerobic standard, running the distance in 11 minutes and 49.4 seconds instead of the required 11 minutes. As a result, she was laid off. Her union subsequently brought a grievance on her behalf. The arbitrator designated to hear the grievance was required to determine whether she had been improperly dismissed.

11 Evidence accepted by the arbitrator demonstrated that, owing to physiological differences, most women have lower aerobic capacity than most men. Even with training, most women cannot increase their aerobic capacity to the level required by the aerobic standard, although training can allow most men to meet it. The arbitrator also heard evidence that 65% to 70% of male applicants pass the Tests on their initial attempts, while only 35% of female applicants have similar success. Of the 800 to 900 Initial Attack Crew members employed by the Government in 1995, only 100 to 150 were female.

12 There was no credible evidence showing that the prescribed aerobic capacity was necessary for either men or women to perform the work of a forest firefighter satisfactorily. On the contrary, Ms. Meiorin had in the past performed her work well, without apparent risk to herself, her colleagues or the public.

III. The Rulings

13 The arbitrator found that Ms. Meiorin had established a *prima facie* case of adverse effect discrimination by showing that the aerobic standard has a disproportionately negative effect on women as a group. He further found that the Government had presented no credible evidence that Ms. Meiorin's inability to meet the aerobic standard meant that she constituted a safety risk to herself, her colleagues, or the public, and hence had not discharged its burden of showing that it had accommodated Ms. Meiorin to the point of undue hardship. He ordered that she be reinstated to her former position and compensated for her lost wages and benefits.

14 The Court of Appeal ((1997), 37 B.C.L.R. (3d) 317 (B.C. C.A.)) did not distinguish between direct and adverse effect discrimination. It held that so long as the standard is *necessary* to the safe and efficient performance of the work and is applied through individualized testing, there is no discrimination. The Court of Appeal (mistakenly) read the arbitrator's reasons as finding that the aerobic standard was necessary to the safe and efficient performance of the work. Since Ms. Meiorin had been individually tested against this standard, it allowed the appeal and dismissed her claim. The Court of Appeal commented that to permit Ms. Meiorin to succeed would create" reverse discrimination," i.e., to set a lower standard for women than for men would discriminate against those men who failed to meet the men's standard but were nevertheless capable of meeting the women's standard.

IV. Statutory Provisions

15 The following provisions of the British Columbia *Human Rights Code*, R.S.B.C. 1996, c. 210, are at issue on this appeal:

> **Discrimination in employment**
>
> **13** (1) A person must not
>
> (a) refuse to employ or refuse to continue to employ a person, or
>
> (b) discriminate against a person regarding employment or any term or condition of employment
>
> because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.
>
> . . . . .
>
> (4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

V. The Issues

16 The first issue on this appeal is the test applicable to s. 13(1) and (4) of the British Columbia *Human Rights Code*. The second issue is whether, on this test, Ms. Meiorin has established that the Government violated the Code.

VI. Analysis

17 As a preliminary matter, I must sort out a characterisation issue. The Court of Appeal seems to have understood the arbitrator as having held that the ability to meet the aerobic standard is necessary to the safe and efficient performance of the work of an Initial Attack Crew member. With respect, I cannot agree with this reading of the arbitrator's reasons.

18 The arbitrator held that the standard was one of the appropriate measurements available to the Government and that there is generally a reasonable relationship between aerobic fitness and the ability to perform the job of an Initial Attack Crew member. This falls short, however, of an affirmative finding that the ability to meet the aerobic standard chosen by the Government is necessary to the safe and efficient performance of the job. To the contrary, that inference is belied by the arbitrator's conclusion that, despite her failure to meet the aerobic standard, Ms. Meiorin did not pose a serious safety risk to herself, her colleagues, or the general public. I therefore proceed on the view that the arbitrator did not find that an applicant's ability to meet the aerobic standard is necessary to his or her ability to perform the tasks of an Initial Attack Crew member safely and efficiently. This leaves us to face squarely the issue of whether the aerobic standard is unjustifiably discriminatory within the meaning of the Code.

A. The Test

1. The Conventional Approach

19 The conventional approach to applying human rights legislation in the workplace requires the tribunal to decide at the outset into which of two categories the case falls: (1) "direct discrimination," where the standard is discriminatory on its face, or (2) "adverse effect discrimination," where the facially neutral standard discriminates in effect: *O'Malley v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536 (S.C.C.) (hereinafter "*O'Malley*") at p. 551, *per* McIntyre J. If a *prima facie* case of either form of discrimination is established, the burden shifts to the employer to justify it.

20 In the case of direct discrimination, the employer may establish that the standard is a BFOR by showing: (1) that the standard was imposed honestly and in good faith and was not designed to undermine the objectives of the human rights legislation (the subjective element); and (2) that the standard is reasonably necessary to the safe and efficient performance of the work and does not place an unreasonable burden on those to whom it applies (the objective element). See *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.), at pp. 208-9, *per* McIntyre J.; *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 (S.C.C.), at pp. 622-23, *per* McIntyre J.; *Brossard (Ville) c. Québec (Commission des droits de la personne)*, [1988] 2 S.C.R. 279 (S.C.C.), at pp. 310-12, *per* Beetz J. It is difficult for an employer to justify a standard as a BFOR where individual testing of the capabilities of the employee or applicant is a reasonable alternative: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.),

at pp. 513-14, *per* Wilson J.; *Saskatchewan (Human Rights Commission) v. Saskatoon (City)*, [1989] 2 S.C.R. 1297 (S.C.C.), at pp. 1313-14, *per* Sopinka J.

21 If these criteria are established, the standard is justified as a BFOR. If they are not, the standard itself is struck down: *Etobicoke, supra*, at pp. 207-08, *per* McIntyre J.; *O'Malley*, *supra*, at p. 555, *per* McIntyre J.; *Saskatoon, supra*, at pp. 1308-10, *per* Sopinka J.; *Central Alberta Dairy Pool*, *supra*, at p. 506, *per* Wilson J.; *Large v. Stratford (City) Police Department*, [1995] 3 S.C.R. 733 (S.C.C.), at para. 33, *per* Sopinka J.

22 A different analysis applies to adverse effect discrimination. The BFOR defence does not apply. *Prima facie* discrimination established, the employer need only show: (1) that there is a rational connection between the job and the particular standard, and (2) that it cannot further accommodate the claimant without incurring undue hardship: *O'Malley*, *supra*, at pp. 555-59, *per* McIntyre J.; *Central Alberta Dairy Pool*, *supra*, at pp. 505-6 and 519-20, *per* Wilson J. If the employer cannot discharge this burden, then it has failed to establish a defence to the charge of discrimination. In such a case, the claimant succeeds, but the standard itself always remains intact.

23 The arbitrator considered the aerobic standard to be a neutral standard that adversely affected Ms. Meiorin. The Court of Appeal, on the other hand, did not distinguish between direct and adverse effect discrimination, simply holding that it is not discriminatory to test individuals against a standard demonstrated to be necessary to the safe and efficient performance of the work. Approaching the case purely on the conventional bifurcated approach, the better view would seem to be that the standard is neutral on its face, leading one to the adverse effect discrimination analysis. On the conventional analysis, I agree with the arbitrator that a case of *prima facie* adverse effect discrimination was made out and that, on the record before him and before this Court, the Government failed to discharge its burden of showing that it had accommodated Ms. Meiorin to the point of undue hardship.

24 However, the divergent approaches taken by the arbitrator and the Court of Appeal suggest a more profound difficulty with the conventional test itself. The parties to this appeal have accordingly invited this Court to adopt a new model of analysis that avoids the threshold distinction between direct discrimination and adverse effect discrimination and integrates the concept of accommodation within the BFOR defence.

2. Why is a New Approach Required?

25 The conventional analysis was helpful in the interpretation of the early human rights statutes, and indeed represented a significant step forward in that it recognized for the first time the harm of adverse effect discrimination. The distinction it drew between the available remedies may also have reflected the apparent differences between direct and adverse effect discrimination. However well this approach may have served us in the past, many commentators have suggested that it ill-serves the purpose of contemporary human rights legislation. I agree. In my view, the complexity

and unnecessary artificiality of aspects of the conventional analysis attest to the desirability of now simplifying the guidelines that structure the interpretation of human rights legislation in Canada.

26 I will canvass seven difficulties with the conventional approach taken to claims under human rights legislation. Taken cumulatively, they make a compelling case for revising the analysis.

(a) Artificiality of the Distinction Between Direct and Adverse Effect Discrimination

27 The distinction between a standard that is discriminatory on its face and a neutral standard that is discriminatory in its effect is difficult to justify, simply because there are few cases that can be so neatly characterized. For example, a rule requiring all workers to appear at work on Fridays or face dismissal may plausibly be characterized as either *directly* discriminatory (because it means that no workers whose religious beliefs preclude working on Fridays may be employed there) or as a neutral rule that merely has an *adverse effect* on a few individuals (those same workers whose religious beliefs prevent them from working on Fridays). On the same reasoning, it could plausibly be argued that forcing employees to take a mandatory pregnancy test before commencing employment is a neutral rule because it is facially applied to all members of a workforce and its special effects on women are only incidental.

28 Several courts and commentators have observed that it seems perverse to have a threshold classification that is so malleable, indeed "chimerical": see, for example, *Canadian Civil Liberties Assn. v. Toronto Dominion Bank*, [1998] 4 F.C. 205 (Fed. C.A.), paras 114 and 145, *per* Robertson J.A.; S. Day and G. Brodsky," The Duty to Accommodate: Who Will Benefit?" (1996), 75 *Can. Bar Rev.* 433, at pp. 447-57; A. Molloy, "Disability and the Duty to Accommodate" (1993), 1 *Can. Lab. L. J.* 23, at pp. 36-37. Given the vague boundaries of the categories, an adjudicator may unconsciously tend to classify the impugned standard in a way that fits the remedy he or she is contemplating, be that striking down the standard itself or requiring only that the claimant's differences be accommodated. If so, form triumphs over substance and the broad purpose of the human rights statutes is left unfulfilled.

29 Not only is the distinction between direct and indirect discrimination malleable, it is also unrealistic: a modern employer with a discriminatory intention would rarely frame the rule in directly discriminatory terms when the same effect — or an even broader effect — could be easily realized by couching it in neutral language: D. Lepofsky, "The Duty to Accommodate: A Purposive Approach" (1993), 1 *Can. Lab. L. J.* 1, at pp. 8-9. Dickson C.J., for one, recognized that this more subtle type of discrimination, which rises in the aggregate to the level of systemic discrimination, is now much more prevalent than the cruder brand of openly direct discrimination: *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.), at p. 931. See also the classic case of *Griggs v. Duke Power Co.*, 401 U.S. 424 (U.S. S.C. 1971). The bifurcated analysis gives employers with a discriminatory intention and the forethought to draft the rule in neutral language an undeserved cloak of legitimacy.

(b) Different Remedies Depending on Method of Discrimination

30 The malleability of the initial classification under the conventional approach would not matter so much if both routes led to the same result. But, as indicated above, the potential remedies may differ. If an employer cannot justify a directly discriminatory standard as a BFOR, it will be struck down in its entirety. However, if the rule is characterized as a neutral one that adversely affects a certain individual, the employer need only show that there is a rational connection between the standard and the performance of the job and that it cannot further accommodate the claimant without experiencing undue hardship. The general standard, however, remains in effect. These very different results flow directly from the stream into which the initial inquiry shunts the analysis.

31 The proposition that dramatically different results should follow from a tenuous initial classification of the method of discrimination is disconcerting because the effect of a discriminatory standard does not substantially change depending on how it is expressed: see M. C. Crane, "Human Rights, *Bona Fide* Occupational Requirements and the Duty to Accommodate: Semantics or Substance?" (1996), 4 *C.L.E.L.J.* 209, at pp. 226-29. Kenneth Watkin therefore observes that the question should not be whether the discrimination is direct or indirect, but rather "whether the individual or group discriminated against receives the same protection regardless of the manner in which that discrimination is brought about": K. Watkin, "The Justification of Discrimination Under Canadian Human Rights Legislation and the *Charter*: Why So Many Tests?" (1993), 2 *N.J.C.L.* 63, at p. 88. These criticisms are compelling. It is difficult to justify conferring more or less protection on a claimant and others who share his or her characteristics, depending only on how the discriminatory rule is phrased.

(c) Questionable Assumption that Adversely Affected Group Always a Numerical Minority

32 From a narrowly utilitarian perspective, it could be argued that it is sometimes appropriate to leave an ostensibly neutral standard in place if its adverse effects are felt by only one or, at most, a few individuals. This seems to have been the original rationale of this Court's adverse effect discrimination jurisprudence. In *O'Malley*, *supra*, McIntyre J. commented, at p. 555:

> Where there is adverse effect discrimination on account of creed the offending order or rule will not necessarily be struck down. It will survive in most cases because its discriminatory effect is limited to one person or to one group, and it is the effect upon them rather than upon the general work force which must be considered.

In *Central Alberta Dairy Pool*, *supra*, Wilson J. held at p. 514, that "the group of people who are adversely affected ... is always smaller than the group to which the rule applies." More recently, in *Chambly (Commission scolaire régionale) c. Bergevin*, [1994] 2 S.C.R. 525 (S.C.C.), at p. 544, Cory J. made the more modest observation that "[a]lmost invariably, those adversely affected will be members of a minority group."

33 To the extent that the bifurcated analysis relies on a comparison between the relative demographic representation of various groups, it is arguably unhelpful. First, the argument that an apparently neutral standard should be permitted to stand because its discriminatory effect is limited to members of a minority group and does not adversely affect the majority of employees is difficult to defend. The standard itself is discriminatory precisely because it treats some individuals differently from others, on the basis of a prohibited ground: see generally *Toronto Dominion Bank*, *supra*, at paras. 140-41, *per* Robertson J.A. As this Court held in *Law v. Canada (Minister of Employment & Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.), at para. 66, if a rule has a substantively discriminatory effect on a prohibited ground, it should be characterized as such regardless of whether the claimant is a member of a majority or minority group.

34 Second, the size of the "affected group" is easily manipulable: see Day and Brodsky, *supra*, at p. 453. For example, in *Toronto Dominion Bank*, *supra*, the Bank instituted a policy of having returning employees submit to drug tests. Was the affected group the small minority of returning employees who were drug-dependent, leading to a characterization of the policy as adverse effect discrimination? Or was the affected group all returning employees who were required to submit to invasive drug-testing on the assumption that some of them were drug-dependent, lending itself to a characterization of the policy as direct discrimination? "It is possible for a policy to be characterized as direct discrimination, or adverse effect discrimination, or both, depending on how 'neutrality' and the group affected are defined by the adjudicator": Day and Brodsky, *supra*, at p. 453. Because the size of the affected group is so manipulable, it is difficult to justify using it as the foundation of the entire analysis.

35 Third, the emphasis on whether the claimant is a member of a majority or a minority group is clearly most unhelpful when the affected group actually constitutes a *majority* of the workforce: see B. Etherington, "Central Alberta Dairy Pool: The Supreme Court of Canada's Latest Word on the Duty to Accommodate" (1993), 1 *Can. Lab. L.J.* 311, at pp. 324-25. The utilitarian arguments about the minority's having to abide by the practices of the majority for reasons of economic efficiency or safety fade in strength as the affected group nears the status of the majority.

36 At this point, which exists where women constitute the adversely affected group, the adverse effect analysis may serve to entrench the male norm as the" mainstream" into which women must integrate. Concerns about economic efficiency and safety, shorn of their utilitarian cloaks, may well operate to discriminate against women in a way that is direct in every way except that contemplated by the legal nomenclature. An analysis that does not acknowledge this reality fails to give full effect to the purpose of the human rights legislation at issue.

(d) Difficulties in Practical Application of Employers' Defences

37 The conventional analysis developed by this Court has also been criticized for drawing difficult distinctions between the elements an employer must establish to rebut a *prima facie* case

of direct discrimination and the elements an employer must establish to rebut a *prima facie* case of adverse effect discrimination. For example, a distinction has been drawn between the obligation to explore "reasonable alternatives," applicable to direct discrimination, and the obligation to consider "individual accommodation," applicable to adverse effect discrimination: see *Large*, *supra*, at paras. 30-34, *per* Sopinka J.

38 In practice, however, there may be little difference between the two defences: see, for example, *Canada (Attorney General) v. Levac* (1992), 22 C.H.R.R. D/259 (Fed. C.A.); *Large v. Stratford (City) Police Department* (1992), 92 D.L.R. (4th) 565 (Ont. Div. Ct.), *per* Campbell J., at pp. 577-79; *Saran v. Delta Cedar Products Ltd.* (January 25, 1995), Attafuah (B.C. Human Rights Comm.); *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1994), 25 C.H.R.R. D/296 (B.C. Human Rights Council). In *Thwaites v. Canada (Canadian Armed Forces)* (1993), 19 C.H.R.R. D/259 (Can. Human Rights Trib.), it was recognized, at p. D/282, that,

> [t]he logical conclusion from this analysis is that there is very little, if any, meaningful distinction between what an employer must establish by way of a defence to an allegation of direct discrimination and a defence to an allegation of adverse effect discrimination. The only difference may be semantic. In both cases, the employer must have regard to the particular individual in question. In the case of direct discrimination, the employer must justify its rule or practice by demonstrating that there are no reasonable alternatives and that the rule or practice is proportional to the end being sought. In the case of adverse effect discrimination, the neutral rule is not attacked but the employer must still show that it could not otherwise reasonably accommodate the individual disparately affected by that rule. In both cases, whether the operative words are "reasonable alternative" or "proportionality" or "accommodation," the inquiry is essentially the same: the employer must show that it could not have done anything else reasonable or practical to avoid the negative impact on the individual.

Parties, tribunals and courts are therefore compelled to frame their arguments and decisions within the confines of definitions that are themselves blurred. The broad purpose of human rights legislation may be obscured in the process. If the ultimate practical question is common to both the direct and adverse effect discrimination analyses, it may fairly be argued that there is little reason to distinguish between either the two analyses or the available remedies.

(e) Legitimizing Systemic Discrimination

39 It has also been argued that the distinction drawn by the conventional analysis between direct and adverse effect discrimination may, in practice, serve to legitimize systemic discrimination, or "discrimination that results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination": *Canadian National Railway v. Canada (Human Rights Commission)*, [1987] 1 S.C.R. 1114 (S.C.C.)

(hereinafter "*Action Travail*"), at p. 1139, *per* Dickson C.J. See generally I. B. McKenna," Legal Rights for Persons with Disabilities in Canada: Can the Impasse Be Resolved?" (1997-98), 29 *Ottawa L. Rev.* 153, and P. Phillips and E. Phillips, *Women and Work: Inequality in the Canadian Labour Market* (1993), at pp. 45-95.

40 Under the conventional analysis, if a standard is classified as being" neutral" at the threshold stage of the inquiry, its legitimacy is never questioned. The focus shifts to whether the individual claimant can be accommodated, and the formal standard itself always remains intact. The conventional analysis thus shifts attention away from the substantive norms underlying the standard, to how "different" individuals can fit into the "mainstream," represented by the standard.

41 Although the practical result of the conventional analysis may be that individual claimants are accommodated and the particular discriminatory effect they experience may be alleviated, the larger import of the analysis cannot be ignored. It bars courts and tribunals from assessing the legitimacy of the standard itself. Referring to the distinction that the conventional analysis draws between the accepted neutral standard and the duty to accommodate those who are adversely affected by it, Day and Brodsky, *supra*, write at p. 462:

> The difficulty with this paradigm is that it does not challenge the imbalances of power, or the discourses of dominance, such as racism, able-bodyism and sexism, which result in a society being designed well for some and not for others. It allows those who consider themselves "normal" to continue to construct institutions and relations in their image, as long as others, when they challenge this construction are "accommodated."
>
> Accommodation, conceived this way, appears to be rooted in the formal model of equality. As a formula, different treatment for "different" people is merely the flip side of like treatment for likes. Accommodation does not go to the heart of the equality question, to the goal of transformation, to an examination of the way institutions and relations must be changed in order to make them available, accessible, meaningful and rewarding for the many diverse groups of which our society is composed. Accommodation seems to mean that we do not change procedures or services, we simply "accommodate" those who do not quite fit. We make some concessions to those who are "different," rather than abandoning the idea of "normal" and working for genuine inclusiveness.
>
> In this way, accommodation seems to allow formal equality to be the dominant paradigm, as long as some adjustments can be made, sometimes, to deal with unequal effects. Accommodation, conceived of in this way does not challenge deep-seated beliefs about the intrinsic superiority of such characteristics as mobility and sightedness. In short, accommodation is assimilationist. Its goal is to try to make "different" people fit into existing systems.

I agree with the thrust of these observations. Interpreting human rights legislation primarily in terms of formal equality undermines its promise of substantive equality and prevents consideration of the effects of systemic discrimination, as this Court acknowledged in *Action Travail, supra.*

42 This case, where Ms. Meiorin seeks to keep her position in a male-dominated occupation, is a good example of how the conventional analysis shields systemic discrimination from scrutiny. This analysis prevents the Court from rigorously assessing a standard which, in the course of regulating entry to a male-dominated occupation, adversely affects women as a group. Although the Government may have a duty to accommodate an individual claimant, the practical result of the conventional analysis is that the complex web of seemingly neutral, systemic barriers to traditionally male-dominated occupations remains beyond the direct reach of the law. The right to be free from discrimination is reduced to a question of whether the "mainstream" can afford to confer proper treatment on those adversely affected, within the confines of its existing formal standard. If it cannot, the edifice of systemic discrimination receives the law's approval. This cannot be right.

(f) Dissonance Between Conventional Analysis and Express Purpose and Terms of Human Rights Code

43 Although the various human rights statutes have an elevated legal status (*Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145 (S.C.C.); *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321 (S.C.C.)), they remain legislative pronouncements and, in the absence of a constitutional challenge, this Court must interpret them according to their terms, and in light of their purposes. As I suggested earlier, the conventional analysis may compromise both the broad purposes and the specific terms of the Code.

44 In British Columbia, the relevant purposes are stated in s. 3 of the Code:

> **3.** ...
>
> (a) to foster a society in British Columbia in which there are no impediments to full and free participation in the economic, social, political and cultural life of British Columbia;
>
> (b) to promote a climate of understanding and mutual respect where all are equal in dignity and rights;
>
> (c) to prevent discrimination prohibited by this Code;
>
> (d) to identify and eliminate persistent patterns of inequality associated with discrimination prohibited by this Code;

> (e) to provide a means of redress for those persons who are discriminated against contrary to this Code;
>
> . . . . .

This Court has held that, because of their status as "fundamental law," human rights statutes must be interpreted liberally, so that they may better fulfill their objectives: *O'Malley*, *supra*, at p. 547, *per* McIntyre J.; *Action Travail, supra*, at pp. 1134-36, *per* Dickson C.J.; *Robichaud v. Brennan*, [1987] 2 S.C.R. 84 (S.C.C.), at pp. 89-90, *per* La Forest J. An interpretation that allows the rule itself to be questioned only if the discrimination can be characterized as "direct" does not allow these statutes to accomplish their purposes as well as they might otherwise do.

45 Furthermore, the terms of the British Columbia Code do not contemplate one type of employment-related discrimination being treated differently from another. Section 13(1) generally prohibits discriminating "against a person regarding employment or any term or condition of employment." Section 13(4) states that the general rule does not apply "with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement." The BFOR defence thus applies to all types of discrimination. There is no presumption that an ostensibly neutral rule is not discriminatory in itself, nor is there any statement in the Code that a discriminatory rule can be allowed to stand as long as the group or individual against whom it discriminates constitutes a minority of the workforce and it would be prohibitively difficult to accommodate them.

46 Most of the other Canadian human rights statutes that refer to a BFOR do not confine it or the duty to accommodate to certain types of discrimination. Indeed, some statutes expressly foreclose such reasoning, as I will discuss below. Stated simply, there is no statutory imperative in this case to perpetuate different categories of discrimination and provide different remedies for their respective breaches.

(g) Dissonance Between Human Rights Analysis and Charter Analysis

47 The conventional analysis differs in substance from the approach this Court has taken to s. 15(1) of the *Canadian Charter of Rights and Freedoms*. In the *Charter* context, the distinction between direct and adverse effect discrimination may have some analytical significance but, because the principal concern is the *effect* of the impugned law, it has little legal importance. As Iacobucci J. noted at para. 80 of *Law*, *supra*:

> While it is well established that it is open to a s. 15(1) claimant to establish discrimination by demonstrating a discriminatory legislative purpose, proof of legislative intent is not required in order to found a s. 15(1) claim: *Andrews, supra*, at p. 174. What is required is that the claimant establish that either the purpose or the effect of the legislation infringes s. 15(1),

> such that the onus may be satisfied by showing only a discriminatory effect. [Emphasis in original.]

48 Where s. 15(1) of the *Charter* is concerned, therefore, this Court has recognized that the negative effect on the individual complainant's dignity does not substantially vary depending on whether the discrimination is overt or covert. Where it is possible to make a *Charter* claim in the course of an employment relationship, the employer cannot dictate the nature of what it must prove in justification simply by altering the *method* of discrimination. I see little reason for adopting a different approach when the claim is brought under human rights legislation which, while it may have a different legal orientation, is aimed at the same general wrong as s. 15(1) of the *Charter*.

49 It has been suggested that the distinction between direct and adverse effect discrimination in human rights analysis may be attributable, at least in part, to a sense that "unintentional" discrimination occasioned by "neutral" rules is less deserving of legal censure: see Etherington, *supra*, at pp. 324-25. At p. 457, Day and Brodsky, *supra*, argue that,

> It seems apparent that the distinction between direct and adverse effect discrimination is based on the need to maintain that there is a difference between intentional discrimination and unintentional discrimination, even though tribunals and courts, including the Supreme Court of Canada, have repeatedly ruled that unintentional discrimination is no less a violation of human rights law, and that it is the effects of discrimination which matter. There remains a holdover sense that direct discrimination is more loathsome, morally more repugnant, because the perpetrator *intends* to discriminate or has discriminated *knowingly*. By contrast, adverse effect discrimination is viewed as "innocent," unwitting, accidental, and consequently not morally repugnant. [Emphasis in original.]

I acknowledge that there may in some cases be differences in the respective origins of directly discriminatory standards and neutral standards with adverse effects. However, this Court long ago held that the fact that a discriminatory effect was unintended is not determinative of its general *Charter* analysis and certainly does not determine the available remedy: *Law*, *supra*, at para. 80, *per* Iacobucci J.; *Andrews v. Law Society (British Columbia)*, [1989] 1 S.C.R. 143 (S.C.C.), at pp. 174-175, *per* McIntyre J.; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at para. 62, *per* La Forest J. In cases such as *O'Malley*, *supra*, and *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561 (S.C.C.), this Court endeavoured to entrench the same principle in its analysis of human rights legislation. In my view, care should be taken to ensure that this goal is not compromised by a bifurcated method of analysing claims made pursuant to such legislation.

3. Toward a Unified Approach

50 Whatever may have once been the benefit of the conventional analysis of discrimination claims brought under human rights legislation, the difficulties discussed show that there is much

to be said for now adopting a unified approach that (1) avoids the problematic distinction between direct and adverse effect discrimination, (2) requires employers to accommodate as much as reasonably possible the characteristics of individual employees when setting the workplace standard, and (3) takes a strict approach to exemptions from the duty not to discriminate, while permitting exemptions where they are reasonably necessary to the achievement of legitimate work-related objectives.

51 Many of those who have studied the issue and written on it have advocated such a unified approach: see W. Pentney, "Belonging: The Promise of Community, Continuity and Change in Equality Law 1995-96" (1996), 25 C.H.R.R. C/6; Day and Brodsky, *supra*, at pp. 459-60 and 472; Lepofsky, *supra*, at pp. 16-17; Crane, *supra*, at pp. 231-32; Molloy, *supra*, at pp. 36-37; Watkin, *supra*, at pp. 86-93; M. F. Yalden, "The Duty to Accommodate: A View From the Canadian Human Rights Commission" (1993), 1 *Can. Lab. L.J.* 283, at pp. 286-93; Canadian Human Rights Commission, *The Effects of the Bhinder Decision on the Canadian Human Rights Commission: A Special Report to Parliament* (1986).

52 Furthermore, some provinces have revised their human rights statutes so that courts are now required to adopt a unified approach: see s. 24(2) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19; s. 12 of the Manitoba *Human Rights Code*, S.M. 1987-88, c. 45, and, in a more limited sense, s. 7 of the Yukon *Human Rights Act*, S.Y. 1987, c. 3. Most recently, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, was amended (S.C. 1998, c. 9) so that s. 15(2) of the Act now expressly provides that an otherwise discriminatory practice will only constitute a BFOR if the employer establishes that the needs of the individual or class of individuals cannot be accommodated without imposing undue hardship.

53 Finally, judges of this Court have not infrequently written of the need to adopt a simpler, more common-sense approach to determining when an employer may be justified in applying a standard with discriminatory effects. See *Bhinder*, *supra*, at pp. 567-68, *per* Dickson C.J. (dissenting); *Central Alberta Dairy Pool*, *supra*, at pp. 528-29, *per* Sopinka J. (dissenting); *Large*, *supra*, at para. 56, *per* L'Heureux-Dubé J. It is noteworthy that even Wilson J., writing for the majority of this Court in *Central Alberta Dairy Pool*, *supra*, arguably recognized that a form of accommodation — the search for proportionate, reasonable alternatives to a general rule — had a certain place within the BFOR analysis, then applicable only to cases of direct discrimination. See in particular her references, at pp. 518-19, to *Brossard, supra*, and *Saskatoon, supra*.

4. Elements of a Unified Approach

54 Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:

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

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment 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 accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

55 This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool*, *supra*, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]." It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

56 Having set out the test, I offer certain elaborations on its application.

Step One

57 The first step in assessing whether the employer has successfully established a BFOR defence is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the job. The initial task is to determine what the impugned standard is generally designed to achieve. The ability to work safely and efficiently is the purpose most often mentioned in the cases but there may well be other reasons for imposing particular standards in the workplace. In *Brossard, supra*, for example, the general purpose of the town's anti-nepotism policy was to curb actual and apparent conflicts of interest among public employees. In *Caldwell*, *supra*, the Roman Catholic high school sought to maintain the religious integrity of its teaching environment and curriculum. In other circumstances, the employer may seek to ensure that qualified employees are present at certain times. There are innumerable possible reasons that an employer might seek to impose a standard on its employees.

58 The employer must demonstrate that there is a rational connection between the general purpose for which the impugned standard was introduced and the objective requirements of the job. For example, turning again to *Brossard, supra*, Beetz J. held, at p. 313, that because of the special character of public employment, "[i]t is appropriate and indeed necessary to adopt rules

of conduct for public servants to inhibit conflicts of interest." Where the general purpose of the standard is to ensure the safe and efficient performance of the job — essential elements of all occupations — it will likely not be necessary to spend much time at this stage. Where the purpose is narrower, it may well be an important part of the analysis.

59 The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose. This inquiry is necessarily more general than determining whether there is a rational connection between the performance of the job and the *particular standard* that has been selected, as may have been the case on the conventional approach. The distinction is important. If there is no rational relationship between the general purpose of the standard and the tasks properly required of the employee, then there is of course no need to continue to assess the legitimacy of the particular standard itself. Without a legitimate general purpose underlying it, the standard cannot be a BFOR. In my view, it is helpful to keep the two levels of inquiry distinct.

Step Two

60 Once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. This addresses the subjective element of the test which, although not essential to a finding that the standard is not a BFOR, is one basis on which the standard may be struck down: see *O'Malley*, *supra*, at pp. 547-50, *per* McIntyre J.; *Etobicoke, supra*, at p. 209, *per* McIntyre J. If the imposition of the standard was not thought to be reasonably necessary or was motivated by discriminatory *animus*, then it cannot be a BFOR.

61 It is important to note that the analysis shifts at this stage from the general purpose of the standard to the particular standard itself. It is not necessarily so that a particular standard will constitute a BFOR merely because its general purpose is rationally connected to the performance of the job: see *Brossard, supra*, at pp. 314-15, *per* Beetz J.

Step Three

62 The employer's third and final hurdle is to demonstrate that the impugned standard is reasonably necessary for the employer to accomplish its purpose, which by this point has been demonstrated to be rationally connected to the performance of the job. The employer must establish that it cannot accommodate the claimant and others adversely affected by the standard without experiencing undue hardship. When referring to the concept of "undue hardship," it is important to recall the words of Sopinka J. who observed in *Renaud v. Central Okanagan School District No. 23*, [1992] 2 S.C.R. 970 (S.C.C.) , at p. 984, that "[t]he use of the term 'undue' infers that some hardship is acceptable; it is only 'undue' hardship that satisfies this test." It may be ideal from the employer's perspective to choose a standard that is uncompromisingly stringent. Yet the standard,

if it is to be justified under the human rights legislation, must accommodate factors relating to the unique capabilities and inherent worth and dignity of every individual, up to the point of undue hardship.

63 When determining whether an existing standard is reasonably necessary for the employer to accomplish its purpose, it may be helpful to refer to the jurisprudence of this Court dealing both with the justification of direct discrimination and the concept of accommodation within the adverse effect discrimination analysis. For example, dealing with adverse effect discrimination in *Central Alberta Dairy Pool*, *supra*, at pp. 520-21, Wilson J. addressed the factors that may be considered when assessing an employer's duty to accommodate an employee to the point of undue hardship. Among the relevant factors are the financial cost of the possible method of accommodation, the relative interchangeability of the workforce and facilities, and the prospect of substantial interference with the rights of other employees. See also *Renaud*, *supra*, at p. 984, *per* Sopinka J. The various factors are not entrenched, except to the extent that they are expressly included or excluded by statute. In all cases, as Cory J. noted in *Chambly, supra*, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case."

64 Courts and tribunals should be sensitive to the various ways in which individual capabilities may be accommodated. Apart from individual testing to determine whether the person has the aptitude or qualification that is necessary to perform the work, the possibility that there may be different ways to perform the job while still accomplishing the employer's legitimate work-related purpose should be considered in appropriate cases. The skills, capabilities and potential contributions of the individual claimant and others like him or her must be respected as much as possible. Employers, courts and tribunals should be innovative yet practical when considering how this may best be done in particular circumstances.

65 Some of the important questions that may be asked in the course of the analysis include:

> (a) Has the employer investigated alternative approaches that do not have a discriminatory effect, such as individual testing against a more individually sensitive standard?
>
> (b) If alternative standards were investigated and found to be capable of fulfilling the employer's purpose, why were they not implemented?
>
> (c) Is it necessary to have all employees meet the single standard for the employer to accomplish its legitimate purpose or could standards reflective of group or individual differences and capabilities be established?
>
> (d) Is there a way to do the job that is less discriminatory while still accomplishing the employer's legitimate purpose?

(e) Is the standard properly designed to ensure that the desired qualification is met without placing an undue burden on those to whom the standard applies?

(f) Have other parties who are obliged to assist in the search for possible accommodation fulfilled their roles? As Sopinka J. noted in *Renaud, supra*, at pp. 992-96, the task of determining how to accommodate individual differences may also place burdens on the employee and, if there is a collective agreement, a union.

66 Notwithstanding the overlap between the two inquiries, it may often be useful as a practical matter to consider separately, first, the *procedure*, if any, which was adopted to assess the issue of accommodation and, second, the *substantive content* of either a more accommodating standard which was offered or alternatively the employer's reasons for not offering any such standard: see generally Lepofsky, *supra*.

67 If the *prima facie* discriminatory standard is not reasonably necessary for the employer to accomplish its legitimate purpose or, to put it another way, if individual differences may be accommodated without imposing undue hardship on the employer, then the standard is not a BFOR. The employer has failed to establish a defence to the charge of discrimination. Although not at issue in this case, as it arose as a grievance before a labour arbitrator, when the standard is not a BFOR, the appropriate remedy will be chosen with reference to the remedies provided in the applicable human rights legislation. Conversely, if the general purpose of the standard is rationally connected to the performance of the particular job, the particular standard was imposed with an honest, good faith belief in its necessity, and its application in its existing form is reasonably necessary for the employer to accomplish its legitimate purpose without experiencing undue hardship, the standard is a BFOR. If all of these criteria are established, the employer has brought itself within an exception to the general prohibition of discrimination.

68 Employers designing workplace standards owe an obligation to be aware of both the differences between individuals, and differences that characterize groups of individuals. They must build conceptions of equality into workplace standards. By enacting human rights statutes and providing that they are applicable to the workplace, the legislatures have determined that the standards governing the performance of work should be designed to reflect all members of society, in so far as this is reasonably possible. Courts and tribunals must bear this in mind when confronted with a claim of employment-related discrimination. To the extent that a standard unnecessarily fails reflect the differences among individuals, it runs afoul of the prohibitions contained in the various human rights statutes and must be replaced. The standard *itself* is required to provide for individual accommodation, if reasonably possible. A standard that allows for such accommodation may be only slightly different from the existing standard but it is a different standard nonetheless.

B. Application of the Reformed Approach to the Case on Appeal

1. Introduction

69 Ms. Meiorin has discharged the burden of establishing that, *prima facie*, the aerobic standard discriminates against her as a woman. The arbitrator held that, because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard. While the Government's expert witness testified that most women can achieve the aerobic standard with training, the arbitrator rejected this evidence as "anecdotal" and" not supported by scientific data." This Court has not been presented with any reason to revisit this characterization. Ms. Meiorin has therefore demonstrated that the aerobic standard is *prima facie* discriminatory, and has brought herself within s. 13(1) of the Code.

70 Ms. Meiorin having established a *prima facie* case of discrimination, the burden shifts to the Government to demonstrate that the aerobic standard is a BFOR. For the reasons below, I conclude that the Government has failed to discharge this burden and therefore cannot rely on the defence provided by s. 13(4) of the Code.

2. Steps One and Two

71 The first two elements of the proposed BFOR analysis, that is (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job; and (2) that the employer adopted the particular standard in an honest and good-faith belief that it was necessary to the fulfilment of that legitimate work-related purpose, have been fulfilled. The Government's general purpose in imposing the aerobic standard is not disputed. It is to enable the Government to identify those employees or applicants who are able to perform the job of a forest firefighter safely and efficiently. It is also clear that there is a rational connection between this general characteristic and the performance of the particularly strenuous tasks expected of a forest firefighter. All indications are that the Government acted honestly and in a good faith belief that adopting the particular standard was necessary to the identification of those persons able to perform the job safely and efficiently. It did not intend to discriminate against Ms. Meiorin. To the contrary, one of the reasons the Government retained the researchers from the University of Victoria was that it sought to identify non-discriminatory standards.

3. Step Three

72 Under the third element of the unified approach, the employer must establish 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 accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. In the case on appeal, the contentious issue is whether the Government has demonstrated that this particular aerobic standard is reasonably necessary in order to identify those persons who are able to performthe tasks of a forest firefighter safely

and efficiently. As noted, the burden is on the government to demonstrate that, in the course of accomplishing this purpose, it cannot accommodate individual or group differences without experiencing undue hardship.

73 The Government adopted the laudable course of retaining experts to devise a non-discriminatory test. However, because of significant problems with the way the researchers proceeded, passing the resulting aerobic standard has not been shown to be reasonably necessary to the safe and efficient performance of the work of a forest firefighter. The Government has not established that it would experience undue hardship if a different standard were used.

74 The procedures adopted by the researchers are problematic on two levels. First, their approach seems to have been primarily a descriptive one: test subjects were observed completing the tasks, the aerobic capacity of the test subjects was ascertained, and that capacity was established as the minimum standard required of every forest firefighter. However, merely describing the characteristics of a test subject does not necessarily allow one to identify the standard *minimally* necessary for the safe and efficient performance of the task. Second, these primarily descriptive studies failed to distinguish the female test subjects from the male test subjects, who constituted the vast majority of the sample groups. The record before this Court therefore does not permit us to say whether men and women require the same minimum level of aerobic capacity to perform safely and efficiently the tasks expected of a forest firefighter.

75 While the researchers' goal was admirable, their aerobic standard was developed through a process that failed to address the possibility that it may discriminate unnecessarily on one or more prohibited grounds, particularly sex. This phenomenon is not unique to the procedures taken towards identifying occupational qualifications in this case: see generally K. Messing and J. Stevenson, "Women in Procrustean Beds: Strength Testing and the Workplace" (1996), 3 *Gender, Work and Organization* 156; K. Messing, *One-Eyed Science: Occupational Health and Women Workers* (1998). Employers and researchers should be highly mindful of this serious problem.

76 The expert who testified before the arbitrator on behalf of the Government defended the original researchers' decision not to analyse separately the aerobic performance of the male and female, experienced and inexperienced, test subjects as an attempt to reflect the actual conditions of firefighting. This misses the point. The polymorphous group's average aerobic performance is irrelevant to the question of whether the aerobic standard constitutes a minimum threshold that cannot be altered without causing undue hardship to the employer. Rather, the goal should have been to measure whether members of all groups require the same minimum aerobic capacity to perform the job safely and efficiently and, if not, to reflect that disparity in the employment qualifications. There is no evidence before us that any action was taken to further this goal before the aerobic standard was adopted.

77 Neither is there any evidence that the Government embarked upon a study of the discriminatory effects of the aerobic standard when the issue was raised by Ms. Meiorin. In fact, the expert reports filed by the Government in these proceedings content themselves with asserting that the aerobic standard set in 1992 and 1994 is a minimum standard that women can meet with appropriate training. No studies were conducted to substantiate the latter assertion and the arbitrator rejected it as unsupported by the evidence.

78 Assuming that the Government had properly addressed the question in a procedural sense, its response — that it would experience undue hardship if it had to accommodate Ms. Meiorin — is deficient from a substantive perspective. The Government has presented no evidence as to the cost of accommodation. Its primary argument is that, because the aerobic standard is necessary for the safety of the individual firefighter, the other members of the crew, and the public at large, it would experience undue hardship if compelled to deviate from that standard in any way.

79 Referring to the Government's arguments on this point, the arbitrator noted that, "other than anecdotal or 'impressionistic' evidence concerning the magnitude of risk involved in accommodating the adverse-effect discrimination suffered by the grievor, the employer has presented no cogent evidence ... to support its position that it cannot accommodate Ms. Meiorin because of safety risks." The arbitrator held that the evidence fell short of establishing that Ms. Meiorin posed a serious safety risk to herself, her colleagues, or the general public. Accordingly, he held that the Government had failed to accommodate her to the point of undue hardship. This Court has not been presented with any reason to interfere with his conclusion on this point, and I decline to do so. The Government did not discharge its burden of showing that the purpose for which it introduced the aerobic standard would be compromised to the point of undue hardship if a different standard were used.

80 This leaves the evidence of the Assistant Director of Protection Programs for the British Columbia Ministry of Forests, who testified that accommodating Ms. Meiorin would undermine the morale of the Initial Attack Crews. Again, this proposition is not supported by evidence. But even if it were, the attitudes of those who seek to maintain a discriminatory practice cannot be reconciled with the Code. These attitudes cannot therefore be determinative of whether the employer has accommodated the claimant to the point of undue hardship: see generally *Renaud, supra*, at pp. 984-85, *per* Sopinka J.; *Chambly, supra*, at pp. 545-46, *per* Cory J. Although serious consideration must of course be taken of the "objection of employees based on well-grounded concerns that their rights will be affected," discrimination on the basis of a prohibited ground cannot be justified by arguing that abandoning such a practice would threaten the morale of the workforce: *Renaud, supra*, at p. 988, *per* Sopinka J.; *Cranston v. Canada* (1997), 97 C.L.L.C. 230-008 (Can. Human Rights Trib.). If it were possible to perform the tasks of a forest firefighter safely and efficiently without meeting the prescribed aerobic standard (and the Government has

not established the contrary), I can see no right of other firefighters that would be affected by allowing Ms. Meiorin to continue performing her job.

81 The Court of Appeal suggested that accommodating women by permitting them to meet a lower aerobic standard than men would constitute "reverse discrimination." I respectfully disagree. As this Court has repeatedly held, the essence of equality is to be treated according to one's own merit, capabilities and circumstances. True equality requires that differences be accommodated: *Andrews*, *supra*, at pp. 167-69, *per* McIntyre J.; *Law*, *supra*, at para. 51, *per* Iacobucci J. A different aerobic standard capable of identifying women who could perform the job safely and efficiently therefore does not necessarily imply discrimination against men." Reverse" discrimination would only result if, for example, an aerobic standard representing a minimum threshold for *all* forest firefighters was held to be inapplicable to men simply because they were men.

82 The Court of Appeal also suggested that the fact that Ms. Meiorin was tested individually immunized the Government from a finding of discrimination. However, individual testing, without more, does not negate discrimination. The individual must be tested against a realistic standard that reflects his or her capacities and potential contributions. Having failed to establish that the aerobic standard constitutes the minimum qualification required to perform the job safely and efficiently, the Government cannot rely on the mere fact of individual testing to rebut Ms. Meiorin's *prima facie* case of discrimination.

VII. Conclusion

83 I conclude that Ms. Meiorin has established that the aerobic standard is *prima facie* discriminatory, and the Government has not shown that it is reasonably necessary to the accomplishment of the Government's general purpose, which is to identify those forest firefighters who are able to work safely and efficiently. Because it has therefore not been established that the aerobic standard is a BFOR, the Government cannot avail itself of the defence in s. 13(4) of the Code and is bound by the prohibition of such a discriminatory standard in s. 13(1)(b). The Code accordingly prevents the Government from relying on the aerobic standard as the basis for Ms. Meiorin's dismissal. As this case arose as a grievance before a labour arbitrator, rather than as a claim before the Human Rights Tribunal or its predecessor, relief of a more general nature cannot be claimed. No challenge was made to the other components of the Government's Tests.

84 I would allow the appeal and restore the order of the arbitrator reinstating Ms. Meiorin to her former position and compensating her for lost wages and benefits. Ms. Meiorin's union, the appellant on this appeal, shall have its costs in this Court and in the court below.

Appeal allowed.

Pourvoi accueilli.

Footnotes

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Tab 20

para 19

1999 CarswellBC 2730
Supreme Court of Canada

British Columbia (Superintendent of Motor Vehicles)
v. British Columbia (Council of Human Rights)

1999 CarswellBC 2730, 1999 CarswellBC 2731, [1999] 3 S.C.R. 868, [1999] S.C.J. No. 73, [2000] 1 W.W.R. 565, [2000] B.C.W.L.D. 89, 131 B.C.A.C. 280, 181 D.L.R. (4th) 385, 214 W.A.C. 280, 249 N.R. 45, 36 C.H.R.R. D/129, 47 M.V.R. (3d) 167, 70 B.C.L.R. (3d) 215, 93 A.C.W.S. (3d) 524, J.E. 2000-43

Terry Grismer (Estate), Appellant v. The British Columbia Council of Human Rights (Member Designate Tom Patch), Respondent and The British Columbia Superintendent of Motor Vehicles and the Attorney General of British Columbia, Respondents and The Attorney General for Ontario, the Attorney General for New Brunswick, the Attorney General for Alberta, the British Columbia Human Rights Commission, and the Council of Canadians with Disabilities, Interveners

L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache, Binnie JJ.

Heard: October 13, 1999
Judgment: December 16, 1999 *
Docket: 26481

* A corrigendum was issued by the court on January 26, 2000. The change has been incorporated herein.

Proceedings: reversing (1997), 155 D.L.R. (4th) 137, 100 B.C.A.C. 129, 163 W.A.C. 129, 44 B.C.L.R. (3d) 301, 30 C.H.R.R. D/446, 5 Admin. L.R. (3d) 145 (B.C. C.A.); reversing (1996), 25 C.H.R.R. D/309 ((B.C. S.C.); affirming (1994), (sub nom. Grismer v. British Columbia (Attorney General)) 25 C.H.R.R. D/296 (B.C. Human Rights Council)

Counsel: *Frances M. Kelly*, for the appellant.
Deborah K. Lovett, Q.C., and *J. Douglas Eastwood*, for the respondents the British Columbia Superintendent of Motor Vehicles and the Attorney General of British Columbia.
Hart Schwartz and *David Milner*, for the intervener the Attorney General for Ontario.
Cameron Gunn and *Bruce Judah, Q.C.*, for the intervener the Attorney General for New Brunswick.
Roderick Wiltshire, for the intervener the Attorney General for Alberta.

Deirdre A. Rice, for the intervener the British Columbia Human Rights Commission.
David Baker, for the intervener the Council of Canadians with Disabilities.

Subject: Public; Constitutional; Human Rights

Headnote

Human rights --- Statutory exemptions — Duty to accommodate — Undue hardship

Claimant's peripheral vision was impaired by ophthalmic condition — Claimant's driver's licence was cancelled on ground that vision did not meet standard of minimum field of vision — Standard constituted prima facie discrimination — Not shown that standard was bona fide occupational requirement or had bona fide reasonable justification — Claimant entitled to individual assessment to prove safe driving ability.

Droits de la personne --- Exemptions statutaires — Obligation d'accommodement — Préjudice injustifié

Vison périphérique du demandeur était limitée en raison d'une condition ophtalmique — Demandeur a vu son permis de conduire annulé au motif que sa vision ne satisfaisait pas à la norme du champ de vision minimal — Norme était discriminatoire à sa face même — Il n'a pas été démontré que la norme constituait une exigence professionnelle justifiée ou qu'elle avait une justification réelle — Requérant avait droit à une évaluation individuelle pour démontrer sa capacité à conduire sans compromettre la sécurité routière.

The claimant suffered a stroke which resulted in an ophthalmic condition, homonymous hemianopsia, which eliminated peripheral vision to the left in both eyes. The claimant's driver's licence was cancelled by the Superintendent of Motor Vehicles on the ground that his vision no longer met the standard of a minimum field of vision of 120 degrees. The claimant was repeatedly denied a licence despite having passed requisite driving and vision tests. The British Columbia Council of Human Rights found that the standard was prima facie direct discrimination, as it was not reasonably necessary to apply absolute visual field standards without individual assessments. An individual assessment of the claimant was ordered. The Superintendent applied for judicial review. The application was dismissed. The Superintendent appealed to the Court of Appeal. The appeal was allowed. Following the Court of Appeal's decision, the test for discrimination under the British Columbia Human Rights Code was modified. The council appealed to the Supreme Court of Canada.

Held: The appeal was allowed.

In accordance with the modified test, once the claimant established that the standard was prima facie discriminatory, the onus shifted to the defendant to prove on a balance of probabilities that the discriminatory standard was a bona fide occupational requirement or had

a bona fide and reasonable justification. While the goal of highway safety was legitimate and rationally connected to the general function of issuing driver's licences, an absolute standard was not reasonably necessary to accomplish the goal. It was not shown that all people with homonymous hemianopsia could not achieve reasonable highway safety. People with less than full peripheral vision may be able to drive safely. The claimant compensated for his disability, as evidenced by a driving examiner's assessment. It was not shown that the risk or cost associated with providing individual assessments constituted undue hardship. The claimant was entitled to an individual assessment.

Le demandeur a eu un accident cérébrovasculaire ayant provoqué une maladie ophtalmologique, l'hémianopsie homonyme, qui a entraîné une perte de la vision périphérique du côté gauche de ses deux yeux. Le *Superintendent of Motor Vehicles* a révoqué le permis de conduire du demandeur au motif que la vision de ce dernier ne satisfaisait plus à la norme minimale d'une vision périphérique de 120 degrés. Le demandeur s'est vu refusé à plusieurs reprises l'octroi d'un permis et ce, même s'il avait réussi les examens de conduite et de vision exigés. Le *British Columbia Council of Human Rights* a conclu que la norme constituait à première vue de la discrimination directe, puisqu'il n'était pas raisonnablement nécessaire d'appliquer des normes absolues de champ visuel en l'absence d'évaluations individuelles. La tenue d'une évaluation individuelle a été ordonnée. Le Surintendant a demandé le contrôle judiciaire de cette décision. Sa demande a été rejetée. Le Surintendant a interjeté appel à la Cour d'appel et celle-ci l'a accueilli. À la suite de la décision de la Cour d'appel, le critère applicable en matière de discrimination prévu par le *Human Rights Code* de la Colombie-Britannique a été modifié. Le Conseil a formé un pourvoi auprès de la Cour suprême du Canada.

Arrêt: Le pourvoi a été accueilli.

Suivant le critère modifié, à partir du moment où le demandeur avait démontré que la norme était à première vue discriminatoire, il incombait dès lors au défendeur de prouver, selon la prépondérance des probabilités, que la norme discriminatoire constituait une exigence professionnelle justifiée ou qu'elle avait une justification réelle et raisonnable. Même si l'objectif de sécurité routière était légitime et rationnellement lié aux fonctions générales consistant en la délivrance de permis de conduire, une norme absolue n'était pas raisonnablement nécessaire pour atteindre cet objectif. Il n'avait pas été démontré que toutes les personnes atteintes d'hémianopsie homonyme étaient dans l'incapacité d'atteindre l'objectif de sécurité routière raisonnable. Les personnes qui n'ont qu'une vision périphérique partielle peuvent être capables de conduire de façon sécuritaire. L'évaluation faite par la personne ayant fait subir le test de conduite au demandeur démontrait que ce dernier surmontait son handicap. Il n'a pas été démontré que les risques ou les coûts associés

à l'administration d'évaluations individuelles constituaient une contrainte excessive. Le demandeur avait droit à une évaluation individuelle.

Table of Authorities

Cases considered by/Jurisprudence citée par *McLachlin J.*:

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U., (sub nom. *British Columbia Government & Service Employees' Union v. Public Service Employee Relations Commission)* 99 C.L.L.C. 230-028, [1999] 10 W.W.R. 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 176 D.L.R. (4th) 1, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 244 N.R. 145, 66 B.C.L.R. (3d) 253, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 127 B.C.A.C. 161, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 207 W.A.C. 161, 46 C.C.E.L. (2d) 206, 35 C.H.R.R. D/257, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 68 C.R.R. (2d) 1, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU)* [1999] 3 S.C.R. 3 (S.C.C.) — applied

Eldridge v. British Columbia (Attorney General) (1997), 151 D.L.R. (4th) 577, 218 N.R. 161, 96 B.C.A.C. 81, 155 W.A.C. 81, [1998] 1 W.W.R. 50, 46 C.R.R. (2d) 189, 38 B.C.L.R. (3d) 1, [1997] 3 S.C.R. 624 (S.C.C.) — referred to

Statutes considered/Législation citée:

Human Rights Act, S.B.C. 1984, c. 22
Generally/en général — referred to

s. 3 — considered

Human Rights Code, R.S.B.C. 1996, c. 210
Generally/en général — referred to

s. 8 — considered

s. 8(1) — referred to

APPEAL by British Columbia Human Rights Council from judgment reported at (1997), 44 B.C.L.R. (3d) 301, 155 D.L.R. (4th) 137, 100 B.C.A.C. 129, 163 W.A.C. 129, 30 C.H.R.R. D/446, 5 Admin. L.R. (3d) 145 (B.C. C.A.), allowing appeal from decision reported at (1996), 25 C.H.R.R. D/309 (B.C. S.C.), dismissing petition for judicial review of decision of council reported at (1994), (sub nom. *Grismer v. British Columbia (Attorney General)*) 25 C.H.R.R. D/296 (B.C. Human Rights Council).

POURVOI du British Columbia Human Rights Council à l'encontre de l'arrêt publié à (1997), 44 B.C.L.R. (3d) 301, 155 D.L.R. (4th) 137, 100 B.C.A.C. 129, 163 W.A.C. 129, 30 C.H.R.R. D/446, 5 Admin. L.R. (3d) 145 (B.C. C.A.), accueillant l'appel à l'encontre de la décision publiée à (1996), 25 C.H.R.R. D/309 (B.C. S.C.), rejetant la demande de contrôle judiciaire de la décision du conseil publiée à (1994), (sub nom. *Grismer v. British Columbia (Attorney General)*) 25 C.H.R.R. D/296 (B.C. Human Rights Council).

The judgment of the court was delivered by *McLachlin J.*:

I. Introduction

1 Driving automobiles is a privilege most adult Canadians take for granted. It is important to their lives and work. While the privilege can be removed because of risk, it must not be removed on the basis of discriminatory assumptions founded on stereotypes of disability, rather than actual capacity to drive safely. This case concerns a blanket refusal of a licence to drive on the basis of lack of peripheral vision associated with a condition known as homonymous hemianopia ("H.H"). The issue is whether the member designated by the British Columbia Council of Human Rights (the "Member") erred in holding that a blanket refusal in Mr. Grismer's case, without the possibility of individual assessment, constituted discrimination contrary to the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22 (now the *Human Rights Code*, R.S.B.C. 1996, c. 210).

2 This case is not about whether unsafe drivers must be allowed to drive. There is no suggestion that a visually impaired driver should be licensed unless she or he can compensate for the impairment and drive safely. Rather, this case is about whether, on the evidence before the Member, Mr. Grismer should have been given a chance to prove through an individual assessment that he could drive. It is also about combatting false assumptions regarding the effects of disabilities on individual capacities. All too often, persons with disabilities are assumed to be unable to accomplish certain tasks based on the experience of able-bodied individuals. The thrust of human rights legislation is to eliminate such assumptions and break down the barriers that stand in the way of equality for all.

3 I conclude that the Member did not err in concluding that the blanket refusal was unjustified and that Mr. Grismer should have been given the opportunity to show in an individualized evaluation that he could drive without undue risk.

II Facts

4 Terry Grismer was a mining truck driver who lived and worked in the interior of British Columbia. In 1984, at the age of 40, he suffered a stroke. As a result of the stroke, he suffered from H.H., which eliminated almost all of his left-side peripheral vision in both eyes. The B.C. Motor Vehicle Branch cancelled Mr. Grismer's licence on the ground that his vision no longer met the standards set by the British Columbia Superintendent of Motor Vehicles for safe driving. The Superintendent's standards require a minimum of a 120 degree field of vision, as compared to the 200 to 220 degree field of vision possessed by the average person. While exceptions are permitted to the 120 degree standard in other cases, people with H.H. always have less than a 120 degree field of vision and are never permitted to drive in British Columbia. These standards were developed by the B.C. Medical Association for the Superintendent and were subsequently adopted by the Canadian Medical Association. The Motor Vehicle Branch applied the H.H. restriction absolutely, permitting no exceptions or individual assessments.

5 Over a seven-year period, Mr. Grismer tried four times to be reconsidered for a licence. He passed the standard visual test and the thirty minute driving test, and was found by the driving examiner to compensate well for his loss of peripheral vision. However, he was denied a licence on each occasion because he had H.H. and could not meet the absolute 120 degree standard.

6 Throughout this period, Mr. Grismer continued to drive on private roads at work (where no licence was required) and on public roads. He informed the Motor Vehicle Branch that he would continue to drive on public roads without a licence. Although Mr. Grismer's licence was cancelled, he was not actually prohibited from driving, so neither the Motor Vehicle Branch nor the police made any serious effort to prevent him from driving. He had two minor accidents, neither of which was caused by his visual impairment. One accident occurred at the mine, when he backed his vehicle into a truck at night, and the other happened in the town of Merritt, when he struck a cyclist who ran a red light and came from the left. The cyclist was found to be at fault.

7 After his fourth licence refusal, Mr. Grismer filed a complaint with the British Columbia Council of Human Rights, which designated a member to hear his claim. The Member found in his favour, ordered that the discrimination cease, and awarded Mr. Grismer $500. Unfortunately, Mr. Grismer died shortly after the case was heard. Nevertheless, the Superintendent brought a petition for judicial review of the Member's decision, and Mr. Grismer's estate was given standing for appeal purposes. The reviewing judge at the British Columbia Supreme Court dismissed the Superintendent's petition. The British Columbia Court of Appeal allowed it and overturned the decision of the Member. The matter now comes before this Court for final review.

8 Since the decisions in the tribunals below, this Court has reviewed and modified the test for discrimination in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.) ("*Meiorin*"). The issue on this appeal is whether the

Superintendent's absolute prohibition against driving with H.H. has been shown to be a valid standard under the test set out in *Meiorin*, negating the charge of discrimination.

III. Decisions

9 The Member reviewed the provisions of the B.C. *Human Rights Act* and the case law. He found that:

- the standard should be classified as *prima facie* direct discrimination;

- the onus was on the Superintendent to provide reasonable justification for the standard (i.e. to establish that there was no reasonable or practical alternative to the absolute rule);

- "something more than merely a 'real' or 'minimal' risk must be established to justify limiting the equality right of people with disabilities" and that impressionistic evidence will not suffice;

- the standard was based on knowledge of visual field defects, was up to date, had a logical foundation, and was not impressionistic. However, it was not based on hard evidence of the relationship between H.H. and driving accidents;

- there is lack of agreement on standards among different jurisdictions outside Canada, with a number of countries permitting people with H.H. to obtain driver's licences in some circumstances;

- based on the lack of empirical evidence linking Mr. Grismer's disability with road safety and the lack of consensus between jurisdictions, and noting the difficulty in getting better evidence of risk, the Superintendent's standard should not be applied absolutely, but must be applied "in a manner that ensure[s] individual assessment";

- in the result, the Superintendent had not met the burden of justifying the visual field standards as reasonably necessary "as they are applied [inflexibly] by the MVB", and discrimination was established.

- since Mr. Grismer had not undergone a recent individual assessment, it would be inappropriate to order the Superintendent to reinstate Mr. Grismer's licence. Instead, the Member ordered the Superintendent to assess Mr. Grismer and consider the possibility of restrictions on his licence if necessary; and finally

- Mr. Grismer was entitled to only $500 nominal compensation since he had not established damage, hurt or humiliation.

10 The reviewing judge, Williamson J., dismissed the petition for judicial review on the grounds that the Member had made no error in interpreting and applying the *bona fide* and reasonable justification defence, and that his "finding of fact" that individualized testing was possible was entitled to deference.

11 The Court of Appeal, *per* Donald J.A., unanimously allowed the appeal on the ground that the Member had erred by:

- blending the analyses for direct and indirect discrimination, leading to the application of the wrong approach; since this was not an allegation of indirect discrimination, the question of individual accommodation arose only in setting the standard, beyond which there was no reason to make individual accommodation;

- suggesting that the standard could not be justified absent more empirical data from experimental studies;

- finding an insufficient link between the risk and the licensing standard, given the endorsement of medical associations across Canada and the "intuitive connection" between the absence of peripheral vision and the risk of accidents; and

- concluding that individual testing should be considered absent evidence that such assessment was a practical alternative, and considering whether individual testing was possible, as opposed to practical. There was no evidence of a "safe or reliable form of testing that can measure the ability to deal with unexpected or exceptional traffic situations".

IV. The Issue

12 The test for discrimination under the B.C. human rights legislation in *Meiorin, supra*. Neither the Member nor the reviewing courts had the benefit of that test. The question before us is whether, applying the new test to the findings of fact of the Member, an absolute prohibition on licensing people with H.H. and a less than 120 degree field of vision, without the possibility of individual assessment, constituted discrimination.

V. Legislation

13 The relevant statutory provision is s. 3 of the *Human Rights Act*, S.B.C. 1984, c. 22, which was in force at the time Mr. Grismer's licence was cancelled. Section 3 read:

> 3. No person shall
>
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

> (b) discriminate against a person or class of persons with respect to any accommodation, service or facility customarily available to the public,
>
> because of the race, colour, ancestry, place of origin, religion, marital status, physical or mental disability. ...

14 That section has been repealed and replaced, and is now s. 8(1) of the *Human Rights Code*, R.S.B.C. 1996, c. 210. Section 8 of the new Code is identical to s. 3 of the old Act in most respects, but the introductory sentence now reads: "A person must not, *without a bona fide and reasonable justification*, (a) ..." (emphasis added). Both parties to this appeal agreed that s. 8 of the Code applies to this case.

VI. Analysis

A. The Meiorin Test

15 Prior to *Meiorin*, the legal test for discrimination distinguished between "direct" and "adverse effect" discrimination. Direct discrimination in the workplace arose from standards which were discriminatory on their face. Adverse effect discrimination arose from standards which were neutral on their face, apparently applying to everyone equally, but which had an adverse effect on some groups of people.

16 The distinction between the two classes of discrimination was important because different defences and remedies applied to each class. If direct discrimination was found, the defendant could justify the discriminatory standard on the basis that it was a *bona fide* occupational requirement ("BFOR"). A standard was held to be a BFOR if the defendant proved that: (1) it was imposed honestly and in good faith; and (2) it was reasonably necessary for the safe and efficient performance of the work and did not impose an unreasonable burden on those to whom it applied. Absent these two elements, the standard was struck down, and the defendant was obliged to change the discriminatory standard. It could not escape by making exceptions for, or "accommodating", particular groups.

17 Very few standards discriminated directly, however. Most fell into the second category of indirect discrimination, or discrimination by effect. Here the test was less stringent. The defendant could justify the discrimination by establishing that: (1) there was a rational connection between the defendant's goal and the standard in question, and (2) the defendant could not further accommodate the plaintiff without incurring undue hardship. This allowed employers and service providers to continue to apply standards which in effect caused discrimination, as long as they took steps, short of undue hardship, to accommodate individuals affected by the discrimination.

18 In *Meiorin*, the Court rejected this dual approach to discrimination for a number of reasons. Among them was the observation that characterizing a standard as either directly or indirectly discriminatory was artificial, since their effect is the same, yet the outcome of the case might turn on the distinction. Moreover, the distinction between direct and adverse effect discrimination legitimized employment procedures where the employer did not intend to discriminate, but nevertheless adopted standards and practices that had the effect of unjustifiably excluding people falling into certain groups from employment or services. In such cases, the standard remained in place and continued to exclude those not prepared to challenge it or demand accommodation. For those who did demand it, the accommodation was limited by what the defendant could afford.

19 *Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. Such characteristics are frequently based on bias and historical prejudice and cannot form the basis of reasonably necessary standards. While the *Meiorin* test was developed in the employment context, it applies to all claims for discrimination under the B.C. Human Rights Code.

20 Once the plaintiff establishes that the standard is *prima facie* discriminatory, the onus shifts to the defendant to prove on a balance of probabilities that the discriminatory standard is a BFOR or has a *bona fide* and reasonable justification. In order to establish this justification, the defendant must prove that:

> (1) it adopted the standard for a purpose or goal that is rationally connected to the function being performed;
>
> (2) it adopted the standard in good faith, in the belief that it is necessary for the fulfillment of the purpose or goal; and
>
> (3) the standard is reasonably necessary to accomplish its purpose or goal, in the sense that the defendant cannot accommodate persons with the characteristics of the claimant without incurring undue hardship.

21 This test permits the employer or service provider to choose its purpose or goal, as long as that choice is made in good faith, or "legitimately". Having chosen and defined the purpose or goal — be it safety, efficiency, or any other valid object — the focus shifts to the *means* by which the employer or service provider seeks to achieve the purpose or goal. The means must be tailored

to the ends. For example, if an employer's goal is workplace safety, then the employer is entitled to insist on hiring standards reasonably required to provide that workplace safety. However, the employer is not entitled to set standards that are either higher than necessary for workplace safety or irrelevant to the work required, and which arbitrarily exclude some classes of workers. On the other hand, if the policy or practice is reasonably necessary to an appropriate purpose or goal, and accommodation short of undue hardship has been incorporated into the standard, the fact that the standard excludes some classes of people does not amount to discrimination. Such a policy or practice has, in the words of s. 8 of the *Human Rights Code*, a "bona fide and reasonable justification". Exclusion is only justifiable where the employer or service provider has made every possible accommodation short of undue hardship.

22 "Accommodation" refers to what is required in the circumstances to avoid discrimination. Standards must be as inclusive as possible. There is more than one way to establish that the necessary level of accommodation has not been provided. In *Meiorin*, the government failed to demonstrate that its standard was sufficiently accommodating, because it failed to adduce evidence linking the standard (a certain aerobic capacity) to the purpose (safety and efficiency in fire fighting). In Mr. Grismer's case, a general connection has been established between the standard (a certain field of peripheral vision) and the purpose or goal of reasonable highway safety. However, the appellant argues that some drivers with less than the stipulated field of peripheral vision can drive safely and that the standard is discriminatory because it does not provide for individualized assessment. Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship.

B. Application of the Test to this Case

23 Mr. Grismer established a *prima facie* case of discrimination under the Act by showing that he was denied a licence that was available to others, and that the denial was made on the basis of a physical disability, namely H.H. At this point the onus shifted to the Superintendent of Motor Vehicles to prove, on a balance of probabilities, that the discriminatory standard had a *bona fide* and reasonable justification. To do this, the Superintendent had to show that the purpose of the standard (his goal) was rationally connected to the Superintendent's function, that the standard was adopted in good faith, and that it was reasonably necessary to achieve his goal, in the sense that accommodation of Mr. Grismer was impossible without undue hardship.

24 Before we can answer these questions, we must define the Superintendent's purpose or goal with more precision. Whether a goal is "rationally connected" to a function, and whether a standard is "made in good faith" and "reasonably necessary" can only be assessed in relation to a defined goal.

25 The Superintendent's goal in this case was to maintain highway safety. But what kind of safety? What degree of risk would be tolerated? Where did the Superintendent draw the line between the need to maintain highway safety and the desirability of permitting a broad range of people to drive? The possibilities range from absolute safety, in which case few if any mortals would be allowed to drive, to a total lack of concern for safety, in which case everyone, regardless of their lack of ability, would be allowed to drive. Between these two extremes lies the more moderate view that reasonable safety suffices. The question is: where on this spectrum did the Superintendent set the bar?

26 The evidence suggests that the Superintendent set a goal of reasonable safety. It would have been unfeasible for the Superintendent to have set a goal of absolute road safety, as nobody is a perfect driver. Even among drivers with excellent vision, hearing and reflexes, there is a range of driving ability. Moreover, many people are licensed even though their physical characteristics might make them less safe than the average driver. The medical consultants at the Motor Vehicle Branch who assess the risk involved in licensing drivers with various disabilities seemed to be aware of the potential hardship involved in losing one's licence. The consultants balanced the need for people to be licensed with the need for reasonable highway safety. For example, it appears the Superintendent licensed people with severe hearing difficulties, provided that they could pass an individualized test showing that they compensate reasonably well for their lack of hearing. Similarly, the Superintendent licensed people over 80, even though their age made them more susceptible to maladies like heart attacks and strokes and reduced their reaction time, provided again that they could pass an individualized test showing that they compensated reasonably well for any such disabilities that they had. To pass these tests, the hearing impaired or elderly were not required to demonstrate that they were perfectly safe drivers. They were merely required to demonstrate that they could drive reasonably safely. Finally, people with less than a 120 degree field of vision, but who did not have H.H., were licensed if the doctor was convinced that their vision was adequate for safe driving despite being below the 120 degree standard.

27 The Superintendent thus recognized that removing someone's licence may impose significant hardship. Striking a balance between the need for people to be licensed to drive and the need for safety of the public on the roads, he adopted a standard that tolerated a moderate degree of risk. The Superintendent did not aim for perfection, nor for absolute safety. The Superintendent rather accepted that a degree of disability and the associated increased risk to highway safety is a necessary trade-off for the policy objectives of permitting a wide range of people to drive and not discriminating against the disabled. The goal was not absolute safety, but reasonable safety.

28 Having determined the nature of the Superintendent's objective, the next question is whether the Superintendent established on a balance of probabilities that the goal of reasonable road safety was rationally connected to the Superintendent's public function. In *Meiorin*, the question was whether the purpose (safety and efficiency) was rationally connected to the performance of the job

(fire fighting). In this case, the question is whether the Superintendent's goal (ensuring a reasonable level of highway safety) was rationally connected to his general function (issuing driver's licences). There can be no question that a rational connection has been shown. Highway safety is indubitably connected to the licensing of drivers. Common sense and experience tell us that driver's licences should only be issued to those who can demonstrate a reasonable degree of ability and safety in driving.

29 The second question is whether the Superintendent adopted the standard in good faith. Here again, there can be no doubt that the Superintendent satisfied the requirement. No one suggests that the Superintendent had any motive for the standard he chose other than to maintain highway safety.

30 The third question is whether the standard chosen by the Superintendent was reasonably necessary to accomplish the legitimate purpose. To meet this requirement, the Superintendent had to show that he could not meet his goal of maintaining highway safety while accommodating persons like Mr. Grismer, without incurring undue hardship. Risk has a limited role in this analysis. It is clear from *Meiorin* that the old notion that "sufficient risk" could justify a discriminatory standard is no longer applicable. Risk can still be considered under the guise of hardship, but not as an independent justification of discrimination. In this case, risk is used as a measure of the level of safety which was sought by the Superintendent, and as a factor in assessing the lack of accommodation provided by the Superintendent for people with H.H. The critical issue is whether the Superintendent's non-accommodating standard was reasonably necessary to the achievement of reasonable highway safety.

31 Before discussing the ways in which the Superintendent sought to justify the blanket rejection of licensing people with H.H. in this case, two common indicia of unreasonableness mentioned in these proceedings may be noted. First, a standard that excludes members of a particular group on impressionistic assumptions is generally suspect. That is not the case here: the Member found that the Superintendent's prohibition was based on current knowledge and was not impressionistic. Second, evidence that a particular group is being treated more harshly than others without apparent justification may indicate that the standard applied to that group is not reasonably necessary. There is some suggestion that the Superintendent's standard for people with H.H. may have been higher than that applied to people with other visual defects. The Superintendent permitted some people with less than a 120 degree field of vision to undergo tests to see if they could compensate for their disability. However, he insisted on a blanket rejection of people with H.H.

32 Against this background, I come to the question of whether the Superintendent met the burden of showing that the standard he applied to people with H.H. — an absolute denial of a driver's licence — was reasonably necessary to achieve the goal of moderate highway safety. In order to prove that its standard is "reasonably necessary", the defendant always bears the burden of demonstrating that the standard incorporates every possible accommodation to the point of undue hardship, whether that hardship takes the form of impossibility, serious risk or excessive cost.

In this case, there are at least two ways in which the Superintendent could show that a standard that permits no accommodation is reasonably necessary. First, he could show that no one with the particular disability could ever meet the desired objective of reasonable highway safety. For example, using current technology, someone who is totally blind cannot safely operate a motor vehicle on the highway. Since accommodation of such a person is impossible, it need not be further considered. Alternatively, if the Superintendent could not show that accommodation is totally inconsistent with his goal, he could show that accommodation is unreasonable because testing for exceptional individuals who can drive safely despite their disability is impossible short of undue hardship.

33 Both alternatives are types of accommodation. In the first scenario, the accommodation would be to consider whether a person with H.H. should be permitted to drive at all. The second type of accommodation would be to conduct individual assessments to determine which if any individuals with H.H. should be licensed. The Superintendent was required to show that at least one of these two forms of accommodation would be impossible short of undue hardship in relation to the goal of reasonable highway safety. If the Superintendent in this case could not establish either of these propositions, then he failed to discharge the onus upon him of establishing that a blanket exclusion of persons with Mr. Grismer's condition is reasonably necessary to meet the goal of reasonable highway safety.

34 The first possibility is that people with Mr. Grismer's condition could not be accommodated because it would be totally incompatible with the Superintendent's standard of highway safety. In other words, no person with his condition could ever drive on highways without creating an unacceptable level of risk to the public. The Court of Appeal reasoned that it is common sense, or "intuitive", that there is a connection between an absence of peripheral vision and a risk of accidents. Intuition tells us, it is true, that lack of peripheral vision may reduce the ability of people to anticipate emergencies and react as quickly as they could otherwise. However, this does not support the conclusion that people with this condition can never meet the standard of reasonable highway safety, for two reasons.

35 First, it assumes a standard of perfection, which is not the general standard that the Motor Vehicle Branch applies to people seeking driver's licences, as discussed above. Many people of varying driving abilities are licensed every day. Second, the suggestion that accommodating people with H.H. could never be possible without undue safety risk is belied by the fact that some drivers with less than full peripheral vision appear to drive safely and are allowed to drive by other state licensing agencies. The "Swedish Study", introduced by the Superintendent, indicated that Britain, Japan, Finland and many states in the U.S. might well allow people with H.H. to drive in some conditions. (P. Lövsund, A. Hedin and J. Törnros, "Effects on Driving Performance of Visual Field Defects: A Driving Simulator Study" *Accid. Anal. & Prev.* vol. 23 (1991), pp. 331-42). While the fact that other jurisdictions have different standards does not mean

that Canadian governments should change theirs, the lack of international unanimity undermines the Superintendent's presumption that people with H.H. can never drive safely.

36 The evidence on the effects of the condition contradicted the Superintendent's claim that no person with H.H. could ever meet the standard of reasonable safety he expects of others. For example, the Swedish Study indicated that while most people with visual defects such as H.H. have slower reaction times than those with normal fields of vision, some people are able to compensate for their disability. Other evidence showed that individuals with Mr. Grismer's condition can compensate to some extent for their lack of peripheral vision by using prism lenses and by turning their head from side to side to survey the road. Not everyone with H.H. will succeed in reducing the risk associated with this condition through these means. However, that does not defeat the argument that some may be able to do so, and those exceptional individuals should be accommodated if it is possible short of undue hardship.

37 The evidence suggested that Mr. Grismer was among those who are able to benefit from these compensatory techniques. Mr. Grismer's prism glasses did not actually expand his visual field in a straight-ahead test. However, the glasses did allow him to look outside his normal field without turning his head as much, just as bifocals allow people to focus down without dropping their head. The Superintendent's own ophthalmological expert testified that he was "impressed" by the way Mr. Grismer used his prism glasses. The evidence also showed that Mr. Grismer had adapted his driving style so that he was in the habit of constantly looking to the left to check the blind spot caused by his condition. This constant head and eye movement increased Mr. Grismer's ability to see the road. Finally, the Member noted that Mr. Grismer seemed to make particularly effective use of the mirrors on his truck, again expanding his visual field beyond the restriction imposed by his condition. In short, the evidence suggested that some people with H.H. may be able to drive safely and that Mr. Grismer may have been among them.

38 Having failed to prove on a balance of probabilities that no one with Mr. Grismer's condition could ever drive with a reasonable level of safety, in order to succeed the Superintendent was required to show that the second type of accommodation — individual assessment — was also not feasible because it would have been impossible short of undue hardship. The Superintendent made two arguments in relation to hardship. First, he argued that individual assessment was not possible because there were no known tests by which to establish whether someone like Mr. Grismer could drive in a reasonably safe manner. Until such tests were developed, he argued, the Motor Vehicle Branch was permitted to categorically exclude everyone with this disability. Second, the Superintendent argued that even if there had been a test, it would have been so expensive and dangerous that its use would have constituted "undue hardship".

39 The evidence revealed that at least two tests for road safety of people with H.H. had been developed: one used by the Swedish researchers; and a Mercedes simulator referred to by the Superintendent's ophthalmologist. The Superintendent, assuming that it was unnecessary to test

people with H.H., directed no substantive research into the current availability or cost of such simulators, contenting himself with knowledge of testing gained ten years earlier. The evidence also suggested that some testing for the ability to compensate for loss of peripheral vision could be done in a laboratory. Mr. Grismer's optometrist testified that he allowed Mr. Grismer to use prism glasses and move his eyes around during testing, in order to get a better indication of Mr. Grismer's actual ability to compensate for his disability.

40 Road tests, alone or in combination with laboratory testing, also might have assisted in gauging Mr. Grismer's actual driving safety. The Superintendent's witness argued that it would be expensive and dangerous to simulate the emergency situations which are the focus of concern for people with H.H. Yet many driving tests involve danger, and ways are found to reduce it. The evidence did not displace the possibility of road testing in a vehicle equipped with dual controls, permitting the examiner to react to sudden dangers if Mr. Grismer failed to do so. Another possibility that could have been explored, depending on the results of the available tests, was a conditional licence. Most obviously, Mr. Grismer could have been required to wear his prism glasses while driving.

41 The Superintendent alluded to the cost associated with assessing people with H.H., although he offered no precise figures. While in some circumstances excessive cost may justify a refusal to accommodate those with disabilities, one must be wary of putting too low a value on accommodating the disabled. It is all too easy to cite increased cost as a reason for refusing to accord the disabled equal treatment. This court rejected cost-based arguments in *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.), at paras. 87-94, a case where the cost of accommodation was shown to be modest. I do not assert that cost is always irrelevant to accommodation. I do assert, however, that impressionistic evidence of increased expense will not generally suffice. Government agencies perform many expensive services for the public that they serve. Moreover, there may be ways to reduce costs. For example, in this case the Motor Vehicle Branch might have used simulators or tests available elsewhere. The Superintendent's evidence did not establish that the cost of accommodation would be excessive and did not negate the possibility of cost-reduced alternatives. It was therefore open to the Member to reject the Superintendent's argument based on cost.

42 In summary, the Superintendent offered no evidence that he had considered any of the options that might have made an assessment of Mr. Grismer's driving abilities viable and affordable. Content to rely on the general opinion of the medical community, and ignoring the evidence that some people with H.H. can and do drive safely, he offered not so much as a gesture in the direction of accommodation. His position, quite simply, was that no accommodation was necessary. Under the *Meiorin* test, it was incumbent on the Superintendent to show that he had considered and reasonably rejected all viable forms of accommodation. The onus was on the Superintendent, having adopted a *prima facie* discriminatory standard, to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship.

The Superintendent did not do so. On the facts of this case, the Superintendent's blanket refusal to issue a driver's licence was not justified. He fell into error in this case not because he refused to lower his safety standards (which would be contrary to the public interest), but because he abandoned his reasonable approach to licensing and adopted an absolute standard which was not supported by convincing evidence. The Superintendent was obliged to give Mr. Grismer the opportunity to prove whether or not he could drive safely, by assessing Mr. Grismer individually. It follows that the charge of discrimination under the *Human Rights Act* was established.

