Most Negative Treatment: Check subsequent history and related treatments.

2006 CarswellOnt 8621
Ontario Arbitration

Imperial Oil Ltd. v. C.E.P., Local 900

2006 CarswellOnt 8621, [2006] O.L.A.A. No. 721, [2007] L.V.I. 3696-1, 157 L.A.C. (4th) 225, 88 C.L.A.S. 273

In the Matter of an Arbitration between Imperial Oil Ltd., (the "Company") and Communications, Energy & Paperworkers Union of Canada, Local 900, (the "Union")

J. More Member, M.G. Picher Chair, R.C. Filion Member

Heard: November 8, 2004 - July 22, 2005
Judgment: December 11, 2006
Docket: None given.

Counsel: R. Ross Wells, John B. Laskin, Ailsa Wiggins, for Company, Imperial Oil
Michael A. Church, Ken Stuebing (Articling Student), for Union

Subject: Occupational Health and Safety; 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

Table of Authorities

Cases considered:

Alberta Wheat Pool v. Grain Workers' Union, Local 333 (1995), 48 L.A.C. (4th) 332 (B.C. Arb.) — referred to

British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (1999), (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, 35 C.H.R.R. D/257, 46 C.C.E.L. (2d) 206, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. BCGSEU)* [1999] 3 S.C.R. 3, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 68 C.R.R. (2d) 1, 7 B.H.R.C. 437, (sub nom. *Public Service Employee Relations Commission (B.C.) v. British Columbia Government & Service Employees' Union)* 244 N.R. 145, (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, 66 B.C.L.R. (3d) 253, (sub nom. *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.)* 176 D.L.R. (4th) 1, 1999 CarswellBC 1907, 1999 CarswellBC 1908 (S.C.C.) — considered

C.H. Heist Ltd. v. E.C.W.U., Local 848 (1991), 20 L.A.C. (4th) 112 (Ont. Arb.) — referred to

Canadian National Railway v. CAW-Canada (2000), [2000] L.V.I. 3135-1, 2000 CarswellNat 2285, 95 L.A.C. (4th) 341 (Can. Arb.) — followed

Canadian National Railway v. U.T.U. (1989), 6 L.A.C. (4th) 381 (Can. Arb.) — followed

Canadian Pacific Ltd. v. U.T.U. (1987), 31 L.A.C. (3d) 179 (Can. Arb.) — considered

Construction Labour Relations v. I.U.O.E., Local 955 (2004), 129 L.A.C. (4th) 1, 2004 CarswellAlta 1522 (Alta. Arb.) — referred to

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.) — followed

Entrop v. Imperial Oil Ltd. (2000), 2 C.C.E.L. (3d) 19, 189 D.L.R. (4th) 14, (sub nom. *Imperial Oil Ltd. v. Entrop*) 37 C.H.R.R. D/481, 2000 C.L.L.C. 230-037, 50 O.R. (3d) 18, 2000 CarswellOnt 2525, 137 O.A.C. 15 (Ont. C.A.) — followed

Esso Petroleum Canada v. C.E.P., Local 614 (1994), 56 L.A.C. (4th) 440 (B.C. Arb.) — considered

Fording Coal Ltd. v. U.S.W.A., Local 7884 (January 8, 2002), Doc. X-33/00(a) (B.C. Arb.) — referred to

Graymont Western Canada Inc. v. Cement, Lime, Gypsum & Allied Workers, Local D575 (2002), 114 L.A.C. (4th) 269 (Man. Arb.) — referred to

I.U.O.E., Local 793 v. Sarnia Cranes Ltd. (1999), (sub nom. *International Union of Operating Engineers, Local 793 v. Sarnia Cranes Ltd.*) 99 C.L.L.C. 220-072, 1999 CarswellOnt 1951, [1999] L.V.I. 3034-1, [1999] L.V.I. 3021-2, [1999] O.L.R.B. Rep. 479 (Ont. L.R.B.) — referred to

Imperial Oil Ltd. v. C.E.P., Local 777 (2001), 2001 CarswellAlta 1962 (Alta. Arb.) — referred to

J.D. Irving Ltd. v. C.E.P., Locals 104 & 1309 (2002), 111 L.A.C. (4th) 328, 2002 CarswellNB 544 (N.B. Arb.) — followed

Labatt Ontario Breweries (Toronto Brewery) v. Brewery, General & Professional Workers Union, Local 304 (1994), 42 L.A.C. (4th) 151, 1994 CarswellOnt 1281 (Ont. Arb.) — considered

Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co. (1965), 16 L.A.C. 73 (Ont. Arb.) — referred to

Metropol Security v. U.S.W.A., Local 5296 (1998), 69 L.A.C. (4th) 399, 1998 CarswellOnt 6198 (Ont. Arb.) — referred to

Monarch Fine Foods Co. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647 (1978), 1978 CarswellOnt 931, 20 L.A.C. (2d) 419 (Ont. Arb.) — considered

National Gypsum (Canada) Ltd. v. I.U.O.E., Locals 721 & 721B (1997), 1997 CarswellNS 554, 67 L.A.C. (4th) 360 (N.S. Arb.) — referred to

Procor Sulphur Services v. C.E.P., Local 57 (1998), 1998 CarswellAlta 1334, [1999] L.V.I. 2994-2, 79 L.A.C. (4th) 341 (Alta. Arb.) — referred to

Provincial-American Truck Transporters v. Teamsters, Local 880 (1991), 18 L.A.C. (4th) 412 (Ont. Arb.) — referred to

R. v. B. (S.A.) (2003), 178 C.C.C. (3d) 193, 311 N.R. 1, 231 D.L.R. (4th) 602, 21 Alta. L.R. (4th) 207, 339 A.R. 1, 312 W.A.C. 1, 2003 SCC 60, 2003 CarswellAlta 1525, 2003 CarswellAlta 1526, [2004] 2 W.W.R. 199, [2003] 2 S.C.R. 678, 112 C.R.R. (2d) 155, 14 C.R. (6th) 205 (S.C.C.) — considered

R. v. C. (R.) (2005), [2005] 3 S.C.R. 99, 237 N.S.R. (2d) 204, 754 A.P.R. 204, 32 C.R. (6th) 201, 135 C.R.R. (2d) 109, 2005 SCC 61, 2005 CarswellNS 445, 2005 CarswellNS 446, (sub nom. *R. v. C. (R.W.)*) 201 C.C.C. (3d) 321, 340 N.R. 53, (sub nom. *R. v. C. (R.W.)*) 259 D.L.R. (4th) 1 (S.C.C.) — considered

R. v. Stillman (1997), [1997] 1 S.C.R. 607, 42 C.R.R. (2d) 189, 1997 CarswellNB 107, 1997 CarswellNB 108, 113 C.C.C. (3d) 321, 144 D.L.R. (4th) 193, 5 C.R. (5th) 1, 185 N.B.R. (2d) 1, 472 A.P.R. 1, 209 N.R. 81 (S.C.C.) — considered

St. Peter's Health System v. C.U.P.E., Local 778 (2002), 106 L.A.C. (4th) 170, 2002 CarswellOnt 4709 (Ont. Arb.) — 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.) — followed

U.F.C.W., Local 1288P v. Larsen Packers Ltd. (2004), (sub nom. *Larsen Packers Ltd. v. U.F.C.W., Local 1288P*) 135 L.A.C. (4th) 313, 2004 CarswellNB 708 (N.B. Arb.) — referred to

Cases considered by *R.C. Filion Member*:

Entrop v. Imperial Oil Ltd. (2000), 2 C.C.E.L. (3d) 19, 189 D.L.R. (4th) 14, (sub nom. *Imperial Oil Ltd. v. Entrop*) 37 C.H.R.R. D/481, 2000 C.L.L.C. 230-037, 50 O.R. (3d) 18, 2000 CarswellOnt 2525, 137 O.A.C. 15 (Ont. C.A.) — referred to

R. v. B. (S.A.) (2003), 178 C.C.C. (3d) 193, 311 N.R. 1, 231 D.L.R. (4th) 602, 21 Alta. L.R. (4th) 207, 339 A.R. 1, 312 W.A.C. 1, 2003 SCC 60, 2003 CarswellAlta 1525, 2003 CarswellAlta 1526, [2004] 2 W.W.R. 199, [2003] 2 S.C.R. 678, 112 C.R.R. (2d) 155, 14 C.R. (6th) 205 (S.C.C.) — 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

s. 8 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 217.1 [en. 2003, c. 21, s. 3] — considered

ss. 487.04-487.09 [en. 1995, c. 27, s. 1] — considered

s. 487.05 [en. 1995, c. 27, s. 1] — considered

s. 487.05(1) [en. 1995, c. 27, s. 1] — considered

s. 487.06(1) [en. 1995, c. 27, s. 1] — considered

DNA Identification Act, S.C. 1998, c. 37
Generally — referred to

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

s. 5(1) — referred to

s. 17(1) — referred to

Labour Relations Act, R.S.O. 1990, c. L.2
Generally — referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1
s. 25 — considered

Statutes considered by *R.C. Filion Member*:

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

Human Rights Code, R.S.O. 1990, c. H.19
Generally — referred to

Occupational Health and Safety Act, R.S.O. 1990, c. O.1
s. 25 — considered

Decision of the Board:

1 This arbitration concerns a policy grievance filed by the Union against the Alcohol and Drug Policy introduced by the Company in its Products and Chemicals Division at its refinery at Nanticoke, Ontario. While some nineteen individual grievances are also before us, it is agreed that the Board should deal firstly with the policy grievance, remaining seized of all other matters. Central to the dispute is the Union's objection to the Company's use of random, unannounced and not-for-cause alcohol and drug testing. It also objects to the post-incident alcohol and drug testing provisions of the policy. The policy grievance apparently raises, for the first time, the propriety of random or unannounced drug testing by the use of oral swabs for the detection of cannabis use, including actual impairment.

2 The issues in dispute were narrowed by reason of a preliminary award of this Board, which issued on February 20, 2005. In that award the Board upheld the preliminary objection raised by the Company with respect to the arbitrability of the Union's challenge to random, unannounced alcohol testing by breathalyser. As noted in that award, the Company's

practice in that regard had continued unchallenged by the Union since 1992, a period which spanned several renewals of the collective agreement. As we noted in the preliminary award:

> ... By essentially acquiescing in the long-standing practice of the Company in this regard, the Union must be taken to have waived any objection which it might have to that practice. We are therefore satisfied that the scope of the grievance before us does not extend to entertaining evidence or argument concerning the Company's long unchallenged practice of administering random breathalyser tests for the purposes of alcohol testing in the workplace.

3 While the preliminary award rejected certain other preliminary issues raised by the Company, the Board did reserve on an objection to arbitrability made by the Company on the basis of delay. The announcement of the Company's new policy was communicated on May 21, 2003. It went into effect on July 1, 2003.

4 Essentially the Company's objection with respect to timeliness, for the purposes of this award, bears on what it maintains is the Union's unreasonable delay in challenging the Company's policy, originally introduced in 1992. It submits, in part, that to the extent that randomness in alcohol breathalyser testing was not objected to by the Union, the bargaining agent cannot now raise the issue of randomness as might apply to the testing of oral fluids for cannabinoids. Counsel for the Company similarly challenges the timeliness of the Union now objecting to such aspects of the Company's policy as post-incident drug testing and the signing of consent forms by employees under the Alcohol and Drug Policy.

5 We cannot sustain the Company's objection with respect to timeliness. While it is true that article 6.09 of the collective agreement, which governs the filing of union grievances, contemplates that a grievance is to be filed within twenty-one (21) calendar days of the Union becoming aware of the occurrence being grieved, the collective agreement appears to be devoid of language which would make the time limits mandatory, such as to suggest that a matter would be considered abandoned or settled, if there is a failure to follow the established time limits.

6 Alternatively, the sequence of events tends to support the Union's position on timeliness. Counsel for the Union notes to the Board that in December of 1996 a complaint by employee Martin Entrop of the Company's Sarnia refinery brought a broad challenge to the Company's Alcohol and Drug policy. Counsel notes that the Union followed the progress of that complaint through the interim decisions of the Human Rights Board of Inquiry in 1994, up to and including the final decision of the Ontario Court of Appeal rendered on July 21, 2000. Reminding the Board that the Company suspended random drug testing after July of 2000, by reason of the decision of the Court of Appeal, counsel for the Union submitted that the matter arose again afresh when random drug testing was effectively resumed in May of 2003, with the introduction of a new form of unannounced drug testing by the sampling of oral fluids. It is following that change, on October 15, 2003 that the Union's policy grievance was filed.

7 Should the Union now be prevented from grieving a random or unannounced drug testing policy which involves the taking of buccal swabs from employees? We think not. That issue, apparently never before considered by a board of arbitration, is one of considerable significance for both parties. Nor can this Board see any prejudice to the Company, given the passage of only a few months between the introduction of its new random drug testing method and the filing of the grievance. Moreover, if it were necessary to do so, we would exercise our discretion under the provisions of the *Ontario Labour Relations Act* to extend the time limits in these circumstances. For these reasons the Company's objection as to the timeliness of this grievance, in all of its aspects, must be rejected.

I Facts

A — Company Evidence

8 The Company's Nanticoke refinery was built in 1978 by Texaco, and was acquired in the late 1980s. Refining crude oil into products such as gasoline, propane and aviation fuel, it is said to produce approximately one-third of Ontario's petroleum product base. The refinery employs 230 employees with approximately 100 working day and night shifts. Contractors also work on site utilizing employees whose numbers can, during major projects, be as high as 300. There

is no dispute that given the nature of the materials, processes and products involved, the work of the refinery and the employees within it represents a highly safety sensitive endeavour. The commitment of both the Company and the Union to safety is reflected in article 19 of the collective agreement which reads, in part, as follows:

> **19.01** It is agreed by both parties that emphasis shall be placed upon the need for safe and healthy working conditions and practices on the Company premises. The Company shall continue to make provisions for the safety and health of its employees during the hours of employment.

9 The nature of the Company's operation at Nanticoke, with particular attention to safety policies and procedures, was explained in the evidence of Mr. Ian Howieson, the Refinery Manager. According to his testimony there appears to be no record of any bargaining unit employee ever having tested positive for drugs. Mr. Howieson relates, however, that on one occasion an operating engineer in charge of a crane caused damage to a warehouse door. When it was decided to do a post-incident test, at that time by urinalysis, the contractor's employee tested positive, and his employment on the premises was terminated. The Refinery Manager also related some examples of plant employees being involved in incidents, such as a minor train-truck collision and a derailment, when employees were drug tested, with negative results. There is no record of any employee in the plant having tested positive for cannabinoids. While this grievance does not concern alcohol testing, it appears to be common ground that there was one positive alcohol test which did result in discipline, a matter now pending under the grievance and arbitration process.

10 Mr. Howieson explained the process by which employees are made to give random unannounced breath and cheek swab samples for alcohol and drug testing. He notes that that requirement is imposed upon all safety sensitive employees, including supervisors and managers, up to and including himself.

11 The Company issued a letter dated May 21, 2003 over the signature of Human Resources Vice-President R.F. Lipsett, explaining the suspension of random urinalysis drug testing and announcing the resumption of random, unannounced drug testing by means of saliva samples. His letter reads, in part, as follows:

> TO: Imperial Oil and ExxonMobil Canada Employees
>
> Effective July 1, 2003, we will be revising our alcohol and drug (A&D) policy to re-introduce random *drug* testing for employees in safety-sensitive and other specified positions. While random drug testing under our original policy tested for five drugs of abuse, the new procedure will test only for marijuana at this time.
>
> The policy was first revised in March 2001 to align it with a decision of the Ontario Court of Appeal. The court found that random *alcohol* testing could be justified for safety-sensitive positions because a positive test demonstrates likely impairment. However, the court expressed concerns about random drug testing primarily because a positive drug test using urinalysis does not demonstrate likely impairment. In light of those concerns, we temporarily suspended the random *drug* testing component of the policy to allow us to investigate other drug testing technologies that would indicate likely impairment at the time of a positive test.
>
> During the past two years, we engaged experts in workplace drug testing programs to investigate alternatives to random urinalysis drug testing. With their assistance, we determined that oral fluid (or saliva) drug testing for marijuana would address the concern of the Ontario Court of Appeal decision that a workplace drug test indicate likely impairment. Random oral fluid testing will also contribute to the objectives of our A&D policy to reduce the risk of incidents in which drugs are a contributing factor and to deter the use of marijuana where its use may negatively affect work performance and safety.
>
> Scientific studies have shown that while the most dramatic detrimental effects from the use of marijuana occur within the first two hours after drug use, significant deficits in some performance areas persist for four hours or longer. This means that test results that indicate marijuana use within the previous four hours will indicate likely impairment. Exactly how long an individual will test positive following the use of marijuana depends on a number of factors,

but it is unlikely that someone will test positive after four hours using an oral fluid test. As a result, we can conclude that a person who tests positive for marijuana on a random oral fluid test is likely impaired at the time of the test.