43 This is the conclusion that the *Meiorin* test requires, on the evidence and findings in this case. The question may be put, however, whether this approach places too high an evidentiary burden on the government, particularly in situations involving public safety. The obvious answer to this question is that it is the Legislature, not the Court, which has placed the evidentiary burden of showing reasonable necessity once *prima facie* discrimination has been made out. More fundamentally, is it really inappropriate to require a governmental body that rejects an application for a driver's licence on the basis of disability to prove on a balance of probabilities that the denial is reasonably necessary to the standard of highway safety it has selected? The government authority knows why it makes the denial and is in the best position to defend it. The government must only establish its justification according to the relaxed standard of proof on a balance of probabilities. Common sense and intuitive reasoning are not excluded, but in a case where accommodation is flatly refused there must be some evidence to link the outright refusal of even the possibility of accommodation with an undue safety risk. If the government agency can show that accommodation is impossible without risking safety or that it imposes some other form of undue hardship, then it can maintain the absolute prohibition. If not, it is under an obligation to accommodate the claimant by allowing the person an opportunity to show that he or she does not present an undue threat to safety.

44 This case deals with no more than the right to be accommodated. It does not decide that Mr. Grismer had the right to a driver's licence. It merely establishes that he had a *right to be assessed.* That was all the Member found and all that we assert. The discrimination here lies not in the refusal to give Mr. Grismer a driver's licence, but in the refusal to even permit him to attempt to demonstrate that his situation could be accommodated without jeopardizing the Superintendent's goal of reasonable road safety. This decision stands for the proposition that those who provide services subject to the *Human Rights Code* must adopt standards that accommodate people with disabilities where this can be done without sacrificing their legitimate objectives and without incurring undue hardship. It does not suggest that agencies like the Motor Vehicle Branch must lower their safety standards or engage in accommodation efforts that amount to undue hardship.

45 Nor should this decision be taken as predetermining the result in other cases. This appeal is essentially a judicial review of a decision of a human rights tribunal in a particular case. The result flows from the evidence called before and accepted by the Member in this case. The Member found that the Superintendent had not met the burden of proving that a blanket refusal without the

possibility of individual accommodation was reasonably necessary under the Act. In another case, on other evidence, that burden might be met.

VII. Conclusion

46 I would allow the appeal and restore the decision of the Member Designate. As Mr. Grismer's estate pursued this case in the public interest, it is appropriate that the respondents, the British Columbia Superintendent of Motor Vehicles and the Attorney General of British Columbia, pay the appellant's costs.

Appeal allowed.

Pourvoi accueilli.

Footnotes

Tab 21

pars 92, 99, and 103

2000 CarswellOnt 2525
Ontario Court of Appeal

Entrop v. Imperial Oil Ltd.

2000 CarswellOnt 2525, [2000] O.J. No. 2689, 137 O.A.C. 15, 189 D.L.R. (4th) 14, 2000 C.L.L.C. 230-037, 2 C.C.E.L. (3d) 19, 37 C.H.R.R. D/481, 50 O.R. (3d) 18, 98 A.C.W.S. (3d) 418

In the Matter of the Ontario Human Rights Code, R.S.O. 1990 c. H.19, as Amended

In the Matter of the Complaint Dated January 16, 1992, as subsequently amended, by Martin Entrop Alleging Discrimination on the Basis of Handicap by Imperial Oil Limited

In the Matter of an Appeal from the Decision of the Ontario Court of Justice (General Division) Divisional Court Dated February 6, 1998

Martin Entrop and The Ontario Human Rights Commission, Complainants/Respondents and Imperial Oil Limited, Respondent/ Appellant and Canadian Civil Liberties Association, Intervener

Morden, Laskin, Goudge JJ.A.

Heard: January 18, 1999
Judgment: July 21, 2000
Docket: CA C29762

Proceedings: reversing in part (1998), 35 C.C.E.L. (2d) 56 (Ont. Div. Ct.); affirming (1995), 95 C.L.L.C. 230-022 (Ont. Bd. of Inquiry); and affirming (1995), 96 C.L.L.C. 230-001 (Ont. Bd. of Inquiry); and affirming (1996), 24 C.C.E.L. (2d) 122 (Ont. Bd. of Inquiry)

Counsel: *W. Niels F. Ortved* and *Jenny P. Stephenson*, for Appellant, Imperial Oil.
Marvin J. Huberman and *H.W. Roger Townshend*, for Ontario Human Rights Commission.
Paul J.J. Cavalluzzo and *Jeffrey M. Andrew*, for Martin Entrop and the Intervener.

Subject: Public; Constitutional; Employment; Human Rights

Headnote

Human rights --- Practice and procedure — Appeal — Appeal to court — Jurisdiction — General

Employer introduced comprehensive alcohol and drug policy — Pursuant to policy, employee disclosed that seven years prior he had had alcohol problem — Employee was removed from his job and placed in less desirable position — Employee successfully brought complaint before Human Rights Commission, which found that employer had discriminated against employee on basis of handicap, and that policy, as whole, violated Human Rights Code — Employer's appeal was dismissed — Divisional Court held that standard of review of board's jurisdiction to expand scope of inquiry to deal with entire policy was correctness, but that all other findings and conclusions of board were mixed fact and law, to which standard of reasonableness applied — Employer brought further appeal — Standard of review of general questions of law is correctness — Standard of review of board's findings of fact and application of law to findings of fact is reasonableness — Board's jurisdiction to expand scope of inquiry was question of law, to which correctness standard applied — Interpretation of definition of "handicap" under s. 10 of Code and test to justify prima facie case of discrimination under ss. 11 and 17 of Code were also questions of law to which standard of correctness applied — Standard of reasonableness applied to other issues raised in appeal — Human Rights Code, R.S.O. 1990, c. H.19, ss. 10, 11, 17.

Administrative law --- Review for lack or excess of jurisdiction — General

Employer introduced alcohol and drug policy that provided for employee in safety-sensitive occupation to self-declare whether employee has or has had substance abuse problem within definition of its administrative guidelines, and for random substance abuse testing — Pursuant to policy, employee disclosed that some years prior he had had alcohol problem — Employee was removed from his job and placed in less desirable position — Human Rights Commission and Board of Inquiry concluded that employer's alcohol and drug policy discriminated against employee personally and then went on to consider whether policy, on whole, violated Human Rights Code — Employer appealed — Divisional Court held that board had jurisdiction to consider policy as whole — Employer brought further appeal — Board's decision to inquire into all aspects of alcohol testing could be justified, but board had no jurisdiction to inquire into drug testing — Board of Inquiry's jurisdiction is circumscribed by "the subject matter of the complaint" — Subject matter of employee's complaint was mandatory disclosure of past alcoholism, reassignment, and conditions of his reinstatement — Board could not invoke jurisdiction over drug testing policy because of employee's use of Tylenol 3 as he was not at risk for his use of medication — Board could not rely on alleged violation of s. 13(1) of Code to confer jurisdiction over all aspects of alcohol and drug testing when entire policy was not subject matter of employee's complaint — Undertaking employee was required to sign upon reinstatement, that he would comply with provisions of policy, entitled board to assert

jurisdiction over alcohol testing but not drug testing — Undertaking made by employee was not directed at drug abuse as employee never had drug abuse problem — Undertaking did not justify broad-ranging inquiry into drug testing — Board could not use broad remedial power under s. 41(1)(a) to expand its jurisdiction — Inquiry into drug testing under policy was allowed to proceed as employer was not prejudiced by broadening of inquiry — Human Rights Code, R.S.O. 1990, c. H.19, ss. 13(1), 41(1)(a).

Human rights --- What constitutes discrimination — Handicap — Physical handicap — Employment — General

Employer introduced alcohol and drug policy that provided for employee in safety-sensitive occupation to self-declare whether employee has or has had substance abuse problem, and for random substance abuse testing — Policy also provided for mandatory alcohol and drug testing for all job applicants and for all employees in various circumstances — Pursuant to policy, employee disclosed that seven years prior he had had alcohol problem — Employee was removed from his job and placed in less desirable position — Employee successfully brought complaint before Human Rights Commission, which found that employer had discriminated against employee on basis of handicap, and that policy, as whole, violated Human Rights Code — Board held that policy directly discriminated against employees who were using or had used drugs, on ground of handicap, contrary to Code — Board held that requirement of disclosing substance abuse problems contravened Code as definition of "substance abuse problem" was too broad and unlimited in duration — Board also held that provision prescribing minimum of seven years between reassignment following disclosure and reinstatement, and mandatory conditions of reinstatement, breached Code as they were not necessary in all cases — Board held that pre-employment and random drug testing breached Code as employer failed to prove that positive drug test showed impairment, and that random alcohol testing breached Code as testing was not reasonably necessary to deter alcohol impairment on job — Employer's appeal was dismissed — Divisional Court held that conclusions of board were reasonable and were based on evidence before it — Further appeal by employer allowed in part — Unified approach to justifying workplace rule adopted by Supreme Court of Canada in recent decision was to be applied, meaning employer could rely on ss. 11 and 17 of Code to justify policy — Drug abuse and alcohol abuse are handicaps within meaning of Code — Person who tests positive on random test may be casual user, and not substance abuser, and not actually be handicapped — Policy treated even casual users as substance abusers, meaning perceived and actual substance abusers were adversely affected by policy — Provisions for drug and alcohol testing were prima facie discriminatory — Drug testing provisions of policy violated Code but alcohol testing provisions did not — General purpose of testing was rationally connected to performance of work and policy was developed and implemented honestly and in good faith, but drug testing provisions were not reasonably necessary to accomplish purpose — Positive drug test does not demonstrate impairment but positive breathalyzer reading does — Random alcohol testing for safety-sensitive positions

could be justified providing sanctions for positive test were individually tailored — Dismissal for positive test in all circumstances was not consistent with employer's duty to accommodate — Policy for mandatory disclosure, reassignment, and reinstatement were prima facie discriminatory — Provisions were not reasonably necessary to accomplish employer's purpose — Requirement of disclosing substance abuse problems dating more than five or six years in past was unreasonable — Automatic reassignment out of safety-sensitive position following disclosure was not reasonably necessary — Provisions failed to accommodate individual differences and capabilities — Requirement of two years' rehabilitation followed by five years' abstinence was overly broad — Mandatory conditions and undertakings for reinstatement were unlawful and should have been tailored to individual's circumstances — Human Rights Code, R.S.O. 1990, c. H.19, ss. 11, 17.

Human rights --- What constitutes discrimination — Miscellaneous issues

Employer introduced alcohol and drug policy that provided for employee in safety-sensitive occupation to self-declare whether employee has or has had substance abuse problem, and for random substance abuse testing — Policy also provided for mandatory alcohol and drug testing for all job applicants and employees in various circumstances — Pursuant to policy, employee disclosed that seven years prior he had had alcohol problem — Employee was removed from his job and placed in less desirable position — Employee successfully brought complaint before Human Rights Commission, which found that employer had discriminated against employee on basis of handicap, and that policy, as whole, violated Human Rights Code — Board held that posting, printing, and dissemination of policy constituted publication of notice of intention to infringe right contrary to s. 13(1) of Code — Employer's appeal allowed — Question existed whether board had properly considered issue — In any event, employee failed to establish that employer breached s. 13(1) of Code — Evidence did not reasonably support conclusion that policy indicated intention to discriminate — Finding that employer implemented policy in good faith was inconsistent with finding that policy indicated intention to discriminate — Board did not consider s. 13(2) of Code, which provides that s. 13(1) of Code shall not interfere with freedom of expression or opinion — Human Rights Code, R.S.O. 1990, c. H.19, ss. 13(1), 13(2).

Human rights --- What constitutes discrimination — Retaliation for previous complaint

Employer introduced alcohol and drug policy that provided for employee in safety-sensitive occupation to self-declare whether employee has or has had substance abuse problem within definition of its administrative guidelines and for random substance abuse testing — Pursuant to policy, employee disclosed that some years prior he had had alcohol problem — Employee was removed from his job and placed in less desirable position — Employee successfully brought complaint before Human Rights Commission, which found that employer had discriminated against employee on basis of handicap, and that policy, as whole, violated Human Rights Code — With respect to award of damages, board dealt with matters of alleged

reprisal against employee for his human rights complaints and heard viva voce evidence from authors of company memoranda — Board awarded employee $1,241.93 in special damages for lost overtime, $10,000 in general damages, and $10,000 for mental anguish for "the wilful and reckless manner" of infringement — Employer's appeal was dismissed — Divisional Court held that board's conclusions were reasonable — Further appeal by employer dismissed — Reinstatement process was lengthy and intrusive, and demeaned and ostracized employee, causing him stress and anxiety — At very least, employer's conduct was reckless in subjecting employee to process — Employer took number of actions, which board ruled amounted to acts of reprisal against employee for having brought human rights complaint — Actions included aggressive monitoring of his work performance, pressuring him to withdraw complaint, and interfering with his ability to function as elected delegate of organization representing non-unionized employees' interests — Board's findings were reasonably supported by evidence — Employer's conduct justified award of damages for mental anguish — Human Rights Code, R.S.O. 1990, c. H.19.

Human rights --- Remedies — Damages — General

Employer introduced alcohol and drug policy that provided for employee in safety-sensitive occupation to self-declare whether employee has or has had substance abuse problem within definition of its administrative guidelines and for random substance abuse testing — Pursuant to policy, employee disclosed that some years prior he had had alcohol problem — Employee was removed from his job and placed in less desirable position — Employee successfully brought complaint before Human Rights Commission, which found that employer had discriminated against employee on basis of handicap, and that policy, as whole, violated Human Rights Code — With respect to award of damages, board dealt with matters of alleged reprisal against employee for his human rights complaints and heard viva voce evidence from authors of company memoranda — Board awarded employee $1,241.93 in special damages for lost overtime, $10,000 in general damages, and $10,000 for mental anguish for "the wilful and reckless manner" of infringement — Employer's appeal was dismissed — Divisional Court held that board's conclusions were reasonable — Further appeal by employer dismissed — Reinstatement process was lengthy and intrusive, and demeaned and ostracized employee, causing him stress and anxiety — At very least, employer's conduct was reckless in subjecting employee to process — Employer took number of actions, which board ruled amounted to acts of reprisal against employee for having brought human rights complaint — Actions included aggressive monitoring of his work performance, pressuring him to withdraw complaint, and interfering with his ability to function as elected delegate of organization representing non-unionized employees' interests — Board's findings were reasonably supported by evidence — Employer's conduct justified award of damages for mental anguish — Human Rights Code, R.S.O. 1990, c. H.19.

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s. 13(4) — considered

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s. 5 — referred to

s. 5(1) — considered

s. 8 — considered

s. 10 — referred to

s. 10(1) "because of handicap" — considered

s. 11 — considered

s. 11(1) — considered

s. 11(2) — considered

s. 13 — referred to

s. 13(1) — considered

s. 13(2) — considered

s. 17 — referred to

s. 17(1) — considered

s. 17(2) — considered

s. 32(2) — considered

s. 36(1) — considered

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The judgment of the court was delivered by *Laskin J.A.*:

Introduction

1 In 1992 the appellant Imperial Oil Limited instituted a comprehensive alcohol and drug testing policy (the "Policy") for its employees at its two Ontario refineries. The main question on this appeal is whether the provisions of the Policy discriminate on the ground of handicap or whether they are *bona fide* occupational requirements.

2 The respondent Martin Entrop suffered from alcohol abuse in the early 1980s. Although he had not had a drink for over seven years, because he worked in what Imperial Oil classified as a safety-sensitive job, the Policy required him to disclose his previous alcohol abuse problem to management. When he disclosed it, he was automatically reassigned to another job. Although he was eventually reinstated to his former position, he filed a complaint with the respondent the Ontario Human Rights Commission (the "Commission"), alleging that Imperial Oil discriminated against him in his employment because of his handicap contrary to s.5(1) of the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended (the "Code"). On the Commission's recommendation, the Minister of Labour appointed a Board of Inquiry to hear the complaint.

3 The Board chair, Constance Backhouse, (the "Board") broadened the scope of the inquiry to deal not just with Entrop's specific complaint but with all aspects of alcohol and drug testing under the Policy. In a series of decisions she concluded that the challenged provisions of the Policy were *prima facie* discriminatory and could not be justified as *bona fide* occupational requirements. She

awarded Entrop damages in the amount of $21,241.93, including $10,000 for mental anguish. An appeal from her decision was dismissed by the Divisional Court.

4 Imperial Oil appeals to this court with leave. It submits that the provisions of the Policy are not discriminatory, that the Board had no jurisdiction to expand the scope of the inquiry into all aspects of alcohol and drug testing under the Policy, and that the award of damages to Entrop for mental anguish is not supportable.

II. The Alcohol and Drug Policy

5 Following a number of incidents, such as the Exxon Valdez oil spill in Alaska, in which alcohol and drugs were thought to be contributing factors, Imperial Oil became concerned that substance abuse threatened the safety of its employees, the public and the environment. It decided to implement a comprehensive alcohol and drug policy at its two Ontario refineries. In developing the Policy, Imperial Oil consulted widely with its employees and with experts in alcohol and drug addiction and occupational health and safety. The stated objective of the Policy was "to minimize the risk of impaired performance due to substance abuse." The Policy was announced to the employees on October 19, 1991 and implemented on January 1, 1992.

6 The Policy principally targeted employees in safety-sensitive positions, about ten per cent of Imperial Oil's workforce. Safety-sensitive positions " have a key and direct role in an operation where impaired performance could result in a catastrophic incident affecting the health or safety of employees, sales associates, contractors, customers, the public or the environment"; and "have no direct or very limited supervision available to provide frequent operational checks."

7 Under the Policy, as amended in February 1992, the following key work rules applied to employees in safety-sensitive positions:

- No presence in the body of illicit drugs or their metabolites, nor a blood-alcohol concentration exceeding .04 per cent (.04 grams per 100 millilitres) while at work.

- Unannounced random alcohol and drug testing, alcohol testing by breathalyzer and drug testing by urinalysis.

- On a positive test or other Policy violation, automatic dismissal.

- To remain in or qualify for a safety-sensitive position, completion of a certification process, including a medical examination, a negative test for alcohol and drugs, and a signed acknowledgement of compliance with the Policy.

- Mandatory disclosure to management of a current or past "substance abuse problem".

- On disclosure of a substance abuse problem, reassignment to a non-safety-sensitive position.

- Reinstatement to a safety-sensitive position only on completing a company approved two-year rehabilitation program followed by five years of abstinence, and on signing an undertaking to abide by specified post-reinstatement controls.

8 Although the Policy mainly focused on employees in safety-sensitive positions, it also provided for mandatory alcohol and drug testing for all job applicants and all employees in the following circumstances:

- Pre-employment testing for specified drugs for all job applicants, as a condition of employment.

- Testing for alcohol and specified drugs for all employees:

    - after a significant work accident, incident or near miss ("post-incident")

    - where reasonable cause existed to suspect alcohol or drug use ("for cause")

- On a positive test, progressive discipline up to and including dismissal could be imposed.

III. The Facts Giving Rise to the Complaint before the Board

9 Martin Entrop has worked for Imperial Oil at its Sarnia Refinery since the mid-1970s. In 1987 he was promoted to the position of senior control board operator, responsible for controlling various oil refining processes.

10 Entrop is a recovered alcoholic. He testified that he had a previous alcohol abuse problem but that he had not had a drink since 1984. The Board accepted his testimony.

11 In October 1991 Imperial Oil announced its Policy. As I have said, the Policy required employees in safety-sensitive positions to disclose to management a past or current substance abuse problem. Entrop's position, senior control board operator, was classified as a safety-sensitive position. On October 26, 1991, in accordance with the provisions of the Policy, Entrop notified management that he had previously been an alcoholic and that he had been sober continuously since 1984. Imperial Oil immediately reassigned him to a non-safety-sensitive position at the same rate of pay. Entrop claimed that his new position was "less desirable".

12 On January 16, 1992, he filed with the Commission a complaint of discrimination alleging that "his right to equal treatment in employment without discrimination has been infringed because of my handicap and perceived handicap contrary to s.5(1) of the *Ontario Human Rights Code*."

13 Shortly after Entrop filed his complaint, Imperial Oil amended its Policy to permit employees with past substance abuse problems to be reinstated to safety-sensitive positions under

specified conditions. In March 1992 Entrop applied for reinstatement. He underwent several medical evaluations, all of which showed that his alcohol dependence was in remission and that he had no psychological or psychiatric problems preventing him from resuming his old job. On May 15, 1992, Imperial Oil agreed to reinstate Entrop to his former position as senior control board operator if he signed "an undertaking regarding post-reinstatement controls." The undertaking required Entrop to agree to unannounced alcohol tests and to comply with and be subject to the Policy. Entrop signed the undertaking on May 26, 1992 and he was then reinstated.

14 In March 1995 after Entrop had continuously tested negative, Imperial Oil removed several of the post-reinstatement controls. However, on June 1, 1995, after his hearing before the Board of Inquiry had started, Entrop amended his complaint to include an allegation that Imperial Oil had engaged in a series of reprisals against him for initiating his complaint to the Commission, contrary to s.8 of the Code.

15 On June 2, 1995, in her fifth interim decision, the Board permitted Entrop to further amend his complaint to allege that, when Imperial Oil distributed the Policy to its employees and circulated "educational awareness materials" to explain how the Policy operated, it violated s.13(1) of the Code, because it published a notice that indicated an intention to infringe a right under the statute. A new "amended amended complaint" containing an allegation that Imperial Oil had breached s.13(1) was filed on December 7, 1995.

IV. The Decision of the Board of Inquiry

16 The "Decision" of the Board of Inquiry consisted of eight interim decisions delivered over a two-year period from August 25, 1994 to September 12, 1996. Of these, the most significant are decisions 5 through 8, which deal with the expanded scope of the hearing, Entrop's original complaint of discrimination, the allegations of reprisal against Entrop, the remedies for Imperial Oil's breaches of the Code, and the legality of the Policy provisions for alcohol and drug testing. Because many of the Board's findings and her jurisdiction to expand the scope of the hearing are in issue in this appeal, I will briefly summarize the substance of each of her eight interim decisions.

Interim Decision No. 1, August 25, 1994

17 The parties asked for a preliminary ruling on the scope of the hearing. Imperial Oil sought to limit the Board's inquiry to the portion of the Policy that applied to Entrop, that is the provisions for disclosure of a previous substance abuse problem, reassignment and reinstatement. The Commission took the position that, in addition to dealing with Entrop's specific complaint, the Board should inquire into the entire Policy. The Board declined to rule, saying that it was premature to do so. In the Board's view the scope of the hearing had to await further scrutiny.

Interim Decision No. 2, September 27, 1994

18 On a Commission motion for the production of documents, the Board ruled that she would take a "phased" approach to the hearing. In the first phase she would consider Entrop's complaint. She again refused to rule on whether the entire Policy would be in issue, saying that would become clear as the hearing progressed.

Interim Decision No. 3, October 21, 1994

19 In this third interim decision the Board dealt with three matters. First, she ruled that she would consider whether the terms of Entrop's reinstatement to his previous position violated the Code. Because the Policy, as originally promulgated, contained no provision for reinstatement, Entrop's original complaint contained no allegation about reinstatement. When Imperial Oil amended its Policy in February 1992 to permit reinstatement. Entrop sought and obtained reinstatement to his former position. He did not, however, apply to amend his complaint to allege discrimination in connection with his reinstatement. Nonetheless the Board held that the inquiry would cover Entrop's reinstatement because "the issue of reinstatement is not severable from the issue of job loss."

20 Second, the Board allowed the Commission to amend the complaint of discrimination to add allegations of reprisal against Entrop for filing his complaint, contrary to s.8 of the Code.

21 Third, under her "phased" approach, the Board deferred her ruling on whether the Commission could further amend the complaint to allege that Imperial Oil's distribution of its Policy to its employees violated s.13 of the Code.

Interim Decision No. 4, December 5, 1994

22 The Commission asked to widen the scope of the inquiry to include random drug testing. The request was made because Entrop's doctor had provided a pain killer (Tylenol 3) containing codeine for Entrop's injured knee, and codeine is a drug specifically targeted under the Policy. The Board ruled that it would reserve its decision on the Commission's request until after the first phase of the inquiry.

Interim Decision No. 5, June 2, 1995

23 In this fifth interim decision, the Board decided that she would hear the complaint in three phases. Phase one would deal with Entrop's complaint of discrimination concerning his previous alcohol dependency; phase two would deal with the allegations of reprisal; and phase three would deal with the Policy as a whole. Thus the Board decided to expand the hearing into all aspects of alcohol and drug testing under the Policy. She justified her decision to do so on four separate bases:

1. Entrop's use of Tylenol 3;

2. The undertaking Entrop was required to sign to be reinstated "incorporated the Policy by reference";

3. The Board's broad remedial jurisdiction under s.41(1)(a) of the Code; and

4. The distribution of the Policy and supporting literature to Imperial Oil's workforce raised an alleged violation of s.13(1) of the Code.

24 The Board also indicated that she would consider in phase 3 whether Imperial Oil had breached s.13(1) and, as I have already said, she permitted Entrop to amend his complaint to allege a breach of s.13(1).

25 Having determined that she had jurisdiction to inquire into all aspects of alcohol and drug testing under the Policy, she then reserved her decision on whether she would make findings on these issues. The Board's jurisdiction to inquire into all the testing provisions in the Policy and eventually to make findings on them was one of Imperial Oil's grounds of appeal both in the Divisional Court and in this court.

Interim Decision No. 6, June 23, 1995

26 In this interim decision the Board made its findings on phase one, Entrop's complaint of discrimination on the ground of handicap because of his past alcohol dependence. The Board found on expert evidence that alcohol abuse was a " handicap" under the Code. She then concluded, relying on the broad definition of "handicap", that Entrop had established a *prima facie* case of discrimination contrary to s.5. In her view, by requiring Entrop to disclose his past alcohol abuse, by removing him from a safety-sensitive position, and by imposing conditions on his reinstatement, Imperial Oil had directly discriminated against him on the basis of "perceived handicap".

27 The Board held that the only defence to a *prima facie* case of direct discrimination was s.17 of the Code. She held that to establish "incapability" under s.17(1) Imperial Oil had to meet a subjective standard of good faith and an objective standard of reasonable necessity. She found that Imperial Oil had met the subjective standard of good faith. She also found that Imperial Oil had the right to insist that employees in safety-sensitive positions be unimpaired by alcohol. However, Imperial Oil failed to meet the objective standard of reasonable necessity because it could not establish that Entrop's previous alcoholism had adversely affected his job performance. Therefore Imperial Oil was not justified in treating him differently.

28 The Board also found that even if Imperial Oil's treatment of Entrop was objectively justified, the company had not met its duty to accommodate him under s.17(2) of the Code. The mandatory obligation to disclose his past alcohol dependency, his automatic reassignment and his subsequent

reinstatement under the conditions specified in his undertaking all failed the accommodation requirement.

Interim Decision No. 7, August 10, 1995

29 In this interim decision the Board dealt with phase two of the hearing, the allegations of reprisal against Entrop for filing his complaint, and with the remedy for the breaches of the Code she found in phases one and two. The Board held that Imperial Oil had retaliated against Entrop contrary to s.8 of the Code. She found that after he filed his human rights complaint he had been subjected to a series of acts, actual and threatened, that detrimentally affected him in his job at Imperial Oil. She listed a number of incidents, which in her view amounted to an ongoing pattern of reprisal. In some of the incidents she found that Imperial Oil intended to retaliate against Entrop; for others she could find no proof of intent but still held that s.8 had been breached because the "reasonable human rights complainant" in Entrop's position would be justified in perceiving that Imperial Oil had retaliated.

30 The Board awarded Entrop $10,000 in general damages to compensate him for the "intrinsic value" of the infringement of his rights, $10,000 in damages for mental anguish, for his rights being infringed wilfully and recklessly, and $1,241.93 in special damages for lost overtime because of his reassignment. Only the award of damages for mental anguish is in issue on this appeal.

Interim Decision No. 8, September 12, 1996

31 In this eighth and last interim decision the Board considered the legality of the parts of the Policy dealing with alcohol and drug testing. She found that drug abuse, like alcohol abuse, was a handicap under the Code. She also found that Imperial Oil's Policy directly discriminated against employees who were using or had used drugs, on the ground of handicap contrary to s.5 of the Code. Although she accepted that employees impaired by drugs were incapable of fulfilling the essential requirements of the job, she held that the expert evidence unequivocally showed that drug testing cannot establish impairment. Therefore, a positive drug test could not substantiate an incapability defence under s.17(1) of the Code. She also found that the Policy provisions on disclosure of drug use, reassignment and reinstatement were not justified under s.17(1). Further, she found that the Policy provisions on reassignment and reinstatement did not satisfy Imperial Oil's duty to accommodate under s.17(2).

32 Although this eighth interim decision mainly dealt with drug testing, the Board also considered the legality of random alcohol testing. During the hearing the Commission conceded that, in contrast to urinalysis for drug impairment, breathalyzer testing does show alcohol impairment. The Commission also conceded that alcohol testing may be permissible "for cause" and "post-incident". The Board, however, declined to rule on the accuracy or reliability of breathalyzer testing or on its legality for cause or post-incident.

33 But the Board apparently accepted the Commission's argument that breathalyzer testing was not necessary to detect or deter alcohol impairment on the job because other less intrusive measures were available. These methods included employee assistance programs, health promotion programs, supervisory assessment and peer control programs.

34 The Board ended her decision with five general conclusions, all of which are in issue on this appeal. They are:

> 1. The Policy's requirement that employees in safety-sensitive positions disclose any current or past "substance abuse problem" contravenes the Code because the definition of "substance abuse problem" is too broad and is unlimited in duration.
>
> 2. The Policy provisions that prescribe a minimum of seven years between reassignment following disclosure of a substance abuse problem and potential reinstatement breach the Code because this length of time is not necessary in all cases.
>
> 3. The mandatory conditions of reinstatement breach the Code because they are more than necessary in some cases.
>
> 4. The Policy provisions for pre-employment and random drug testing breach the Code because Imperial Oil failed to prove that a positive drug test shows impairment. However, drug testing "for cause", "post-incident", on "certification for safety-sensitive positions" and "post-reinstatement" may be permissible, but only if Imperial Oil establishes that this "testing is necessary as one facet of a larger process of assessment of drug abuse".
>
> 5. The Policy provisions for random alcohol testing breach the Code because Imperial Oil failed to establish that this testing is reasonably necessary to deter alcohol impairment on the job. Alcohol testing for "certification" for safety-sensitive positions and "post-reinstatement" may be permissible but again only if Imperial Oil establishes that this testing "is necessary as one facet of a large process of assessment of alcohol abuse".

35 The Board also included in this decision an appendix in which she set out in more detail her reasons for concluding that she had jurisdiction not only to inquire into the drug and random alcohol testing provisions of the Policy but to make findings on them as well. In this appendix she added one further conclusion to her five general conclusions. She held that the posting, printing and dissemination of the Policy constituted "the publication or display for the public" of a "notice" under s.13(1) and that to the extent the testing provisions contravened the Code they announced an intention to infringe a right contrary to the section.

36 On this appeal Imperial Oil asks that we set aside the Board's five general conclusions, that we declare the Board had no jurisdiction concerning her fourth and fifth conclusions, and that we set her aside her conclusion on s.13(1).

37 Following this eighth interim decision the Board indicated that if necessary she would conduct a fourth phase of the hearing to address revisions to Imperial Oil's Policy and further allegations of reprisal. However, the record before the Divisional Court and this court included only the eight interim decisions that I have summarized.

V. The Decision of the Divisional Court (Flinn, Kent and Feldman JJ.)

38 The Divisional Court upheld the Board of Inquiry and dismissed Imperial Oil's appeal. Flinn J., writing for the court, held that most of the submissions made by Imperial Oil raised questions of mixed fact and law, and therefore the applicable standard of review was reasonableness. However, on the question of the Board's jurisdiction to consider the entire Policy, he held that the standard was correctness.

39 Flinn J. then addressed Imperial Oil's five main arguments. First, he agreed with the Board's interpretation of ss.5 and 17 of the Code and held that the Board's finding that Entrop's rights were infringed on the ground of handicap was reasonably supported by the evidence. Second, he concluded that the broad remedial jurisdiction in the Code and the undertaking to comply with the Policy signed by Entrop as a condition of his reinstatement gave the Board jurisdiction to consider the Policy as a whole. Third, he saw no reason to interfere with the Board's findings that drug abuse was a handicap and drug testing under the Policy breached the Code, holding that these findings were "reasonable and based on the evidence". Fourth, he held that the Board had not erred in her assessment of the expert evidence. Fifth, he held that the award of damages to Entrop was not excessive. In summary, Flinn J. held that all the Board's orders and conclusions were supportable on the evidence.

VI. Grounds of Appeal

40 In this court Imperial Oil raised six grounds of appeal.

> 1. The Divisional Court erred by applying the wrong standard of review to the Board's findings.
>
> 2. The Divisional Court erred in holding that the Board had jurisdiction to inquire into all aspects of alcohol and drug testing under the Policy.
>
> 3. The Divisional Court erred in upholding the Board's conclusion that the Policy's provisions for alcohol and drug testing violate the Code.

4. The Divisional Court erred in upholding the Board's conclusion that the Policy's provisions for mandatory disclosure, reassignment, reinstatement and certification violate the Code.

5. The Board erred in holding that Imperial Oil infringed s.13(1) of the Code by distributing its Policy to its employees.

6. The Divisional Court erred in holding that the Board's finding that Imperial Oil infringed Entrop's rights "wilfully and recklessly" was reasonably supported by the evidence.

VII. Discussion

First Issue — Did the Divisional Court apply the wrong standard of review?

41 The Divisional Court held that the standard of review of the Board's jurisdiction to expand the scope of its inquiry to deal with the entire Policy was correctness, but that all other findings and conclusions of the Board were on issues of mixed fact and law, for which the standard of review was reasonableness. Imperial Oil submits that the Divisional Court erred because it applied the reasonableness standard to questions of law, such as the concept of perceived handicap under s.10 of the Code. Imperial Oil contends that these questions should have attracted the correctness standard.

42 Under s.42(3) of the Code, an appeal from a Board decision to the Divisional Court may be made on questions of law or fact or both and the Divisional Court has wide powers to affirm, reverse or substitute its opinion for that of the Board. The standard of review applicable to a human rights tribunal subject to such a broad right of appeal has been settled by the Supreme Court of Canada in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at 583-5 and *Berg v. University of British Columbia*, [1993] 2 S.C.R. 353 (S.C.C.), at 368-9. The standard of review of general questions of law, including the interpretation of the governing human rights statute is correctness; the standard of review of the Board's findings of fact and the application of the law to those findings of fact is reasonableness.

43 Thus, in this appeal, the Board's jurisdiction to expand the scope of the inquiry is, as the Divisional Court held, a question of law to which the correctness standard applies. But so too is the interpretation of the definition of "handicap" under s.10 of the Code, and the test to justify a *prima facie* case of discrimination under ss.11 and 17 of the Code. For the other issues raised in the appeal the reasonableness standard applies. In my view, this is the appropriate approach to the substantive issues raised by Imperial Oil.

Second Issue — Did the Divisional Court err in holding that the Board had jurisdiction to inquire into all aspects of alcohol and drug testing under the Policy?

44 Entrop's human rights complaint alleged that Imperial Oil discriminated against him on the ground of handicap because the company required him to disclose his previous alcohol abuse, and once he had disclosed it, reassigned him out of his safety-sensitive position. Entrop's complaint thus focused on the provisions of the Policy for mandatory disclosure of past alcohol abuse and reassignment on disclosure. Nonetheless, the Board decided part way through the hearing that she would broaden the inquiry into all aspects of alcohol testing and even into drug testing under the Policy. Imperial Oil submits that she had no jurisdiction to do so. The Divisional Court rejected this submission.

45 For reasons that I will outline, the Board's decision to inquire into all aspects of alcohol testing can be justified. However, the Board had no jurisdiction to inquire into drug testing. Moreover, I think that the Board was unwise to have done so, especially in the way that she did, even though Imperial Oil did not claim that it was prejudiced. That said, because both the Board and the Divisional Court have considered whether the drug testing provisions of the Policy violate the Code, practically I see no alternative but to do so as well.

46 The jurisdiction of a board of inquiry under the Code is provided for in Part IV of the statute, titled "Enforcement". Under s.36(1) the Commission may refer "the subject matter of the complaint to a board of inquiry." [1] Under s.39(1) the board of inquiry shall hold a hearing to determine whether a right of the complainant under the Act has been infringed and if so by whom, and to decide an appropriate remedy. Thus the board of inquiry's jurisdiction is circumscribed by "the subject matter of the complaint." The subject matter of Entrop's complaint was the mandatory disclosure of his past alcoholism, his reassignment, and, fairly, the conditions of his reinstatement. His complaint, admittedly, contains a general statement that if he again obtains a safety-sensitive position he will be subject to drug and alcohol testing. But what prompted his complaint and its real subject matter was the mandatory disclosure of his past alcohol abuse and the consequences of disclosing it. His complaint was properly amended to add allegations of reprisal.

1 S.O. 1994, c. 27, s.65(12). Under the previous provisions in force when Entrop's complaint was dealt with by the Commission, the Commission requested the Minister to appoint a Board and the Minister was required to do so. Under the new provisions the Minister's role in the appointment of boards of inquiry, which was purely formal, has been eliminated.

47 As I have said, the Board justified her decision to go beyond the parameters of Entrop's original complaint on four separate grounds: Entrop's use of Tylenol 3; the distribution of the Policy and supporting literature to Imperial Oil's workforce allegedly violated s.13(1) of the Code; the undertaking Entrop was required to sign as a condition of his reinstatement incorporated the entire Policy by reference; and a board of inquiry's broad remedial jurisdiction under s.41(1)

(a) of the Code. The Division Court relied on the last two grounds to dismiss Imperial Oil's jurisdictional argument. In my view, only the undertaking signed by Entrop affords a plausible basis for expanding the scope of the Board's inquiry into alcohol testing. None of the four grounds justifies inquiring into drug testing. I shall, however, discuss each of the four grounds relied on by the Board.

48 Entrop was taking Tylenol 3, a pain killer prescribed by his doctor, for a knee injury that he had sustained. Tylenol 3 contains codeine, and codeine is a drug targeted by the Policy. The Policy prohibits not only the use of illicit drugs and non-prescribed drugs but also the intentional misuse of prescribed medications. The Board therefore concluded that Entrop's use of Tylenol 3 put him in jeopardy of discriminatory action by Imperial Oil and thus raised a live issue before her of the validity of Imperial Oil's random drug testing.

49 To invoke jurisdiction over Imperial Oil's entire drug testing policy because of Entrop's use of Tylenol 3 is unsupportable. He never alleged in his complaint to the Commission that he had been discriminated against because he took this medication and he had never been subjected to a random drug test. Moreover, the Policy does not sanction an employee for using a prescribed medication legitimately for medical reasons and Imperial Oil never suggested Entrop had misused this medication. In short, Entrop was not at risk for his use of Tylenol 3.

50 Invoking jurisdiction over all aspects of Imperial Oil's alcohol and drug testing because the company distributed the Policy to its employees stands on no firmer foundation. Section 13(1) of the Code provides that the right to equal treatment is infringed by the publication of a "notice, sign, symbol, emblem, or other similar representation" indicating an intention to infringe a protected right. The Commission argued that by distributing the Policy and explanatory literature to its employees Imperial Oil exposed its entire Policy to review by the board of inquiry. The Board accepted that argument.

51 I do not think that the Board could properly rely on an alleged violation of s.13(1) to confer jurisdiction over all aspects of alcohol and drug testing when the entire Policy was not the subject matter of Entrop's complaint. Had Entrop's complaint put all the provisions of the Policy in issue then the Board might legitimately have considered whether the distribution of the Policy to Imperial Oil's workforce infringed s.13(1). Alternatively, under s.32(2) of the Code, the Commission could have initiated its own complaint alleging that the entire Policy was discriminatory, including an allegation that its distribution violated s.13(1). But the Commission did not do so.

52 In June 1995 the Board did permit Entrop to amend his complaint to allege an infringement of s.13(1). That amendment was not filed until December 1995, long after the Board decided she had jurisdiction to expand the scope of the inquiry. She did not rely on this "amended amended complaint" and it was not referred to by counsel in this court. In my view, it does not advance the

respondents' position on the Board's jurisdiction. Thus, I do not think s.13(1) provides any support for the Board's decision to inquire into all aspects of alcohol and drug testing under the Policy.

53 I now come to the two grounds relied on by the Divisional Court for upholding the Board's jurisdiction. When Entrop filed his original complaint the Policy did not provide for reinstatement of an employee taken out of a safety-sensitive position because of a substance abuse problem. However, as I have said, Imperial Oil amended the Policy to provide for reinstatement. Entrop took advantage of this amendment and he was reinstated, but on conditions, including a condition that he sign an undertaking to comply with and be subject to the Policy. The Board held that this undertaking "incorporated by reference" the entire Policy into the conditions of Entrop's reinstatement and thus gave the Board jurisdiction over the entire Policy. In her words the undertaking "transformed a case of previous alcohol dependency into a larger case with matters of drug abuse and random testing inextricably linked into Mr. Entrop's reinstatement." On a generous view, I think that the undertaking entitled the Board to assert jurisdiction over alcohol testing but not drug testing.

54 An employee of Imperial Oil was always subject to and obliged to comply with the Policy. The undertaking affirmed that obligation. Indeed, all the employees in safety-sensitive jobs were required to certify in writing that they agreed to be bound by the terms of the Policy. Although Entrop was bound by the Policy when he filed his complaint with the Commission he did not allege then that the other provisions of the Policy dealing with random alcohol testing and drug testing discriminated against him. He did not suggest, for example, that random drug testing put him at risk or placed him in jeopardy. Nor did Entrop or the Commission ask to amend the complaint to cover the undertaking and by reference the Policy as a whole.

55 However, Entrop did have an alcohol abuse problem. And the undertaking addressed that problem by imposing additional "controls" on Entrop. For example, in the undertaking, Entrop had to agree to "undergo unannounced alcohol testing, at a frequency of at least twice per quarter ... in addition to any testing ... required ... as an employee in a safety-sensitive position in accordance with the Alcohol and Drug Policy." This provision and the undertaking as a whole were rooted in Imperial Oil's concern that Entrop might again become an alcoholic. Viewed expansively, therefore, the undertaking gave the Board jurisdiction to inquire into all aspects of alcohol testing under the Policy.

56 But Entrop never had a drug abuse problem. The undertaking was not directed at drug abuse. Thus, the undertaking did not justify a broad ranging inquiry into drug testing. Indeed the Board even inquired into pre-employment drug testing, to which Entrop was not and could never be subjected since he was already an employee when the Policy was introduced, and into drug testing " post-incident" and "for cause", though Entrop had not been tested after an incident or for cause.

57 Finally, the Board relied on its broad remedial jurisdiction in s.41(1)(a) of the Code to give it jurisdiction to inquire into the legality of the entire Policy. Section 41(1)(a) is indeed a broad remedial provision. Once the board of inquiry finds that a complainant's rights have been infringed the Board may direct the infringing party "to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices". But it seems to me the proposition that the Board's broad remedial power can be used to expand its jurisdiction is logically flawed. The Board cannot work backwards from its remedial powers to enlarge the subject matter of the complaint. In other words the Board's remedial powers cannot confer jurisdiction over a matter if the Board had no jurisdiction over it at the outset. The range of remedies available to the Board, though broad enough to include future practices, must be linked to the subject matter of the complaint. In this case the Board's remedy could properly address Entrop's complaint and Imperial Oil's future practices concerning the subject matter of his complaint, that is the disclosure of past alcohol abuse, reassignment, reinstatement and unannounced alcohol testing. To go further and conduct what amounted to a freestanding inquiry into drug testing cannot be justified by s.41(1)(a) of the Code.

58 I thus conclude that the Board had jurisdiction to expand the scope of the inquiry into all aspects of alcohol testing but not drug testing. Also, expanding the scope of the inquiry in the way that she did caused two practical difficulties. First the scope of the inquiry became a moving target. The hearing began in August 1994 as an inquiry into Entrop's complaint of handicap discrimination because of his previous alcohol abuse. Not until June 1995, ten months into the hearing, in her fifth interim decision, did the Board decide to broaden the scope of the inquiry to deal with the issues of drug and alcohol testing. Not until her eighth and last interim decision in September 1996, over two years after the hearings began, did she decide that she had jurisdiction to make findings on these broader issues. Broadening the scope of the inquiry in this way did not prejudice Imperial Oil. Nonetheless, ordinarily hearings proceed much more efficiently and effectively when the parties know what the issues are at the outset.

59 Second, the inquiry into the Policy's provisions on drug testing lacked a proper factual underpinning. Entrop had never been tested for drugs. Apart from his use of Tylenol 3 under prescription, he did not consume drugs. Thus, his complaint did not raise a live dispute about drug testing. The courts have, with good reason, been wary about resolving disputes that do not have a proper factual or evidentiary foundation. The Board justified her inquiry into drug testing on the ground of "judicial economy". Because she had heard a good deal of evidence about the development and implementation of the Policy and because the Commission's resources were limited, she concluded that broadening her inquiry into drug testing would be economical. However, judicial economy was a debatable justification for turning Entrop's narrow complaint about how Imperial Oil dealt with his past alcohol abuse into a wide-ranging inquiry into drug testing. Moreover, the inquiry into drug testing took place in phase three. The Board could simply have ended the inquiry after phase two.

60 However, with some misgivings, I will address the merits of the various aspects of Imperial Oil's Policy on drug testing. I do so because the Board and the Divisional Court did so and because Imperial Oil has not asserted that it was prejudiced by the broadening of the inquiry. Indeed, the Board gave both sides a fair opportunity to lead evidence and make submissions on all contested issues. In these circumstances, to avoid the merits would be of little solace to any of the parties.

Third Issue — Did the Divisional Court err in upholding the Board's conclusion that the Policy's provisions for alcohol and drug testing violate the Code?

61 This is the main issue on the appeal. Imperial Oil submits that the provisions in the Policy for pre-employment drug testing, random alcohol and drug testing for safety-sensitive positions, and testing post-incident and for cause are not discriminatory. Alternatively, Imperial Oil contends that, even if these provisions are *prima facie* discriminatory, they are justified as *bona fide* occupational requirements ("BFORs").

62 I will first discuss the legal principles to be applied to a complaint that a workplace standard or rule is discriminatory, and then apply these principles to the challenged provisions of the Policy.

1. The legal principles

63 Determining whether a workplace rule violates the Code is a two-stage process. At the first stage, the complainant must show that the workplace rule is *prima facie* discriminatory on a prohibited ground. If a *prima facie* case of discrimination is made out, at the second stage the burden shifts to the employer to justify the rule.

64 Therefore, the complainant must first show that the workplace rule contravenes s.5(1) of the Code. Section 5(1) provides:

> **5.** — Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

65 For years, courts and human rights tribunals held that a contravention of s.5(1) could occur in one of two ways: the contravention was characterized as " direct" discrimination if the workplace rule was discriminatory on its face; and "adverse effect" discrimination if the rule was neutral on its face but discriminatory in its effect on an employee or group of employees. Adverse effect discrimination has also been termed "indirect" or "constructive" discrimination. The distinction between direct and adverse effect discrimination was first recognized by the Supreme Court of Canada in *O'Malley v. Simpsons-Sears Ltd.* (1985), 23 D.L.R. (4th) 321 (S.C.C.). McIntyre J. discussed the distinction in the following passage at 332:

> A distinction must be made between what I would describe as direct discrimination and the concept already referred to as adverse effect discrimination in connection with employment. Direct discrimination occurs in this connection where an employer adopts a practice or rule which on its face discriminates on a prohibited ground. For example, "No Catholics or no women or no blacks employed here." There is, of course, no disagreement in the case at bar that direct discrimination of that nature would contravene the Act. On the other hand, there is no concept of adverse effect discrimination. It arises where an employer for genuine business reasons adopts a rule or standard which is on its face neutral, and which will apply equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic of the employee or group, obligations, penalties, or restrictive conditions not imposed on other members of the work force. For essentially the same reasons that led to the conclusion that an intent to discriminate was not required as an element of discrimination contravening the Code, I am of the opinion that this court may consider adverse effect discrimination as described in these reasons a contradiction of the terms of the Code. An employment rule honestly made for sound economic or business reasons, equally applicable to all to whom it is intended to apply, may yet be discriminatory if it affects a person or group of persons differently from others to whom it may apply. From the foregoing I therefore conclude that the appellant showed a *prima facie* case of discrimination based on creed before the board of inquiry.

66 After this decision, much of the human rights case law on employment discrimination centred on whether the discrimination was direct or indirect. The distinction was important because what the employer had to show to justify the *prima facie* discriminatory rule and the appropriate remedy differed depending on whether the rule was discriminatory on its face or facially neutral but discriminatory in its effect.

67 Ontario's Code gives an employer two separate defences to a *prima facie* case of handicap discrimination. Under s.11, an employer may justify a workplace rule that has the effect of discriminating against a person or group of persons on a prohibited ground by showing that the rule is a BFOR:

> **11.** — (1) A right of a person under Part I is infringed where a requirement, qualification or factor exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,
>
> (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
>
> (b) it is declared in this Act, other than in section 17, that to discriminate because of such ground is not an infringement of a right.

(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

68 Under s.17, an employer may justify a *prima facie* case of handicap discrimination by showing that the complainant is incapable of performing the essential duties of the job:

17. — (1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of handicap.

(2) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

69 This court held in *O.N.A. v. Orillia Soldiers Memorial Hospital* (1999), 42 O.R. (3d) 692 (Ont. C.A.) that s.11 applies to cases of adverse effect discrimination and s.17 applies to cases of direct discrimination.

70 Though important, characterizing the discrimination as direct or indirect was often difficult. This case is a good example. Is the rule requiring all employees in safety-sensitive positions to undergo random alcohol and drug testing facially neutral because it applies to an entire segment of the workforce, or discriminatory on its face because it targets substance abusers and perceived substance abusers? The Board of Inquiry held that these Policy provisions were discriminatory on their face and constituted direct discrimination on the ground of handicap. In this court, Imperial Oil contended that the Policy was neutral on its face and that if it discriminated at all, the discrimination was indirect. Because the Board found that the discrimination was direct, she held the only defence available to Imperial Oil was under s.17. Imperial Oil, on the other hand, argued that it could rely on s.11 of the Code.

71 The development of human rights jurisprudence was well-served by the distinction between direct and adverse effect discrimination, or, more accurately, by the recognition of adverse effect discrimination as a form of discrimination. The Code aims to remove discrimination in Ontario. Its main purpose is not to punish the wrongdoer but to provide relief for the victim of discrimination. Recognizing adverse effect discrimination furthers this purpose. It focuses not on the intention of the employer but on what is most important, the effect or the result of the employer's conduct. Indeed, few modern employers openly discriminate directly by advertising, for example, "No Blacks or Jews employed here." Even those employers with a discriminatory intent will invariably

use neutral language to frame their employment rules. Thus, in most cases, the inquiry focuses on the effect of the employer's actions.

72 However, increasingly, tribunals, courts and academics have doubted the continuing validity of the distinction between direct and adverse effect discrimination. Then, late last year, after this appeal was argued, the Supreme Court of Canada, in two ground-breaking decisions — *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. ("Meiorin")* (1999), 176 D.L.R. (4th) 1 (S.C.C.) and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) ("Grismer")* (1999), 181 D.L.R. (4th) 385 (S.C.C.) — erased the distinction between direct and adverse effect discrimination and prescribed a single three-step test, which the employer must meet to justify a *prima facie* case of discrimination. *Meiorin* was a sex discrimination case, *Grismer* a handicap discrimination case. Both cases were decided under the British Columbia *Human Rights Code* and in both the reasons were written by McLachlin J.

73 In *Meiorin*, McLachlin J. gave seven reasons for abandoning the distinction between direct and adverse effect discrimination:

> 1. The distinction is artificial. Few cases "can be so neatly characterized"; and the distinction is unrealistic because today most employers use neutral words whatever their intent.
>
> 2. The remedies could differ depending on the kind of discrimination. If the employer could not justify a workplace rule that was discriminatory on its face, the rule would ordinarily be struck down. The employer, however, could maintain a rule that was neutral on its face but discriminatory in its effect, by accommodating individuals affected by the discrimination to the point of undue hardship. A different result flowing from a questionable initial classification is difficult to justify.
>
> 3. The rationale for the remedy for adverse effect discrimination is questionable. Facially-neutral workplace rules were permitted to remain in effect because ordinarily they affected a minority of employees. But permitting a neutral rule to stand because it did not adversely affect the majority of employees is difficult to defend. Moreover, the size of the "affected group" can be manipulated and, in some cases, can actually constitute a majority of the workforce.
>
> 4. Although the defences to direct and adverse effect discrimination differed, the differences were hard to define; in practice, probably no meaningful distinction existed.
>
> 5. The distinction between direct and adverse effect discrimination may legitimize systemic discrimination. If a workplace rule is characterized as neutral on its face, its legitimacy is not questioned. Instead, the inquiry focuses on whether the complainant can be accommodated.

> 6. Permitting a workplace rule to be questioned only if it is discriminatory on its face does not permit human rights statutes "to accomplish their purpose as well as they might otherwise do".
>
> 7. The court's approach to human rights legislation should not differ from the court's approach to the equality guarantee in s.15(1) of the *Canadian Charter of Rights and Freedoms*. Eliminating the distinction between direct and adverse effect discrimination is more consistent with the Court's interpretation of s.15(1), which principally focuses on the effect of the challenged law.

74 For these reasons, the Supreme Court abandoned the problematic distinction between direct and adverse effect discrimination. Instead, the Court adopted in *Meiorin* and affirmed in *Grismer* a "unified approach" that avoids this distinction. This new approach requires employers setting workplace rules to accommodate affected employees as much as reasonably possible, but permits employers to maintain discriminatory rules reasonably necessary to achieve legitimate work-related objectives.

75 In *Meiorin*, at pp. 24-25, the Court proposed that an employer could justify a *prima facie* discriminatory workplace rule or standard by meeting a three-step test:

> Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR. An employee may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
>
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment 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 accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

If the three-step test is met, the workplace rule is a BFOR.

76 The significance of eliminating the distinction between direct and adverse effect discrimination and of the three-step justification for a *prima facie* discriminatory workplace rule is that now the rule itself must accommodate individual differences to the point of undue hardship. If it does, the rule is a BFOR. If it does not, the rule is discriminatory. McLachlin J. discussed the significance of her unified approach in *Grismer* at 393:

> *Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased. Employers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them. Incorporating accommodation into the standard itself ensures that each person is assessed according to her or his own personal abilities, instead of being judged against presumed group characteristics. [Emphasis in original.]

77 The Supreme Court's three-step test was formulated in the context of a discrimination complaint under the British Columbia *Human Rights Code*, R.S.B.C. 1996, c.210. The wording of the statutory defences available to an employer under Ontario's Code differs from the wording under the British Columbia *Code*. Section 11 of Ontario's Code sets out in detail the elements of a BFOR; the comparable provision of the British Columbia Code, s.13(4), provides simply that "subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement."[2] In the case of handicap discrimination, s.17 of the Ontario Code has no counterpart in the British Columbia Code. The difference in wording in the two statutes raises the question whether the Supreme Court's three-step test for justifying a *prima facie* discriminatory workplace rule should be applied in this case. In my view, the unified approach and the three-step test adopted in *Meiorin* should be applied. Applying the unified approach means that Imperial Oil can rely on s.11 of the Code as well as s.17. Under either section, however, to justify its workplace rules it must satisfy the three-step test in *Meiorin*. I rely on the following reasons for applying *Meiorin* in this case.

2 Section 13(1) of the B.C. statute is comparable to s.5 of Ontario's *Code*. Section 13(1) states:
13(1) A person must not
(a) refuse to employ or refuse to continue to employ a person, or

(b) discriminate against a person regarding employment or any term or condition of employment

because of the race, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or because that person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person.

78 First, although the Supreme Court in *Grismer* said only that the *Meiorin* test applies to all claims for discrimination under the British Columbia Code, it seems to me the Court contemplated that the test would apply generally to discrimination claims under human rights legislation unless precluded by the applicable statutory provisions. Thus, at 393 of *Grismer*, McLachin J. wrote: "*Meiorin* announced a unified approach to adjudicating discrimination claims under human rights legislation."

79 Second, as McLachlin J. observed in *Meiorin*, the Ontario statute already reflects the unified approach she advocates. Section 11(2) of the Code provides that a board of inquiry shall not find a rule is a BFOR "unless it is satisfied that the needs of the group of which the person is a member cannot be accommodated without undue hardship". Similarly, the statutory defence under s.17 imposes a duty to accommodate to the point of undue hardship and a *prima facie* discriminatory rule not saved by s.17 will be struck down. See *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489 (S.C.C.).

80 Third, though the language of s.11 does reflect the distinction between direct and adverse effect discrimination — because it provides a BFOR defence "where a requirement ... exists that is not discrimination on a prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by prohibited ground of discrimination" — I would limit the situations to which s.11 does not apply to those few cases that can be "neatly characterized" as cases of direct discrimination. I have in mind the kinds of cases referred by McIntyre J. in *O'Malley v. Simpsons-Sears Ltd.*, *supra* — "No Catholics or no women or no blacks are employed here" — where the requirement expressly includes a prohibited ground of discrimination. So limiting the cases to which s.11 does not apply is consistent with the reasoning underlying the Supreme Court's unified approach in *Meiorin*. The case before us, however, is the kind of case where characterizing whether the discrimination is direct or indirect is problematic and thus where s.11 should be applied using the *Meiorin* test. The focus should be, as s.11 mandates, on the effect or the result of the challenged provisions of the Policy.

81 Fourth, the three-step justification test proposed by the Supreme Court is consistent with both the language of ss.11 and 17 of the Code and the jurisprudence under these provisions. See *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 (S.C.C.) and *Large v. Stratford (City) Police Department* (1995), 128 D.L.R. (4th) 193 (S.C.C.). Indeed, the Supreme Court's new three-step test combines the elements of the previous test for justifying adverse effect discrimination with the elements of the previous test for justifying direct discrimination. And, as McLachlin J. observed in *Meiorin*, there is little difference between the two previous tests, other than semantics.

82 As I have said, eliminating the distinction between direct and adverse effect discrimination and adopting *Meiorin* unified approach allows Imperial Oil to rely on s.11 of the Code as a defence to Entrop's claim, a defence the Board held was not available to it. But that defence, which is an express BFOR defence, must now be assessed against the *Meiorin* test.

83 The language of s.17 differs from the language of s.11. Under s.17 Imperial Oil can legitimately assert, as the Board held, that an employee impaired by alcohol or drugs "is incapable of performing the essential duties or requirements" of safety-sensitive jobs. But, unless Imperial Oil shows that its methods for establishing impairment — random alcohol and drug testing,

mandatory disclosure and automatic reassignment — are themselves BFORs, then its s.17 defence will fail.

84 The elements of the *Meiorin* test for establishing a BFOR closely parallel the elements of the incapability defence developed in the case law under s.17 and applied by the Board in this case. Relying on *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, *supra*, the Board held that, to show Entrop was incapable of performing the essential requirements of the job under s.17(1), it had to meet a subjective standard of good faith and an objective standard of reasonable necessity. In substance, these comprise the second step and one aspect of the third step in the *Meiorin* test. The Board also applied the other aspect of the third step, the duty to accommodate to the point of undue hardship, as it is prescribed by s.17(2) of the Code. The first step in the new test in *Meiorin* — the workplace rule is rationally connected to the performance of the job — is drawn from the jurisprudence on adverse effect discrimination. The need for a rational connection, though not expressly adverted to by the Board, was implicit in her analysis and, as I have said, is consistent with the wording of s.17.

85 For these reasons, I propose to analyze whether the challenged provisions of the Policy breach the Code using the new three-step test in *Meiorin*. I do not believe that doing so causes any unfairness to the parties. Because the *Meiorin* test and the test applied by the Board are so similar, both sides addressed the relevant questions. Thus, the new test can be applied to the findings of the Board.

2. Pre-employment drug testing and random alcohol and drug testing for employees in safety-sensitive positions

86 The workplace rules that lie at the heart of Imperial Oil's Policy are the provisions for pre-employment drug testing and random alcohol and drug testing for employees in safety-sensitive positions. The Board concluded that these provisions breached the Code, and her conclusion was upheld by the Divisional Court. Imperial Oil submits that these provisions do not breach s.5 but that, even if they do, they are justified because they are *bona fide* occupational requirements. I agree that the drug testing provisions of the Policy violate the Code. However, I disagree with the Board and the Divisional Court on random alcohol testing. The important difference between alcohol and drug testing is that a positive drug test does not demonstrate impairment; a positive breathalyzer reading does. I therefore think that random alcohol testing for safety-sensitive positions, though *prima facie* discriminatory, can be justified providing the sanctions for a positive test are individually tailored. With this brief background, I will discuss the application of the *Meiorin* test to these provisions.

(a) Are these provisions prima facie discriminatory on the ground of handicap?

87 Section 5(1) of the Code guarantees every person "a right to equal treatment with respect to employment without discrimination because of ... handicap." Handicap is defined very broadly

in s.10 of the Code, both in respect of what conditions constitute a handicap and who can claim protection against handicap discrimination:

> "because of handicap" means for the reason that the person has or has had, or is believed to have or have had,
>
> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
>
> (b) a condition of mental retardation or impairment,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) a mental disorder, or
>
> (e) an injury or disability for which benefits were claimed or received under the *Workers' Compensation Act*;

88 This definition provides protection to persons who have a handicap, persons who had a handicap but no longer suffer from it, persons believed to have a handicap whether they do or not, and persons believed to have had a handicap, whether they did or not. In other words, the definition protects those who have or have had an actual or perceived handicap.

89 The Board found, on uncontradicted expert evidence, that drug abuse and alcohol abuse — together substance abuse — are each a handicap. Each is " an illness or disease creating physical disability or mental impairment and interfering with physical, psychological and social functioning." Drug dependence and alcohol dependence, also separately found by the Board to be handicaps, are severe forms of substance abuse. Therefore, on the findings of the Board, which are not disputed on this appeal, substance abusers are handicapped and entitled to the protection of the Code.

90 A person who tests positive on a random alcohol or drug test may be a casual user, not a substance abuser, and may, therefore, not actually be handicapped. But the Policy treats even casual or recreational users as substance abusers. The Policy's Administrative Guidelines, which are "intended to provide additional details, interpretative guidance and administrative procedures" in support of the Policy list the following categories of substance abusers:

CATEGORIES OF SUBSTANCE ABUSERS	
EXPERIMENTER	An individual who experiments with alcohol or drugs, usually out of curiosity.
RECREATIONAL USER	A person who uses and gets "high" on alcohol or drugs at special occasions, e.g. parties.
REGULAR USER	One who adopts a constant pattern of alcohol or drug abuse while attempting to maintain normal day-to-day activities.
BINGE USER	An individual who consumes alcohol or drugs in an uncontrolled manner for short periods of time and then abstains until the next binge.
DEPENDENT USER	A dependent, or addicted, user has become psychologically or physically dependent on the use of drugs, characterized by a progressive loss of control despite either a desire to reduce intake or knowledge or recurring disturbances in health, work of social functioning.

91 The Guidelines then state: "In the cycle of substance abuse, users frequently begin by experimenting with drugs and progress to the dependent user stage later on."

92 Thus, though the social drinker and casual drug user are not substance abusers and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the Policy. In other words, Imperial Oil believes that any person testing positive on a pre-employment drug test or a random drug or alcohol test is a substance abuser. Because perceived as well as actual substance abuse is included in the definition of handicap under the Code, anyone testing positive under the alcohol and drug testing provisions of the Policy is entitled to the protection of s.5 of the Code. Imperial Oil applies sanctions to any person testing positive — either refusing to hire, disciplining or terminating the employment of that person — on the assumption that the person is likely to be impaired at work currently or in the future, and thus not "fit for duty." Therefore, persons testing positive on an alcohol or drug test — perceived or actual substance abusers — are adversely affected by the Policy. The Policy provisions for pre-employment drug testing and for random alcohol and drug testing are, therefore, *prima facie* discriminatory. Imperial Oil bears the burden of showing that they are *bona fide* occupational requirements. See *Canadian Civil Liberties Assn. v. Toronto Dominion Bank* (1998), 163 D.L.R. (4th) 193 (Fed. C.A.).

(b) Are these testing provisions justified as BFORs?

93 The question is whether Imperial Oil can justify these *prima facie* discriminatory workplace rules as BFORs under the three-step test in *Meiorin*. The Board held that, because these provisions were discriminatory on their face — the discrimination was direct — Imperial Oil could not rely on the BFOR defence under s.11 of the Code; the only defence available was under s.17. However, *Meiorin* has eliminated the distinction between direct and adverse effect discrimination for the provisions of the Policy challenged in this case, thus permitting Imperial Oil to rely on s.11 as

well as s.17. As I have said earlier, the three-step test in *Meiorin* applies to either defence. As in most cases, whether Imperial Oil can meet the test turns on the third step.

(i) Has Imperial Oil adopted alcohol and drug testing for a purpose rationally connected to the performance of the job?

94 *Meiorin* tells us that the first step focuses not on the validity of the particular challenged workplace rules but on their more general purpose. The stated purpose or objective of the Policy "is to minimize the risk of impaired performance due to substance use" in order "to ensure a safe, healthy and productive workplace." This general purpose is rationally connected to the performance of the work at Imperial Oil's two refineries. Common sense and experience suggest that an accident at a refinery can have catastrophic results for employees, the public and the environment. Promoting workplace safety by minimizing the possibility employees will be impaired by either alcohol or drugs while working is a legitimate objective. Imperial Oil has met the first step of the *Meiorin* test.

(ii) Did Imperial Oil adopt these testing provisions in an honest and good faith belief that they were necessary to accomplish the company's purpose?

95 The second step is the subjective element of the test. The Board found that Imperial Oil developed and implemented the challenged provisions of the Policy honestly and in good faith. That finding is reasonably supported by the evidence. Imperial Oil consulted widely with its employees and with experts in both occupational health and safety and substance dependency. It assembled one of Canada's most comprehensive databases on workplace alcohol and drug abuse. Imperial Oil has met the second step of the *Meiorin* test.

(iii) Are these testing provisions reasonably necessary to accomplish Imperial Oil's purpose?

96 This third step of the *Meiorin* test focuses on the means Imperial Oil has used to accomplish its purpose. The question is whether Imperial Oil has shown that the alcohol and drug testing provisions of the Policy are reasonably necessary to identify those persons who cannot perform work safely at the company's two refineries, because they are impaired by alcohol or drugs. To meet this third requirement Imperial Oil must show that it cannot accommodate individual capabilities and differences without experiencing undue hardship. The phrase "undue hardship" suggests that Imperial Oil must accept some hardship in order to accommodate individual differences.

97 An employer's workplace rule may fail to satisfy the third step in the *Meiorin* test in several ways. For example the rule may be arbitrary in the sense that it is not linked to or does not further the employer's legitimate purpose; the rule may be too broad or stricter than reasonably necessary to achieve the employer's purpose; the rule may unreasonably not provide for individual

assessment; or the rule may not be reasonably necessary because other means, less intrusive of individual human rights, are available to achieve the employer's purpose.

98 I turn now to whether Imperial Oil's alcohol and drug testing provisions are reasonably necessary. As the Board held, Imperial Oil has the right to assess whether its employees are capable of performing their essential duties safely. An employee working in a safety-sensitive position while impaired by alcohol or drugs presents a danger to the safe operation of Imperial Oil's business. Therefore, as the Board found, "freedom from impairment" by alcohol or drugs is a BFOR. An employee impaired by alcohol or drugs is incapable of performing or fulfilling the essential requirements of the job. The contentious issue is whether the means used to measure and ensure freedom from impairment — alcohol and drug testing with sanctions for a positive test — are themselves BFORs. Are they reasonably necessary to achieve a work environment free of alcohol and drugs?

99 I deal with drug testing first. The drugs listed in the Policy all have the capacity to impair job performance, and urinalysis is a reliable method of showing the presence of drugs or drug metabolites in a person's body. But drug testing suffers from one fundamental flaw. It cannot measure present impairment. A positive drug test shows only past drug use. It cannot show how much was used or when it was used. Thus, the Board found that a positive drug test provides no evidence of impairment or likely impairment on the job. It does not demonstrate that a person is incapable of performing the essential duties of the position. The Board also found on the evidence that no tests currently exist to accurately assess the effect of drug use on job performance and that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems. On these findings, random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment.

100 The random drug testing provisions of the Policy suffer from a second flaw: the sanction for a positive test is too severe, more stringent than needed for a safe workplace and not sufficiently sensitive to individual capabilities. This aspect of the Policy's provisions on random drug testing was not addressed by the Board. However, the Administrative Guidelines specify the consequences of a Policy violation. Employees in non-safety-sensitive jobs who test positive are subject to progressive discipline, which consists of a warning, a three-to-five day suspension without pay, and termination. But for employees in safety-sensitive positions who test positive for drugs or alcohol, the Guidelines provide only one sanction: termination of employment.

101 Howard Moyer, the manager of Imperial Oil's Policy, acknowledged in his evidence before the Board that employees in safety-sensitive positions testing positive for drugs or alcohol would be given no individual accommodation. In his view "certain corporate minimums" had to be maintained. According to Moyer, unless the employee can explain a positive finding, the employee is fired.

> Q. For safety-sensitive positions, the automatic consequence for a first violation for presence in the body would be termination of employment.
>
> A. I would quarrel with the use of the term "Automatic". We certainly go through an in-depth investigative process with each random position that we have, but if there isn't a reasonable explanation of that, then the result for a person in a safety-sensitive job is termination.

102 Automatic termination of employment for all employees after a single positive test is broader than necessary. In some cases termination may be justified; but in others, the employee's circumstances may call for a less severe sanction. Imperial Oil failed to demonstrate why it could not tailor its sanctions to accommodate individual capabilities without incurring undue hardship.

103 Pre-employment drug testing suffers from the same two flaws: a positive test does not show future impairment or even likely future impairment on the job, yet an applicant who tests positive only once is not hired.

104 In this court Imperial Oil submitted that the Board mischaracterized the underlying workplace standard the company sought to achieve by drug testing. The Board characterized the standard as "freedom from impairment." Imperial Oil argued that the standard is what the Policy says, "no presence" of drugs or their metabolites. Imperial Oil contended that in the interests of safety it is legitimately entitled to adopt a "no presence" standard, that does not depend for its efficacy on the discovery of impairment.

105 There are two answers to Imperial Oil's submission. First, the Board's finding that the standard was "freedom from impairment" by drugs is a finding of fact, which is reasonably supported by the evidence and thus is entitled to deference. Second, the "no presence" standard does not assist Imperial Oil because it too is arbitrary, again for the reason that a positive drug test does not demonstrate incapability to perform the work safely. Therefore, the drug testing provisions of the Policy are not BFORs.

106 The provisions for random alcohol testing for employees in safety-sensitive positions stand on a different footing. Breathalyzer testing can show impairment. The expert evidence at the hearing confirmed the reliability and utility of breathalyzer testing to measure alcohol impairment, and the Commission conceded its reliability and utility. The Commission also took no issue with the standard used by Imperial Oil, .04 per cent. Studies indicated that with a blood alcohol concentration of .04 per cent most individuals show discernible signs of impairment. Admittedly the effects of alcohol on an individual will vary depending on a wide array of factors: size, age, sex, body metabolism, body fat, the amount of food in the stomach, acquired tolerance, stress and fatigue. Despite individual variability, we use a bright line standard — 80 milligrams of alcohol in 100 mililitres of blood — in the criminal law for drinking and driving offences. The standard used by Imperial Oil was reasonable to ensure workplace safety.

107 Despite the overwhelming expert evidence and the Commission's concession, the Board seemed unconvinced of the utility of breathalyzer testing to measure impairment. Moreover, she disagreed that random alcohol testing was reasonably necessary for employees in safety-sensitive positions. She held that "the provisions of the Policy that provide for random alcohol testing are unlawful because [Imperial Oil] failed to prove such screening is reasonably necessary to deter alcohol impairment on the job." In her opinion other less drastic means existed to deter alcohol impairment on the job. Those means included various kinds of employee supervision and assessment programs.

108 I find the evidence the Board relied on weak and her reasoning unpersuasive. The Board gave great weight to the evidence of Dr. Shain, the head of workplace programs at the Addiction Research Foundation, even though he had no practical experience with drug and alcohol testing in the workplace. Dr. Shain thought that other programs were more effective in eliminating alcohol abuse. In his opinion, properly trained supervisors had a "very high likelihood of being able to detect impairment" on the job. His opinion fails to appreciate that Imperial Oil does use trained supervisors to detect impairment, but in conjunction with breathalyzer testing. Most important, however, Dr. Shain's opinion fails to adequately appreciate that a safety-sensitive position is one that by definition has no direct or very limited supervision.

109 Relying exclusively on supervisors to detect impairment raises additional concerns, also addressed in the expert evidence before the Board. Supervisors have other duties; at Imperial Oil their primary focus is to direct the manufacture of petroleum products. Supervisors are often unwilling to confront employees with an alcohol problem, or at least to do so constructively. And, increased supervision may lead to harassment of or even discrimination against some employees. Random testing is seen by many experts to be fairer to employees because of its objectivity.

110 Imperial Oil can legitimately take steps to deter and detect alcohol impairment among its employees in safety-sensitive jobs. Alcohol testing accomplishes this goal. For employees in safety-sensitive jobs, where supervision is limited or non-existent, alcohol testing is a reasonable requirement.

111 The Commission's "Policy Statement on Drugs and Alcohol Testing" recognizes that an employer can administer alcohol testing to its employees without contravening the Code. The Commission's Policy Statement provides:

> If workers will be required to undergo drug and alcohol testing during the course of their employment — on the grounds that such testing, at the time that it is administered, would indicate actual impairment of ability to perform or fulfil the essential duties or requirements of the job, as opposed to merely detecting the presence of substances in the system — the employer should notify them of this requirement at the beginning of their employment.

Because alcohol testing does indicate "actual impairment of ability to perform or fulfil the essential duties or requirements of the job, as opposed to merely detecting the presence of substances in the system" and because Imperial Oil's Policy fairly notifies employees in safety-sensitive positions that they will have to undergo random alcohol testing, such testing is consistent with the Commission's Policy Statement. I think it significant that the intervener, who vigorously opposed drug testing, took no position on alcohol testing in the workplace.

112 However, random alcohol testing though reasonable for employees in safety-sensitive jobs, will not satisfy the third step of the *Meiorin* test unless Imperial Oil has met its duty to accommodate the needs of those who test positive. The Policy's Guidelines provide for dismissal from employment following a single positive test. The Board did not discuss the question of individual accommodation following a positive breathalyzer test. However, for the reasons I discussed in connection with drug testing, dismissal in all cases is inconsistent with Imperial Oil's duty to accommodate. To maintain random alcohol testing as a BFOR, Imperial Oil is required to accommodate individual differences and capabilities to the point of undue hardship. That accommodation should include consideration of sanctions less severe than dismissal and, where appropriate, the necessary support to permit the employee to undergo a treatment or a rehabilitation program.

113 I would therefore set aside the Board's conclusion that random alcohol testing for employees in safety-sensitive positions breaches the Code and in its place hold that this testing is a BFOR provided the sanction for an employee testing positive is tailored to the employee's circumstances.

(c) Drug testing post-incident and for cause

114 The Policy provides testing for alcohol and specified drugs "after a significant work accident, incident or near miss as determined by management" and "where reasonable cause exists to suspect alcohol or drug use or possession in violation of this Policy." The Commission accepted that alcohol testing was sufficiently related to job performance to justify its use post-incident or for cause and the Board made no ruling on this issue. The Board did, however, conclude that drug testing post-incident or for cause was permissible only if Imperial Oil could establish that it was "necessary as one facet of a larger assessment of drug abuse." Although the Board did not elaborate on what larger assessment is required, her conclusion is consistent with the evidence and her finding that drug testing cannot accurately measure impairment. I would, therefore, not interfere with the Divisional Court's order upholding the Board's conclusion on drug testing post-incident and for cause.

Fourth Issue — Did the Divisional Court err in upholding the Board's conclusion that the Policy's provisions for mandatory disclosure, reassignment, reinstatement and certification violate the Code?

115 Entrop's original complaint of discrimination was directed at the Policy provisions for mandatory disclosure, reassignment and reinstatement. The Board concluded that the mandatory disclosure, reassignment and reinstatement provisions violated the Code. She concluded that alcohol and drug testing for certification for safety-sensitive positions and post-reinstatement may be permissible if Imperial Oil "can establish that testing is necessary as one facet of a larger process of assessment" of alcohol or drug abuse. The Divisional Court upheld her conclusions and I would too.

(a) Are the provisions for mandatory disclosure, reassignment and reinstatement prima facie discriminatory?

116 The Policy requires any employee in a safety-sensitive position to disclose a current or past substance abuse problem. On disclosure, that employee is automatically reassigned to a non-safety-sensitive job. The employee can only be reinstated to a safety-sensitive position by undergoing two years of rehabilitation, followed by five years of abstinence and by agreeing to a set of post-reinstatement controls.

117 A substance abuse problem — which triggers the provisions for disclosure, reassignment and reinstatement — is defined in the Policy's Administrative Guidelines to include:

> For purposes of the Policy, an employee has or has had a substance abuse problem if he or she meets one or more of the following criteria:
>
> **(a) Episodic Abuse**
>
> Has continued to use alcohol or drugs despite knowledge of recurring disturbances in health, work or social functioning.
>
> . . . . .
>
> **(b) Dependence**
>
> Has developed a physical and/or psychological dependence characterized by:
>
> (i) progressive loss of control despite either a desire to reduce intake or knowledge of recurring disturbances in health, work or social functioning;
>
> (ii) a pattern of tolerance and withdrawal.
>
> . . . . .
>
> **(c) Treatment**

Has participated in a structured program of counselling, therapy or other treatment for alcohol or drug abuse (episodic or dependence).

118 The Board found that a "substance abuse problem" is a handicap. That finding is supported by the expert evidence and is not challenged on appeal. Entrop had a previous substance problem as defined in the Policy. He therefore had a handicap as defined in the Code. Although he had not a drink since 1984, the Policy required him to disclose his substance abuse problem, his past handicap, to management. On disclosure, he was reassigned to a less desirable job, though at comparable pay, and was reinstated only after agreeing to a rigorous medical evaluation and ongoing controls. Entrop therefore was adversely affected in his employment because of his past handicap. Imperial Oil's treatment of him and the Policy's provisions for mandatory disclosure, reassignment and reinstatement are, therefore, *prima facie* discriminatory.

(b) Are the provisions for mandatory disclosure, reassignment and reinstatement BFORs?

119 Imperial Oil has met the first two steps of the *Meiorin* test. A workforce unimpaired by alcohol or drugs is rationally connected to — indeed is essential to — the work done by Imperial Oil employees in safety-sensitive jobs, and Imperial Oil adopted these Policy provisions honestly and in good faith.

120 The contentious question is whether Imperial Oil has shown that the Policy provisions for mandatory disclosure, automatic reassignment and reinstatement are reasonably necessary to ensure that employees working in safety-sensitive jobs are not impaired by alcohol or drugs. In my view, the provisions as drafted are not reasonably necessary to accomplish Imperial Oil's purpose. The provisions fail the third step in the *Meiorin* test for at least four reasons.

121 First, requiring an employee to disclose a past substance abuse problem, no matter how far in the past, is an unreasonable requirement. As the Commission acknowledged, Imperial Oil is entitled to require disclosure of a current substance abuse problem and a past substance abuse problem to a point. That point is reached when the risk of relapse or recurrence is no greater than the risk a member of the general population will suffer a substance abuse problem. On the expert evidence before her, the Board found that the cut-off point is five to six years of successful remission for a person with a previous alcohol abuse problem and six years of successful remission for a person with a previous drug abuse problem. Had the Policy provisions on mandatory disclosure been tailored to these cut-off points, I would have found them unobjectionable.

122 Second, automatic reassignment out of a safety-sensitive position following disclosure of a past substance abuse problem is not reasonably necessary either. Automatic reassignment cannot be justified because it follows a mandatory disclosure obligation that itself is too broad. More important, automatic reassignment fails to accommodate individual differences and capabilities. Although Imperial Oil may be justified in temporarily removing an employee with an active or

recently-active substance abuse problem from a safety-sensitive job, it failed to establish that a single rule, automatic reassignment, was reasonably necessary in all cases. To use the words in *Meiorin* at p. 28, Imperial Oil failed to show that it could not accommodate " individual testing against a more individually sensitive standard" without imposing undue hardship on the company.

123 Entrop's case is a good example of why the Policy provisions for mandatory disclosure and automatic reassignment are not reasonably necessary. The evidence showed that his risk of relapse was extremely low and that his past alcohol abuse had not adversely affected his performance as a control board operator. In short, he was not incapable of performing his job because of his past alcohol abuse. Even so, and though he had been in remission for over seven years, once he disclosed his previous handicap, he was automatically reassigned. In applying the Policy provisions to Entrop without considering his individual circumstances, Imperial Oil's treatment of him was unjustified.