Starting July 1, 2003, employees in safety-sensitive and other specified positions — including senior management, corporate department managers and senior operating personnel and their direct reports — will be selected to take a Breathalyser test for alcohol, as they do today, and to provide an oral fluid sample, which will be tested for marijuana.

(original italics)

12 The elements of the Company's Alcohol and Drug Policy were spoken to and explained by Mr. Howard Moyer, the Company's Alcohol and Drug Policy Manager. The policy contains, in part, the following provisions:

E. Job Category Definitions

For purposes of this policy, jobs are categorized and defined as follows:

1. Safety-sensitive Positions

Positions which meet both of the following conditions as determined by Imperial Oil and ExxonMobil Canada:

(a) they 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, the public or the environment; and

(b) they have no direct or very limited supervision available to provide frequent operational checks.

This category includes all employees who are required to rotate through or temporarily relieve in safety-sensitive positions.

2. Specified Positions

Positions which have significant ongoing responsibilities for decisions or actions likely to affect the safe operations, finances or reputation of the company

3. All other positions

F. Work Rules for Employees in all Job Categories

1. The following are strictly prohibited for employees in all job categories:

(a) use, possession, distribution, offering or sale of illicit drugs, illicit drug paraphernalia or unprescribed drugs for which a prescription is legally required in Canada, while on company business or premises;

(b) presence in the body of illicit drugs, unprescribed drugs for which a prescription is legally required in Canada, or their metabolites while on company business or premises;

(c) use, possession, distribution, offering or sale of alcoholic beverages on company premises, except for approved social functions;

(d) having a blood alcohol concentration of .04 percent (.04 grams per 100 ml) or higher while on company business or premises;

(e) intentional misuse of prescribed medications, over-the-counter medications or other substances while on Company business or premises; and

(f) being unfit for scheduled work due to the use of aftereffects of alcohol, illicit drugs, unprescribed drugs for which a prescription is legally required in Canada, or the intentional misuse of medications.

2. Employees in all job categories have a responsibility to manage potential impairment during working hours due to the legitimate use of medications, in consultation with their personal physician, pharmacist or one of the company's occupational health centres. Where the use of medication may negatively affect work performance and safety, a company health professional may issue medical work limitations requiring modified work or temporary reassignment.

3. Employees in all job categories are subject to testing for alcohol and specified drugs after a significant incident as determined by management. Post incident testing will form part of an individualized assessment of the possibility of substance abuse or substance dependence. The purpose of this type of testing is to help eliminate substance use as a cause and to determine whether substance use was a possible contributing factor in an incident. It is recognized that a positive post-incident test does not independently prove that.

4. As part of an individualized assessment of the possibility of substance abuse or substance dependence, all employees are subject to mandatory testing for alcohol and drugs where reasonable cause exists to suspect alcohol or drug use or possession in violation of this policy.

5. Testing may be conducted on an unannounced periodic or random basis as part of a post-rehabilitation monitoring and aftercare agreement permitting an employee with a past substance abuse or substance dependence problem as described in section (I)(1) of this policy, to enter or return to work.

6. A positive test result, failure to report for a test, refusal to submit to a test, refusal to consent to disclosure of a test result to management, or an attempt to tamper with a test sample constitutes a violation of this Policy.

7. The Company may conduct unannounced searches for alcohol, drugs or drug paraphernalia, on company owned or controlled premises where there is reasonable cause to suspect that they may be present.

G. Additional Work Rules for Employees in Safety-Sensitive Positions

1. Employees in safety-sensitive positions are prohibited from consuming any alcoholic beverage during working hours, whether on or off company premises. This provision applies to meal times and other personal work breaks, whether or not they are considered to be paid time. Employees in safety-sensitive positions are also required to limit their consumption prior to working hours so that there is no alcohol in the body while at work.

2. Employees in safety-sensitive positions are expected to check with their personal physician or the appropriate company health centre if there is any doubt about the potential impact of a particular medication on their performance. Safety-sensitive employees are required to report any use of medications that may impact their fitness for duty to the appropriate company health centre or their supervisor before commencing work.

3. Employees in safety-sensitive positions are subject to unannounced random testing for alcohol and specified drugs.

. . .

K. Corrective Action

A violation of this policy may result in corrective action up to and including termination of employment. If an employee violates the provisions of this policy, an investigation will be conducted before corrective action is taken. The appropriate corrective action in a particular case depends on the nature of the policy violation and the circumstances surrounding it.

13 Mr. Moyer related that the unannounced drug and alcohol testing is governed by a computer program which generates selections in such a way as to ensure that each employee is randomly tested at least once in each year. While for a time that program was operated on his own computer, the selection process is now handled out of the Houston, Texas head office of ExxonMobil.

14 Mr. Moyer explained that following the decision of the Ontario Court of Appeal in *Entrop*, as of March 2001, the Company ceased performing random, unannounced drug tests by urinalysis. It did so because the Court struck down the random drug testing aspect of the Company's policy, reasoning in part that because urinalysis, unlike the breathalyser test, could not provide proof of actual impairment, resort to random drug testing could not be justified and was in violation of the *Ontario Human Rights Code*. Mr. Moyer explained, however, that the Company values the deterrent impact of unannounced random testing, and therefore looked for a technology for drug testing that might parallel the immediate impairment detection of the breathalyser test for alcohol. After consultation with the head office of ExxonMobil, and upon the advice of two recognized drug testing authorities, Dr. Robert Willette and Dr. Leo Kadehjian. The Company decided to utilize an oral fluid drug test, a process which would detect the likelihood of actual impairment by reason of cannabinoids in the body. That change in the Company's drug policy was introduced by way of the letter of May 21, 2003, reproduced above.

15 As reflected in the evidence of both Mr. Moyer and Mr. Howieson, when an employee is called upon to undergo a random, unannounced alcohol and drug test he or she is required to fill out consent form which reads, in part, as follows:

> I have read the Im perial Oil Limited and ExxonMobil Canada Limited alcohol and drug policy and acknowledge that, in accordance with that policy, I have been requested to submit to a:
>
> • Urinalysis test for the sole purpose of determining the presence in my body of the following drugs or their metabolites:
>
> • Amphetamines, cocaine, cannabinoids, opiates, phencyclidine
>
> — or —
>
> • amphetamines, cocaine, cannabinoids, opiates, phencyclidine, barbiturates, benzodiazepines, methaqualone, methadone, propoxyphene
>
> • oral fluid test for the sole purpose of determining the presence in my body of cannabinoids
>
> • breath alcohol test for the sole purpose of determining the presence in my body of alcohol
>
> I have been fully informed as to the nature of the test(s), the procedure(s) to be employed and the employment implications of a positive test result for alcohol or any of the above drugs and metabolites.
>
> I hereby consent to the tests, and only those tests, checked (X) above, including tests for adulteration, and authorize Imperial Oil and ExxonMobil Canada's designated testing laboratory or Imperial Oil and ExxonMobil designated medical review officer to release the test result(s) to management of Imperial Oil Limited or ExxonMobil Canada.

16 The material before the Board also confirms that employees who occupy safety sensitive positions are also required to sign a further consent form. Part of that form involves consent to a medical examination for determining the employee's fitness for duty in a safety sensitive position. A separate part deals with the Company's Alcohol and Drug Policy. It reads as follows:

> **(A) Employee acknowledgement and declaration**

I hereby acknowledge that I have read the Imperial Oil Limited and ExxonMobil Canada alcohol and drug policy and agree to comply with the policy as a condition of employment. I further declare that:

(1) I wish to enter or remain in a safety-sensitive position as defined in this policy;

(2) *I do not have a substance abuse or substance dependence problem as defined in the attached Schedule "A"'

(3) during my forthcoming medical examination, I shall inform the examining physician of any medical condition that could present a significant risk to the safe performance of duties in a safety-sensitive position;

(4) I understand that should I:

(a) use, possess, distribute, offer or sell alcohol, illicit drugs, illicit drug paraphernalia or unprescribed drugs for which a prescription is legally required in Canada, while on company business or premises;

(b) refuse to submit to a urinalysis, oral fluid or alcohol breath test;

(c) tamper with a urine or oral fluid test sample, or

(d) test positive on an alcohol or drug test,

I may be subject to discipline up to and including termination for cause without notice or pay in lieu of notice.

_____ _____

Employee signature Date

* Employees in or candidates for safety-sensitive positions are required to notify management if they have or have had a substance abuse or substance dependence problem within the past six years.

17 The Company's Alcohol and Drug Policy is a complex and voluminous document which has evolved through a substantial number of iterations and amendments. It is common ground that the current policy also provides for reasonable cause alcohol and drug testing as well as for post-incident alcohol and drug testing. In both of those circumstances the policy calls for urinalysis tests. While those tests do not prove actual impairment at the time the test is taken, they do test for a broader band of drugs. While the oral fluid drug test, used in random testing, is utilized to detect only cannabinoids, urinalysis can test for the use of alcohol, cannabinoids, cocaine, amphetamines, opiates, phencyclidine, as well as other specified drugs of abuse and their metabolites, including barbiturates, benzodiazepines, methaqualone, methadone and propoxyphene. In the case of a reasonable cause or post-incident test employees are likewise required to sign an Acknowledgement and Consent form.

18 The broader band of drug detection by urinalysis used in reasonable cause and post-incident testing does not demonstrate actual impairment. It does, however, allow the Company to monitor whether an employee has consumed a wider variety of drugs, in some cases over a period of several weeks prior to the actual test. As Mr. Moyer explained, part of the reason for continuing to use urinalysis in reasonable cause and post-incident testing is that it has a greater deterrent effect. That is presumably because it yields a broader band of information about the employee, even though it may not prove actual impairment, as is the case with the oral fluid drug test.

19 In his evidence, Mr. Moyer expressed the belief that the cut-off points at which the drugs or metabolites are detected confirm that at some point the employee did use the drug to the point of impairment. He also explained that under the administrative system which is in place, the urine samples and oral fluid samples are tested at a laboratory in Mississauga and the results are sent to ExxonMobil headquarters in Houston, Texas. When a drug or metabolite is detected, according to Mr. Moyer, the precise nature of the drug is not communicated back to local management. Rather,

local management is simply told that the drug test returned a positive result. As reflected in the Company's policy, it also appears that the donor is not identified to the test laboratory except by his or her employee number. As reflected in the text of the policy itself, the process is obviously thoroughgoing. All positive test results are reviewed by a medical review officer who is an independent physician with expertise in substance abuse, before those results are communicated to the Company. The Medical Review Officer verifies the chain of custody and checks laboratory positives to eliminate the possible legitimate use of medications or other clinical reasons for the positive result. The employee donor is contacted and given an opportunity to explain a positive result before the tests are communicated to the Company. If the positive is viewed by the Medical Review Officer as being confirmed, that is communicated to the Substance Abuse Control Unit which then notifies the test administrator, in the case of the Nanticoke refinery Mr. Moyer, who then contacts local management, advising only that a positive result has been obtained.

20 The Company called certain expert witnesses in support of its case. Among them is Barbara Butler, a recognized and respected expert in workplace drug and alcohol testing policies. Her evidence confirms that the most current survey data indicate that drug use, and in particular the use of cannabis, has risen substantially in recent years. She notes that the most recent survey, in 2005, indicates that twice as many respondents indicate having used cannabis in the past year, as compared with 1984. She also notes data that would show an increase in the rate of use and that the frequency of use in men is twice as high as among women.

21 Ms. Butler expressed her view that four key areas must be addressed in the implementation of any effective drug and alcohol policy. They are employee education and awareness, the training of supervisors, the presence of an effective employee assistance program and, finally, investigative tools, including testing. Analysing two studies made in relation to roadside breathalyser test programs, Ms. Butler confirms that there is a deterrent impact which is in direct relation to the knowledge of persons that they may be randomly stopped for assessment and possible testing for alcohol consumption when driving. That fact, coupled with the negative consequences that flow from positive breathalyser tests has confirmed the deterrent value of testing in a number of jurisdictions, with respect to roadside breathalyser testing for alcohol.

22 She notes that only the province of Victoria in Australia has moved to fully random alcohol roadside testing, apparently as a result of a high level of alcohol and drug fatalities in that jurisdiction. In Canada a police officer administering a roadside breathalyser program cannot simply stop a motorist and insist that the individual take a breathalyser test. The police officer must first make some judgement as to whether there is reasonable cause to ask the particular motorist to undergo a breathalyser. In the province of Victoria, Australia there is no need for the constable to have reasonable cause to believe that the subject may be impaired before directing the breathalyser test. It appears that the alcohol testing program in Victoria has had a measurable deterrent impact. According to Ms. Butler, more recently it has been expanded to include oral fluid drug testing.

23 As further examples of the effectiveness of randomness as a deterrent, Ms. Butler cites other areas of activity. She notes, for example, that in GO Train commuter service in and around Toronto, passengers are not required to show their tickets, except when they are randomly requested to do so by ticket inspectors on board the trains. Similarly, highway truck transport vehicles are not mandatorily inspected, although adherence to proper standards is maintained through periodic random truck inspections.

24 The Company's case with respect to the correlation between workplace accidents and alcohol and drug abuse was also bolstered by expert testimony. Dr. Louis Francescutti, the Director of the Alberta Centre for Injury Control and Research, gave testimony on the preventability of workplace accidents. Indeed, the thrust of his evidence was to say that the term "accident" is a misnomer. He stresses that what are normally termed accidents are in fact events which are almost universally preventable, being generally attributable to unintentional or intentional human behaviour. Citing the factors of education, engineering, enforcement and economic incentives, he states that workplace incidents causing injury are a preventable phenomenon, endorsing in part the viewpoint of Ms. Butler that, among other things, the perception of being caught is arguably the greatest deterrent to a change in behaviour. With respect to the correlation between substance use and injuries, Dr. Francescutti notes data to the effect that a person who consumes twelve alcoholic drinks per year is three times as likely to die in an injury event than one who does not.

25 That the oral fluid drug test is a reliable means of detecting actual current impairment from the consumption of cannabis was also established through expert testimony. Two noted American authorities, Dr. Robert Willette and Dr. Leo Kadehjian, gave extensive evidence with respect to the evolution of cannabis use and drug testing for cannabis since the 1970s. Their evidence confirms that oral fluid testing has in fact existed since the 1930s, and has evolved into a process which can detect a wide variety of drugs. With respect to THC, the active ingredient in cannabis, Dr. Willette explained than smoking marijuana causes that substance to be absorbed into the mucosa of the mouth. He indicates that the effects of rinsing the mouth are relatively minimal, and that oral fluid drug testing does not produce false positives.

26 The testimony of the two expert witnesses gave some detail as to the quality controls and inspections which surround the process of oral fluid drug testing from the point of collection through laboratory processing. Their evidence also confirms the generally recognized fact that the effects of smoking marijuana are most strongly felt for a period of fours hours, and that impairment can in fact extend over an eight hour period, spans of time which can result in positive readings through the oral fluid drug test. For example, concentrations of 10 nanograms of THC per millilitre of oral fluid will reliably confirm that the subject has smoked marijuana within a four hour period of the taking of the sample. That is the cut-off level used in the oral fluid drug test.

27 While the evidence given by Dr. Willette and Dr. Kadehjian was extensive and relatively detailed with respect to the science surrounding the consumption, absorption and detection of THC by means of the cheek swab test, and they were extensively cross-examined by counsel for the Union, there appears to be no substantial dispute about the accuracy of their testimony. No contrary expert opinion was adduced in evidence by the Union. On the whole, we are satisfied that their evidence does confirm, beyond any real controversy, that the cheek swab test introduced by the Company as part of its random and unannounced drug testing policy does accurately detect actual impairment in the subject tested at the time the test is taken. It should be noted, however, that the process cannot be analogised to the breathalyser test. While the breathalyser yields an immediate result readable by the technician administering the test, there is no immediate reading of a result or confirmation of actual impairment with the oral fluid drug test. As that test is administered, the sample must be sent to a laboratory, in the case of the Company in Houston, for analysis before any result is known. In fact, as discussed below, an employee who is impaired by cannabis consumption at the time he or she takes an oral fluid drug test may, in all likelihood, be sent immediately to work in a safety sensitive position, the result of the test being known only many days later. However, as confirmed in the evidence of Dr. Willette and Dr. Kadehjian, there can be little doubt about the accuracy of the positive drug test and confirmation of impairment which is returned at that time.