124 A third and related reason why these Policy provisions are not reasonably necessary is that the requirement of two years' rehabilitation followed by five years' abstinence is overly broad. The Board concluded that "a minimum seven year period between the date of reassignment and potential reinstatement" contravenes the Code "because this length of time is not necessary in all cases." I agree with that conclusion, which again is supported by the expert evidence led at the hearing. Indeed, the seven year period is required even for those who have successfully completed a treatment program because " substance abuse problem" as defined in the Policy includes participation in a "structured program of counselling, therapy or other treatment." Imperial Oil did not show that a single seven year rule was needed and that it could not without undue hardship accommodate differences in how quickly individuals recover from a substance abuse problem.

125 Fourth, as the Board also concluded, "the mandatory conditions and undertakings for reinstatement are unlawful since the evidence shows this is more than is necessary in certain instances." Imperial Oil may legitimately insist on placing special controls for a period of time on an employee with a previous substance abuse problem who is returned to a safety-sensitive position. But the controls must be tailored to the individual's circumstances to meet the accommodation requirement.

126 The controls initially demanded by Imperial Oil apply to all employees reinstated to a safety-sensitive position after disclosure of a past substance abuse problem. Many are onerous. For example, the employee must attend a self-help group (apparently indefinitely), must commit "to report to Imperial Oil's Occupational Health Division any changes in his/her circumstances that may significantly increase the risk of relapse", must commit "to report to his/her supervisor/ manager compliance with the above conditions on a periodic basis to be determined by the review panel", and must commit " to undergo annual medical examinations, including screening for alcohol and drug abuse, conducted by Imperial's Occupational Health Division". These controls can be modified over time but to require them at all for employees like Entrop cannot be justified.

127 For these reasons, Imperial Oil has failed to meet the third step of the *Meiorin* test. The provisions for mandatory disclosure, reinstatement and reassignment cannot, therefore, be justified as BFORs.

(c) Testing for certification and post-reinstatement

128 Under the Policy, employees hired into, promoted to or transferred to safety-sensitive jobs are required to satisfactorily complete a certification process, which includes a negative result on an alcohol and drug test. Employees with a past substance abuse problem wishing to be reinstated into a safety-sensitive job must also complete the certification process and "post-reinstatement" may be required to undergo "frequent and unannounced testing in addition to random testing."

129 The Board concluded that testing for certification or post-reinstatement did not contravene the Code provided it was part of a larger assessment to determine whether an employee was not merely using but was abusing alcohol or drugs. Under the Policy, however, alcohol and drug testing is but one part of the certification process and but one of the post-reinstatement controls. Both certification and reinstatement controls are intended to ensure that employees in safety-sensitive positions are not impaired by alcohol or drugs on the job. The Board did not discuss or make any findings whether either the certification process as a whole or the post-reinstatement controls as a whole was a satisfactory method of assessing substance abuse. I therefore think it unnecessary to interfere with the Board's conclusions on testing for certification and post-reinstatement.

Fifth Issue — Did the Board err in concluding that Imperial Oil infringed s.13(1) of the Code by distributing its Policy to its employees?

130 In her last interim decision, in an appendix to her reasons, the Board concluded that Imperial Oil infringed s.13(1) of the Code by distributing the Policy and supporting literature to its employees. Section 13(1) provides:

> **13.** — (1) A right under Part I is infringed by a person who publishes or displays before the public or causes the publication or display before the public of any notice, sign, symbol, emblem, or other similar representation that indicates the intention of the person to infringe a right under Part I or that is intended by the person to incite the infringement of a right under Part I.

131 The Board concluded that the posting and printing of the Policy and its distribution together with educational awareness materials to Imperial Oil's workforce amounted to "the publication or display before the public" of a "notice" under s.13(1). She then held that, to the extent the Policy violated the Code, this publication and display "indicated the intention ... to infringe a right" under the statute. The Divisional Court did not expressly address the Board's conclusion that Imperial Oil infringed s.13(1).

132 In my view, the Board's conclusion that Imperial Oil infringed s.13(1) should be set aside. The possible breach of s.13(1) only became an issue before the Board as one of the grounds she relied on to confer jurisdiction over the alcohol and drug testing provisions of the Policy. Earlier in these reasons, I expressed the view that s.13(1) could not be used to expand the Board's jurisdiction. However, even if the Board could properly consider s.13, in my view, the respondents have failed to establish that Imperial Oil breached this provision.

133 Even accepting that the posting of the Policy and its distribution to Imperial Oil's employees amounted to the publication of a "notice", to contravene s.13(1), the notice must indicate an intention to infringe a right under the Code. The evidence does not reasonably support the conclusion that the Policy indicates an intention to discriminate. The Board did not discuss the question of intention. Intention might be inferred from the Board's finding that alcohol and drug testing under the Policy amounted to direct discrimination on the ground of handicap. However, in her sixth interim decision, the Board found that Imperial Oil was justified in insisting that its employees in safety-sensitive positions not be impaired by alcohol or drugs and that the company had developed and implemented the Policy in good faith to achieve a workplace free of impairment. These findings are inconsistent with the finding that the Policy indicates an intention to discriminate.

134 Also, the Board did not even consider s.13(2) of the Code, which provides that s.13(1) "shall not interfere with freedom of expression or opinion." [3] Even apart from s.13(2), however, for the reasons I have stated, I would set aside the Board's finding that Imperial Oil infringed s.13(1) of the Code.

3 The constitutionality of s.13(1), that is whether it contravenes the guarantee of freedom of opinion and expression in s.2(b) of the *Charter*, was not raised before the Board or before us.

Sixth Issue — Did the Divisional Court err in holding that the Board's finding that Imperial Oil infringed Entrop's rights "wilfully and recklessly" was reasonably supported by the evidence?

135 In her seventh interim decision, the Board dealt with monetary compensation for Entrop. She awarded him $1,241.93 in special damages for lost overtime because of his reassignment, $10,000.00 in general damages to compensate him for " the intrinsic value" of the infringement of his rights, and $10,000.00 for mental anguish, for "the wilful and reckless manner" of the infringement. Imperial Oil attacks only the award for damages for mental anguish. It submits the evidence does not show that the company's conduct was " wilful and reckless". The Divisional Court rejected this submission and I would too.

136 Two aspects of Imperial Oil's conduct support the award. First, the Board accepted Entrop's evidence of the adverse effect on him of the job reinstatement process. This process was

lengthy and intrusive for a problem, alcohol abuse, that Entrop fairly believed he had conquered. The process demeaned him and ostracized him with his co-workers, thus causing him stress and anxiety. At the very least, Imperial Oil acted recklessly in subjecting Entrop to this process.

137 Second, Imperial Oil took a number of actions, which the Board ruled amounted to acts of reprisal against Entrop for having brought a human rights complaint. These actions included the aggressive monitoring of his work performance, pressuring him to withdraw his complaint, interfering with his ability to function as an elected delegate to the Joint Industrial Council, the organization that represents non-unionized employee interests, unfairly refusing to assign him to light duties because of his injured knee, and unfairly issuing him a warning letter when he was unavoidably delayed in reporting for a random test. The Board found that at least some of these actions were taken deliberately by Imperial Oil in retaliation for Entrop's filing of a complaint. That finding is reasonably supported by the evidence. In my view, the evidence on Entrop's reassignment together with the finding of reprisal support the Board's conclusion that Imperial Oil's conduct was wilful and reckless and thus justifies the award of damages for mental anguish. I would therefore not give effect to this ground of appeal.

Conclusion

138 I would allow Imperial Oil's appeal on three issues:

> (i) I would hold that the Board had no jurisdiction to inquire into the drug testing provision of the Policy;
>
> (ii) I would set aside the Board's conclusion that random alcohol testing for employees in safety-sensitive positions violates the Code, and in its place I would hold that such testing is a BFOR provided the sanction for an employee testing positive is tailored to the employee's circumstances; and
>
> (iii) I would set aside the Board's conclusion that Imperial Oil infringed s.13(1) of the Code and would dismiss that part of Entrop's complaint.

139 In all other respects, I would dismiss the appeal. Because success has been divided, I would make no order for costs.

Appeal allowed in part.

Footnotes

Tab 22

paras 161-162

2006 CarswellAlta 1859
Alberta Arbitration

Weyerhaeuser Co. v. C.E.P., Local 447

2006 CarswellAlta 1859, [2006] A.G.A.A. No. 48, [2007] A.W.L.D. 1253, [2007] A.W.L.D. 1254, [2007] A.W.L.D. 1255, 154 L.A.C. (4th) 3, 87 C.L.A.S. 67

Weyerhaeuser Company Ltd. and Communications, Energy and Paperworkers Union, Local 447

A.C.L. Sims Member

Heard: October 3 - November 13, 2003
Judgment: August 10, 2006
Docket: None given.

Counsel: Craig Neuman, for Weyerhaeuser Company Ltd.
John Carpenter, for C.E.P., Local 447

Subject: Labour; Public

Headnote

Labour and employment law --- Labour law — Collective agreement — Health and safety

Labour and employment law --- Labour law — Collective agreement — Management rights — Work rules — Miscellaneous

Labour and employment law --- Labour law — Labour arbitrations — Arbitration award — Remedies — Damages — Entitlement

Table of Authorities

Cases considered by *A.C.L. Sims Member*:

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Canada Safeway Ltd. v. U.F.C.W., Locals 401, 373A & 312A (1999), 1999 CarswellAlta 1706 (Alta. Arb.) — considered

Canadian National Railway v. CAW-Canada (2000), [2000] L.V.I. 3135-1, 2000 CarswellNat 2285, 95 L.A.C. (4th) 341 (Can. Arb.) — considered

Canadian National Railway v. U.T.U. (1989), 6 L.A.C. (4th) 381 (Can. Arb.) — considered

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Clarke Institute of Psychiatry v. O.N.A. (2001), [2001] L.V.I. 3193-10, 95 L.A.C. (4th) 154, 2001 CarswellOnt 2007 (Ont. Arb.) — considered

Construction Labour Relations Assn. (Alberta) v. C.J.A., Local 1325 (2001), 96 L.A.C. (4th) 343, 2001 CarswellAlta 1900 (Alta. Arb.) — considered

Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580 (1986), [1987] D.L.Q. 69 (note), 1986 CarswellBC 411, 38 C.C.L.T. 184, 71 N.R. 83, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* [1986] 2 S.C.R. 573, (sub nom. *R.W.D.S.U. v. Dolphin Delivery Ltd.)* 9 B.C.L.R. (2d) 273, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 87 C.L.L.C. 14,002, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 33 D.L.R. (4th) 174, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* 25 C.R.R. 321, (sub nom. *R.W.D.S.U., Local 580 v. Dolphin Delivery Ltd.)* [1987] 1 W.W.R. 577, 1986 CarswellBC 764 (S.C.C.) — considered

Dupont Canada Inc. v. C.E.P., Local 28-0 (2002), 105 L.A.C. (4th) 399, [2002] L.V.I. 3282-1, 2002 CarswellOnt 1739 (Ont. Arb.) — considered

Elk Valley Coal Corp. v. U.S.W.A., Local 7884 (2003), 2003 CarswellBC 3405, 121 L.A.C. (4th) 280 (B.C. Arb.) — considered

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Hill v. Church of Scientology of Toronto (1995), 25 C.C.L.T. (2d) 89, 184 N.R. 1, (sub nom. *Manning v. Hill)* 126 D.L.R. (4th) 129, 24 O.R. (3d) 865 (note), 84 O.A.C. 1, [1995] 2 S.C.R. 1130, 1995 CarswellOnt 396, 1995 CarswellOnt 534, (sub nom. *Hill v. Church of Scientology)* 30 C.R.R. (2d) 189, 1995 SCC 67 (S.C.C.) — considered

Imperial Oil Ltd. v. C.E.P., Local 777 (2001), 2001 CarswellAlta 1962 (Alta. Arb.) — considered

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IWA-Canada v. Weyerhaeuser Co. (2004), (sub nom. *Weyerhaeuser Co. v. I.W.A.)* 127 L.A.C. (4th) 73, 2004 CarswellBC 2039 (B.C. Arb.) — considered

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385, (sub nom. *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.)* 90 C.R.R. (2d) 189, 78 C.L.R.B.R. (2d) 161 (S.C.C.) — considered

Trimac Transportation Services - Bulk Systems v. T.C.U. (1999), 1999 CarswellNat 2995, [2000] L.V.I. 3090-2, 88 L.A.C. (4th) 237 (Can. Arb.) — considered

U.S.W.A. v. Lake Ontario Steel Co. (1968), 19 L.A.C. 103 (Ont. Arb.) — referred to

Vorvis v. Insurance Corp. of British Columbia (1989), 25 C.C.E.L. 81, [1989] 1 S.C.R. 1085, [1989] 4 W.W.R. 218, 58 D.L.R. (4th) 193, 94 N.R. 321, 36 B.C.L.R. (2d) 273, 42 B.L.R. 111, 90 C.L.L.C. 14,035, 1989 CarswellBC 76, 1989 CarswellBC 704 (S.C.C.) — considered

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Weyerhaeuser Co. Ltd. v. C.E.P., Local 181 (October 31, 2003), B. Bruce J. (N.B. Arb.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Human Rights, Citizenship and Multiculturalism Act, R.S.A. 2000, c. H-14

Generally — referred to

Human Rights Code, R.S.O. 1990, c. H.19

s. 40(1) — referred to

Mines Act, R.S.B.C. 1996, c. 293

Generally — referred to

***A.C.L. Sims Member*:**

1 These grievances involve two questions about drug testing: if and when it is appropriate for an Employer to demand that an employee submit to drug and alcohol testing following a workplace incident; and the manner in which it is appropriate that such tests be conducted.

2 Weyerhaeuser Company Ltd. runs an oriented strand board mill in Edson, Alberta. Mill employees are represented by Local 447 of the Communication, Energy and Paperworkers Union of Canada. The two cases involve the first instances of post incident testing under a new "Substance" section introduced into Weyerhaeuser's Health and Safety Standards. The Employer introduced the standard unilaterally. While discussed with the Union before implementation, the policy has no Union approval. The terms "standard" and "policy" are used interchangeably and refer to the same document.

3 Each grievor was subjected to a test following an incident at work. Ms. Phyllis Roberto was unloading a tanker car when she slipped causing a valve to release spraying her with a concentrated resin. Mr. Len Brown was tested after a garage door closed, damaging a truck. Neither test proved positive so neither employee was subjected to any direct consequence under the policy as a result of being tested. It is the manner in which Ms. Roberto and to a lesser degree Mr. Brown were subjected to testing that gives rise to the second aspect of this case.

4 Ms. Roberto and Mr. Brown each grieved and the wording of their grievances are the same; Ms. Roberto's dated February 7, 2003 and Mr. Brown's on March 11, 2003.

> Nature of Grievance: Individual and Policy grievance: In violation of the collective agreement — Articles 4:01/5:01/24 and any other articles that may apply.
>
> Settlement desired: 1. Test to be destroyed. 2. No record of test. 3. Personal file purged. 4. Compensation for humiliation and loss of dignity. 5. Compensation for lost wages and benefits. 6. She be made whole in all respects. 7. Declaration that the collective agreement has been breached and an order amending the policy as appropriate according to law.

The introduction of the policy

5 This plant is one of a number of oriented strand board plants in Weyerhaeuser's North American operations. Its Canadian operation is headquartered in Vancouver, B.C., and the head office is near Tacoma, Washington State, USA.

6 Mr. Rob Guy is the plant's unit general manager. He has been involved in the development of the drug and alcohol policy "since day 1." One of the reasons he was brought into Edson in 2001 was to deal with the unduly high number of injuries in the mill.

7 Soon after his arrival Mr. Guy spoke to employees one on one. Many, he says, spoke about concerns over drug use and related concerns about plant safety. He responded by trying to get

the message out that, while the company did not care what employees did at home, drugs had to be kept out of the workplace. He reinforced this message with a letter sent to all employees on September 17, 2001:

> It has come to my attention that there are people who choose to use illegal substances in this workplace, thereby jeopardizing their health and safety as well as that of their workmates.
>
> Let me make myself clear on this subject. I will not tolerate the use of illegal drugs or alcohol on this worksite. If you make a decision to use an illegal drug or consume alcohol while at work, you are making a decision to risk your employment with Weyerhaeuser.

8 Mr. Guy attended crew meetings and spoke on the topic. The results of a survey in December 2001 indicated many employees, although not a majority, felt substance abuse was a significant problem in their work area.

9 He had several general discussions with the Union, including those at labour-management meetings, when the questions of substance abuse and testing were raised.

10 Weyerhaeuser decided to develop a national approach to drug testing. To that end, they retained a contractor, Denning Health Group, to help develop a drug and alcohol component to the Company's safety policy, and to train company staff in the content and application of that policy. Denning and its principal, Mr. Tom Yearwood, helped introduce the new policy in the Edson Plant. Once the policy was in place, Denning contracted to provide on-call testing services, and to have samples analyzed by a laboratory in the United States.

11 The policy ultimately put in place in Edson in February 2003 went through several drafts. Significant changes were made between drafts, one of which, relating to the circumstances under which post-incident testing might be undertaken, is of particular significance to this case. The specific changes are reviewed later. In preparation for the introduction of this policy in Edson management met and reviewed the draft policies and provided feedback. They also had discussions with the Union and invited them to express their concerns.

12 During 2002, the Employer had Denning conduct three introductory meetings on the policy. One meeting involved four hours with the Union executive. During this time Mr. Yearwood explained where the samples went for analysis and the breathalyzer and drug testing processes. There was also an evening meeting for union members but few attended, partly due to shift schedules. At a further meeting the next morning the Union executive was able to ask Mr. Yearwood questions, although the meeting was cut short when Mr. Yearwood's plane had to leave early. Mr. Yearwood told the meetings that the tests were going to be conducted at either the hospital or a medical centre and that he "was still trying to work that out."

13 Mr. Don DeVuyst, the president of Local 447, described the interaction between the Company and the Union over the introduction of the new policy. The Company told him they were going to introduce a policy and he told them that the Union did not approve of such testing policies, particularly because, in its view, drug testing was incapable of proving impairment. The Union was not inclined to get co-opted in the introduction of the new policy.

14 On October 31, 2002 Mr. Guy wrote to all plant employees telling them that the Company had adopted the new substance abuse standard:

> Effective January 1, 2003, testing employees for the use of alcohol or drugs will be conducted where reasonable cause exists to test. Examples include:
>
> • Significant near miss (where there was high potential to cause injury or property damage such as a near collision between a person and rolling stock or a lock out violation)
>
> • Behavioral characteristics where an employee is observed behaving or performing in a clearly unusual manner that reasonably indicates that drugs or alcohol may be a contributing factor.
>
> • Accident or incident resulting in injury (recordable incident)
>
> Where an employee has tested positive, he/she will be referred to a substance abuse professional (SAP) to determine if a treatment plan is appropriate. The employee must adhere with all terms and conditions of a Return to Work Agreement including treatment plans and follow up testing. The goal is rehabilitation.

15 This letter attached another from the Washington head office, announcing this same initiative in all OSB Mills. It read, in part:

> All OSB mills will be implementing a revised **For-Cause** testing process in 2003. In many mills testing will be automatic after significant property damage and recordable incidents. At all mills, leadership will be diligent in asking questions and probing the need to conduct a test for reasonable cause. Protocol for all OSB mill testing will be coordinated by national contract testing vendors to ensure confidentiality and reliability.
>
> During 2002, Weyerhaeuser Human Resource representatives updated both the Canadian and United States substance policies. The OSB business has adopted these policies and added some specific definitions that can guide managers and team leaders in making a determination on when to test.

16 Also attached was a sheet setting out "For Cause Testing Criteria", which at that point, for post-accident testing, read:

> Post Accident and Significant Near Miss*
>
> • In all injury/accident cases immediate medical treatment will be provided before an employee is tested.
>
> • A test will be conducted of employees involved in a recordable incident or a significant near miss (incl. Property damage), unless a supervisor/team leader makes a specific finding not to test. The supervisor/team leader must get approval from the mill manager not to test.
>
> • In the interest of employee safety and confidentiality, when a decision is made to test, the employee will not be allowed to continue working and the test will be conducted as soon as practical. If the test is negative, the employee will be paid for any scheduled time missed (this also applies to behavioral cause testing below).
>
> • In the case of late reporting or unreported injuries/significant safety issues, testing may be conducted if the incident would have warranted testing at the time of the incident.

17 On or before December 5, 2002 the Company gave the Union a new draft of the policy. It invited the Union to forward any questions but the Union decided not to because they were still suspicious they were being indirectly co-opted into supporting the program. The executive sought legal advice and discussed the policy briefly with the members at the next Union meeting.

18 The gist of the changes were described to the Union's executive. One of the changes that bothered them concerned the post-incident or accident testing criteria. They were not told what the changes were intended to achieve. Initially the new policy was to take effect January 1st, 2003. However, Mr. DeVuyst insisted that the Union members were entitled to know the changes in advance and to have a full copy of the policy, not just the letter.

19 On January 31, 2003 the Company posted a notice in the plant saying:

> Please note that the substance impairment standard will come into effect February 1, 2003.

20 The standard itself, Mr. DeVuyst says, was only given to the members in their mail slots on February 7th. Ms. Roberto says she had not received the revised final policy prior to her incident on February 6th. My conclusion is that the company implemented the policy as of February 1, 2003 but did not in fact send copies to employees until February 7th, probably triggered by the incident involving Ms. Roberto that happened the day before.

The incident involving Ms. Phyllis Roberto

21 Ms. Roberto works as a back-up lab technician. One of the duties she is occasionally required to perform involves unloading a rail tanker full of a resin used in Weyerhaeuser's OSB manufacturing process. These cars come in about once per week. As a result, the various lab technicians and back-up lab technicians do not have to perform this task very often.

22 The unloading is done after the contents of the rail car are steam heated to a temperature that allows the liquid to flow freely. Rail cars have a ball valve at the top of the tank. The exact configuration of these valves varies from car to car, but they all accept a universal hose coupler. In Weyerhaeuser's operation the tank car is parked in an enclosed bay inside the plant. A heavy metal clad hose with a coupler on the end runs from the bay, through the main plant and a pumping mechanism, to a storage tank located at the far end of the plant. A control room near the rail car bay contains monitors to show the liquid flow in the pipeline.

23 The tester's job is to go to the top of the rail car once the contents have been heated and connect the hose pipe by coupling it to the ball valve at the top of the tank, open the ball valve, and then start the pump. Once the tank empties, and the hose and monitors show that the product has been unloaded, the employee then reverses the flow for a moment to blow any residue product in the line back into the rail car. It was while Ms. Roberto performed this last step that the accident occurred. She was on top of the tank and had uncoupled the hose and put it to one side. As she bent over she slipped and her knee knocked the ball valve on the top of the rail car. It was unexpectedly loose and as a result opened, causing the product that remained in the rail car to blow out of the valve, covering her face and the top of her body.

24 She had difficulty seeing. The force of the blow back pushed up her glasses and hardhat and the product was burning her eyes. Nonetheless she fumbled around and closed the valve. She then got down, tried to remove her outer garments and called for help.

25 She went to the prep house room for eye-wash solution, but could not make the dispenser work. She then decided to try the emergency shower, but the water in the shower smelt foul. Mr. Parker, the back-up foreman, arrived. He helped her get to the first aid room on the second floor, where others helped her flush her eyes for 15 minutes. Her eyes were burning throughout and she couldn't really see. Next, a female employee on the incoming shift helped her into the ladies locker room where she was able to shower and shampoo her hair and put on a clean set of clothes.

26 After that Tony Alstead took her to the local hospital in the company van. The plant nurse phoned ahead to tell them the name of the chemical involved. The nurse at the hospital gave her soothing eye drops. Once the doctor arrived he tested her for cornea burns but found none. He said she was free to go back to work. This did not seem reasonable to Ms. Roberto since she still

had difficulty seeing and just wanted to go home. At that point Mr. Peter Sikora showed up at the hospital to organize getting people back to work.

27 Mr. Tony Alstead is a manager at the plant with whom Ms. Roberto also had a personal relationship. Since she lived out of town, he took her to his home in Edson to rest. He then went back to the plant. At about 9:30 a.m. he called to see how she was doing. At 11:30 a.m. he called to tell her the company wanted her to take a drug test. She was upset by this and asked him why and he replied it was due to the "new policy" and the incident. She asked him what would happen if she refused. He told her if she submitted to the test she would be suspended with pay until the results came back. If she refused she would be suspended without pay until the company decided what to do.

28 She asked to speak to Mr. DeVuyst from the Union since he had been dealing with this new policy. Mr. Alstead found Mr. DeVuyst and asked him to give her a call. Ms. Roberto asked Mr. DeVuyst if he knew why they wanted to test her to which he replied no but he would go and find out. She asked if she had to do it and he said he could not advise her on that but would support her in her decision. Ms. Roberto had not seen the policy prior to this incident.

29 Mr. DeVuyst recalls being called on the morning of Ms. Roberto's accident and asked about the new testing policy. He says she wanted to know why she was being required to take a test so he went to pull his copy of the policy. His copy (in retrospect probably draft 2) spoke of a need for cause. He went to see Ms. Donna Peeke in human resources. She told him that Ms. Roberto was going for a test and they were not going to debate the issue. Mr. Rob Guy came by and Mr. DeVuyst argued the issue with him. It became clear that Mr. DeVuyst's copy of the policy was the earlier draft so he was given Mr. Guy's updated copy. Mr. DeVuyst says Ms. Peeke did not have the latest version. He then called Ms. Roberto and arranged to meet her at the hotel where the testing was to take place.

30 Ms. Roberto says that Mr. Dave Appelt, the team leader for C-Crew, and Mr. Alstead arrived at Mr. Alstead's house in a company crew cab. Mr. DeVuyst called her back and told her that earlier he had been quoting from an old policy draft but that he had obtained the new version which she could read. He said it was debatable whether a Union representative could go with her. He told her management had told him they were going to do a test and that they were not going to entertain any argument about it. At that point she had to leave for the test which was scheduled for 12:30 p.m. — 20 minutes away. She asked Mr. DeVuyst, on the phone, where they were taking her and he said to the Summerland Inn. She asked him the address and he read it from the paper Ms. Peeke had given him. She said "that's the Edson Motor Hotel — I thought we were going to a lab." Mr. DeVuyst said he would meet them at the hotel.

Testing Ms. Roberto

31 Ms. Roberto was then escorted to the company van and put in the back seat. It had child-proof locks so that she could not get out. She heard the locks click and says that, to her, it felt too much like being taken away by the police. When they got to the hotel she was escorted into the lobby. She felt extremely self-conscious because her eyes were still swollen and looked as if she had been beaten up and been crying. Mr. DeVuyst had not yet arrived. The desk clerk directed them to Room 101.

32 Ms. Roberto's recollections of what took place once she arrived at the room are that, when the door opened, she smelt a waft of stale beer and urine. She saw an elderly man sitting in the corner at a round table. She described him as shaking like a leaf. It was learnt later that the gentleman had a medical condition that made him shake. Ms. Roberto was not mocking his condition, but clearly this feature added to her overall unease about what was happening to her. She described the environment as "more like you were there to make a drug deal than go for an official test." She says the man introduced himself and perhaps showed her his credentials as he had her fill out some papers. While they were doing that, Union President DeVuyst arrived and she was given a couple of minutes to talk to him. After that the man gave her a breathalyzer test, the two of them sitting at the table while the other three men present (Tony, Dave and now Don) sat on the bed. He had to administer the breathalyzer twice. After that he handed Ms. Roberto a cup and told her to go into the bathroom and fill it.

33 Ms. Roberto said "it could take a while" to which the tester replied "we've got four hours." Ms. Roberto went into the bathroom, distressed by the whole situation. She worried about the state of the bathroom "the kind where my mother would have told me not to sit on the toilet seat." The tap in the tub was dripping. There was no blue dye in the toilet. She worried about being in a bathroom where the four men in the room could hear every noise she made. Her eyes were still hurting and she had had no sleep for 24 hours. She found herself asking what she had done to deserve being treated in this way. Eventually she partially filled the jar and went back into the room and gave it to the tester. He had to split it into two vials but had difficulty doing so because of his shaking.

34 Mr. DeVuyst described the scene at the hotel when he got there. Ms. Roberto was there talking to the tester. Mr. DeVuyst asked for and was afforded an opportunity to speak to her. She asked what would happen if she refused and he replied that it would be taken as a positive test. He said the Union couldn't advise her what to do but would support her either way. They returned to the room and Ms. Roberto and the tester dealt with the breathalyzer. While this was happening Mr. DeVuyst read over the policy section dealing with the drug testing procedure, checking to see if the tester was doing things correctly. Mr. DeVuyst walked into the bathroom and noted that none of the preliminary steps had been taken. He waited for the tester to go into the bathroom for this purpose but it never happened. Instead, when the breathalyzer test was done the tester gave Ms. Roberto the cup and told her not to wash her hands. Mr. DuVuyst said she was in the bathroom

for quite a while to the point where he became worried about her. He tried to make conversation during that time in an effort to make her feel more comfortable.

35 Ms. Roberto came out, saying it is not as much as you wanted, but it's the best I can do. The tester did not take the sample's temperature. With Ms. Roberto's help he divided up the sample and sealed the vials, telling her where they were going to go and getting her to sign papers. After the testing was done Mr. DeVuyst had a brief conversation with Ms. Roberto outside the room. He felt she was coping surprisingly well. Her face and eyes were quite swollen and she could hardly look at him. She then went home with Tony and Dave.

36 Mr. DeVuyst described the hotel's reputation in a somewhat self-deprecating way, saying "it's the hotel I used to hang out in;" "it didn't look like a new place 25 years ago" and "If you've got a hole in your pants you fit right in."

The aftermath of Ms. Roberto's testing

37 Ms. Roberto was not allowed to go back to work for the next few days until the test results came back negative. During that time she spoke to co-workers who she says were outraged by what had happened to her. They raised their concerns on her behalf at a safety meeting. Ms. Peeke called her from human resources to say that the results were taking longer than expected and that she should not expect to hear anything before the weekend was over. It was the next Tuesday when the results came back negative. She arranged to return to work on the Thursday.

38 Ms. Roberto was interviewed by telephone about the incident itself and sent in a typed report once she was able to do so. Ms. Peeke called her because she had heard Ms. Roberto "had some feedback" on her experience at the hotel. Ms. Roberto says Ms. Peeke said to her that "she could not have done it."

39 A grievance was filed. On her return on the Thursday Ms. Roberto, along with Mr. Mike Meek from the Union, went into a grievance meeting with Mr. Guy. Mr. Guy told her that he had made the decision to have her tested and he stood by that decision. He said something to the effect that he distanced himself from the decision. This comment struck Ms. Roberto as particularly insensitive since, in her view, she had no way to distance herself from the events. She had expected Mr. Guy to talk about the event, but he would not. She says this lack of any expression of human concern changed her previously enthusiastic attitude to her job into one of not caring. She says the incident started to affect her at home. She suffered nightmares and anxiety at the thought of going to work. Minor incidents began putting her into an emotional turmoil.

40 Ms. Roberto says that for her "the final straw" in this incident came when she was again on night shift. Mr. Parker asked her if she would unload the tanker car and she replied that she did not want to do so. He said that was fine. However, later it was said that she had refused to perform her job. She went to the lab manager to discuss this and he told her the unloading procedure was

a part of her job. She arranged to discuss it with Mr. Guy. This appears to have been an emotional interview for her. The bottom line message Mr. Guy gave her was that if she was not willing to off-load the product she would have to give up her position because the duty to accommodate did not apply in her circumstances.

41 Ms. Roberto went to see a psychologist. She explained to him how she was feeling about work and how this incident and its aftermath were affecting her life. He told her to take some time away from work, and she applied for short term disability leave. She went to see a doctor for help the next week. As time past she says matters just got worse. She saw a counselor weekly until July and then every two weeks during August and September.

42 Ms. Roberto returned to work for two weeks in August, then took some vacation and returned full-time on September 17th. Her claim for short term disability insurance was refused in June for all absences after May 11th. Rather than fight Maritime Life's refusal and return to work, Ms. Roberto says she followed her doctor and her psychologist's advice and stayed off work.

43 Ms. Roberto discussed her options with her doctors, first Dr. Govender and then Dr. Walker. She says they initially recommended medication but she was reluctant to "mask the problem" and chose psychotherapy instead. She also took steps at home to try to come to grips with what was bothering her by meditation and by journalizing events as they unfolded, trying to identify what caused her to overreact. Her refusal of medication was one reason cited for Maritime Life's refusal of her disability insurance claim. Another was their view that it took an excessive time for her reactions to surface after the incident.

44 Ms. Roberto described several situations at work that triggered her anxiety. She found herself trying to avoid people by eating lunch in the locker room and going up back stairs. Several times she almost left to go home in the middle of a shift. Even after returning to work, Ms. Roberto continued to feel that she had been treated as if she was not a person. It left her feeling uncaring towards her job in a way that contrasted sharply with the way she felt before. In her view, the incident hurt her reputation in the community and this had an affect on her children. She was known in town as the person who had been drug tested. She says her children had a hard time "seeing their mother being a basket case."

45 The incident itself was more difficult for her because of Mr. Alstead's involvement. He is a manager and she is a bargaining unit employee. His being involved deprived her of the opportunity to discuss her circumstances with him as her "significant other".

46 Dr. Malcolm Walker saw Ms. Roberto for the difficulties she experienced following this incident. He provided an opinion on the matter which reads, in part:

> Ms. Roberto, as I understand was apparently involved in a work related accident, which subsequently led to her allegedly being subjected to a very unorthodox drug screen. This apparently occurred at a local hotel in Edson, after she had been removed from a friend's home, where she had been visiting. This apparently took place in the presence of an ex-RCMP officer, amongst others. No medical person was in attendance at the time, as far as the history was conveyed to me.
>
> The RCMP and any medical doctor will confirm that if this indeed happened, it can be construed as nothing short of harassment and abuse. This should never have happened and should be prevented from happening again.
>
> Ms. Roberto exhibited many signs of Anxiety and Post Traumatic Stress, which was confirmed by her psychologist. These symptoms, although clearly subjective, were clearly not only as a result of the accident, but more so as a result of the apparent humiliation which followed it.

47 Dr. Walker testified, with the parties consent, by telephone. He confirmed his view that Ms. Roberto was suffering from anxiety, stress and depression following her experiences. In his view this was attributable more to the testing events then to the accident itself. He expressed the opinion that, in post-traumatic stress cases, it is not unusual for people to take some significant time before they are willing and ready to discuss the issue. He says that when he was initially consulted and when he saw Ms. Roberto over her insurance forms he had assumed that her after effects were simply a result of the explosion on the tank. It was not until April 22nd that he learnt more about the incident. At that time Ms. Roberto had been seeing her psychologist, Dr. Gary Last. Dr. Walker says he received a report from Dr. Last and "put two and two together." Dr. Last's report was prepared in support of an insurance claim for Ms. Roberto. He believes the combined signs of depression and anxiety point back to the testing incident. Dr. Walker's opinion is based on what he learnt from Mr. Last's report, what Ms. Roberto told him, and his own observations of her. He last saw her in July of 2003.

48 Dr. Walker confirmed the opinion he expressed in his letter, that substance abuse testing carried out without either police or professional health care involvement was highly unorthodox and had none of the indicia of reliability he felt necessary and appropriate.

The incident involving Mr. Len Brown

49 Mr. Brown works in Weyerhaeuser's shipping department. Some of Weyerhaeuser's OSB product is shipped out by truck, although more goes by rail. The shipping area is just a part of the large open plan floor of the plant. The truck entrance consists of a 24' × 16' overhead door operated at the time by a button in the shipper-receiver's office located right next to the door, separated only by a glass window.

50 On the day in question, Mr. Brown recalls it being "crisp" at minus 38°. The door, when opened, let in a lot of cold air and it was difficult to keep the place warm. A truck arrived to offload some material. Mr. Brown was in the shipper-receiver's office. He opened the door and the truck backed in. What happened is documented in a Safety Incident Investigation Report prepared by Vernon Banfield (the out-of-scope team leader) that same day:

> Truck offloading Material struck overhead door
>
> Truck driver pulled up to normal position to back up through overhead door at shipping. The Shipping staff member opened the overhead door when the trucker was in position and the trucker waited until the door was completely open prior to backing into the door opening with the truck and 2 trailers.
>
> The trucker backed into the mill angling 6 feet different from front to back. He opened the door on the truck and stepped down to check his load position as the darkness in the warehouse prevented good visibility. He then got back into the truck and started to drive outside to try to straighten his load out by backing into the warehouse in a straighter position. At the same time he returned to the cab and started forward the shipping operator pushed the close overhead door button located inside shipping office. The truck driver pulled ahead and the truck exhaust stacks, lights, and horn struck the overhead door, pushing it outwards.
>
> The shipping operator noticed this happening and tried to stop the door.

51 The pictures attached to the report show that, from the viewpoint of a driver backing in, the end of the trailer is difficult to see because of the angle and the difference in lighting. The lines on the floor are worn off. The door, as it closed, damaged the equipment on the top of the truck's cab; the smoke stacks, horn and emergency beacons.

52 Mr. Brown's recollection is that the truck driver drove the unit in and stopped. He got out of the cab and waived at Mr. Brown who was standing in the office. Mr. Brown, assuming this meant he was done, pressed the button to close the door. Later, the trucker told Mr. Brown that the reason he got out of his truck is because the windows were frosted up and he could not see. Mr. Brown was speaking to another worker in the office at the time. A moment later he heard a crash, turned around and saw people trying to stop the door. One of the people in the office (perhaps Mr. Brown) hit the button to stop the door.

53 Mr. Don Pape was standing next to Mr. Brown in the shipping office when the incident happened. He recalls the truck arriving with its load, backing into the bay and stopping. The driver got out of his truck. There was nothing unusual he observed about Mr. Brown hitting the down button. It was -38° to -40° outside so they tried to shut the door quickly. He said there was nothing he would have done differently had he been the one closest to the button.

54 Mr. Vern Banfield called upstairs. They were concerned with how to close the door because of the cold. Mr. Harry Quinn, the maintenance supervisor, came down and he and Mr. Banfield held a brief meeting. Then, Production Manager Sikora came down. After 10-15 minutes Mr. Brown was called into the office where they told him they felt it was a significant enough incident to warrant a drug test. They did not examine the truck nor did they ask any questions of Mr. Brown before making that decision. All Mr. Brown learnt from them of their reasons was that it was going to cost a lot of money. Mr. Brown was sent upstairs for a coffee while those remaining tarped over the door. Mr. Sikora told Mr. Brown that the truck driver was also being sent for a drug test.

55 Mr. Eric Richards was the job steward on the day shift that day. He works as a shipper-receiver. Mr. Richards talked to Mr. Brown about what happened and made notes of Mr. Brown's statement. His notes, made 3 or 4 hours later that day, but taken from an earlier set of notes, read:

> At 8:45 a.m. bay door at shipping department was open and board truck was backed into the loading area. Lenord went into shipping office to talk with Don Pape. While in office the trucker (who was now out of truck) signaled to Lenord to close the door. Lenord then pushed button to shut bay door. After he pushed the button he turned to talk with Don. At that time the other people in the office started to shout to reopen door (Vern, Marge & Don). As Lenord turned to the button he saw the truck moving and door coming down on the truck.

56 Mr. Richards did not participate in any way in management's investigation. He says Mr. Bulmer and Mr. Sikora said "he is going for testing no matter what — that's the way it is." Mr. Richards accompanied Mr. Brown and the truck driver to the Super 8 motel.

57 Mr. Brown says Mr. Richards told him that if he refused the test it would be taken as if it were a positive test.

58 Mr. Brown confirms that, since this incident, the policy has changed and the drivers shut the door themselves. Prior to the incident Mr. Brown says the employees suggested the company install "eyes" on the door to prevent it moving when any obstruction is in the way. This did not happen. They also suggested getting an amber flashing light installed to show when the door is moving. These suggestions were made to the safety committee but generated no response.

Testing Mr. Brown

59 Mr. Brown and Mr. Richards were taken by company van to the Super 8 motel. They sat in the lobby for 5 or 10 minutes while Mr. Sikora booked a room.

60 The truck driver went for his test first which took 30-45 minutes. Mr. Brown stayed in the hotel lobby. People were going in and out but Mr. Brown was not paying much attention to them. The trucker came down and told Mr. Brown it was his turn. He went to the room alone where he

met an elderly man who introduced himself and explained he was going to do a breathalyzer test. Mr. Brown blew into the machine twice and registered zero but the operator was unable to get the machine to print a report, so he just wrote on the tape. The man then explained the drug test portion. Mr. Brown was given a container, told to use the washroom, and told not to use the water while he was in there. Mr. Brown entered the bathroom and produced a sample. Mr. Brown recalls that nothing was done to secure the bathroom and no bluing agent was used in the toilet.

61 Mr. Brown set the sample down on the sink and the tester then, with some difficulty due to his shaking, separated the sample and sealed it into two vials which he placed in a courier bag. Mr. Brown signed some papers and then returned to the lobby. At this point the tester noted that they had missed one test for the truck driver and that he had to return to the room.

The aftermath of Mr. Brown's testing

62 Once the testing was over Mr. Brown was dropped off at home and told Company officials would deliver his truck to him later. This left Mr. Brown sitting at home with no vehicle wondering what was going on and, as he put it, "trying to explain to two teenage kids why their dad was getting drug tested."

63 Later that afternoon a person from the plant delivered Mr. Brown's truck to his home. He told Mr. Brown that the company would let him know when it was alright for him to report back to work. This person also told Mr. Brown that Mr. Sikora had told him that Mr. Brown had tested zero on the breathalyzer test. Mr. Brown agrees he told Mr. Sikora that fact at the hotel. On Tuesday night the company phoned to say that the drug test had come back negative and that he should return to work the next morning, which he did. Mr. Brown is concerned about the impact of this incident on his reputation and that of his family. His wife works in the Catholic School system. He has two teenage children who he has always counseled to avoid drug use. He asked for a copy of his results but was never given them.

Testing arrangements

64 Mr. Yearwood told the Union the year before that testing would be at the hospital or a lab but that he was still looking into the arrangements.

65 Mr. Guy's understanding was that Denning Health Group was to look after all the testing protocols, arranging labs, follow-ups on all positive tests and so on. He says there were discussions about having testing done at the mill, but they had limited private spaces and only four washroom areas, so they did not think it was suitable. He only had minor involvement with arranging alternative locations. He recalls that he wrote a request to use the hospital and says Denning's representative was going to check into that. He heard nothing back. The medical clinics, he understood, were not open 24 hours per day.

66 Mr. George VanderKracht is the individual involved in administering the tests to both Ms. Roberto and Mr. Brown. He is a retired RCMP officer with 37 years police experience. He was retained on a per-incident basis by Denning Management Services to administer drug and alcohol tests. He was hired after he replied to an advertisement in the local newspaper. He was the person who suggested to Denning that they use the Summerland Hotel since he had used that hotel for testing truckers under a contract with another agency and knew they rented out rooms by the hour. That may be a useful test for economy but the fact that a hotel rents rooms by the hour is a dubious consideration for ensuring it provides an environment sensitive to an employee's privacy and dignity.

67 No one from Denning was called to elaborate on why the original plans for testing in a hospital or lab could not be achieved.

The legal issues that arise in this case

68 The Employer's position is that it had cause to test, and therefore a right to demand that Ms. Roberto and Mr. Brown submit to drug and alcohol tests, under the policy it had recently introduced. That policy, it maintains, is a reasonable policy which it was entitled to introduce unilaterally as part of its right to manage. It relies upon the post-incident testing aspects of the policy that it say were reasonably applied in these circumstances and supported testing the grievors.

69 The Union argues that the policy is not reasonable in the way it purports to justify post-incident testing and omits from its terms important limitations designed to ensure any given request for a test is reasonable in the circumstances. Further it argues the demand for a test in each of these circumstances was unreasonable; primarily for lack of sufficiently serious incidents, lack of any sufficient investigation and as a result a lack of any cause to pursue testing as "a reasonable line of inquiry."

70 In addition, the Union argues, the manner in which these demands were made and the tests were carried out was also unreasonable and amounted to a serious affront to the personal dignity and privacy rights of the two employees. This breach of rights, the Union argues, justifies an award of damages because of the harm done by the Employer's unjustified actions.

71 The Union argues that the law on non-consensual drug and alcohol testing for employees has developed based on the proposition that an Employer's interest in testing must be balanced with an employee's right to dignity and privacy. Policies, to be justified, must pass the KVP tests for reasonableness and be contract and statute law compliant. In addition, they must be reasonable in their application. The Union argues that, in assessing the reasonableness of a policy or its application, arbitrators should pay heed to the values inherent in the Canadian Charter of Rights and Freedoms to the extent those values support and reinforce the importance of individual dignity and privacy.

72 The Employer argues that its policy on post-incident testing comports with the case law as it has developed. The Union answers that some of the cases, as well as this policy specifically, go too far. The thresholds necessary to justify testing have been reduced or eliminated. The requirement for a reasonable inquiry, leading to an objective, supportable conclusion that drug or alcohol impairment is a reasonable line of inquiry has been reduced down to a meaningless checklist, devoid of protections for the employee. The Union supports these answers by referring to some of the seminal cases that first outlined the circumstances in which testing could be justified. It contrasts the circumstances they allude to with those in the case at hand.

73 Even if testing is justified, the Union argues, it must still be done with proper attention to the dignity and privacy of the individuals and according to proper standards. Indeed, the company's policy says as much. The manner of testing in this case failed to meet that objective, even if testing was justified. It argues that, when an employer forces testing but fails to justify the testing or fails to carry out the testing in a manner respectful of the employee's dignity and privacy rights, then the employee should have a remedy in damages. It is insufficient to say, since the tests were negative in each case and no discipline was involved, that "no harm's done."

74 The Union refers to one of the earliest reported awards on employee drug testing in Canada:

Canadian Pacific Ltd. v. U.T.U., 31 L.A.C. (3d) 179 (Can. Arb.) (M. Picher)

75 Arbitrator Picher made a general statement at p. 186 that the Union draws upon because of its relevance to both when testing is justified and how it ought to be carried out.

> It appears to the arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet rigorous standards from the standpoint of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate

> circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

76 The Union emphasizes the references to the need for "reasonable justification," "reasonable grounds" or "good and sufficient grounds for administering a drug test." This element, it argues, has been unduly watered down in this Employer's approach to post-incident testing and in some of the more recent reported cases.

77 I note two other points in the award that are important to the analysis in this case. Arbitrator Picher drew on the well established case law that said that an Employer has a right to demand a medical examination to ensure the employee is physically fit to perform their assigned work in a safe manner. He then asked, and answered, the following question at p. 186:

> Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.
>
> (*emphasis added*)

78 The right to demand a drug test arises not as an absolute right of one person to demand a test of another (because no such right exists); it only arises because it is implicit in the contract of employment. I note this (perhaps obvious) point because, within the concept that testing is allowed because it is implicit in the contact of employment, lie the limits upon the permissible interference with human integrity and liberty.

79 The second point relates to the statement that "any such test must, however, meet rigorous standards from the standpoint of the equipment, the procedure and the qualifications and care of the technicians responsible for it." This is followed by a comment on the admissibility of the resulting evidence. Tests that fail to meet these rigorous standards may fail as evidence of impairment. However, the invasion of privacy occurs whether or not the results are needed as evidence. Those who test negative care little that they could have challenged the results if they proved positive. In this case, I am asked to explore the remedy available to an employee faced with a demand that they take tests under what they say are less then rigorous conditions. In his reference to the U.S. Federal Railroad Regulation, arbitrator Picher noted, at p. 184:

The regulation provides for stringent conditions which must exist prior to requiring an employee to submit to a urine test, including procedural safeguards for the maintenance, calibration and administration of testing devices by qualified technicians.

80 At p. 183 he noted, also from the U.S. experience:

While both urine tests and blood tests employed to detect the presence of drugs cannot claim complete infallibility, it appears that when such tests are administered in keeping with exacting technical and professional standards, they can produce a generally acceptable degree of reliability and have, therefore, become more and more established as a means of fact-finding by certain public authorities.

(emphasis added)

81 The technical and professional standards repeatedly alluded to in the cases are not only important because the results may prove inadmissible if standards are not followed. That is clearly the Employer's direct interest, and in the Employer's long term interest as well if testing is to have credibility. Standards are equally important for employees who are tested. Privacy and dignity issues are not just about being comfortable with the surroundings while being tested. They extend to the assurances the person has that the information obtainable from the samples taken from them are used only for the purposes for which they were taken, and that reliable and enforceable measures are taken to prevent any ulterior use, whether accidental or deliberate and whether now or in the future through unauthorized data banking. When tests are taken by professionals bound by laws enforceable in Alberta, such as in a hospital or clinic, or by a professionally qualified occupational health care employee, the individual has the assurance that the person's professional ethics and practice are subject to regulation by their licensing body. When the testing is by someone less clearly regulated and the results are analyzed beyond the reach of local or even national licensing bodies, the privacy concerns for an individual are higher.

82 The Employer and the Union agree that the Canadian jurisprudence has proceeded on the basis of a "balancing of interests" approach to testing even though they disagree on where the balance lies. This approach is described and accepted by Arbitrator M. Picher in:

Canadian National Railway v. CAW-Canada (2000), 95 L.A.C. (4th) 341 (Can. Arb.) at 367

The competing theoretical basis for arbitral consideration of the issue, advanced by the Company, has been described as the "balancing of interests" approach. That perspective, perhaps best represented by the decision of Arbitrator McAlpine in the Esso Petroleum case, and further reflected in arbitral awards such as Re Provincial-American Truck Transporters and Re Sarnia Cranes Ltd. and I.U.O.E., Loc. 793, [1999] O.L.R.B. Rep. May/June 479 (Shouldice), holds that in determining whether an employer may resort to drug and alcohol

> testing of its employees, a board of arbitration must endeavour to balance the interests of the employees in the privacy and integrity of their person with the legitimate business and safety concerns of the employer. Within that theoretical framework, neither the employee nor the employer can assert any absolute right. Rather, the analysis focuses on whether, given the nature of the enterprise and the work performed, reasonable limitations on the individual rights of the employees can fairly be implied. If so, then a correlative right may vest in the employer to require a medical examination of the employee, including alcohol or drug testing.

and at p. 369:

> Without exception, boards of arbitration, striving to be responsive and pragmatic in the face of workplace realities and genuine concerns for safety, have opted for the balancing of interests approach. In this Arbitrator's view that is the preferable framework for a fair and realistic consideration of the issue of drug and alcohol testing in the workplace generally, most especially in an enterprise which is highly safety sensitive. While the time-honoured concept of the sovereignty of an individual over his or her own body endures as a vital first principle, there can be circumstances in which the interests of the individual must yield to competing interests, albeit only to the degree that is necessary. The balancing of interests has become an imperative of modern society: it is difficult to see upon what basis any individual charged with the responsibilities of monitoring a nuclear plant, piloting a commercial aircraft or operating a train carrying hazardous goods through densely populated areas can challenge the legitimate business interests of his or her employer in verifying the mental and physical fitness of the individual to perform the work assigned. Societal expectations and common sense demand nothing less.

83 Safety is an undisputably important cause and no tolerance should be afforded personal choices that expose co-workers to the risk of physical harm at work. However, privacy and dignity interests are sometimes too easy to discount just because they are so private and personal. Not every step taken in the name of safety is beyond rational examination. If such action is ineffective, or extracted at an unnecessary cost to human dignity and privacy, then it must remain open to question, and ultimately to a choice, based on an objective balancing of interests. This must include the effectiveness of the tests and the other alternatives that might be available.

84 Arbitrator Picher in *CN* relied upon the discussion of the employee's privacy interests contained in

> *Trimac Transportation Services - Bulk Systems v. T.C.U.* (1999), 88 L.A.C. (4th) 237 (Can. Arb.) (Burkett)

85 Arbitrator Burkett described privacy interests in the following terms:

The "best" reconciliation of two legitimate but competing interests is achieved by measuring their competing impacts. Accordingly, an assessment of the extent to which mandatory random drug testing furthers the objective of a safe and productive workplace and a corresponding assessment of the extent to which it invades individual privacy is required.

Against this background it is useful to discuss in broad terms the meaning and importance of privacy in the Canadian setting. The right to one's privacy is the right to protection from the unwarranted intrusion of others into one's life. The underlying premise is that in a democratic society, an individual is free to live as he/she pleases without interference or monitoring, so long as there is no adverse impact upon another nor breach of the law. The Canadian acceptance of the right to privacy is traced through legislation, international and constitutional law, scholarly writings and judicial statements by Oscapella in "Drug Testing and Privacy", vol. 2, Can. Lab. L.J. 325. The conclusion there is that privacy, as protected by Section 8 of the Charter, is "an essential value in Canadian society". Specific reference is made to the judgment of the Supreme Court of Canada in *R. v. Dyment*, [1988] 2 S.C.R. 417, a case involving the taking of a blood sample for evidence of impairment. In his judgment, Justice LaForest referred to privacy as "at the heart of liberty in the modern state" and as "grounded in man's physical and moral autonomy (and) ... as essential for the well-being of the individual ... (and) for the public order". Although conceding that privacy must be balanced against other societal needs, the court found that "persons are protected not just against the physical search but against the indignity of the search ...". The court concluded that [at pp. 431-2]:

> ... the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity.

86 He goes on to note that:

Employer initiated mandatory (i.e. involuntary) random drug testing brings to the fore the question of the extent to which employer business interests may override employee privacy interests. This is so because such testing, while conducted in the interests of safety, not only provides others with access to personal information, but also constitutes a physical invasion.

87 This is equally true for post-incident testing, although the Employer's justification is stronger than for random testing.

88 Arbitrator Picher, in the *CN case* from 2000 (*supra*) affirmed a general proposition he advanced in an earlier case.

Canadian National Railway v. U.T.U. (1989), 6 L.A.C. (4th) 381 (Can. Arb.)

> ... the right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such it must be used judiciously and only with demonstrable justification, based on reasonable and probable grounds.

89 That statement was generic; it was not made in the context of any specific category of demand for a drug test. It is the overarching principle that the Union alleges is getting lost as cases define more precisely the circumstances that might justify tests following an incident.

90 The Union argues that Charter of Rights and Freedoms properly has an influence on the development and interpretation of the common law. There is no reason it should have any less of an influence on the development of the law of the workplace through arbitrated decisions. The Supreme Court of Canada said in:

> *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.) at para. 97:
>
> > Charter values, framed in general terms, should be weighed against the principles which underlie the common law. The Charter values will then provide the guidelines for any modification to the common law which the court feels is necessary.

91 The Court also said, in:

> *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558* (2002), 208 D.L.R. (4th) 385 (S.C.C.)
>
> The Charter constitutionally enshrines essential values and principles widely recognized in Canada, and more generally, within Western democracies. Charter rights, based on a long process of historical and political development, constitute a fundamental element of the Canadian legal order upon the patriation of the Constitution. The Charter must thus be viewed as one of the guiding instruments in the development of Canadian law.
>
> This Court first considered the relationship between the common law and the Charter in *Dolphin Delivery Ltd. v. R.W.D.S.U., Local 580*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174 (S.C.C.), where McIntyre J. concluded, at p. 603:
>
> > Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative. In this sense, then, the Charter is far from irrelevant to private litigants whose disputes fall to be decided at common law.

> The reasons of McIntyre J. emphasize that the common law does not exist in a vacuum. The common law reflects the experience of the past, the reality of modern social concerns and a sensitivity to the future. As such, it does not grow in isolation from the Charter, but rather with it.

92 The Charter emphasizes the importance of individual security, dignity, freedom from unjustified interference and similar values which the unbridled insistence on a right to test for alcohol and drugs can infringe. Even if, as Arbitrator Picher suggests in *CN*, neither party's rights are absolute, it is still important to recognize the fundamental nature and importance of the rights involved on the employee's side of the balancing process.

Relevant Collective Agreement Terms

93 The Employer relies on its management's rights clause to justify its policy.

> **Article 4 Employer's Rights**
>
> 4.01 The Union acknowledges that it is the exclusive function and right of the Employer, subject to the terms of this Agreement to:
>
> (a) operate and manage its business in all aspects,
>
> (b) maintain order, discipline and efficiency,
>
> (c) make and alter from time to time the rules and regulations to be observed by the employees, providing such rules and regulations are uniformly and fairly applied to all employees and not in conflict with this Agreement,
>
> (d) direct the work force,
>
> (e) determine job content, including methods, processes and means of production and handling,
>
> (f) select, hire, promote, transfer within its plant, lay off because of lack of work and discharge for just cause.

94 Article 14 includes a mention of Safety Programs, but the policy does not derive from those provisions:

> **14.01 Safety Program**
>
> The Company shall maintain an Accident Prevention Committee with representatives from the Company and the Union. The make up of this committee will include one member of

the Union Executive, one member elected by the membership and one representative from management. Employee and management participation beyond this minimum number is supported by both the Union and Company.

14.02 Unsafe conditions

Employees will not operate with unsafe equipment or unsafe working conditions. All employees are expected to report immediately and document any unsafe equipment or conditions.

95 The *Alberta Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000 c.H-14 is specifically incorporated into the collective agreement (although by its former name).

Article 24 Individual Rights Protection Act

The Company and the Union agrees to incorporate and abide by the provisions governing discrimination contained in the Alberta Individual's Right Protection Act, its amendments or successor legislation.

Unilaterally introduced policies

96 Some drug and alcohol testing policies are negotiated with a trade union; others, like this one, are introduced unilaterally, as an exercise of management's rights. The legal issues that arise where such policies are negotiated are significantly different than where they are unilaterally introduced by management. This is because much of the "balancing of rights" has been brokered through the bargaining process and union consent given to the resulting procedures.

97 Management is not obliged to seek Union consent. The management rights article recognizes specifically the right to make rules so long as they do not conflict with the agreement. An objection to a unilaterally imposed drug and alcohol testing protocol based on lack of union participation was in the most part rejected in:

Dupont Canada Inc. v. C.E.P., Local 28-0 (2002), 105 L.A.C. (4th) 399 (Ont. Arb.) (P. Picher)

The fact that the Company did not consult the Union in the creation of its Policy respecting Drug and Alcohol does not breach any provision of the collective agreement. The Company is entitled to make rules respecting the operation of its business, inclusive of rules in furtherance of its ongoing effort to ensure safety in the workplace. The general limitation on the Company's entitlement to make such rules and policies is that they may not be inconsistent with the terms of the collective agreement; they must abide by the standard of reasonableness, as set out in *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73 (Robinson), and they must also, of course, be consistent with any law of general application, such as the *Human Rights Code*, R.S.O. 1990, c.H.19, of Ontario, as

amended, and any related principles such as the duty of reasonable accommodation in respect of disabilities.

98 Unilaterally introduced policies of this type (i.e. those that impact on basic employee rights or involve discipline, or both) must not be contrary to the collective agreement or statute law and, under the second point in the *KVP* test, they must be reasonable.

99 In earlier cases, to establish the need for, and thus reasonableness of, a drug and alcohol testing policy, an Employer was required to show that there was a substance abuse problem within the workplace that could not be addressed by less intrusive measures. In a preliminary award in an arbitration involving this Employer and the C.E.P. (reviewed in more detail below) Arbitrator Taylor dealt with whether the Employer had to prove drug and alcohol problems in the plant as a precondition to introducing a policy. He held (at p. 109) that, in inherently safety-sensitive industries, "the Employer does not need to adduce evidence of an actual substance abuse problem in the workplace as a precondition to the introduction of the standard." He did so following a thorough review of how Canada's law on drug and alcohol testing has developed in inherently safety sensitive industries.

100 Given these conclusions, which I accept, and which I find are binding on these parties, I do not need to canvas the more detailed evidence put forward by the Employer about the dangerous nature of its Edson Plant and the past indicia of drug and alcohol use by employees while working in this plant.

The Weyerhaeuser Policy Itself

101 The policy in this case is a 21 page document. It begins with the following introduction:

> The Company will maintain a healthy and safe work environment by, among other measures, providing a workplace free from the effects of drug and alcohol use. The importance of this standard is underscored by the fact that many of our employees work in situations in which an error in judgment or compromised motor skills could result in injury or death. It is therefore critical that our employees remain free from the effects of drug and alcohol use while on duty.
>
> Notwithstanding Company initiatives to date to reinforce the requirement for employees to attend work free from the effects of substances that cause impaired job performance, there is still evidence that some employees do attend work under the influence of controlled drugs or alcohol.
>
> This Standard reflects the Company's dual objectives of ensuring workplace safety and improving employee health. In order to assist in achieving these two objectives, the Company has adopted this standard which includes testing employees for the use of drugs and alcohol in specified circumstances.

> This Standard is just one aspect of our comprehensive approach to workplace health and safety, and augments the efforts and programs already underway in local units, many of which involve local management and trade unions through occupational health and safety committees and programs like our EFAP.

102 The policy's objectives stated (at page 2), make it clear that the policy includes disciplinary consequences.

> While the primary objective of this standard is to improve the health and safety of Weyerhaeuser's employees and while help is provided for those who are affected by drug or alcohol use, failure to comply with this standard may lead to disciplinary action up to and including dismissal, taking into account all relevant factors and circumstances and the principles of just cause.

103 This disciplinary aspect is reinforced (on page 5) under the heading "Consequences":

> Employees failing to comply with this standard will be referred to a Substance Abuse Professional for assessment however, depending upon and with regard to all of the circumstances of each instance, failure to comply with this standard may result in discipline up to and including termination, as determined in accordance with the principles of just cause.

104 The policy is written to recognize and reflect the Employer's duty to accommodate those with disabilities related to drug or alcohol use:

> As intended by the Company, and as required by the human rights laws of the provinces in which it operates, the Company will reasonably accommodate any disability disclosed in the administration of this standard or otherwise communicated to the Company by any employee. Nothing in this standard in any way negatives the duty to accommodate an employee or relieves the Company from ensuring that any discipline, including dismissal, meets any applicable just cause standard.

105 The policy lists the following circumstances where tests may be required:

> Employees will be required to undergo alcohol and or controlled substance testing in five separate scenarios. They are as follows:
>
> - Safety Certification Testing (Drugs only)
> - Intervention/For Cause
> - Post Accident

- Return to Duty

- Follow up

106 These grievances deal particularly with the Post-Accident provisions.

107 The policy deals specifically with refusal to comply:

> Refusal to Test: Amplified
>
> After an employee has received notice to report for an alcohol or controlled substance test, that employee will be considered to have refused to submit to a test when he or she:
>
> A. expressly refuses to test; or,
>
> B. fails to appear at the test site within a reasonable time frame without a reasonable explanation for the delay; or,
>
> C. fails to sign step 2 of the breath alcohol testing form; or,
>
> D. fails to provide an adequate breath sample without a valid medical explanation; or,
>
> E. fails to sign copy 2 of the Urine Custody and Control Form; or,
>
> F. fails to provide adequate urine for controlled substance (drug) testing without a valid medical explanation; or
>
> G. engages in conduct that obstructs or is intended to obstruct, the testing process of urine or breath.

108 The consequences of refusing to comply are the same as for failing the test. This aspect of the policy, and the Employer's actions in this case, presuppose that when an employee is required by management to submit to a test, the "obey now grieve later" rule applies. This assumption takes no account of whether the test is in fact mandated by the circumstances and the policy, or whether the conditions under which the tests are administered are appropriate.

109 The following paragraph is significant to the manner of testing.

> All testing and test results are confidential and measures are taken to ensure the privacy and dignity of employees involved in the testing process. The details of the testing process are set in a subsequent section of this standard.

110 The circumstances said to justify post-accident/incident testing are set out at page 12:

Post Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:

- A fatality or significant bodily injury
- Significant damage to Company property or equipment
- Possible exposure to legal action or liability
- Significant environmental damage
- A near miss that in management's opinion may have resulted in any of the above.

111 The procedures, also set out at p. 12, read:

1. Both drug and alcohol testing will be carried out in circumstances where a post accident test is required. Alcohol testing shall be carried out within eight (8) hours of the accident and drug testing is to be carried out within thirty two (32) hours of the accident.

2. Employees must make themselves available for the purpose of testing.

3. If a Unit has a collective bargaining agreement, the supervisor should comply with the agreement when initiating testing.

112 The policy goes on to describe more specifically the step-by-step processes to be used in collecting and analyzing samples.

113 This policy changed through three drafts as it was being prepared for introduction both in Edson and nationally. The changes relating to post-incident testing show that significant modifications were made to the degree of managerial approval or oversite required and the description of the threshold level of event necessary to justify testing.

114 Draft 1 provided:

Post Accident testing will be carried out in circumstances in which one or more of the following occur:

- Accidents that result in a citation for a moving violation when an employee is operating a Company vehicle; or
- A fatality; or

• Serious injury occurs in which the injured employee is treated away from the scene of the accident and for which time loss is likely to occur other than on the day of the accident; or,

• Property damage in excess of $5,000.00; or,

• Any accident or incident in which, having regard to all of the circumstances, a drug/alcohol test is desirable to aid in determining the cause of the accident. Such a decision must be justified and supported.

• NOTE: Except in the case of a fatality, the Unit Manager, or his or her designate, may determine that, having regard to all of the circumstances, a drug/alcohol test is not necessary or required in determining the cause of the accident. Such a decision must be justified and supported.

Testing may include any or all employees directly or indirectly involved in the accident.

115 In draft 2, the NOTE, giving the unit manager the discretion to decide against testing, is removed. Instead, testing is only to be done with the unit manager's approval. The circumstances are changed, but the third circumstance includes a requirement of some reasonable suspicion of drug or alcohol involvement.

Post Accident interventions will be done with the unit manager's approval in cases where one or more of the following occur:

• Level I or II incidents

• Accidents that result in the employee being charged for a moving violation when an employee is operating a Company vehicle; or

• Any accident or incident in which, having regard to all of the circumstances, it is reasonable to suspect drugs or alcohol is involved. Such a decision must be justified and supported.

116 The third and final draft implemented as of February 1, 2003 and set out above eliminates this requirement of reasonable cause for suspicion entirely. The manager's approval requirement remains.

117 Mr. Guy testified that these changes were a result of feedback as the policy was discussed in the plants. More realistically, in my view, it was modified in response to specific arbitration cases involving the *Fording Coal* policy, in particular Arbitrator Love's decision (discussed below) in:

Fording Coal Ltd. v. U.S.W.A., Local 7884, [2002] B.C.C.A.A.A. No. 243 (B.C. Arb.)

118 The influence of this decision can be seen more particularly in the "Quick Reference Guide" prepared for management's use in applying the policy.

Post-Accident Testing Policies

119 I now turn to the more recent cases dealing with post-incident testing. I note by way of introduction that while some Unions have negotiated policies, others have challenged their legitimacy on several grounds. The most prominent challenges have involved alleged conflict with human rights obligations not to discriminate based on addictions, privacy concerns and conflict with collective agreement terms, particularly the just cause for discipline provision. Several factors make the resulting case law complex.

120 First, the seminal cases identify the issues involved as a clash of rights and interests. They resolve such clashes not by giving any one right primacy over any other right (as initially advocated by both labour and management) but by adopting the "balancing of interests" approach. The result is that decisions in each case, both "on the shop floor" and at arbitration must involve the cautious exercise of judgment. It is almost impossible to distill any "bright line" tests to be applied or to give clear cut answers about what ought to be done in hypothetical situations.

121 Second, some of the case law turns on the interpretation of human rights prohibitions against discrimination based on the disability of addiction. That law is itself complex. Addiction is a disability but casual or recreational use is not. How, and the degree to which, arbitrators should apply human rights rules is also an area where the law has changed over time.

122 Third, the rules used to scrutinize employer policies — known as the KVP rules - have been for many years the subject of debate about their scope. Some view them as applying primarily as a restraint on allowable discipline. Others give them broader scope, applying to the validity of any employer policy, whether having the potential for disciplinary consequences or not.

123 Fourth, the arbitral law is less clear then it might be on how to deal with positive, but not expressly contractual, rights possessed by employees. It is easy to say that an employee has a positive right to privacy, or a right not to be subjected to a discriminatory rule or practice. Arbitrators can and do refuse to enforce such rules by declaring policies invalid or by setting aside discipline. However, the basic workplace rule is obey now, grieve later. The case law sets limits on that rule, for example, in cases involving health, safety, personal appearance, or illegal acts. What it does not do is address squarely what, if any, other remedy an employee may have where the rule, and the exercise of an employer's power and authority to enforce the rule, results in a breach of an employee's fundamental rights. Policies may say, as this one does for example, "all testing and test results are confidential and measures are taken to ensure the privacy and dignity of

employees ..." However, such policies rarely specify what the employee can do if such expressions of intent are not met.

124 Fifth, some of the cases involve policy grievances challenging a proposed policy as globally illegal. Others involve individual grievances challenging the application of the policy to an individual set of circumstances. The result in the policy grievance cases is generally not to bless all aspects of the policy, but to defer many of the key issues to be resolved in subsequent "application" cases. The policy grievance cases also, of necessity, focus on a specific employer's written policy. The wording of each policy, and the protections and procedures specific policies adopt, tend to set the framework for the analysis. That same analysis may not be applicable to differently worded policies using similar terms but with different protections, definitions, or working environments.

The Taylor Awards on the validity of this policy

125 Several of the authorities relied upon by the parties involve policy grievances concerning the validity of entire drug testing policies. The Employer here invited a broad look at this policy; the Union urged a narrower view. This case, the Union argued, is about post-incident testing and the application of the policy in the specific post-incident circumstances involving Ms. Roberto and Mr. Brown. The Union's position is that any comprehensive review of the policy, and its justification, should occur on a national basis through a policy grievance and not in the context of these grievances.

126 To that end, this same Weyerhaeuser policy was the subject of a broad policy grievance brought by the I.W.A. and heard by Arbitrator Colin Taylor, Q.C., the results of which are reported at;

> *IWA-Canada v. Weyerhaeuser Co.* (2004), 127 L.A.C. (4th) 73 (B.C. Arb.) ("the Weyerhaeuser preliminary policy decision")
>
> *IWA-Canada v. Weyerhaeuser Co.* (B.C. Arb.) (Taylor) (the "Weyerhaeuser final policy decision")

127 Paragraphs 12-15 of the final decision outline the parameters of that policy grievance.

> 12 The IWA has filed a policy grievance (the "Policy Grievance") alleging that the implementation of the Standard, in business units where it has collective agreements with Weyerhaeuser, violates the terms of those collective agreements as being discriminatory and unreasonable exercises of management rights.

> 13 The Policy Grievance has been advanced on behalf of all IWA locals that have collective agreements with Weyerhaeuser in Canada and these are situated in several Canadian provinces.
>
> 14 In order to avoid the expense and delay associated with a multiplicity of proceedings on similar issues in various jurisdictions in Canada, the parties have agreed to resolve the issue of the validity of the Standard in one comprehensive arbitration, the results of which will be binding on the parties in each province in which Weyerhaeuser has business units with collective agreements with the IWA.
>
> 15 The parties have agreed that the arbitration of the Policy Grievance will proceed on the basis of a general assessment of the validity of the Standard without reference to individual collective agreement terms, or the facts underlying any existing or future grievance concerning the validity of the Standard or its application in any particular set of facts.

128 I have the benefit of Arbitrator Taylor's analysis but, as paragraph 15 shows, that analysis is expressly limited in its scope. In reaching his conclusion, and after reviewing many other authorities, Arbitrator Taylor relied particularly on two cases:

> *Canadian National Railway v. CAW-Canada* (2000), 95 L.A.C. (4th) 341 (Can. Arb.) (M.G. Picher)
>
> *Fording Coal Ltd. v. U.S.W.A., Local 7884* (2002), 67 C.L.A.S. 234 (B.C. Arb.) [(January 8, 2002), Doc. X-33/00(a) (B.C. Arb.)] (Hope)

of which he said at page 100 of the preliminary decision:

> In my respectful view, these two decisions best reflect the legal principles that govern the arbitral review of drug and alcohol testing policies and govern the resolution of this dispute.

129 I have already referred to the *CN* decision. The *Fording Coal* decision is one of several involving that employer and the United Steelworkers. Like the Taylor decision, it involved a policy grievance directed in a general way at the prima facie validity of the policy under the *KVP* test. Several cases involving the application of that *Fording* policy were then decided after the policy grievance. These include:

> *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [2002] B.C.C.A.A.A. No. 243 (B.C. Arb.) (Love)
>
> *Fording Coal Ltd. v. U.S.W.A., Local 7884* (2002), 112 L.A.C. (4th) 141 (B.C. Arb.) (Glass)
>
> *Fording Coal Ltd. v. U.S.W.A., Local 7884* (2003), 119 L.A.C. (4th) 165 (B.C. Arb.) (Devine)

130 Both Arbitrator Hope in the *Fording* policy grievance and Arbitrator Taylor in the subsequent *Weyerhaeuser* final policy grievance make important observations about the appropriate scope of a policy grievance in assessing the general validity of a policy compared to subsequent cases that deal with the application of that policy to particular circumstances. That analysis needs noting; (a) because this is an application case under the policy addressed by Arbitrator Taylor and (b) because there is a danger of assuming that if a policy has "passed a policy grievance" then its terms can thereafter be applied literally and mechanically. This is not the case as both arbitrators made clear in their reasons. In application cases, the Employer must still justify its specific actions under the policy using a balancing of interests approach. The *Fording* cases, and to a degree Arbitrator Taylor's analysis of those *Fording* application cases in his *Weyerhaeuser* decisions, go some distance in framing the way that balancing process is to be carried out.

131 Following the leading authorities, Arbitrator Taylor held that the Weyerhaeuser policy, had to meet the *KVP* test.

> 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.
>
> *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73 (Ont. Arb.) (Robinson)

132 In general, and specifically for the task he was assigned, Arbitrator Taylor held that there is a distinction between aspects of a policy that make that policy *void ab initio*, and issues that arise in the application of the policy that make it unenforceable in a particular situation. Of this he said at page 79:

> In [*Fording Coal*] Arbitrator Hope observed that the question as to whether a unilaterally imposed rule is to be seen as *void ab initio* is limited to the first two of the six principles identified in *KVP*. The remainder relate to the application of rules including substance abuse policies.

133 Arbitrator Hope's comments on this are to be found at paragraphs 11-16 of his award and the following observations are particularly relevant:

> 11 The question arising with respect to those principles is whether they support the proposition that an employer can be prohibited from introducing a rule or discipline code in the first instance or whether challenges should be addressed on facts arising in particular circumstances. That issue arises in this dispute with respect to the question of whether the Policy is to be seen as void ab initio or whether it is within the right of the Employer to introduce the Policy with the question of its validity left to be determined in the context of individual applications.
>
> 12 In my view, the answer to that question is contingent upon whether the Policy is unlawful or unreasonable on its face, as opposed to an application of the Policy that may or may not survive the application of the test of just cause. On a careful review of the numerous authorities, I conclude that the question in KVP of when a rule is to be seen as void ab initio is limited to the first two "characteristics" identified by Arbitrator Robinson. They are "characteristics" that relate to rules that are contrary to the collective agreement and those that are unreasonable on their face. The remainder of the "characteristics" and the principles relating to the effect of rules on dismissals relate to the application of rules, including drug and alcohol policies. In short, the questions raised in the KVP criteria with respect to whether rules or policies are void ab initio are whether they are consistent with the collective agreement and whether they are reasonable on their face.

and at paragraph 15:

> On the authorities, the starting point in the resolution of this dispute is to recognize that the Policy serves only to put employees on notice with respect to the Employer's expectations in terms of conduct with respect to alcohol and drug use and some indication of the disciplinary consequences which will flow from actions alleged to be in breach of the Policy.
>
> 16 That reality applies even though the testing aspect of the Policy introduces a complicating factor in the sense that mandatory testing is neither a rule of conduct nor a disciplinary consequence. It is an investigative or preventative tool. However, it is clear that the KVP and CGE reasoning applies with equal force to mandatory testing as it does to rules of conduct and discipline codes. The testing policy must be consistent with the provisions of the collective agreement and must be reasonable on its face.

134 Arbitrator Taylor used this analysis to define the limits of what should be dealt with in the case before him, saying for example at paragraphs 117-119 of the final award:

> 117 The Company has adopted a company-wide policy dealing with issues relating to substance impairment in its Canadian workplaces. The IWA has filed a policy grievance alleging that the Standard is *void ab initio* as being discriminatory and unreasonable exercises of management rights.
>
> 118 An arbitrator has jurisdiction to declare a unilaterally introduced policy invalid on the basis that it is unreasonable, separate from the application of the policy in particular circumstances.
>
> 119 Moreover, that is the limit of my jurisdiction. The parties have expressly limited my jurisdiction to a determination of the validity of the Standard and not its application in any particular set of facts. Thus, the obligation on the Union is to establish that the Standard is void as being unreasonable in the sense contemplated in *KVP* or otherwise unlawful.

135 Throughout his final award Arbitrator Taylor identified issues which, in his view, went beyond the first two points in the KVP test and were matters of application. For example, he said at paragraph 16-18 of the final decision:

> 16 That procedural agreement, reached by the parties for the conduct of this arbitration, gave rise to certain evidentiary disagreements occasioned by the Union seeking to introduce evidence arising from filed grievances in order to establish factors which the Union contended with to the unreasonableness of the Standard, particularly as it relates to post-incident testing and substance testing procedures which the Union characterized as degrading, humiliating and an unwarranted violation of dignity and privacy.
>
> 17 Evidence which demonstrated that individual employees have expressed strong disagreement with the Standard and, in particular, the testing procedures, was permitted as going to reasonableness.
>
> 18 The protocol agreement governing the submission of this matter to arbitration limits my jurisdiction to a determination of the validity of the Standard and not its application in any particular set of facts.

136 At paragraph 126 he noted:

> 126 The Standard does not serve to create any additional rights in management. The arbitral authorities repose in management, with or without a policy, the right to require employees, where reasonable cause exists, to submit to testing. Thus, as can be seen in the Fording Coal line of cases, the validity of the Standard will arise in its application, including issues

relating to the testing and collection procedure, qualifications and role of Substance Abuse Professionals and whether or not an employee works in a safety-sensitive position.

137 Between paragraphs 127 and 140 Arbitrator Taylor identified aspects of the policy which he found were not reasonable and therefore required amendment. Subject to those comments he held, at paragraphs 141-142, that Weyerhaeuser's policy *per se* was not *void ab initio*.

> 141 With those exceptions, it is my view that the Standard has not been shown to be unreasonable in the legal sense or otherwise unlawful. As to the invasion of privacy, the requirement is to submit to testing where there is reasonable cause or where the employee's condition is relevant to the safety related incident. There are no automatic penalties for testing positive or refusing a test. The limitations advanced by the Union, including those attaching to drug testing and the anticipated deficiencies in the testing procedure and Substance Abuse Professional qualifications, arise in the application of the Standard, not its introduction: Fording Coal.
>
> 142 As Arbitrator Hope noted in Fording Coal, this finding that the Standard is not void ab initio is not a determination that its application in any particular circumstances will meet the test of just cause (see the Fording Coal line of cases going to the application of the policy). The Standard is a statement of the Company's policy with respect to alcohol and drug use and puts employees on notice as to the Company's expectations and the disciplinary consequences which could arise from a breach thereof as well as notice that employees may be required to submit to testing in certain circumstances. On each and every application of the Standard, the Company will bear the onus of establishing that its actions were justified.
>
> (emphasis added)

138 The Taylor decision arises from a case between these parties pursued specifically to obtain a ruling on the broad legality of the policy before me. This plant too is inherently safety sensitive. I follow that award in this case, because of the parties' agreement as to the decision's general application to each facility. I do so as well because I agree with Arbitrator Taylor's overall approach and his conclusions. I note particularly, however, that some of the items advanced in this case are those same items referred to in paragraph 141 as arising "in the application of the standard not its introduction." I note also that some of the points in issue here relating to the inquiry necessary for post-incident testing arise from that part of the policy he found to be unreasonable.

139 At the close of his preliminary ruling Arbitrator Taylor noted the clash of interests involved in these issues, saying at p. 109:

> I am keenly aware of the competing interests striving for dominance here. The Union seeks protection for the privacy and dignity of individual employees and the right to be free from unreasonable invasion of those strongly held Canadian values. The Company operates in a

> safety-sensitive environment and seeks to protect the safety and well-being of its employees and operations consistent with its public duty. The Solomonic task is to reconcile those competing interests in the light of established jurisprudence.

140 I agree entirely with this observation. I would only add three additional points about how this "competition for dominance" is playing out in practice.

141 First, as some of the early cases illustrate, many believe the real efficacy of a drug and alcohol policy "on the ground" and in its ability to achieve a change in workplace culture comes not from any finely tuned balancing of rights but from its ability to act as a deterrent. While arbitrators have generally rejected random testing as a practice, and deterrence as a justifying value, it would be naïve to ignore the power the belief in straightforward deterrence still has in the design of policies and more particularly in their day-to-day application.

142 Second, most policies use the mechanism of treating the refusal to submit to a test as the equivalent of a failed test, or as insubordination, or both. Despite the balancing of fundamental rights the employee is usually faced with the full force of the "obey now grieve later" rule. In *CN Rail* (*supra*) at p. 384-85 Arbitrator Picher said:

> Given the highly sensitive nature of the Company's operations as a railway, it is reasonable for the Company to require employees in risk-sensitive positions to undergo drug and alcohol testing in circumstances where it has reasonable grounds to believe that an employee is impaired while on duty, while subject to duty or while on call, including where an employee has been involved in a significant accident or incident, or when an employee seeks promotion or transfer into a risk-sensitive position. While it is true that in all of the foregoing circumstances a positive drug test would not give the employer conclusive proof that an employee was or would have been impaired while at work, or that he or she suffers from an alcohol or drug addiction or dependency, it may nevertheless be a significant or relevant piece of evidence which the employer can legitimately weigh in the balance in considering the merits of discipline, renewed safety measures or additional vigilance in the aftermath of an accident or incident ...
>
> In the result, I am satisfied that those aspects of the drug and alcohol testing policy which would require an employee, under pain of discipline, to undergo drug and alcohol testing on the basis of reasonable grounds, including after a significant accident or incident, or as a precondition to promotion or transfer into a risk-sensitive position, are not, of themselves, unreasonable by the standards of *KVP*, and are not a violation of the collective agreements. Obviously an employee can decline to undergo a drug or alcohol test where it is manifest that there are no reasonable grounds to do so.
>
> (emphasis added)

143 Any such right to decline testing for want of reasonable grounds is not obvious on the face of this policy. Nor was it obvious to the managers or employees involved in this grievance.