B — Union Evidence

28 The Union's evidence was given through two witnesses. The first, Mr. Keith Punchak, is the president of the Union local at Nanticoke. He indicates that he previously worked in the Company's IOCO refinery at Port Moody, British Columbia, moving to Nanticoke in 1995. The thrust of his evidence is that there has not been any problem within the refinery at Nanticoke, either with respect to alcohol or drug use. While he did acknowledge awareness of one employee having failed an alcohol test, it appears that the Union was not initially aware of that circumstance. The unchallenged evidence of Mr. Punchak is, however, to the effect that there has never been a positive drug test at Nanticoke.

29 According to him, as was the case at the IOCO refinery in British Columbia, the employees who work in the refinery generally grew up together and are part of a relatively close community. He indicates that that produces a form of buddy system which would detect a problem should it ever arise, something he emphasises has never happened with respect to drug use.

30 According to his evidence the refinery is generally safe and well run. When asked to comment on the apparent increase in reports of "near miss" incidents, Mr. Punchak indicated that making near miss reports is sometimes a device utilized by employees when they are otherwise unable to secure a response to a safety concern that they might have. As he explains it, a near miss report gets to Refinery Manager Ian Howieson, and then things get done.

31 When asked to comment on his view of the random and unannounced drug testing by means of the oral fluid drug test program, Mr. Punchak, a Company employee since 1981 with no disciplinary record, was adamant. As he put it: "I continually have to prove myself innocent, over and over again. I don't feel that's right at all. ... I don't like it." While under cross-examination he confirmed being aware of two past incidents of alleged positive tests for alcohol consumption. Nevertheless, he strongly asserted that the random drug testing program is simply not justified and that it can have negative effects on morale. He notes, for example, that when it appears that the frequency of tests is increased, workers get the impression that the Company is deliberately trying to catch someone. He cites as an example the higher number of tests he indicates occurred in a particular month shortly before this hearing. In that kind of circumstance, he states, his fellow workers feel that "It's a witch hunt."

32 The evidence of employee Ron Fletcher is largely to the same effect. A 56 year old parent and grandparent, he is in his 28th year at the refinery, having been hired at its opening under Texaco. He testified that the Nanticoke refinery is in a relatively rural location, set in an industrial park along with an Ontario Power Generating station and a Stelco Steel plant. The town itself, numbering a population of 100, is one of a number of small centres in the area.

33 He relates that under Texaco there was no drug or alcohol testing program. That policy was commenced by the Company in 1992, when the workplace was not unionized, something which only came about in 1995 with the certification of the Union, and the advent of the first collective agreement in December of 1996.

34 He relates that the workforce at the refinery is extremely stable, composed principally of long term employees like himself, many in their 50s, and most of whom live within a thirty mile radius of the Nanticoke facility. The employees, who are either technicians or tradespersons, come with extensive experience and training, with the bulk of new hires presently having community college certification from Lambton College in Sarnia.

35 Mr. Fletcher stated that he was not aware, from the time of his initial employment with Texaco, of any alcohol or drug related injuries in the refinery. Nor, he stated, was he ever aware of any problem caused by alcohol or drug abuse in the form of accidents or incidents. His evidence indicated that his knowledge was, in part, based on his experience as the first president of the Union in the refinery, and his involvement in the negotiation of some three collective agreements. As he testified, the workforce is extremely conscious of the need for safety, and the high risks to the refinery and to the surrounding community in the event of any serious incident. He notes that under Texaco the plant went for some 5 million man hours without any lost time accident, and at the time of his evidence the refinery had not had a lost time accident in over a year. As he put it: "We all understand what we are dealing with and we deal with it very conscientiously."

36 Mr. Fletcher clearly feels strongly about the random, unannounced drug testing conducted by the Company. While he does not object to "for cause" testing, he questions why the Company should be able to exercise powers which cannot be exercised by the Ontario Provincial Police. His evidence confirms that when he was asked to sign a consent form for a random, unannounced drug test he added to the form a note to the effect that he was taking the test "under duress". That prompted a subsequent investigation wherein he was advised that any such notation would be taken as a violation of the policy and be viewed as tantamount to a refusal, which could lead to discipline.

37 Mr. Fletcher also expressed concern about the impact of the Company's policy with respect to post-incident or post-accident testing. As he related it, in the past if an employee should cut his or her finger while working, the individual would feel no concern about attending at the first aid medical facility on site. More recently, however, he indicated that the Company has increased the requests for alcohol and drug testing on such occasions, something which has in fact caused employees to be less prone report minor injuries. The thrust of his account is that while at one time an injured employee could look forward to being cared for, increasingly the first response of the Company is to apply a presumption or suspicion of impairment, even in the most minor circumstances.

38 It is clear that Mr. Fletcher views the Alcohol and Drug Policy, as applied by the Company, as an affront to the dignity of employees. He related the incident of a carpenter employed by a contractor who tripped on some uneven

concrete, as a result of which he suffered a swollen hand. When the carpenter refused to undergo an alcohol and drug test he was immediately "let go". In his testimony Mr. Fletcher stated "There was no just cause, yet he was subjected to the humiliation of an alcohol and drug test." When asked to characterize the random, unannounced drug testing policy he stated: "Its an unnecessary challenge to my integrity." He stressed that he has no history of any alcohol or drug problem.

39 Under cross-examination Mr. Fletcher did not dispute that there might be a deterrent effect build into unannounced, random testing, as appears to be proven with respect to the administration of the R.I.D.E. program administered by police for roadside breathalyser testing. He nevertheless expressed his strong conviction that general vigilance in the workplace, coupled with testing on a "for cause" basis would be sufficient, and would satisfy him. Under cross-examination he did concede, when reminded, that at some point prior to the certification of the Union, therefore before 1995, one employee did fail a random urinalysis drug test, although his understanding of the facts is that the individual had consumed marijuana on his time off and was not impaired at work. Mr. Fletcher's view that there has never been any work related drug problem remained unchanged. Indeed, the evidence does not establish any incident of the work related use of marijuana, or any other drug, since the Company took control of the refinery in the 1980s.

II — Submissions

A — Union Argument

40 Counsel for the Union argues that the Company's random, unannounced drug testing policy as a mandatory condition of employment under the threat of discipline or discharge is unreasonable and contrary to the collective agreement. He notes that the vast majority of the tests conducted by the Company are random drug tests, there being evidence of only two occasions of post-incident drug tests, neither of which produced a positive result. He stresses that since the Union was certified in 1995 not a single member of the bargaining unit has ever tested positive, whether under the previous urinalysis test administered by the Company or under the current oral fluid drug test. In that time, he submits, there has been only one instance of an employee having failed an alcohol test at work, a matter which is the subject of a pending grievance. He submits that the Company has adduced no evidence to suggest that there is any real or perceived threat of drug use or abuse in the workplace or among the workforce. While he concedes that drug testing is appropriate on the basis of reasonable cause, on a case by case basis, he argues strenuously that there can be no justification for the systematic and continuous, random and unannounced drug tests of all of the employees in the bargaining unit. That treatment, counsel submits, is appropriate in a negotiated return to work agreement where an employee might be identified as having a history of drug use or abuse. He maintains that it is not appropriate on a speculative basis where all employees are subjected to such a test not less than once a year, without any reason to believe that they are deserving of such scrutiny.

41 Counsel stresses that in Canada, unlike the USA, there is no legislative underpinning for mandatory random or speculative drug testing of employees, which he characterizes as an intrusive invasion of the privacy of the individual. He submits that in Canadian jurisprudence bodily fluid testing is considered as extraordinary, and to be administered only within the constraints of the well established Canadian arbitral jurisprudence. In that regard he cites a number of leading cases, including *Esso Petroleum Canada v. C.E.P., Local 614* (1994), 56 L.A.C. (4th) 440 (B.C. Arb.) (McAlpine); *Trimac Transportation Services - Bulk Systems v. T.C.U.* (1999), 88 L.A.C. (4th) 237 (Can. Arb.) (Burkett); *Canadian National Railway v. CAW-Canada* (2000), 95 L.A.C. (4th) 341 (Can. Arb.) (M. Picher); *Dupont Canada Inc. v. C.E.P., Local 28-0* (2002), 105 L.A.C. (4th) 399 (Ont. Arb.) (P.C. Picher); *J.D. Irving Ltd. v. C.E.P., Locals 104 & 1309* (2002), 111 L.A.C. (4th) 328 (N.B. Arb.) (M.G. Picher).

42 Counsel submits that arbitrators, including Arbitrator McAlpine dealing with the instant Company over a decade ago, have consistently ruled that in a safety sensitive industry drug testing can be imposed on employees, but only in specific instances where reasonable cause is demonstrated, or where there has been an accident or incident which justify such a measure. Finally, arbitrators have endorsed random, unannounced drug testing as part of a post-rehabilitation return to work agreement in the case of an employee with a demonstrated history of drug use or abuse. Counsel submits that the policy of the Company which is here under review violates the balancing of interests approach which has

traditionally been taken by boards of arbitration in Canada, and is contrary to the most fundamental rules governing the promulgation of plant rules as enunciated in *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.* (1965), 16 L.A.C. 73 (Ont. Arb.) (Robinson).

43 By way of comparison, counsel stresses that a police constable cannot, under Canadian law, randomly submit a motorist to a breathalyser test without first having cause to do so, even under a roadside R.I.D.E. program. He notes that the only common law jurisdiction that allows such a suspension of personal rights is Victoria, Australia, as noted in Ms. Butler's evidence. On what basis, he asks, can Imperial Esso visit upon its employees a level of intrusion and a degree of authority which Parliament and all of Canada's provincial legislatures have not seen fit to vest in police authorities?

44 With respect to the facts, counsel stresses that there has not, since 1978, been any recorded incident of an employee under the influence of drugs in the workplace or having tested positive for drugs after the introduction of urinalysis drug test in 1992. There are, he submits, no facts on the ground to justify recourse to what he characterises as a highly extraordinary, if not unprecedented, drug testing policy. Noting that the jurisprudence has affirmed that an employer in a safety sensitive industry need not await a catastrophe before implementing "for cause" drug testing, counsel argues that, at a minimum, before having recourse to the extraordinary procedure of random unannounced drug testing of all employees, the Company should, at a minimum, be required to point to some genuine, real justification within its workplace for such a measure. That would, for example, involve strong evidence of a serious problem of drug and alcohol use or abuse in the refinery. There is, he submits, no such evidence before us and the evidence which we do have is entirely to the contrary. Stressing that there has been only one failed alcohol test recorded since 1992 in the workplace, and no failed drug test, he argues that if anything, the results of the tests taken by the Company prove the Union's point.

45 Counsel also questions the Company's motives, particularly as regards its approach to post-incident drug testing. In that circumstance, as reflected in the evidence of Mr. Moyer, counsel notes that the Company does not use the oral fluid drug test, the only test which would prove impairment at the moment of an accident or incident. Rather, as Mr. Moyer explained, it prefers to use the urinalysis test. Counsel notes Mr. Moyer's explanation that that test will "catch more people". That, he submits, is the motive behind the policy, the Company being more interested in detecting drug use among employees in their private lives rather than determining their impairment at work.

46 Counsel for the Union takes strong exception to the form of the consent document which an employee is compelled to sign when he or she is given a random, unannounced drug test. In particular, the Union objects to both the urinalysis test and the oral fluid test "for the sole purpose of determining the presence in my body" of the listed drugs. The Union submits that the mere presence in the body of a metabolite, consistent with past use of a drug, does not establish actual impairment at the time that the sample is taken or that the employee at any time used or abused drugs while at work or ever worked under the influence of drugs. On that basis he submits that the consent form and the test result itself cannot form the basis of discipline.

47 Counsel also cautions the Board with respect to any weight to be given to the evidence of Ms. Butler, at least to the extent that it concerns the employees at the Nanticoke refinery. He notes that the surveys to which she refers, dealing with general drug use trends within society, do not necessarily reflect the facts which may be found at the Nanticoke refinery, or in the surrounding community. He stresses that Ms. Butler admits that she did not interview employees in the bargaining unit and has no specific knowledge of the demographics or of the presence or absence of a drug use culture at or around the Nanticoke facility. He also submits that her analysis of deterrence principles, drawn largely from the model of the highway traffic breathalyser testing, does not speak to the justification of random drug testing in the workplace, particularly where there has been no demonstrated history of a drug problem. In that regard he stresses that it is not insignificant that neither nor the Parliament of Canada nor the Ontario Legislature has elected to authorize workplace drug testing, a governmental policy he submits is amply justified by the protections already provided to employers in safety sensitive industries within the existing Canadian jurisprudence. The Union does not challenge the content of the expert testimony of Drs. Willette, Kadehjian and Francescutti, dealing as it does with scientific accuracy, theories of deterrence and risk management. Its counsel argues that that evidence is simply not responsive to the legal issues, including the workplace protection of employee dignity and the balancing of employer and employee interests in

matters of personal privacy. Counsel also challenges the Company's demand that employees sign a consent form, under threat of discipline, when they are directed to submit to a random, unannounced drug test. In that regard he points to the warning given to Mr. Fletcher who submitted to a test, but wrote on the consent form that he did so under duress. Counsel submits that in no other reported case of drug testing are employees compelled, under pain of discipline, to sign a consent form on a basis that counsel characterizes as "sign, or else ...". He argues that the true issue should be whether the Company has justification to demand a drug test, an issue which he argues should turn only on whether there is reasonable cause to do so.

48 Additionally, with request to post-incident testing, counsel notes to the attention of the Board the wide language used within the administrative guidelines addressed to Company management with respect to the administration of post-incident drug testing. He points, among other things, to the following two paragraphs of the guidelines:

> Supervisors, managers and other Company representatives authorized to order post-incident tests are expected to exercise careful judgement in deciding when to conduct a test and which workers to test. As a general statement, testing must be conducted after all significant incidents, as defined below, unless there is clear evidence that worker performance could not have been a potential contributing factor. Because post-incident testing is an investigative procedure, testing is required even in the absence of direct evidence or suspicion of alcohol or drug misuse.
>
> . . .
>
> Post-incident testing may be conducted at management discretion for near misses or lower-level incidents if they are considered to have had a significant potential for more serious consequences. However, reasoned judgements are required in such cases to avoid treating employees in an arbitrary fashion or discouraging them from reporting lower-level incidents or near misses.

Counsel submits that the foregoing provisions and the Company's policy with respect to post-incident tests are excessively broad, with the potential to be applied in virtually any circumstance which could be said to have potential consequences for safety.

49 With respect to the jurisprudence, counsel notes that virtually all arbitrators have concluded that mandatory alcohol and drug testing is an extraordinary measure which amounts to a breach of the privacy of the individual, a measure which should be resorted to only in extremely circumscribed situations. He stresses that the preponderant Canadian jurisprudence expressly rejects mandatory, random, unannounced drug testing, a measure deemed to be beyond the reasonable standard of rules judged in accordance with the principles of the *KVP* case, and beyond any reasonable balancing of interests as between the employer and the employee.

50 Counsel notes that only one decision, a decision which has not been reported, which issued from Alberta, has supported the Company's policy. That award, which involves the Company at its Strathcona refinery and the Union's Local 777, was issued by a board of arbitration chaired by Arbitrator T.J. Christian, on May 27, 2000. Counsel stresses that that award has not been cited or followed by any other arbitrator in Canada, and runs counter to the clear preponderance of the jurisprudence, which is to the contrary with respect to the right of an employer to conduct speculative, random, unannounced drug and alcohol testing.

51 With respect to jurisprudence supportive of the Union's position, in addition to the cases cited above, counsel also refers the Board to the following awards: *Canadian National Railway v. U.T.U.* (1989), 6 L.A.C. (4th) 381 (Can. Arb.) (M.G. Picher); *National Gypsum (Canada) Ltd. v. I.U.O.E., Locals 721 & 721B* (1997), 67 L.A.C. (4th) 360 (N.S. Arb.) (MacKeigan); *Metropol Security v. U.S.W.A., Local 5296* (1998), 69 L.A.C. (4th) 399 (Ont. Arb.) (Whitaker); *I.U.O.E., Local 793 v. Sarnia Cranes Ltd.*, [1999] O.L.R.B. Rep. 479, [1999] O.L.R.D. No. 1282 (Ont. L.R.B.); *Construction Labour Relations v. I.U.O.E., Local 955* (2004), 129 L.A.C. (4th) 1 (Alta. Arb.) (Beattie); *U.F.C.W., Local 1288P v. Larsen Packers Ltd.* (2004), 135 L.A.C. (4th) 313 (N.B. Arb.) (North); *Fording Coal Ltd. v. U.S.W.A., Local 7884*, [2002] B.C.C.A.A.A. No. 9 (B.C. Arb.) (Hope); *Imperial Oil Ltd. v. C.E.P., Local 777*, [2001] A.G.A.A. No. 102 (Alta. Arb.)

(Simms); *Graymont Western Canada Inc. v. Cement, Lime, Gypsum & Allied Workers, Local D575* (2002), 114 L.A.C. (4th) 269 (Man. Arb.) (Jamieson).