144 Third, drug and alcohol testing has itself become something of an industry, serving an important need but at the same time promoting its own growth and self interest.

145 These comments are not meant to be critical of these other "competing interests striving for dominance" to use Arbitrator Taylor's description. However, if these additional forces are glossed over, and the analysis conducted only in the lofty language of employee safety and fundamental rights a cynicism will grow in the workforce that will make it ever more difficult for employers and unions to work collaboratively on these issues.

146 Arbitrator Taylor found at paragraph 127 of his final award that certain aspects of the standard are not, on their face, reasonable and require revision. The aspects that touch on this case are as follows. Section 11 — Prohibited Conduct purported to prohibit employees from using alcohol within 8 hours of controlled substances within 32 hours of an accident or incident requiring a post-accident or incident test. He held these prohibitions "did not strike the appropriate balance, saying at para. 129-130:

> Assuming the Company is justified in requiring a post-accident/incident test, then such testing should occur as quickly as is reasonably possible in all of the circumstances. Alcohol and drug tests are time sensitive.
>
> 130 I am mindful of the fact that some of the Company's operations are in small communities and there may be logistical problems in arranging testing, particularly if sample collection must be undertaken in the middle of the night.
>
> 131 The Company's requirement to conduct testing which meets the highest standards of accuracy with proper and full regard for the privacy and dignity of those affected must be balanced with the employee's right to use his or her own time without interference by the Company. Prima facie, the time periods stipulated in paragraphs "C" and "D" appear to be arbitrary.

147 The circumstances in which post-incident testing could be ordered, and the appraisal and investigation required for that appraisal, under the policy in the form put before Arbitrator Taylor read (from paragraph 132):

> **132 Section III — Post accident/incident testing:**
>
> The purpose of Post Accident/Incident testing is to rule out impairment as a potential cause of the incident. Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:

> • A significant bodily injury. A recordable incident (defined by OSHA standards) will initiate the decision process to determine if a test is required following an injury. The circumstances of each case must be taken into consideration before making the decision to test.
>
> • Significant damage to Company property or equipment
>
> • Possible exposure to legal action or liability
>
> • Significant environmental damage
>
> • A near miss that in management's opinion may have resulted in any of the above.
>
> This testing policy applies when an employee is involved in a accident while traveling in a company owned or rented vehicle on company business.

148 I note that the significant bodily injury provision included a rider that is not in the policy in place when the events of this case took place. Of these provisions the arbitrator ruled:

> 133 It will be observed that post-accident/incident testing is not mandatory. It may be required "with the unit manager's approval." This seems to suggest some sort of investigation to determine if testing is required to rule out impairment as a potential cause of the incident.
>
> 134 In respect of the first bullet, there is reference to a process to determine if a test is required and the circumstances of each case must be taken into account before making the decision to test. That process is not stipulated for the remaining four events which might trigger testing.
>
> 135 In my view, post-accident;/incident testing should only occur where the condition of employees is seen as a reasonable line of inquiry. That requires a connection between the employment and the incident; a determination that the employee's act or omission contributed to the incident and consideration of whether testing will assist in the investigation.
>
> 136 The parties are directed to meet and to attempt to reach agreement on a revision of this provision in accordance with these observations ...
>
> (emphasis added)

Parties' positions on post-incident testing

149 The Employer argued before me that its policy on post-incident testing complies with the current state of the law and cited particular the detailed analysis of the area in Arbitrator Hope's

policy decision in *Fording* and Arbitrator Love's "application decision" in the *Fording (Brennan)* grievance both cited above. They also cited Arbitrator Beattie's decision in

> *Construction Labour Relations Assn. (Alberta) v. C.J.A., Local 1325* (2001), 96 L.A.C. (4th) 343 (Alta. Arb.) (Beattie)

150 That decision, however, is based on the application of a policy jointly agreed to by labour and management through collective bargaining. Arbitrator Beattie emphasized the point himself at p. 354 saying:

> The Alcohol and Drug Policy is a policy endorsed by the Union and is viewed by both parties, and the industry, as very important in ensuring safety on the work site.
>
> Most of the cases relied upon by the Union involved unilateral policies regarding alcohol and drug use/abuse and whether the "invasive" or "intrusive" test procedure of urinalysis was considered as straying beyond the balance to be achieved between the employer's safety concerns and the employee's privacy rights. Although the cases provide a jurisprudential background, they have, in our view, little application in the present case. The issue in this case is the exercise of discretion by the Employer in applying the agreed upon Policy, ...

and again at p. 356:

> The present case must be decided in a context much different than most of the cases cited above, namely the context of a specific policy which, as the Employer points out in its argument, has a bias in favour of alcohol and drug testing, not the converse.

151 The Union argues that Weyerhaeuser's policy is unduly broad on its face and in its application in the way it purports to allow drug and alcohol testing following an incident. In a general way the Union argues that post-incident testing has been elevated from just one form of reasonable cause testing, where the onus is on the Employer to demonstrate reasonable grounds for demanding a test, to a separate category that allows a test to be demanded solely because of an event or near miss in the workplace without any significant reasons to believe drug or alcohol even might be involved.

152 At p. 377 of the 2000 *CN* decision, Arbitrator M. Picher refers specifically to post-incident testing. After noting the general acceptance of reasonable cause testing he says:

> I am also satisfied that a fair extension of reasonable cause testing is that it applies quite properly in a post-accident or post-incident situation. As the lessons of the Hinton collision and the focus of the Foisy Commission Report made clear, in the aftermath of an accident, which in the railway industry can be of catastrophic proportions, a railway can expect to be held to a standard of intense scrutiny with respect to the due diligence it exercises in ensuring

> the fitness for duty of its employees. It can expect to be held to a rigorous obligation to gain the widest possible information about factors which may have influenced the unfolding of an incident. This level of obligation was found to be a legitimate basis for reasonable cause drug testing by the Human Rights Board of Inquiry in Entrop.

153 At page 383, Arbitrator Picher addressed the argument that risk avoidance justified random drug testing. He rejected the proposition, in part because it implied that any risk, regardless of degree, trumps an employee's privacy interest. Of this he said:

> This cannot be so. Where countervailing privacy interests are at stake, there must be a balancing of impacts such that the degree of risk must meet a threshold sufficient to override the privacy interest.

154 This comment was made in respect to random testing. However, it is equally applicable to the post-incident testing to which he also refers.

155 The arbitral law and the policies that have emerged now clearly differentiate between what has become known as "reasonable cause" testing and "post-incident testing." These terse labels unfortunately imply a simplicity that downplays the several protections included within each test.

156 The two circumstances are not the same. Reasonable cause tests are justified when employee's exhibit, or other evidence points to, impairment sufficient to give the Employer reasonable cause to suspect the employee may be at work impaired by alcohol or drugs. There need to be observations, plus the forming of a reasonable opinion, but there does not need to be an incident of harm to precipitate the demand for a test. The inquiry in post-incident testing is precipitated by an event and the need to inquire into that event to determine its cause. If the possibility emerges that the event *might* have been caused by a particular employee's impairment and it is reasonable for the Employer to conclude that it is necessary to explore that possibility and, by testing, perhaps rule it out as a cause or significant contributing factor in the incident, then testing may also be justified.

157 The two circumstances can overlap. The investigation of an incident may itself reveal sufficient evidence to provide reasonable cause to suspect an employee's impairment. However, the tests are not the same. A factor that has led arbitrators to uphold testing in response to a significant incident is an employer's need and obligation to account publicly, often to some external regulatory agency, for the cause of the incident. That factor plays no role in reasonable cause testing.

158 Both categories, despite their titles, must meet a reasonableness standard. Indeed, this is implicit in that arbitrators assess such unilaterally introduced policies using the *KVP* standard, and reasonableness is one of its basic tenants.

159 Unions have argued in a number of cases that the level of evidence or suspicion of impairment necessary to justify a reasonable cause test (i.e. where no incident has occurred) should also apply to justify testing to rule out impairment following an incident. The only difference between the two categories, if that argument was accepted, would be in the event that initially attracted the employer's attention. After that, the employer would still need to point to evidence that positively suggested impairment to a sufficient degree to override the employee's privacy interests. In my view, adopting the *same* test is not justified either in principle or based on the case law. The tests are different because the circumstances and the interests involved are different. Both tests, however, must still involve a balancing of interests, both within the policy itself and at the point of application.

160 I agree with Arbitrator Devine in the *Fording (Cryderman)* decision when he concludes at p. 188:

> It is readily apparent the standards for which I will call "post-incident" testing (which includes accidents, near misses and "serious" incidents) must be different from the standards that apply to "reasonable cause" testing. The focus must of necessity be on the incident itself, rather than on apparent aberrant behaviour by the employee. Whether the standard for such post-incident testing is lower, as stated by Arbitrators McAlpine and Love, it is undoubtedly a different standard.

161 On my reading of the subsequent cases the reference to the standard being lower has been taken out of context. There needs to be less evidence to support the employee's impairment than there would need to be to justify a reasonable cause test, but there needs to be other significant information about the event and the employee's connection to or role in the event, that themselves serve to justify testing. Again, the overall standard is not lower it is just different. There still needs to be evidence to suggest that possible impairment is a reasonable line of inquiry.

162 There are three elements to the post-incident testing discussed in the cases of particular significance here. They are the threshold level of incident needed to justify testing, the degree of inquiry necessary before the decision is made, and the necessary link between the incident and the employee's situation to justify testing.

163 The Union observes that the events that heralded the introduction of post-incident testing were of catastrophic proportions, like the Exon Valdez incident or the Hinton train derailment. Both policies and arbitration awards since then have clearly extended post-incident testing to much less catastrophic events, but they have not, or should not, the Union argues, reduce the threshold for testing down to virtually nothing so that a near miss of some minor damage to property will suffice.

164 One might say that if a major disaster justifies a test so should a minor incident, since it too might have had greater consequences and is equally deserving of investigation. However, part of the justification for allowing testing is the Employer's duty to account for safety incidents and the related public interest in ensuring serious safety infractions within industry receive public exposure. Such duties involve a threshold level of harm before they arise. In my view, the same threshold concept applies in post-incident testing and it is not appropriate to override privacy interests in all cases, no matter how small the incident or how remote the employee's involvement or the chance that impairment may have played a role. Without thresholds, post-incident testing amounts to little more then an ever present threat of testing, which, while not quite as intrusive as random testing, suffers from many of the same objections.

165 The Employer relies particularly upon the decision in:

Fording Coal Ltd. v. U.S.W.A., Local 7884, [2002] B.C.C.A.A.A. No. 243 (B.C. Arb.) (Love)

166 "Significant Event" under that policy was defined as follows:

> Post Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:
>
> • A fatality or significant bodily injury
>
> • Significant damage to Company property or equipment
>
> • Possible exposure to legal action or liability
>
> • Significant environmental damage
>
> • A near miss that in management's opinion may have resulted in any of the above.

167 On the question of the degree of significance the event must have, Arbitrator Love rejected the Union's argument, saying at paragraph 41:

> 41 The Union argued that the accident was minor, causing a minor amount of damage, and could not be viewed as a significant event justifying a urine sample from the Grievor. In my view, the accident in this case constitutes a significant event, because there was some damage to the company property. Further, given the design of the fork-lift, which was operated from a standing position, without any back support or restraining device, there was some risk of injury if Mr. Brewer was ejected from the machine. Fortunately, he was not ejected and he did not suffer any injury. In my view there is no requirement to show a "substantial degree of harm" or "damage beyond a threshold" before a reasonable line of inquiry is established. In my view, there is no need for the Employer to establish "damage to property or person"

> beyond a threshold risk. The policy clearly states fatalities, injuries to person or property, and significant environmental damage are significant events. Also significant events are actions which contribute to an "unusual risk" of the event occurring.

168 It appears to me that this passage relies on the policy too literally, and finds, without further consideration, that any damage to company property will suffice. I cannot accept that as an appropriate balance based on the prior jurisprudence. While the Hope award upheld the policy in a general sense, it left much about the policy to be fleshed out in its application. It may be that in the *Fording (Brewer)* case the event was indeed of sufficient significance, but a statement that *any* property damage will suffice, and that *no thresholds* apply goes too far and overlooks the concept of a balancing of interests. On this point, this same Weyerhaeuser policy came up for consideration in a New Brunswick case:

> *Weyerhaeuser Co. Ltd. v. C.E.P., Local 181* (October 31, 2003), B. Bruce J. (N.B. Arb.) (unreported decision)

169 The grievor, an electrician put his hand in his pocket and cut his finger on a utility knife. It was a small cut, but he went to the hospital and got a couple of stitches for cosmetic reasons. He filed a WCB form as it was a "reportable injury." When he got back to the plant he was told to take a drug and alcohol test. He was given the choice of taking the test in a hotel room or in the plant's kitchen. As is the case here, the grievor felt humiliated by being tested and felt the decision unjustified. He sought damages for injury to his reputation in the community.

170 The parties agreed at the outset that they would not challenge the validity of the policy itself, only the application of the policy to the facts at hand. While the arbitrator made a number of observations about the policy in general, some aspects of which we refer to below, the key question was whether the grievor's cut to his finger was "a significant bodily injury" as contemplated by the policy. The Employer, with advice from their Tacoma Washington head office, interpreted that phrase to include any "recordable incident" within WCB rules. The arbitrator rejected that approach, holding at para. 50 that:

> ... a significant bodily injury which is juxtaposed against the term "fatality" in the Substance Impairment Policy document must be seen as an injury that is potentially life threatening or would require the employee to be absent from work for a period of time because of temporary or permanent disability resulting from the injury.

171 Arbitrator Lanyon took a different view in

> *Elk Valley Coal Corp. v. U.S.W.A., Local 7884*, [2003] B.C.C.A.A.A. No. 210 (B.C. Arb.)

172 The policy in that case purported to allow testing based on damage to property, with no limiting threshold. The Union objected that the incident was minor. The arbitrator held, at paragraph 26:

> ... an incident does not have to involve a dangerous occurrence in order to raise a safety concern. Both Arbitrators Hope, Q.C. and Love state that an employee's condition is relevant in the investigation of a "safety related incident" or in the investigation of a "safety event." The definition of a significant event also includes the "unusual risk of such an occurrence." This only makes common sense. Good fortune or good luck, as in the case of a "near miss", should not be the measure of any policy concerning safety.

173 The *Fording (Cryderman)* decision (*supra*) also considered the sufficiency of the incident. The grievor drove a truck across the floor of an open pit mine and ran over a large rock that tore apart the pickup's rear drive shaft. On this question, Arbitrator Devine reviewed two prior *Fording* grievances; the *Brewer* case (*supra*) and

> *Fording Coal Ltd. v. U.S.W.A., Local 7884* (2002), 112 L.A.C. (4th) 141 (B.C. Arb.) (Glass)

174 In the *Olson* decision, the grievor did not contest the direction to take the test, the only issue was the grievor's refusal. Of the *Brewer* decision, he noted that the facts there involved "a mine vehicle goes out of control" which required a report to the Ministry under the *Mines Act*. Arbitrator Devine noted (at p. 188) that Arbitrator Love's three part test (alluded to below) "... leaves open the issue of what is a "significant incident." Love, he noted relied heavily on the analysis in *Esso Petroleum (MacAlpine)* supra. This led Arbitrator Devine to examine that case in more detail. He then concluded, at p. 189:

> The language, which limits post-incident testing to cases involving a significant event, is in keeping with the jurisprudence. At issue here is whether damage to the property of the Company simpliciter is sufficient to constitute a "significant" event. There is no initial threshold specified on what constitutes property damage. If it is to apply as the only initiating event, there must by definition be something more at stake than trivial damage absent other issues such as an injury or a serious safety concern.

175 He recognized that, at times, damage is only one of several factors, but went on to say at p. 190:

> There was no apparent safety issue at stake in the investigation. Nor was there a reportable incident under the Mines Act. Absent these considerations, the factual circumstances concerning the damage to company property must be sufficiently egregious to require an explanation from the employee. The determination that the facts are sufficiently egregious so

> as to focus on the conduct of the employee as the "root cause" requires a careful elimination of other causes.
>
> (*emphasis added*)

and at p. 191 he held that:

> While the damage to the pickup was an unusual event, that alone is not enough to warrant a demand for a test.

and, in conclusion at p. 191:

> If there was a reasonable doubt, the employee should receive the benefit of that doubt. This at a minimum requires a more thorough investigation as part of the application of the Employer's policy, which at present seems to rely heavily on the fact of property damage alone to justify a demand for a urine test.
>
> (*emphasis added*)
>
> **8. Summary**
>
> Post-incident testing is an acknowledged right of an Employer for those of its employees engaged in safety-sensitive occupations. Post-incident testing will be justified in cases involving damage to Company property provided that sufficient safeguards are observed so that a third party can be satisfied that the request for a test was demonstrably justified by the facts obtained in a thorough investigation, and the demand was not arbitrary or capricious. In this way, the rights of the employee are balanced against the rights of the Company to test when appropriate.

176 I agree with this approach. In my view the amount of the damage or the magnitude of the incident must remain a factor to be weighed in determining whether there is sufficient cause to justify overriding the employee's privacy rights through mandatory testing. This can include the near miss concept which, almost by definition, involves no damage, but there still has to be a sufficient gravity to the event. Any near miss must involve a realistic conclusion after a thorough investigation that serious damage almost occurred.

177 The next significant element is the degree of inquiry needed before a post-incident test is required. The reported cases and the facts in this case show a wish to boil the question of whether a test is called for down to a checklist. Arbitrator Devine commented at p. 190 in the *Fording (Cryderman)* case:

> ... the Employer uses a "logic tree" to work towards a decision to request a urine test. It is appropriate to employ such a device because it contributes to consistency in the application of

the Employer's policies. The tree, however, has a few limbs missing at least in its application in this case.

178 At paragraphs 46 and 47 of *Fording (Brewer)*, Arbitrator Love developed a three point test for the Employer's duty before it can demand a test in a post-incident situation.

> 46 The wording of the Employer's policy calls for the exercise of discretion by the Employer in making a decision to demand a sample. This is explicit from the words "may require the employee to undergo testing." The exercise of discretion calls for a "reasoned decision" on the part of the Employer, in the sense that the decision to test cannot be arbitrary. The policy provides no guidance as to when a test will be ordered. Given that the demand for a drug test involves a degree of invasion of privacy, the Employer must consider carefully the "need for the test." Having said that the Employer must carefully consider the need for the test, I recognize that it is not necessary for an Employer to engage in a rights balancing exercise: Imperial Oil (Parsons Grievance).
>
> 47 I note that even in Esso Petroleum, where the panel determined that mandatory post incident testing was valid, the panel also held that "there must be some objective consideration of the individual case" and the wording of the guideline indicated that "company representatives authorized to order post-incident tests are expected to exercise careful judgement in deciding when to conduct a test and which employees to test." In my view, the Employer must consider the circumstances of the case before requesting the test, and consider:
>
> - Is there a connection between the employee's area of responsibility and the accident?
>
> - Is it necessary to investigate whether the actions or omissions of the employee contributed or caused the incident?
>
> - Will the test assist in the investigation, at the minimum, by negativing impairment as a possible cause or contributing factor?
>
> In my view, these are minimum requirements for the condition of the Employee to be a reasonable line of inquiry.

179 Having authored the decision in *Imperial Oil (Parsons Grievance)*, and noting that in that case the grievor's admission of drug use prior to the test in question altered the situation somewhat, I have difficulty with the proposition that the employer need not engage in any "rights balancing exercise." There can be circumstances so unexplainable by other causes that testing for impairment becomes a reasonable line of inquiry, but the decision to test must still be made recognizing and balancing the employee's privacy interests. The reasons in *Imperial Oil (Parsons)* show a thorough and probing inquiry was conducted which included questions to the grievor before the decision

was made. The case was complex since the grievor was dismissed following a random test under a return to work agreement. However, the grievance raised in part the validity of the decision to test the grievor the first time, which followed an "incident", but not one which met the "significant incident" definition in Imperial Oil's own unilaterally imposed policy. The board then said, at p. 44:

> The policy provides for mandatory testing in two circumstances; after an incident or where reasonable cause exists to suspect drug or alcohol use. The test requisition form gives the basis for the test as "post-incident." The managers involved in the investigation, far from suggesting they had reasonable cause to suspect drug or alcohol impairment say they directed the test to rule out alcohol or drugs as a potential cause. Mr. McMullan's documentation in support of the post-incident alcohol or drug test recites that he reasonably believed the incident may have caused "a spill or abnormal discharge impacting significantly on the environment or on the community." It says of Mr. Parsons that impairment of this employee cannot be ruled out as a potential contributory factor.
>
> The Union maintains that, on the evidence before us, and on the evidence available to the three managers who decided to test Mr. Parsons, there was no "significant incident" within the meaning given that terms in the A & D Policy. We agree with that conclusion. Mr. Fukushima was taken through each of the sub-clauses involved and agreed that none of them fit the definitions in the circumstances.
>
> However, in our view the Union's argument downplays the "near-miss" aspect of the administrative guidelines. The Policy says post-incident testing may be conducted at management's discretion for near misses or lower-level incidents if they are considered to have had significant potential for more serious consequences. The policy places the onus on management to demonstrate its reasoned judgment why that is so, and cautions against arbitrary treatment. However, the policy clearly contemplates tests for incidents that fall short of the "serious incident" definition.
>
> In our view, there was a reasoned basis for the decision to test under the policy even though we find it was not a "serious incident" within the definition. First, the excess amount allowed to flow into the tank was not 40 gallons, it was in excess of 1,900 gallons of product. This puts the degree of inattention in a slightly different perspective. Second, the Employer perceived a pattern of spills, and no evidence was called to suggest this was unfounded or an unreasonable matter to consider. Third, we are not persuaded that the decision was tainted by preconceived notions that Mr. Parsons was a drug user. Some suggestion was made of this in cross-examination, but the participants denied it was so or that it was a factor that influenced the decision. The Employer had eliminated mechanical causes. Mr. Parsons apparently offered no explanation himself and since he was the operator responsible, some explanation at the time was called for, even if it was only something like "I went for a smoke."

We also note that, while it occurred only after the decision to test was made (although before the actual test) Mr. Parsons in fact admitted drug use. At that point the Employer had reasonable cause to test on that ground even if its decision to test on the basis of a near miss significant incident was wrong.

Imperial Oil Ltd. v. C.E.P., Local 777, [2001] A.G.A.A. No. 102 (Alta. Arb. Bd.)) (Sims)

180 The Union relies on the decision in:

Industrial Contractors Assn. of Alberta v. General Teamsters, Local 362 (2002), 115 L.A.C. (4th) 419 (Alta. Arb.) (Beattie)

181 There, the grievor parked a truck and got out. Another vehicle operator backed another unit into his vehicle causing $2,000 to $3,000 damage. A superintendent, after a cursory review, felt the grievor exercised poor judgment in failing to take preventative action. He demanded a drug test, which the grievor refused to take. The grievor was fired and ultimately reinstated. The reinstatement was based largely on the words of the Employer's policy which, unlike the policy here, states directly that reasonable grounds are needed for post-incident testing. The policy read:

Muskeg River Constructors may conduct drug and/or alcohol testing under the following circumstances.

. . .

2) Following an incident, near miss or potentially dangerous incident where there are reasonable grounds.

182 The policy included a checklist to be used to assess whether reasonable grounds existed. It made mandatory an *assessment for reasonable grounds*, for employees involved in "Class 1" incidents described as:

a) Any incident involving costs over $25,000.00.

b) All incidents involving lost work days.

c) All environmental incidents involving costs over $25,000.00.

d) A fatality.

e) All near misses with the potential for serious injury or major equipment damage.

183 The Arbitrator adopted the Union's argument which included, at p. 430, the following:

> 3. Mr. Edwards' decision had nothing to do with a consideration of drug and alcohol involvement but simply had to do with the damages. He acknowledged that the Reasonable Cause Checklist (Exhibit 9) gave no indication of any concern about drugs or alcohol. Even the check box for "reasonable cause for alcohol and/or drug testing" was not checked off. The only thing checked off was Mr. Edwards' subsequent check for "poor judgment". He had not even seen the Checklist before making his decision, which is a requirement of the Policy. He also did not consult, as is required, prior to making his decision. There was no evidence of any of the factors to be considered in assessing whether there are reasonable grounds to believe that drugs or alcohol may have been a contributing factor (Exhibit 8, pp. 5, 6). At the least his actions were inconsistent with the Policy, at worst a breach of the Policy. "Damage" is not a criterion in determining if a test should be requested unless it is a "Class 1" incident (damage over $25,000: Exhibit 8, p. 6). The Policy cannot simply be applied "automatically", in any case involving damage, as appears to be the view of Mr. Edwards.

184 Returning to the three point checklist in *Fording (Brewer)* which found its way into this Employer's Quick Guide, I agree that anything that assists in achieving consistency is worthwhile. However, as was obviously the case in *Fording (Cryderman)*, and as is the case here with the use of the "Quick Guide", if such a device too readily leads to the attitude that "if we tick off the boxes we can test" it is harmful because it distracts from the judgment that inevitably needs to be exercised based on the entire circumstances. It is not enough to say "ok — we have enough to test" if important factors have been ignored or avoided. The individual to be tested should, unless the circumstances preclude it, be asked for their explanation. If they are sufficiently close to the incident to justify finding out whether their being impaired might be part of the cause, their explanation of events must also be relevant to the decision as to whether testing is justified.

185 I agree with another observation made in the *Fording (Cryderman)* case.

> While I agree with the Employer that the investigation occurs in "real time" and some deference is to be accorded to the process, the prism of hindsight is the only means by which one can test the application of the Employer's policies. It cannot be a complete defence to testing without adequate grounds. Otherwise, the "just cause" protection to which the employee is entitled will be vitiated.

186 In the *Fording (Brewer)* decision and in the *Elk Valley Coal Corp.* decision the arbitrators each spoke of the need for the Employer to be given "substantial latitude" to investigate a safety event. In my view it is important to distinguish between two concepts. Where an Employer has conducted a thorough investigation and come to a conclusion, albeit one upon which right thinking people might differ, it is entirely proper not to second guess the conclusion. However, that principle presupposes a thorough investigation. Respect for a difficult choice is quite a different concept than saying the Employer should not be held to a reasonable investigation process. What is reasonable

to investigate must be judged based on the circumstances and what was realistic at that time. However, if the investigation at the time was not reasonable in the circumstances, its inadequacy should not be justified on the basis of giving latitude to the Employer. To do so is simply to favour the Employer's interest in testing over the employee's privacy interests, solely on the basis that the Employer chose not to conduct as probing an investigation as they might have done.

187 Arbitrator Taylor in his policy decision (*supra*) held at para. 133 that the Weyerhaeuser policy itself, by requiring managerial approval, suggested "... some sort of investigation to determine if testing is required to rule out impairment as a potential cause of the accident." His comments at paragraphs 134-135 reinforce this conclusion. In ruling that way he appears to have favoured (as I do) the analysis of Arbitrator Devine in the *Fording (Cryderman)* case over that of Arbitrator Love in the *Fording (Brewer)* case. Arbitrator Taylor did not expressly opt for the one analysis over the other but he did not need to since he directed the parties to modify their policy in such a way that would ensure an inquiry was conducted in order to determine on the facts of each case "whether the condition of employees is seen as a reasonable line of inquiry." There must be, he held, within the requirements of the policy, a determination that the employee's act or omission contributed to the incident and consideration of whether testing will assist in the investigation.

188 This brings us to the third element, the link between the incident and the employee involved. Obviously this is closely linked to the quality of the investigation and it is what makes the "we've got enough to test" checklist approach inappropriate. Again I agree with the *Fording (Cryderman)* award where the arbitrator said at page 190:

> The determination that the facts are sufficiently egregious so as to focus on the conduct of the employee as the "root cause" requires a careful elimination of other causes.
>
> Sufficient care must be taken to exhaust other realistic possibilities. There was no such careful investigation in this case. Wilson did not question the Grievor at all about the incident so as to eliminate environmental causes despite the fact it was apparent the rock just broke the surface of the soil over which the Grievor drove. ... [He then listed other circumstances and continued] ...
>
> None of these circumstances were properly investigated and eliminated before a urine test was demanded.

189 In my view, absent some statutory obligation to report on a broader basis, the investigation must lead to the conclusion not just that someone might have been impaired, but that the particular employee's role in the event might have been due to impairment. The "reasonable line of inquiry" conclusion thus needs to be employee specific.

The decision to test Ms. Roberto

190 Mr. Guy testified that he made the decision to test Ms. Roberto with information from Mr. Pete Sikora and Mr. David Appelt. He made no inquiries of his own and relied upon what they told him. They had not interviewed Ms. Roberto and neither did Mr. Guy. Ms. Peeke of Human Resources was not involved in making the decision to test, but may have confirmed for Mr. Guy after the fact that his decision was correct. She also wrote up the Substance Test Incident Report later that day. Mr. Guy says he also called the Washington State head office for confirmation of his decision.

191 Mr. Guy says he had not thought at all of testing Ms. Roberto until Mr. Sikora and Mr. Appelt approached him and "reminded him we should be doing a substance impairment test."

192 The standard (draft 3) at that point read as follows:

> Post Accident/Incident testing for alcohol or controlled substance use will be done with the unit manager's approval in cases where one or more of the following occur:
>
> - A fatality or significant bodily injury;
> - Significant damage to Company property or equipment;
> - Possible exposure to legal action or liability;
> - Significant environmental damage;
> - A near miss that in management's opinion may have resulted in any of the above.

193 He had discussed this with the Union and knew they felt it was inappropriate and virtually authorized random testing. The training taken on the standard generally predated this final wording. Since drafts 1 & 2, the note about approval had changed and so had the description of the degree of severity. Mr. Guy says he went through the analysis in the policy. He pulled out the Quick Guide and used it, asking himself the three questions it posed and answered yes to each of them. This Quick Guide read:

> 3 questions to ask yourself for post accident testing:
>
> a) Is there a connection between the employees' employment and the accident?
>
> b) Is it necessary to investigate whether the actions or omissions of the employee contributed to or caused the accident?
>
> c) Will the test assist in the investigation, at a minimum by negating impairment as a possible cause or contributing factor?

> An injury that meets the definition of a Recordable will normally trigger a test. Other injuries or near injuries require closer review.

194 These are the three minimum questions extracted from Arbitrator Love's *Fording (Brewer)* decision without the preceding cautionary comments.

195 Mr. Guy's view of the policy's statement that testing "will be done with the unit manager's approval" was that that did not vest him with any discretion in the matter. Rather, if the answers to the three questions were yes, it required a "business decision" to follow the policy and to test. He says there was no indication that Ms. Roberto might have been impaired by alcohol or drugs, and that that possibility "was no part of his decision to proceed to test."

196 He says he followed up with Mr. Appelt and Mr. Sikora and determined that there was no known reason for what happened. However, the incident happened when Ms. Roberto was alone, so without their having asked her what happened it is hardly surprising that they did not know. I do not accept as a valid reason for not asking her any wish not to disturb her following the event since they were fully prepared to disturb her for the testing itself.

197 The report Ms. Peeke later filled out says, in part:

> "This was an incident that could result in a more serious injury"; and
>
> The decision to test was made to negate impairment as a possible cause or contributing factor for this incident."

198 Mr. Guy confirmed that the Company's Safety Report categorized this as a level 3 incident and that under draft 2 of the policy testing would not have occurred since it limited tests to Level 1 and 2 incidents as determined using the Company's own Incident Investigation process.

The decision to test Mr. Brown

199 The decision to send Mr. Brown for a test was made by Mr. Harry Quinn. He was the maintenance manager and was filling in for Mr. Guy during his absence. He had received some training in the standard during its development stage. He was part of the leadership team which, he says, was given some background on arbitration decisions and testing procedures. The lead team had also been given the Quick Guide to review. He does not recall privacy ever being a topic of discussion during the training.

200 He says that, when the incident involving Mr. Brown occurred, he was in a meeting and was called out by Mr. Vern Banfield, the team leader and asked to go down to the shipping area. Mr. Banfield described what had happened and then they went through the standard and the three questions in the Quick Guide. He and Mr. Banfield called down Donna Peeke and the three of

them worked through the three questions again. A little later, Mr. Pete Sikora came down and they "bounced their decision off him." They were not quite clear how they should deal with the issue because it also involved a contractor (the driver). Mr. Banfield had gathered the initial information. Mr. Quinn did not talk to Mr. Brown directly but he thought Mr. Banfield had. Mr. Brown says not. He saw no need to speak to Mr. Brown directly.

201 In neither Mr. Brown's case nor the contractor's did they have any concern that the incident was caused by impairment. They did conclude that acts by both men contributed to the incident; the one by backing-up the truck and the other by pressing the door button.

202 Mr. Quinn says they went through the five issues in the standard and answered no to everything except "significant damage to company property or equipment." He calculated the damage quickly in his head at about $2,000 to the truck and $4,000 to the overhead door. He had no guidelines or instructions as to what value should be considered significant. He was aware that the earlier draft attached a dollar value limit by referring to Investigation Guide Level I and II incidents. Ultimately, the door was replaced at a cost of about $8,000, but the old door was damaged and not worth that much.

203 For each individual Mr. Quinn says they answered yes to each of the three questions in the "Quick Guide". Mr. Banfield completed the necessary form later that day. While Mr. Quinn had no concern about impairment he still felt testing was necessary to rule it out absolutely, relying on the words in the Quick Guide. He agreed that this meant, so long as there was an incident involving sufficient damage and an employee involved, there would always be testing done. He agreed that "if there is enough damage you will test if the employee did something." He would always answer yes to question (c). He said he did not think $2,000 damage would be significant but that $8,000 might be.

Were the decisions to test Ms. Roberto and Mr. Brown reasonable?

204 My conclusion, based on the evidence adduced before me, the policy and the case law I have now reviewed, lead me to the conclusion that neither demand meets the test of reasonableness.

205 I agree with Arbitrator Taylor's observations on the policy itself, set out above. In particular, in my view, the policy, to be reasonable within the meaning of the *KVP* requirement, must mandate a real investigation and a real exercise of judgment by the responsible manager. It must be written in such a way as to make it clear to the responsible person that they are balancing rights and not simply checking off a list. Perhaps the best evidence of the inadequacy of the policy's current wording is Mr. Guy's assumption, after reading the policy, that the requirement for his approval was not included to give him any discretion, based on his judgment, as to whether a test should or should not be undertaken in the circumstances.

206 In my view the policy should also say directly that, unless circumstances make it impossible, the investigation that precedes the decision and thus the conclusion that "testing represents a reasonable line of inquiry" should include obtaining the individual's account of the event. To exclude the individual without good reason seriously undermines the *bona fides* of the inquiry and the resulting decision. Even if that is not essential for a reasonable policy then, in my view, it is nonetheless essential for a reasonable application of that policy.

207 In each case here, the responsible managers concluded quite reasonably in the circumstances, that there was no real suspicion of impairment. In each case, the cause of the injury or damage was relatively obvious or would have been if the individuals involved had been spoken to had been asked what happened. In each case they would have been reminded that the safety committee had previously made a recommendation which, had it been acted upon, would have reduced the likelihood of the event happening. In the case of the door an electronic eye or a pressure sensitive switch of the type used in elevator doors could have prevented the damage. For the tanker car, a counterweight for the pipe had been suggested that would have made it easier to maneuver and probably have avoided Ms. Roberto's experience.

208 My conclusion in relation to each investigation is that the desire to test was foremost in the decision-makers minds; that rather than doing as full an investigation as time allowed in the circumstances. They believed they could test if they could complete the checklist and did not look beyond that and make reasoned judgment based on all the available information. I can only conclude that they felt the introduction of testing would work as a deterrent in the workplace and they were anxious to see that happen. Certainly the comments made to the Union suggest such an attitude prevailed.

Reasonableness of the testing procedures

209 Even when an Employer makes a reasonable and justifiable demand for a drug and alcohol test, it is still obliged to carry out that testing in a reasonable manner. Indeed, the Employer's own policy says as much in respect to several of the issues in this case.

210 If employees are to be made subject to a policy they should be given access to that policy in advance. Point 4 in the *KVP* test says specifically "It must be brought to the attention of the employee affected before the company can act on it." Here, the Employer posted a brief notice on January 31, 2003 announcing that "the substance impairment standard" will come into effect the very next day. However, the Employer had been making significant changes to this standard. These changes went directly to the issue of post-incident testing. I have found that the standard was not distributed to employees until the day after Ms. Roberto's incident. When she sought help and advice her Union advisor was still working from an earlier draft. Even Ms. Peeke did not have the current version. The application of the policy to Ms. Roberto with inadequate notice of the policy's specific terms was unreasonable. This is not just theoretical. Her first question was "what

happens if I refuse?" and because copies had not been provided in advance no clear answer could be given at the point she needed it.

211 The next concern is over the way Ms. Roberto was "escorted" to the hotel. The Employer's policy says that "employees must make themselves available for the purpose of testing." The section on Refusal to Test speaks of an employee who "fails to appear at the test site within a reasonable timeframe without a reasonable explanation" and who "engages in conduct that obstructs ... the testing process." Ms. Roberto was not at the plant, she was to all intents and purposes at home resting up from a very unpleasant experience.

212 She was not asked to appear at a test site. Rather two managers came and got her in a van and took her to the test site. I recognize that one of them was Mr. Alstead with whom she had a relationship and at whose house she was resting. However, this wasn't a friend giving her a ride. The conversation going on at the plant and relayed to her by Mr. DeVuyst - "she was going for a test and they were not going to debate the issue" — colour this act of "taking her for a test." It was unsolicited and involuntary. The company offered no explanation as to why it could not just ask her to attend and rely on the policy if she did not show up. It offers no explanation like "she couldn't get there and asked for a ride." Overall my conclusion is that the company officials were going to get Ms. Roberto tested whether she or the Union liked it or not. She was fetched from Mr. Alstead's house for that purpose with no sensitivity as to how she might feel about being treated in this manner. She commented specifically on the locking of the doors. I am sure that was just part of the truck's normal equipment and that there was no effort to lock her in. However, I am equally satisfied that she was left feeling she was being taken away without any real option in the matter. To say this was unreasonable suffers only from understatement.

213 The next issue is location. This question is closely tied to who should do the testing. If testing is performed by a qualified medical professional, then that person will usually offer, as part of their professional activities, a suitable place from which they conduct their practice. This is not always so, and it is not uncommon, for example, for an Employer to have an occupational health professional working within a plant.

214 The question of the suitability of location is important because of the diverse and often remote nature of workplaces in many of the industries where testing might be called for. Plants often run 24 hours per day. Hospitals and labs, particularly in remote areas, often have limited hours.

215 In one of the *Fording Coal* application cases, an employee refused to provide a urine sample in-plant, offering instead to do so through his own doctor. The policy in question gave the company the option of an on-site or off-site test. He was disciplined for insubordination and grieved. The arbitrator upheld the Employer's right to discipline in these circumstances but varied the penalty.

Fording Coal Ltd. v. U.S.W.A., Local 7884 (2002), 112 L.A.C. (4th) 141 (B.C. Arb.) *(Glass)*

216 Arbitrator Hope's *Fording Policy* decision had already upheld the policy itself, and the Union agreed that the circumstances justified the demand for a test under that policy. The case thus focused on the testing process itself. Unlike the situation at hand, all the Employer sought was a urine sample for an express testing process. It involved giving a sample, to be split into two containers. One was tested right away using a dip stick test. If it showed negative, the grievor would return to work and the second vial would be sealed and sent for testing for contaminants. If it showed positive, the grievor would be suspended and the samples sent to a lab for confirmation testing.

217 The grievor objected to a company employee administering the test at the plant. Rather, he wanted to do it through his doctor and in fact was able to get a local lab to take a sample. The questions were described at page 173. Given the company's express testing procedure, could the company, under threat of discipline; (a) force an employee to submit to urine collection on-site, by a company representative; and (b) force an employee to authorize (i.e. sign a consent) the company's choice [of tester] for testing an employee's bodily fluid?

218 The Employer's argued that once it was decided (or in that case agreed), that the request to test was valid, the employee's right to privacy was "effectively waived." This argument was described at page 174:

> Once that determination is made, all that is left is the procedure to be followed in collecting the sample and getting the test done, both of which must be carried out in a scientifically reliable manner. The company is entitled to establish procedures for collection and testing that will offer reliable results.

219 The Employer in that case referred to the following quotation from:

> *Canadian Pacific Railway v. C.A.W., Local 101* (1991), 22 L.A.C. (4th) 164 (Can. Arb.) (M. Picher) at 167
>
> ... it is not appropriate, as a general matter, to expect an employer such as the company, with national operations and its own extensive medical staff and services, to negotiate a testing process acceptable to the individual employee on a case-by-case basis.

220 After a detailed discussion of the practical problems associated with an employee chosen tester arrangement, the arbitrator upheld the company's right to designate the tester and thus the location of the test. In his conclusions he set out a framework for analysis that I find practical and sensible. He rejected the employer's argument that privacy concerns end once the right to test is established. He held, at pages 187-189:

It is established by the Hope Policy Award that privacy rights at an open pit mine site are outweighed by the employer's interests particularly in relation to safety. These rights are not to be overridden completely, but they are to be infringed to the extent necessary to permit effective testing for drug and alcohol impairment.

If the level of infringement is set too low, the testing may be ineffective. By ineffective, I mean that it may not be received as reliable evidence of drug impairment for a number of reasons. These may include:

(a) Mistakes in collection by an untrained or inexperienced collector;

(b) The opportunity for adulteration by a donor;

(c) Procedural errors;

(d) Related to the above, chain of custody mistakes.

If the level of infringement is set too high, then the collection and testing procedure may be invalidated as too severe an infringement of privacy rights, going beyond what is necessary to achieve reliable collection and testing.

. . .

In examining applications of the employer's policy, including the collection and testing process, there continues to be a need for a balancing of interests. This is not just needed for the purpose of determining the validity of a drug-testing policy in the first place.

The balancing of interests operates in a sense on a sliding scale. The extent of infringement of privacy rights is to be weighed against the legitimate interests of the employer, in particular in relation to safety. It will take a higher level of expense and inconvenience and/or a higher level of degradation of the collection and testing procedures, to outweigh a more egregious or severe invasion of privacy. Similarly, it will take a lower level of expense or degradation of the procedures to outweigh a lesser infringement of privacy rights. There is no absolute standard in either case.

Applying the sliding scale of competing interests in this case, what is the result?

Mandatory drug testing at the very minimum requires the provision of a urine sample in controlled conditions, where the employer bears the burden of establishing the reliability of the collection, transport and testing of the specimen. As I have stated earlier, this rules out employees having the right out to choose their own physician or physician's designate as a collector or tester.

. . .

> I agree with the reasoning in CP Rail and C.A.W., Loc. 101 (supra). It is unreasonable to allow for ad hoc personal choices for the employee. I read the Hope Policy Award as establishing a base level of privacy infringement, recognizing the right of the employer to set up clear protocols and workable contractual commitments with respect to collection and testing. If the Hope Policy Award does not go that far, I hereby find that this is indeed a minimum base for testing and for collection procedures. Without it there is no effective policy.

221 He then turned specifically to whether having an employee do the testing involved a greater infringement of privacy rights then was the case with an outside contractor and if so, did the advantages of mine site collection justify any such increased incursion into privacy rights. He concluded that (at p. 190):

> On the whole, collection and testing by another employee is a slightly higher level of infringement of privacy rights, than collection and testing by an outside contractor.

222 However, the practical advantages of this made the added intrusion worthwhile because it allowed an immediate return to work, avoided a need for escorts, reduced time lapses and overcame the difficulties due to the hours of operation of labs etc. He said also at p. 191:

> It should be recalled that both in the case of LCO collection and outside contractor collection, the confirmation portion of the specimen goes anyway to a designated laboratory from which detailed results and findings will be reported to a medical review officer appointed by the employer, and then to the employer. It should also be borne in mind that the fact of a drug test being administered will generally be known amongst the donor employee's fellow workers, regardless of mine site collection or off-site collection of the sample.

223 He found the demand that the employee provide a urine sample at the plant reasonable, even after balancing the employee's privacy interests, and therefore concluded that a refusal amounted to insubordination. In reducing the 3 day suspension to a written reprimand he took into account that the policy, at the time of enforcement, was only 3 days old and said:

> I do not intend to undermine the "work now grieve later" rule, but as the instruction given raised a new and quite sensitive question of personal privacy, it was somewhat more excusable for the grievor to make a stand on the basis of what he (wrongly) thought were his privacy rights.

224 The issue of location was also addressed, under this Weyerhaeuser policy, in Arbitrator Bruce's decision in the *Scott McKay* grievance, (*supra*). The grievor there was offered the option of taking the test at various locations in the mill, or at a local hotel. He decided "it would be more

humiliating if he went to one of the local hotels and was seen by someone who knew him" (para. 10). He was concerned as well that, as he was an active coach and referee in the community, news of his taking alcohol and drug tests might hurt his reputation. The tests were ultimately taken in a kitchen at the mill site. The results were negative. On the location the arbitrator said:

> Further, the evidence is that the Employer acted reasonably and fairly in the actual administration of the test. The Grievor had Union representatives available to him and the Employer offered the Grievor the choice of various locations where the test could be taken. Although the kitchen where the Grievor chose to have the test taken was viewable through windows from outside, it must be seen as relatively acceptable location for the test. No doubt some improvements might be made in terms of blinds on the window which would allow for greater privacy if it is to be used for testing in the future.

225 In my view testing through a recognized laboratory employing professionals subject to licensure, or through a similar professional employee working within an employer's occupational health and safety department would always be the best solution and the solution best equipped to protect an employee's privacy. However, Canada's diverse worksites and the need for 24 hour a day availability does not make this a practical solution. I accept that there are situations where a hotel room may be a better option than the use of unsuitable locations within a plant, and I am not inclined to rule out the use of the hotel rooms entirely. Indeed, the Super 8 room used for Mr. Brown appears to have been adequate.

226 I do find, however, with some familiarity with available accommodation in Edson, that the hotel chosen for Ms. Roberto's test was totally inappropriate. No one seriously tried to defend it as a suitable choice. I do not fault the tester for the choice; he was simply retained for $40 dollars per test to be on call to carry out testing. Rather, given the commitments to dignity and privacy in the policy and in the introductory sessions, I find incredible that such a significant decision was left to the last minute and then delegated with no apparent oversight.

227 Perhaps it is old fashioned but some people still do draw conclusions from seeing a woman taken by men into certain classes of hotel without baggage in the middle of the day. It is entirely understandable that Ms. Roberto was, as she says, apprehensive and even horrified by what she was being subjected to.

228 The Employer's policy sets its own standards and substantial compliance with its terms are, in my view, a precondition to a reasonable application of the policy. In general terms the policy says:

> All testing and test results are confidential and measures are taken to ensure the privacy and dignity of employees involved in the testing process.

229 I read *are* taken to mean *must* be taken. It sets out detailed testing protocols.

230 Under Section V — Urine Controlled Substance Testing Procedures it provides, in part, and under the heading "Collection Procedures:"

> We have adopted extensive procedures for assuring the integrity of the collection and testing process. The safeguards in place are rigorous and provide several layers of protection to employees by ensuring against the possibility of a switched or mislabeled specimen. Should you ever have a question about any collection procedures, contact your supervisor or ask to speak to the Company's substance abuse testing program administrator.
>
> > A. The Collection Site Person (CSP) will secure the collection area against unauthorized access. The CSP must add a bluing agent to the water in the toilet bowl and reservoir and remove any materials that could be used for adulterating a sample at the time of collection. The CSP will "seal" any water faucets in the collection area so that they cannot be used during the collection process. In cases where the above is not applicable, the CSP will take whatever steps are necessary to ensure the integrity of the collection process.

231 I find that nothing was done with the taps and no bluing agent was used. No explanation was given that would suggest this was a "not applicable" situation; the tester simply chose not to follow the procedure. He said in his evidence that he didn't see the point to sealing the taps. He went on to say "there is a fair amount of trust in the system. They are not going to tamper with the sample. I've no reason to believe they would or did."

232 The difficulty with this attitude, which is lax vis-à-vis the employee is that it suggests a similar laxity in those conditions designed to protect the employee. It seriously calls into question the rigour of the training he says he received from Denning.

233 The policy goes on to say:

> > B. The CSP is expected to treat the employee with respect and preserve, as much as possible, the privacy, modesty and dignity of the employee throughout the collection process.

234 The tester, along with three other men, were in the small hotel room throughout Ms. Roberto's tests, and in particular while she was in the toilet trying to provide a sample. I cannot accept that as "preserving her privacy, modesty or dignity." It in fact caused her immediate and long term distress.

. . .

> > D. The CSP will ask the employee to wash his or her hands and then will give the employee the collection container and direct him or her to the bathroom. The CSP will

> advise the employee that a specimen of at least 45 ml. is required. After the sample has been provided and the employee has exited the washroom (or other area of collection) the CSP will take the temperature of the urine and must do so within four minutes.

235 Ms. Roberto was not told to wash her hands. The Union witness testified that the tester did not take the specimen's temperature but I accept his evidence that the containers have temperature indicators built into them so as to make any further test unnecessary.

236 Under the heading Certified Laboratory the policy says:

> The labs that are used by for our testing purposes must comply with and have been approved by, the American Department of Health and Human Services (DHHS) under their National Laboratory Certification Program which was set up in 1988. The purpose of this program was to ensure that only laboratories with the highest standards of accuracy would be certified for drug testing. At present, there are only two laboratories certified to this standard in Canada.

237 The tests were not sent to one of the two Canadian laboratories. Rather they were couriered to a U.S. lab, which reduces the employee's ability to rely on any protections that might be afforded by accessible Canadian licensure.

238 Section VI — Breath Alcohol Testing Procedure provides that.

> Alcohol testing may only be carried out in privacy where the results of the test can neither be seen or heard by persons other than those involved in the testing process.
>
> . . .
>
> No one either than the BAT and the employee are allowed to be present during the test unless the employee is accompanied by a predetermined employee representative who can verify his or her identity a such.
>
> . . .
>
> The confirmation test is considered to be the final result even if it is lower than the screening test. The employee will receive a copy of the test results at the time that the test is taken and the results will be communicated to the Company in a confidential manner.

239 No attention seems to have been paid to this provision in Ms. Roberto's case, although Mr. Brown was tested in private.

240 When a breath test is taken, the employee is to be given a form with the machine's reading. In Mr. Brown's case, the tester could not get the machine to print the result. This did not concern him too much since it was a zero result. He just hand wrote the result on Mr. Brown's copy of the

form. However, when he sent the form in to Denning he attached what purported to be a test record printed by the machine showing the time as 11:56. He explained that, after Mr. Brown had gone, he was able to get the machine to print up a slip since it stored test records in memory. However, he did nothing on the form to show this was a record printed after the fact. Rather, it is sent in as the official record as if it had been completed at the time. The tester simply took a "no harm's done" view of the matter.

241 Once again this calls into question the degree of training and oversight provided for this testing. I found the Employer's policy was not implemented either reasonably or according to its own terms in either of these cases.

The option to refuse

242 The Employer here maintains it was entitled to test and, while admitting some unfortunate aspects in respect to Ms. Roberto's test experience, defends the reasonableness of its testing process. It resists liability for damages. This leads me to ask, before turning to damages, whether the employees involved had any other credible option but to participate in the process as directed by the Employer. In Ms. Roberto's case she asked at every turn "what happens if I refuse?" Mr. Brown said, albeit belatedly, that he participated "under protest."

243 The policy set out above treats any refusal in the same way as a positive test. It makes no provision to allow the employee to challenge the validity of the decision to test, or any step in the test process that is either unreasonable or fails to comply with the Employer's own policy.

244 Schedule A attached to the policy, which Ms. Roberto did not sign because the standard had not even been sent out, but which all employees were required to sign, says in part:

> I also understand that if I test positive for a controlled substance or refuse to submit to a test (as defined in the standard) that I will be immediately removed from duty and, subject to my execution of a Commencement of/Return to Duty Agreement as set out in Schedule "B", I will be referred to a Substance Abuse Professional (SAP) for an assessment. I understand and agree that I may refuse to sign the Commencement of/Return to Duty Agreement or see a Substance Abuse Professional but that refusing to do either will have the same effect as resigning any position without further compensation from the Company.

245 One option the employee thus has is to refuse to participate. However, if they do so they are immediately suspended from work and must submit to an assessment by a Substance Abuse Professional. That may be appropriate where the refusal is indicative of avoiding a drug test, but it is, itself, an invasion of privacy and in my view unjustified where a valid objection is based on an unreasonable demand, or on a non-compliant or unreasonable testing procedure. Refusal to see a Substance Abuse Professional and provide the information that person would demand to complete an assessment would involve a deemed resignation.

246 Even if an objecting employee took that route and attended before a Substance Abuse Professional, that employee would still not be reinstated until they signed a "Commencement of/ Return to Duty Agreement." They would have to agree with the following terms:

> **Commencement of/Return to Duty Agreement**
>
> My signature below confirms that I have read and agree to the terms set out in this agreement.
>
> 1. I acknowledge that I have tested positive for a controlled substance or have refused to submit to a test as defined by Weyerhaeuser's Health and Safety Standard — Substance Abuse (the "Standard") and that as a condition of my employment or contract with Weyerhaeuser (the "Company") I am executing this Commencement of/Return to Duty Agreement and promise to abide by its terms.
>
> 2. I agree to meet with a Substance Abuse Professional (SAP) as directed by the Company and to adhere to any conditions of treatment determined by the SAP.
>
> 3. I acknowledge and agree that I may, subject to the specific circumstances, be terminated immediately, without further notice or compensation if I:
>
> a) engage in Prohibited Conduct within two years of the date indicated below; or
>
> b) fail to meet with the SAP as directed; or
>
> c) do not comply with the treatment program determined by the SAP; or
>
> d) refuse to test for controlled substances as set out in the Standard or,
>
> e) refuse to test for controlled substances as determined necessary by the SAP.
>
> 4. I understand that I will not be considered for reinstatement until the Company has received written confirmation from the SAP that I am fit for duty.
>
> 5. I give permission to the Company to contact the SAP and to inquire as to my treatment with regard to the length of time that I will be off work (if any) and whether or not I am or have complied with my treatment.

247 In my view 2, 3(a)(d)(e) and 5 are all unacceptable invasions of an employee's rights where their refusal to test is based not on hiding their own drug use but on the Employer's own unreasonable conduct.

248 In ordinary matters of workplace administration an employee's obligation, on pain of discipline for insubordination, is summed up in the "work first — grieve later" rule, normally described using the following quotation:

> ... an industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And some one must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.
>
> *Ford Motor Co.*, 3 L.A.C. 779 (Shulman) quoted with approval in *U.S.W.A. v. Lake Ontario Steel Co.* (1968), 19 L.A.C. 103 (Ont. Arb. Bd.)) (Weiler) at 108.

249 There are exceptions to this rule. As Brown and Beattie, *Canadian Labour Arbitration*, note at 7:3610:

> "... arbitrators have consistently held that employees are not bound by the principle when adequate redress cannot be secured through the grievance and arbitration process.

250 The *Fording* policy award (*supra*) suggests that this is one of those exceptions:

> 17 In terms of the application of the testing provisions of the Policy, where employees refuse to submit to testing, employers are required, as a condition of imposing discipline, to prove facts in each case that support a finding that they had just cause to require testing. Despite the Policy, employees retain the right recognized by Arbitrator Picher on p. 385 "[to] decline to undergo a drug or alcohol test where it is manifest that there are no reasonable grounds to do so." It is important to recognize at the outset that the issue of just cause will arise in every case.

251 Where what the Employer purports to do involves an invasion of fundamental privacy rights, the exception to the work (or obey) now grieve later rule should apply. However, the efficacy of such an exception arises as a defense to discipline for insubordination, which rarely involves termination or an indefinite suspension. Here, while the company has reserved its disciplinary options in the policy, it has in effect tried to avoid its use by obliging the employee to go through the Substance Abuse Counselor or be deemed to have resigned. In so doing they have made refusal such an unpalatable option that the employee is left little choice but to go along with the testing or face an extended period without work or pay. The Employer here cannot say to an employee with any credibility - you have a reasonable remedy if we force you to test when it is unreasonable for us to do so, or when the testing process we use does not meet a standard of reasonableness or even

the standards we have set for ourselves. In my view this supports the conclusion that damages are the only viable remedy when such a breach occurs.

The question of damages

252 The Employer concedes that an arbitrator under a collective agreement may award damages but argues the circumstances where they are appropriate are limited and do not apply in this case. It begins by referring to:

> *Ontario Hydro v. C.U.P.E., Local 1000* (1990), 16 L.A.C. (4th) 264 (Ont. Arb.) (Kates)

253 That case involved an analysis of the impact the then recent Supreme Court of Canada case in *Vorvis* had on the ability of arbitrators to award damages.

> *Vorvis v. Insurance Corp. of British Columbia* (1989), 58 D.L.R. (4th) 193, [1989] 1 S.C.R. 1085 (S.C.C.)

254 Vorvis was a common law wrongful dismissal action in which the Plaintiff sought aggravated and punitive damages for mental suffering and anguish as a result of the Employer's allegedly punitive treatment in carrying out the discharge. The arbitrator in *Ontario Hydro* noted that *Vorvis* clarified three significant aspects of the right, at common law, to claim such damages. First, such a claim is jurisdictionally available at common law without an express contract clause to that effect. Second, there is a distinction between aggravated and punitive damages, the former being used to compensate and the latter to deter. The two types of damages are distinct from one another and ought not be blended into one concept. That distinction is set out in *Vorvis* at page 202:

> Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

255 The third point concerned the circumstances when such an award might be appropriate which arbitrator Kates described as (at p. 269) raising:

> ... an almost insurmountable obstacle in the way of awarding either aggravated or punitive damages in wrongful dismissal cases.

256 They described the test, again at p. 269 as follows:

> ... the impugned employer actions that triggered the request for these extraordinary remedies on account of the victim's mental suffering would have to be capable of being made the subject-matter of "an independent cause of action." That is to say, it will not suffice for the aggrieved employee to rely simply on the principal cause of action, namely, breach of "the reasonable notice period" in support of such claim for aggravated and punitive damages. Rather, in order to succeed the aggrieved employee would have to demonstrate that the untoward employer action that resulted in the aggrieved employee's mental suffering is capable of being clothed in a separate and identifiable (i.e., independent) cause of action apart from the principal cause of action.

257 It suggested that such claims for relief would be restricted to the rarest of circumstances, a point the Employer in this case emphasizes. This is not however, a case of dismissal.

258 In the Supreme Court's rationale for such a restrictive approach it emphasized the fact that an employee's loss when employment is terminated is restricted to damages for lost notice. However, it excepted from this, in parenthesis "in the absence of collective agreements which involve consideration of the modern labour law regime." This comment led the arbitrator in *Ontario Hydro* to analyze whether the just cause provision in collective agreements freed those seeking aggravated or punitive damages of the need to establish a independent actionable course of conduct. He concluded it did not. Translating this requirement to a collective agreement claim, the arbitrator suggested aggravated or punitive damages would not arise from a lack of just cause alone, but might from the breach for example, of a clause guaranteeing union representation where its absence aggravated the employee's grief or where the dismissal violated an anti-discrimination clause. This conclusion is summed up at p. 274 of *Ontario Hydro*:

> What is the important and overriding condition to awarding such extraordinary relief is whether the employer failed to follow the procedures prescribed in the collective agreement in effecting the discharge or compounded the mistaken decision to discharge by violating another substantive provision of the collective agreement that would warrant, apart from the just cause provision, a separate grievance complaint. Accordingly, where the collective agreement mandatorily prescribes conditions under which discipline may be taken or proscribes employer conduct that in itself would constitute a violation of the collective agreement then the employer will thereby render itself liable to incur these extraordinary remedies. In other words where the employer either could have avoided or alleviated the victim's mental suffering or has aggravated the suffering that has already been inflicted as a result of its omission to adhere to the collective agreement then the employer may very well be vulnerable to a claim for extraordinary relief.

259 The board restricted the notion of independent actionable wrong to wrongs arising out of the collective agreement (since the case was decided long before *Weber*, see: below) saying at p. 276:

> Nor do we accept the trade union's alternative argument that the breach to Mr. Winnitoy's personal reputation in his community (in the light of the employer's unsubstantiated allegations) would constitute any such independent cause of action. Firstly, we are of the opinion that the independent cause of action that is referred to by the S.C.C. must mean, in the collective bargaining context, an infraction of the collective agreement that gives rise to a grievance for which we would be jurisdictionally covered. We do not hold that the S.C.C. intended that arbitration boards should be seized of a "defamation" case as an adjunct to our remedial powers in directing aggravated and punitive damages. In any event, nothing we say herein is intended to restrict Mr. Winnitoy from pursuing such relief on those grounds by commencing an appropriate civil action.

260 Arbitrator Knopf awarded damages for mental distress to an employee who suffered discrimination due to her race and country of origin.

> *Clarke Institute of Psychiatry v. O.N.A.* (2001), 95 L.A.C. (4th) 154 (Ont. Arb.)

261 The case is of assistance in terms of the approach to damages, but not in terms of their appropriateness under a collective agreement alone. In Ontario, where the events took place, arbitrators are given the specific statutory authority to apply the Ontario Human Rights legislation and the damage award was made expressly under the authority of section 40(1) of the Ontario Human Rights Code. The two complainants in that case were each awarded $6,000 for their mental anguish and other losses.

262 In a British Columbia's decision the arbitrator awarded damages for a breach of the collective agreement's anti-discrimination provision and the tort of intentional infliction of emotional suffering. Addressing her authority over the tort aspect of the case, arbitrator McEwen said, at p. 273:

> In support of its second head of damages, that flowing from the tort of the intentional infliction of emotional suffering, the Union cited two cases, namely Re Tyee Village Hotel and Hotel, Restaurant & Culinary Employees & Bartenders Union, Loc. 40 (Prudhomme) (1999), 81 L.A.C. (4th) 365 (Albertini), and Re CVC Services and I.W.A.-Canada, Loc. 1-71 (Jackson) (1997), 65 L.A.C. (4th) 54 (Lanyon). Those cases stand for the propositions (1) that arbitrators have jurisdiction to deal with the tort (see *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.)), and (2) that the elements required to prove the tort are: (a) flagrant and extreme conduct; (b) it is reasonably foreseeable that the conduct would cause distress or suffering; and (c) the conduct must have caused actual harm.
>
> *Bear Creek Lodge v. H.E.U.* (2002), 106 L.A.C. (4th) 254 (B.C. Arb.) (McEwen)

263 She addressed the appropriate remedy at p. 288:

> What remedy is appropriate in the circumstances? Consistent with the approach taken by Arbitrator Lanyon in the CVC Services case, I have determined that the Employer is liable for damages representing (a) as compensation for the personal harassment against her, an amount representing the Grievor's lost wages from her last day of employment (October 1, 2001) until the date of this Award, and (b) compensation in the amount of a further six month's pay (subject to a deduction for mitigation in the event that she receives employment income in the interim) for the subject tort.

264 I have also considered the general principles of damages, and their application in arbitration, usefully set out in:

> *Canada Safeway Ltd. v. U.F.C.W., Locals 401, 373A & 312A*, [1999] A.G.A.A. No. 88 (Alta. Arb.) (Taylor)

265 The Supreme Court of Canada's decision:

> *Weber v. Ontario Hydro* (1995), 125 D.L.R. (4th) 583 (S.C.C.)

makes it clear that all issues properly arising out of the collective agreement fall within the exclusive jurisdiction of arbitration. In my view all the issues in this case fall within that category. Everything that happened was as a result of the employment relationship and the exercise or purported exercise of rights that are rooted in the employment relationship and the collective agreement, including of course the management rights article said to justify this policy.

266 I find this is a case where damages are appropriate. In Mr. Brown's case, I find his damages are limited. He was taken for testing from work, not home, and the test site circumstances were far less offensive than those to which Ms. Roberto was subjected. While Mr. Brown feels that his reputation may have been hurt there is very little evidence of that beyond his having to explain his situation to his daughters. I have a concern about the way the company dealt with his car which, in the absence of evidence of impairment, they had no business touching at all. He was, however, subjected to testing in circumstances that were not appropriately justified under the policy, and that were carried out in a way that in several respects were unreasonable. I direct that he be awarded $500.00 for the personal indignities and mental suffering to which he was unjustifiably exposed.

267 I find Ms. Roberto's damages were far more profound. In my view the cumulative effect of the way she was treated was deplorable. Her feelings at the time; of being treated as if she was being "taken away by the police" were not far off the mark. She was at home not at work. I see no justification for her being picked up and escorted in the way she was when a simple direction to report at a location was all that was needed and was what the policy allowed. The comments made to Mr. DeVuyst suggest to me the company was bound and determined to have Ms. Roberto tested and their determination to exercise what they perceived as their authority seems to have numbed

any sensitivity to her dignity and her right to liberty. They subjected her to testing conducted on their behalf with inadequate oversight.

268 I accept Ms. Roberto's description of what took place at the hotel. In my view it was a wholly unsuitable location. No one in authority had exercised any judgment in making these arrangements. Ms. Roberto's description of feeling totally distraught sitting in the washroom with four men on the other side of the door able to hear everything going on was totally understandable. Despite the comforting words of the policy, nothing at all was done to protect her privacy and dignity. Company representatives were present and could very easily have said "this is not appropriate" but sat by and did nothing. Mr. DeVuyst checked for compliance with the policy but the company representative appears to have been unconcerned.

269 I accept Ms. Roberto's own evidence and her physician's evidence that this incident was the primary cause of her anxiety and stress following the event and the reason why she was unable to work for an extended period of time. I do so accepting that she had some prior medical conditions but this had not prevented her from productive and meritorious employment up to that point. After the incident Ms. Roberto sought assistance from the employee assistance program as well as from her personal physician. She attended for counseling with a psychologist on eight occurrences up to August 7, 2003 and then every two weeks from then to September 25th. She returned to work on August 5th and after taking holidays went back to her regular shift on September 17th. I find that she took appropriate steps to mitigate the effects of the incident.

270 I award Ms. Roberto damages for these indignities and her mental suffering in the sum of $10,000.00. In addition, she will be made whole for the monies she lost from being off work. The Employer may deduct from this any monies Ms. Roberto received from disability insurance plans.

271 In both cases all records of the grievors' being tested and the results of those tests will be removed from the grievors' files. For these reasons I find these tests were not reasonably justified and were in any event carried out in a way that was unreasonable and contrary to the Employer's own, unilaterally introduced, policies. They violated each employee's right to privacy. I allow both grievances.

Tab 23

paras 43-44

1992 CarswellBC 257
Supreme Court of Canada

Renaud v. Central Okanagan School District No. 23

1992 CarswellBC 257, 1992 CarswellBC 910, [1992] 2 S.C.R. 970, [1992] 6 W.W.R. 193, [1992] S.C.J. No. 75, 13 B.C.A.C. 245, 141 N.R. 185, 16 C.H.R.R. D/425, 24 W.A.C. 245, 35 A.C.W.S. (3d) 841, 71 B.C.L.R. (2d) 145, 92 C.L.L.C. 17,032, 95 D.L.R. (4th) 577, J.E. 92-1483, EYB 1992-67039

LARRY S. RENAUD v. BOARD OF SCHOOL TRUSTEES, SCHOOL DISTRICT NO. 23 (CENTRAL OKANAGAN), CANADIAN UNION OF PUBLIC EMPLOYEES, LOCAL 523 and BRITISH COLUMBIA COUNCIL OF HUMAN RIGHTS; ONTARIO HUMAN RIGHTS COMMISSION, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, CANADIAN LABOUR CONGRESS, DISABLED PEOPLE FOR EMPLOYMENT EQUITY and PERSONS UNITED FOR SELF HELP IN ONTARIO (P.U.S.H.) ONTARIO (Intervenors)

La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin and Stevenson * JJ.

Heard: March 24, 1992
Judgment: September 24, 1992
Docket: Doc. 21682

* Stevenson J. took no part in the judgment.

Counsel: *Karen Scott* and *Henry S. Brown, Q.C.*, for appellant.
Robert E. Groves, for respondent Board of School Trustees, School District No. 23 (Central Okanagan).
John Baigent, for respondent Canadian Union of Public Employees, Local 523.
Janet E. Minor and *M. David Lepofsky*, the intervenor Ontario Human Rights Commission.
Karnick Doukmetzian and *Gerald Chipeur*, for intervenor Seventh-day Adventist Church in Canada.
Jeffrey Sack, Q.C., and *Steven Barrett*, for intervenor Canadian Labour Congress.
Anne M. Molloy and *Janet L. Budgell*, for intervenors Disabled People for Employment Equity and Persons United for Self Help in Ontario (P.U.S.H.) Ontario.

Subject: Labour; Employment; Constitutional

Headnote

Human Rights --- What constitutes discrimination — Religion — Work on religious holiday

Labour Law --- Collective agreement — Discrimination

Civil liberties and human rights — Equality rights — Discrimination on basis of religion — Religious beliefs preventing employee from working scheduled shifts — Union threatening grievance because employer's proposed accommodation breaching collective agreement — Employer dismissing employee — Employee filing complaint against employer and union under s. 8 of Human Rights Act — Employee discharging duty to assist in securing accommodation — Collective agreement being subject to Human Rights Act — Effect of proposed accommodation on collective agreement being minor — Employer and union breaching duty to accommodate employee.

Employment — Duties and liability of employer — Statutory duties — Religious beliefs preventing employee from working scheduled shifts — Union threatening grievance because employer's proposed accommodation breaching collective agreement — Employer dismissing employee — Employee filing complaint against employer and union under s. 8 of Human Rights Act — Employee discharging duty to assist in securing accommodation — Collective agreement being subject to Human Rights Act — Effect of proposed accommodation on collective agreement being minor — Employer and union breaching duty to accommodate employee.

Employment — Rights of employee — Religious beliefs preventing employee from working scheduled shifts — Union threatening grievance because employer's proposed accommodation breaching collective agreement — Employer dismissing employee — Employee filing complaint against employer and union under s. 8 of Human Rights Act — Employee discharging duty to assist in securing accommodation — Collective agreement being subject to Human Rights Act — Effect of proposed accommodation on collective agreement being minor — Employer and union breaching duty to accommodate employee.

Labour law — Collective agreements — Nature and effect — Religious beliefs preventing employee from working scheduled shifts — Union threatening grievance because employer's proposed accommodation breaching collective agreement — Employer dismissing employee — Employee filing complaint against employer and union under s. 8 of Human Rights Act — Employee discharging duty to assist in securing accommodation — Collective agreement

being subject to Human Rights Act — Effect of proposed accommodation on collective agreement being minor — Employer and union breaching duty to accommodate employee.

Labour law — Unions — Duties and liability — Religious beliefs preventing employee from working scheduled shifts — Union threatening grievance because employer's proposed accommodation breaching collective agreement — Employer dismissing employee — Employee filing complaint against employer and union under s. 8 of Human Rights Act — Employee discharging duty to assist in securing accommodation — Collective agreement being subject to Human Rights Act — Effect of proposed accommodation on collective agreement being minor — Employer and union breaching duty to accommodate employee.

Employment — Duties and liability of employee — Religious beliefs preventing employee from working scheduled shifts — Union threatening grievance because employer's proposed accommodation breaching collective agreement — Employer dismissing employee — Employee filing complaint against employer and union under s. 8 of Human Rights Act — Employee discharging duty to assist in securing accommodation — Collective agreement being subject to Human Rights Act — Effect of proposed accommodation on collective agreement being minor — Employer and union breaching duty to accommodate employee.

The employee worked as a custodian for the school board and was a member of the union. His work schedule involved an afternoon shift from 3:00 p.m. until 11:00 p.m. on Friday. However, his religion forbade him to work from sundown Friday until sundown Saturday. He asked the school board to accommodate his inability to work the full Friday shift. The board concluded that the only practical alternative was to create a Sunday to Thursday shift for him. The union threatened to file a grievance if that proposal was not rescinded because the proposal violated the collective agreement. After further unsuccessful attempts by the board to accommodate, it terminated the employee's employment. The employee filed a complaint pursuant to the British Columbia *Human Rights Act* against the school board and the union. The member designate who investigated the complaints determined that the requirement that the employee work on Friday nights was adverse effect discrimination, that it was not a bona fide occupational requirement, that the union and the school board both breached their duty to accommodate the employee, and that they were both equally liable under s. 8 of the Act. The school board and the union each applied to quash the member designate's decision for errors of law on the face of the record. The Supreme Court of British Columbia granted the applications on the ground that once a bona fide occupational requirement was established there was no duty to accommodate. When the British Columbia Court of Appeal dismissed his appeal, the employee appealed to the Supreme Court of Canada.

Held:

Appeal allowed.

There is a duty to accommodate notwithstanding the presence of a bona fide occupational requirement in cases of adverse effect discrimination. The duty of an employer to accommodate the religious beliefs and practices of employees requires the employer to take reasonable measures short of undue hardship. More than mere negligible effort is required. The words "reasonable" and "short of undue hardship" are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact. The concern for the impact on other employees is a factor to be considered. However, the employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor inconvenience is the price of religious freedom in a multicultural society. Moreover, objections based on attitudes inconsistent with human rights are irrelevant. This category includes objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. Otherwise an employer could effectively contract out of human rights with its employees. Here, there was no evidence that the rights of other employees were likely to be affected by the proposed accommodation. There was no evidence that any other individual employee objected to the adjustment of his or her schedule to effect the accommodation.

A collective agreement is subject to the *Human Rights Act*. The Act prohibits adverse effect discrimination no less than direct discrimination. In both instances private arrangements, whether by contract or collective agreement, must give way to the requirements of the statute. In the case of unjustified direct discrimination, the whole provision is invalid because its purpose as well as effect is to discriminate on a prohibited ground. A collective agreement provision which is neutral on its face but operates in a discriminatory fashion against the employee is valid in its general application. However, the Act requires that an employee be accommodated by exempting that employee from its provisions to the extent that it no longer discriminates against him or her on the basis of religion. Otherwise the employer and the union could contract out of the Act's requirements. This they cannot do. However, the effect of a collective agreement is relevant in assessing the degree of hardship occasioned by interference with its terms. Substantial departure may constitute undue interference with the employer's business. Here the sole impact of the threatened grievance was the cost of defending it and that did not constitute undue hardship. The only other alleged effect of the proposed accommodation was the effect on other employees, for which there was no evidence.

Section 8 of the *Human Rights Act* prohibits both direct and adverse effect discrimination against a person respecting employment. As a union is a person under the Act, a union which causes or contributes to the discriminatory effect incurs liability. To justify the discrimination, the union must discharge its duty to accommodate. A union may become a party to discrimination in two ways. First, it may participate in the formulation of the work rule, such as one contained in a collective agreement, that has the discriminatory effect. Second, a union may impede the reasonable efforts of an employer to accommodate. The primary concern respecting the impact of a union's accommodating measures is the effect on other employees. Any significant interference with others' rights will ordinarily justify a union's refusal to consent to a proposed measure. This is a test of undue hardship grounded on the reasonableness of the proposed measures. A union shares a joint responsibility with the employer to seek to accommodate the employee, although the employer can be expected to initiate the process. The union's duty only arises when its involvement is required to make accommodation possible and no other alternative resolution can reasonably be found. Here the union had an original duty to accommodate. By incorporating the work schedule in the collective agreement and insisting on adherence to it, the union contributed to the formation and continuation of the discrimination. The school board's suggestion was the most reasonable solution to the problem. The union failed in its duty to cooperate with the board in arriving at a reasonable solution.

Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. This does not mean the complainant has a duty to originate a solution. When an employer has initiated a reasonable proposal that would fulfil the duty to accommodate, the complainant has a duty to facilitate its implementation. Otherwise the complaint will be dismissed. Here the employee fully discharged his duty.

Table of Authorities

Cases considered:

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Bhinder v. Canadian National Railway, [1985] 2 S.C.R. 561, 9 C.C.E.L. 135, 17 Admin. L.R. 111, 86 C.L.L.C. 17,003, 7 C.H.R.R. D/3093, 23 D.L.R. (4th) 481, 63 N.R. 185 — *considered*

Central Alberta Dairy Pool v. Alberta (Human Rights Commission), [1990] 2 S.C.R. 489, [1990] 6 W.W.R. 193, 76 Alta. L.R. (2d) 97, 33 C.C.E.L. 1, 72 D.L.R. (4th) 417, 90 C.L.L.C. 17,025, 113 N.R. 161, 12 C.H.R.R. D/417, 111 A.R. 241 — *applied*

Gohm v. Domtar Inc. (1992), 39 C.C.E.L. 213, 89 D.L.R. (4th) 305, *(*sub nom. *O.P.E.I.U., Local 267 v. Domtar Inc.)* 92 C.L.L.C. 17,015, 8 O.R. (3d) 65 (Div. Ct.) — *considered*

Insurance Corp. of British Columbia v. Heerspink, [1982] 2 S.C.R. 145, [1983] 1 W.W.R. 137, 39 B.C.L.R. 145, 137 D.L.R. (3d) 219, 82 C.L.L.C. 17,014, [1982] I.L.R. 1-1555, 43 N.R. 168, 3 C.H.R.R. D/1163 — *applied*

Ontario (Human Rights Commission) v. Etobicoke (Borough), [1982] 1 S.C.R. 202, 40 N.R. 159, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 3 C.H.R.R. D/781 — *applied*

Ontario (Human Rights Commission) v. Simpsons-Sears Ltd., [1985] 2 S.C.R. 536, 9 C.C.E.L. 185, 17 Admin. L.R. 89, 86 C.L.L.C. 17,002, 64 N.R. 161, 7 C.H.R.R. D/3102, 23 D.L.R. (4th) 321, 12 O.A.C. 241 — *applied*

Trans World Airlines Inc. v. Hardison, 432 U.S. 63, 53 L. Ed. 2d 113, 97 S. Ct. 2264 (1977) — *distinguished*

Statutes considered:

Human Rights Act, S.B.C. 1984, c. 22

s. 1 "person"*referred to*

s. 8(1)*considered*

s. 8(4)*considered*

s. 9*considered*

United States Constitution:

First Amendment*referred to*

Words and phrases considered:

reasonable

short of undue hardship

Appeal by employee from judgment of British Columbia Court of Appeal, (1989), 11 C.H.R.R. D/62, 90 C.L.L.C. 17,004, dismissing ap peal from order of Dohm J., (1987), 9 C.H.R.R. D/4609, quashing decision of Verbrugge, Member Designate, (1987), 8 C.H.R.R. D/4255, that employee discriminated against under s. 8 of *Human Rights Act* by employer and union.

The judgment of the court was delivered by *Sopinka J.*:

1 The issue raised in this appeal [from (1987), 8 C.H.R.R. D/4255, reversed 9 C.H.R.R. D/4609, which was affirmed (1989), 11 C.H.R.R. D/62, 90 C.L.L.C. 17,004] is the scope and content of the duty of an employer to accommodate the religious beliefs of employees and whether and to what extent that duty is shared by a trade union. While this duty has been recognized and discussed as it relates generally to employers (*Ontario (Human Rights Commission) v. Simp- sons-Sears Ltd.*, [1985] 2 S.C.R. 536, 9 C.C.E.L. 185, 17 Admin. L.R. 89, 86 C.L.L.C. 17,002, 64 N.R. 161, 7 C.H.R.R. D/3102, 23 D.L.R. (4th) 321, 12 O.A.C. 241, at pp. 552-56 [S.C.R.] and *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, [1990] 6 W.W.R. 193, 76 Alta. L.R. (2d) 97, 33 C.C.E.L. 1, 72 D.L.R. (4th) 417, 90 C.L.L.C. 17,025, 113 N.R. 161, 12 C.H.R.R. D/417, 111 A.R. 241, at pp. 520-29 [S.C.R.]), little judicial consideration has been given to the question raised by the involvement of a collective agreement and a certified trade union. Is a trade union liable for discrimination if it refuses to relax the provisions of a collective agreement and thereby blocks the employer's attempt to accommodate? Must the employer act unilaterally in these circumstances? These are issues that have serious implications for the unionized workplace.

The Facts

2 The appellant was employed by the board of school trustees, school district No. 23 (Central Okanagan) (the "school board") and was a member of the Canadian Union of Public Employees, Local 523 (the "union"). He had been employed by the school board since 1981 and in 1984 used his seniority to secure a Monday to Friday job at Spring Valley Elementary School ("S.V.E."). The gymnasium at S.V.E. was rented out to a community group on Friday evenings and a custodian was required to be present for security and emergency purposes during this time. Pursuant to the employer's work schedule, which was included in the collective agreement, the job at S.V.E. involved an afternoon shift from 3:00 p.m. until 11:00 p.m. during which only one custodian was on duty. As a Seventh-day Adventist, the appellant's religion forbade him from working on the church's sabbath, which is from sundown Friday until sundown Saturday. The appellant met with a representative of the school board to try to accommodate his inability to work the full Friday shift. The school board representative was agreeable to the request but indicated that the school board

required the consent of the union if any accommodation involved an exception to the collective agreement. Many of the alternatives discussed by the representative and the appellant involved transfer to "prime" positions which the appellant did not have enough seniority to secure. The appellant was reluctant to accept a further alternative, that he work a four-day week, as this would result in a substantial loss in pay. In spite of these possibilities and other alternatives that could perhaps have been implemented without the union's consent, the employer concluded that the only practical alternative was to create a Sunday to Thursday shift for the appellant which did require the consent of the union.