52 On the basis of the foregoing, counsel for the Union asks the Board to declare that those portions of the policy at issue are invalid. He submits that the remedial order should draw that conclusion with respect to random, unannounced drug testing, the mandatory consent form and the breadth of management discretion which the policy allows in post-incident drug testing.

B — Company Argument

53 On behalf of the Company, Mr. Laskin addressed the general jurisprudence and the issue of the balancing of interests in support of the Company's policy of random, unannounced drug testing. Mr. Wells separately addressed the issue of post-incident testing and the consent form.

54 With respect to the first issue, namely mandatory, random, unannounced drug testing, counsel argues that there is a fair balancing of interests in the Company's policy. Stressing the highly safety sensitive nature of the refinery environment, a factor recognized by both parties, counsel submits that the facts tendered in evidence confirm that in the particular workplace in question, the policy under examination is appropriate and reasonable. He reminds the Board that to the extend that the Union never grieved random alcohol breathalyser testing, it has to that extent acknowledged the value of deterrence through the application of such a test, on a random, unannounced basis. And while counsel acknowledges that there has been a "magnificent" safety record demonstrated in the facility, he questions whether that record could have been achieved by any other means.

55 Counsel argues that both the science and the law have evolved considerably since the time of the McAlpine award. As a point of departure, he notes that the Ontario Court of Appeal ruled in *Entrop* that requiring employees to undergo mandatory, random, unannounced tests, in that case breathalyser tests, does not violate the *Ontario Human Rights Code*, to the extent that the test is capable of detecting impairment. Given this Board's ruling in the preliminary award, which essentially confirms that the Union has accepted random breathalyser testing, he submits that that reflects the parties' understanding of the kinds of measures which the Company can take to comply with the provisions of article 19.01 of the collective agreement, which reads as follows:

> **19.01** It is agreed by both parties that emphasis shall be placed upon the need for safe and healthy working conditions and practices on the Company premises. The Company shall continue to make provisions for the safety and health of its employees during the hours of employment.

Further, with respect to the Company's legal obligations, reference is made to section 25 of *The Occupational Health and Safety Act*, R.S.O. 1990, c. 0.1, s.25, which mandates that the employer must "take every precaution reasonable in the circumstances for the protection of the worker." Additionally, counsel notes the amendment of the *Criminal Code of Canada* in 2003, whereby section 217.1 of the *Code* now reads as follows:

> **217.1** Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

56 Referring to the expert testimony of Dr. Kadehjian, Dr. Willette, Dr. Francescutti and Ms. Butler, counsel stresses the fact that cannabis has a significant presence in current Canadian society, with an increase in use from 1989 to 2004 to the extent of more than doubling the persons who admit to past year consumption of the drug. He submits that the "impressionistic" evidence of Mr. Fletcher and Mr. Punchak should not be taken as a reliable barometer of the possible presence of drug use among the employees in the refinery, noting that Mr. Fletcher admitted to knowing of at least one employee having used marijuana. Counsel points to the unchallenged evidence that prior to the Union's certification an employee failed a urinalysis test by reason of having smoked marijuana, apparently to ease personal stress in his life.

It does not appear disputed that the test in question was by urinalysis, and did not confirm that the consumption of marijuana in that case caused impairment while at work.

57 Counsel points to the testimony of Dr. Francescutti as confirming the value of deterrence as a means of preventing injury incidents. He cites with favour the deterrence theory which holds that seat belt use has been improved by reason of random police checks. He also cites the random alcohol and drug testing used in one province in Australia, as a means of deterring impaired driving. Indeed, he notes that deterrent randomness is resorted to in a number of ways in the workplace, such as making random checks of contractors on site to ensure that they have the necessary permits and that they are complying with safety standards.

58 Counsel stresses that the Company's policy is intended to create a safe work environment by the reduction of any risks of accidents or incidents which could be contributed to by drugs and alcohol, and to deter the use of such substances where their use might negatively affect work performance and safety. He stresses that the policy is many-faceted, and includes such elements as assessment and rehabilitation, education and awareness as well as work rules and testing. He notes that an employee assistance plan is an integral part of the Company's policy, and that its referral and aftercare programs have assisted employees with substance abuse problems to achieve rehabilitation and return to work after successful treatment.

59 With respect to the breadth of the Company's policy concerning alcohol and drug testing, counsel notes that such testing is done in the following circumstances:

- Post-incident testing;
- Reasonable cause testing, where reasonable cause exists to suspect alcohol or drug use in violation of the policy;
- Periodic unannounced testing as part of a post-rehabilitation and aftercare agreement with an employee with a past substance abuse or dependence problem;
- Random testing, but only for employees in safety sensitive positions and specified positions;
- Initial certification testing for safety-sensitive positions; and
- Initial entry and periodic testing for specified positions.

As noted above, counsel emphasises that the policy at the Nanticoke refinery is not the same as the policy reviewed by Arbitrator McAlpine in the earlier award cited above. He explains that it is a policy which evolved in light of the jurisprudence, and in particular the decision of the Ontario Court of Appeal in *Entrop* which, he submits, effectively confirmed the legitimacy of random, unannounced drug testing, to the extent that such testing would be able to show actual impairment in a safety sensitive work environment.

60 Counsel emphasises that the Company's return to random, unannounced drug testing, after the suspension of urinalysis tests in the wake of *Entrop* , was only made possible by the oral fluid drug test technology which does detect actual impairment by cannabis. He argues that the purpose of giving the test is not to catch or control employees, but rather to deter them from dysfunctional behaviour which would involved obvious safety risks in the workplace. Reviewing the evidence of the Company's expert witnesses as well as Mr. Moyer, counsel notes that the manner in which the tests are conducted is fully consistent with respecting the privacy of the individuals involved and with producing a reliable, fully verified conclusion. He further submits that the Company's belief in the deterrent value of random drug testing is not simply a matter of the Company's opinion, but is a confirmed fact verified by the testimony of expert witnesses such as Dr. Francescutti and Dr. Willette, as well as the evidence of one Union witness, Ronald Fletcher. He maintains that relying on the self-policing of employees themselves is simply not an acceptable substitute.

61 With respect to the jurisprudence, counsel cites the same cases referred to by counsel for the Union. He stresses, however, that none of those case deal with a regime of random, unannounced drug testing which can detect actual

impairment. In that regard he refers the Board to the comments of Arbitrator Burkett in the *Trimac* award, at p. 272-73, where stress is placed upon the inherent flaw found in random urinalysis tests, which fall short of proving impairment and tend, rather, to provide the employer with an intrusive view into the private life of an employee, who may well have consumed a drug such as cannabis away from the workplace. That concern, counsel stresses, is not present under the policy which the Company has introduced.

62 As noted above, the decision of the Ontario Court of Appeal in *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (Ont. C.A.) is central to the Company's policy to re-introduce random drug testing by the oral fluid drug test. Its counsel draws to the Board's attention the following passage from the judgement of the Court, appearing at paras. 98 and 99:

> [98] I turn now to whether the 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, 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 test currently exists 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.

63 It is also useful to note the comments of the Court with respect to the different footing upon which it viewed random alcohol testing by breathalyser. In that regard it reasoned, at paras. 106 through and including 111:

> [106] The provisions for random alcohol testing for employees in safety sensitive positions stand on a different footing. Breathalyser testing can show impairment. The expert evidence at the hearing confirmed the reliability and utility of breathalyser 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, 0.04 per cent. Studies indicated that with a blood alcohol concentration of 0.04 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 millilitres 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 breathalyser 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 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 the 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 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 not use trained supervisors to detect impairment, but in conjunction with breathalyser 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, 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 or 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 is significant that the intervenor, who vigorously opposed drug testing, took no position on alcohol testing in the workplace.

64 Counsel for the Company stresses that the technology of oral fluid drug testing must be viewed as the equivalent of alcohol breathalyser test, as it does establish actual impairment. On that basis, he submits that such testing can plainly not be viewed as contravening the *Ontario Human Rights Code*, R.S.O. 1990, c.H.19. Further, he submits that it is a reasonable condition of employment that employees in safety sensitive positions be subject to random, unannounced testing for both alcohol and drugs, and that the Company's policy as presently administered is in furtherance of a valid business purpose of safety and the deterrence of substance use and abuse in the workplace, and does not violate the collective agreement.