3 The union had a meeting to discuss making an exception for the appellant but instead passed the following motion:

> ... that the Kelowna sub-local of Local 523 demand that management of SD #23 rescind the proposal of placing any employee on a Sunday-Thursday shift. If, failing this agreement, a Policy Grievance be filed immediately to prevent the implementation of this proposal due to the severe violations of the Collective Agreement.

The appellant was informed of the rejection of the proposed accommodation and the ongoing requirement to work on Friday nights. He was also informed of the intention of the school board to continue to seek a viable accommodation. After further unsuccessful attempts to accommodate, the school board eventually terminated the appellant's employment as a result of his refusal to complete his regular Friday night shift.

4 The appellant filed a complaint pursuant to s. 8 of the British Columbia *Human Rights Act*, S.B.C. 1984, c. 22 (the "Act"), against the school board and pursuant to s. 9 against the union. The proceedings were subsequently amended by the member designate (appointed by the British Columbia Council of Human Rights to investigate the complaints) to include a claim against the union under s. 8 as well.

Legislation

5 For convenience, the relevant legislation is reproduced below:

> 8. (1) No person or anyone acting on his behalf shall
>
> (*a*) refuse to employ or refuse to continue to employ a person, or
>
> (*b*) discriminate against a person with respect to employment or any term or condition of employment,
>
> because of the ... religion ... of that person ...

(4) Subsections (1) and (2) do not apply with respect to a refusal, limitation, specification or preference based on a bona fide occupational requirement.

9. No trade union, employers' organization or occupational association shall

(*a*) exclude any person from membership,

(*b*) expel or suspend any member, or

(*c*) discriminate against any person or member

because of the ... religion ... of that person or member ...

Decision of the Member Designate

6 The member designate investigated the complaint and found in favour of the appellant. She began her reasons by reviewing the facts of the case, paying particular attention to the efforts of the school board to accommodate the appellant. The member designate then discussed the issue of amending the complaint. The complaint, as filed, was deficient and the member designate amended the complaint to encompass a s. 8, as well as the s. 9, complaint against the union to bring the complaint into conformity with the nature of the proceedings. She determined that no prejudice would be suffered by the union as a result of the amendment as the union had been represented throughout the proceedings and had fully taken part in the s. 8 complaint against the school board.

7 The member designate then turned to the issue of bona fide occupational requirement ("B.F.O.R."). Reviewing the case of *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202, 40 N.R. 159, 82 C.L.L.C. 17,005, 132 D.L.R. (3d) 14, 3 C.H.R.R. D/781 , the adjudicator noted that the presence of a discriminatory provision in a collective agreement does not, in and of itself, make that provision bona fide. The member designate acknowledged, however, that once a B.F.O.R. was established, there was no duty to accommodate individual employees (citing *Bhinder v. Canadian National Railway*, [1985] 2 S.C.R. 561, 9 C.C.E.L. 135, 17 Admin. L.R. 111, 86 C.L.L.C. 17,003, 7 C.H.R.R. D/3093, 23 D.L.R. (4th) 481, 63 N.R. 185). As discussed in *Simpsons-Sears Ltd.*, supra, however, if a B.F.O.R. is *not* established, there is a duty to accommodate to avoid adverse effect discrimination.

8 The member designate determined that the condition of employment that the appellant work on Friday nights amounted, prima facie, to adverse effect discrimination. As the collective agreement set those terms of employment, both the school board and the union were liable for that discrimination. The member designate concluded that it was B.F.O.R. that a custodian be present in schools but it is *not* a B.F.O.R. that a custodian at the appellant's school work from 3:00 p.m. until 11:00 p.m. on Fridays. The preference of the union and school board that the school operate on this work schedule failed to satisfy the objective branch of the *Etobicoke* test as it was not

related to the safety, efficiency, etc., of the job. Thus there was a duty on the union as well as on the school board to accommodate the appellant. She reached this conclusion on the basis that the duty to accommodate enunciated in *Simpsons-Sears Ltd.* applied equally to a union and an employer.

9 Having found that the union was instrumental in bringing about the adverse effect discrimination, the member designate further found that the union was liable equally with the employer for the adverse effect discrimination. She further found that neither had discharged its duty to accommodate the religious beliefs of the complainant.

10 Accordingly, she ordered that the respondents cease discriminating against the appellant, make available to the appellant the next available custodial position and that each respondent pay damages of $6,250 for lost wages and $1,000 for emotional distress.

Courts Below

11 The school board and the respondent union brought separate applications by way of certiorari to quash the member designate's decision for "errors of law on the face of the record." Dohm J. in the Supreme Court of British Columbia granted the applications and set aside the decision of the member designate. The decision was quashed on the ground that the member designate erred in failing to follow *Bhinder v. Canadian National Railway*, supra, in that once a B.F.O.R. was established there was no duty to accommodate. The appellant appealed this decision to the British Columbia Court of Appeal which dismissed his appeal. The Court of Appeal agreed with Dohm J. that the member designate erred in finding that there was a duty to accommodate. Applying *Bhinder*, the Court of Appeal held that once a B.F.O.R. was established, the individual application of the rules could not constitute discrimination under the Act. In view of this finding, the liability of the respondent union was not considered.

The Issues

12 Leave to appeal was limited to the following issues:

> Whether regular attendance at work in accordance with a schedule established by an employer is a *bona fide* occupational requirement providing a complete defence to a complaint of discrimination on the basis of religious beliefs.
>
> Whether an employer or a labour union representing him is under any duty to effect a reasonable accommodation where, for reasons of religious belief, the employee is unable to work a particular shift.

13 The respondents succeeded in the courts below in proceedings by way of certiorari based on alleged errors of law apparent on the face of the record. Accordingly, the appeal must succeed if the courts below were wrong that the member designate erred in law. The first ground upon

which leave was granted was the basis for the decisions in the courts below. Both Dohm J. and the Court of Appeal decided that the member designate erred in finding a duty to accommodate in the face of a B.F.O.R., which finding was contrary to *Bhinder*. Those decisions were made without the benefit of the reasons of this court in *Central Alberta Dairy Pool*, supra, in which both the majority and the minority judgments held that there is a duty to accommodate notwithstanding the presence of a B.F.O.R. in cases of adverse effect discrimination. The majority put it this way (at p. 517 [S.C.R.]):

> ... where a rule has an adverse discriminatory effect, the appropriate response is to uphold the rule in its general application and consider whether the employer could have accommodated the employee adversely affected without undue hardship.

In my minority judgment I indicated that (at p. 528):

> An employer who wishes to avail himself of a general rule having a discriminatory effect on the basis of religion must show that the impact on the religious practices of those subject to the rule was considered, and that there was no reasonable alternative short of causing undue hardship to the employer.

14 The respondent employer conceded in this court that notwithstanding the presence of a B.F.O.R. the employer had a duty to accommodate.

15 By reason of the foregoing, only the issues relating to the second ground are before us for determination. In this regard, the respondents contended that the member designate erred in law in the following respects:

16 (1) in the definition of the nature and extent of the duty to accommodate;

17 (2) in the application of the definition of this duty:

18 (a) in holding that economic liability by reason of a threatened grievance could not constitute undue hardship;

19 (b) in holding that the effect on employee morale was not a relevant consideration with respect to undue hardship;

20 (c) in finding that the complainant had no duty to assist in the employer's attempts to accommodate;

21 (3) in finding that the respondent union had a duty to accommodate;

22 (4) in amending the complaint to include s. 8 of the Act.

Nature and Extent of the Duty to Accommodate

23 The duty resting on an employer to accommodate the religious beliefs and practices of employees extends to require an employer to take reasonable measures short of undue hardship. In *Simpsons-Sears Ltd.*, McIntyre J. explained that the words "short of undue hardship" import a limitation on the employer's obligation so that measures that occasion undue interference with the employer's business or undue expense are not required.

24 The respondents submitted that we should adopt the definition of undue hardship articulated by the Supreme Court of the United States in *Trans World Airlines Inc. v. Hardison*, 432 U.S. 63, 53 L. Ed. 2d 113, 97 S. Ct. 2264 (1977). In that case, the court stated (pp. 84-85 [U.S.]):

> To require TWA to bear more than a de minimus cost in order to give Hardison Saturdays off is an undue hardship ... to require TWA to bear additional costs when no such costs are incurred to give other employees the days off that they want would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison Saturdays off ... would in effect require TWA to finance an additional Saturday off and then to choose the employee who will enjoy it on the basis of his religious beliefs. While incurring extra costs to secure a replacement for Hardison might remove the necessity of compelling another employee to work involuntarily in Hardison's place, it would not change the fact that the privilege of having Saturdays off would be allocated according to religious beliefs. [Footnote omitted.]

This definition is in direct conflict with the explanation of undue hardship in *Simpsons-Sears Ltd.* This court reviewed the American authorities in that case and referred specifically to *Hardison* but did not adopt the "de minimus" test which it propounded.

25 Furthermore there is good reason not to adopt the "de minimus" test in Canada. *Hardison* was argued on the basis of the establishment clause of the First Amendment of the *United States Constitution* and its prohibition against the establishment of religion. This aspect of the *Hardison* decision was thus decided within an entirely different legal context. The case law of this court has approached the issue of accommodation in a more purposive manner, attempting to provide equal access to the workforce to people who would otherwise encounter serious barriers to entry. The approach of Canadian courts is thus quite different from the approach taken in U.S. cases such as *Hardison* and more recently *Ansonia Board of Education v. Philbrook*, 479 U.S. 60, 93 L. Ed. 2d 305, 107 S. Ct. 367 (1986).

26 The *Hardison* de minimus test virtually removes the duty to accommodate and seems particularly inappropriate in the Canadian context. More than mere negligible effort is required to satisfy the duty to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator

must go to accommodate is limited by the words "reasonable" and "short of undue hardship." These are not independent criteria but are alternate ways of expressing the same concept. What constitutes reasonable measures is a question of fact and will vary with the circumstances of the case. Wilson J., in *Central Alberta Dairy Pool*, listed factors that could be relevant to an appraisal of what amount of hardship was undue as (at p. 521):

> ... financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities can be adapted to the circumstances. Where safety is at issue both the magnitude of the risk and the identity of those that bear it are relevant considerations.

She went on to explain that "this list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case" (at p. 521).

27 The concern for the impact on other employees which prompted the court in *Hardison* to adopt the de minimus test is a factor to be considered in determining whether the interference with the operation of the employer's business would be undue. However, more than minor inconvenience must be shown before the complainant's right to accommodation can be defeated. The employer must establish that actual interference with the rights of other employees, which is not trivial but substantial, will result from the adoption of the accommodating measures. Minor interference or inconvenience is the price to be paid for religious freedom in a multicultural society.

28 The member designate did not err in the test that she applied and her decision must be upheld unless she erred in law in other respects as submitted by the respondents. I now turn to those alleged errors.

The Threatened Grievance

29 The member designate refused to give effect to the submission that the economic impact of a grievance threatened by the respondent union constituted undue hardship. She was of the view that the collective agreement was subject to the *Human Rights Act* and the only economic consequence to the employer would have been the costs of defending the grievance.

30 The proposition relied on by the member designate is fully supported by the authorities. In *Insurance Corp. of British Columbia v. Heerspink*, [1982] 2 S.C.R. 145, [1983] 1 W.W.R. 137, 39 B.C.L.R. 145, 137 D.L.R. (3d) 219, 82 C.L.L.C. 17,014, [1982] I.L.R. 1-1555, 43 N.R. 168, 3 C.H.R.R. D/1163, Lamer J. (as he then was) stated (at p. 158 [S.C.R.]):

> Furthermore, as it [the *Human Rights Code*] is a public and fundamental law, no one, unless clearly authorized by law to do so, may contractually agree to suspend its operation and thereby put oneself beyond the reach of its protection.

In the *Etobicoke* case this principle was stated to apply to a collective agreement. At p. 213 [S.C.R.], McIntyre J. stated:

> While this submission is that the condition, being in a collective agreement, should be considered a *bona fide* occupational qualification and requirement, in my opinion to give it effect would be to permit the parties to contract out of the provisions of *The Ontario Human Rights Code*.
>
> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.

31 The respondent board submits, however, that this principle does not apply in the case of adverse effect discrimination. The basis for this submission is that in the case of direct discrimination the offending provision is struck down but that in adverse effect discrimination it is upheld in its general application and the complainant is accommodated so that it does not affect him or her in a discriminatory fashion. I do not accept this submission. Adverse effect discrimination is prohibited by the *Human Rights Act* no less than direct discrimination. In both instances private arrangements, whether by contract or collective agreement, must give way to the requirements of the statute. In the case of direct discrimination which is not justified under the Act, the whole of the provision is invalid because its purpose as well as effect is to discriminate on a prohibited ground. Thus, in *Etobicoke*, a provision in the collective agreement, which required firefighters to retire at age 60, could not be applied because in all of its applications it discriminated by its very terms on the basis of age. This discriminatory effect could not be justified as a B.F.O.R.

32 On the other hand a provision such as the one in this case is neutral on its face but operates in a discriminatory fashion against the appellant. The provision is valid in its general application. What the human rights legislation requires is that the appellant be accommodated by exempting him from its provisions to the extent that it no longer discriminates against him on the basis of his religion. To suggest that the provision must be applied to include the appellant within its terms is to allow the employer and the union to contract out of the requirements of the *Human Rights Act*. This they cannot do. This does not mean that the collective agreement cannot contain a formula for the accommodation of the religious beliefs of employees. An employer who avails himself of such a general provision must, however, establish that it complies with the duty to accommodate. See *Central Alberta Dairy Pool*, at p. 528.

33 While the provisions of a collective agreement cannot absolve the parties from the duty to accommodate, the effect of the agreement is relevant in assessing the degree of hardship occasioned by interference with the terms thereof. Substantial departure from the normal operation of the conditions and terms of employment in the collective agreement may constitute undue interference in the operation of the employer's business.

34 The member designate did not err in law in concluding that the collective agreement did not relieve the respondent employer of its duty to accommodate. She concluded that the sole impact of the threatened grievance which would have sought to enforce the collective agreement was the cost of defending it and that this did not constitute undue hardship. The only other alleged effect of the proposed accommodation was with respect to the effect on other employees and their reaction which the respondent board feared would result from unilateral action on the part of the employer without union approval. It is, therefore, necessary to consider whether the member designate erred in law in respect of this factor.

Effect on Other Employees

35 The respondent board submits that the member designate erred in stating that the employer's fear that unilateral action on the part of the employer might bring forth reprisals from other employees was not a justification for refusing to accommodate the appellant. This submission is based on the following statement in the evidence of Harvey Peatman, the secretary-treasurer of the respondent board:

> Q. What would have happened if the school district had moved unilaterally without union approval to accommodate him in some way in your view? What did you think would happen?
>
> A. Well, possible riot by the members of the union but — No, more seriously, very definitely being faced with a grievance which really would have been undefendable.

36 This statement would justify the conclusion that the alleged fear of employee reprisal was not the real reason for the employer's decision not to create the special shift for the appellant. The real reason was the concern relating to the threatened grievance which was based on a mistake of law. I have explained above that there was no error of law on the part of the member designate in this regard. If this concern played any part in the decision of the employer, it did not constitute justification for the refusal to accommodate the appellant.

37 The reaction of employees may be a factor in deciding whether accommodating measures would constitute undue interference in the operation of the employer's business. In *Central Alberta Dairy Pool*, Wilson J. referred to employee morale as one of the factors to be taken into account. It is a factor that must be applied with caution. The objection of employees based on well-grounded concerns that their rights will be affected must be considered. On the other hand, objections based

on attitudes inconsistent with human rights are an irrelevant consideration. I would include in this category objections based on the view that the integrity of a collective agreement is to be preserved irrespective of its discriminatory effect on an individual employee on religious grounds. The contrary view would effectively enable an employer to contract out of human rights legislation provided the employees were ad idem with their employer. It was in this context that Wilson J. referred to employee morale as a factor in determining what constitutes undue hardship.

38 There is no evidence in the record before the court that the rights of other employees would likely have been affected by an accommodation of the appellant. The fact that the appellant would be assigned to a special shift may have required the adjustment of the schedule of some other employee but this might have been done with the consent of the employee or employees affected. The respondents apparently did not canvass this possibility. The union objected to the proposed accommodation on the basis that the integrity of the collective agreement would be compromised and not that any individual employee objected on the basis of interference with his or her right. In my opinion, the member designate came to the right conclusion with respect to this issue.

Union's Duty to Accommodate

39 The duty to accommodate developed as a means of limiting the liability of an employer who was found to have discriminated by the bona fide adoption of a work rule without any intention to discriminate. It enabled the employer to justify adverse effect discrimination and thus avoid absolute liability for consequences that were not intended. Section 8 of the Act, like many other human rights codes, prohibits discrimination against a person with respect to employment or any term or condition of employment without differentiating between direct and adverse effect discrimination. Both are prohibited. Moreover, any person who discriminates is subject to the sanctions which the Act provides. By definition (s.1), a union is a person. Accordingly, a union which causes or contributes to the discriminatory effect incurs liability. In order to avoid imposing absolute liability, a union must have the same right as an employer to justify the discrimination. In order to do so it must discharge its duty to accommodate.

40 The respondent union does not contest that it had a duty to accommodate but asserts that the limitations on that duty were not properly applied by the member designate. It submits that the focus must be on interference with the rights of employees rather than on interference with the union's business. It further submits, and is supported in this regard by the Canadian Labour Congress ("C.L.C."), that a union cannot be required to adopt measures which conflict with the collective agreement until the employer has exhausted reasonable accommodations that do not affect the collective rights of employees.

41 These submissions raise for determination the extent of a union's obligation to accommodate and how the discharge of that duty is to be reconciled and harmonized with the employer's duty. These are matters that have not been previously considered in this court.

42 As I have previously observed, the duty to accommodate only arises if a union is party to discrimination. It may become a party in two ways.

43 First, it may cause or contribute to the discrimination in the first instance by participating in the formulation of the work rule that has the discriminatory effect on the complainant. This will generally be the case if the rule is a provision in the collective agreement. It has to be assumed that all provisions are formulated jointly by the parties and that they bear responsibility equally for their effect on employees. I do not find persuasive the submission that the negotiations be re-examined to determine which party pressed for a provision which turns out to be the cause of a discriminatory result. This is especially so when a party has insisted that the provision be enforced. In this respect, I am in agreement with the majority of the Ontario Divisional Court in *O.P.E.I.U., Local 267 v. Domtar Inc.*, (March 19, 1992) (Ont. Div. Ct.) [now reported (sub nom. *Gohm v. Domtar Inc.*) (1992), 39 C.C.E.L. 213, 89 D.L.R. (4th) 305, 92 C.L.L.C. 17,015, 8 O.R. (3d) 65]. That case dealt with a provision in a collective agreement which required the complainant to work one Saturday in six for four hours. This conflicted with her religious beliefs. The minority view expressed by Campbell J. was that the inclusion of the Saturday work schedule was merely a recognition by the union of the company's policy in this regard. The majority concluded, however, that the presence of the provision in the agreement was a barrier to the continued employment of the complainant, and the union, having aided in the creation of the barrier, was jointly liable to her.

44 Second, a union may be liable for failure to accommodate the religious beliefs of an employee notwithstanding that it did not participate in the formulation or application of a discriminatory rule or practice. This may occur if the union impedes the reasonable efforts of an employer to accommodate. In this situation it will be known that some condition of employment is operating in a manner that discriminates on religious grounds against an employee and the employer is seeking to remove or alleviate the discriminatory effect. If reasonable accommodation is only possible with the union's cooperation and the union blocks the employer's efforts to remove or alleviate the discriminatory effect, it becomes a party to the discrimination. In these circumstances, the union, while not initially a party to the discriminatory conduct and having no initial duty to accommodate, incurs a duty not to contribute to the continuation of discrimination. It cannot behave as if it were a bystander asserting that the employee's plight is strictly a matter for the employer to solve. I agree with the majority in *O.P.E.I.U., Local 267* that "Discrimination in the workplace is everybody's business" (at p. 13 [p. 222 C.C.E.L.]).

45 The timing and manner in which the union's duty is to be discharged depends on whether its duty arises on the first or second basis as outlined above. I agree with the submissions of the respondent union and C.L.C. that the focus of the duty differs from that of the employer in that the representative nature of a union must be considered. The primary concern with respect to the impact of accommodating measures is not, as in the case of the employer, the expense to or disruption of the business of the union but rather the effect on other employees. The duty to

accommodate should not substitute discrimination against other employees for the discrimination suffered by the complainant. Any significant interference with the rights of others will ordinarily justify the union in refusing to consent to a measure which would have this effect. Although the test of undue hardship applies to a union, it will often be met by a showing of prejudice to other employees if proposed accommodating measures are adopted. As I stated previously, this test is grounded on the reasonableness of the measures to remove discrimination which are taken or proposed. Given the importance of promoting religious freedom in the workplace, a lower standard cannot be defended.

46 While the general definition of the duty to accommodate is the same irrespective of which of the two ways it arises, the application of the duty will vary. A union which is liable as a co-discriminator with the employer shares a joint responsibility with the employer to seek to accommodate the employee. If nothing is done both are equally liable. Nevertheless, account must be taken of the fact that ordinarily the employer, who has charge of the workplace, will be in the better position to formulate accommodations. The employer, therefore, can be expected to initiate the process. The employer must take steps that are reasonable. If the proposed measure is one that is least expensive or disruptive to the employer but disruptive of the collective agreement or otherwise affects the rights of other employees, then this will usually result in a finding that the employer failed to take reasonable measures to accommodate and the union did not act unreasonably in refusing to consent. This assumes, of course, that other reasonable accommodating measures were available which either did not involve the collective agreement or were less disruptive of it. In such circumstances, the union may not be absolved of its duty if it failed to put forward alternative measures that were available which are less onerous from its point of view. I would not be prepared to say that in every instance the employer must exhaust all the avenues which do not involve the collective agreement before involving the union. A proposed measure may be the most sensible one notwithstanding that it requires a change to the agreement and others do not. This does not mean that the union's duty to accommodate does not arise until it is called on by the employer. When it is a co-discriminator with the employer, it shares the obligation to take reasonable steps to remove or alleviate the source of the discriminatory effect.

47 In the second type of situation in which the union is not initially a contributing cause of the discrimination but by failing to cooperate impedes a reasonable accommodation, the employer must canvass other methods of accommodation before the union can be expected to assist in finding or implementing a solution. The union's duty arises only when its involvement is required to make accommodation possible and no other reasonable alternative resolution of the matter has been found or could reasonably have been found.

48 The member designate did not, therefore, err in applying the *Simpsons-Sears Ltd.* definition of the duty to accommodate to the respondent union. Moreover, she found that the union was involved in the conduct which resulted in adverse effect discrimination and that its duty to accommodate arose by reason of this fact. The respondent union, therefore, owed a duty to accommodate jointly

with the employer. The proposal for accommodation presented to the union was found to be reasonable. While it was submitted that the member designate failed to consider the trespass on the rights of other employees, I am satisfied that the only possible effect was the adjustment to the schedule of one employee to work the Friday afternoon shift in place of the appellant. The respondent union conceded in argument that there is no evidence that employees were canvassed to ascertain whether someone would volunteer to switch with the appellant. If this occurred, no employees' rights would have been adversely affected. The onus of proof with respect to this issue was on the respondent union. I agree with the member designate that it was not discharged.

49 Finally, in view of the fact that the duty to accommodate of the union was shared jointly with the employer, it was not incumbent on the member designate to determine whether all other reasonable accommodations had been explored by the employer before calling upon the union. Nevertheless, it appears to me that the member designate was of the view that the special shift proposal was not only reasonable but the most reasonable. This view is fully supported by the evidence. Accordingly, the decision of the member designate must be upheld unless the respondents are correct that there was an error in law on her part with respect to the complainant's duty to facilitate accommodation of his religious beliefs.

Duty of Complainant

50 The search for accommodation is a multi-party inquiry. Along with the employer and the union, there is also a duty on the complainant to assist in securing an appropriate accommodation. The inclusion of the complainant in the search for accommodation was recognized by this court in *Simpson-Sears Ltd.* At p. 555 [S.C.C.], McIntyre J. stated:

> Where such reasonable steps, however, do not fully reach the desired end, the complainant, in the absence of some accommodating steps on his own part such as an acceptance in this case of part-time work, must either sacrifice his religious principles or his employment.

To facilitate the search for an accommodation, the complainant must do his or her part as well. Concomitant with a search for reasonable accommodation is a duty to facilitate the search for such an accommodation. Thus in determining whether the duty of accommodation has been fulfilled the conduct of the complainant must be considered.

51 This does not mean that, in addition to bringing to the attention of the employer the facts relating to discrimination, the complainant has a duty to originate a solution. While the complainant may be in a position to make suggestions, the employer is in the best position to determine how the complainant can be accommodated without undue interference in the operation of the employer's business. When an employer has initiated a proposal that is reasonable and would, if implemented, fulfill the duty to accommodate, the complainant has a duty to facilitate the implementation of the proposal. If failure to take reasonable steps on the part of the complainant causes the proposal to founder, the complaint will be dismissed. The other aspect of this duty is

the obligation to accept reasonable accommodation. This is the aspect referred to by McIntyre J. in *Simpsons-Sears Ltd.* The complainant cannot expect a perfect solution. If a proposal that would be reasonable in all the circumstances is turned down, the employer's duty is discharged.

52 In my opinion the member designate did not err in this respect. The complainant did everything that was expected of him with respect to the proposal put forward by the employer. It failed because the union refused consent and the employer refused to proceed unilaterally. The appellant had no obligation to suggest other measures. Moreover, it is not suggested that the appellant turned down any reasonable proposal which was offered to him.

Conclusion

53 In this appeal the discriminatory effects have resulted from certain workplace conditions. Both the employer and the union had an impact on setting these conditions and thus both are responsible for remedying any adverse effects caused by those conditions. The member designate found that neither party had discharged its duty to accommodate. These findings were not based on any error of law.

54 The member designate concluded that the employer was liable for its failure to accommodate. The employer's view that proceeding unilaterally with the Sunday to Thursday shift would result in a grievance may have been justified but it does not satisfy the employer's duty to accommodate. The position of the employer was based on a mistake of law. The union might have grieved but the grievance would have been dismissed. The mere fact that the employer might have been required to defend an ill-founded grievance cannot justify failure to accommodate. Fear of employee reprisals was not well grounded.

55 I agree with the member designate that in this case the union had an original duty to accommodate. By incorporating the work schedule in the collective agreement and insisting on adherence to it, the union contributed to the discrimination. Its conduct was a factor in the formation of the discriminatory rule and in its operation. The union also contributed to the continuation of the discrimination with its refusal to accept the employer-suggested accommodation which was not only reasonable but the most reasonable solution to the problem. It had a duty to cooperate with the employer in arriving at a reasonable solution to the problem which it failed to do.

56 The complainant appears to have done everything in his power to assist in arriving at an accommodation. He took part in many meetings and discussions with both the school board and the union and actively sought union approval of the proposed accommodation. The complainant fully discharged the duty resting on him.

Amendment of Complaint

57 The respondent union submitted that the member designate erred in amending the complaint to allege that the union was liable under s. 8 as well as s. 9 of the *Human Rights Act*. While not, strictly speaking, an issue upon which leave to appeal was granted, I am satisfied from the record before the court that the case was presented to the member desig nate on this basis of liability and the amendment simply brought the complaint into conformity with the proceedings. I agree with the member designate that no prejudice to the union was occasioned by the amendment. I agree with the respondents, however, that the reasons are in error in stating that liability of the respondent union was found also under s. 9. This section has no application in the circumstances. This error did not affect the relief granted.

Disposition

58 I would therefore allow the appeal, set aside the orders of Dohm J. and of the Court of Appeal, and restore the decision of the member designate, with costs to the appellant against the respondent board and union, both here and below.

Appeal allowed.

Footnotes

Tab 24

para 20

1987 CarswellNat 1646
Canada Arbitration

Canadian Pacific Ltd. v. U.T.U.

1987 CarswellNat 1646, [1987] C.L.A.D. No. 61, 31 L.A.C. (3d) 179, 7 C.L.A.S. 100

Re Canadian Pacific Ltd. and United Transportation Union

M.G. Picher

Judgment: October 15, 1987
Docket: None given.

Counsel: W.M. Jessop and others, for the union
D.A. Lypka and others, for the employer

Subject: Labour; Employment

Headnote
Labour and employment law

***M.G. Picher*:**

1 Conductor A.B. Hutchinson of Moose Jaw was discharged for his involvement with a prohibited narcotic. It is common ground that on or about July 19, 1986, officers of the Royal Canadian Mounted Police and the Moose Jaw city police conducted a search of conductor Hutchinson's residence following a tip. In the backyard of Mr. Hutchinson's property they found 104 marijuana plants growing, some 74 of which were estimated to be in excess of six feet tall. Some of the plants were growing in a greenhouse apparently constructed for that purpose. The police seized four pounds of marijuana found in the grievor's residence. He was charged with the cultivation of marijuana, contrary to the *Narcotic Control Act*, R.S.C. 1970, c. N-1.

2 On July 29, 1986, the company attempted to conduct an investigation into the continued employability of conductor Hutchinson. The grievor attended the investigation but refused to answer all questions relating to the charges against him, including the fact that he had been charged. He apparently did so on the advice of his criminal lawyer, stating, "I cannot answer any incriminating questions that could have a bearing on my pending case".

3 The company decided to hold conductor Hutchinson out of service. On July 30, 1986, the grievor appeared in Provincial Court, at which time a preliminary hearing was set for October 8, 1986. Being aware of what transpired in court on July 30th, the company sought to conduct a further investigation on August 1, 1986. As he had before, conductor Hutchinson continued to refuse to answer any questions relating to the charges against him, citing his lawyer's advice. Given the position taken by the grievor, the company's officer, in a letter dated August 15, 1986, informed the grievor that his investigation was indefinitely adjourned until such time as Mr. Hutchinson would be willing to answer the company's questions. The union then grieved the company's action, objecting to the employer's decision to hold him out of service.

4 On October 8, 1986, Mr. Hutchinson's preliminary inquiry was held in Provincial Court at Moose Jaw. Based on the evidence then placed before the court, including the four pounds of marijuana, it was deemed that there was sufficient cause for the matter to be sent to trial. Shortly thereafter conductor Hutchinson apparently changed lawyers. Having been held out of service for some six months, he agreed to the resumption of the company's investigation on January 21, 1987.

5 On that occasion, apparently on the advice of a different lawyer, the grievor agreed to answer the questions put to him. He acknowledged that previously, in 1977, he had been convicted of possession of marijuana — a fact until then unknown to the company. He also acknowledged that on July 24, 1986, when he was asked by superintendent Hedden of the company to undergo a drug test, he refused to do so. During the investigation, through a series of almost monosyllabic answers, conductor Hutchinson denied any involvement whatever in the cultivation of the 104 marijuana plants found on his property. When asked who cultivated the plants found both in the greenhouse and in the yard, he responded that his wife did. When further asked for what purpose they were cultivated, conductor Hutchinson answered that it was for his wife's consumption. The grievor denied any involvement whatever in the cultivation or use of the marijuana, asserted that he did not use marijuana any longer and could not recall the last time that he had. When asked how long he had been aware that such quantities of marijuana were being cultivated and stored on his property, he answered, "Approximately a month, I can't be sure".

6 Based on the information available to it, the company concluded that conductor Hutchinson had a degree of involvement in the cultivation and possession of substantial amounts of marijuana that was incompatible with his continued employment. Notwithstanding that his disciplinary record was clear at the time, in light of what it viewed as the severity of the circumstances, the company terminated the grievor's employment. The union grieves both the suspension of conductor Hutchinson pending his investigation as well as his discharge. It relies, in part, on the fact that some time following the grievor's termination, the criminal charges against him were struck down by the court, apparently because the delay in bringing the matter to trial was deemed contrary to the protections of the accused under the *Canadian Charter of Rights and Freedoms*. The union stresses that the conduct for which the grievor was discharged, if true, relates entirely

to his actions while off duty and off company premises. It maintains that there is no evidence upon which either the suspension or the discharge of conductor Hutchinson can be justified.

7 This case raises, in vivid terms, the issue of the obligations of a railroad in respect of the involvement of its employees in the production, trafficking, possession or use of illegal drugs. There was a time, in the 1960's, when a substantial body of opinion held that "soft" drugs, and marijuana in particular, were relatively benign substances whose use posed no substantial threat. Those days are gone. Two decades of experience with accidents, both industrial and non-industrial, sometimes tragic in their proportions, caused by the use of prohibited drugs, have gradually affirmed the conclusion that involvement with illegal drugs, including marijuana, poses a dangerous threat to health and safety. That was dramatically brought home to the railroading industry by the recent Conrail tragedy. On January 4, 1987, near Baltimore, a consist of locomotives of the Conrail Railroad ran through a number of signals, including a stop signal, into the path of an oncoming Amtrack passenger train, causing a collision that resulted in the loss of 16 lives and injuries to another 175 persons. The investigation disclosed that the engineer and brakeman in control of the locomotive consist had substantial amounts of marijuana in their blood at the time of the collision.

8 Much has been written in recent years about the problem of alcohol and drug abuse as it impacts on the work place. It is a problem that relates to productivity as well as to health and safety. According to one estimate, a degree of substance abuse, whether of drugs or alcohol, is present in some 10% of employees, a statistic which is said to obtain reliably in virtually all industries: see, generally, T.S. Denenberg, R.L. Masters, K.B. Cooper, "The Arbitration of Employee Drug Abuse Cases, Arbitration Promise and Performance", Proceedings of the Thirty-Sixth Annual Meeting, National Academy of Arbitrators, Quebec City, May 24 to 27, 1983 (Washington, D.C., Bureau of National Affairs, 1984) pp. 90-127.

9 Most employers, including the company in the instant case, have come to recognize that chronic drug abuse, like alcoholism, is a medical condition to be dealt with in so far as possible through an employee assistance programme (EAP). To be successful, such programmes must be perceived by the employee as non-threatening, and they necessarily depend to a large extent on the voluntary participation of the employee in need. Given the high cost of training employees and the inefficiencies inherent in losing the services of qualified and experienced personnel, the high success rate of such programmes is generally seen as a substantial aid to productivity: see Denenberg and Denenberg "Alcohol and Drug Issues in the Workplace" (Bureau of National Affairs, Washington, D.C., 1983), and see "Employee Assistance Programs: Benefits, Problems and Prospects", Bureau of National Affairs (Washington, D.C., 1987).

10 While there are many parallels between drug and alcohol abuse, there are also some important differences. Firstly, employers are generally more familiar with the problems, symptoms and treatment of alcoholism. As a general rule, although not exclusively, the use of illegal drugs

is found among younger and more junior employees, and the realities of drug use are less familiar to both senior management and senior union officers. Lastly, drug use carries the taint of illegality that is not a factor in the use of alcohol. This may account in some measure for the reluctance of some employers to deal with the issue and of many employees to come forward and seek assistance.

11 Another major point of distinction between alcohol and drugs is the problem of detectability, a factor which has given rise to the controversial topic of drug testing in the work place. While inebriation through alcohol may be relatively obvious, and even reduced impairment can be detected by non-expert observation, the same is not true for the presence of some drugs in an employee. Given the safety hazards inherent in drug abuse in the work place, drug testing has become the subject of much discussion and increasing application in a variety of employment settings. The reliability of drug tests has been closely scrutinized and, at times, questioned: see, *e.g.*, Palca, "U.S. Drug Tests: Hit-and-Miss", Nature, vol. 323, September, 1986, p. 285. While both urine tests and blood tests employed to detect the presence of drugs cannot claim complete infallibility, it appears that when such tests are administered in keeping with exacting technical and professional standards, they can produce a generally acceptable degree of reliability and have, therefore, become more and more established as a means of fact- finding by certain public authorities.

12 The policing of drug use among the employees of public carriers is one area in which drug testing has gained increasing acceptance. The incompatibility of habitual drug use or dependence by employees in the transportation industry, whose activities impact readily on the lives and safety of many, is scarcely debatable. The possession of an illegal drug by a railway employee while on duty or subject to duty is plainly prohibited by Rule G of the Uniform Code of Operating Rules. Such conduct has been clearly confirmed by this office as a dismissible offence: see CROA case No. 1536. The United States Federal Aviation Administration revokes the medical certification of any pilot for "mental and neurologic" standards if it is established that he or she has an active drug dependence. Because of their concern with the debilitating after- effects of drug use, a number of airlines have adopted rules prohibiting any use whatever of drugs for a period of 24 hours prior to active duty. A physician retained by the U.S. Airlines Pilots Association and that union's attorney have jointly stated that in their opinion the use of marijuana is not compatible with flight safety if it is within 24 hours of flight time: see Denenberg, Masters and Cooper, Proceedings of the Thirty-Sixth Annual Meeting of the National Academy of Arbitrators, cited above.

13 Concern for the threat which drug use poses for the safety of rail transportation has prompted the Federal Railroad Administration of the United States to enact regulations to govern the drug testing of railway employees: see 50 Fed. Reg. 31, 508 (1985). While the returns are still preliminary, at least one authority has expressed the view that the regulation has dramatically reduced the incidence of drug-related accidents within the railway industry in that country: see "Accuracy of Drug Tests Examined During Drug and Alcohol Abuse Conference", Daily Labour Report No. 226, November 24, 1986, pp. A-8, A-12.

14 The American regulation seeks, in so far as possible, to balance the interest of the railway to ensure safe operations with the interest of the employee not to be unduly deprived of rights of personal dignity and privacy. It does not permit random testing or testing for unsubstantiated reasons. Testing is permitted only following an accident or where, in the opinion of at least two trained members of management, it is established that there are grounds for reasonable suspicion that an employee is involved in the use of a prohibited drug. A fuller elaboration of the railroad regulations is found in Hartsfield, "Medical Examinations as a Method of Investigating Employee Wrongdoing" (1986), Labour Law Journal, October, 692 at pp. 693-4. The regulation provides for stringent conditions which must exist prior to requiring an employee to submit to a urine test, including procedural safeguards for the maintenance, calibration and administration of testing devices by qualified technicians. Since urine tests may not pin-point with sufficient exactness the time at which an individual was exposed to a drug, in the event of a positive test, the employee is given the option of a blood test which can yield more precise evidence to rule out current impairment. An employee can therefore avoid the presumption of impairment by demanding to provide a blood sample at the time a urine test is taken.

15 The constitutional legitimacy of the regulation depends substantially on the decision of the Supreme Court of the United States in *Schmerber v. California* (1966), 384 U.S. 757, which held that the use of a blood test to establish a criminal driving offence does not violate the Fifth Amendment right against self-incrimination or the Fourth Amendment's prohibition of unreasonable searches and seizures. American judicial authority would appear to support the view that an employee refusing, without reasonable justification, to submit to a drug test required for the legitimate business purposes of an employer is subject to discharge: see Hartsfield, article cited above and part 2 of the same article appearing in (1986) Labour Law Journal, November, 767.

16 There are, as yet, no regulations in Canada comparable to those governing drug testing in the American railway industry. However, boards of arbitration in Canada have, on a number of occasions, found drug use and involvement with drugs to be grounds for discipline, and in some cases for discharge, particularly in the field of transportation. As noted above, in CROA 1536, this office found that the possession of marijuana while on duty justified the discharge of an employee. Similar conclusions have been drawn in other parts of the transportation industry. For example, it was found by the arbitrator in *Re Air Canada and Int'l Assn. of Machinists, Lodge 148* (1973), 5 L.A.C. (2d) 7 (Andrews), that trafficking in marijuana was incompatible with the grievor's continued employment as an aircraft maintenance mechanic. However, in another case, the mere possession of a small quantity of marijuana while off duty was not seen as sufficient to justify discharge: *Re Air Canada and Int'l Assn. of Machinists* (1975), 10 L.A.C. (2d) 346 (Morin). Understandably, the cases treat off-duty trafficking more seriously than possession. Apart from the more serious criminal ramifications impacting on an employee's reputation, that approach reflects a natural concern about a person whose involvement with drugs extends to producing or selling it

for profit. It is not unnatural to harbour concerns that the profit motive may cause the individual's trafficking activities to spread into the work place.

17 There are no reported decisions on the issue of drug testing for employees in Canada of which the arbitrator is aware. There are, however, some general principles which are instructive. It is well established that an employer does have the right to require an employee to submit to a medical examination where the purpose of such an examination is to confirm that he or she is physically fit to perform assigned work in a safe manner. That conclusion is confirmed in a number of arbitral awards: see, *e.g., Re Monarch Fine Foods Co. Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Loc. 647* (1978), 20 L.A.C. (2d) 419 (M.G. Picher); *Re Oil, Chemical & Atomic Workers, Local 9-593 and BP Oil Ltd.* (1972), 24 L.A.C. 122 (Palmer); *Re U.S.W., Loc. 6571 and Lake Ontario Steel Co. Ltd.* (1970), 22 L.A.C. 206 (Hanrahan).

18 Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.

19 Canadian public policy reflects a clear concern for the dangers of drug use within the transportation industry. As noted above, Rule G of the Uniform Code of Operating Rules articulates the direct prohibition of drug possession for railroad employees on duty or subject to duty. In the aviation industry, s. 409 of the *Air Regulations*, C.R.C. 1978, c. 2, under the *Aeronautics Act*, R.S.C. 1970, c. A-3, specifically prohibits a person from acting as a crew member of an aircraft while using a drug that may cause impairment that would endanger flight safety. An extraordinary provision was recently introduced into s. 5.5 [enacted 1985, c. 28, s. 1], of the *Aeronautics* Act, whereby a physician who is aware of a medical condition or impairment in his or her patient that would constitute a hazard to aviation safety is placed under a statutory obligation, with the protection of privilege, to report that condition to a medical adviser designated by the Minister of Transport. That duty would appear to extend to conditions of drug impairment and drug dependence. In the transportation industry, where the risk of drug use is concerned, of necessity vigilance and caution have become the rule.

20 What guidance do the foregoing considerations provide in the instant case? It appears to the arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet

rigorous standards from the standpoint of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

21 A first issue in the instant case is whether the company was justified in holding the grievor out of service pending its investigation. The conduct for which he was criminally charged appeared, on its face, to involve activities away from the work place and on the grievor's own time. It is well established that the laying of a criminal charge does not, of itself, justify the suspension of an employee, particularly where the conduct giving rise to the charge does not appear to be work-related. In some cases, however, off-duty conduct that is the subject of a criminal charge may seriously affect the legitimate interests of the employer. The operative principle was well summarized by the majority of the board of arbitration in *Re Ontario Jockey Club and Mutuel Employees' Assn.* (1977), 17 L.A.C. (2d) 176 (Kennedy) at p. 178:

> The better opinion would appear to be that the employer's right to suspend where an employee has been charged with a criminal offence must be assessed in the light of a balancing of interests between employer and employee. The employee, of course, has a legitimate interest in being considered innocent until he has been proven guilty. If, however, the alleged offence is so related to the employment relationship that the continued employment of the employee would present a serious and immediate risk to the legitimate concerns of the employer as to its financial integrity, security and safety of its property and other employees as well as its public reputation, then indefinite suspension until the charges have been disposed of would appear to be justified. In determining the nature of the legitimate interests of the employer, it is necessary to look at the nature of the offence, the work being performed by the employee, and the nature of the employer's business.

See also *Re Oshawa General Hosp. and O.N.A.* (1981), 30 L.A.C. (2d) 5 (Adams), where a board of arbitration sustained the suspension by a hospital of a nurse found in possession of a substantial quantity of marijuana and marijuana plants, and charged with the possession of narcotics for the purposes of trafficking and see, generally, *Re Hydro-Electric Com'n of City of Hamilton and I.B.E.W., Loc. 138* (1984), 13 L.A.C. (3d) 205 (Devlin).

22 Mr. Hutchinson is a conductor, and as such is the person primarily responsible for the movement of the train to which he is assigned. Based on a newspaper report and the observations of its own officers during the grievor's court appearances, the company had reason to believe that conductor Hutchinson was involved in the possession of marijuana and the cultivation of more than 100 plants in his greenhouse and backyard. The outward circumstances were such as to give the company reasonable apprehension to believe that conductor Hutchinson was heavily involved in what may be described as the "drug culture", relating to the production and use of marijuana. In the arbitrator's view, in those circumstances it was not unreasonable for the company to have substantial concerns about whether conductor Hutchinson was a habitual user of marijuana, whose consumption of that drug might seriously impair his work performance. Indeed, given the quantity of marijuana he was charged with cultivating and possessing, there were grounds for the company to be concerned that he was, in fact, drug- dependent.

23 Nothing in the grievor's conduct at the time he was charged and when the company attempted to conduct its initial investigation provided any reassurance in respect of these serious questions. Upon inquiries by the company, conductor Hutchinson refused to answer any questions whatever relating to the charges against him. Indeed he refused to acknowledge that he had been charged. He declined to answer any questions respecting his involvement in the use of drugs and, when asked to do so, refused to submit to a drug test. In these circumstances the arbitrator is satisfied that the company had ample justification to hold conductor Hutchinson out of service pending a full and satisfactory investigation of his involvement with the cultivation, possession and use of marijuana. In the circumstances which then obtained, given the *prima facie* evidence of the grievor's involvement with marijuana, as long as these critical questions remained unanswered, the company could not responsibly continue his assignment to a substantially unsupervised position in charge of the movement of trains. The company was justified in having a reasonable apprehension for the safety of its operations and had grounds for reasonable concern about its public reputation should conductor Hutchinson be maintained in service. In this regard it is of little consequence that the newspapers did not identify Mr. Hutchinson as a railway employee. The company is not obliged to await a tragic accident or a scathing editorial before acting to protect its reputation.

24 I turn to consider whether the evidence discloses just cause for the discharge of conductor Hutchinson. While the off-duty possession of a prohibited drug is a serious matter, such conduct will not necessarily justify discharge, or indeed any measure of discipline, if the objective circumstances disclose no adverse impact on the legitimate interests of the employer. If, for

example, during a period of extended vacation, an employee is charged with the possession of a small quantity of marijuana in circumstances that do not suggest habitual use or drug-dependence, or any involvement with the drug in a work- related context, it is difficult to see what interest the company could assert to impose a disciplinary penalty for such an event. Needless to say, each case must turn on its own particular facts.

25 In a drug-related discipline case the burden of proof, as in any case of discipline, is upon the company. Where, however, certain objective facts — however circumstantial — are established that would point to the heavy involvement of a railroad employee in the production and use of drugs, the onus may shift to the employee to provide a full and satisfactory account of his or her actions and circumstances to justify continued employment. The absence of a full and credible explanation, in the face of overwhelmingly incriminating evidence, leaves an employer with the public safety obligations of a railroad with little choice but to suspend or terminate the employment of a person whose habits or activities appear so dramatically incompatible with the safe operation of its business. On the other hand, the admission by an employee that he or she is involved in drug use or is drug-dependent should not necessarily be seen as justifying automatic termination. In many circumstances, where drug-dependence is, like alcoholism, tantamount to an illness, a non-disciplinary response, involving the offer of help through a company sponsored employee assistance programme might be the more appropriate reaction. Where, however, the employee is uncooperative and evidence of his or her involvement with drug use goes unexplained, termination of the employment relationship may be the only responsible alternative.

26 In the instant case, has Mr. Hutchinson been sufficiently candid and forthcoming? I must regrettably conclude that he has not. His actions and statements in explanation of his obviously incriminating circumstances tax all credulity. Faced with the inescapable fact that substantial amounts of a prohibited drug were found both growing and stored on his property, conductor Hutchinson initially refused to answer any questions put to him by his employer. Critical to the assessment of his credibility is the further fact that he refused to submit to a drug test when asked to do so. While he may be free to make that choice, he cannot claim freedom from the compelling inferences that may be drawn from it. This is not a case, moreover, where the reliability of a drug test can be, or indeed was, asserted as a reason for his refusal. Had the test which the company proposed to administer been in some way deficient or unreliable, its results would have been a matter for full examination through the grievance and arbitration procedure. Because of Mr. Hutchinson's summary refusal to undergo any test, however, that issue never matured.

27 Conductor Hutchinson's purported explanation for the presence of substantial quantities of marijuana on his property give further reason for pause. While he admits to a prior conviction for the possession of marijuana, a fact previously undisclosed to the company, he denies any use of it at the time he was charged, and any involvement whatever in the fact that remarkable amounts of that drug were found stored and growing at his home. In short, almost monosyllabic answers, he asserts that all of the marijuana found in his home, being some four pounds in quantity, as

well as the 104 plants growing there, both inside a greenhouse and in the yard, were entirely the doing of his wife. As he would have it, she planted, tended, harvested and processed all of that marijuana for her own consumption. The dubiousness of that unflattering account is compounded by the entirely incredible statement of conductor Hutchinson that he was entirely unaware of this state of affairs save for perhaps a month prior to the charges brought against him.

28 It is generally accepted that an employer making a grave charge against an employee should be expected to provide proof whose reliability is commensurate with the seriousness of the allegation: see *Re Indusmin Ltd. and United Cement, Lime & Gypsum Workers Int'l Union, Loc. 488* (1978), 20 L.A.C. (2d) 87 (M.G. Picher). By the same token, when such evidence is established which, absent some good and credible explanation, would, on the balance of probabilities, lead to an inference of wrongdoing, it is incumbent on the employee affected to provide a full and compelling explanation. In this case conductor Hutchinson has fallen short of discharging that obligation. No corroborating witnesses were brought forward to substantiate his plea of total innocence at the company's investigation, nor did he appear at the arbitration hearing where his explanation might be made the subject of testimony under oath and the probe of cross-examination. On the whole of the evidence, having regard to the grievor's prior criminal record, to his refusal to submit to a drug test, and to all of the objective circumstances disclosed, I find it impossible to conclude, on the balance of probabilities, that the grievor has been candid with the company and this office, or that he is innocent of involvement in the production and possession of large quantities of marijuana at his place of residence. In these circumstances, and in the absence of any persuasive mitigating factors, the arbitrator cannot conclude that the discharge of conductor Hutchinson was other than a responsible and appropriate response by the company.

29 For these reasons the grievance must be dismissed.

Tab 25

para 222

IN THE MATTER OF AN ARBITRATION

(Under the *Labour Relations Act, 1995*)

BETWEEN:

MECHANICAL CONTRACTORS ASSOCIATION SARNIA

("MCAS")

- AND -

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING & PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 663

("UA")

- AND -

SARNIA CONSTRUCTION ASSOCIATION (INTERVENOR)

("SCA")

- AND -

ONTARIO SHEET METAL WORKERS' AND ROOFERS' CONFERENCE, AND ITS AFFILIATED LOCAL UNION SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 539 (INTERVENOR)

("SMW")

AND IN THE MATTER OF an arbitration of the grievance dated December 14, 2012 concerning drug and alcohol testing in Sarnia, under the Ontario Provincial Collective Agreement between the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council

BEFORE: G. T. SURDYKOWSKI – Sole Arbitrator

APPEARANCES (oral hearing and by way of written submissions):

For MCAS and the Intervenor SCA: Richard J. Charney, Counsel; Pamela Hofman, Counsel; Lauren Heusar, Articling Student.

For the UA: Michael McCreary, Counsel; Amy Stein, Counsel.

For the Intervenor SMW: Eric Comartin, Counsel.

HEARING HELD IN TORONTO, ONTARIO ON SATURDAY, APRIL 6, 2013;
WRITTEN SUBMISSIONS CONCLUDED ON JUNE 24, 2013.

INDEX

AWARD – FINAL

I INTRODUCTION

1. The December 14, 2012 policy grievance in this case has been filed under the Ontario Provincial Collective Agreement between the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council (the "Provincial Agreement") by which the MCAS (and SCA) and the UA are bound (Exhibit #1). The grievance concerns site or pre-access alcohol and drug testing for Suncor Energy Inc. ("Suncor") work sites in the Sarnia/Lambton area. The MCAS and UA are the primary parties in this proceeding.

2. The MCAS agreed to accept the Union's policy grievance concerning its Member Contractors' decision to comply with the Suncor's demand and the Suncor Contractor Policy. The SCA sought and obtained Intervenor status without objection. The SMW sought and was granted limited Intervenor status. I was advised that Suncor was given notice of this proceeding. Suncor made no attempt to participate as a party in the proceeding.

3. The MCAS and the SCA agreed that notwithstanding its technical status as an Intervenor the SCA would carry the litigation ball on behalf of the employer side of the collective agreement divide, and that the determination of the grievance is binding on its Member Employers.

4. The grievance was filed in response to a December 4, 2012 letter (Applicant's Book of "Authorities", T-1.), from Andrew Pilat, General Manager of the MCAS, in which he advised UA Business Manager Ross Tius that effective January 1, 2013 MCAS member contractors would obey a direction from Suncor that contractors providing goods or services to it in Canada comply with Suncor's "Contractor Alcohol and Drug Standard" (the " Suncor Contractor Policy," - Applicant's Book of Authorities, T-2). One of the requirements in that respect is universal mandatory pre-access alcohol and drug testing.

5. The UA grieves the decision by MCAS and its Sarnia area Employer Members (who are also members of the SCA) to implement mandatory pre-access alcohol and drug testing in respect of Suncor jobsites. The UA alleges that the Suncor Contractor Policy violates the management rights and "Hiring and Mobility" provisions (Articles 10 and 36, respectively) of the Provincial Agreement because it is an unreasonable exercise of management rights and imposes unreasonable restrictions on MCAS/SCA Member Employers' obligation to hire through the UA. The UA asserts that the resulting SCA Member Employer alcohol and drug testing policies unduly and excessively violate bargaining unit employee privacy rights without reasonable cause or justification. The UA also alleges that the pre-access testing policies in issue violate the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Code").

6. The SCA's position is that the pre-access alcohol and drug testing in issue is justified and reasonable, and that it does not violate either the collective agreement or the Code. The SCA asserts two reasons for its Member Employers' intention to comply with the Suncor Contractor Policy:

a. the Suncor Standard is consistent with all applicable laws and will enhance safety at worksites; and

b. the Member Contractors want to ensure that they maintain their favourable competitive position with the site owners in the Sarnia area relative to non-union contractors.

7. The Suncor Contractor Policy is derived from Suncor's Alcohol and Drug Policy for its own employees (Applicant's Book of Authorities, T-3), which it appears is itself largely derived from the so-called "Canadian Model for Providing Safe Workplace" produced by the Construction Employer's Association of Alberta (the so-called "Canadian Model" – Exhibit #8, T-1A). The Suncor Contractor Policy requires employees to submit to intrusive drug and alcohol testing as a pre-condition to working on a Suncor jobsite. That is, it stipulates mandatory pre-access alcohol and drug testing for all contractor employees before they are permitted to work on a Suncor jobsite in the Sarnia area.

8. There is no suggestion that pre-access testing has previously been required.

9. Although Suncor chose not to participate, the SCA secured and filed a "will say" witness statement from a Suncor management representative – Joe Vetrone , previously Vice President of Environment, Health and Safety at Suncor, and currently Vice President of Integration and Planning at Suncor Energy Products Partnership, a subsidiary of Suncor.

10. There are four main kinds of alcohol and drug testing. Reasonable cause testing, and non-random post-incident testing are no longer legally controversial. Random testing remains controversial and largely disapproved of (most recently by the Supreme Court of Canada in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34; released 2013-06-14). To be clear, reasonable cause, post-incident, and random testing as such (which I put this way because the UA seeks to equate random testing to pre-access testing) are not in issue. The focus of this proceeding is on pre-access testing.

11. The grievance renews the contest between management rights and employee privacy rights, particularly under a collective agreement. The primary legal issues are:

(i) do MCAS/SCA Member Employers have the right to unilaterally impose the pre-access alcohol and drug testing in issue under either the management rights provision in the Provincial Agreement or otherwise?

(ii) whether or not MCAS/SCA Member Employers have the collective agreement right to do so, does the pre-access alcohol and drug testing in issue contravene the Code?

12. The alcohol and drug testing policies in issue in this proceeding are the SCA Model Policy (notwithstanding that there is no evidence that it has been specifically adopted by any employer), and the policies adopted by the individual Member Employers. I note that not all of the Member Employer policies have been put before me. I infer that the ones which are before me are a representative sample.

13. The Suncor alcohol and drug policies are in issue notwithstanding that Suncor is not a party to this proceeding because the SCA Member Employers' policies and conduct in issue have been prompted by Suncor's direction and insistence that all contractors "have an alcohol and drug policy that meets or exceeds" either its own alcohol and drug policies or the "Canadian Model". The SCA Member Employers' alcohol and drug testing policies all incorporate or defer to the Suncor policies. Those Suncor policies are therefore directly in issue.

II. PROCEDURE AND NATURE OF THE EVIDENCE AND SUBMISSIONS

14. The dispute between the parties was litigated under an agreed ad hoc expedited hearing protocol, the foundation for which is set out in a January 3, 2013 email between counsel (Exhibit #3). In that protocol:

(a) the parties stipulated that the Provincial Agreement work in issue is safety sensitive, and that there is therefore no reason to prove this fact (para. 6 or "f");

(b) the parties agreed that the UA has put the MCAS on notice that while it opposes pre-access testing, it favours health and safety and believes that other less intrusive measures are sufficient for that purpose (para. 7 or "g");

(c) the parties agreed to rely primarily on "will-say" statements instead of oral testimony to establish the relevant facts (para. 3 or "c"), and to make written submissions on an agreed mutual exchange time table basis.

15. In the result, I heard oral testimony from only one witness. The rest of the evidence before me is in the form of 15 written "will say" witness statements and hundreds of pages of documentary evidence. Most of the evidence that is before me is therefore in written form.

16. The UA filed will say witness statements from the following individuals:

(a) Ross Tius has been the Business Manager of UA, Local 663 for 13 years. He was previously Local 663's Business Agent for 10 years, and before that he worked "on the tools" in Sarnia from 1968. Mr. Tius supplemented his will say statement (Exhibit #5) with oral testimony, and was cross-examined on his oral and will say evidence at the hearing on April 6, 2013;

(b) Rick Leneve is the Business Agent of the United Brotherhood of Carpenters and Joiners of America, Local 1256. Like the UA, Local 1256 operates a construction industry hiring hall which refers its members to jobs in the area (Exhibit #10, T-1);

(c) John Barnsfield is the General Manager of the Sarnia-Lambton Industrial Education Cooperative, a 19-member cooperative dedicated to improving the competitiveness of the Sarnia-Lambton industrial community by developing educational programs and services, and by helping organizations achieve world-class safety performance through safety and leadership development programs (Exhibit 10, T-2);

(d) Jim Bradshaw is the President of the Sarnia Building Trades Council, which works closely with the skilled trades in the Sarnia area on a wide range of issues, including working conditions and workplace safety. Mr. Bradshaw is also the Business manager of SMW, Local 539 and serves on the Sarnia-Lambton Industrial Education Cooperative (Exhibit #11).

(**Note**: In my April 22, 2013 "Award – Reply Evidence" I ruled that the Bradshaw will say statement, and parts of the Barnfield will say statement, both submitted in reply, were not proper reply evidence and form no part of the record of evidence in this proceeding.)

17. The SCA filed 11 will say witness statements (2 of which are submitted as expert reports). These statements include or refer to documents which purport to support assertions made in the statements. Six of these will say statements are from representatives of SCA Member Employers; namely:

(a) Valerie Rendell, Corporate Manager of Labour Relations for Jacobs Industrial Services Ltd. ("Jacobs") which is the largest industrial maintenance contractor in Canada. Jacobs was founded near Sarnia as Catalytic Enterprises in 1951 (Exhibit #8, T-2);

(b) Doug Shortt, Jacobs' Operational Manager for the Region of Ontario and Eastern Canada (Exhibit #8, T-3);

(c) Ray Curran, Chairman of the Board of Curran Construction, a general contractor to heavy industrial clients since 1948 (Exhibit #8, T-4);

(d) Doug Chalmers, formerly President and CEO of Doug Chalmers Construction Limited ("DCCL"), which he founded in 1973 and grew to be the largest scaffolding contractor in Ontario. DCCL is now part of the Brand Energy and Infrastructure group of companies. Mr. Chalmers is now a director of ASIH LP, a Brand group company (Exhibit #8, T-5);

(e) Rodney Reynolds, Maintenance & Construction Manager for Flint Transfield Services Limited which provides maintenance services to the Suncor Refinery in Sarnia (Exhibit #8, T-6);

(f) Charles Webb, President and CEO of Anderson-Webb Limited, an industrial mechanical contractor in business since 1985 (Exhibit #8, T-7).

Two SCA will say statements are from representatives of site owners in the Sarnia area; namely:

(g) Wayne Standing, Site Maintenance Manager, Refinery and Chemical Plant, Imperial Oil Limited ("IOL") in Sarnia, Ontario (Exhibit #8, T-8);

(h) the previously mentioned Joe Vetrone, Vice President of Integration and Planning at Suncor Energy Products Partnership, a subsidiary of Suncor (Exhibit #8, T-9).

18. The SCA's 9th will say witness statement is from Robert Neil Tidsbury, President of Construction Labour Relations — An Alberta Association ("CLR Alberta"). Mr. Tidsbury has been a labour relations staff member of CLR Alberta since 1979, and served as chief operating officer in 1985. Mr. Tidsbury has been involved in CLR Alberta's joint initiative with the Building Trades Unions in the development, review and update of the Canadian Model (Exhibit #8, T-9).

19. The SCA's 10th will say witness statement is filed as an expert report by Barbara Butler, who the SCA puts forward as an expert in the field of alcohol and drug policy development. Since 1987, Ms. Butler has worked as a consultant on alcohol and drug policy issues for private sector employers, and all levels of government organizations. Ms. Butler has also been involved

in legal proceedings as an expert witness on alcohol and drug policy development and implementation, (Exhibit #9, T-10 and 10A).

20. The 11th will say witness statement is an expert report from Dr. Leo J. Kadehjian. Dr. Kadehjian received his Bachelor's degree in Organic Chemistry from M.I.T. in 1972 and his Ph.D. in Biochemistry from Stanford University in 1977. He is a biomedical consultant who has provided oversight of the U.S. Federal Courts' drug testing programs; has lectured on the neurobiology of addiction, the pharmacology of drugs and drug testing issues; and has provided expert testimony in numerous courts and labour arbitrations, primarily in the United States but also in New Zealand and Canada (in the *Sterling Crane*, *Imperial Oil Ltd.*, and *Bantrel* arbitration cases cited below, and in the Alberta Human Rights and Citizenship Commission proceeding in *Lockerbie & Hole*), (Exhibit #9, T-11 and 11A).

21. All of the parties' submissions are in writing. These total 286 pages. The UA and the SCA filed and exchanged main, reply and sur-reply submissions at the same time in accordance with an agreed to schedule. Counsel filed written submissions in accordance with the SMW's limited Intervenor status at the same time as the UA and the SCA filed their main submissions.

22. The authorities cited by the parties include the following legislation and cases:

(A) Legislation specifically cited:

Criminal Code, RSC 1985, c C-46

Health Information Custodians in the Province of Ontario Exemption Order, SOR/2005-399

Human Rights Code, R.S.O. 1990, c H.19;

Occupational Health and Safety Act, RSO 1990, c O.1

Personal Health Information Protection Act, 2004, SO 2004, c 3, Sch. A

Personal Information Protection and Electronic Documents Act S.C. 2000, c. 5

(B) Cases cited:

K.V.P. Co. Ltd. v. Lumber & Sawmill Workers' Union, Local 2537 (1965) 16 L.A.C. 73 (Robinson, Chair);

Ontario Hydro v. I.B.E.W., [1983] O.L.R.B. Rep. Jan. 99;

U.A., Local, 463 v. Ontario Hydro, 1987 CanLII 3297 (ON LRB – Herman);

Toronto (Metropolitan) v. C.U.P.E., Local 43, (1990) 74 O.R. (2d) 239 (ON C.A.);

Provincial Truck Transporters v. Teamsters Union, Loc. 880, (1991) 18 L.A.C. (4th) 412 (Brent, Chair);

Entrop v. Imperial Oil Ltd., [1996] O.H.R.B.I.D. No. 30 (Backhouse), appeal dismissed in *Imperial Oil Ltd. v. Ontario (Human Rights Commission)*, [1998] O.J. No. 422, 108 O.A.C. 81 (ON. Div. Ct.), appeal allowed in part in *Entrop et al. v. Imperial Oil Limited at al.*, (2000) 50 O.R. (3d) 18 (ON C.A.);

R. v. Stillman, [1997] 1 S.C.R. 607;

Trimac Transportation Services – Bulk Systems v. Transportation Communications Union, (1999) 88 L.A.C. (4th) 237 (Burkett – Canada);

Sarnia Cranes Ltd., [1999] OLRB Rep. May/June 479 (OLRB – Shouldice);

British Columbia (Public Service Employee Relations Commission) v. BCGSEU, [1999] 3 S.C.R. 3 (S.C.C.) – commonly referred to as "*Meiorin*";

Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City); Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City), [2000] 1 S.C.R. 665 (S.C.C.);

Canadian National Railway Co. v. C.A.W.-Canada, (2000) 95 L.A.C. (4th) 341 (M.G. Picher – Canada);

Imperial Oil Ltd. v. C.E.P., Local 777, [2001] A.G.A.A. No. 102 (Sims, Chair – AB);

Fluor Constructors Canada Ltd. v. I.B.E.W., (2001) 100 L.A.C. (4th) 391 (Elliott – AB);

Dupont Canada Inc. v. C.E.P., Local 28-0, (2002) 105 L.A.C. (4th) 399 (P.C. Picher, Chair);

Oak Bay Marina Ltd. v. British Columbia (Human Rights Commission), (2002) 217 D.L.R. (4th) 747 (BC C.A.);

J.D. Irving Ltd. v. C.E.P., (2002)111 L.A.C. (4th) 328 (M.G. Picher, Chair – NB);

Graymont Western Canada Inc. v. Cement, Lime, Gypsum & Allied Workers, Local D575, (2002) 114 L.A.C. (4th) 269 (Jamieson – MB);

"Employee alleges company forcing consent to security screening", March 4. 2003, Privacy Commissioner PIPED Act Case Summary #127, 2003 CanLII 36718 (PCC);

Milazzo v. Autocar Connaisseur Inc., 2003 CHRT 37 (CHRT – Mactavish);

Weyerhaeuser Company Ltd. v. I.W.A., (2004) 127 L.A.C. (4th) 73 Taylor – BC), "*Weyerhaeuser #1*";

Weyerhaeuser Co. v. I.W.A., [2004] B.C.C.A.A.A. No. 164 (Taylor), "*Weyerhaeuser #2*";

L.I.U.N.A., Local 1059 v. Bruce Power L.P., 2005 CanLII 35990 (ON LRB – Serena);

Canada Safeway Ltd. v. UFCW Local 373A, [2002] C.L.A.S. 15, A.G.A.A. No. 23 (Warren);

Bruce Power LP, 2005 CanLII35990 (ON OLRB);

Electrical Power Systems Construction Assn., 2005 CanLII 49085 (ON LRB – Silverman);

Imperial Oil Ltd. v. C.E.P., Local 900, (2006) 157 L.A.C. (4th) 225 (M.G. Picher, Chair); upheld, (2009) 96 O.R. (3d) 668, 183 L.A.C. (4th) 193 (ON C.A.);

North Bay General Hospital v. Ontario Public Service Employees Union, (2006) 154 L.A.C. (4th) 425 (Randall);

Vancouver Shipyards Co. Ltd. v. U.A., Local 170, (2006) 156 L.A.C. 4th) 229 (Hope – BC);

Weyerhaeuser Co. v. Ontario (Human Rights Commission), (2007) 279 D.L.R. (4th) 480 (ON Div. Ct.), "*Weyerhaeuser #3*";

Greater Toronto Airports Authority v. P.S.A.C., Local 0004, [2007] 90 C.L.A.S. 177 (Devlin – Canada);

Bantrel Constructors Co. v. U.A., Local 488, (2007) 162 L.A.C. (4th) 122 (Smith, Chair – AB), appeal allowed (2009) 305 D.L.R. (4th) 397, 182 L.A.C. (4th) 97 (AB C.A.);

Hamilton Health Sciences v. Ontario Nurses' Association, 2007 CanLII 73923 (ON LA), 167 L.A.C. (4th) 122 (Surdykowski);

Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Co., 2007 ABCA 426 (2008) 289 D.L.R. (4th) 95 (AB C.A.), application for leave to appeal dismissed [2008] S.C.C.A. No. 96;

Luka v. Lockerbie & Hole Inc. and Syncrude Canada Ltd., 2008 AHRC 1 (CanLII) (Bryant), appeal dismissed 2011ACA 3 (CanLII – AB C.A.);

Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ),[2008] 2 S.C.R. 561 (S.C.C.);

Dennis v. Eskasoni Band Council, [2008] C.H.R.D. No. 38 (CHRT – Hadjis);

Mechanical Contractors Association of Sarnia v. U.A., Local 663, [2008) O.L.A.A. No. 621 (T. Jolliffe);

Ontario Power Generation v. Society of Energy Professionals, (2009) 98 C.L.A.S. 246, 2009 CLB 9908 (Etherington);

Sterling Crane – A Division of Procrane Inc. v. I.U.O.E. Local 793, [2009] OLRB Rep. November/December 952 (OLRB – Jesin);

Leonard v. Noble Drilling (Canada) Ltd., [2010] N.L.H.R.B.I.D. No. 1 (NLBID – Burridge), appeal dismissed in *Leonard v. Newfoundland and Labrador (Human Rights Commission)*, (2011) 307 Nfld. & P.E.I.R. 236 (NL S.C.T.D.);

Irving Pulp & Paper Ltd. v. C.E.P., Local 30, (2009) 189 L.A.C. (4th) 218 (Veniot, Chair – NB); appeal of judicial review decision setting aside arbitration award as unreasonable dismissed (2011) 348 D.L.R. (4th) 105, 216 L.A.C. (4th) 418 (NB C.A.), appeal allowed in *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 (released 2013-06-14) (S.C.C.);

Harris Rebar, a Division of Harris Steel ULC. 2010 CanLII 53289 (ON OLRB);

Moore v. British Columbia (Education), 2012 SCC 61, (2012) 351 D.L.R. (4th) 451 (S.C.C.);

R. v. Metron, 2012 ONCJ 506, (2012) 1 C.C.E.L. (4th) 266 (ON C.J.);

C.*E.P. v. Suncor Energy Inc.*, (2012) 536 A.R. 325 (AB C.A.);

C.*E.P. v. Suncor Energy Inc.*, (2012) 539 A.R. 206 (AB C.A.), dismissing appeal of granting of injunction in (2012) ABQB 627;

Tonolli Canada Limited v United Steelworkers, and its Local 9042, 2013 CanLII 15108 (ON LA – Surdykowski);

Teck Coal Limited v. USW Local 9346 (Elkview Operations) and USW Local 7884 (Fording River Operations), May 9, 2013, Taylor – BC, unreported.

(Note: There were also media articles put forward. Modern media being what it is such articles are generally of limited or no assistance. In this case, I have not bothered to list them because they are entirely without cogency to the issue.)

III. COMMENTS ON THE MATERIALS

23. I have read everything the parties have put before me – every page and many several times. Because most of the evidence and all of the submissions are in written form, a comprehensive review is unnecessary. Similarly, I consider it unnecessary to analyze every authority cited, partly because it would not be helpful to do so, and partly because of the impact of the Supreme Court of Canada's decision in *Irving Pulp & Paper, Ltd.* This decision was released on June 14, 2013, before the parties had completed their written submissions. The parties had a full opportunity to consider and make submissions with respect to this significant decision (and they did so).

24. With respect to the "will say" statements, I continue to hold the view I recently expressed of such witness statements in *Tonolli Canada Limited* as follows:

> 5. There is a significant difference between an agreed statement of fact and a "will say" statement. An agreed fact is just that, and except in extraordinary circumstances (such as when cogent evidence or facts of which the arbitrator can take quasi-judicial notice clearly contradict the agreed "fact") an arbitrator will accept an agreed fact as stated. On the other hand, a "will say" statement is a summary of the substance of what the witness would say if he testified. Unless specifically agreed to, the contents of a "will say" statement which is admitted as evidence are not simply accepted as fact. The contents are assessed for relevance, credibility, reliability and weight like any other evidence. ...

25. I note that the "will say" statements in this case are full of beliefs and opinions. In that respect, I am guided by the Supreme Court of Canada decision in *R. v. Mohan*, [1994] 2 S.C.R. 9 in which Sopinka J. (speaking for the Court at pages 20-37) stated that an expert witness is someone qualified by education or experience and able to provide the trier of fact with opinion evidence about matters outside of everyday human knowledge and experience to assist the trier of fact to come to the necessary conclusions of fact. The general rule is that a non-expert witness can testify only to facts s/he has perceived. However, a non-expert witness can testify about matters of opinion regarding everyday experience (e.g. questions concerning apparent intoxication age, speed, weather, handwriting and identity in general) – but must nevertheless

restrict themselves to facts. (See also the Supreme Court of Canada decisions in: *Graat v. R.*, [1982] 2 S.C.R. 819, and *R. v. Beland*, [1987] 2 S.C.R. 398.)

26. I accept that the "will say" statements of Ms. Butler and Dr. Kadehjian constitute expert evidence. The weight properly accorded to them is another matter.

27. The other SCA "will say" statements are from individuals who have significant experience in the construction industry. However, these individuals are either principals of the SCA or one of its Member Employers, representatives of clients who are pushing for pre-access testing (including a senior management representative from Suncor), and in the case of Mr. Tidsbury, the President of CLR Alberta, a moving force behind the so-called Canadian Model. Although the evidence of these individuals is informed, I am not satisfied that constitutes either independent or expert evidence about the issue which I am tasked with determining and I do not accept it as such. The UA's will say statements are similarly deficient, to the same result.

IV. BACKGROUND

28. As the Affiliated Bargaining Agent of the designated Employee Bargaining Agency party to the Provincial Agreement in "MCA Zone 5, Sarnia" under the Provincial Agreement, the UA represents qualified or certified journeymen and apprentice plumbers, steamfitters, pipefitters, gasfitters, petroleum mechanics, welders, and job foremen in the Sarnia area. As part of its Provincial Agreement rights, duties and responsibilities, the UA refers its members and "travelers" from other UA Locals to Sarnia area employment with employers bound by the Provincial Agreement to perform construction industry work covered by the Provincial Agreement in the Industrial, Commercial and Institutional Sector, and in the Electrical Power Systems Sector (except for work covered by a collective agreement between the United Association of Journeymen and Apprentices in the Plumbing and Pipe Fitting Industry of the United States and Canada and EPSCA). MCAS and SCA Member Employers are bound by the Provincial Agreement.

29. The SCA is a multi-trade employers' organization based in the City of Sarnia, in the County of Lambton. The SCA's membership consists of approximately 50 contractors and 20 suppliers (i.e. the "Member Employers") who provide construction supplies and services to the major companies in the Sarnia/Lambton "Chemical Valley" (as it is commonly referred to) including Suncor, IOL, DuPont, and Nova Chemicals.

30. The SCA's primary role is to facilitate and coordinate collective bargaining through specialized trade organizations of mechanical, electrical, sheet metal and general contractors. SCA Member Employers must adhere to all the collective agreements which the SCA negotiates.

The MCAS is an employer trade organization for the mechanical trade, which has relations with the SCA. The MCAS has more than 20 members, most of whom are also members of the SCA. The MCAS is also a Zone Association of the Employer Bargaining Agency, the Mechanical Contractors Association Ontario Operating under the provincial bargaining umbrella, the MCAS is responsible for local negotiations of the Sarnia appendix to the Provincial Agreement, subject to the approval of the MCAO and its provincial Employee Bargaining Agency counterpart, the Ontario Pipe Trades Council.

V. THE PROVINCIAL AGREEMENT

31. Article 10 and the relevant parts of Article 36 of the Provincial Agreement are unremarkable management rights and hiring hall provisions respectively. For ease of reference, they are set out in Appendix A.

VI. THE ALCOHOL AND DRUG TESTING POLICIES

(A) The "Canadian Model"

32. The "Canadian Model for Providing Safe Workplace" has been produced by the Construction Employer's Association of Alberta. It is apparent that the so-called "Canadian Model" (Exhibit #8, T-1A) is really the "Alberta Model". The Canadian Model is not and does not have the authority of legislation – not even in Alberta where it originated. The cases cited suggest that that the Alberta employer community has embraced the Canadian Model. With the possible exception of British Columbia, the Canadian Model appears to have made little inroad in other Canadian jurisdictions. The Canadian Model is a lengthy (61 pages of text) document directed at the construction industry. It includes sections entitled Alcohol and Drug Guidelines (which includes a lengthy introduction which states that the purpose of the Policy is "to ensure a safe workplace for all workers by reducing the risks associated with the use of alcohol and drugs"); Alcohol and Drug Policy; Independent Legal Opinion; Independent Medical Opinion; Frequently Asked Questions; Employers' Guide; Supervisor's Guide; and Workers' Guide.

33. The Canadian Model states (at page G-3) that

> "The Objective of the ... alcohol and drug guidelines is to reduce the risks of incidents (safety, health, environmental and operational) of which alcohol and drug use may be a contributing factor or cause. The Canadian Model strongly supports rehabilitation activities and opportunities for re-employment and applies to all positions within the company including management personnel."

34. It states (also at page G-3) that in addition to prohibitions against reporting for or being at work "under the influence of" alcohol or drugs, and possessing, distributing or using alcohol or illegal drugs on any company workplace: "No worker shall test positive for alcohol or drugs at concentrations as specified in section 3.1 of the alcohol and drug work rule." In addition to specifying alcohol and drug concentration limits, section 3.1 states that an employee "shall not" refuse an alcohol or drug test.

35. It appears that the Canadian Model is not specifically restricted to safety sensitive workplaces or positions, but it also appears that every position on every construction job site is considered to be safety sensitive.

36. In addition to the statement of Objective at page G-3, the Alcohol and Drug Policy section states in section 1 (page 1) that its purposes are to provide a safe workplace and ensure that employees are treated fairly and with respect. Section 2 ("The Alcohol and Drug Policy is Important") on the same page refers to the Alberta *Human Rights, Citizenship and Multiculturalism Act* in as follows:

> "2.3 There are no reasonable alternatives to the company that impose a smaller burden on any rights an employee may have under Alberta's Human Rights, Citizenship and Multiculturalism Act and at the same time are equally as effective in promoting the purposes of this alcohol and drug policy."

37. Section 4.6 provides for random alcohol and drug testing. Section 4.7 is labeled "Site access testing" and states that:

> "When an owner directly or by contract requires site access testing, an employer may require alcohol and drug testing ... of any employee as a condition of access to the owner's property."

38. Section 5 sets out the "Consequences for Failure to Comply With the Alcohol and Drug Work Rule". Section 5.1 ("Company responses to violations") states that:

> "The company may discipline, or terminate for cause, the employment of an employee who fails to comply with the alcohol and drug work rule. The appropriate response depends on the facts of the case, including the nature of violation, the existence of prior violations, the response to previous corrective programs and the seriousness of the violation."

Section 5 goes on to provide specifics, including the proviso in section 5.4.2 that the owner of a site may permit a person who has been denied entry to access its site if a company, union or "labour provider" submits a written statement by the banned person to the effect that /he "agrees to reasonable conditions imposed by the owner or the contractor or the bargaining agent or labour provider or a part of a corrective or rehabilitative program."

39. Alcohol and Drug Policy "Appendix A – Alcohol and Drug Testing Procedures" specifies the manner of testing; namely, breath and saliva for alcohol, and urine and "oral fluids" for drugs, and describes protocols for that testing.

40. The Canadian Model "Independent Legal Opinion" cautions that: "The law relating to human rights, alcohol and drug dependencies and alcohol and drug testing is in an ongoing period of development ..." It questions the applicability of the Ontario Court of Appeal decision in *Entrop* in Alberta having regard to the Alberta Court of Appeal decision in the *Elizabeth Metis Settlement* case (reported at (2009) 8 Alta. L.R. (5th) 16, 457, 310 D.L.R. (4th) 519, reversing the Chambers Judge's decision reported at (2007) 81 Alta. L.R. (4th) 28). (I note that in *Alberta (Aboriginal Affairs and Northern Development) v. Cunningham,* 2011 SCC 37, [2011] 2 S.C.R. 670 the unanimous Supreme Court of Canada quashed that decision of the Court of Appeal and affirmed the original decision of the Chambers Judge.) The legal opinion cautions that there are potential discrimination and accommodation issues by inferred reference to the three-step test in *Meiorin*, by reference to "random testing" and the safety-sensitive position/workplace issue, and to duty to accommodate considerations. The opinion states that the issue of random drug testing has not been finally resolved and references several cases in that respect, including the arbitration decisions by Arbitrator Jones in 2004 in *Suncor Energy v. C.E.P., Local 707* (no citation provided); *Milazzo*; and Mr. Burkett's decision sitting (it appears) as an arbitrator in Alberta under the *Canada Labour Code* in *Trimac Transportation Services*.

41. I see nothing in the legal opinion which specifically references site or pre-access testing.

42. Ultimately, the legal opinion seems to suggest that if there are problems with the Canadian Model it will likely be in its application rather than in its structure. That was a prescient thought.

(B) The Suncor Contractor Policy

43. For ease of reference, the Suncor Contractor Policy (Applicant's Book of Authorities, T-2) is set out in Appendix B to this Award. This policy requires contractors who provide services to Suncor to meet or exceed the requirements of the Suncor Alcohol and Drug Policy (Applicant's Book of Authorities, T-3) for its own employees, or the Canadian Model. The relevant parts (for the purposes of this proceeding) are set out in Appendix C.

44. For the immediate purposes of this case, the Suncor Contractor Policy provides that all contractors that provide goods or services to Suncor in Canada must:

> "1. have an alcohol and drug policy that meets or exceeds either (i) Suncor's Alcohol and Drug Policy, Supporting Standards or (ii) the 2005 Canadian Model for Providing a Safe Workplace - Alcohol and Drug Guidelines and Work Rule as amended on October 1, 2010

> (Canadian Model), and (iii) any Site Specific Standards (as such policies or standards may be amended from time to time),
>
> 2. ensure when workers are initially deployed on behalf of the contractor organization (directly or indirectly, including sub-contractors), or are returning to a Suncor worksite after an absence of 90 calendar days or more, that prior to accessing any Suncor worksite any such worker must pass a pre-access alcohol and drug test in accordance with the Canadian Model.
>
> ..."

That is, Suncor has stipulated that as a pre-condition to commencing work on any Suncor work-site the employees of the MCAS Member Employers, which includes UA members, must pass a pre-access alcohol and drug test in accordance with the "Canadian Model"; and, be re-tested if more than 90 calendar days have passed since the date of the employee's last pre-access test and the employee has not remained in continuous employment, unless he has been continuously employed by the same employer.

45. Although none of the Suncor documents specify the method of testing, it appears that they are based on the Canadian Model. As noted above, the Canadian Model specifies the manner, protocols and concentration limits for breath, saliva, oral fluid and urine testing. It is reasonable to infer that the Suncor Contractor Policy pre-access testing is also to be carried out by way of breath, saliva, oral fluid or urine testing in accordance with and to the specification of the so-called Canadian Model.

(C) The SCA Model Policy

46. According to the will say statement of Ray Curran, the SCA Model Policy (Exhibit #8, T-4A) was developed in consultation with Ms. Butler. The Policy states that it is intended to provide "some basic generic guidelines which members may consider in developing their own Alcohol and Drug Policy" in response to the requirements of "customers" (i.e. site owners such as Suncor, IOL and Petro-Canada). The purpose of the SCA Model Policy is described in s. 2 as follows:

> The purpose of this policy is to communicate to employees [the contractor's] position on alcohol and drug use. [The contractor] is committed to providing and maintaining a safe and healthy work environment. This commitment includes the health and safety of its employees, customers, the community and the environment.
>
> The Company recognizes that use of alcohol, illicit drugs, and the use or misuse of medications can limit an employee's ability to perform in a safe and productive manner in the workplace and can have a serious and negative impact on the health and safety of himself/herself and others.
>
> The implementation of this policy is, therefore, an added and important component of the company's overall safety program. The objective of this policy is to minimize the risk of health

> and safety hazards as a result of impaired or substandard performance due to alcohol and drug use.
>
> This policy also outlines the assistance available to employees dealing with a substance abuse problem.

47. Section 5 ("Alcohol and Drug Testing"), of the SCA Model Policy provides for reasonable cause and post-incident reasonable cause testing. It says nothing about random or pre-access testing. Section 5B includes a requirement that all facilities involved in the collection of specimens and conducting the tests meet the standards of the Standards Council of Canada Laboratory Accreditation Program for Substance Abuse, or be certified for Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services.

48. Article 6 of Appendix "A" (added in 2009) discusses the circumstance of a positive test. It specifically sets out how an employee who tests positive for alcohol and drugs can be returned to work:

> Any employee removed from work because of a positive test, or a refusal to test, should their employment be continued, may return to work only upon confirmation from a qualified addictions professional that the employee is ready to return to work.

49. There is no evidence or indication that any Member Employer of the SCA (or the MCAS) has adopted the SCA Model Policy as written.

(D) Jacobs Industrial Services Ltd. Alcohol and Drug Policy

50. Jacobs' Alcohol and Drug Policy (Exhibit #8, T-2A) is dated October 2010 and states (in s. 4.20.1) that the Policy and standards in it were developed "with reference to" the "Canadian Model". It states (in s. 4.20.3) that compliance with the policy "is a condition of employment"; that testing will be performed "where there are reasonable grounds to suspect drug/alcohol use" and to "identify Employees whose performance is affected due to alcohol and drug use"; and that "Employees who refuse to participate in investigations and submit to A&D testing will be subjected to disciplinary action, up to and including termination of employment or removal from the site for failure to comply with company policy." (Emphasis supplied.)

51. The Policy provides for reasonable cause testing (s. 4.20.8 b), what I consider to be reasonable cause post-incident testing (s. 4.20.8 c), and return to work testing (s. 4.20.8 d IV – V) – none of which are in issue in this proceeding. The Policy specifies (in s. 4.20.5) that neither testing nor termination of employment are automatic and that "In all instances, a thorough investigation is required prior to determining whether an A&D Test is required."; and that: "Owner/Client required pre-access testing is not part of this policy (With the exception of 4.20.7 f – Client requirements)." Since s. 4.20.7 f specifies that Jacobs will comply if a client requires

the removal of an "individual" from the client's site or project for a violation of its (i.e. the client's) policy, it effectively incorporates all such client requirements into the Jacobs Policy. That is, a client's pre-access testing requirements are part of and override Jacobs' alcohol and drug policy. In this case that means the breath, saliva, oral fluid or urine testing in accordance with and to the specification of the so-called Canadian Model.

52. Section 4.20.20 f iv also specifies that:

> "Removal of an individual from the client's site or project because of a violation of its policy will result in an immediate site ban."

This includes a positive pre-access test result or a refusal to take such a test. The Jacobs Policy says nothing about the duration of the site ban. I infer that that will depend entirely on the client's policy or wishes.

(E) Curran Contractors Ltd. Alcohol and Drug Policy

53. Under "Scope and Application" (page 41) the Curran Policy (Exhibit #8, T-4A) states that:

> "This policy applies to all employees while engaged in company business, on company premises or while operating company vehicles. Because of the greater risks associated with certain jobs in certain locations, the company may require or may be required by the customer to implement more stringent monitoring processes for employees engaged in certain jobs. These processes, if adopted, shall be deemed to be incorporated into the company's policy for the affected employees. ..."

54. The Curran Policy distinguishes between safety sensitive, risk sensitive, and non-sensitive work (page 43), but includes pre-access testing for both safety sensitive and risk sensitive work (but random testing only for safety sensitive work). The Policy specifies that:

> "The type of work and consequently the type of alcohol and drug testing will be determined by Curran Contractors Ltd. in consultation with the respective client prior to beginning any work on a project."

55. Since Suncor's demand that SCA Member Employers conduct pre-access testing as a precondition to worker deployment on a Suncor job site is at the root of the grievance in this case, it is clear that Curran will implement any testing required by Suncor or any other client/customer. Once again, this must mean breath, saliva, oral fluid or urine testing in accordance with and to the specification of the so-called Canadian Model.

56. The Curran Policy goes on to define pre-access testing as requiring that:

> "An employee must successfully pass and alcohol and drug test within the past 12 month period or more recently, depending on the client's requirements, before commencing work on a project."

(It also defines reasonable cause, non-random post-incident, and random testing – none of which are directly in issue in this proceeding.)

57. The Curran Policy says nothing about the consequences of a positive pre-access test result. I infer that that will depend entirely on the client's policy or wishes.

(F) Anderson-Webb E H & S Management System Alcohol and Drug Policy

58. The Anderson-Webb alcohol and drug policy (Exhibit #8, T-7A) states that it applies to all employees while engaged in company business, while working on company premises, or while operating company equipment or vehicles (s. 3.2), but also states (in s. 3.3) that:

> "Due to greater health and safety risks associated with certain jobs in certain locations, the company may impose more stringent monitoring processes for employees engaged in certain jobs. These processes, if adopted shall be deemed to be incorporated into the company's policy for the affected employees."

59. Like the Curran Policy section 4.2 D of the Anderson-Webb Policy states that:

> "Some clients may require more stringent testing and positive level standards in which case the stringent of standards will apply [sic]. Each employee will be informed of these standards prior to commencement of work on client's premises."

60. The Anderson-Webb Policy provides (in s. 5) for reasonable cause testing, reasonable cause post-incident testing, and random testing. Section 5.6(a) also provides that:

> "When an owner directly or by contract requires site access testing, Anderson-Webb may require alcohol and drug testing of any employee as a condition of access to the owner's property."

61. Section 5.10 stipulates that:

> "An employee who is in contravention of Anderson Webb Limited's Drug and Alcohol Policy the policy while engaged in work on any work site shall be subjected to that work site's Drug and Alcohol Policy requirements and will be removed permanently from any further work on that site while employed by Anderson Webb Limited."
>
> (Emphasis added.)

62. This must mean breath, saliva, oral fluid or urine testing in accordance with and to the specification of the so-called Canadian Model.

VII. THE PARTIES' SUBMISSIONS – ABRIDGED

63. The UA submits that pre-access alcohol and drug testing is *de facto* random testing because the demand that the test be taken is mandatory and arbitrary, without any cause or even suspicion of actual alcohol or drug use by the employee or a workplace problem in that respect. The UA submits that unlike the forms of alcohol and drug testing which are legally permissible (i.e. reasonable cause, non-random post-incident, or as part of a return to work rehabilitation program), such indiscriminate pre-access testing without individualized reasonable justification, and which hinges solely on a third party's demand (in this case Suncor) that every employee assigned or referred to work on a particular site be tested, is not reasonably justified.

64. The UA submits that the pre-access testing component of the alcohol and drug policies in issue is unreasonable, and that neither the management rights provision, not anything else in the Provincial Agreement permits the introduction of unreasonable rules or policies. Further, the UA submits that Article 36A.1 of the Provincial Agreement requires the SCA Member Employers to "hire through the Local Union office", and obliges them to accept UA members referred to employment in accordance with these hiring hall provisions unless they have just or reasonable cause not to. The UA submits that the mere fact that a referred UA member tests positive for marijuana metabolites or other drugs in his urine does not constitute just or reasonable cause.

65. The SCA denies that the Provincial Agreement prohibits its Member Employers from imposing pre-access alcohol and drug testing in the exercise of their management rights in response to Suncor's demand. The SCA submits that its Member Employers have implemented alcohol and drug policies which include a pre-access testing component because of their overriding concern for safety, in accordance with their management right and obligation to do so. The SCA asserts that this case is about the genuine desire of its Member Employers and the clients they serve, including Suncor, to achieve absolute workplace safety for every employee and the communities in which they operate. The alcohol and drug policies in issue are part of a proactive approach to health and safety.

66. The SCA argues that the Suncor Contractor Policy and its Member Employer alcohol and drug policies are necessary because common sense suggests that some employees attend work under the influence of alcohol or other drugs, and that in addition to not being fit for duty such employees create health and safety risks which can result in a potentially catastrophic accident at worksites like Suncor's. The SCA submits that pre-access alcohol and drug testing is therefore a necessary and critically important risk identification and management component of a health and safety risk mitigation and management strategy on safety-sensitive worksites.

67. The UA retorts that the SCA's position is based on an erroneous and baseless assumption that a positive pre-access drug test, or a refusal to take such a test, will indicate a heightened workplace safety risk due to impairment. The UA argues that merely asserting that the testing is in the interests of health and safety is insufficient to justify a serious infringement of employee off-duty work conduct and bodily integrity and privacy. Counsel submits that the concrete evidence necessary to show that the proposed policy is actually required and will actually achieve the asserted result in a manner proportionate to the corresponding infringement of employee rights is missing.

68. The UA argues that the SCA has not established that the pre-access testing in issue is reasonably necessary. Counsel argues that the SCA has cited no examples of workplace incidents in Sarnia where post-incident investigation suggested that drug or alcohol impairment was a contributing factor. Counsel submits that the SCA's evidence in that respect is unclear, lacks particularity and is based on hearsay, and should therefore be given no weight. Counsel argues that even if it is accepted, the evidence falls well short of establishing that undetected on-the-job drug and/or alcohol impairment is causing any significant health and safety risks at Suncor's Sarnia work-sites. He submits that on the contrary, the evidence establishes that the Sarnia/Lambton Chemical Valley is one of the safest workplace jurisdictions in North America.

69. The UA observes that the SCA does not allege that the work on a Suncor Sarnia site is any more dangerous or "safety-sensitive" than work on other Sarnia area job sites, and yet its Member Employers are only introducing pre-access testing for employees assigned or referred to Suncor worksites. Counsel submits that this undermines the SCA's purported health and safety necessity justification for pre-access testing. The UA asserts that the pre-access alcohol and drug testing in issue is being used as a means to obtain blanket random alcohol and drug testing at Suncor sites, and that this is contrary to the arbitral consensus described by Arbitrator M.G. Picher in *Imperial Oil Ltd.* The UA argues that the pre-access testing in issue is also contrary to Arbitrator Jolliffe's 2008 decision in *Mechanical Contractors Association of Sarnia*. Counsel asserts that the same employers are seeking to introduce the very alcohol and drug testing which was rejected by Arbitrator Jolliffe for proceeding in a "lock-step, check list fashion" without regard to the surrounding circumstances.

70. The UA submits that the 3-step *Meiorin* test applies to pre-access testing, and cites the Ontario Court of Appeal decision in *Entrop* in support of its submission that pre-access testing must be reasonably necessary and appropriate for the stated work-related purpose. The UA further submits that the case law reveals that the general consensus is that random and therefore pre-access drug and alcohol testing cannot be justified as reasonably necessary for the purpose of ensuring workplace safety. The UA asserts five reasons for this:

1. There is no established causal relationship between pre-access testing and a decrease in workplace injuries, let alone workplace injuries due to on-the-job impairment.

2. Pre-access testing has no bearing on an employee's behaviour with respect to drug and alcohol use once that employee has passed the test and gained access to the job site. The only ways to ensure that employees remain substance-free on the job is through proper education, training and monitoring – all measures which are already in place.

3. There is no evidence of a drug and alcohol problem in the Sarnia region or of any workplace injuries resulting from alcohol or drug use. The SCA has presented no positive test results in post-incident testing data in Sarnia, or any data indicating a reduction in the injury rate coincident on the introduction of pre-access testing in Alberta. The pre-access testing in issue therefore targets a non-existent problem.

4. The proposed method of drug testing tests for only "recent" drug use, not present impairment. The SCA has provided no evidence to demonstrate that urinalysis can actually detect impairment, which is separate and distinct from drug use. The SCA's evidence also fails to establish that there is a test capable of detecting past drug impairment or that such a test would reveal anything about an individual's present or future fitness for work.

5. The opinions proffered by several of the SCA's witnesses are just that, and not cogent evidence, while the UA's evidence (from the American Civil Liberties Union) suggests that most individuals who use drugs do so during off-duty hours and are never impaired at work.

71. The SMW joins in the UA's submission that the SCA has presented no reliable evidence that there is a demonstrated alcohol and drug problem in any Suncor or any other Sarnia area workplace, or that pre-access testing will address the purported problem if there is one.

72. The SCA submits that the *Meiorin* test is not applicable notwithstanding that the Ontario Court of Appeal applied it in *Entrop*. Counsel says that the workplace standard which requires employees not come to work under the influence of alcohol or drugs is an uncontroversial *bona fide* occupational requirement ("BFOR"), and that the policies requiring pre-access testing in issue are not *prima facie* discriminatory. The SCA argues that the alcohol and drug policies in issue simply enforce that standard and are different from the policy considered in *Entrop*. The SCA submits that the Court accepted that substance abuse is a disability under the Code and found a *prima facie* case of discrimination because all users were perceived to be substance abusers under the policy and subject to the same sanction (termination of employment) which was too severe and not sufficiently sensitive to individual capabilities, while in this case there is no evidence that the Member Employers believe all employees who test positive for drugs or alcohol are addicted. In any event, says counsel, although the Court of Appeal held that the

random and pre-employment drug testing in *Entrop* failed on the third branch of the *Meiorin* test because they could not be justified as reasonably necessary to accomplish IOL's legitimate goal of a safe workplace free of impairment, the Court also held that alcohol and drug testing for employees hired into, promoted to or transferred to safety sensitive positions, which counsel asserts is akin to pre-access testing, did not contravene the Code.

73. Having sought to both rely on the fact that the Ontario Court of Appeal decision in *Entrop* has been referenced in many decisions concerning alcohol and drug testing policies and to distinguish it, counsel submits in reply that much of the *Entrop* decision is *obiter*. I infer that the suggestion is that the *Entrop* decision should be accorded little or no weight.

74. Although the SCA does not quite concede the point, it submits that even if a positive drug test does not indicate impairment, it is nevertheless probative and justified in a safety sensitive environment. Further, the SCA says its Member Employers are not relying on pre-access testing to show impairment. They intend to rely on pre-access testing, and more specifically on a positive test result to indicate that an employee is not able or willing to manage his or her alcohol or drug consumption in advance of an alcohol and drug test that he or she knows is compliant with human rights legislation, which the SCA asserts pre-access testing in a safety-sensitive worksite has been consistently found to be.

75. The SCA acknowledges that post-incident and reasonable cause testing are useful, but says that these come too late because they are performed after the fact, after the damage, possibly including loss of life, has already occurred. The SCA submits that the following evidence demonstrates the positive health and safety impact of pre-access testing as follows:

> a. 50% drop in medical aid incidents, 25% drop in first aid and doctor visits and drop in non-negative post-incident test results (*Bantrel* arbitration decision at page 129 – which the UA submits is a legal nullity and no authority for anything because it was ultimately quashed by the Alberta Court of Appeal.);
>
> b. Total Recordable Incidence Rate ("TRIR") of 0.32 where pre-access testing is conducted compared to TRIR of 0.48 on sites where no pre-access testing is conducted (Witness Statement of Doug Chalmers);
>
> c. reduction in the percentage of non-negative post-incident tests from 18.5% to 3.8% at a site in a community that, as described, is similar to Sarnia (Witness Statement of Valerie Rendell);
>
> d. reduction in the percentage of non-negative post-incident tests from 23.4% to less than half that frequency (Witness Statement of Valerie Rendell);
>
> e. reduction in the percentage of non-negative pre-access tests from 7% to 2.2%-3% in the years following implementation (Witness Statement of Valerie Rendell);

f. reduction in the percentage of non-negative post-incident tests from approximately 30% to 10% (Witness Statement of Robert Neil Tidsbury); and

g. reduction in the percentage of non-negative pre-access tests from approximately 5% - 7% to 2%-3.5%.

76. The SCA submits that any suggestion that an employer is not permitted to infringe on employee privacy unless and until a major alcohol and drug problem has already arisen in the workplace or an event of some catastrophic proportion has occurred is contrary to the overwhelming weight of the jurisprudence and to common sense. The SCA submits that the consensus in the arbitral jurisprudence is that refineries, like chemical plants, do not need to demonstrate an alcohol and drug problem in the workplace to introduce pre-access testing and that an employer is not required to demonstrate a "significant problem" with alcohol and drug related issues at a safety sensitive worksite. Counsel argues that placing such an evidentiary burden on an employer, or requiring the SCA to meet a higher standard than he asserts has been established by the arbitral jurisprudence for refineries, would be unreasonable. The SCA invokes what counsel refers to in the SCA's reply submissions as the "intuitive appeal" of a conclusion an employer is not required to demonstrate a need for pre-access alcohol and drug testing in a safety sensitive workplace. By definition, says counsel, pre-access testing applies to workers who are not already on the worksite. Employers want to assess the risk that the incoming workers will be under the influence of alcohol or drugs at work. As such, the prevalence of alcohol and drug use in the workplace prior to a worker entering that workplace is likely of little relevance. Pre-access testing is therefore reasonable without evidence of a substance use problem at the workplace, unlike random testing which has been held to require some evidence of such problem.

77. The SCA asserts that "there is no longer a great deal of controversy over whether pre-access drug and alcohol testing is permissible under Canadian law", and that similar policies in safety-sensitive workplaces have been upheld across the country. The UA denies this assertion. The UA submits that pre-access testing itself has received little direct consideration in the extensive jurisprudence on drug and alcohol testing.

78. The SCA submits that the case law demonstrates that testing policies similar to the ones in issue have been applied in safety-sensitive workplaces across the country, and have been upheld as both reasonable under the *K.V.P.* standard, and compliant with human rights legislation. It asserts that the risk and consequences of a catastrophic incident which could occur when an employee works under the influence of alcohol or drugs are great, and that an employer's right and duty to mitigate that risk outweighs the privacy interests of employees who choose to work in a safety-sensitive environment. Indeed, the SCA submits that it has already been determined that the appropriate balancing of employee privacy interests and employer

obligations to ensure workplace safety permits health and safety policies which allows for alcohol and drug testing in certain circumstances, including an alcohol and drug test before an employee is allowed onto a safety sensitive worksite.

79. The UA submits that under the SCA Member Employer alcohol and drug policies the consequence of a positive pre-access test or a refusal to submit to the test is that the employee will be banned from and prohibited from working on any Suncor worksite, notwithstanding a lawful referral under the Provincial Agreement. Counsel says that under the policies in issue this severe consequence follows in all positive result or refusal cases, notwithstanding that neither a positive pre-access drug test result, nor a refusal to take such a test, suggest much less establish that the employee was impaired at the time of the test, or that the employee ever has been impaired while at work. Similarly, says the UA, a positive result or a refusal to test does not suggest that the employee will be impaired at work after the test, which by definition is when work on a Suncor job site would commence.

80. Citing the SCA's will say witness statements (specifically Mr. Tidsbury's at para. 22; Ms. Rendell's at paras. 14 and 21; Mr. Curran's at para. 11; Mr. Reynolds' at para. 15, and page 6 of Dr. Kadehjian's report), the UA submits that SCA Member Employers perceive an employee who fails (i.e. tests positive) or refuses a pre-access test as not only a health and safety risk, but as disabled within the meaning of the Code and that this entitles such employees to the protections of that legislation.

81. The SCA responds that the policies do not provide for automatic termination on a positive test. The SCA says that employees who test positive or fail the pre-access test are not perceived or treated as being addicted or otherwise disabled, and that the Code does not apply. Counsel points out that Appendix "A" to the SCA Model Policy sets out suggested steps in the event of the violation of an employer's alcohol and drug policy. Counsel points out that paragraphs 5-8 also provide that employees with alcohol or drug addictions will be accommodated to the point of undue hardship, and that there is a path for safe return to work following a violation of an employer's alcohol and drug policy. Counsel also notes that Jacobs' Policy specifically prohibits termination of employment as a result of a positive drug or alcohol test and provides a path for return to work in the event that an employee either refuses to test or tests positive for alcohol or drugs, which is a recognized form of accommodation.

82. The SCA submits that the clear trend in the jurisprudence is to permit alcohol and drug testing for alcohol and drugs prior to a transfer into a safety-sensitive positions as a reasonable exercise of management rights which complies with human rights legislation. Notwithstanding that assertion of clarity, counsel refers to Cote J.A.'s dissent in the 2012 *Communications, Energy and Paperworkers; UA, Local 707 v Suncor Energy Inc.* Alberta Court of Appeal decision as indicative of the lack of consensus in the case law regarding the reasonable necessity

of random testing is reasonably necessary. The SCA points to paragraphs 14-17 and 20 of the dissent:

> 14. Killing or maiming people in a big accident, or a number of smaller accidents, is a uniquely weighty danger. The legal term "convenience" or "inconvenience" scarcely suffices. The big issue here is the "balance of convenience". Very full detailed and overwhelming evidence here shows the dangers of accidents, and of the danger of drinking or drugs among workers. Privately giving a urine sample to be tested for alcohol or drugs does not begin to equal death or dismemberment, or widowhood or becoming orphaned, by an accident. People routinely go to labs to give their physicians urine samples, and for a far broader set of tests. If the chamber's judge did not see comparing death or maiming with that as the pivotal issue, that was error of law. And if it was seen, the contrary view unreasonable, in my respectful view.
>
> ...
>
> 16. The physical dangers would be bad enough if those facing the perils of accidents were all Suncor employees and members of the respondent union. But they are not; those people work alongside thousands of other workers. Any accident, ranging from a truck backing up to huge explosion, is likely to kill or injure others. Maybe even to kill or hurt members of the public not employed at the plant in question. Those others have no say in this litigation. The evidence here shows that this plant contains a number of very dangerous substances, often under pressure or at high temperatures. Some small leaks could be catastrophic. Even mere inconvenience to the public or to non-parties is always a relevant factor for balance of convenience for an injunction.
>
> 17. Apart from dangers of death or injury, any sort of fire or explosion at an oil sands plant is likely to cause colossal financial loss from physical damage and loss of production...And quite possibly to inflict heavy vicarious liability...on Suncor for the negligence of one of its employees. And maybe lead to prosecution under safety legislation. If this injunction gave Suncor a defence against a negligence claim, then the enormous loss could fall on innocent non-parties to the present suit.
>
> ...
>
> 20. Even if that mandatory random testing may not catch (or deter) all those who come to work under the influence of alcohol or drugs, that it not the legal test. Our fire departments, fire marshals, building inspectors, and police have not yet prevented all careless fires or impaired driving. The Ministry of Transport cannot detect all airplane pilots who drink or have impairing medical conditions. Yet no one would repeal those laws or disband those forces.

83. The SCA also cites Arbitrator Taylor's decision in *Teck Coal* as support for random testing as being reasonably necessary to ensure workplace safety. Counsel says that in dismissing the union's request for an interim order prohibiting the employer from conducting random testing pending adjudication of a policy grievance in that respect, the arbitrator balanced employee privacy interests against workplace safety when he considered which party would suffer the greater irreparable harm.

84. The UA argues that the all-employee pre-access alcohol and drug testing described in the Suncor Contractor Policy which is effectively being adopted by SCA Member Employers is, if anything, even more expansive and objectionable than random drug testing. Counsel emphasizes

that proportionality is at the heart of the balancing of interests approach which has been universally adopted in such cases, and submits that the pre-access testing in issue is completely lacking in proportionality.

85. The SCA acknowledges that random testing has received only limited support but denies that pre-access testing is the same as or worse than unannounced random testing. Counsel argues that pre-access testing has been more widely accepted in courts, by arbitrators, and by human rights tribunals. The SCA asserts that the UA (and SMW) seek to conflate these two types of testing in order to obscure the different treatment the jurisprudence accords them. The SCA submits that alcohol and drug testing policies in issue reflect the concerns of arbitrators and human rights tribunals and serve to ensure the safety of employees, communities, and the environment while having a minimal impact on employee privacy interests. The SCA asserts that such policies have been consistently found to be a proportionate, measured and rational response to increased employer obligations to ensure a safe workplace.

86. Notwithstanding its assertion that pre-access and random testing are different, and that pre-access testing has been widely accepted, the SCA cites few cases in which pre-access testing has been considered and relies mainly on decisions which only dealt with random testing. For example, counsel points out that the union in *Trimac Transportation Services* accepted that random alcohol and drug testing as reasonable when such testing was required by United States' law for drivers who crossed the border and only challenged the requirement of random testing for employees who did not have to travel to the United States. The SCA asserts that this is significant because it demonstrates an acceptance that alcohol and drug testing where required to perform work in certain areas is reasonable – when all that case really points out in that respect is that the United States' regulatory scheme is beyond the reach of Canadian arbitrators. The SCA submits that arbitrators have allowed employers to implement alcohol and drug testing despite good safety performance, in the workplace. For example, says counsel, in *DuPont Canada Inc.* Arbitrator P. Picher agreed that the employer could implement an alcohol and drug policy focus was prevention of alcohol and drug problems that could adversely impact on safety at a worksite that had not experienced an on-the-job lost-time work injury in 10 years.

87. Although it asserts that no such evidence is required, the SCA submits that the evidence nevertheless demonstrates the need for the pre-access testing in issue. The SCA disputes the UA's evidentiary assertions and maintains that its evidence of the experience with pre-access alcohol and drug testing in Canadian jurisdictions shows subsequent reductions in safety incident frequencies and post-incident failure rates and demonstrates that pre-access testing improves workplace safety.

88. In response to the UA's criticisms of the substantiating evidence, the SCA asserts that the evidence shows the following occurred in the approximately four years since the Jolliffe decision:

(a) The "drug sniffing dog" incident at IOL and the incident at Suncor that followed the Olympic hockey final game described by Mr. Tius in his oral testimony.

(b) Mr. Reynolds' evidence of an incident in paragraph 13 of his witness statement which the UA has not denied;

(c) Mr. Webb's evidence in paragraph 13 of his witness statement of two incidents which the UA claims are unparticularized, but does not deny; and

(d) Mr. Webb's evidence in paragraph 15 of his witness statement of a third incident.

89. The SCA also says that the following evidence suggests that number of 1.5 incidents per year is actually understated:

(a) Ms. Rendell's evidence that the post-incident failure rate at a site in Ontario was 18.2%, and that a further 9.1% of test requests were refused.

(b) Ms. Butler's evidence about the prevalence of substance use based on use patterns in southwestern Ontario.

(c) Ms. Butlers' and Dr. Kadehjian's evidence of the difficulties in detecting substance use.

(d) The evidence is from a survey of five contractors, not from the entire employer base.

90. The SCA says that its and its Member Employers are not concerned about an employee who may indulge in a little marijuana with his friends on a Friday night, but with their obligation to keep their employees and the general public safe. The SCA states that the objective is not to intrude upon employees' private lives, but to eliminate the dangers of alcohol and drug use in the workplace. The SCA submits that this is a reasonable and laudable goal which is readily achievable with the assistance of pre-access testing. The SCA says it understands and respects that there are two sides to this issue, but submits that, as the case law has articulated, both sides are required to relinquish their ideal position in favour of "balancing of interests", and that the alcohol and drug policies in issue fairly allow employers the margin necessary to ensure safety while preserving to employees a modicum of dignity and privacy.

91. The SCA submits that an employer is obliged to do everything possible to ensure that an employee's consumption of alcohol or drugs does not result in harm to that employee or to

others. In support of this submission, counsel points to section 25(2)(h) of the *Occupational Health and Safety Act* and s. 217.1 of the *Criminal Code*. The UA responds that there is nothing in section 25(2)(h) of the *Occupational Health and Safety Act* or in s. 217.1 of the *Criminal Code* which justifies every employer action which relates to health and safety. These provisions only require employers to take reasonable steps to protect employee health and safety.

92. The UA submits that the fact that other unions in this or other jurisdictions have agreed to pre-access testing does not assist the Employers. In the SMW's submissions in support of the UA, counsel writes emphasizes the significant potential impact on its members if pre-access testing is determined to be acceptable. Counsel says that whatever the practices of other unions the SMW has never agreed or consented to, and actively opposes, pre-access/random access testing of its members which counsel submits is not a BFOR and has no legitimate purpose. The SMW submit that pre-access testing violates the Code, but that even if it doesn't it violates the dignity and fails to respect employee privacy.

93. The UA submits that the Supreme Court of Canada decision in *Irving Pulp & Paper, Ltd.* expressly equates the evidence required to justify random testing at the Irving plant with that required to justify it at "chemical plants or even in workplaces that pose a risk of explosion", and agrees with the original Board of Arbitration's conclusion that uncertain or minimal safety gains from testing did not outweigh a severe invasion of employee privacy. Counsel refers to paragraph 45 of the decision in which Abella J. wrote for the majority that:

> The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse. It has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (*Canadian National*) and chemical plants (*DuPont Canada Inc. and C.E.P., Loc. 28-0 (Re)* (2002), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (*ADM Agri-Industries*), in the absence of a demonstrated problem with alcohol use in that workplace.

94. The UA submits that the Supreme Court of Canada's decision in *Irving Pulp & Paper, Ltd.* is determinative of the issues in this proceeding: namely, that in accordance with that decision the SCA Member Employers' unilateral imposition of pre-access alcohol and drug testing is unreasonable and must be rejected because:

> 1. Pre-access testing is *de facto* random testing without reasonable cause and like unilaterally imposed random drug and alcohol testing in a unionized workplace pre-access testing is prohibited in absence of a demonstrated alcohol and/or drug use problem.

2. The SCA has not alleged much less demonstrated an actual need for pre-access alcohol and drug testing as a precondition to being permitted onto a Suncor Sarnia work site. The SCA has offered only a few vague and unparticularized anecdotal examples of work site substance use or impairment in millions of man hours worked, and it isn't even clear that any of these "incidents" occurred on a Suncor job site.

3. There is no evidence that any UA member was ever being impaired on a Suncor job site.

4. The urine and bodily fluids pre-access testing in issue proceeds in the discredited mandatory "lock-step, check-list fashion", fails to consider the employee and the circumstances on an individualized basis, is far more invasive and constitutes a significantly greater affront to human dignity than breathalyzer testing, and is not proportional to the alleged problem.

5. The evidence of Mr. Tius establishes the impressive safety record of UA members working as employees of MCAS Member Employers, and more specifically that in 2012 there were only 11 recordable injuries in 5,515,167 man hours worked; that is, a TRIR of 0.4. In the 4th quarter of 2012 there was a total of 1, 251,155 man hours worked with only 1 recordable injury for a TRIR of 0.2.

95. Notwithstanding its reliance on random testing case law, the SCA submits that the Supreme Court of Canada's recent decision in *Irving Pulp & Paper, Ltd.*, which specifically concerned random testing, is not relevant to the pre-access testing issue in this case because:

a) *Irving Pulp & Paper, Ltd.* concerned random alcohol testing whereas at issue in this case is the decision of the SCA to implement pre-access testing;

b) the board of arbitration in *Irving Pulp & Paper, Ltd.* found that the worksite was not as dangerous as a chemical plant, whereas in this case there is no dispute that the refinery worksite is dangerous;

c) the board of arbitration in *Irving Pulp & Paper, Ltd.* found that there was no significant issue with drugs and alcohol in the workplace, whereas in this case there is evidence that workers attend at work under the influence or become impaired on the worksite; and

d) the majority Supreme Court of Canada decision in *Irving Pulp & Paper, Ltd.* is about the standard of review and the deference to be accorded to decisions of labour arbitrators, and the Court did not say it would have been unreasonable for the arbitration board to allow random alcohol testing.

96. The SCA argues that what the Supreme Court of Canada actually did in *Irving Pulp & Paper, Ltd.*, was confirm that arbitrators have accepted reasonable cause, post-incident, and

return-to-work testing, and have rejected mandatory unannounced random testing without reasonable cause. Counsel points out that the Court did not comment on pre-access testing.

97. Notwithstanding its assertion that its Member Employers are motivated by health and safety considerations, the SCA concedes that the pre-access alcohol and drug testing is issue is being imposed in response to Suncor's demand for such testing. The SCA argues that pre-access testing is necessary in order to protect its Member Employers' "relative competitive position". The SCA claims that if the UA's grievance succeeds Suncor will resort to using non-union contractors. The SCA submits that I must consider the consequences of denying its Member Employers pre-access testing when a site owner requires it, including the relative competitive position of union contractors in the Sarnia area versus non-union contractors. The SCA asserts that the petrochemical industry in Ontario stands alone in Canada and the United States as the petrochemical location that does not perform pre-access testing, and that this practice puts Ontario employers at a competitive disadvantage. The SCA says that the reality is that Suncor will not admit any contractors whose employees have not passed an appropriate pre-access alcohol and drug test and that if SCA Member Employers bound by collective agreements with the UA want to continue to obtain work from Suncor, they are going to have to adopt pre-access testing.

98. The UA argues that this assertion cannot be a consideration when fundamental human rights and privacy rights are in issue, and that there is in any event no evidence about what Suncor will do in the event that the grievance is upheld. The UA submits that it is at least as likely that Suncor, which counsel notes was given notice of this proceeding but declined the opportunity to participate, will comply with the decision in this case. The UA suggests that it is in any event far from clear that Suncor could obtain the services required from non-union sources. On the contrary, says the UA, it is apparent to anyone familiar with the Sarnia/Lambton Chemical Valley that Suncor will have great difficulty obtaining the skilled workers it needs outside of the unionized workforce. The UA also suggests that if Suncor persists in its demands in the face of a decision declaring pre-access testing to be unlawful, its Suncor's conduct would be susceptible to direct legal challenge.

VIII. DECISION

99. To repeat, this case concerns only unilateral employer-imposed pre-access alcohol and drug testing in a safety-sensitive workplace, and more specifically on Sarnia area Suncor worksites. It raises both collective agreement and *Human Rights Code* issues in that respect.

100. There is no merit to SCA's suggestion that universal mandatory pre-access testing has been widely accepted in courts, by arbitrators, and by human rights tribunals. That is simply not

so – certainly not in Ontario. However, this is not entirely a case of first impression in Ontario. *Weyerhaeuser #3* and the *Entrop* litigation dealt with pre-employment drug testing, which for practical purposes is a form of pre-access testing, but in a non-union (no collective agreement) situation. *Provincial –American Truck Transporters* and *Trimac Transportation Services* are decisions of Ontario arbitrators under the *Canada Labour Code* which dealt with a form of pre-access testing mandated by United Sates' regulatory requirements. *Canadian National Railway Co.* and *Greater Toronto Airports Authority* dealt with "pre-access" to safety-sensitive positions alcohol and drug testing. The OLRB decision in *Sarnia Cranes Ltd.* dealt with the entire spectrum of alcohol and drug testing, and concluded that the pre-access testing invoked by the employer at the instance of the employer's third party customer IOL was contrary to the International Union of Operating Engineers' Provincial Agreement and the Ontario *Human Rights Code* (as it then read – see below).

101. Alcohol and drug testing has been fiercely litigated in cases in which collective agreement or human rights issues were raised and determined. There has never been a serious issue about an employer's right to have an alcohol and drug policy. An employer can and probably should have such a policy. The concern has always been with the components of a unilateral alcohol and drug policy. More specifically, what can an employer's unilateral alcohol and drug policy require of employees?

102. The arbitral and Court jurisprudence on the issue of alcohol and drug testing continues to evolve. The amount of jurisprudence demonstrates the extent of the controversy and the importance of the issue to employers and employees. The jurisprudence has established a proportional balancing of rights and interests approach to the issue of mandatory alcohol and drug testing unilaterally imposed by an employer in the exercise of management rights under a collective agreement in a safety-sensitive workplace. The jurisprudence has evolved to the point that reasonable cause, non-random evidence based post-incident, and return to work monitoring post-treatment alcohol and drug testing are no longer controversial. There is no longer any question that an employer can unilaterally implement these sorts of non-arbitrary testing so long as it is a component of a broader approach and assessment of workplace related alcohol and drug use. The debate in that respect is closed.

103. The primary parties in *Mechanical Contractors Association of Sarnia* were also the MCAS and the UA. As in this case, the SCA intervened and carried the employer-side litigation ball. The subject of the decision was a reasonable cause and post-incident alcohol and drug testing policy formulated in response to IOL's third party directions and guidelines. Arbitrator Jolliffe noted (in paragraph 31) that: "... the Sarnia construction sector has a proven good safety record, there being no persuasive indication of any deficiency in that regard." Although he also noted (in paragraph 84) that the MCAS and SCA acknowledged that pre-access and random testing "are qualitatively different than reasonable cause and post-incident testing" , there was no

issue of pre-access or random testing in relation to safety sensitive work in that round of alcohol and drug testing litigation between these parties.

104. Particularly in this jurisdiction, mandatory non-cause related alcohol and drug testing, including random and pre-access testing remain controversial notwithstanding the Ontario Court of Appeal decision in *Entrop*. True pre-access alcohol and drug testing is a relatively recent issue in Ontario. It appears to have arisen largely at the instance of third party customers of contractors like the MCAS/SCA Member Employers, just as it did in Alberta.

105. Contrary to what has been asserted in this proceeding (or with respect, what may be suggested in the Supreme Court of Canada decision in *Irving Pulp & Paper, Ltd.*) the arbitral jurisprudence on the issue of alcohol and drug testing is not entirely consistent. Indeed, as Arbitrator Smith observed in *Bantrel*, there is an east-west arbitral divide in that respect. I continue to hold the view that although decisions of arbitrators, tribunals or courts in other jurisdictions, particularly appellate (Court of Appeal) decisions, may be persuasive, I am not bound by them. I am bound by the decisions of Ontario reviewing and appellate courts, and by the decisions of the Supreme Court of Canada. In the face of a binding Ontario Court of Appeal or Supreme Court of Canada decision a conflicting or "different path" decision from another jurisdiction has little or no persuasive value.

106. In this case, I am bound by the Ontario Court of Appeal decision in *Entrop*, which remains the leading Ontario case on the human rights component of the issue. I am also bound by the Supreme Court of Canada's decision in *Irving Pulp & Paper, Ltd.* I reject the SCA's submission that *Irving Pulp & Paper, Ltd.* is irrelevant. On the contrary, it is now the leading case in the collective agreement management rights part of the alcohol and drug testing debate.

107. I note that Abella J. began her analysis in *Irving Pulp & Paper, Ltd.* with the observation (in paragraph 17) that when the issues arises in a collective agreement workplace environment decisions which deal with alcohol and drug testing in non-unionized workplaces under human rights legislation offer little analytical assistance (specifically referring to the Ontario Court of Appeal decision in *Entrop*). Although I take the point, I am not sure (with respect) that I entirely agree with that assertion (which must be read together with her comments in paragraph 20 of the majority decision). In any event, the case before me raises both collective agreement and Code issues. Although in *Irving Pulp & Paper, Ltd.* the issue was alcohol, that case, like *Entrop*, concerned unannounced mandatory without cause random testing. Neither case was directly concerned with pre-access testing. I agree that random and pre-access testing are both qualitatively different from reasonable cause and non-random post-incident testing. Although only unilateral pre-access testing is in issue in this case, the UA suggests that pre-access testing is a form of random testing. In any event, the jurisprudence on other types of alcohol and drug testing informs the analysis.

108. The *Entrop* human rights decision and the *Irving Pulp & Paper, Ltd.* collective agreement decision are the leading cases in those respects. Both inform my determination of the grievance in this case.

(A) The Jurisprudence – Collective Agreement Issue

109. Notwithstanding my conclusion that *Irving Pulp & Paper, Ltd.* and *Entrop* have eclipsed the previous jurisprudence and read together rule the field on the issue of alcohol and drug testing in employment environment, it is worth recalling what was said in some of the earlier cases because it foreshadows the unsteady evolution to the result in *Irving Pulp & Paper, Ltd.*

110. *Bantrel* is an often-cited Alberta case which considered the Canadian Model (as it then was) and the employer's right to require employees already on site when a pre-access testing policy was implemented to submit to alcohol and drug testing as a condition of continued access to the site. I agree with the UA that the Board of Arbitration's decision in that case offers little assistance because it was quashed by the Alberta Court of Appeal. However, it is worth noting that it suggests that unilateral employer imposed pre-access testing has a longer and different history in western Canada, and as I have already mentioned, that there is a divergence of opinion about pre-access testing between the western arbitral view and the eastern arbitral view.

111. Because the Alberta Court of Appeal decision in *Bantrel* overturned the judicial review decision and quashed the arbitration decision, it is the only significant determination in that proceeding for the purposes of the analysis in this case. The Court of Appeal rightly considered it significant that the Canadian Model had been incorporated into the collective agreements between the employer and the two union parties to the proceeding. However, the then (2001) Canadian Model permitted testing for cause but did not require pre-employment or pre-access testing. Third party Petro Canada adopted pre-access testing as part of its alcohol and drug policy, and the collective agreement employer (Bantrel) incorporated this new Petro Canada pre-access testing policy into its own policy without any negotiation with either union. The issue at arbitration was whether applying this new pre-access testing policy to employees already on site when it was adopted violated the collective agreement or the Alberta human rights legislation.

112. The Board of Arbitration's majority conclusion that there was no violation of the collective agreement or the Alberta *Human Rights, Citizenship and Multiculturalism Act* was initially upheld on judicial review. The Court of Appeal noted (in paragraph 34) the importance to all concerned of efforts to improve workplace safety, particularly on hazardous work sites but concluded (in paragraph 35 – rightly in my respectful view) that the case was not primarily about the desirability of combatting substance abuse in the workplace, but about alcohol and drug testing for existing employees having regard to the provisions of the collective agreements. As I

read its decision, the Court of Appeal quashed as unreasonable the Board of Arbitration majority decision on two bases. First, the conclusion that the 2001 Canadian Model authorized or contemplated pre-access testing was an unreasonable interpretation of the collective agreements; and second, that whether or not the new pre-access policy was itself reasonable for the particular work site, the parties had not agreed to it in their collective agreements. This very much presaged the Supreme Court of Canada's determination in *Irving Pulp & Paper, Ltd.*

113. The preliminary decision in *Weyerhaeuser #1* did not concern random or pre-access testing but includes a comprehensive review of the alcohol and drug testing jurisprudence at the time, with particular emphasis on Arbitrator M.G. Picher's decision in *Canadian National Railway Co.* Prior to *Irving Pulp & Paper, Ltd.* the leading cases on alcohol and drug testing in Ontario were the Ontario Court of Appeal decision in *Entrop* (notwithstanding that it did not deal with collective agreement issues) and *Canadian National Railway Co.*, which were issued within 3 days of each other, and Arbitrator Burkett's decision in *Trimac Transportation Services*. The latter two decisions dealt with both collective agreement and human rights issues.

114. In *Canadian National Railway Co.*, Arbitrator Picher confirmed that the arbitral balancing of interests approach which had been developed was a pragmatic response to workplace health and safety reality in safety-sensitive workplaces. He concluded that this reality required that a unionized employer's right to require employees to submit to alcohol and drug testing did not have to be specifically derived from statute or the collective agreement. I note that this decision followed by some 11 years the same arbitrator's decision in *Canadian National Railway Co. v. U.T.U.*, (1989) 6 L.A.C. (4th) 381, in which he wrote that:

> "... the right ... to demand ... a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by aw. As such it must be used judiciously, and only with demonstrable justification based on reasonable and probable grounds."

These two decisions are not inconsistent. They simply have to be read together in order to obtain a true sense of the balancing required, particularly in light of Arbitrator Picher's approval of *Trimac Transportation Services.*

115. In *Trimac Transportation Services*, Arbitrator Burkett correctly observed (at page 258) that the contest in every alcohol and drug testing case is between the employer right and obligation to take reasonably necessary steps to maintain a safe workplace, and the employee right to privacy. The basic rules which govern the employer unilateral collective agreement rule-making power were established over 45 years ago in *K.V.P. Co. Ltd.* The *K.V.P.* approach has been approved at all levels of all jurisdictions of the Canadian justice system, most recently by the Supreme Court of Canada in *Irving Pulp & Paper, Ltd.*, and it continues to be the established starting point in the management rights rule-making discussion, largely because the foundation

of the rules is reasonableness. Arbitrator Burkett also cited LaForest J.'s observation in *R. v. Dyment*, [1988] 2 S.C.R. 417 at pp. 431-432 that: "... the use of a person's body without his consent to obtain information about him invades an area of personal privacy essential to the maintenance of his human dignity." Arbitrator Burkett rightly observed that the contest is a balancing between the unassailable objective of promoting workplace health and safety and the fundamental underpinning of a free and democratic society; namely, the essential, albeit not absolute, core value of individual privacy.

116. The jurisprudence reflects this struggle of balancing competing rights and interests in what we think of as being a free and democratic society. In paragraph 115, Arbitrator Jolliffe referred to the following passage at pages 425 to 426 of *Fluor Constructors Canada Ltd.* which the SCA also relies on in this case:

> Canadians tend to have a visceral negative reaction when the state, employers, or anyone in authority dictates to them what they can or cannot do, especially on their personal time or with their personal property. And yet, society continues to evolve in its reaction to intrusion on individual freedoms. Society can slowly recognize that intrusions on individual rights and freedoms are necessary because of the benefits resulting from that intrusion. At one time Canadian society found laws about drinking and driving and wearing seat belts repugnant. Society, for the most part, has come to accept those "intrusions" as useful and now desirable because of the injury, death and damage those intrusions prevent. Society today has a very different view of drinking and driving then it did 20 years. The legislative intrusions, and public education and a variety of other initiatives, caused a shift in values to acceptance of intrusion as necessary and even desirable because of the broader societal benefits.

While the changes in society are undeniable, this cannot mean that every intrusion on privacy rights is justified. As privacy rights are stripped away it becomes even more important to carefully examine every new intrusion and to limit it to the extent that it is demonstrably necessary. It certainly does not follow from the fact that the relatively minor intrusion of mandatory seat belt use and the more significant intrusion of impaired driving testing have been justified and largely accepted (which has not been followed by mandatory Interlock Ignition access for drivers whether or not they have been convicted of an impaired driving offence) that the more personally intrusive pre-access alcohol and drug testing in issue is justified or acceptable.

117. In his 2000 *Canadian National Railway Co.* decision Arbitrator Picher invoked the image of nuclear near-meltdown and drunken pilots in the sky, and concluded that the safety-sensitive nature of railway operations, combined with what he considered to be a relatively high incidence of positive test results (which was 10% over "all categories which included hiring, promotion, reasonable cause and post-incident testing", without breaking the numbers down by category) and the employer record of alcohol and drug arbitration cases, was sufficient to demonstrate the need for the testing in issue in that case because the employer had exhausted less intrusive

alternatives and had established a human rights appropriate approach to alcohol and drug disability issues.

118. In my view, Arbitrator M.G. Picher's observation in his 1989 *Canadian National Railway Co.* decision (paragraph 114, above) continues to ring true. There is no evidence that the sky is falling.

119. Although the contest has long been acknowledged to be between management health and safety rule or policy-making rights and obligations and employee privacy rights this has often been linked to employee productivity as well as to potential of health and safety Armageddon. It is apparent that this potential consequence-based approach gave relatively short shrift to privacy rights. There is little indication of consideration or more than lip service to "bigger picture" contextual considerations, including nature and importance of personal privacy in a free and democratic society. It also tends to overstate the significance of the public safety interest and to ignore the role of government actors as guardian of the public interest.

120. Indeed, much of the pre-*Irving Pulp & Paper, Ltd.* jurisprudence focused on the potential for catastrophic incidents which could affect the health and safety of employees or others, and public and environmental safety, if employees in a safety-sensitive workplace or position worked under the influence of alcohol or drugs, even if they were not "legally" impaired.

121. We live in a society which is increasingly regulated, and in which governments and citizens, and employers and employees, increasingly do not trust each other. Open and surreptitious surveillance is increasingly common. With it rights and freedoms, particularly privacy rights, are sacrificed on the altar of safety and security. John Locke once cautioned that: "As soon as men decide all means are permitted to fight an evil, then their good becomes indistinguishable from the evil they set out to destroy." That is worth remembering.

122. Generally speaking, a society is a grouping of individuals who live in a defined geographical area subject to the same political authority and shared set of general values. Ours is a free and democratic society. The essential core value of a free and democratic society is individual freedom. Privacy is an essential component of the individual freedom which is fundamental to a vibrant democracy.

123. Of course, there is no such thing as absolute freedom in any society. Even in a free and democratic society no one can have absolute freedom or absolute privacy. The nature of society is that there must be a balance between individual rights and societal needs. Sometimes even the fundamental or core right to privacy must give way to a demonstrable societal necessity. Privacy rights associated with personal freedom and privacy rights co-exist with obligations and restrictions recognized as essential to the proper functioning of that society. This social contract

of mutual rights and freedoms (including the core right to privacy) on one hand, and obligations (including the obligation to accept the limits on one's own rights and freedoms and to respect the rights and freedoms of others) on the other reflects the balancing which society has deemed appropriate for the mutual benefit and protection of all its members. The foundation of a free and democratic society is mutual trust that members will respect and comply with their social contract rights and obligations. Of course, human beings being what we are, mutual trust is not nearly enough. That is why a free and democratic society must have "the law". The law of society consists of constitutionally derived legislation and jurisprudence which reflects and evolves in response to changes in the accepted "social contract" norms of mutual rights and freedoms of the society.

124. Accordingly, even in a free and democratic society there are formal and informal rules which are thought to be necessary for the orderly functioning of society and have been formulated for the greater benefit of all. The formal rules are the statutory laws promulgated by duly elected governments within their jurisdiction, and contracts agreed to within the framework of those laws. These formal rules are enforced (or not if found to be unconstitutional or otherwise lacking in legitimacy) as necessary by the justice system, which in this jurisdiction also incorporates the common law to the extent that it has not been overtaken by legislation. Although legislatures tend to react to the demands of and changes in society, there is a proactive element to the legislative system.

125. The basic legal framework includes legislation which can cut both ways, but which by and large impinges on freedom by prohibiting or restricting behaviour which society deems too risky or otherwise inappropriate (criminal and quasi-criminal, health and safety, and employment standards legislation, for example), or which codifies and protects fundamental rights and freedoms from unjustified infringement (human rights and privacy legislation, for example).

126. The justice enforcement system has judicial and quasi-judicial components, both of which also exercise a constitutional oversight jurisdiction over the Legislatures. In our modern society, the quasi-judicial component, which operates subject to the oversight of the judicial component, has an ever increasing impact on the non-criminal law day-to-day affairs of society. However, our justice is reactive rather than proactive. It is primarily a complaint-driven and evidence-based system. The fundamental underpinning of our entire reactive justice system is reasonable or probable cause. It does not favour non-cause-related preventative measures which impinge on the fundamental rights of individuals in our society. Perhaps that is why *K.V.P.* has remained the starting point for the management rights rule-making discussion.

127. Our labour relations justice system is as reasonable and probable cause-based as the other components of our civil law and litigation system. It is evidence-based, not faith or belief-based. Accordingly, assumptions, unsupported presumptions, anecdotal or unparticularized evidence,

and broad-based statistical inferential reasoning is typically "not good enough" to satisfy the balance of probabilities onus of proof. The extent to which an employer can require an employee to undergo alcohol and drug testing will depend on the degree of safety sensitivity and demonstrated (not presumed) legitimate need in the particular workplace. The evidence sufficient for the purpose will depend on the circumstances of the particular case, but it must in any event always include cogent direct non-anecdotal evidence from that workplace. The employer must also establish that the rule or policy will probably improve workplace health and safety. Uncertain or speculative health and safety gains do not justify a significant invasion of employee privacy. The resulting threshold may be a high one, but the Supreme Court of Canada in *Irving Pulp & Paper, Ltd.* has made it clear that that is the way it should be, particularly when fundamental individual privacy rights are in the balance.

128. A workplace is not a democracy. But neither does a workplace operate outside of society, and worker does not check his societal rights at the workplace door. An employer has the right to manage its workplace and direct its employees. But not only is this right to manage and direct not absolute, it is limited by legislation (such as the *Employment Standards Act*, the *Occupational Health and Safety Act*, the *Workplace Safety and Insurance Act*, and a myriad of legislation depending on the nature of the workplace), and as the Supreme Court of Canada decision in *Irving Pulp & Paper, Ltd.* makes clear, in a unionized workplace by the collective agreement (and in Ontario the *Labour Relations Act, 1995*).

129. When an employer acts unilaterally without specific statutory authority and the only collective agreement provision in play is the management rights clause contained or deemed to be contained in the collective agreement, the question becomes: "is the employer acting reasonably". When a unilateral employer rule or policy invades an employee fundamental right to privacy, for the rule or policy to be reasonable it must be a necessary proportionate response to a demonstrated need in the particular workplace which outweighs the impact of the incursion of employee privacy rights.

130. Notwithstanding that Ontario is a residual management rights jurisdiction (i.e. an employer bound by a collective agreement continues to have all of the management rights of a non-unionized employer except to the extent that these rights are fettered by the collective agreement or legislation which applies to that unionized employer), when it comes to resolving a conflict between employee privacy rights and employer collective agreement rights the question is not: "does the collective agreement prohibit it?"; but rather: does the collective agreement permit it?" In the absence of statutory or collective agreement authority, an employer which implements or proposes to implement a rule or policy which invades employee privacy rights that employer bears the onus of establishing that the rule or policy is a necessary and proportionate response which is likely to meet a demonstrably legitimate need in the particular workplace which intrudes on employee privacy to the least possible extent.

131. The actual competing "interests" are the employee fundamental or core right to privacy and the employer right to operate its business to make the most possible profit. Conflict is inevitable.

132. In addition to being free and democratic, ours is also a capitalist society. Capitalism is grounded in the concept of free enterprise. As such, capitalism derives from the core values of a free and democratic society. Although the employer profit motive is not objectionable, it and management rights are derivative and cannot stand on the same footing as privacy rights. Management rights, though significant in the workplace, are not fundamental in the same sense as individual privacy rights. All things being equal in a contest between the two, privacy rights must prevail.

133. It seems to me that the pre- *Irving Pulp & Paper, Ltd.* collective agreement "balancing of interests", approach did not properly weigh the relative significance of the employee and employer "interests" in issue and gave little or no weight to the collective agreement context or interest. If the focus of the debate is truly employee health and safety as the SCA says it is, the legitimate employer business management interests should not be treated as being at the same level as the fundamental employee right to privacy.

134. It is clear from the SCA's submissions, and from the conduct of its Member Employers, that a significant concern, perhaps their most significant concern is a business concern. A legitimate business concern is not by itself sufficient to justify a significant intrusion on employee privacy rights. Trampling on the fundamental employee right to privacy in the interests of employer business concerns is not balancing. Whatever the business concern, measures such as pre-access alcohol and drug testing which significantly invade employee privacy are only justified if there is a demonstrable need for health and safety action, the testing is likely to have the desired effect, and other less intrusive measures have been tried and have failed or are not reasonably available.

135. The public interest is a factor which cannot be ignored. However, neither should its significance in a private rights dispute be overstated. The public interest in workplace health and safety is reflected in legislation. In Ontario this is primarily the *Occupational Health and Safety Act*, but collaterally includes the *Employment Standards Act* and the *Workplace Safety and Insurance Act*. The proactive expression and protection of the broader public interest in workplace health and safety is a matter for the Legislature, not for individual employers, or for arbitrators or Courts. Although the public interest is a consideration in a proceeding such as this one, as the Ontario Court of Appeal recognized in *Entrop* and the Supreme Court of Canada recognized in *Irving Pulp & Paper, Ltd.*, the contest is between employer and employee rights and obligations.

136. The arbitrator in *Fluor Constructors Canada Ltd.* makes two important points (perhaps unwittingly in the context of the decision). First, Canadians tend to react instinctively against attempts to invade their privacy. This instinctive reaction is born of a free and democratic society. In our society individuals are free to give up privacy rights, and modern technology (such as Facebook) entices many (perhaps unthinkingly) to do so. However, they are equally free to resist attempts to invade their privacy, regardless of the professed intentions of the invader. Every intrusion on privacy rights must be objectively justified and limited to the extent demonstrably necessary for a legitimate purpose.

137. The passage from *Fluor Constructors Canada Ltd.* cited in paragraph 116 (above) reflects the fact that members of a free and democratic society are always free to voluntarily give up a right or freedom, but can only be required to do so by contract (including a collective agreement), or by legislation which society through its elected representatives has deemed necessary for the individual or the greater good. It is a point which, with respect, Cote J.A. (who I reiterate was writing in dissent) failed to recognize in the 2012 *Communications, Energy and Paperworkers UA, Local 707 v Suncor Energy Inc.* passage from the decision cited by the SCA (paragraph 82, above). In the absence of statutory or contractual obligation the individual has the right to determine for himself whether submitting to alcohol and drug testing, with or without sanctions in the event of a positive test, is preferable to risking injury in an accident in which alcohol or drugs may be a factor. It is true that people routinely provide urine or blood samples, or undergo other invasive testing, by and at the request of medical health professionals. In the absence of such testing mandated by public health or criminal law legislation, they do so voluntarily upon the advice of those medical health professionals without risk of sanction if they refuse to do so. If an individual voluntarily submits to such testing he does so for personal medical purposes without risk of "failure" for his own direct benefit with significant legislated privacy protections.

138. Further, although an employer can ask an employee to provide confidential medical information, the circumstances and extent to which an employer can do so are restricted. An employer does not derive any right to compel an employee to compromise his legitimate right to keep personal medical information confidential from the mere existence of an employment relationship. (See, for example, *Hamilton Health Sciences*, which dealt with an employer's right to access an employee's confidential medical information for STD benefits purposes, paragraphs 20-22, 25-26, 28 and 30; and, *Providence Care, Mental Health Services v. Ontario Public Service Employees Union, Local 431*, 2011 CanLII 6863 (ON LA – Surdykowski), in which I revisited the issue, and which analysis has by and large been applied in this jurisdiction). The same analysis is equally applicable to the invasion of any other employee privacy right. An employer may impinge on an employee's privacy right only to the extent required or permitted by legislation, or by a collective agreement or other contract of employment, or to the extent

demonstrably necessary for the particular legitimate purpose. Further, Cote J.A.'s reference (in paragraph 20 of his dissent) to criminal, quasi-criminal and fire code legislation misses the point that alcohol and drug testing is not specifically permitted much less mandated by legislation except in limited circumstances. Pre-access alcohol and drug testing is not mandated or specifically permitted by legislation in this jurisdiction.

139. In any event, it does not follow from the fact that the relatively minor intrusion of mandatory seat belt use and the more significant intrusion of impaired driving testing have been justified, legislated, and largely accepted that the even more intrusive pre-access alcohol and drug testing in issue is justified or acceptable.

140. There is no doubt that employee alcohol and drug use may increase the risk of accident and injury in a safety sensitive workplace. However, that must be demonstrated to be the case in the particular workplace. Alcohol and drug use have been identified as significant contributing factors to the carnage on our roads. But neither the same *Criminal Code* which rightly outlaws impaired driving, nor any other legislation, requires drivers of motor vehicles to pass a "pre-access" test to demonstrate that they are not performance deficient due to alcohol or drugs before they operate a motor vehicle. As far as I am aware no such reliable drug testing technology is available. However, alcohol testing technology is available (in the form of breathalyzer-based Ignition Interlock systems) and is used after criminal conviction for impaired driving. Even then, it is not part of the sentencing in every impaired driving case. Similarly, although no Legislature has considered it necessary to pass legislation which specifically authorizes the R.I.D.E. Program initiative, the sometimes-derided judicial activism has filled that gap – demonstrating the contribution of jurisprudence to "the law". The Supreme Court of Canada has approved R.I.D.E. programs as a lawful exercise of the general police power (in this jurisdiction) under s. 216(1) of the Ontario *Highway Traffic Act* (see, *Dedman v. The Queen*, [1985] 2 S.C.R. 2; *R. v. Hufsky*, [1988] 1 S.C.R. 621; *R. v, Ladouceur*, [1990] 1 S.C.R. 1257).

141. There are many examples of circumstances in which pre-access testing is not required notwithstanding that "customers" may face significant health and safety risks from a service provider who is performance or judgment deficient due to alcohol or drugs. For example, I have no evidence and am not otherwise aware that physicians and surgeons who make life and death decisions, police officers who carry and are authorized to use lethal weapons, fire fighters, or transport truck drivers who do not drive cross-border (in which case they must be tested to comply with U.S. (not Ontario or Canadian) law) are required to submit to unilaterally imposed alcohol and drug testing before they access their workplace.

142. It is noteworthy that notwithstanding his alcohol and drug testing conclusions in *Canadian National Railway Co.*, Arbitrator Picher held (at page 382) that even then automatic discipline short of discharge consequent upon a positive test result was not reasonable or

justifiable because a positive result of impairment while on or subject to (i.e. on-call for) duty and did not by itself constitute just cause for that purpose. He also found no evidence which supported the employer's risk theory justification; that is, that an employee who once ingested drugs (and therefore tested positive) probably has or will attend work under the influence of or suffering from significant after effects of off-duty alcohol or drug use (just as Arbitrator Burkett rejected it on substantially the same basis in *Trimac Transportation Services* (at pages 273-275)).

143. The entire Supreme Court of Canada in *Irving Pulp & Paper, Ltd.* recognized that the arbitral jurisprudence has established a proportional balancing of rights and interests approach to the issue of unilaterally imposed mandatory alcohol and drug testing in the exercise of management rights under a collective agreement in a safety sensitive workplace. As clarified by the Supreme Court of Canada this approach posits that an employer cannot unilaterally impose a privacy invasive rule or policy which has employment consequences unless it can demonstrate a need for that rule or policy which outweighs the harmful impact of employee privacy rights.

144. When applied to a safety sensitive workplace, the proportionate balancing of interests approach permits reasonable cause, non-random post-incident, and return to work after treatment for substance abuse alcohol and drug testing as part of a broader workplace alcohol and drug policy. However, the Supreme Court of Canada decision in *Irving Pulp & Paper, Ltd.* also makes it clear that the mere fact that a workplace is dangerous or safety sensitive does not automatically justify the unilateral imposition of mandatory random testing with employment consequences. That is, the fact that a workplace is safety-sensitive is not sufficient to demonstrate that a unilateral arbitrary or non-reasonable cause based alcohol and drug testing policy is necessary. The suggestion that the fact that a workplace is safety-sensitive is sufficient for that purpose (in *DuPont Canada Inc.*, *Weyerhaeuser #2*, and *Fording Coal*, for example) has been discredited. The Supreme Court of Canada's decision in *Irving Pulp & Paper, Ltd.* makes it clear that that is only a necessary precondition which, to paraphrase Abella J., starts but does not end the alcohol and drug testing justification conversation.

(B) Collective Agreement Issue - *Irving Pulp & Paper, Ltd.*

145. *Irving Pulp & Paper, Ltd.* concerned the employer's unilateral adoption of mandatory unannounced random alcohol testing (by breathalyzer) of employees in safety-sensitive positions in a dangerous workplace environment. The union grieved the without cause component of the testing policy. Reasonable cause, non-random post-incident, and return to work monitoring program alcohol and drug testing were not in issue. By majority decision, the Board of Arbitration concluded that the employer had failed to demonstrate that the testing in issue was justified and outweighed the employee right to privacy. The New Brunswick Court of Queen's Bench allowed the employer's application for judicial review and quashed the arbitration decision as unreasonable. The New Brunswick Court of Appeal dismissed the union's appeal.

The Supreme Court of Canada allowed the union's further appeal and restored the arbitration decision.

146. Writing for the 6-judge majority, Abella J. begins by rightly pointing out that highly significant and sensitive privacy and safety interests in a dangerous unionized workplace are usually dealt with in collective bargaining, and that failing agreement in that respect an employer's right to unilaterally impose a reasonable health and safety rule or policy which affects bargaining unit employee privacy rights derives solely from its management rights under the collective agreement. Abella J. approved the proportional balancing of interests approach which has evolved in the arbitral jurisprudence, and what she characterized as the "hallmark collective bargaining tenet" that an employer cannot impose a workplace rule which has disciplinary consequences unless the demonstrable need for the rule outweighs the impact on employee privacy rights. Abella J. clearly states (in paragraph 4) that that the dangerousness of a workplace is a relevant but not determinative factor, or as she puts it, it "does not shut down the inquiry, it begins the proportionality exercise."

147. Abella J. expanded on these points in paragraphs 21-27 of the majority decision. She continued in paragraphs 30-38, 45, 50 and 52-52 as follows:

> [30] 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 directly involved in a workplace accident or significant incident, or where the employee is returning to work after treatment for substance abuse. (See *Esso Petroleum Canada and C.E.P., Loc. 614, Re (*1994), 56 L.A.C. (4th) 440 (McAlpine); *Canadian National Railway Co. and C.A.W.-Canada Re* (2000), 95 L.A.C. (4th) 341 (M. Picher), at pp. 377-78; *Weyerhaeuser Co. and I.W.A. (Re)* (2004), 127 L.A.C. (4th) 73 (Taylor), at p. 109; *Navistar Canada, Inc. and C.A.W, Local 504 (Re)* (2010), 195 L.A.C. (4th) 144 (Newman), at pp. 170 and 177; *Rio Tinto Alcan Primary Metal and C.A.W.-Canada, Local 2301 (Drug and Alcohol Policy) (Re)* (2011), 204 L.A.C. (4th) 265 (Steeves), at para. 37(b)-(d).)
>
> [31] But the dangerousness of a workplace — whether described as dangerous, inherently dangerous, or highly safety sensitive — is, while clearly and highly relevant, only the beginning of the inquiry. It has never been found to be an automatic justification for the unilateral imposition of unfettered random testing with disciplinary consequences. What has been additionally required is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.
>
> [32] The blueprint for dealing with dangerous workplaces is found in *Imperial Oil Ltd. and C.E.P., Loc. 900 (Re)* (2006), 157 L.A.C. (4th) 225 ("*Nanticoke*"), a case involving a grievance of the employer's random drug testing policy at an oil refinery, which the parties acknowledged was highly safety sensitive. Arbitrator Michel Picher summarized the principles emerging from 20 years of arbitral jurisprudence under the KVP test for both drug and alcohol testing:
>
> - *No employee can be subjected to random, unannounced alcohol or drug testing, save as part of an agreed rehabilitative program.*

- *An employer may require alcohol or drug testing of an individual where the facts give the employer reasonable cause to do so.*

- It is within the prerogatives of management's rights under a collective agreement to also require alcohol or drug testing following a significant incident, accident or near miss, where it may be important to identify the root cause of what occurred.

- Drug and alcohol testing is a legitimate part of continuing contracts of employment for individuals found to have a problem of alcohol or drug use. *As part of an employee's program of rehabilitation, such agreements or policies requiring such agreements may properly involve random, unannounced alcohol or drug testing generally for a limited period of time, most commonly two years*. In a unionized workplace the Union must be involved in the agreement which establishes the terms of a recovering employee's ongoing employment, including random, unannounced testing. *This is the only exceptional circumstance in which the otherwise protected employee interest in privacy and dignity of the person must yield to the interests of safety and rehabilitation, to allow for random and unannounced alcohol or drug testing.* [Emphasis added; para. 100.]

[33] There can, in other words, be testing of an individual employee who has an alcohol or drug problem. *Universal*, random testing, however, is far from automatic. The reason is explained by Arbitrator Picher in *Nanticoke* as follows:

> . . . a key feature of the jurisprudence in the area of alcohol and drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced drug testing for all employees in a safety sensitive workplace as being an implied right of management under the terms of a collective agreement. *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 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*. 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. [Emphasis added; para. 101.]

[34] Significantly, Arbitrator Picher acknowledged that the application of the balancing of interests approach could permit general random testing "in some extreme circumstances":

> 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)

[35] In the case before him, however, since there was no evidence of a substance abuse problem at the oil refinery, the random drug testing component of the policy was found to be unjustified

(*Nanticoke*, at para. 127). His decision was upheld as reasonable by the Ontario Court of Appeal (*Imperial Oil Ltd. v. Communications, Energy & Paperworkers Union of Canada, Local 900*, 2009 ONCA 420, 96 O.R. (3d) 668).

[36] The balancing of interests approach has not kept employers from enacting comprehensive drug and alcohol policies, which can include rules about drugs and alcohol in the workplace, discipline for employees who break those rules, education and awareness training for employees and supervisors, access to treatment for substance dependence, and after-care programs for employees returning to work following treatment.

[37] But I have been unable to find any cases, either before or since *Nanticoke*, in which an arbitrator has concluded that an employer could unilaterally implement random alcohol or drug testing, even in a highly dangerous workplace, absent a demonstrated workplace problem (*Esso Petroleum*, at pp. 447-48; *Metropol Security, a division of Barnes Security Services Ltd. and U.S.W.A., Loc. 5296 (Drug and Alcohol testing) (Re)* (1998), 69 L.A.C. (4th) 399; *Trimac Transportation Services — Bulk Systems and T.C.U. (Re)* (1999), 88 L.A.C. (4th) 237; *Canadian National*, at pp. 385 and 394; *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, [2002] B.C.C.A.A.A. No. 9 (QL), at para. 30; *ADM Agri-Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 195 (Substance Abuse Policy Grievance)*, [2004] C.L.A.D. No. 610 (QL), at para. 77; *Petro-Canada Lubricants Centre (Mississauga) and Oakville Terminal and C.E.P., Local 593 (Re)* (2009), 186 L.A.C. (4th) 424 (Kaplan), at pp. 434-39; *Rio Tinto*, at para. 37(a) and (d)).

[38] In the only two arbitration decisions that have upheld random alcohol testing, the employers were found to be justified in implementing random alcohol testing for employees in safety sensitive positions because there was a demonstrated general problem with alcohol use in a dangerous workplace (*Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.*, T.J. Christian, Chair, May 27, 2000, unreported ("*Strathcona*"); *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004*, [2007] C.L.A.D. No. 243 (QL) (Devlin) ("GTAA")).

...

[45] But, as previously noted, the fact that a workplace is found to be dangerous does not automatically give the employer the right to impose random testing unilaterally. The dangerousness of the workplace has only justified the testing of particular employees in certain circumstances: where there are reasonable grounds to believe that the employee was impaired while on duty, where the employee was directly involved in a workplace accident or significant incident, or where the employee returns to work after treatment for substance abuse. It has never, to my knowledge, been held to justify random testing, even in the case of "highly safety sensitive" or "inherently dangerous" workplaces like railways (*Canadian National*) and chemical plants (*DuPont Canada Inc. and C.E.P., Loc. 28-0 (Re)* (2002), 105 L.A.C. (4th) 399), or even in workplaces that pose a risk of explosion (*ADM Agri-Industries*), in the absence of a demonstrated problem with alcohol use in that workplace. That is not to say that it is beyond the realm of possibility in extreme circumstances, but we need not decide that in this case.

...

[50] That conclusion is unassailable. Early in the life of the *Canadian Charter of Rights and Freedoms*, this Court recognized that "the use of a person's body without his consent to obtain information about him, invades an area of personal privacy essential to the maintenance of his

> human dignity" (*R. v. Dyment*, [1988] 2 S.C.R. 417, at pp. 431-32). And in *R. v. Shoker*, 2006 SCC 44, [2006] 2 S.C.R. 399, it notably drew no distinction between drug and alcohol testing by urine, blood or breath sample, concluding that the "seizure of bodily samples is highly intrusive and, as this Court has often reaffirmed, it is subject to stringent standards and safeguards to meet constitutional requirements" (para. 23).
>
> ...
>
> [52] This is not to say that an employer can never impose random testing in a dangerous workplace. If it represents a proportionate response in light of both legitimate safety concerns and privacy interests, it may well be justified.
>
> [53] Moreover, the employer is not only always free to negotiate drug and alcohol testing policies with the union, as was said in *Nanticoke*, "such an extraordinary incursion into the rights of employees must be expressly and clearly negotiated" (para. 101 (emphasis added)). But where, as here, the employer proceeds unilaterally without negotiating with the union, it must comply with the time-honoured requirement of showing reasonable cause before subjecting employees to potential disciplinary consequences. Given the arbitral consensus, an employer would be justifiably pessimistic that a policy unilaterally imposing random alcohol testing in the absence of reasonable cause would survive arbitral scrutiny.
>
> [Italicized emphasis supplied; underlined emphasis in paras. 45 and 50 added.]

With respect, that is well and rightly said.

148. The three dissenting judges in *Irving Pulp & Paper, Ltd.* actually agreed with the majority on most points – including the applicable principles. The minority agreed with the majority's characterization of the issue, with the arbitral balancing approach, and that the arbitral approach is entitled to deference. The minority agreed that the arbitral jurisprudence does not recognize an unqualified employer right to unilaterally impose workplace rules on bargaining unit employees outside of the collective bargaining process, and establishes that the onus is on the employer to justify such rules. The minority considered the only issue in that case was whether the policy was reasonable, and that the key question was the threshold of evidence required for the employer to meet its burden to demonstrate reasonableness and thereby justify its random alcohol testing policy. The minority agreed that the arbitral consensus is that an employer must demonstrate evidence of an alcohol problem in the workplace in order to justify a random alcohol testing policy. Although the minority observed that consistency is fundamental to the rule of law, and that arbitrators should therefore not depart from an established arbitral consensus, the minority also made it clear that it is open to an arbitrator to depart from an arbitral consensus so long as it articulates a reasonable basis for doing so.

149. Where the minority parted company with the majority was in the application of the principles by the original Board of Arbitration. The minority drew a distinction between a "significant" or "serious" problem and "a" problem in the workplace, and concluded that the arbitral consensus is that the employer need only establish the existence of "a" problem, and that

the arbitral jurisprudence does not require an employer to establish a link between an alcohol problem and the accident, injury or near miss history in the workplace. The minority posited that requiring such a causal connection is not only unreasonable, but patently absurd, and that an employer does not have to wait for a serious incident of loss, damage, injury or death to occur before taking action. The minority concluded that the Board of Arbitration's decision to hold the employer to the higher evidentiary standard led it to unreasonably strike down the policy.

150. I agree that an employer does not have to endure a catastrophic incident before it acts. However, I am with respect unable to understand the suggestion that an employer need not demonstrate an actual employee alcohol or drug use issue which creates a real potential for significant negative workplace health and safety events, and that its unilateral proactive measures are likely to meaningfully reduce that potential. Surely cogent evidence of a problem sufficiently significant to justify what everyone agrees is a significant invasion of privacy right is required.

151. The Supreme Court of Canada majority decision in *Irving Pulp & Paper, Ltd.* is unequivocal: in a unionized workplace the employer can and should attempt to bargain health and safety rules or policies in to the collective agreement, failing which the employer is restricted to making such rules or policies which satisfy the *K.V.P.* test in the exercise of its management rights under the collective agreement. A unilaterally imposed mandatory alcohol and drug testing policy imposed without demonstrable reasonable cause, such as a substance abuse problem in the workplace, is an unjustified and unlawful invasion of employee privacy. Even in safety-sensitive workplaces the employer cannot impose speculative alcohol or drug testing which encroaches on employee privacy in the interests of deterrence which is not demonstrably necessary.

152. A unilaterally imposed policy of mandatory random alcohol and drug testing which by definition invades employee privacy rights is prohibited unless the employer can demonstrate a need for it in the particular workplace, such as a general problem with substance abuse, or specific extraordinary safety risks to employees or the public. Further, the expected safety gains of a policy which significantly impacts employee privacy rights must be real and more than minimal.

153. In recognition of the importance of the individual employee personal privacy right in issue, the emphasis throughout is on a balancing approach individualized to the workplace for justification purposes, and to the employee for consequences purposes.

154. Finally, I agree with the UA that the fact that other unions have agreed to alcohol and drug testing protocols which include pre-access testing does not speak to the specific issue in this proceeding. It does not mean that it is reasonable for every or any other union to do so. Every collective bargaining relationship has its own dynamic, and every employer and every union has its own reasons for agreeing to a particular provision or requirement, often in consideration for

some other collective bargaining objective. However, the fact that other employer-union collective bargaining partnerships have bargained pre-access alcohol and drug testing provisions into their collective agreement demonstrates the Supreme Court of Canada's point in *Irving Pulp & Paper* that that is the way it can and should be done.

(C) The Jurisprudence – *Human Rights Code* Issue

155. Not all discrimination is unlawful. It is not unlawful to for an employer to discriminate on a non-prohibited ground. It is not even unlawful for an employer to discriminate on a prohibited ground if the 3-step *Meiorin* test is satisfied.

156. The Canadian Human Rights Tribunal decision in *Milazzo* dealt with an employer drug policy which included pre-employment, post-incident and random testing, and a "zero tolerance" approach which resulted in a refusal to employ or immediate termination in the event of a positive test result. The CHRT applied the *Meiorin* test which requires that the adoption of a rule or standard must be supported by convincing evidence, and rightly held that impressionistic evidence will generally not suffice (at paragraph 62, referencing paragraphs 41-42 of *Grismer*). On the evidence before it, the CHRT concluded (in paragraph 79) that the results of one drug test will not indicate whether someone is a casual user, an abuser, or a drug dependent addict (i.e. disabled). However, the Tribunal adopted the Supreme Court of Canada's analysis in *Boisbriand* and concluded (in paragraphs 82-88) that the prohibition against discrimination on the basis of disability extended to perceived as well as actual disability. The CHRT also noted (in paragraph 187) that an employer is not entitled to refuse to employ a person without addressing the issue of accommodation on an individualized case-by-case basis.

157. As in *Bantrel*, it is the Court of Appeal decision in *Entrop* which deserves the most attention, and by which I am bound. *Entrop* concerned an IOL alcohol and drug testing policy under which employees in safety-sensitive positions were subject to unannounced, random alcohol and drug testing. A positive test or other policy violation led to automatic dismissal. There was no applicable collective agreement. The litigation was commenced by an employee complaint under the *Human Rights Code*. *Entrop* is therefore a human rights decision, without any collective agreement component.

158. The Board of Inquiry's decision in favour of the employee complainant was upheld on judicial review by the Divisional Court. Persisting in its position, IOL appealed.

159. Strictly speaking, the SCA's submission that the relevant parts of the Court of Appeal's decision (i.e. the parts dealing with drug as opposed to alcohol testing) are *obiter* is correct. Indeed, the Court of Appeal in *Entrop* recognized that it was saying into *obiter* territory, but Laskin J.A., writing for the unanimous Court (at paragraph 60) considered it appropriate (albeit with some misgivings) to do so in order to address the merits of the drug testing policy in issue

because both the Board of Inquiry and the Divisional Court had done so, IOL did not assert that it would be prejudiced, the parties had had a fair opportunity to address all the issues, and that in the circumstances "to avoid the merits would be of little solace to any of the parties." In the result, the Court of Appeal examined and applied the *Meiorin* test to the IOL pre-employment and random drug testing policy for employees in safety-sensitive positions.

160. In my view, Court of Appeal and Supreme Court of Canada *obiter* is generally there for a calculated reason and offers what intended and persuasive guidance. Certainly arbitrators and court in both Ontario and other Canadian jurisdictions have paid close attention to what the Court of Appeal wrote in *Entrop*.

161. The Court of Appeal in *Entrop* noted that:

(a) once a complainant satisfies the onus to establish that a workplace rule is discriminatory the onus shifts to the employer to justify the application of the rule; and,

(b) that in its decisions in *Meiorin* and *Grismer* the Supreme Court of Canada abandoned the distinction between direct and indirect or "adverse effect" discrimination which had proved to not be up to the analytical task, and substituted a 3-step test which an employer must meet to justify a *prima facie* case of employment discrimination (which unified approach McLachin J. noted in *Meiorin* was already reflected in the Ontario Code).

162. If the 3-step test is met, the workplace rule or policy is a BFOR. In most cases today, the third step of the *Meiorin* test is the only one seriously in issue. The third step requires an employer to justify a *prima facie* discriminatory workplace standard, rule, or policy by establishing on a balance of probabilities that it is reasonably necessary to accomplish a legitimate work-related purpose, which typically includes demonstrating that it is impossible to accommodate employees on an individualized basis without undue hardship. (*Entrop* Court of Appeal decision paragraph 75.) This is analogous to the collective agreement management rights requirement articulated by the Supreme Court of Canada in *Irving Pulp & Paper, Ltd.* Although the accommodation requirement may appear to add a significant layer to the analysis, it does not seem to me to be terribly different in principle to the requirement that the rule or policy response to a failed or refused alcohol or drug test be non-automatic and that the disciplinary or other employer response be individualized to the particular circumstances.

163. The Court of Appeal observed that an important difference between alcohol and drug testing is that a positive drug test does not demonstrate impairment but a positive alcohol breathalyzer test does, and that *prima facie* discriminatory random alcohol testing of employees in safety-sensitive positions can be justified if sanctions for a positive test are tailored to the

individual (paragraph 86). It was not disputed that that substance abusers are "handicapped" and entitled to the protections of the Code. The Court of Appeal noted that a person who tests positive on a random alcohol or drug test may be a casual user who is not actually handicapped, but that the IOL policy treated everyone who tested positive on a pre-employment of random alcohol or drug test as a substance abuser (i.e. as handicapped). Because the IOL policy applied the same sanctions to any person who tested positive (namely, refusal to hire, discipline or termination of employment) on the assumption that the person was likely to be impaired at work currently or in the future, and thus not "fit for duty", both perceived and actual substance abusers were adversely affected by the policy. Because the Code protections apply to perceived as well as actually handicapped persons (substance abusers) the policy provisions for pre-employment drug testing and for random alcohol and drug testing were therefore *prima facie* discriminatory and IOL bore the burden of demonstrating that they were BFORs (paragraphs 87-92).

164. (I note that the Code has been amended since *Entrop* (and *Sarnia Cranes Ltd.*) The term "handicap" has been replaced by the term "disability". Perhaps more importantly, the prohibition against discrimination in employment in that previous version of the Code was "because of handicap" which was specifically defined as meaning "for the reason that a person has, has had, or is believed to have or have had" any of the various disabilities described in s. 10(1)(a) through (e). The current Code simply defines "disability" as being the same various things previously (and still) described in s. 10(1)(a) through (e), without the "has, has had, or is believed to have or have had" language. Changes in statutory language are generally considered to be meaningful. However, as the Ontario Divisional Court held in *Weyerhaeuser #3*, the Supreme Court of Canada decision in *Boisbriand* maintained the subjective component which protects individuals from discrimination on the basis of perceived (or deemed) disability. That is as it should be for "nearly constitutional" human rights legislation which requires broad and purposeful interpretation. It would be absurd to excuse an employer's discriminatory conduct motivated by an erroneous belief that a person was disabled when he actually was not. Consequently, although it is fair to say, as Arbitrator M.G. Picher's did in *Canadian National Railway Co.*, that human rights legislation like the Code is not intended to protect casual alcohol or drug users who are not "handicapped" substance abusers, the human rights protections do extend to persons who are perceived and treated as though they are handicapped even if they are not.)

165. The Court of Appeal accepted that the general purpose of the IOL policy in *Entrop* was rationally connected to the legitimate purpose of promoting health and safety in the IOL refinery workplaces (paragraph 94), and that the impugned policy testing provisions had been developed and implemented honestly and in good faith (paragraph 95).

166. However, although the Court of Appeal agreed (in paragraph 98) that freedom from on the job impairment is a BFOR, the question was whether the alcohol and drug testing and

sanctions for a positive test were BFORs; that is, were they "reasonably necessary to achieve a work environment free of alcohol and drugs?" The Court of Appeal held (in paragraphs 99-103) that the pre-employment and random drug testing suffer from the same two from a serious fundamental flaws: they do not measure present or likely future impairment or that a person is or will be incapable of performing the essential duties of his job because such testing only indicates past use without any indication of when or how much of the drug was used; and, the sanctions for a positive (failed) test were too severe in that they were more stringent than needed for a safe workplace and not sufficiently sensitive to individual capabilities. The Court of Appeal also noted that the Board of Inquiry had found on the evidence that there were no available tests which accurately assessed the effect of drug use on job performance and that drug testing programs have not been shown to be effective in reducing workplace drug use, or accidents or work performance problems. The Court of Appeal concluded that random drug testing for employees in safety-sensitive positions could not be justified as reasonably necessary to accomplish the legitimate goal of a safe workplace free of impairment.

167. However, the Court of Appeal was satisfied that alcohol testing for employees in safety-sensitive jobs with limited or no supervision is a BFOR, provided that the sanction for a failed test is tailored to the individual employee's circumstances for Code purposes (paragraphs 109-110, 138).

(D) Determination – Collective Agreement Issue

168. Several issues can be disposed of summarily.

169. First, notwithstanding that the initial onus in this case is on the UA, that onus is limited to establishing no more than that the SCA (and MCAS) Member Employers have implemented or intend to implement a unilateral rule or policy which impinges on employee privacy rights for which there is no specific statutory of collective agreement authority. That is plainly so. The onus then shifts to the SCA to establish that the pre-access alcohol and drug testing policy is reasonable. In order to do that the SCA must establish that the pre-access component of its Member Employer's is a necessary and proportionate response which is likely to meet a demonstrably legitimate need in the particular workplace which intrudes on employee privacy to the least possible extent.

170. Second, the mere fact that the Suncor workplaces in issue are safety-sensitive is insufficient for that purpose.

171. Third, I reject the SCA's submission that an employer is obliged to do everything possible to ensure that employee alcohol or drugs use does not result in harm to employees or others, or that anything in the *Occupational Health and Safety Act* or the *Criminal Code* requires or justifies pre-access alcohol or drug testing. I agree with the UA that the legislated requirement is that

an employer take reasonable steps to ensure workplace health and safety. That is the very issue in this case: is the unilateral pre-access testing in issue a reasonable employer initiative? No employer is at risk of criminal or quasi-criminal prosecution for failing to implement pre-access testing, particularly if such testing is itself unlawful.

172. Fourth, the SCA's evidence falls far short of demonstrating that there is any alcohol and drug problem at any safety-sensitive refinery work site, and more specifically that falls far short of establishing any such problem at any Suncor work site, which justifies the implementation of the pre-access alcohol and drug testing in issue. Indeed, there is no evidence of any alcohol or drug problem at any Sarnia area Suncor work site, or even of any health and safety incidents at any Sarnia area Suncor work site, much less any such incidents in which alcohol or drugs was found to be a contributing factor.

173. Much of the SCA's justification evidence consists of statistics and opinions about what the statistics presented probably mean. Critics from Benjamin Disraeli to Mark Twain have disparaged the utility of statistics. The real point of such criticisms is that statistics and charts which display statistics must be examined and interpreted with skeptical care. It is particularly dangerous to draw conclusions from non-expert opinions about the meaning of a particular set of statistics.

174. I am not an expert in statistics. However, I do know that some statistics and interpretations of statistics can be trusted and some cannot. To be a cogent and reliable indicator of fact, statistical evidence must be gathered, analyzed and presented properly.

175. Statistics is the science of collecting and classifying a group of facts according to their relative number and determining certain values that represent characteristics of the group. In applying statistics to an industrial or societal problem, it is necessary to begin with the population to be studied. Statistical surveys are often used to collect sample data in a systematic way. A survey may focus on preferences or behaviour, including alcohol and drug related behaviour. For practical reasons, survey research is generally based on a sample of the population being studied instead of trying to collect the desired data from the entire group. Appropriate data collected from a representative sample of the population can be subjected to statistical analysis, serving two related purposes: description and inference. Descriptive statistics summarize sample data numerically or graphically. Frequency and percentages are typically used to describe behavioural characteristics data. Inferential statistics uses apparent patterns in sample data to draw inferences about the population represented, with an appropriate accounting for randomness. Statistical inferences may take many forms, including forecasting, prediction and, extrapolation and interpolation.

176. Gathered and interpreted properly, statistics can indicate characteristics or suggest propensities. However, the initial problems of survey construction and sampling add to the

difficulty of computing statistical evidence of a particular group. "Sampling" is the scientific selection of observations to acquire some knowledge of a statistical population. Sampling may be a structured attempt to obtain representative statistical evidence of characteristics which can be used to extrapolate the result to the larger population, or the result of an incomplete response to a survey of the whole population. Both may raise questions about how representative a figure the sampling actually is. Obviously, the reliability of a result is more questionable when the sampling is the product of the response rate. A second problem of sampling is that it must resort to the theory of probability, which has its own problems and limitations.

177. One of the most familiar and least meaningful statistical measures is the arithmetic average. Averaging is fraught with interpretive dangers. Sampling errors or return rate issues may be magnified by averaging survey results, and small numbers of relatively high data values may skew the results in a way which distorts the results.

178. In his will say witness statement, Mr. Tidsbury cites workplace alcohol and drug use statistics gathered by CLR Alberta. With respect, his evidence raises many questions. The first set of questions concern the gathering of the data included in Mr. Tidsbury's statement. These include: how was the surveying referenced in paragraph 16 of his statement conducted? What were the survey questions asked? What was the response rate? What type or categories of contractors (including their geographical area of operations) were surveyed and what were the response rates by type or category of contractor? The second set of questions concern Mr. Tidsbury's opinions and the conclusions he draws. Assuming that the opinions and conclusions are in fact his, is Mr. Tidsbury qualified to analyze and interpret the statistical data? Are the stated differences between alcohol and drug testing results before and after the introduction of pre-access testing in Alberta statistically meaningful? Can the Alberta statistical experience be transferred or extrapolated to the Suncor sites in the Sarnia/Lambton area?

179. There is no evidence that responds to any survey/sampling questions. Notwithstanding that Mr. Tidsbury has previously testified in human rights and the quashed arbitration proceeding in *Bantrel*, there is no evidence that he is qualified to analyze or interpret statistics, or to provide the opinions he expresses. There is no evidence the Alberta statistics can be extrapolated to Suncor in Sarnia/Lambton.

180. Valerie Rendell states that Jacobs presumes that alcohol and drug testing is an essential part of ensuring workplace health and safety, which given the issue and the purpose of the evidence I infer includes pre-access testing. The only apparent basis for the professed presumption is a client requirement for such testing. Indeed, in paragraph 5 of her will say statement Ms. Rendell states, as does the policy itself, that pre-access testing component of the Jacobs policy applies "where the client implements such a requirement". Notwithstanding the professed importance of pre-access alcohol and drug testing there is no indication that Jacobs has

implemented such testing on any other job site; i.e. on any job site where the client does not require it.

181. In paragraphs 13-17 of her statement, Ms. Rendell refers to statistics. She refers to the statistical experience at a single unspecified job site in an unspecified "family-oriented community" which is not "proximate to a major urban centre" in "western Canada". She goes on to speak of the experience after the implementation of pre-access testing "at most sites in Alberta", and of average failure test results and what those statistics "may very well represent". Ms. Rendell then proceeds to compare the post-incident testing failure rate at an unspecified safety-sensitive work site in an unspecified Ontario location (which I infer is not in the Sarnia/Lambton area since she would undoubtedly have said so if it was) to Jacobs' experience at the unspecified Alberta site. Ms. Rendell states that the "most telling statistic pointing to the effect of pre-access testing on safety" is the decrease in post-incident failure rates after pre-access testing was implemented in Alberta. Finally, Ms. Rendell provides Jacob's testing statistics as of January 1, 2013. I note that judging by the figures for 2012, the figure listed as being "averages" are actually annual totals – which makes the entire chart suspect.

182. In her conclusions, Ms. Rendell offers that Jacobs' approach to alcohol and drug testing is premised on the assumption that alcohol and drug safety risk are a daily workplace hazard, and pre-access alcohol and drug testing is an accepted and effective component of the overall safety strategy in the construction industry in Alberta. She also states that in many (again unspecified) global jurisdictions such policies are mandated by legislation a significant point which is given little subsequent heed. In paragraph 21Ms. Rendell speculates about individuals who test positive on a pre-access test. The basis for her speculation is unstated. Finally, in paragraph 25, Ms. Rendell states several things, including that alcohol and drug use and dependency are "major issues in our workplace", and that an (again unspecified) number of long term employees including supervisors tested positive for drugs on a pre-access test when "nobody, through observation or contact, would have expected that these excellent employees were drug dependent.

183. Where to begin? Like Mr. Tidsbury, there is no indication that Ms. Rendell is qualified to interpret or draw conclusions from statistics. The Alberta information is insufficiently particularized and lacks any cogent connection to Ontario much less to Sarnia/Lambton or any Suncor site in Sarnia/Lambton. Having regard to the lack of any information about how or where they were obtained and the apparent confusion between total and average figures in the Jacobs statistics she provides, it is difficult to consider them reliable indicators of anything. However, to my statistically inexpert eye the post-incident and pre-access (which I infer are from outside of Ontario) positive test result figures to not demonstrate a serious general problem. There being no apparent connection between the statistics and the Sarnia/Lambton area much less any Suncor job site in the area, the statistics suggest nothing about an alcohol and drug

problem on a Sarnia area Suncor site. On the other hand, to the extent that the Jacobs statistics can be taken to suggest anything, they suggest that reasonable cause testing has been an effective tool. Ms. Rendell's statements in paragraph 25 offer no basis for her assertion that alcohol and drug use and dependency are "major issues in our workplace", or suggest what "our workplace" means. Finally, her statement in that same paragraph demonstrate one of the fundamental problems with pre-access testing; namely that it test for past use and not present or future impairment or performance deficiency. The fact that no one would have expected a positive pre-access drug test result from the unspecified number of "excellent" long term employees suggests that there were no actual health and safety or performance issues with these employees over a "long term".

184. Doug Shortt's will say statement adds very little. In essence, he stresses the safety-sensitive nature of Jacobs' operations and opines that self-reporting and reasonable cause testing are effective at combating (his word) alcohol and drug safety risks in Jacobs' workplaces, and that it is difficult detect employees who may be under the influence of alcohol, or drugs. Mr, Shortt states that without other (unstated but presumably pre-access testing) measures he strongly believes that it is only a matter of time before a very serious and avoidable alcohol or drug related incident occurs. Mr. Shortt offers no substantive factual basis for the views he expresses. But it is noteworthy that notwithstanding his broad and lengthy experience in the industry, he offers no actual experience with serious alcohol or drug related health and safety incidents.

185. Ray Curran asserts (in paragraph 6) of his will say statement) that the: "Effects of drug or alcohol use are known to be a cause of workplace accidents, often with catastrophic results." Is that so? Where is the evidence of this alleged truism? Further, there are undoubtedly numerous factors which tend to contribute to workplace health and safety issues. For purposes of this case the question is: to what degree of significance do alcohol and drug issues contribute to a health and safety problem on Suncor worksites which privacy-invasive pre-access testing is likely to significantly decrease? Mr. Curran states that in the five rounds of provincial bargaining since 1997 the UA's Employee Bargaining Agency (the OPTC) has not attempted to bargain a specific prohibition against of restriction on alcohol and drug testing into the Provincial Agreement. With respect, so what? Has the Employer Bargaining Agency attempted to bargain alcohol and drug testing into the Provincial Agreement? There is no suggestion it has. Equally "so what" is the assertion that UA's international parent union or other building trades unions have agreed to pre-access testing in Alberta, or that the Ironworkers' and Boilermakers' Employee Bargaining Agencies have done do in their Ontario Provincial Agreements. Who knows why those Unions did so, or what they gained in return? The same is true for the assertion that the UA has agreed to pre-access testing for certain pipeline work in the Sarnia area. None of this advances the analysis of the MCA/SCA's case in this proceeding.

186. More telling of the motivation for the employer push for pre-access testing is Mr. Curran's somewhat ambiguous but certainly unparticularized assertion that pre-access testing has been agreed to for employees engaged in construction activity in the petrochemical industry "in the vast majority, if not all, other jurisdictions in North America", and that Ontario employers will be at a competitive disadvantage if they are unable to implement pre-access testing.

187. Doug Chalmers admits that under DCCL's policy an employee who was caught using drugs on site before declaring a substance abuse problem would be automatically discharged. That was a *prima facie* Ontario *Human Rights Code* violation (failure to investigate whether the employee suffered from a disability, and if so, whether accommodation was reasonably available). Mr. Chalmers recounts that in 2002 (at least ten years before the grievance in this case was filed) someone (he doesn't say it was him) observed two employees smoking marijuana while on break in a parked vehicle during the workday. He draws no connection to a Suncor worksite.

188. Mr. Chalmers compares the Brand/Aluma safety performance experience in three Canadian and two United Sates areas to what he says is the world class safety performance TRIR (0.40). He provides no basis for offering the two United States areas (which operate under their own and I think it safe to say different regulatory scheme) as comparators. The Canadian TRIRs comparisons offered are 0.48 for Ontario, 0.44 for the Canadian average (including Fort McMurray), and 0.32 for Fort McMurray. He suggests that this makes Fort McMurray, which has pre-access testing, the safest place to work in Canada. From this, Mr. Chalmers concludes pre-access alcohol and drug testing diminishes the frequency of workplace safety incidents. He says that this conclusion is supported by the unparticularized "facts" (which I infer do not relate to a Suncor work site – because Mr. Chalmers would undoubtedly have said so if they did) asserted in paragraph 23 of his will say. Finally, Mr. Chalmers offers his "professional opinion" that: "Pre-access testing would allow more craftsmen to return to their families after work, injury-free."

189. Not only is Mr. Chalmers' conclusory leap a huge one, it is not clear that the differences between the Canadian TRIRs are statistically significant, particularly when one is an average which carries with it the problems of averaging and includes both of the other two. It is impossible to connect the relative TRIRs to pre-access alcohol drug testing on the basis of the facts asserted. Finally, Mr. Chalmers' opinion may be construction industry professional, but it is not expert.

190. Rodney Reynolds is a Maintenance & Construction Manager for a contractor which provides services to Suncor. But he doesn't talk about Suncor. He talks about the company's work in Alberta and Ontario generally. Mr. Reynolds states that employers are statutorily mandated to by the *Occupational Health and Safety Act* and *Criminal Code* to provide what he

refers to as a "safer working environment for its employees". He describes "two occasions where employees smelling of alcohol or acting in an uncoordinated manner were subjected to a reasonable cause testing regime" and one of whom tested positive (for something), which he goes on to suggest means that the worker who had tested positive had in fact been working while under the influence of an intoxicating substance, inferring but not specifically suggesting that pre-access testing would have caught this worker earlier.

191. None of Mr. Reynold's evidence, such as it is, relates to a Suncor work site. Although he is technically not incorrect when he states that employers are statutorily mandated to provide a safe work environment, this cannot be taken to suggest that pre-access testing is statutorily mandated. The only statutory mandate is that an employer take reasonable steps to ensure workplace health and safety. Mr. Reynold's two employee examples suggests only that reasonable cause testing works. It cannot follow from his example (which does not specify the substance or the level of the positive test result) that pre-access testing, which by definition occurs before (usually well before) an employee attends at a workplace would capture only past use and not present impairment or performance deficiency, would have captured the individual before he accessed the workplace.

192. Mr. Webb's will say evidence does little to assist the analysis or guide my determination of the grievance. Perhaps the most cogent inference is the one which is already obvious form the SCA`s submissions; namely, that the pre-access testing component of the Anderson-Webb alcohol and drug policy has been has been included in response to the demands of its clients "such as Suncor and Imperial Oil". That is, it is primarily a business purposes initiative.

193. Mr. Webb recounts a 2010 example of an employee who appeared to be impaired by alcohol, refused to be tested, and left. He seems to conclude that a pre-access test could have avoided the situation. Mr. Webb cites another example of a Boilermaker who was referred to work for Anderson-Webb at a Suncor site and was denied access by Suncor because it had previously expressed concerns about his condition and fitness for work. When Mr. Webb asked if he was willing to take a drug and alcohol test the employee said he could not pass such a test. From this, Mr. Webb concludes that if Suncor had not denied access Anderson-Webb would have sent an employee who "was under the influence of drugs or alcohol to work at a safety-sensitive workplace", and that pre-access testing would have disclosed that the employee was not fit for work.

194. With respect neither conclusion follows from the facts stated by Mr. Webb. There is no suggestion much less evidence that the first employee was impaired or performance deficient when he came to work on the day in question. Perhaps he had a stash on site. In any event pre-access testing cannot detect future alcohol impairment or performance deficiency. However, this first example does suggest that reasonable cause detection and testing works. The second

example does not in fact suggest that the Boilermaker employee was impaired or performance deficient when he was denied site access by Suncor. It suggests only that he had a history of drug use at a level which would have resulted in a positive drug test. It also suggests that neither Suncor nor Anderson-Webb considered their *Human Rights Code* obligations.

195. Wayne Standing of IOL describes the nature of that client's Sarnia operation, refers to IOL's own employee alcohol and drug policy, and its parallel policy for contractors. Although he claims (in paragraph 11 of his 5-page will say statement) that alcohol and drug use remain a problem in the workplace, he offers nothing concrete to support that bald assertion. Saying it does not make it so, and is not nearly enough for the SCA's purposes in this case.

196. Mr. Vetrone speaks for Suncor. He briefly describes Suncor's Canadian and Sarnia operations, and the health and safety risks associated with those safety-sensitive workplaces. Mr. Vetrone describes Suncor's commitment to safety, the introduction of its harmonized Alcohol and Drug policy, and its Contractor Policy, including the pre-access testing requirement for contractors which is in issue. There is not a single word in Mr. Vetrone's will say statement which suggests that there is a substance abuse problem at any Suncor facility in Sania/Lambton, much less one which demonstrably justifies the need for personally invasive pre-access alcohol and drug testing.

197. I infer from her will say report that Barb Butler suggests that any employer that operates in a safety-sensitive environment must proactively address alcohol and drug issues, because not doing so could result in preventable accidents which could result in liability under occupational health and safety legislation or the *Criminal Code* if an employer fails to take reasonable steps in that respect. Ms. Butler describes the concerns with alcohol and drug impacts on performance as a lead-in to a discussion on drug use patterns. In this discussion she notes that surveys on general population alcohol and drug use patterns use the random selection sample technique which should yield results "more or less" representative of the general population. She identifies authorities which support her assertion that, if anything, the problems with such surveys tend to underreport true use patterns. Ms. Butler references the most recent Centre of Addiction and Mental Health ("CAMH") survey which suggests that a large percentage (81.2% in Ontario overall) and 83.4% in southwestern Ontario) of adults report being current drinkers. Of current drinkers, 7.2% of those in southwestern Ontario reported being daily drinkers (which is lower than the rate most regions in Ontario). Other statistics include:

- 21.9% of southwestern Ontario residents exceeded Health Canada's low risk drinking guidelines during the previous 12 months, the highest of the provincial regions;

- 13.1% of southwestern Ontario drinkers reported weekly binge drinking (5 or more drinks on a single occasion weekly), which is the highest of all regions;

- 20.6% of southwestern Ontario respondents reported "hazardous/harmful" drinking compared to the provincial figure of 14.4%;

- 13.4% of Ontario adults and 15.4% (up from 12.1% in 2010) of southwestern Ontario reported using cannabis in the previous year, with the % being higher for men and increasing with age;

- 41.7% of cannabis users reported moderate or high risk of cannabis problems during the past 3 months

- 7% of respondents reported lifetime use of cocaine (with the rate for men more than double that of women); the rate southwestern Ontario residents was 5.9%;

- 23.9% (22.9% in southwestern Ontario) of respondents reported prescription opioid pain reliever use in the previous year.

Southwestern Ontario is a large and diverse geographical area. There is no statistical evidence specific to the Sarnia area, or to the Sarnia contractor employee catchment area if that is a larger area (which I do not know from the evidence presented.

198. Ms. Butler asserts that there is no reason to believe that the use patterns would be significantly different for Sarnia contractor employees, and justifies proactive steps to minimize alcohol and drug use workplace safety hazards. With respect, there is no basis for Ms. Butler's opinion that "there is no reason to believe" alcohol or drug use patterns would be different in the Sarnia area. There obviously are differences, and the question which arises is where do the differences arise, and is there a characteristic if the local or other area population which explains the difference. There is no indication that there has been any attempt to gather alcohol and drug use data for Sarnia area Chemical Valley employees, much less specific to any Suncor Sarnia area worksite.

199. Ms. Butler goes on to discuss the roles, strengths and limitations of components of an effective alcohol and drug use policy, and how these are addressed in the SCA Model Policy. She concludes that an employer in a safety-sensitive environment cannot rely solely on self-referral, peer intervention, or supervisor action, and that testing initiatives are required. This leads into Ms. Butler's discussion about reasonable cause testing, post-incident testing, post-treatment testing and post-violation testing – none of which are in issue in this case. She then arrives at site or pre-access testing.

200. Ms. Butler describes this (in paragraph 51) as a "common practice in Northern Alberta ... increasingly being introduced as a condition of work on higher risk job sites an construction projects in other parts of Canada." She describes pre-access testing in general terms and states (in paragraph 52) that the objective "is to mitigate the risk of employees attending work under the influence of alcohol or other drugs" by bringing their attention to the importance of the employer's policy. She also notes other potential collateral benefits.

201. In her conclusions (paragraphs 54 59), Ms. Butler refers to the evidence offered by Mr. Tidsbury. She suggests pre-access testing can identify workers who need assistance in managing alcohol or drug use. Although she acknowledges (in paragraph 58) that pre-access testing may not prevent every worker who passes the test from reporting to work under the influence of alcohol or drugs in the future, she says that that is where the other elements of a comprehensive alcohol and drug policy, including other forms of testing, come in.

202. Ms. Butler is a consultant on workplace alcohol and drug policy development and implementation. I accept that she is an expert for such policy purposes. However, there is nothing in her will say statement or background which suggests that she is an expert in statistics or sociology. With respect, there is very little in Ms. Butler's report which assists the SCA. Assuming that one can extrapolate the CAMH general population alcohol and drug use statistics to the SCA Member Employer workforce (something which is far from clear that Ms. Butler is qualified to express an opinion on, or which is apparent from the evidence before me), I am not satisfied that anything in he will say evidence suggests that there is a need for privacy invasive pre-access alcohol and drug testing on any Suncor work site in the Sarnia area. Nor does Ms. Butler make a case for pre-access testing effectiveness. Read as a whole, her report pays scant attention to employee privacy considerations and does little more than offer an opinion that it is desirable from a policy point of view to include pre-access alcohol and drug testing as part of a comprehensive alcohol and drug policy.

203. In his expert will say report Dr. Kadehjian says that following about pre-access testing (at pages 6-7):

> Pre-access testing is designed to identify those applicants for safety-sensitive positions who may be currently using drugs and therefore present unacceptable safety-risks to the workplace and even the public. In addition, the existence of a pre-access testing policy, as well as other drug testing policy components, may discourage drug-using applicants from even applying for such safety-sensitive positions. Thus, importantly, pre-access testing is a proactive response to mitigate the potential safety risks presented from future drug using employees. Pre-access testing is proactive in that it demonstrates to applicants that the employer takes its safety responsibilities very seriously and expects its employees to do the same.
>
> Workplace urine drug testing is designed through the use of appropriate cutoffs to detect recent use of drugs associated with increased safety-risks, a "red flag". A positive pre-access urine drug

test indicates that the applicant had used drugs recently enough to test positive. Those who fail a pre-access drug test when they have advance notice that they will be tested may be regular drug users who were unable or unwilling to stop their drug use temporarily in order to pass a pre-access drug test. Regular drug users present an increased risk of adverse employment outcomes.

I understand that those subjected to pre-access testing are selected from a hiring hall and have advance notice that if offered a position they will be subjected to drug testing. Anyone using drugs that is unable to refrain from drug use for the few days necessary to ensure having a "negative" test result obviously either has a dependency issue or is cavalier about their drug use and workplace safety rules. Considering that there may be criminal penalties for use of illicit drugs outside of the workplace, drug users are willing to risk those consequences and show an unwillingness to abide by those laws. One could argue that if such persons are willing to risk criminal penalties and not abide by such criminal statutes, how would an employer have any confidence that a worker in a safety-sensitive position would be willing to diligently follow workplace safety rules. In not adhering to workplace safety rules, consequences may be not only to themselves but to their fellow workers and the public.

There are a few studies which have specifically examined pre-access testing and subsequent workplace outcomes. The U.S. Postal Service study involved pre-employment drug testing but the results were held in confidence and not responded to without any effect on hiring and then examined subsequent workplace outcomes for those who had initially tested positive or negative. The study demonstrated significantly higher subsequent accident and injury rates for those applicants who had a positive pre-employment drug test (cocaine and cannabis). The study found that those with marijuana positive tests had 55% more accidents, 85% more injuries and 78% increase in absenteeism. Those testing positive for cocaine had an 85% increase in injuries and a 145% increase in absenteeism. The authors' second publication presenting the two-year follow-up data still found significantly increased risks for those testing positive for marijuana, albeit declined from the year 1 data. But for the cocaine positive applicants the risks remained the same after two years' of follow up. In any event, even if there are benefits in identifying those creating workplace risks for only one year, one year of increased risk presents an unacceptable risk to employers where a single adverse event may be devastating.

Another study of pre-employment testing and subsequent employment outcomes (absenteeism, involuntary turnover, injuries and accidents) within the U.S. Postal Service (several cities but not Boston which was the basis for the above mentioned studies) did demonstrate an increased rate of absenteeism as well as an increased rate of involuntary turnover. The authors noted significant costs associated with such involuntary separation and absenteeism which could be avoided through the use of a sound testing program. It should also be noted that more of the applicants who tested positive were not hired (27% disqualified) than those who tested negative (19% disqualified). Had those individuals who tested positive been hired perhaps the adverse outcomes would have been increased. The authors also noted that the low overall accident and injury rates would have required a larger number of cases to note any meaningful disparity between injury and accident rates between those testing positive or negative.

Another early review found that "Enough studies of pre-employment drug testing programs have been published with sufficiently consistent results that we can conclude that pre-employment drug test results are, in at least some job settings, valid predictors of some job-related behaviors." The authors also concluded that drug testing for safety-sensitive positions may still be justified based on the need to safeguard the public safety.

> Thus, given the employer's legal responsibility to provide a safe workplace and mitigate safety risks to their employees and the public, and the clear safety risks that drug-using employees present, not only to themselves, but to their coworkers and the public, a comprehensive drug testing program which begins with pre-access testing for those in safety-sensitive positions is an important proactive response to mitigate those safety concerns.
>
> (Emphasis added.)

204. For purposes of this proceeding, it is not sufficient for an expert to opine that pre-access alcohol and drug testing may reveal that an employee who seeks access to a safety-sensitive workplace or position has used alcohol or drugs or may be regular drug user who may in the future come to work under the influence of alcohol or drugs, or the debilitating after effect of alcohol or drug use. It is not enough to say that the pro-active response of pre-access testing may mitigate potential safety risks in that respect. That is not the free and democratic society that we live in. This approach gives no thought to personal privacy considerations, to the onus on an employer to demonstrate with cogent evidence that this privacy invasive testing is reasonably necessary (not merely desirable) and is likely to have the desired effect, or to the proportionate balancing of employer and employee interests so recently approved by the Supreme Court of Canada.

205. There is no suggestion in Dr. Kadehjian's report that he has any direct specific knowledge of any Sarnia area Suncor work site. His opinions and conclusions are derived from the application of his impressive expertise to the written materials provided to him by the SCA (listed at page 1 of his report). I do not point this out to be critical of Dr. Kadehjian. But it is a fact. Dr. Kadehjian could only work with what he had, and his expert opinion is only as good as the information upon which it is based. In this case, Dr. Kadehjian is able to provide only a very general opinion. Although he was provided with copies of the various alcohol and drug policies listed in his report he has no information specific to any Sarnia area work site, much less to any Suncor work site.

206. At pages 8-10 of his report Dr. Kadehjian "responds" to Mr. Tius' will say statement. Dr. Kadehjian emphasizes the problems with co-worker and supervisor detection and reporting of workplace alcohol and drug issues. Such problems probably exist in some workplaces. The question is: is there such a problem on any Suncor worksite in the Sarnia/Lambton area? In the absence of at least some evidence that there actually is an alcohol and drug problem in the workplace in issue that is in fact escaping detection by less privacy intrusive means, that does not lead to the conclusion that pre-access alcohol and drug testing is necessary. Dr. Kadehjian does not refer to any such evidence.

207. Dr. Kadehjian also says that: "... because there may appear to be minimal identification of [possible drug-related safety risks] does not mean that it does not exist." This is of course true. But neither does it suggest that it does exist. To repeat, the onus is on the employer to

demonstrate that that there is demonstrable such risk sufficient to justify privacy invasive pre-access testing.

208. In view of my assessment of the SCA's evidence, I do not find it necessary to examine the UA's evidence other than to comment on Dr. Kadehjian's response to Mr. Tius' observation that there were only 11 recordable injuries in 2012. In Dr. Kadehjian's view this is not an admirable figure, and that "from an employer standpoint, 11 injuries may be considered 11 too many." I note that Mr. Tius' complete assertion (in paragraph 8 of his will say statement) is that this represents a TRIR for 2012 of 0.4 – which Mr. Chalmers identified as being a world class safety performance TRIR. Further, there is no indication that alcohol or drugs were a factor in any of these 11 recordable injuries, or in any speculative unreported injuries.

209. In this case, as in the "*Nanticoke*" (*Imperial Oil Ltd. v. C.E.P., Loc 900*, (2006) 157 L.A.C. (4th) 225) decision referred to extensively with obvious approval in the majority Supreme Court of Canada decision in *Irving Pulp & Paper, Ltd.*, there is no evidence of an out-of-control or indeed any alcohol or drug culture in any Sarnia area Suncor workplace. In fact, I have no evidence of actual alcohol or drug use at any Sarnia area Suncor site.

210. Further, although I do not suggest that SCA Member Employers are not concerned about their employees' workplace health and safety, I am satisfied that that is only a part of their motivation for implementing the pre-access testing in issue. The SCA does not dispute the UA's assertion that pre-access alcohol and drug testing is only being implemented at safety-sensitive work sites of clients who demand it. This certainly begs the UA's question: if the pre-access testing is so necessary, so important, and so effective, why isn't it being implemented at every safety-sensitive work site? The answer is that the real need and the primary motivating factor is the one identified in the SCA's evidence and submissions; namely, that MCAS/SCA Member Employers' overriding concern that they maintain their favourable competitive position with the site owners in the Sarnia area relative to non-union contractors.

211. I am not satisfied that that is sufficient justification to override fundamental employee personal privacy rights in the circumstances. I also observe that there is no evidence from Suncor that MCAS/SCA Member Employers will fall out of contractual favour if they are prohibited from implementing pre-access alcohol and drug testing. Indeed, Suncor may encounter legal problems if it persists in demanding that MCAS/SCA Member Employers implement an alcohol and drug testing regime that has been found to be unlawful.

212. Further, as a former OLRB construction industry Vice-Chair, I consider it unlikely that Suncor will be able to fulfill its requirements by turning to non-union employers. But if Suncor chooses to try to do so and thereby avoid the collective agreement issue, it will still face the same

Human Rights Code issue that IOL faced in Entrop, and which the MCAS/SCA Member Employers face in this case.

213. In the result, I am not satisfied that there is a demonstrable need for the pre-access alcohol and drug testing in issue which is sufficient to justify the significant invasion of privacy inherent in such testing. I find that in the circumstances described by the evidence presented, the introduction and implementation of pre-access alcohol and drug testing is an unreasonable exercise of management rights contrary to Article 10 of the Provincial Agreement.

(E) Determination – *Human Rights Code* Issue

214. I am satisfied that the MCAS/SCA Member Employers have implemented or seek to implement pre-access alcohol and drug testing for a purpose rationally connected to the performance of work covered by the Provincial Agreement. Notwithstanding that I am not satisfied that the SCA Member Employers have implemented or seek to implement pre-access alcohol and drug testing primarily for health and safety reasons, I am satisfied that part of their motivation is an honest and good faith belief that such testing is necessary to the fulfilment of that legitimate work-related purpose. Accordingly, I am satisfied that the first two steps of the *Meiorin* test are satisfied.

215. I agree with the SCA that a workplace standard which requires that employees not come to or be at work under the influence of alcohol or drugs is a BFOR, and that such a rule or policy is not *prima facie* discriminatory. However, I am not satisfied that the pre-access alcohol and drug testing is reasonably necessary to the accomplishment of the legitimate work-related health and safety purpose. That is, I am not persuaded that the third step of the *Meiorin* test is satisfied.

216. First, for the reasons given above, the evidence does not establish that there is a health and safety workplace problem due to alcohol or drug use at any Suncor site.

217. Second, I am not satisfied that the pre-access alcohol and drug testing in issue is suitable for the professed purpose. It is clear that such testing cannot detect on-the-job impairment or performance deficiency. By definition the testing is performed before (and on the evidence probably well before) the employee accesses the actual work site. As described, the alcohol and drug pre-access testing will not establish that an employee has or will attend a work site under the influence of alcohol or drugs.

218. There is no evidence that the pre-access alcohol and drug testing in issue is a valid predictor of future alcohol use either generally or on the job. Pre-access drug testing will not measure current impairment or performance deficiency. It will only indicate past use, without indicating when or how much of the drug was used. The results of one drug test will not indicate

whether someone is a casual user, an abuser, or a drug dependent addict (i.e. disabled). Pre-access testing is a form of pre-employment testing. As the Ontario Court of Appeal noted in *Entrop*, such testing is fundamentally flawed because it does not measure present or likely future impairment or that a person is or will be incapable of performing the essential duties of his job. In these respects, pre-access drug testing is even more deficient for the professed purpose than random drug testing.

219. The SCA Member Employer alcohol and drug policies in evidence belie the SCA's denial that a positive pre-access test will result in termination or that an employee who tests positive is perceived to be disabled. As I read it, under the Jacobs policy employee who is referred or assigned to Suncor work site but is denied access because of a positive pre-access test result will be permanently banned from that and presumably any other Suncor site, full stop. Under the Curran policy Suncor's wishes prevail, which leads to the same permanent Suncor site ban, again full stop. Under the Anderson-Webb policy a positive pre-access test result leads to permanent "removal" (i.e. ban) from the site. Although somewhat more nuanced because the policy states that this ban continues while the individual is employed by Anderson-Webb the fact is that Anderson-Webb will have no say if the individual is no longer its employee, and the reality in the construction industry is that there will generally be little if any alternative work even for "steady Eddie" permanent employees, and for a hiring hall referred employee the result is a termination of employment.

220. As in *Entrop*, the second fundamental flaw of the pre-access testing in issue in this case is that the sanctions for a positive (failed) test under the MCAS/SCA Member Employers' policies are too severe, and not sufficiently sensitive to individual capabilities or observant of employee rights and employer obligations under the *Human Rights Code*.

221. Further, the SCA specifically states that its Member Employers are relying on a positive pre-access test result, not to show impairment, but to indicate that an employee is not able or willing to manage his or her alcohol or drug consumption. It is apparent from Ms. Rendell's will say statement (paragraphs 14 and 21), which is submitted in support of the position of all SCA Member Employers, and from the SCA's submissions read as a whole, that an employee who tests positive on a pre-access alcohol or drug test is perceived to be "disabled" within the meaning of the Code, but that the MCAS/SCA Member Employers' alcohol and drug policies deny such an employee his or her rights under the Code.

222. In short, the pre-access alcohol and drug testing in issue casts too broad a net. It is bound to capture employees who are not impaired, performance deficient, and who present no workplace health and safety risk. Employees who are not impaired or performance deficient during working hours due to alcohol or drug use are treated as though they are or will be. At the

same time impairment or performance deficiencies for reasons unrelated to alcohol or drug use are ignored.

223. I am satisfied that as described or implemented the pre-access alcohol and drug component MCAS/SCA Member Employers' violate section 5(1) of the Ontario *Human Rights Code*.

(F) Declarations and Orders

224. In the result:

(a) **THE GRIEVANCE IS ALLOWED**;

(b) **I DECLARE THAT** the pre-access alcohol and drug testing which has been or is being implemented in response to Suncor's site access requirements is contrary to Article 10 of the Ontario Provincial Collective Agreement between the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council which is binding on the MCAS and SCA Member Employers;

(c) **I DECLARE THAT** the pre-access alcohol and drug testing which has been or is being implemented in response to Suncor's site access requirements violates s. 5(1) on the Ontario *Human Rights Code*;

(d) **I ORDER ALL MCAS AND SCA MEMBER EMPLOYERS TO** forthwith cease and desist from conducting pre-access alcohol and drug testing of employees assigned or referred to perform work under the Ontario Provincial Collective Agreement between the Mechanical Contractors Association Ontario and the Ontario Pipe Trades Council.

225. It is not clear that any other remedy or relief is requested or appropriate. If any other remedy or relief is requested, the UA must so advise, in writing, within 30 days of the date of this Award, failing which this Award will be final in that respect.

226. I shall remain seized for the purposes of rectification, to deal with any other or further remedial or relief issues, and to deal with any dispute concerning the implementation or administration of this Award.

227. I want to make it clear that any employer may implement pre-access alcohol or drug testing at a particular work site if it can demonstrate that such testing will probably have a meaningful ameliorating effect on an actual substance abuse problem at that work site, and so

long as such pre-access testing is part of a broader alcohol and drug policy which includes and individualized approach to dealing with employee alcohol and drug issues which is consistent with the Ontario *Human Rights Code*.

228. Also, if anyone actually believes that pre-access alcohol and drug testing in safety-sensitive or any other workplaces is necessary in the public health and safety interest they should approach the appropriate government officials or elected representatives so that the Legislature is alerted to the issue and can take appropriate regulatory action.

DATED AT TORONTO THIS 20TH DAY OF AUGUST 2013.

George T. Surdykowski

George T. Surdykowski – Sole Arbitrator

APPENDIX A

Article 10 – Management Rights

10.1 The [UA] agrees that it is the exclusive right of each Contractor covered by this Agreement:

10.2 To manage its business in all respects in accordance with its commitments and responsibilities, including but not limited to the right to manage the jobs, locate, extend, curtail, or cease operations, to determine the number of men required, to determine the kinds of and locations of machines, tools, equipment and materials to be used and the schedules of production to be met, and to maintain order, discipline and efficiency.

10.3 To hire. Discharge, transfer, promote, assign or reassign, demote lay-off or discipline employees for just cause.

10.4 To introduce new methods and facilities or to change existing methods and facilities.

10.5 It is agreed that all the above rights shall not be exercised in a manner inconsistent with express provisions of this Agreement, and shall be subject to the provisions of the Grievance Procedure.

...

Article 36 – Hiring and Mobility

36.1 Pursuant to section 163.5(7) of the labour Relations Act, 1995, it is agreed that Employers may not make the election under Section 163.5(1) of the Act, and that the provisions of this Article 36 apply to all Employers and supersede any conflicting local appendices language.

36A - Hiring

36A.1 The Employer must hire through the Local Union Office and no one will be employed unless they are in possession of a Work Referral Slip from the Local Union Office prior to commencing work.

36A.2 All General Foremen and Foremen shall be within the bargaining unit covered by the Provincial Agreement and members of the Union.

...

36A.3.2 **Applicable to all Zones Except Kitchener, Barrie, Toronto.**

The Employer shall be entitled to name hire up to 50% of the employees within the bargaining unit, excluding foremen, from the Out-of-Work List at the Local Union Office for work on each project. Each name-hired employee/member must have been on the Out- of-Work list for two calendar weeks immediately prior to hiring, The Local Union Business Manager shall have the discretion to permit higher percentages for name hires and to waive the two-week condition. The provisions of this clause are not intended nor meant to remove higher levels of name hire where already being used, or desired to be used in futurere, in any particular Zone.

36A.3.2.1 There shall be no "banking" of name-hired calls so that any Employer not utilizing its full name-hire allowance shall not be permitted to include the unused portion of such allowance when hiring at a later date.

36A.3.2.2 The process of 50% name-hire shall be implemented by the selection of one tradesperson of the Employer's choice from the Local Union Out-of-Work List followed by one tradesperson referred by the Local Union Office from the Out-of-Work List in accordance with the Local Union Work Referral Rules.

36A.4 Layoff can be in any order, however in all cases of layoff, Local Union members shall be given preference of employment (as per Article 7.7) subject to the mobility percentage provisions in Article 36B.

36A.5 Other hiring provisions existing in the Local Appendices that are not addressed in this Article are to be maintained.

368B – Mobility

36B.1 Any Employers undertaking mechanical work within the geographic jurisdiction of a Local Union is permitted to transfer into the Local Union geographic jurisdiction only one (l) working foreman to act as the Employer's representative on each job or project. Such foreman shall be a member of the United Association and shall register at the Local Union Office and be issued a Work Referral card prior to commencing work on any project within the Local Union geographic jurisdiction.

36B.2 All employees/members of the United Association transferred into the geographic jurisdiction of a Local Union shalt be deemed to be name-hires for the purpose of Article 36A and must be counted in the allowable percentage there under.

36B.3 An Employer undertaking mechanical work within the geographic jurisdiction of a Local Union is permitted to transfer, from outside the geographic jurisdiction of the Local Union having jurisdiction over the job or project, a maximum of 20% of the total bargaining unit employee workforce on each project, provided however that the transferred UA members/employees must register at the Local Union Office and be issued a Work Referral Card

36B.4 Any UA member/employee being transferred into the geographic jurisdiction of another Local Union must have been continuously employed in the bargaining unit under the Provincial Agreement by the Employer for a period not less than two weeks immediately prior to his/her transfer to the job or project within the geographic jurisdiction of the Local Union having geographic jurisdiction over the job or project unless a lesser period is agreed in the discretion of the host Local Union. The Employer and the transferred member/employee must be able to verify the duration of employment prior to the transfer through his/her paystubs and payroll records.

36B.5 An employer performing franchise style specialty work in another Zone may transfer two employees. These employees are not restricted from such employment by the 20% provision.

APPENDIX B

Suncor Energy

STANDARD

CONTRACTOR ALCOHOL AND DRUG STANDARD Number: CO-S22

Date Developed: Revision Date: Last Reviewed on: May 15, 2012

Document Owner:

Document Contact:

SCOPE AND PURPOSE

Suncor is committed to providing a safe work environment for all workers and for those whose safety may be affected by such workers. Suncor recognizes that the use of alcohol and drugs can adversely impact a safe work environment. This Contractor Alcohol and Drug Standard (the "Standard") is aimed at ensuring a safe work environment and identifies minimum standards that are expected of a contractor to mitigate the workplace risks associated with alcohol and drugs.

The purpose of this Standard is to address and minimize the risks in the workplace associated with alcohol and drugs and to clarify the contractor's obligations to ensure that all workers deployed on behalf of the contractor have the ability to safely and acceptably perform their assigned duties without any limitations relating to alcohol and drug use. This Standard supports the Environmental Health and Safety Policy and is only one facet of an overall approach to risk mitigation and safety that contractor's [sic]are expected to comply with.

GUIDANCE & STANDARDS

Suncor requires commitment on the part of contractor organizations and contract workers to accept responsibility for their own safety and the safety of others. This commitment includes conduct or behaviour that may adversely affect their ability to safely and reliably perform their duties. As such, all contractor organizations, including service providers, must ensure that all workers deployed on behalf of the contractor organization (directly or indirectly, including sub-contractors) to any worksite controlled or occupied by Suncor are fit for duty and that these workers remain fit for duty throughout their work shift.

All contractors that provide goods or services to Suncor in Canada must:

1. have an alcohol and drug policy that meets or exceeds either (i) Suncor's Alcohol and Drug Policy, Supporting Standards or (ii) the 2005 Canadian Model for Providing a Safe Workplace - Alcohol and Drug Guidelines and Work Rule as amended on October 1, 2010 (Canadian Model), and (iii) any Site Specific Standards (as such policies or standards may be amended from time to time),

2. ensure when workers are initially deployed on behalf of the contractor organization (directly or indirectly, including sub-contractors), or are returning to a Suncor worksite after an absence of 90

calendar days or more, that prior to accessing any Suncor worksite any such worker must pass a pre-access alcohol and drug test in accordance with the Canadian Model.

a) The pre-access test will be valid for return access to a Suncor worksite for:

   i. a period not more than 90 calendar days from the date the test was completed. Workers will be required to provide proof of a valid pre-access test to the contractor organization for each subsequent return to a Suncor worksite; or

   ii. for as long as the worker remains in continuous employment (without lay-off or termination of employment) with the same contractor organization.

b) A worker will not be required to complete a pre-access test for initial access to a Suncor worksite for the following circumstances:

   i. the worker has remained in continuous employment with the current contractor organization since the date of the pre-access test;

   ii. the worker has previously completed a pre-access test with respect to work to be performed on another worksite in accordance with the Canadian Model, and it is not more than 90 calendar days since the date the test was completed.

   iii. the worker is participating in a rapid site access program (RSAP) in Alberta, or participating in a similar program approved by Suncor, and is considered "active"; or,

   iv. the worker is present at a Suncor worksite for temporary short term day-by-day access such as vendor representative, visitors, government agents, or consultants who may from time to time attend at a Suncor worksite for visits, tours, inspections or deliveries. These individuals must be authorized by Suncor to be present on a Suncor worksite, and while on the worksite must be escorted at all times by Suncor personnel or other personnel designated by Suncor.

EXCEPTIONS

Intentionally left blank.

DEFINITIONS

All undefined capitalized terms in this Standard are as defined in the Suncor Alcohol and Drug Policy.

REFERENCES TO RELATED DOCUMENTS

Suncor Alcohol and Drug Policy
Suncor Environmental Health and Safety Policy

APPENDIX C

Suncor Energy

POLICY STATEMENT

ALCOHOL AND DRUG POLICY Number: CO-104

Date Developed: June 20th, 2012 *Revision Date: new* *Last Reviewed on: May 15, 2012*

Approved by: Steve Williams, CEO

Document Owner: VP EHS

Document Contact: Director EHS Client Services

SCOPE AND PURPOSE

Suncor is committed to providing a safe work environment for its Employees and for those whose safety may be affected by its Employees. Suncor recognizes that the use of Alcohol and Drugs can adversely impact a safe work environment. This Policy, Supporting Standards and Site Specific Standards are aimed at ensuring a safe work environment and outline specific responsibilities, requirements and expectations to adequately mitigate the workplace risks associated with Alcohol and Drugs.

The purpose of this Policy is to address and minimize the risks in the workplace associated with Alcohol and Drugs and to ensure that all Employees are Fit for Duty. This Policy outlines the expectations regarding Fitness for Duty, and the prohibitions against the use and possession of Alcohol and Drugs. This Policy supports the Environmental Health and Safety Policy and is only one facet of an overall approach to risk mitigation and safety.

GUIDANCE & STANDARDS

This Policy applies to all Suncor Employees in Canada.

In addition to the obligations set out in this Policy and Supporting Standards, all Employees must comply with any additional Site Specific Standards.

1. RESPONSIBILITIES

a) **Employees** will perform their job safely and responsibly, and in all ways consistent with established Company practices. In addition, all Employees will:

i. report Fit for Duty for all scheduled or unscheduled duty and remain Fit for Duty while on Company Business and Company Premises;

ii. read, understand and abide by this Policy and Supporting Standards, as well as their responsibilities under it;

iii. seek advice and follow appropriate treatment if they have a current or emerging problem, and follow recommended monitoring programs after attending treatment;

iv. co-operate with any work modification related to safety concerns;

v. notify their Leader if they believe a co-worker, contract worker or visitor is not Fit for Duty on the job; and

vi. cooperate as required with an investigation into a violation of this Policy or Supporting Standards, including any request to participate in the testing program as and when required to do so under this Policy.

b) The Company is responsible for:

i. ongoing leadership and supervision to ensure safe operations and effectiveness of the Program;

ii. determining and providing appropriate levels of training for Employees;

iii. guiding Employees who voluntarily seek assistance for a personal problem to appropriate resources (e.g., Health and Wellness, EFAP and/or other local resources) while maintaining confidentiality in accordance with Section 10 of this Policy;

iv. making arrangements for an assessment through Health and Wellness if, in the course of any performance-related discussion, an Employee states they have a problem with Alcohol or Drugs;

v. taking appropriate steps to investigate any possible violation of the requirements set out in this Policy and Supporting Standards; and

vi. implementing the requirements of this Policy and Supporting Standards.

2. DEFINITIONS

b) Alcohol refers to beer, wine and distilled spirits, and includes the intoxicating agent found in medicines or other products.

...

g) Drug means any substance, including Illicit Drugs and Medications, the use of which has the potential to change or adversely affect the way a person thinks, feels or acts.

h) Drug Paraphernalia means any equipment, product or material intended or designed for use in manufacturing, compounding, converting, concealing, processing, preparing or introducing an Illicit Drug or Alcohol into the human body. This also refers to any product or device that may be used to attempt to mask, tamper with or adulterate an Alcohol and Drug testing sample.

...

l) Failure to Test includes the failure to report directly for a test, refusal to submit to a test, or refusal to agree to disclosure of a test result to the Company Program Coordinator. A failure to test will also include inability to provide sufficient quantities of breath or urine fluid to be tested without a valid medical explanation acceptable to the Company.

m) Fitness for Duty or Fit for Duty means the ability to safely and acceptably perform assigned duties without any limitations due to the use or after-effects of Alcohol or Drugs.

...

o) Illicit Drugs means any controlled substance or drug, illegal to possess, cultivate or traffic pursuant to the Controlled Drugs and Substances Act, the Criminal Code of Canada, or any other applicable legislation or regulation. For greater certainty Illicit Drugs does not include a Medication.

...

q) Medical Review Officer means a properly qualified independent physician who validates Alcohol and Drug test results.

r) Medication means a Drug obtained (i) over-the-counter, or (ii) by the Employee through a doctor's prescription, or (iii) through a Health Canada authorization.

s) Policy or Alcohol and Drug Policy means this Alcohol and Drug policy.

w) Safety-Sensitive Position means a position in which Employees have a key or direct role in an operation where if actions or decisions are not carried out properly could result in:

i. a serious incident affecting the health or safety of Employees, contractors, customers, the public, the environment; or

ii. an inappropriate response or failure to respond to an emergency or operational situation.

Employees who are required to temporarily relieve in a Safety-Sensitive Position and Leaders who directly supervise the Safety-Sensitive Positions and who may perform the same duties or exercise the same responsibilities are deemed to hold Safety-Sensitive Positions.

x) Specified Position means an executive position that the Company designates as having significant and ongoing responsibilities for decisions or actions that are likely to affect the safe operations of the Company.

...

aa) Substance Abuse Assessment means an assessment conducted by a Substance Abuse Professional to determine whether an Employee has a substance dependence disorder.

3. REQUIREMENTS AND PROHIBITIONS

a) The following are prohibited while on Company Business or at Company Premises:

i. the use, possession, cultivation, manufacture, storage, distribution, offering or sale of Alcohol, Illicit Drugs or Drug Paraphernalia;

ii. the possession, storage or use of prescription Medications prescribed for another individual or the possession, storage or use of prescription Medications without being able to produce a legally, medically obtained prescription;

iii. the distribution, offering or sale of Medications;

iv. reporting to work or being at work while not Fit for Duty; and

v. the consumption of Alcohol or Illicit Drugs or the consumption of any product containing Alcohol while on duty including during meals or breaks unless otherwise permitted in accordance with the Social and Business Hosting Standard.

b) Employees must comply with the following requirements:

i. report Fit for Duty and remain Fit for Duty while at work;

ii. report for testing and participate in testing as required and promote the integrity of the testing process without tampering, adulterating or interfering with testing (e.g., masking agents, diluting);

iii. use Medications responsibly and seek appropriate guidance regarding Medications that may impact safe work performance. Medications of concern are those that inhibit or may inhibit an Employee's ability to perform their job safely. More detail is found in the Medication Standard;

iv. when designated "on call", Employees must remain Fit for Duty to respond to a call and be in compliance with this Policy and Supporting Standards;

v. if an Employee is under the influence of Alcohol or Drugs and is contacted by the Company to perform unscheduled services, Employees must decline the work request without any adverse consequences to the Employee;

vi. Employees must advise a Leader if a person may not be Fit for Duty, may be under the influence of Alcohol or Drugs, or may otherwise be in violation of this Policy and Supporting Standards. Reports must be made as soon as possible;

vii. Subject always to an obligation to be Fit for Duty, an Employee must also refrain from the use of Alcohol or Drugs (other than Medications used in accordance with the Medication Standard) after being involved in or observing an incident until the earlier of (i) the Employee has been tested, or (ii) the Employee has been advised by the Company that they will not be tested, or (iii) 32 hours have elapsed since the incident; and

viii. Employees must, when requested, participate fully in any investigation under this Policy and Supporting Standards.

...

6. TESTING

a) **Alcohol and Drug Testing**: Further information on Alcohol and Drug testing is found in the Alcohol and Drug Testing Standard. All Employees are subject to the following Alcohol and Drug testing:

i. post incident

ii. reasonable cause

iii. return to duty – post violation

iv. return to duty – post treatment

v. certification (Employees in Safety-Sensitive Positions)

Additional forms of Alcohol and Drug testing may be required on a site-specific basis.

...

9. CONSEQUENCES OF A POLICY VIOLATION

a) **General Requirements:** Any violation of this Policy and Supporting Standards may result in discipline up to and including termination of employment. In all situations, an investigation will be conducted to verify that a Policy or Standard violation has occurred. The appropriate discipline in a particular case depends on the nature of the Policy or Standard violation and the circumstances surrounding the situation. The severity of the violation will warrant entering the discipline process at different levels. General violations of this Policy Include:

i. failure to comply with the Policy and Supporting Standards;

ii. a positive Alcohol or Drug test (refer to the Alcohol and Drug Testing Standard); or

iii. a Failure to Test.

b) **Referral for Assessment:** After any confirmed positive Alcohol and Drug test, an Employee may be referred by Health and Wellness to a Substance Abuse Professional for a Substance Abuse Assessment (refer to the Substance Abuse Assessment Standard). Failing to meet with the Substance Abuse Professional or attend a scheduled Substance Abuse Assessment is a violation of this Policy.

c) **Conditions for Continued Employment**: Should the Company determine that employment will be continued after a violation of the Policy or Supporting Standards, the Employee will be required to enter into an agreement governing their continued

employment which may require any or all of the following actions, or any other condition appropriate to the situation:

i. temporary removal from their position;

ii. adherence to any recommended treatment and aftercare program;

iii. successful completion of a return to work Alcohol and Drug test;

iv. ongoing unannounced follow-up Alcohol and Drug testing for the duration of their agreement;

v. adherence to any ongoing rehabilitation conditions or requirements; and

vi. no further Policy or Standard violations during the monitoring period.

Failure to meet the requirements of the agreement will be grounds for discipline up to and including termination.

10. CONFIDENTIALITY

Confidentiality will be maintained to the greatest extent possible and disclosure will be restricted to where it is necessary for related health and safety concerns. Only information relating to the level of functionality (e.g., Fitness for Duty and any restrictions that may apply) may be shared with Leaders and for the sole purpose of determining Fitness for Duty, appropriate work accommodations, and/or work re-entry initiatives.

11. SAFETY-SENSITIVE POSITIONS

Because of the greater risk involved in performing certain functions, some positions may be designated as Safety-Sensitive Positions. Employees holding Safety-Sensitive Positions may be subject to additional requirements.

Tab 26

paras 25-26

2002 CarswellMan 1084
Manitoba Arbitration

Graymont Western Canada Inc. v. Cement,
Lime, Gypsum & Allied Workers, Local D575

2002 CarswellMan 1084, [2002] M.G.A.D. No. 55, 114 L.A.C. (4th) 269, 72 C.L.A.S. 23

Re Graymont Western Canada Inc. and Cement, Lime, Gypsum & Allied Workers, Local D575

Jamieson Member

Heard: October 29, 2002
Judgment: November 22, 2002
Docket: None given.

Counsel: M. Meyers, Q.C., L. Diamond, for Union
K. MacLean, for Employer

Subject: Labour; Employment

Headnote
Labour and employment law

***Jamieson Member*:**

1 This supplementary award deals solely with the issue of alcohol and drug testing as a condition of a transfer into safety sensitive positions or specified management positions that is contained in Part I of the Employer's Drug and Alcohol Policy (the Policy):

> As a condition of transfer to a safety sensitive position or a specified management position, as defined in this Policy, an applicant will be required to take drug and alcohol tests as described in this Policy and the results will be considered in determining the applicant's suitability for the position, subject to the terms of any collective agreement which may apply.

2 The need for a supplementary decision on this single aspect of the Policy arose when Arbitrator Martin Freedman, Q.C., handed down an award dated March 15, 2002, which dealt with the legality of the Policy as a whole (see *Re Continental Lime Ltd. and B.B.F., Local Lodge*

No. D575, unreported [now reported 105 L.A.C. (4th) 263]). Referring to Part I of the Policy, Arbitrator Freedman observed, at p. 37 [p. 283 L.A.C.]:

> I regard Part I as clearly severable from the balance of the Policy. In confirming the Policy in effect, which this Award does, I exclude therefrom Part I, and reserve jurisdiction to hear argument and issue a supplementary award regarding Part I, if either party wishes me to do so.

3 Since then, Arbitrator Freedman was appointed to the Manitoba Court of Appeal and is therefore unable to continue with his appointment as Arbitrator in this matter. The parties have asked that I complete the assignment and dispose of the outstanding issue of Part I of the Policy in the form of a supplementary award. In this respect, the parties are in accord that in taking this assignment I am bound by the Freedman Award in so far as the facts that are set out therein as well as by the decisions that were made relating to all other aspects of the Policy.

4 The Employer's operations located in the Interlake Region at Faulkner, Manitoba, are best described as an open face quarry or mining operation, with a lime plant and a calcium carbonate plant on site. There are some 26 employees in the bargaining unit represented by the Union classified as labourer, crusher operator, utility man, drag line operator, truck driver, plant load operator, quarry loader operator, calcium plant operator, kiln attendant, kiln firemen, driller/blaster and maintenance.

5 In the Freedman Award, all of these classifications, except for the drag line operator, were found to fall within the definition of safety sensitive positions as defined in the Policy:

> A "safety sensitive position" is one in which job performance requires the employee to be alert, physically coordinated and exercising good judgment, with a significant involvement in any part of the Company's operations where impaired job performance could affect the health, safety or security of the employee, other persons, property or the environment.

6 The "Impairment Investigation Procedure" set out in Part F of the Policy reads:

> Where the Company has reasonable cause to suspect that any employee is impaired, in violation of the requirements of this Policy, it shall conduct an investigation. "Reasonable Cause" will include unnatural, unusual or extreme behaviour, apparent unfitness for work, involvement in an accident which on initial review by management and following consultation with the safety committee or employee representative of the safety committee, appears to involve an unsafe act by an employee, or any similar conduct which mat reasonable create a suspicion of drug or alcohol use or possession in violation of this Policy.
>
> When the employee who is the subject of such an investigation works in a safety sensitive or specified management position, as defined in this Policy, the Company may require the employee to submit to a drug and/or alcohol test as part of the investigation. Refusal to submit

to such a test will be treated as insubordination and may subject the employee to disciplinary action.

7 Despite the Union's argument that there was no evidence of a drug or alcohol problem at the Employer's Faulkner plant, and therefore no need or justification for the implementation of the Policy, Arbitrator Freedman ruled that the safeguard of there having to be "reasonable and probable grounds" before the Employer can search, investigate or require testing for drug or alcohol impairment meets the arbitral standards of balancing the interests of protecting individual privacy rights and management's right to meet its Health and Safety due diligence obligations by demanding drug or alcohol testing. These standards are articulated in several leading cases, including, *Re Esso Petroleum Canada and C.E.P., Loc. 614* (1994), 56 L.A.C. (4th) 440 (McAlpine); *Re Trimac Transportation Services - Bulk Systems and T.C.U.* (1999), 88 L.A.C. (4th) 237 (Burkett); and, *Re Canadian National Railway Co. and C.A.W.-Canada* (2000), 95 L.A.C. (4th) 341 (M.G. Picher).

8 Against that background, the Union took the same approach in argument before me, as it did before Arbitrator Freedman, asserting that the mandatory drug and alcohol testing presently included in Part I of the Policy for employees who want to transfer to safety sensitive jobs is unreasonable as there has been no discipline for drug or alcohol abuse at the Faulkner plant. The Union also suggested that the very location of the operation in remote cottage country near the shore of Lake Manitoba, some two-and-a-half hours drive from Winnipeg, makes the chance of there ever being a rash of drug or alcohol incidents unlikely as compared with operations in an urban area. The Union added that the workforce at Faulkner is mature, with an average 15 years' seniority and no one employee having a history of substance abuse. In the circumstances the Union submits that the risk of drug or alcohol related incidents here is at the very low end of the scale as opposed to the types of industries that were being examined in *Re Esso Petroleum Canada*; *Re Trimac Transportation Services*; and *Re Canadian National Railway Co., supra.*

9 In support of its argument that drug testing is an unwarranted invasion of employees' privacy rights and that the mandatory testing in Part I of the policy tips the scale unnecessarily in the Employer's favour in the balancing the interests test, the Union canvassed the evolution of drug and alcohol testing in the workplace by referring to numerous precedents and academic writings including, "Alcoholism, Drug Dependency and the Workplace: Problems and Responses", *Labour Arbitration Yearbook*, 1991, Vol 1, 69 (James E. Dorsey and Susan D. Charlton); *Re Canadian Pacific Ltd. and U.T.U.* (1987), 31 L.A.C. (3d) 179 (M.G. Picher); *Re Canadian National Railway Co. and U.T.U.* (1989), 6 L.A.C. (4th) 381 (M.G. Picher); *Re C.H. Heist Ltd. and E.C.W.U., Loc. 848* (1991), 20 L.A.C. (4th) 112 (Verity); *Re Provincial-American Truck Transporters and Teamsters Union, Loc. 880* (1991), 18 L.A.C. (4th) 412 (Brent); *Re Metropol Security, a division of Barnes Security Services Ltd. and U.S.W.A., Loc. 5296 (Drug and Alcohol testing)* (1998), 69 L.A.C. (4th) 399 (Whitaker); *Re Esso Petroleum Canada and C.E.P., Loc. 614, supra*; *Re Sarnia Cranes Ltd. and I.U.O.E., Loc. 793* (1999), 99 C.L.L.C. 143,696 [¶220-072] (O.L.R.B.)

(Shouldice); and *Re Trimac Transportation Services - Bulk Systems and T.C.U., supra.* Without repeating all of the many arbitral principles that the Union urged me to adopt, it will suffice to say a major theme of the Union's argument in this respect is that there are few if any arbitral awards that have upheld any employer's drug and alcohol policy that requires random or mandatory testing where there are no prerequisite reasonable or probable cause provisions.

10 In short, the bottom line of the Union's position is that the reasonable cause prerequisite for drug or alcohol testing that is present elsewhere in the Policy should also be applicable to employees who seek to transfer to a safety sensitive position under Part I. The Union says that it takes no position on applications to transfer to specified management positions.

11 The Employer began its argument by setting the legislative background for its Policy by referring to the *Workplace Safety and Health Act*, R.S.M. 1987, c. W210 (*the Act*), and the *Operation of Mines Regulation*, Man. Reg. 228/94 (*the Regulation*), made thereunder. Along with other provisions in *the Act* and *the Regulation*, the Employer relied specifically on s. 31(1) of *the Regulation* to support its position that the Policy as a whole was required to fulfill its statutory obligations as an operator in the mining industry in Manitoba:

> **Prohibition of alcohol and drugs**
>
> 31(1) An employer shall take all reasonable steps to prevent a worker from
>
> (a) subject to subsections (3) and (4), bringing alcohol or drugs to a mine, or consuming or keeping alcoholic beverages or drugs at a mine; and
>
> (b) working in or about a mine while under the influence of alcohol or under the influence of a drug that impairs or could impair the worker's ability to work safely.

12 The Employer also relied on the above provisions of s. 31 of *the Regulation* to underpin its argument that in the mining industry in Manitoba, the intrusion of privacy vis-à-vis alcohol and drug testing is mandated by statute. In this respect, the Employer argued that in most of the arbitral case law presented by the Union, where alcohol or drug testing policies were struck down, the issue was random testing which is not an issue here. Part I of this Policy merely provides for testing in a given situation, where, according to the Employer, it is not unreasonable to seek warning if an applicant for entry into a safety sensitive job or for promotion to a specified management position, has a substance abuse problem.

13 The Employer also referred me to Article 3.01 of the collective agreement between the parties where "physical fitness" is a requirement for bidding on promotion to a higher paid job in the bargaining unit. According to the Employer, this presumes a pre-promotion medical examination which could include alcohol or drug testing. In this same vein, the Employer points out that under Part I of the Policy, positive test results in transfer or promotion situations do not result in automatic

disqualification of the candidate. If this were so and candidates were disqualified or disciplined on the outcome of the tests, the Employer says, the mandatory testing might then be found to be unreasonable.

14 In support of its overall argument, the Employer referred to *Entrop v. Imperial Oil Ltd.*, [2000] O.J. No. 2689 (QL) (C.A.) [reported 189 D.L.R. (4th) 14]; and *Re Canadian National Railway Co. and C.A.W.-Canada*, *supra*, which the Employer described as the culmination in the development of case law respecting drug and alcohol testing. Going through these lengthy decisions, the key principles that the Employer asked me to draw were the accepted need for Employer's to be proactive rather that reactive in fulfilling their statutory and due diligence obligations in preventing substance abuse incidents. Also, in reconciling the competing interests of the parties, the arbitral focus should be on the nature of the enterprise and, given the work performed, whether reasonable limitations on individual rights of employees can be implied. If so, then a correlative right must vest in the Employer to require a medical examination including alcohol or drug testing. Applying those principles to the situation at Faulkner and taking into account that mining is a high risk industry and, the only industry in Manitoba regulated regarding drugs and alcohol abuse, the Employer submits that the required testing in Part I of its Policy prior to an employee entering a safety sensitive position or a specified management position is reasonable.

15 In this respect, the Employer points out that in *Entrop v. Imperial Oil Ltd.*, *supra*, the Ontario Court of Appeal did not strike down a similar testing related to the certification of individuals as being fit for safety sensitive positions. This provision had been sustained earlier by a Human Rights Board of Inquiry as being a lawful aspect of an Imperial Oil Ltd., drug and alcohol testing policy. The Employer also reminded me that in *Re Canadian National Railway Co. and C.A.W.-Canada*, *supra.*, Arbitrator Picher acknowledged the reasonableness of a similar provision in the policy under review in that case. At p. 386, the Arbitrator said:

> After much consideration, I am satisfied that such testing is justified, and represents a reasonable exercise of management's rights in the highly safety sensitive transportation industry ... It is clearly within the legitimate interests of a railway to reasonably ensure that persons who move into risk sensitive positions do not suffer from active drug or alcohol addiction or dependency ... The careful vetting of applicants for risk-sensitive positions, including drug and alcohol testing administered by the employer, is a reasonable exercise of a railway's management rights.

16 Commencing my analysis on that note, it cannot go unnoticed that in the above *Canadian National Railway* case, Arbitrator Picher only approved the relevant portion of the C.N.R. policy "*after much consideration*". He also admitted that his decision relating to mandatory drug or alcohol testing as a precondition to promotion or transfer into a risk sensitive position, is probably the very first arbitral award or tribunal decision of its kind. Furthermore, the mandatory testing in that portion of the C.N.R. policy was obviously tailored for the extremely high risk running

trades in the railway industry, where the requirement to submit to company administered medical examinations is historically a common condition of employment. There are no such conditions of employment at Faulkner and it has to be remembered that under the Impairment Investigation Procedure approved by Arbitrator Freedman, the Employer's rights to require alcohol or drug testing at Faulkner, even for safety sensitive positions, is strictly limited to situations where there is reasonable cause. Moreover, one can hardly compare the enormous potential for damage and injury in the event of an accident or derailment of a freight train carrying toxic or otherwise dangerous cargoes to the low level of risk at the Faulkner quarry operations. On these two distinctions alone, I am not prepared to blindly follow Arbitrator Picher's bold steps in the evolution of workplace drug and alcohol testing jurisprudence, notwithstanding that I probably would have ruled as he did in the circumstances before him.

17 In the *Entrop v. Imperial Oil Ltd.*, *supra*, case also relied upon by the Employer, the main issue there was whether the alcohol and drug testing policies of Imperial Oil Ltd. violate the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, in the sense of discrimination, given that addiction to drugs or alcohol is a recognized as handicap. This is an entirely different issue than I have here and the fact that the Court chose not to interfere with the relevant portion of the Imperial Oil policy that requires precertification testing for safety sensitive positions does not persuade me that I should follow suit and approve Part I of the Employer's Policy. What I can draw from *Entrop* though, is the test applied by the Court when reviewing Imperial Oil's workplace drug and alcohol testing policy, *i.e.*, whether mandatory testing is reasonably necessary to accomplish an employer's purpose of curtailing on-the-job impairment due to alcohol or drugs.

18 Taking my cues from the Freedman Award, I note that Arbitrator Freedman readily accepted the fact that as a mining operation in the Province of Manitoba, the Employer is "legally required" under *the Regulation*, to take all reasonable steps to prevent its workers from "*bringing, consuming or keeping alcoholic beverages to or at its plant and from working in or about the plant while under the influence* (p. 34) [p. 282 L.A.C.]. At p. 35, he goes on to say, "*This employer has certain statutory obligations, and in my view, the adoption of reasonable drug and alcohol policy is consistent with and in direct fulfilment of those statutory obligations*" [p. 282 L.A.C.]. Those findings take care of the Employer's argument about its statutory obligation to implement the Policy.

19 As indicated earlier, Arbitrator Freedman concurred with and adopted the balancing of interests approach favoured in the arbitral authorities cited above, and found that the Policy, except Part I, met this balancing of interests test. He then went on to find that the stipulation whereby the Employer must have reasonable grounds to believe or reasonable grounds to suspect before exercising the right to demand testing for drugs or alcohol, is an adequate safeguard for the employees. Throughout his findings however, Arbitrator Freedman forcefully expressed his discomfort with the mandatory testing in Part I of the Policy that is outside the limitation of reasonable cause.

20 For example, at p. 35 [p. 282 L.A.C.], Arbitrator Freedman observed, "*The reservation I have is about Part I (quoted at p. 33), which I will discuss shortly.*" Then at pp. 36-7 [p. 283 L.A.C.], referring to the absence of a reasonable cause limitation mentioned above, he said:

> As to Part I, there is no such limitation. Neither the Union nor the Company addressed Part I in argument at all. There was no evidence related to it. My subsequent comments on the Policy are to be understood as excluding any reference to Part I and are expressly subject to the reservation I have, that the requirement to take a drug and alcohol test as a condition of employment in or transfer to a safety sensitive position, without the limitations elsewhere in the Policy relating to such tests, may not be a sustainable requirement. For those employees subject to Part I, the Policy imposes mandatory universal testing, and Part I certainly appears not to be justified under the balancing of interests approach.

21 From the foregoing, it is apparent that had Arbitrator Freedman continued with this assignment, the Employer would have faced a heavy burden to convince him that the absence of reasonable cause in Part I is justified in the particular fact situation surrounding the operations at Faulkner and, in light of the reasonable cause limitation in the rest of the Policy. In filling Arbitrator Freedman's shoes, the Employer has the same burden convincing me.

22 Inside the bargaining unit at Faulkner, the workforce consists of some 26 employees in 12 job classifications, 11 of which were declared as being safety sensitive by Arbitrator Freedman. Accepting that Part I applies only to entry into a safety sensitive position and not to transfers between positions, that leaves only the one employee, the drag line operator, who would be likely to apply for a transfer into a safety sensitive position. Of course, any of the bargaining unit employees could apply for promotion to a specified management position and notwithstanding that the Union took no position on this aspect of Part I, both the transfer and promotion aspects of Part I are still before me and I have to deal with them.

23 Outside the bargaining unit at Faulkner, I note from p. 7 of the Freedman Award, there are some six other employees including, the plant manager, two foremen, two clerical workers and a quality assurance supervisor [p. 267 L.A.C.]. All of these positions are listed in "Appendix B" to the Policy as being determined (by management I assume) to be specified management positions. This leaves only the one classification of drag line operator in the whole workforce outside the scope of the reasonable cause Impairment Investigation Procedure in Part F of the Policy.

24 Also, I have not missed the fact that under Part I, in addition to the provision I have been dealing with, there is also a pre-employment condition that requires all applicants for safety sensitive and specified management positions to submit to a drug and alcohol test:

> As a condition of employment in a safety sensitive position or a specified management position, as defined in this Policy, an applicant will be required to take drug and alcohol tests

as prescribed in this Policy and the results of such tests will be considered in determining the applicant's suitability for the position.

25 Given those circumstances and, particularly in a work environment where the workforce is small, local and stable, with the Employer having ample opportunity to detect drug or alcohol abuse or addiction amidst the employees through its normal supervisory procedures, it seems to me that the Employer's goal of curtailing on-the-job drug and alcohol impairment is for all intents and purposes achieved and its statutory obligations fulfilled by the reasonable cause aspects of the Policy, without the need for further meddling with the employee's privacy rights.

26 Continuing with the balancing of interests and reasonable cause approach taken by Arbitrator Freedman, it is my finding in the particular circumstances of this case, that the portion of Part I of the Policy as drafted, requiring mandatory alcohol and drug testing as a precondition for a transfer into a safety sensitive position or a promotion into a specified management position, is an unnecessary and therefore an unreasonable infringement on the employees' privacy rights.

End of Document

Tab 27

para 63

2007 CarswellOnt 9197
Ontario Arbitration

Hamilton Health Sciences Corp. v. O.N.A.

2007 CarswellOnt 9197, [2007] O.L.A.A. No. 733, 167 L.A.C. (4th) 122, 91 C.L.A.S. 228

In the Matter of an Arbitration (Under the Ontario Labour Relations Act, 1995)

Hamilton Health Sciences, (the "Hospital")
and Ontario Nurses' Association, (the "Union")

In the Matter of the arbitration of policy grievances concerning the administration of the sick leave benefits plan under the collective agreement between the parties

G.T. Surdykowski Member

Heard: January 17, 2006 - August 23, 2007
Judgment: October 5, 2007
Docket: MPA/Y502361

Counsel: Mark Zega, for Hospital
Kate Hughes, for Union

Subject: Labour; Public

Headnote

Labour and employment law --- Labour law — Collective agreement — Wages — Sick leave pay

Table of Authorities

Cases considered by *G.T. Surdykowski Member*:

Holloman v. Life Ins. Co. of Virginia (1940), 7 S.E.2d 169, 127 A.L.R. 110, 192 S.C. 454 (U.S. S.C. Sup. Ct.) — referred to

St. Jean de Brebeuf Hospital v. C.U.P.E., Local 1101 (1977), 16 L.A.C. (2d) 199 (Ont. Arb.) — referred to

York County Hospital Corp. v. S.E.I.U., Local 204 (1992), 25 L.A.C. (4th) 189, 1992 CarswellOnt 1178 (Ont. Arb.) — referred to

Statutes considered:

Arbitrations Act, R.S.O. 1990, c. A.24
Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

Employment Standards Act, 2000, S.O. 2000, c. 41
Generally — referred to

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A
Generally — referred to

s. 70 — referred to

s. 73 — referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1
Generally — referred to

s. 63(1)(f) — referred to

s. 63(2) — referred to

s. 63(4) — referred to

s. 63(5) — referred to

s. 63(6) — considered

Personal Health Information Protection Act, 2004, S.O. 2004, c. 3, Sched. A
Generally — referred to

s. 18 — referred to

s. 29 — referred to

s. 30 — referred to

s. 30(1) — referred to

s. 30(2) — referred to

s. 31 — referred to

s. 37 — referred to

s. 37(1) — referred to

s. 37(1)(a) — referred to

s. 37(1)(h) — referred to

s. 37(2) — referred to

s. 41 — referred to

s. 63 — referred to

Regulated Health Professions Act, 1991, S.O. 1991, c. 18
Generally — referred to

***G.T. Surdykowski Member*:**

I. Introduction

1 This proceeding concerns two policy grievances. It has been bifurcated into three phases. The Award numbers reflect the phase that the particular Award relates to. I have previously issued Awards #1A (dealing with a preliminary issue in Phase #1) and #2 (dealing with an *Employment Standards Act* issue in Phase #2). This Award deals with the Union's allegation in Phase #1 that the "Medical Certificate of Disability" application form for short term sick leave benefits that employees are required to submit is improper. Although the issue is restricted to the short term disability ("STD") requirements it encroaches upon return to work issues.

2 Paragraphs 1-14 of the Introduction in "Award #1A — "Preliminary" Issue" are an equally appropriate general introduction to this Award.

3 However, it bears repeating that prior to the spring of 2005 the Hospital's Employee Health Services ("EHS") Department processed sick leave benefits applications, and obtained information from employees for that purpose. EHS assessed or "adjudicated" employee applications for sick leave benefits and determined in each case whether the employee was entitled to sick benefits. EHS also sought to facilitate early and safe returns to work, with necessary accommodations as required. Although there were (and are) confidentiality protections in place, EHS had to share certain limited information regarding employees' medical conditions with Hospital management in order to perform this function (see Appendix "AA" and paragraph 53, below).

4 The Hospital decided to outsource the short term disability ("STD") sick leave benefit application and assessment/adjudication function for operations and efficiency reasons. Cowan Wright Beauchamp ("Cowan") was the successful private sector bidder for this contract and took on the role and functions formerly performed by EHS, beginning on April 4, 2005 at the General site, April 25, 2005 at the McMaster site, May 16, 2005 at the Henderson site, and June 6, 2005 at the Chedoke site. The contract between the Hospital and Cowan in that respect (Exhibit #18 — the "Cowan contract") as produced, with financial details deleted as confidential and irrelevant and with emphasis added, is attached as Appendix "C" to this Award. I have included it in this Award for the sake of completeness notwithstanding that this contract does nothing to resolve the matters in issue. A contract between the Hospital and a third party cannot give the third party any greater rights than the Hospital itself has with respect to bargaining unit employees.

5 The "Medical Certificate of Disability" (hereinafter referred to as the "Cowan form"), that Cowan requires all employees who apply for sick leave benefits to complete was entered into evidence as Exhibit #22. It is reproduced as Appendix "A" to this Award. The evidence includes three versions of the "Attending Physician's Statement" that the Hospital's EHS Department used over the years for that purpose before the Hospital contracted that function out to Cowan. On the face of these documents the most recent of these was "updated" in November 2002. For the purposes of this case, these appear to be substantially the same and I include only the most recent one as Appendix "AA" for comparison purposes.

6 The Union alleges that bargaining unit nurses are being told that they must sign the consent in the Cowan form and provide all of the information requested, and that they will be denied benefits if they do not do so. The Union asserts that the consent being required of employees in Section B of the Cowan form is coerced, and is therefore not a true consent, and that the consent being required is in any event too broad or otherwise improper. The Union also objects to the reference in Section B of the Cowan form to a maximum reimbursement of $35.00 to the medical professional who completes the form. The Union alleges that Section C of the Cowan

form requires employees to disclose confidential personal medical information that goes beyond what is necessary or appropriate for short term sickness benefits purposes, and which violates bargaining unit employees' collective agreement and statutory privacy rights.

7 The Union does not object to the use of a consent and medical information form for the purpose of STD benefits under the collective agreement. It recognizes that the Hospital is entitled to information in that respect. The Union's concern is with the manner and scope of the consent, and the nature and extent of the confidential medical information that the Cowan form requires bargaining unit employees to provide. The issue in this case is not the extent of the consent or medical information that the Hospital can legitimately seek and use in any particular individual case. The Union acknowledges that a more intrusive investigation of the basis for an application for STD benefits may be appropriate in a particular individual case. The issue is the more general one: that is, what consent and medical information can the Hospital require every employee who seeks STD benefits to provide as a matter of course in the first instance, failing which benefits will be denied? That is an issue which is appropriately raised in a policy grievance, which is what I have before me.

8 En addition to *vive voce* evidence, I have been provided with hundreds of pages of documentary evidence. Counsel made oral and written submissions, and filed numerous (48) Court and arbitration decisions in aid of their submissions. I find it unnecessary to review the evidence in detail, or to set out the parties' submissions even in summary form. I have reviewed the collective agreement, the legislation cited to me, and the evidence. I have read all of the authorities filed, and considered the oral and written submissions. Many of the authorities are of little or no real assistance, and I do not consider it necessary to analyze or even list them. I will address the evidence and arguments, and refer to the jurisprudence as I consider appropriate. I note that unless a different analysis in another jurisdiction is particularly persuasive, I consider it appropriate to give greater weight to the jurisprudence in the jurisdiction in which the case at hand is being litigated when there is a divergence of jurisprudential opinion between jurisdictions, and that is what I have done.

9 I note that there are other separately represented bargaining units at the Hospital. I understand that the Hospital uses the same Cowan form and services for all of them. During argument in Phase 3 of the proceeding (i.e. after Phases 1 and 2 had been completed and while I was in the process of preparing this Award) an award dated July 10, 2007 issued by Arbitrator Knopf with respect to a dispute between the Canadian Union of Public Employees and the Hospital concerning the Cowan form and Cowan's conduct was brought to my attention. The Knopf Award in the "CUPE case" arises out of a mediation/arbitration proceeding held the same day as that award was issued and concerns a different collective agreement bargaining relationship. It is neither binding on me, nor of any particular assistance. However, I was referred to it and I am constrained to comment on it in due course, below.

II. Cowan's Explanation of Its Form

10 As noted above, the Cowan form is reproduced as Appendix "A" to this Award. Exhibit #45 is typical of the letter that is being sent to employees who seek STD benefits. It reads (with dates deleted as irrelevant and as having the potential to identify the employee to whom the particular letter was sent) as follows:

> As you are aware, the hospital has implemented a new process for Short Term Disability adjudication.
>
> We have determined that the Medical Certificate of Disability will be considered the satisfactory proof of disability that we require to justify absences from the workplace as outlined in the Hospitals of Ontario Disability Income Plan (1992). This will be required for all absences of 5 shifts or greater. Cowan Wright Beauchamp, will act on behalf of the hospital to review and assess this information, in consultation with the Family Physician, and advise if there is medical to support the absence. This information will be held in the strictest confidence with Cowan Wright Beauchamp, and no information with respect to diagnosis will be shared with any Hamilton Health Sciences employee, without the expressed consent of the individual employee in question.
>
> If employees do not consent to providing the Medical Certificate of Disability to the appropriate Health Professional, then we will not be able to establish if proof of disability has been met, and as a result, the employee will not be paid sick pay benefits.
>
> You have been absent as of _____ and at this time you still remain off. You will need to provide medical documentation to support that absence. Enclosed you will find a letter for your doctor explaining the process and a Medical Certificate of Disability which your doctor will need to complete. There is a star on that form where you will, need to sign your consent. Please ensure that Cowan Wright Beauchamp receives the required documentation to support your absence by _____. If you are unable to provide this documentation, we will not be able to adjudicate your claim, sick pay benefits may not be in order, and an overpayment recovery would have to be set up.
>
> Enclosed is a copy of the brochure, which was attached to your pay stub on _____, which explains and outlines the process. Also enclosed is a copy of the Attending Physician Statement that is required under this process. If you have any questions or concerns about this process please contact ...
>
> (Emphasis added.)

11 Also in evidence as Exhibit #9, and reproduced as Appendix "B" to this Award, is the "Functional Abilities Form" ("FAF") that the Hospital is using for the purpose assessing employees when they are ready to return to work from an illness or injury. It is useful to compare the Cowan form to this FAF as well as the Attending Physician's Statement previously used by EHS.

12 Helene Santerre is the Cowan representative who drafted the Cowan form in issue, which she customized for the Hospital's use. She does not deal with the Cowan form on a day-to-day basis but continues to have oversight responsibility for it. Santerre testified that Cowan's role in the process is to provide sick leave adjudication and to ensure that employees who apply for short term sick leave benefits obtain appropriate treatment. She says that Cowan can facilitate medical testing and specialist consultations, and provide support to employees and facilitate their return to work. Although Santerre testified that all of the Cowan employees who perform these various functions are medical health professionals it is clear that that is not the case. On the face of its proposal to the Hospital at least one Cowan employee (Geil) was not a medical health professional even then, and another non-medical health professional (Higgenbotham) subsequently became directly involved. Cowan also seeks to identify sick claim trends with a view to reducing these through wellness programs. Santerre confirms that Cowan's role is to report on the status and make recommendations about sick benefits claims, and that the Hospital has the final say in that respect.

13 Santerre testified in examination-in-chief that when she was drafting the form she looked at the 1980 and 1992 HOODIPs, the Hospital's existing policies and the collective agreement. However, she says that she did not look at the collective agreement to ensure that the Cowan form was consistent with it. Indeed when asked in cross-examination whether she (or Cowan) reviewed the collective agreement (which include the 1980 and 1992 HOODIPs) in order to ensure that the Cowan form is consistent with it Santerre responded that "we were not asked to do that", which I take to mean that neither she nor anyone else did so. On the evidence, it is hard to believe that Santerre, who conceded, in cross-examination that she did not review either HOODIP when she drafted the Cowan form, or anyone else at Cowan paid any attention to the collective agreement.

14 Santerre also appears not to understand the HOODIP definitions of "total disability" or "totally disabled". Santerre testified that impairment does not equate to total disability and the Cowan materials (specifically Exhibit #20) refer to an employee's inability to perform the "essential" duties of her occupation, but both HOODIPs define the eligibility as the inability to perform the "regular" duties of the employee's occupation. While Santerre's broad general statement that a person whose abilities are impaired may not be totally or at all disabled is accurate as far as it goes, her example of someone with a broken leg still being able to perform reception work and her assertion that an impairment does not necessarily mean that bargaining unit nurse cannot perform any of her normal duties demonstrate that Cowan does not appreciate the distinction between essential and regular duties for STD benefits purposes under the HOODIPs, particularly when it comes to nurses. There is a difference between essential and regular duties.

As a general matter regular duties is a broader category which encompasses but is not limited to essential duties. Nor is it clear that Santerre appreciates that the Hospital is a highly unionized environment because even if an ill or injured nurse could be assigned to clerical or non-nursing duties doing so could take her out of the bargaining unit and conflict with the rights of employees in another bargaining unit. Perhaps this is why the Hospital has effectively retained full control of return to work and accommodation issues.

15 Santerre says that the Cowan form is similar to (which I take to mean substantially the same as) forms used by other insurers including Sun Life, Great-West Life and Manulife use for the same purpose. (I note that a Manulife medical release form is in evidence (as Exhibit #30), but I did not allow the Hospital to adduce examples of Sun Life or Great-West Life forms because they had not been produced n accordance with my production orders. In any event, the mere fact that an industry norm has developed does not necessarily mean that the practice is acceptable.) Santerre identified three uses for the information obtained from the Cowan form: to determine the applicant employee's eligibility for STD benefits, to ensure that the employee receives proper treatment, and to identify a return to work date and options. She testified that Cowan uses the applicable HOODIP parameters to assess an employee's eligibility for STD benefits. It appears from her testimony that her focus in that respect was on the 1992 HOODIP, which is quite different from the 1980 HOODIP that applies to many of the bargaining unit nurses (see paragraphs 52 and 56-62, below).

16 The Union does not object to the personal information sought in Section A of the Cowan form. Section B is the consent to release information part of the form. The Hospital's Attendance Awareness Program document (Exhibit #41) speaks in terms of employees providing "appropriate" consents to the release of medical information sufficient to allow the Hospital to fulfill its responsibilities. Santerre testified that the purpose of Section B is to inform the employee of the information that is being requested and that more may be requested, of what Cowan will be doing with the information, and to preserve the confidentiality of the information. She explained that Cowan only wants information that is "relative" to the absence in issue, that Cowan seeks "restrictions or limitations" information for return to work purposes, notwithstanding that she is aware that the Hospital has a separate return to work information form (i.e. the FAF) and process. Santerre says that Cowan seeks a release for "WSIB" information so that it can coordinate return to work efforts with that agency, and for an "Automobile insurer" [sic] because such an insurer is the "first payer" if a claim arises out of a motor vehicle accident. She says that return to work information may be shared with supervisors, and "when applicable" the WSIB, an automobile insurer and the long-term disability insurer. Finally, Cowan decided to include the reference to maximum reimbursement of $35.00 for completing the form, which Santerre says is in accordance with OMA and CMA guidelines, so that the doctor will know that he will be reimbursed in that amount and be aware that the employee will be responsible for any amount in excess of that. This is another illustration of Cowan's failure to review the collective agreement and ensure that the Cowan form complies with it. Article 12.14 of the Central portion of the agreement clearly

specifies that the Hospital is responsible for the full cost of any medical certificate that is required of an employee.

17 With respect to Section C, Santerre testified that requests for diagnoses are "normal in the field". Although she agreed in cross-examination that Cowan doesn't necessarily need to have diagnosis, treatment or medication information to verify STD benefits eligibility and that an employer only needs to know an employee's functional limitations, not the diagnosis (which she says is not communicated to the Hospital in any event), Santerre nevertheless maintained that Cowan requires the primary diagnosis and symptoms in order to perform its adjudication function. She says the primary diagnosis and symptoms reveal the nature of the illness and permits Cowan to assess the reasonableness of the duration of the absence. It is difficult to reconcile Santerre's assertion that Cowan requires diagnosis and symptoms information to perform its adjudicative function and to assess the reasonableness of the duration of the absence with her need to know admissions in cross-examination. Not only did she agree with Union counsel that Cowan doesn't necessarily require diagnosis, treatment or medication information in order to verify (which I consider indistinguishable from adjudicate) STD benefits eligibility, she frankly acknowledged that an employer does not require diagnosis information. If the employer, in this case the Hospital, does not require the information, it is not entitled to it unless the collective agreement so provides (an issue that I will return to below). Since a third party agent like Cowan stands in the shoes of the Hospital neither is it entitled to it. Notwithstanding this, Santerre maintained that such information, "current findings" and a prognosis are "useful" for return to work purposes and to assess the appropriateness of the treatment, which Santerre was quick to say was not for the purpose of questioning the doctor but to permit Cowan to facilitate or make treatment suggestions. Santerre says that Cowan seeks a secondary diagnosis and symptoms because that could be what is preventing the employee from returning to work. In cross-examination, Santerre agreed that the Section C information is unnecessary because of the Hospital's own FAF return to work form and process, but she continued to insist that Cowan nevertheless requires that information in order to provide disability management and to facilitate and assist in the employee's medical treatment. Indeed, Santerre testified in cross-examination that the focus of Section C is on return to work issues, and agreed that the Hospital's own FAF provides all of the return to work information that an employer needs. It is clear from the evidence that the Hospital maintains complete control over all aspects of the return to work and accommodation process notwithstanding the provisions in its contract with Cowan in that respect.

18 Santerre explained that the attending physician is in the best position to assess an employee's medical status, and that the physician's role is to diagnose and treat the employee, and provide functional abilities information, but not to determine whether the employee is totally disabled for employment and benefits purposes. In cross-examination, Santerre agreed that the attending physician would be in a better position to do so if s/he were provided with a job description and demands analysis (which the Hospital has for all bargaining unit positions), but she also said that doctors have a limited amount of time to spend on these issues and often are not used to

or comfortable dealing with them. Santerre says that Cowan's role is to adjudicate the claim for benefits, to ensure that the employee is receiving appropriate treatment, and to discern return to work options. It appears from Santerre's evidence that Cowan is seeking the type and amount of confidential medical information because its view is that a bargaining unit nurse is not totally disabled for STD benefits purposes if she can do the essential or perhaps even any of her normal duties. This is the wrong test under either of the HOODIPs (see paragraph 52, below)

III. What Confidential Medical Information Can an Employer Require

General Principles

19 At least two questions typically arise in medical information cases: what is appropriate as a matter of general practice and policy, and what is appropriate in a particular case? These grievances directly raise the general practice and policy issue. But they also engage the question of the particular case as the counterpoint. That is, a question that arises is whether the sort of invasive inquiry that may be appropriate in a particular individual case is also appropriate in the first instance in every case.

20 Both subjectively and objectively, personal medical information is confidential personal information. The confidentiality of the doctor/patient relationship and personal medical information is universally and legislatively recognized as one of the most significant privacy rights in modern Canadian society. There appears to be a general societal notion that the right to privacy is a basic human right, particularly in a modern democratic society. But employer and employee rights in that respect do not arise out of the air. It is far from clear that there is a common law right to privacy (although there is some American jurisprudence that seems to suggest there is — see, for example, *Holloman v. Life Ins. Co. of Virginia*, 192 S.C. 454, 7 S.E.2d 169, 127 A.L.R. 110 (U.S. S.C. Sup. Ct. 1940)), but I think it unnecessary to digress into that discussion (particularly when the parties did not do so). Although the right to privacy is not a right listed in the *Canadian Charter of Rights and Freedoms* or the *Human Rights Code*, there is privacy protection legislation that addresses and reflects the prevailing societal notions of privacy rights with respect to personal health information. This legislation "occupies the field" and overtakes any common law notion of a right to privacy. The *Personal Health Information Protection Act, 2004* (the "PHIPA"; see Appendix "D", attached) is a comprehensive piece of health care privacy legislation. The *Occupational Health and Safety Act* (the "OHSA") contains a medical information privacy provision which prevails over the PHIPA (section 63(6); see Appendix "E", attached).

21 There is nothing in the mere existence of an employment relationship that gives the employer any inherent right to compel its employees to compromise their legitimate right to keep personal medical information confidential. An employer only has a right to an employee's confidential medical information to the extent that legislation or a collective agreement or other contract of employment specifically so provides, or that is demonstrably required and permitted by law

for the particular purpose. Except where required or permitted by law an employer cannot seek and a doctor cannot give out any patient medical information without the patient's freely given informed specific authorization and consent. But there are few if any things that are confidential for all purposes or in all circumstances and the privacy right that attaches to confidential medical information is not absolute. The dispute between the parties reveals the tension between an employer's right to or legitimate need for information in order to properly manage its business and the workplace, and to meet its statutory and collective agreement obligations, and an employee's right to personal privacy.

22 The law that applies to privacy issues includes the "law" that the parties to a collective agreement of individual contract of employment create for themselves. Of course this party created law must fit within the mandatory parameters created by legislation. There is some legislation that parties cannot contract out of (the *Labour Relations Act, 1995* and the *Employment Standards Act*, for example), and there is legislation that the parties can contract out of (the *Arbitration Act*, for example). Parties cannot contract out of the PHIPA or the OHSA.

23 Most modern collective agreements contain sick leave benefit provisions. A fundamental principle that underlies every collective agreement is that bargaining unit employees are under an obligation to regularly attend work as scheduled in accordance with the collective agreement, and to provide notice of and a legitimate excuse for absences from work. Employees are entitled to be paid for work performed in accordance with the collective agreement. In the absence of collective agreement provisions employees are not entitled to be paid if they do not attend work. Employer paid leave benefits, including STD benefits, are all contractual. Paid leaves of absence, whether the absence is due to illness or injury, or otherwise are only available to the extent that the collective agreement so provides, and then only on the negotiated terms that the agreement stipulates.

24 The onus is on the employee to establish entitlement to collective agreement paid sick leave benefits. This generally means that the onus is on the employee to establish that an absence is legitimate in the sense that she is genuinely unable to report for work due to illness or injury. As a general matter, the employer is entitled to sufficient "proof of the employee's assertion that she is unable to attend work due to illness or injury and entitled to benefits. Also as a general matter, even if there are no paid benefits available, or the employee elects to forgo them, the employer is entitled to notice of the fact and expected duration of an absence for the legitimate business purposes of work force management and absenteeism control purposes. Both the employee and the employer have a legitimate interest in and an obligation to facilitate as early a return to work as possible, with accommodation as appropriate where reasonably available. The employer also has a legitimate interest in investigating suspicious absences and information provided by an employee in that respect. Of course all of this begs the question: what is sufficient "proof in that respect? What information is the employer entitled to and what information must the employee provide?

25 As a matter of general principle in that latter respect, what is required is sufficient reliable information to satisfy a reasonable objective employer that the employee was in fact absent from work due to illness or injury, and to any benefits claimed (see, Arbitrator Swan's comments in *St. Jean de Brebeuf Hospital v. C.U.P.E., Local 1101* (1977), 16 L.A.C. (2d) 199 (Ont. Arb.), at pp. 204-206). As a general matter, the least intrusive non-punitive interpretive approach that balances the legitimate business interests of the employer and the privacy interests of the employee is appropriate. But what the employer is entitled to, and concomitantly what the employee is required to provide, will first and foremost depend on what the collective agreement or legislation provide in that respect.

26 I note that the privacy legislation provision is written to require that (subject to exceptions stipulated) the person concerned is the one who must provide an appropriate consent to the disclosure of her confidential medical information. This does not necessarily mean that the person concerned is the only one who can consent to the release of confidential personal medical information for the purpose of establishing the *bona fides* of an absence form work or an entitlement to paid benefits in that respect. In this jurisdiction a union which holds bargaining rights for a bargaining unit of employees has the exclusive right to represent those employees in all employment related matters. Ail employee cannot bargain directly with her employer in that respect Indeed, it is an unfair labour practice for an employer and an employee to bargain directly with respect to any term, condition or other matter related to the employee's employment in the bargaining unit (sections 70 and 73 of the *Labour Relations Act, 1995*). Accordingly, the Union is entitled to negotiate both collective agreement benefits entitlements and the preconditions to such entitlements, including the information that must be provided in order to obtain a particular benefit. That is, as the exclusive bargaining agent the Union can effectively consent to the release of the confidential personal medical information that is required in order to establish entitlement to an STD benefit payment on behalf of bargaining unit employees (subject of course to a bargaining unit employee declining available STD benefits).

27 The several layers of legitimate employer interests suggest that there is more than one stage to the process that is engaged when an employee seeks the benefit of the sick leave provisions in a collective agreement It also suggests that the employer will generally be entitled to less information at the initial stage than at a subsequent stage. The employer's desire for more information, or its genuine concern for an employee's well-being or desire to assist the employee, do not trump the employee's privacy rights. Nor do questions of expediency or efficiency. In the absence of a collective agreement provision or legislation that provides otherwise the employer is entitled to know only that the employee is unable to work because she is ill or injured, the expected return to work date, and what work the employee can or cannot do. A document in which a qualified medical doctor certifies that an employee is away from and unable to work for a specified period due to illness or injury is *prima facie* proof sufficient to justify the absence. Unless the collective agreement (or less likely, legislation) stipulates otherwise, it will also be sufficient to sufficient to

qualify the employee for any applicable sick benefits for that period. To require more invites an unnecessary invasion of the employee's privacy. In order to obtain additional confidential medical information, the employer must demonstrate a legitimate need for specific information on an individual case-by-case basis. That is, for sick benefits purposes an employer has *no prima facie* right to an employee's general medical history, a diagnosis, a treatment plan, or a prognosis other than the expected date that the employee will be able to return to work with or without restrictions.

28 As a general matter there is nothing to prevent an employer from contracting out the information gathering or assessment of medical information function, as the Hospital has done in this case. But the party to whom the employer has contracted out this function stands in the shoes of the employer and has no greater right to or need for information than the employer has if it performs the function itself. And the employer is responsible for the conduct of any third party that performs such a function for it. However, the insertion of such a third party, which is a stranger to the workplace and beyond the direct reach of the collective agreement, may raise suspicions and increase an employee's reluctance to provide confidential personal medical information.

29 A diagnosis or statement of the nature of an illness is undoubtedly confidential medical information. There is a broad and consistent arbitral and judicial consensus that in the absence of contractual provision binding on the employee an employer has no right to a diagnosis. I agree. The British Columbia jurisprudence draws a distinction between a "diagnosis" and a statement of the "nature of the illness". Is there a meaningful distinction between "diagnosis" and "nature of the illness" such that an employer is entitled to the latter in the first instance?

30 Santerre testified that the "primary diagnosis and symptoms" requirement reveals the nature of the illness. That is undoubtedly so, but is the reverse is not necessarily the case. *Taher's Cyclopedic Medical Dictionary* defines "diagnosis" as "the term denoting the name of the disease or syndrome a person has or is believed to have" based on medical tests or an examination of symptoms. That is, a diagnosis is a formal statement that specifically identifies a disease or injury based upon an application of medical scientific methods. It is a medical conclusion that is the product of a process of identifying or determining the nature and cause of an illness or injury from an examination and evaluation of the patient. There are many kinds of "symptoms" (e.g. objective, subjective, cardinal and constitutional), but the term generally refers to any perceptible change in the body or its functions which indicates disease or injury. "Nature of illness" is not a medical term. Having an "illness" or "injury" is the state of being sick or injured, as the case may be. In this context "nature" refers to the kind, class or essential qualities of a disease or injury. Accordingly, "nature of the illness" (or injury) suggests a general statement of a person's illness or injury in plain language without any technical medical details, including diagnosis or symptoms. Although revealing the nature of an illness may suggest the diagnosis, it will not necessarily do so. "Nature of illness" and "diagnosis" are not congruent terms. For example, a statement that a person has a cardiac or abdominal condition or that she has undergone surgery in that respect reveals the essence of the situation without revealing a diagnosis. Once again, what information the employer

(or its agent) is entitled to in that respect beyond that described in paragraphs 24 and 27, above, is a matter of contract and legislation.

31 The 1980 HOODIP refers to a proof of disability "such as a doctor's certificate" (see paragraph 52, below). A "certificate" is a document that testifies to the truth of something. For example, a birth certificate testifies to a person's birth name, sex, and the date and location of birth; a marriage certificate testifies to the fact and *prima facie* legality of a marriage; and so on. A certificate from a qualified medical health professional testifies that s/he has assessed a person as being incapable of working an her occupation due to illness or injury for a specified period and constitutes *prima facie* proof of those facts. I agree with the thrust of the British Columbia jurisprudence that it is not inordinately invasive for an employer to ask that a medical certificate include the reason for incapacity, which would appropriately consist of a general statement of the nature of the disabling illness or injury, without diagnosis or symptoms. It is not unreasonable for an employer to require an employee to provide the reason for her absence or claim for STD benefits, and the mere fact that providing that reason (i.e. the nature of her illness or injury) may suggest a diagnosis does not excuse the employee from providing the reason in order to satisfy the onus on her to justify her absence and claim for benefits even in the first instance.

32 But in the absence of a statutory or collective agreement requirement, a diagnosis or description of symptoms or treatment goes beyond the certification of illness or incapacity that is legitimately required in the first instance. It is only where the employer has a statutory or collective agreement right to more information, or where the employer has reasonable cause to suspect the genuineness, accuracy or quality of the information provided to substantiate an absence that it is entitled to additional information. For example, if the employer has an objective reason to doubt that the doctor who signed a medical certificate actually saw or made any professional evaluation of the employee or that the doctor was qualified to provide the assessment in the certificate, or suspects that the employee had gone "doctor shopping", or has information that casts doubt on the *bona fides* of the alleged illness or injury that the employer is entitled to seek additional information that is specific to and reasonably necessary to address its concerns (see, for example, *York County Hospital Corp. v. S.E.I.U., Local 204* (1992), 25 L.A.C. (4th) 189 (Ont. Arb.) (Fisher, Chair) at page 193). But these are issues that can arise in individual cases, and is not the more general first instance issue before me in these policy grievances.

33 The issue in this case concerns the extent of the confidential medical information that the employer can *require* an employee to provide in the *first instance*. This subsumes the consent issue because the employer cannot require the employee to consent to a release of more confidential personal medical information than it is entitled to for sick leave justification or benefits purposes. The employer can always ask an employee if she is willing to volunteer more information than the employer is actually entitled to, but an employer cannot coerce an employee into "consenting" to provide broader disclosure, and is not entitled to take disciplinary or other steps against, or deny sick benefits to, an employee who declines to provide more medical information than the employer

is entitled to. An employer cannot require an employee to consent to a release of more confidential medical information than is permitted or required by statute or the collective agreement, and that is demonstrably necessary for the particular purpose.

34 Further, the intensely personal nature of confidential medical information, the individual, societal and institutional interests in preserving the confidentiality of such information, and the protections that have been legislated to protect its privacy and use, suggest a conservative approach. Accordingly, collective agreement provisions that speak to the information that an employee must provide to the employer in order to satisfy the employee's obligation to justify an absence or to obtain STD benefits in that respect should be strictly construed.

35 In the first instance for STD benefits purposes, therefore, in the absence of statutory or collective agreement authorization an employer cannot require an employee to consent to the release of more than certification that she is absent and unable to work because she is ill or injured, the general nature of the illness or injury, that the employee has and is following a treatment plan (but not the plan itself), the expected return to work date, and what work the employee can or cannot do. The consent must be both focused on the particular purpose and limited to the particular medical professional. A consent that must be provided for the purpose of STD benefits should not include return to work accommodation considerations other than whether there are likely to be any restrictions on the anticipated return to work date. A "basket" consent that purports to authorize anyone who the employer may ask to release confidential medical information is not appropriate. Nor is it appropriate to require an employee to sign a forward-looking consent that may exclude her from the confidential medical information loop. The overwhelming weight of the arbitral jurisprudence takes a dim view of consents that purport to give an employer prospective permission, particularly where the consent purports to permit the employer to unilaterally (with or without notice to the employee) initiate direct contact with a doctor or other custodian of confidential medical information. Every contact should be through or at the very least with the knowledge and consent of the employee, a separate consent should be required for every contact, and every consent should be limited to the completion of the appropriate form or the specific information required, as appropriate.

36 In the absence of collective agreement authorization a "one size fits all" medical certificate of disability form for STD benefits purposes will necessarily be limited in scope in the first instance. Such a consent should identify the medical professional or custodian of medical information, specify the period it relates to, and although it can ask, the employer cannot require an employee to consent to a release of the employee's general medical history, a primary or secondary diagnosis, a treatment plan (as distinct from the fact that there is one and that it is being followed), or any medical prognosis other than an expected return to work date.

37 What an employer can require of an employee should not be mixed into the same form or same section of the form as what it can ask an employee to volunteer. If a single form is used, it

must clearly distinguish between what information is required (i.e. what the employer or its agent is entitled to) and what the employee is being asked to volunteer (i.e. what information the employer or its agent would like to have if the employee is willing to allow the employer to access).

38 An assertion or undertaking to treat all medical information received in a highly confidential manner, and disseminating it solely on a "need to know" basis, alters none of this. It does not expand an employer's entitlement to information, and really adds nothing to the equation since the employer is under such an obligation in any event. Nor does the fact that an employee has a continuing obligation to account for her absence and the employer has a concomitant right of continuing inquiry in that respect alter the analysis. The nature, extent and frequency of an employer's requests for continuing information, from either the employee or medical professionals must be reasonable in the circumstances (and is an issue addressed in Phase 3 of this proceeding). The fact that a new focused consent is required every time an employer seeks to acquire confidential medical information from someone other than the employee may appear to be inconvenient or inefficient, but convenience or efficacy do not modify an employee's privacy rights. This approach will also both encourage the employer to act reasonably and with due consideration of what it really requires for the particular purpose, and offer some comfort to an employee who may already be feeling vulnerable and exposed.

The CUPE Case

39 The text of the Knopf Award in the CUPE case is two single-spaced pages long. It reveals that a mediation/arbitral ion process was engaged to address "numerous" group and policy grievances challenging the Hospital's use of Cowan to adjudicate benefits claims under the CUPE collective agreement, and the Cowan form and conduct in that respect. The evidence before Arbitrator Knopf was that Cowan's employees are governed by their professional obligations under the *Regulated Health Professionals Act*. That is not the case for the all of the Cowan employees who deal with ONA bargaining unit nurses. The evidence before me is that at least two of these Cowan employees are not medical health professionals (see paragraph 12, above). The Knopf Award indicates that CUPE raised concerns about the text and content of the Cowan "Medical Certificate of Disability" (i.e. the Cowan Form). Except for the treatment of the doctor's fee for completing the form, these concerns are not specified, and the extent to which the arbitrator considered the concerns to be valid must be gleaned form the amended form that is Appendix "B" to the Knopf Award. A "Required Accommodation Form" was also in issue in the CUPE case. There is an identical such form in evidence before me (Exhibit #24) but the parties paid scant attention to it in the hearing. Their focus was on the Cowan form and the Hospital's own FAF. In any case, it appears that the arbitrator's statement that she was satisfied that the content and treatment of "this form" comply with all statutory requirements and do not violate the CUPE collective agreement refers to this Required Accommodation Form and not to Cowan form that is the focus of this proceeding. Because she does not provide any basis for her conclusion, I cannot tell from her award whether the arbitrator was "satisfied" on the basis of her independent assessment or because

the parties came to an agreement in that respect through the mediation part of the process. Since it is unlikely that a one-day mediation/arbitration process presented a full adjudication opportunity in that respect I think that the latter is more likely the case. For policy and practical reasons labour arbitrators are generally willing accept whatever agreements the parties can come to, and unless there is an obvious legal problem are generally "satisfied" that the parties' agreement is statutory and collective agreement compliant. Further, the excerpts from the CUPE collective agreement that are appended to the Knopf Award reveal that only the 1992 HOODIP applies to the CUPE bargaining unit. There are significant differences between the 1980 and 1992 HOODIPs which are important in the case before me. For all of these reasons the Knopf Award is of limited assistance.

A Reality Check

40 I recognize that the real world is not an ideal one. In the ideal world doctors would have perfect knowledge of the relevant medical matters, their patients and their patients' workplaces, and would be completely objective. If that were so, a doctor's simple statement certifying that an employee was ill and unable to work for some specified period of time, and specifying restrictions for return to work and accommodation purposes when and as appropriate, would be good enough for all purposes and nothing further, including any diagnoses or even a statement of the nature of the illness or injury would be required. But that is not the real world, or at least not the one I am familiar with. Medical health professionals are also human beings. The fact is that they are not always entirely objective. It is quite appropriate for medical health professionals to act as advocates for their patients in medical matters within their competence, but not when the advocacy extends beyond their medical expertise or matters of which they have direct knowledge, such as when they have little or no knowledge of the workplace or their patient's job or employment situation other than what their patient decides to tell them.

41 Having said that, this case concerns nurses employed in a hospital setting. As a group, physicians are uniquely situated to assess a nurse's ability to work in a hospital. A physician is likely to know more about the work that a nurse patient typically performs than he does about the work that other patients are engaged in. A physician is likely to know what sort of nurse his patient is and the nature of the work in the department she works in, and is therefore likely to be in good position to assess her ability to perform the work of her occupation.

42 Arbitrators who have concluded that particular collective agreements do not require medical diagnoses to be disclosed to the employer have observed that the employer can often guess the diagnosis from the restrictions or other accommodations that are suggested by a doctor. That is, a diagnosis can often be discerned even when it is not specifically stated. If so, one might well ask: so why not provide the diagnosis? And how can one reasonably object to providing information which will probably also disclose the diagnosis when that information is reasonably required for return to work or accommodation purposes? Is the situation different when an employee is seeking STD benefits? And if it is, and strict limits are imposed on the use of the information that must

be disclosed in the first instance for those purposes, what is the likely result? Could limiting an employer's access to confidential medical information result in applications for sick leave benefits being rejected more often, perhaps requiring more frequent resort to the expensive and time-consuming grievance arbitration process? If so, how does it serve the employee seeking benefits, the privacy interests of that employee, the interests of the parties, or the health system?

43 First of all, the issue before me concerns the Hospital's entitlement (through its agent Cowan) to confidential medial information in the first instance. The fact that additional information may subsequently be required does not mean that the employer is entitled to it in the first instance.

44 Second, it is true that if the matter goes to arbitration, the employee will have to establish that she is (or was) entitled to the benefits. To establish this, it will generally not be good enough to present a doctor's certificate stating only that the employee was disabled and unable to work for a specific or indefinite period. The employer will be entitled to test the claim and the doctor's assertion by questioning the employee and requiring that the doctor to attend the hearing and give evidence, something that even the most cooperative doctors do not like to do. The employer will be entitled to examine the basis for the simple certificate, which will inevitably include what the doctor did or did to do, his/her knowledge of the patient and the workplace, and what conclusions, *including the diagnosis*, and the basis for the conclusions s/he arrived at. The employee's personal and medical history will be subject to much more detailed and intense scrutiny at such a hearing, and in a much more public forum, than is the case in the normal benefits application process. At the end of a lengthy, and for me employee an arduous and often nerve-wracking legal proceeding, the employee may well be awarded the benefits sought, which benefits may well have been approved many months before in the first instance if more information had been provided in the first place. That is, there is a danger that an employee will not receive benefits that she is entitled to in a timely way, when they are most needed.

45 But the real world also includes a society mandated legislated right to privacy, and the fact that narrow disclosure of medical information may have unfortunate or unintended consequences in an individual case, or that broad disclosure of medical information may be appropriate or required in preparation for or during a grievance arbitration (or other legal) proceeding does not alter the analysis. Either an employee has privacy rights or she does not. A right that cannot be exercised is no right at all. Although early broad disclosure might prove to have been useful in a particular case, this does not mean that such broad disclosure is necessary or appropriate in the first instance in every case as a matter of general policy. There are many business or other matters on both sides of the labour relations divide that are "confidential" outside of the grievance litigation process which are no longer confidential for litigation purposes once the grievance arbitration process is invoked. That does not suggest that they should not remain confidential outside of the litigation process. Indeed, the legislative scheme treats litigation disclosure requirements or obligations as an exception to the general rule of voluntary consent restricted to the purpose disclosure of personal health information.

46 The appropriate requirements and concomitant limitations on the disclosure of confidential medical information is also something that the parties to a collective agreement can address themselves to in bargaining. In a particular case, the possible consequences of refusing to provide broader disclosure than is technically required in the first instance is something for the individual employee to weigh, hopefully in consultation with the Union, when she is considering her response to a request for confidential medical information. It is also one of the things that the parties and the employee(s) must consider when they contemplate engaging the grievance litigation process. But the real significance of the real world analysis is that it focuses on individual circumstances and further demonstrates that less disclosure of confidential information is required in the more general first instance inquiry than in an individual case in which questions arise.

IV. Decision

47 Turning to the case at hand, I begin by looking at the legislation and collective agreement.

Legislation

48 The PHIPA is a comprehensive piece of health care privacy legislation. It recognizes the confidentiality of personal medical information and, among other things, establishes rules for the collection, use and disclosure of personal health information to protect the confidentiality and privacy of that information. Relevant excerpts from the PHIPA are set out in Appendix "D". Section 63(6) of the OHSA contains a medical information privacy provision which prevails over the PHIPA (see Appendix "E"). I have already noted that the parties to a collective agreement are bound by and cannot contract out of this legislation.

49 The legislation reflects the modern approach to the issue and emphasizes the individual employee right to keep confidential medical information private except where it is absolutely necessary to disclose it. The PHIPA makes it clear that the individual's freely given (i.e. uncoerced) express or implied informed consent regarding specific personal health information must be obtained before any such information can be collected used or disclosed (section 18) and that personal health information shall only be collected, used or disclosed to the extent reasonably necessary to serve the particular purpose (sections 30 and 37). The OHSA, which prevails over the PHIPA, specifies that no employer (or its agents) shall even seek access to a worker's health records except under authority of a court or tribunal of competent jurisdiction or as required by law without the worker's consent (section 63).

The Collective Agreement

50 The collective agreement between the parties in evidence is in two parts: the "Central Agreement", which as its label suggests is negotiated (or arbitrated) centrally between the "Participating Hospitals" as a group and the Union, and the "Local Agreement" negotiated directly

between the Hospital and the Union. The Central portion of the collective agreement between the parties includes the following sick leave provisions:

ARTICLE 12 — SICK LEAVE AND LONG-TERM DISABILITY

(Articles 12.01 to 12.11 apply to full-time nurses only)

12.01 The Hospital will assume total responsibility for providing and funding a short-term sick leave plan at least equivalent to that described in the 1980 Hospitals of Ontario Disability Income Plan brochure.

The Hospital will pay 75% of the billed premium towards coverage of eligible employees under the long-term disability portion of the Plan (HOODIP or an equivalent plan). The employee will pay the balance of the billed premium through payroll deduction. For the purpose of transfer to the short-term portion of the disability program, employees on the payroll as of the effective date of the transfer with three (3) months or more of service shall be deemed to have three (3) months of service. For the purpose of transfer to the long-term portion of the disability program, employees on the active payroll as of the effective date of the transfer with one (1) year or more of service shall be deemed to have one (1) year of service.

. . .

12.05 Any dispute which may arise concerning a nurse's entitlement to short-term or long-term benefits under HOODIP or an equivalent plan may be subject to grievance and arbitration under the provisions of this Agreement. The Union agrees that it will encourage a nurse to utilize the carrier's medical appeals process, if any, to resolve disputes.

. . .

12.11 A nurse who is absent from work as a result of an illness or injury sustained at work and who has been awaiting approval of a claim for Workers' Compensation for a period longer than one complete pay period may apply to the Hospital for payment equivalent to the lesser of the benefit the nurse would receive from Workers' Compensation if the nurse's claim was approved or the benefit to which "he nurse would be entitled under the short-term sick portion of the disability income plan (HOODIP or equivalent plan). Payment will be provided only if the nurse provides evidence of disability satisfactory to the Hospital and a written undertaking satisfactory to the Hospital that any payments wilt be refunded to the Hospital following final determination of the claim by The Workplace Safety and Insurance Board. If the claim for Workers' Compensation is not approved, the monies paid as an advance will be applied towards the benefits to which the nurse would be entitled under the short-term portion of the

disability income plan. Any payment under this provision will continue for a maximum of fifteen (15) weeks.

(Articles 12.12, 12.13 and 12.14 apply to both full-time and part-time nurses)

12.12 Nurses returning to work from an illness or injury compensable under Workers' Compensation will be assigned light work as necessary, if available.

. . .

12.14 If the Employer requires the employee to obtain a medical certificate, the employer shall pay the full cost of obtaining the certificate.

NOTE: This clause shall be interpreted in a manner consistent with the *Ontario Human Rights Code*.

(Emphasis added.)

The Local portion of the collective agreement contains the following management rights provision:

ARTICLE C - MANAGEMENT RIGHTS

C-1 Except as specifically abridged, delegated, granted or modified by this Agreement, all the rights, powers, and authority of management are retained by the management and remain exclusively and without limitation within the rights of management.

C-2 Without limiting the generality of the foregoing, management's rights include:

a) The light to maintain order, discipline and efficiency, and in connection therewith to make, alter and enforce from time to time, reasonable rules and regulations, policies and practices, to be observed by its' employees, and the right to discipline or dismiss employees for just cause.

b) The direction of the working forces; the right to plan, direct and control the operation of the Hospital, the right to introduce new and improved methods, facilities and equipment, the right to determine: the amount of supervision necessary, combining or splitting up departments, work schedules, establishment of standards and quality of care, the determination of the extent to which the Hospital will be operated and the increase or decrease in employment.

c) The right to select, hire, discipline, dismiss, transfer, assign to shift, promote, demote, classify, lay-off, recall, suspend employees and select employees for positions not covered by this Agreement.

d) The sole and exclusive jurisdiction overall operations, buildings, machinery and equipment vested in the Hospital.

C-3 The exercise of any of these rights will not be inconsistent with the provision of this Agreement.

51 Notwithstanding Article 12.01, it is common ground that the 1980 Hospitals of Ontario Disability Income Plan ("HOODIP") applies to bargaining unit nurses hired before January 1, 2006 and that under the current collective agreement the 1992 HOODIP applies to bargaining unit nurses hired on or after January 1, 2006. There is no suggestion that the HOODIPs do not form part of the collective agreement between the parties. This being a forward-looking policy grievance, it is appropriate to consider the implications of both, notwithstanding that the grievances predate the actual introduction of the 1992 HOODIP.

52 The 1980 HOODIP provides (with emphasis added) that it:

... consists of two periods of benefits, the Sick Pay Benefit and the Long Term Disability Benefit. These cover the periods before and after the payment of disability benefits by the Unemployment Insurance Commission.

For the purposes of the Sick Pay Benefit and the Long Term Disability Benefit, "total disability" and "totally disabled" mean, during the first 104 weeks you are absent from work, that you art: unable to perform the regular duties pertaining to your occupation due to injury or illness and that you are not engaged in any gainful occupation. After 104 weeks, you must be prevented, by injury or illness, from engaging in any gainful occupation for which you are or may become fitted by training, education or experience.

REINSTATEMENT OF BENEFIT

When you return from an absence and work full-time continuously tor three weeks, your benefit period of 15 weeks is reinstated in full. If you are absent from work again due to total disability for the same or a related cause or before you have completed three weeks of full-time employment, the balance of your original sick pay benefit will apply. However, if your subsequent absence is due to a different illness unrelated to the initial one, the full 15-week benefit period will apply even if the absence due to the second illness occurs within three weeks following your return to work.

PROOF OF DISABILITY

Proof of your total disability satisfactory to your employer such as a doctor's certificate is required for absences of three days' duration or over, and is subject to a periodic review

thereafter. However, such proof may be required at any time in order for you to qualify for benefits.

(Emphasis added.)

The 1992 HOODIP contains relevant provisions as follows:

Introduction

The Hospitals of Ontario Disability Income Plan ("HOODIP") is comprised of two parts: the short term disability plan (Part A) and the long term disability plan (Part B) ... the Sick Pay benefit (Part A), covering the first 15 weeks of Total Disability. The Sick Pay benefit is administered and paid by the Participating Employer...

Definitions

. . .

Actively working and Actively at Work mean the performance for a Participating Employer of the regular duties of the person's own occupation for one full working day or shift. This includes vacation days, personal days and/or holidays as well as occasional days used for educational purposes or union business, as granted by the Participating Employer. An Employee on extended leave, such as an approved leave of absence, is not considered to be Actively at Work.

. . .

Total Disability and Totally Disabled means the Member has a medically determinable physical or mental impairment due to injury or illness which prevents her from performing the regular duties of the occupation in which she participated immediately preceding the start of the disability.

. . .

Entitlement to Benefit

. . .

A Member is not considered Totally Disabled unless she is under the active, continuous and medically appropriate care of a Physician and is following the treatment prescribed by the Physician for that disability.

. . .

A Member is not considered Totally Disabled due to a psychological disorder unless she is under the active and continuous care of a Physician or other professional satisfactory to the Participating Employer and is following the treatment prescribed by the Physician or other professional for that disability.

. . .

Recurrence of Disability

Recurrence

If a member returns to work after receiving Sick Pay benefits under this Plan any subsequent period of Total Disability for the same or related cause will be considered as a continuation of the previous benefit period, unless the successive periods of Total Disability are separated by a period where the Member is Actively at Work for:

1. three regular work weeks for full-time employee; or

2. all of the scheduled working days within 21 calendar days for a part time employee,

in which case her benefit period of 15 regular work weeks will be reinstated in full.

. . .

(Emphasis added.)

53 The Union acknowledges that in the past individual employees have given the Hospital a broad consent and access to their confidential medical information, and that such broad access may be appropriate in a particular case. Indeed a review of the Attending Physician's Statements that were used by the Hospital's EHS Department pre-Cowan (see Appendix "AA") reveals that they too asked for a primary diagnosis, whether the employee had previously suffered form the same or a similar condition, any conditions or secondary diagnosis underlying the current illness, whether the employee had been hospitalized and when, whether the employee had undergone surgery as well as the date of the surgery and the name of the surgeon, whether a specialist was involved or had been consulted, and the treatment and dates that it had been provided. That is, there are many similarities between the intrusive questions in the EHS form, to which it appears the Union did not object, and those that the Union complains about in the Cowan form. However, the consent that was required by EHS Attending Physician's Statements was much narrower than the disputed, consent in the Cowan form. The consent in the Attending Physician's Statements was limited to the treating physician (as opposed to "any party involved in my treatment" in the Cowan form), and it restricted the information that could be passed through the "Chinese wall" between the Hospital and its EHS Department to a statement indicating whether the employee was unfit for work, fit to

work with restrictions or fit for regular work, and the return to work date if known (as opposed to the far broader disclosure and use of information contemplated by the Cowan consent).

55 But none of that is really significant. The fact that the Union did not complain about an EHS form that required similar disclosure or that individual employees have given broad consent and access to their confidential medical records in the past, with or without the knowledge or participation of the Union is neither here nor there. The personal nature of confidential medical information is such that permission to access it may be revoked at any time, subject to the consequences of doing so. Except where the issue is one of interpretation of collective agreement provisions in that respect, the concepts of past practice or estoppel do not apply. That is, the fact that an individual employee or bargaining unit employees as a group have voluntarily permitted an employer broad access to confidential information in the past, or that their union has acquiesced to this, does not mean that either the employees or the Union must continue to do so.

56 There are significant relevant differences between the 1980 and 1992 HOODIPs. Under the 1980 HOODIP "total disability" for STD benefit purposes means an inability to perform "the regular duties pertaining to your occupation" because of illness or injury and requires proof "satisfactory to your employer such as a doctor's certificate". Under the 1992 HOODIP "total disability" for STD benefit purposes means "a medically determinable ... impairment" because of illness or injury that prevents the employee from performing "the regular duties of the occupation" when the disability began. Tn order to be entitled to the STD benefit, the employee must be "under the active, continuous and medically appropriate care" of an appropriate medical professional "and is following the treatment prescribed" for the disability.

57 For STD benefit purposes, "medically determinable" really means no more than "which has been determined by a medical professional" in order to eliminate any suggestion that an employee's subjective assessment or one by someone other than a medical professional might be sufficient. I am satisfied that the definition of "total disability" (and the concomitant "totally disabled") is the substantially same under both HOODIPs; namely, an employee's medically confirmed inability to perform the *regular* duties of her occupation due to illness or injury.

58 Under the 1980 HOODIP, all that is required to establish "total disability" for STD benefit purposes is proof "satisfactory to your employer such as a doctor's certificate". "Satisfactory to your employer" does not imply either a subjective test or broad employer discretion with respect to the proof that can be required. The test is one of objective reasonableness. Further, the phrase is modified by "such as a doctor's certificate", which must be interpreted in light of the significant privacy protections legislated for confidential personal medical information. Accordingly, this provides an example of what is deemed to be objectively reasonable proof for 1980 HOODIP STD purposes: namely, a doctor's certificate or the equivalent, which I am satisfied means a certificate from a medical health professional qualified to make the medical assessment attested to. That is, in the first instance under the 1980 HOODIP, the employer is not entitled to more

than a certificate from a qualified medical health professional that states that s/he has assessed the employee as being incapable working at her occupation due to illness or injury for a specified period, the general nature of the illness or injury, that the employee is undergoing treatment (without specifying what it is), and the anticipated return to work date. The employer can only obtain additional confidential medical information if it has objectively reasonable grounds to doubt the accuracy, truth or adequacy of the certificate. There is nothing in the legislation or the collective agreement (which includes the 1980 HOODIP) which entitles the employer to a diagnosis or recital of symptoms, a medical history, the tests or other investigations performed, the treatment plan, or a prognosis other than the expected return to work date and identification of any accommodation requirements at that time.

59 There are significant differences between the 1980 and 1992 HOODIPs. The 1992 HOODIP requires proof that the employee seeking STD benefits has a medically determinable impairment (i.e. that a medical health professional has assessed the employee and concluded that she is has an injury or illness which medically prevents her from performing the *regular duties of her own occupation* for a specified period) *and* that she is "under the active, continuous and medically appropriate care" of an appropriate medical professional "and is following the treatment prescribed" for the disability. Under the 1992 HOODIP for other than a psychological disorder the employee must be under the care of a physician, not any other kind of medical professional, which suggests that the proof of disability must come from a physician. In the case of a psychological disorder the employee must be under the "active and continuous care" of a physician or other professional *satisfactory to the employer*. That means that in the case of a psychological disorder the employer can choose the physician or other professional who the employee is assessed and cared for by for STD benefit purposes. The requirement in the 1992 HOODIP that the employee be under "medically appropriate care" and is following the treatment prescribed entitles the employer to proof from the physician or (in the case of a psychological disorder) other professional that the employee is under his/her active, continuous and medically appropriate care for the disability. This requires more than a mere attestation to that effect. After all would any physician or other professional attest that a patient was receiving anything other than medically appropriate care? Under the 1992 HOODIP the employer is entitled to make its own assessment of the medical appropriateness of the care.

60 Accordingly, in the first instance under the 1992 HOODIP the employer is entitled to a statement from a physician, or in the case of a psychological disorder from a physician or other professional satisfactory to the employer, that states that s/he has assessed the employee as being incapable of performing the regular duties of her occupation due to illness or injury for a specified period, the general nature of the illness or injury, that the employee is under his/her active and continuous care, a description of the treatment plan and an attestation that the employee is following the treatment prescribed, and the anticipated return to work date.

61 In the first instance under the 1992 HOODIP, the employer is still not entitled to a primary or secondary diagnosis or symptoms, or to particulars of the employee's medical history, or the tests or other investigations performed, or to a prognosis other than the expected return to work date and identification of any accommodation requirements at that time. The employer can only obtain confidential medical information in excess of the broader medical statement it is initially entitled to under the 1992 HOODIP if it has an objectively reasonable basis for doubting the accuracy or truth of the information provided in the first instance.

62 The employer is entitled to more confidential personal medical information under the 1992 HOODIP than under the 1980 HOODIP but in the first instance in both cases the employer is not entitled to more than the medically appropriate attestation as aforesaid unless it has an objectively reasonable basis for doubting the accuracy or truth of the information provided. In the first instance an employer is. not entitled to *require* an employee seeking STD benefits under either HOODIP to consent to the release of more medical information than it is entitled to.

Conclusion

63 I am satisfied that the Section B — Consent Information of the Cowan form overreaches. First, the consent should be limited to the treating physician (or other professional in the case of a psychological disorder under the 1992 HOODIP). If there is more than one medical or other professional involved a separate consent is required for each. Second, there is no *prima facie* basis for including any reference to an automobile insurer, which is likely to provide only second hand information if the employee's disability arose out of a motor vehicle accident with respect to which an insurance claim was made. There is no basis for including any reference to the WSIB which operates under a separate statutory insurance scheme for workplace injuries, and which provides its own disclosure (including forms to be completed by the accident employer and the treating medical professionals), adjudication and return to work process. Neither an employer nor any agent of the employer can purport to "adjudicate" a WSIB claim. If the WSIB process is engaged and Cowan's assistance is required that is a separate matter and is *prima facie* not part of the STD benefits claim process. Third, neither the Hospital nor Cowan can seek access to "all information and documents requested concerning [the employee's] medical condition relative to this claim for the purpose of facilitating the delivery of the best medical care and assessment of [the employee's] ability to work." It may not be the place of a medical health professional to assess an employee's entitlement to STD benefits under either HOODIP (but see my observation in paragraph 41, above, regarding the likelihood that physicians are likely to be more familiar with the duties and responsibilities of nurses in a hospital environment and able to assess their ability to perform the same, than of other occupations), but how can it not be the place of the treating physician or other professional who actually examines and treats the employee/patient to assess the employee's ability to work and to determine and facilitate treatment? How can it be the place of someone who may be less qualified (and who may not even be a medical health professional) and who has never met the employee or

been in the workplace to assess that employee's ability to work — particularly when they could only do so on the basis of the information provided by the very professional who the Hospital and Cowan assert cannot do so? Fourth, an undertaking to hold all medical information obtained confidential is appropriate, but the employee should not at the same time be required to consent to the disclosure of more information than the Hospital is entitled to. Disclosure should be limited to that expressly authorized by the employee or as required or permitted by law. Fifth, the employee should never be cut out of the communication loop. Direct contact between the employer (or its third party agent) and the employee's medical caregivers without the employee's knowledge or consent is prohibited. In order to give the employee an opportunity to object, the employee should be advised in advance of any such communication in any event. Sixth, the collective agreement clearly specifies (in Article 12.14 of the Central portion) that the employer shall pay the full cost of obtaining the certificate. It is wrong to imply that the employee may be responsible for any amount in excess of $35.00 (or any other amount). There should be no reference to the medical professional's fee, either maximum or otherwise in consent, or indeed anywhere in the Cowan form. Since it is the Hospital, either directly or through its agent Cowan, who is responsible for payment that matter is best dealt with as a separate matter directly between (in this case) Cowan and the medical health professional, perhaps in a separate or covering letter.

64 The Union's complaint about the form of letter (whish I observe refers to only the 1992 HOODIP — see paragraph 10, above) that is sent to employees along with the Cowan form may be an overreaction, but I appreciate the Union's concern when the letter is read together, as it must be, with what I have concluded is the overly broad consent in the Cowan form. I am satisfied that it is not improper coercion to inform an employee that they may be disqualified form receiving STD benefits if they fail to provide the *appropriate* medical or other information that the Hospital and Cowan are entitled to.

65 As for Section C — Medical Information, I suggest that separate forms are required for employees covered under the 1980 HOODIP and those covered under the 1992 HOODIP.

66 In the first instance under the 1980 HOODIP the Hospital and Cowan are only entitled to a certificate from a qualified medical health professional that stales that s/he has assessed the employee (including the date(s) of the examination/assessment) as being incapable working at her occupation (which should be specified) due to illness or injury for a specified period, a statement of the general nature of the illness or injury, a statement that the employee is undergoing treatment (without disclosing the treatment or treatment plan), and the expected return to work date and any accommodation requirements likely to be required at that time.

67 In the first instance under the 1992 HOODIP the Hospital and Cowan are only entitled to a statement from a physician, or other professional in the case of a psychological disorder, that states that s/he has assessed the employee (including the date(s) of the examination/assessment) as being incapable of performing the regular duties of her occupation (which occupation should

be specified) due to illness, or injury for a specified period, a statement of the general nature of the illness or injury, that the employee is under his/her active, continuous and medically appropriate care for the disability, a description of the treatment supplied, the treatment plan and an attestation that the patient is following the treatment prescribed, and the expected return to work date and any accommodation requirements likely to be required at that time.

68 Under both the 1980 and the 1992 HOODIP the Hospital is also entitled to know when the illness began or the accident occurred and when the employee became unable to attend work, and the date of the first medical examination. It might also be useful for the Hospital to know whether the illness or injury is work-related so that the WSIB process can be engaged if appropriate. However, I am not sure that is necessary because I expect that nurses know enough about the WSIB process, with or without the assistance of the Union, to know when it is appropriate to engage it. The Hospital is not entitled to the other information sought on the Cowan Form "wish list". As the Hospital's agent Cowan is not entitled to diagnoses, symptoms, medical history, the specifics of medical investigation or current findings, treatment or prognosis *other than as indicated above*. This entire section will therefore have to be significantly revised in accordance with this Award. In the first instance, the Hospital is not entitled to all of the information on the Cowan form "wish list".

69 The Hospital or its agent Cowan can ask an employee to volunteer additional confidential information, but in the first instance that should be done on a separate form or at least a separate page that makes it clear that the employee is not obliged to make the disclosure and which requires a separate consent for each parcel of confidential personal medical information. (The information requested should not be as a single package because an employee may be willing to disclose some but not other voluntary information.) If the Hospital or Cowan has reasonable cause to doubt the accuracy or *bona fides* of the information provided in the first instance, or if that information is objectively insufficient for STD benefits purposes in the circumstances of a particular case, they can seek specific broader disclosure. Doing so will engage an individualized process.

70 In the result, this part of the grievances must be allowed. Accordingly,

(a) *I DECLARE THAT* the Cowan form is improper because it requires employees to consent to a release of private personal medical information in excess of what the Hospital or its third party agent Cowan is entitled to in the first instance for either STD benefits or return to work purposes under either the collective agreement or otherwise.

(b) *I ORDER THAT* use of the current Cowan form cease forthwith.

(c) *I ORDER THAT* a new form or forms may be constructed for STD benefits purposes, which form(s) must comply with this Award.

(d) *I ORDER THAT* the Hospital to ensure that its third party agent Cowan complies with this Award.

(e) *I WILL REMAIN SEIZED* for the purposes of rectification, and to deal with any issues arising out of the implementation of this Award. In order to relieve the parties of the time and expense of litigating the propriety of any new Cowan or other form that is constructed for use in administering the STD benefits under either the 1980 or the 1992 HOODIPs anew or before another arbitrator, I will remain seized to deal with any issues in that respect as well.

71 I recognize that this Award may result in a somewhat cumbersome process, but rights are rights and employees who seek STD benefits are just as entitled to stand on their legislated or collective agreement privacy rights as anyone else.

APPENDIX "A"

Appendix "A"

Cowan
Cowan Wright Beauchamp

MEDICAL CERTIFICATE OF DISABILITY

Send completed form marked "confidential" to: Health and Disability Management Programs
Cowan Wright Beauchamp
100 Regina, St. S., Suite 270, Box 96 Waterloo, Ontario, N2J 3Z6
or fax at: (519) 886-2163

Section A-- General Information (To be completed by employer)

Employee Name: _____ Job title: _____

Address: _____
City Province Postal Code

Date of Birth: __/__/__ (DD MM YY) Date of employment: __/__/__ (DD MM YY) Last Day Worked: __/__/__ (DD MM YY)

Employee's Home Phone #: ( ) _____ Work Phone #: ( ) _____

Section B – Consent Information (To be completed by employee)

I authorize any party involved in my treatment including any health care professional, the WSIB or the Automobile Insurer to provide our Medical Service Provider, Cowan Wright Beauchamp (CWB), all information and documents requested concerning my medical condition relative to this claim for the purpose of facilitating the delivery of the best medical care and the assessment of my ability to work. All information will be treated in a highly confidential manner, however, information regarding restrictions or limitations effecting my ability to Return to Work could be shared in a report to Supervisors and when applicable, WSIB, the Automobile Insurer and the Long Term Disability Insurer. A photocopy or other reproduction of this authorization is as valid as the original. The employer will reimburse up to a maximum of $35.00 for appropriate completion of this form upon presentation of an original receipt. Receipts may be mailed to: *Hamilton Health Sciences Corporation, Health, Safety & Wellness, 1200 Main St., W., Ewart Building-296, Chedoke Site Hamilton, Ontario L8N 3Z5*

Employee's Signature: _____ Date: __/__/__ (DD MM YY)

Section C – Medical Information (To be completed by Employee's Physician)

In order to support the medical absence of this employee and to facilitate his-her return to work we require specific information. The Hamilton Health Sciences is committed to providing a transitional-modified work program for its personnel and requires your guidance to ensure a timely and safe return to work. Cowan Wright Beauchamp has been mandated to review all medical absences of five (5) shifts or greater, to determine if the employee is able to return to work and co-ordinate the employee's recovery and return to work. This certificate will be deemed incomplete unless all sections are completed satisfactorily.

1. Diagnosis:

Primary: _____ Symptoms: _____

Secondary: _____ Symptoms: _____

Other contributing factors-complications: _____

2. History:

Symptoms began or accident happened on: __/__/__ (DD MM YY) First visit: __/__/__ (DD MM YY)

Illness or injury forced cessation of work on: __/__/__ (DD MM YY) Is this a work-related illness-injury? ____Yes ____No

Has your patient ever had the same or a similar condition? ____Yes ____No ____Unknown

If yes, state when and describe the condition: _____

Has your patient been hospitalized: ____Yes ____No If yes, please indicate dates: __/__/__ (DD MM YY) to __/__/__ (DD MM YY)

3. Current findings:

When did you most recently examine your patient? __/__/__ (DD MM YY)

Graphic 1

What were your findings on this examination date? _____

_____

What functional limitations affect your patient's ability to perform his/her normal activities, including work?

_____

_____

_____

_____

What investigations have been done? Please list specific tests below:

Tests done (e.g. EKG's, x-rays, lab tests)	Summary of results

4. Treatment

Date of last visit: ___/___/___ (DD MM YY) Date of next visit: ___/___/___ (DD MM YY)

Identify the current medications and dosages prescribed as well as the response to these medications: _____

_____

_____

Therapy? ____Yes ____No If "Yes", indicate type and frequency (e.g. physiotherapy, psychotherapy) _____

_____

Surgery? ____Yes ____No If "Yes" type of surgery: _____

Date: ___ performed ___ planned ___/___/___ (DD MM YY)

Any other treatment or future plans for treatment? _____

_____

Summarize patient's response to treatment: _____

_____

Has your patient been referred to any other physician(s) – specialist(s)? ____Yes ____No

If "Yes" Physician's name and specialty	Date of examination Day Month Year	Findings

5. Prognosis

Please provide details about the return to work plan, including approximate time frames (full time work or modified work / schedule).

_____

_____

Notice to physician: Any information provided by you to the Medical Service Provider may be disclosed to the patient and/or those authorized by him/her to receive such disclosure.

Physician's signature: _____ Date ___/___/___ (DD MM YY)

Print name: _____ Phone number ( ) _____

Graphic 2

Appendix "AA"

Health and Wellness

ATTENDING PHYSICIAN'S STATEMENT

Please complete this form and return it to your patient.

Patient's Name: _____
Date of Birth: _____/_____/_____ (yy/mm/dd)
Primary Diagnosis: _____
Is this a Worker's Compensation Board case? *Yes* _____ *No* _____
When did patient first consult you for this condition? ____/____/____ (yy/mm/dd)

To the best of your knowledge:
a) When did symptoms first appear or accident happen? ____/____/____
b) Has the patient ever had the same or similar condition? *Yes* _____ *No* _____
If yes, state when and describe:

_____
_____
_____

Identify any underlying conditions or secondary diagnosis affecting the present illness:

_____
_____
_____
_____

Has the patient been hospitalized with the primary condition? *Yes* _____ *No* _____
If yes, state where? _____
Dates: _____

If surgery has been performed for this condition, please state:
What procedure: _____
Dates: _____
Surgeon: Dr. _____

Identify any specialists involved in care/consultation for this condition?
Dr. (s): _____

Please outline the treatment provided for this condition:

_____
_____
_____
_____
_____

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Graphic 3

Please identify dates of your treatments of the patient for this condition within the past month:

To the best of your knowledge, indicate the dates that your patient has been totally disabled (unable to work in any capacity):
From: ____/____/____ (yy/mm/dd)
To: ____/____/____ (yy/mm/dd)

Can the patient return to usual work now? *Yes* _____ *No* _____
If no, can he/she return to modified work now? *Yes* _____ *No* _____

a) If yes, what specific restrictions (eg. Hours, postures, lifting)?

b) If no, your best estimate of date able to return?

When do you plan to see your patient next for this condition?

Other comments

Your name: Dr. _____
Practice Address: _____
Telephone #: _____
Signature: _____
Date: ____/____/____ (yy/mm/dd)

Authorization for Release of Information

I hereby authorize my treating Physician to complete this form and for this information to be released to my confidential medical file in Employee Health Services, Hamilton Health Sciences.

I consent for Employee Health Services to release only the following limited information to Hamilton Health Sciences, based on my Doctor's report.

a) Fitness for work. A statement indicating whether I am unfit for work, fit to work with certain restrictions or fit for regular work.
b) Date of expected return to work if it is known. Hamilton Health Sciences may be notified if no return to work date has been determined.

Date: _____

Patient's Signature: _____

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Updated Nov 2002-hr

Graphic 4

APPENDIX "B"

APPENDIX "B"

HAMILTON HEALTH SCIENCES CORPORATION

Functional Abilities Form

☐ Initial Form ☐ Follow-up

Workers Name _____ Address _____
City/Postal Code _____ Telephone # _____

Non-Occupational Injury/Illness Information:
The following information should be completed by the Health Professional:

Date of Examination on which the report is based	Area of Injury
Rehabilitation/Treatment Required? On site Physiotherapy and Occupational Therapy services are available. ☐ Yes ☐ No	Is the worker capable of returning to work immediately without restrictions? ☐ Yes ☐ No If no, please complete the next section.

Please complete where capabilites are known or limitations recommended. Note: "as tolerated" implies that restrictions are recommended but must be quantified in the workplace.	General Comments/Specific Limitations
Capabilities Walking: short distance only ☐ as tolerated ☐ other (eg. uneven ground) ☐ _____ Standing: less than 15 min. ☐ less than 30 min ☐ as tolerated ☐ other ☐ _____ Sitting: less than 30 min. ☐ less than 1 hour ☐ as tolerated ☐ other ☐ _____ Lifting floor to waist: less than 10kg ☐ less than 25kg ☐ as tolerated ☐ other ☐ _____ Lifting waist to shoulder: less than 10kg ☐ less than 25 kg ☐ as tolerated ☐ other ☐ _____ Stair climbing: none ☐ 2-3 steps only ☐ short flight ☐ own pace ☐ as tolerated ☐ Ladder climbing: none ☐ 2-3 steps only ☐ 4-6 steps only ☐ own pace ☐ as tolerated ☐ Limited ability to use hand to: hold objects ☐ grip ☐ type ☐ write ☐ **Limitations** ☐ Bending or twisting of _____ ☐ Repetitive movement of _____ ☐ Chemical exposure to _____ ☐ Environmental exposure to _____ ☐ Operating motorized equipment _____ ☐ Restrictions related to medications: (specify) _____ ☐ Above-shoulder activity _____ ☐ Below-shoulder activity _____ Exposure to vibration: high frequency ☐; low frequency ☐ Limited physical exertion to: mild ☐ ; moderate ☐; as tolerated ☐	

Recommendation for Work hours ☐ Full-time hours ☐ Modified hours ☐ Graduated hours	Complete Recovery Expected? ☐ No ☐ Yes	Estimated Duration of Limitations
Health Professional's Name (Please Print)	Health Profession	Date of Next appointment for review of capabilities (dd/mm/yy)
Full Address	City/Town / Province	Postal Code
Date	Area Code ( ) Telephone	Signature

The following should be filled in by the Worker:

By signing below, I am authorizing any health professional, now treating me, for an injury or disease to provide me, my employer and HHSC Insurance Carrier with information about my functional abilities for a timely Return to Work.

Employee Signature: _____ Date: _____

Graphic 5

APPENDIX "C"

Health and Disability Management
Consulting Services
Service Agreement
between
Cowan Wright Beauchamp Limited

641 Montreal Road

Ottawa, ON K1K OT4

100 Regina Street South
Suite 270, Box 96
Waterloo, ON N2J 3Z6

and
Hamilton Health Sciences Corporation
Sanatorium Road
Hamilton, ON
L9G 3N5

Whereas Hamilton Health Sciences Corporation (HHS) administers and pays full income protection during illness absences ("sick leave") to its eligible employees.

And whereas HHS has requested that Cowan Wright Beauchamp Limited (CWB) provide professional sick leave assessment and other analytical services to HHS;

Effective January 10th, 2005, CWB is appointed by HHS to act as HHS's Health and Disability Management and third-party administrator to provide:

- Sick Leave Adjudication and Medical Case Management for all sick or injured employees of HHS during the Sick Leave and Employment Insurance (where applicable) period of absence.

Sick Leave Adjudication and Medical Case Management

HHS retains CWB to adjudicate sick leave claims received by them and to provide Medical Case Management. This service will include validating whether the employee's absence is due to a defined medical restriction, the review of factors relevant to the disability and the regular issuance of Case Management Reports. It may also include confidential and privileged communication with healthcare professionals involved and assistance and orientation of the employee with required healthcare services.

CWB's health professionals will provide recommendations concerning the eligibility for sick leave payment according to their respective code of ethics and standards of practice (The College of Physicians and Surgeons of Ontario for CWB Medical Director, The Ontario College of Nurses for CWB Occupational Health Nurses and/or any other professional accreditation). *The final decision regarding payment of sick leave benefits is ultimately HHS's responsibility.*

HHS is responsible for providing the pertinent information to CWB in order to determine participant eligibility in accordance with the employer's policies and practices for sick leave benefits. CWB will rely upon the information provided by the employer concerning participant eligibility for its adjudication. HHS will communicate in a timely fashion all the necessary information related to the absence of an employee which may result from a medical condition. *CWB will provide standard forms to HHS to facilitate the collection of the necessary information from both the employee and HHS.*

CWB will provide professional sick leave adjudication and medical case management services to attend to the needs of employees who are away from work for five (5) or more consecutive shifts as a result of a non-occupational disability.

CWB' Sick Leave Adjudication and Medical Case Management Service includes:

- Decisions regarding the eligibility to sick leave benefit payments;

- Communication to HHS of any issues relevant to the disability that may hinder recovery;
- Communication with the employee as required during the Early Intervention program;
- Communication with healthcare professionals involved, if required, including payment of any related fees;
- Assistance and orientation of the employee to any required healthcare services;
- Monitoring and communication of case progress to all stakeholders;
- Early coordination of rehabilitation initiatives to facilitate a timely return to work;
- Communication of potential return to work parameters to the employer;
- Organization of independent assessments that may be necessary to facilitate recovery;
- Issuance of Case Management reports to the employer as needed and monthly summary reports;
- Upon our recommendation, it is HHS' responsibility to initiate the LTD claim applications. CWB will transmit, to the insurer, copies of documents relevant to the LTD claim, prepared by medical professionals, without prejudicial assessments.

Fees and Payment Terms

From January 10th, 2005 until February 28th, 2005 the Sick Leave Adjudication and Medical Case Management component will be provided on a fee-for-service basis based on CWB's hourly rates. During this period our services will include continued case management for the current groups and implementation assistance.

Starting March 1st, 2005, the above services will be provided on a monthly retainer of _____. Fee for services will be reconciled monthly. Fees exceeding the retainer will be reconciled and billed the month following the reconciliation report. Where the retainer exceeds the fees owing, such surplus will remain in the account to be ultimately reconciled the following months. During the first 12 months of service the minimum fee paid to CWB will not be less than _____.

HHS and CWB agree to a Disability Management — Quality Service Standards model that will enhance the results of the program and provide a measurable benefit to HHS. The document will provide the basis of performance management. (Sec attached document and Scorecard) *[not provided]*.

CWB hourly rates (excluding GST) are:

- _____
- _____
- _____
- _____

(Above fees apply for 24 months. CWB reserves the right, with HHS approval, to increase fees for services beyond 24 months to a minimum of CPI.)

On-site communication including program launch, information sessions and any additional requests for attendance during the program period, including meetings with Managers and employees will be provided at a fix rate of _____ + GST.

HHS and CWB shall identify funds that may be required to reimburse referrals or consultations obtained through the Medical Case Management preferred healthcare provider network (Independent Medical Examinations, Functional Capacities Evaluations or facilitating diagnostic tests such as MRI). HHS will incur costs for these services. Prior to incurring these expenses, CWB will seek pre-authorization from HHS and any resulting payment or reimbursement will be determined.

Termination of Contract

Either party may terminate this agreement at any time by providing 60 days written notice.

Confidentiality

Information referred to in the Agreement, and any other confidential personal or medical information disclosed:

(i) by HHS or,

(ii) by or on behalf of employees of HHS,

to CWB for purposes of enabling CWB to provide the services under this Agreement, is referred to, collectively, as the "submitted information".

The submitted information by HHS to CWB shall only be used to provide the services mentioned above. CWB will fully maintain, respect and protect the confidentiality of the medical and personal information received under this agreement and will not release it to any other party, unless such release is authorized *by* the employee and complies with all privacy law requirements. CWB may utilize such information for the preparation of independent Medical Examinations or Functional

Capacities Evaluations. *CWB's healthcare professionals are operating under the confidentiality guidelines of their respective professional colleges.* CWB will ensure safekeeping of all HHS employees' Medical Records incurred for the purpose of the above mentioned services for a period of 10 years, after which the files will be destroyed.

General

This Agreement is a contract made under and will be governed by and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable in the Province of Ontario.

This Agreement may be amended upon written consent of both parties.

APPENDIX "D" — Excerpts From the Personal Health Information Protection Act, 2004

Part III Consent Concerning Personal Health Information

General

Elements of consent

18. (1) If this Act or any other Act requires the consent of an individual for the collection, use or disclosure of personal health information by a health information custodian, the consent,

(a) must be a consent of the individual;

(b) must be knowledgeable;

(c) must relate to the information; and

(d) must not be obtained through deception or coercion.

Implied consent

(2) Subject to subsection (3), a consent to the collection, use or disclosure of personal health information about an individual may be express or implied.

Exception

(3) A consent to the disclosure of personal health information about an individual must be express, and not implied, if,

(a) a health information custodian makes the disclosure to a person that is not a health information custodian; or

(b) a health information custodian makes the disclosure to another health information custodian and the disclosure is not for the purposes of providing health care or assisting in providing health care.

Same

(4) Subsection (3) does not apply to,

(a) a disclosure pursuant to an implied consent described in subsection 20 (4);

(b) a disclosure pursuant to clause 32 (1) (b); or

(c) a prescribed type of disclosure that does not include information about an individual's state of health.

Knowledgeable consent

(5) A consent to the collection, use or disclosure of personal health information about an individual is knowledgeable if it is reasonable in the circumstances to believe that the individual knows,

(a) the purposes of the collection, use or disclosure, as the case may be; and

(b) that the individual may give or withhold consent

Notice of purposes

(6) Unless it is not reasonable in the circumstances, it is reasonable to believe that an individual knows the purposes of the collection, use or disclosure of personal health information about the individual by a health information custodian if the custodian posts or makes readily available a notice describing the purposes where it is likely to come to the individual's attention or provides the individual with such a notice.

Transition

(7) A consent that an individual gives, before the day that subsection (1) comes into force, to a collection, use or disclosure of information that is personal health information is a valid consent if it meets the requirements of this Act for consent.

. . .

Part IV Collection, Use and Disclosure of Personal Health Information

General Limitations and Requirements

Requirement for consent

29. A health information custodian shall not collect, use or disclose personal health information about an individual unless.

(a) it has the individual's consent under this Act and the collection, use or disclosure, as the case may be, to the best of the custodian's knowledge, is necessary for a lawful purpose; or

(b) the collection, use or disclosure, as the case may be, is permitted or required by this Act.

Other information

30. (1) A health information custodian shall not collect,, use or disclose personal health information if other information will *serve the purpose* of the collection, use or disclosure.

Extent of information

(2) A health information custodian shall not collect, use or disclose more personal health information than is *reasonably necessary to meet the purpose* of the collection, use or disclosure, as the case may be.

Exception

(3) This section does not apply to personal health information that a health information custodian is required by law to collect, use or disclose.

Use and disclosure of personal health information

31. (1) A health information custodian that collects personal health information in contravention of this Act shall not use it or disclose it unless required by law to do so.

(2) REPEALED: 2004, c. 3, Sched. A, s. 31 (4).

(3) REPEALED: 2004, c. 3, Sched. A, s. 31 (4).

(4) SPENT: 2004, c. 3, Sched. A, s. 31 (4).

. . .

Use

Permitted use

37. (1) A health information custodian may use personal health information about an individual,

(a) *for the purpose for which the information was collected or created and for all the functions reasonably necessary for carrying out that purpose*, but not if the information was collected with the consent of the individual or under clause 36 (1) (b) and the individual expressly instructs otherwise;

(b) for a purpose for which this Act, another Act or an Act of Canada permits or requires a person to disclose it to the custodian;

(c) for planning or delivering programs or services that the custodian provides or that the custodian funds in whole or in part, allocating resources to any of them, evaluating or monitoring any of them or detecting, monitoring or preventing fraud or any unauthorized receipt of services or benefits related to any of them;

(d) for the purpose of risk management, error management or for the purpose of activities to improve or maintain the quality of care or to improve or maintain the quality of any related programs or services of the custodian;

(e) for educating agents to provide health care;

(f) in a manner consistent with Part II, for the purpose of disposing of the information or modifying the information in order to conceal the identity of the individual;

(g) for the purpose of seeking the individual's consent, or the consent of the individual's substitute decision-maker, when the personal health information used by the custodian for this purpose is limited to the name and contact information of the individual and the name and contact information of the substitute decision-maker, where applicable;

(h) *for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is. or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding*;

(i) for the purpose of obtaining payment or processing, monitoring, verifying or reimbursing claims for payment for the provision of health care or related goods and services;

(j) for research conducted by the custodian, subject to subsection (3), unless another clause of this subsection applies; or

(k) subject to the requirements and restrictions, if any, that are prescribed, if permitted or required by law or by a treaty, agreement or arrangement made under an Act or an Act of Canada.

Agents

(2) If subsection (1) authorizes a health information custodian to use personal health information for a purpose, the custodian may provide the information to an agent of the custodian who may use it *for that purpose* on behalf of the custodian.

. . .

Disclosure

. . .

Disclosures for proceedings

41. (1) A health information custodian may disclose personal health information about an individual,

(a) subject to the requirements and restrictions, if any, that are prescribed, for the purpose of a proceeding or contemplated proceeding in which the custodian or the agent or former agent of the custodian is, or is expected to be, a party or witness, if the information relates to or is a matter in issue in the proceeding or contemplated proceeding;

(b) to a proposed litigation guardian or legal representative of the individual for the purpose of having the person appointed as such;

(c) to a litigation guardian or legal representative who is authorized under the Rules of Civil Procedure, or by a court order, to commence, defend or continue a proceeding on behalf of the individual or to represent the individual in a proceeding; or

(d) for the purpose of complying with,

(i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or

(ii) a procedural rule that relates to the production of information in a proceeding.

Disclosure by agent or former agent

(2) An agent or former agent who receives personal health information under subsection (1) or under subsection 37 (2) for purposes of a proceeding or contemplated proceeding may disclose the information to the agent's or former agent's professional advisor for the purpose of providing advice or representation to the agent or former agent, if the advisor is under a professional duty of confidentiality.

. . .

(Emphasis added.)

APPENDIX "E" — Section 63 of the Occupational Health and Safety Act

Part VIII Enforcement

. . .

Information confidential

63. (1) Except for the purposes of this Act and the regulations or as required by law,

. . .

(f) no person shall disclose any information obtained in any medical examination, test or x-ray of a worker made or taken under this Act except in a form calculated to prevent the information from being identified with a particular person or case.

Employer access to health records

(2) No employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker's written consent.

. . .

Power of Director to disclose

(4) A Director may communicate or allow to be communicated or disclosed information, material, statements or the result of a test acquired, furnished, obtained, made or received under this Act or the regulations.

Medical emergencies

(5) Subsection (1) does not apply so as to prevent any person from providing any information in the possession of the person, including confidential business information, in a medical emergency for the purpose of diagnosis or treatment.

Conflict

(6) This section prevails despite anything to the contrary in the *Personal Health Information Protection Act, 2004.*

(Emphasis added.)

End of Document