65 Mr. Wells addressed the issues of post-incident testing and the mandatory consent form. With respect to post-incident testing, he stresses that the policy as it stands is no different from that same aspect of the policy which was essentially approved in the award of Arbitrator McAlpine in the grievance concerning the Company's IOCO refinery. The policy necessarily gives to local management a discretion to determine whether a given incident is one that does justify alcohol and drug testing. The administrative guidelines do, however, provide some guidance to management with respect to that discretion. In particular, it is to be used after a significant incident, such as a work related accident having serious consequences, or after a near miss or lower level incident which nevertheless has important potential for more grave consequences. The guidelines indicate that testing is not to be conducted where the evidence indicates that worker

performance was not a contributing factor in the incident. Noting that urinalysis is used in post-incident testing, counsel explains that the main purpose of post-incident testing is investigative, seeking to confirm whether substance use can be ruled out as a contributing factor. Counsel recalls the testimony of Dr Francescutti to the effect that a near miss should be viewed as the tip of the iceberg with respect to injury or possible fatal consequences. Reiterating that the Company's post-incident policy was reviewed and essentially approved in both the McAlpine arbitration award as well as in the decision of the Ontario Court of Appeal in *Entrop* , counsel submits that there can be no legitimate objection to that aspect of the Company's drug and alcohol testing policy.

66 With respect to the issue of the consent form, counsel stresses that it is imperative that employees not alter or qualify the language of the consent form, the purpose of which is to ensure the proper administration of alcohol and drug tests in a manner consistent with the Company's policy. In this regard he notes that the Chair of this Board reviewed a similar provision in the drug policy of J.D. Irving Ltd. which placed an affirmative obligation on employees to complete and sign any required documentation. He submits that the case at hand is no different, and that it is not inappropriate or contrary to the collective agreement for the Company to seek to record the acknowledgement and signature of an employee on a consent form on the occasion of a drug or alcohol test. There is nothing, he submits, in the Company's practice which would violate the collective agreement.

67 Counsel notes that the Company does not in this case, as it apparently did in the Gabriel grievance, argue that the consent form is necessary to negate the possible conclusion that without consent there has been a violation of privacy rights, if not an assault upon the person, on the basis of the arbitration awards in *Monarch Fine Foods Co. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 L.A.C. (2d) 419 (Ont. Arb.) (M.G. Picher) and *Alberta Wheat Pool v. Grain Workers' Union, Local 333* (1995), 48 L.A.C. (4th) 332 (B.C. Arb.) (Williams). He submits that in the case at hand the Company's focus is on the orderly administration of the acquiring of health information as part of a legitimate safety program. Counsel also stresses that boards of arbitration in Canada have recognized that, in a safety sensitive industry, where drug testing is administered on what has been called the "Canadian Model", the refusal of an employee to consent to a drug test may be grounds for termination.

III — Supplementary Submissions

68 Following the hearing the Board communicated with counsel for both parties to request supplementary submissions. The Board felt that it should have additional assistance from the parties with respect to understanding certain aspects of the administration of oral fluid testing by buccal swab, as provided for under the *Criminal Code of Canada*. The Board noted to the attention of the parties the consideration which the Supreme Court of Canada has given to those provisions in cases such as *R. v. Stillman*, [1997] 1 S.C.R. 607 (S.C.C.); *R. v. B. (S.A.)*, [2003] 2 S.C.R. 678 (S.C.C.); *R. v. C. (R.)*, [2005] 3 S.C.R. 99 (S.C.C.). We also requested further submissions in relation to an arbitration award in *St. Peter's Health System v. C.U.P.E., Local 778* (2002), 106 L.A.C. (4th) 170 (Ont. Arb.) (Charney). That award concerned an analysis of the concept of assault upon the person in the context of an employer-enforced inoculation.

69 *Stillman* involved the forcible taking of bodily samples, including a buccal swab, from a murder suspect. It arose prior to the amendment of the *Criminal Code of Canada*, with the addition of section 487.05, so that the issue was whether, at common law, police authorities could exercise the right to forcibly obtain hair samples, teeth impressions, and buccal swabs from a suspect, or whether to do so contravened section 8 of the *Canadian Charter of Rights and Freedoms*. The court found that the *Charter* was violated and that the hair samples, buccal swabs and dental impressions obtained should be excluded from evidence.

70 Subsequent to the events in *Stillman* , as reflected in the decisions of the Supreme Court, the *Criminal Code*, R.S.C. 1985, c. C-46 was amended by the insertion of the provisions of sections 487.04 to 487.09 to deal with issuing search warrants to seize bodily substances for forensic DNA testing. The provisions of 487.05(1), considered by *obiter* analysis in *Stillman* , provided as follows:

> **487.05(1)** A provincial court judge who on ex parte application is satisfied by information on oath that there are reasonable grounds to believe
>
> (a) that a designated offence has been committed,
>
> (b) that a bodily substances has been found
>
> (i) at the place where the offence was committed,
>
> (ii) on or within the body of the victim of the offence,
>
> (iii) on anything worn or carried by the victim at the time when the offence was committed, or
>
> (iv) on or within the body of any person or thing or at any place associated with the commission of the offence,
>
> (c) that a person was a party to the offence, and
>
> (d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person.
>
> and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a peace officer to obtain, or cause to be obtained under the direction of the peace officer, a bodily substance from that person, by means of an investigative procedure described in subsection 487.06(1), for the purpose of forensic DNA analysis.

71 As provided in section 487.06(1), upon proper judicial authority bodily samples could be taken by the plucking of individual hairs, the taking of buccal swabs by swabbing the lips, tongue and inside cheeks of the mouth and the taking of blood by pricking the skin's surface with a sterile instrument.

72 As reflected in *R. v. C. (R.)* , the *DNA Identification Act* S.C. 1998, c.37 and certain related amendments to the *Criminal Code* gave to the courts the further power to order the collection of bodily substances from certain convicted offenders, for recording in a regulated data bank. The extensive procedures and safeguards surrounding that process, and the factors to be considered in determining whether to grant such an order were extensively reviewed by the Court in *R. v. C. (R.)*

73 This Board is well aware that the issue before us is entirely a civil matter, relating narrowly to the relative rights of the Company and the employees as represented by their Union under the provisions of the collective agreement. The issue is whether the requirement for employees to submit to random and unannounced surrendering their oral fluids by buccal swabs violates the collective agreement, including article 3.02 which provides, in part:

> **3.02**
>
> The Union and the Company are committed to a work place environment that is free of harassment and where individuals are treated with respect and dignity.

74 Why did we ask for submissions on this aspect of the law? At a minimum, it appears to the Board that it is not inappropriate to have some regard to general societal values and standards with respect to the protection of the dignity of the person, in particular as relates to rights of personal privacy and the surrender of bodily substances. On that basis we felt it appropriate to consider the value, if any, of the analogous concepts and principles which operate within the criminal law in Canada, much as the parties themselves have argued the analogous deterrence theories based on the experience of roadside breathalyser programs. Bearing in mind that the issue before us is unprecedented, as it appears to involve the first instance of Canadian employees being compelled to provide saliva samples by buccal swab to their

employer on a random and unannounced basis, we felt that we should have the broadest perspective and the fullest submissions possible.

75 We also felt that it was appropriate to hear from the parties with respect to the analysis of Arbitrator Charney concerning what he characterized as the enforced inoculation of employees as tantamount to assault upon their person, in accordance with certain fundamental principles of common law. Having become aware of that award only after the hearing, and it not being a case considered or discussed by counsel for either party, we considered it fair to allow submissions to be made in respect of that award, to the extent that it does involve some analysis of the limits of physical intrusion upon or into the body of an employee.

A — Union's Supplementary Submission

76 Counsel for the Union submits that the comment of the Supreme Court of Canada in *Stillman* to the effect that the taking of bodily samples is highly intrusive speaks directly to the issues in the case at hand. He submits that the Company's taking of samples from the body of its employees, under pain of discipline or discharge, violates the sanctity of the body, an element essential to the maintenance of human dignity.

77 Counsel for the Union stresses the comments of the Court and of arbitrators which confirm that absent consent or statutory authority any physical intrusion into the body of an individual is an assault, stressing that there can be no "*de minimis*" level of touching. He submits that the insertion of a buccal swab, which involves the insertion of a probe into a bodily orifice, is manifestly intrusive, in violation of the privacy and dignity of the individual. Counsel stresses that in the case at hand there is no statutory or common law authority for the intrusion into the body exercised by the Company. He also emphasises that there can be no conclusion drawn by this Board that there is any meaningful consent to the Company's action, which he characterizes as an assault. He stresses that the consent form extracted from employees is a meaningless consent, as it is forced upon them under pain of termination. He submits that whatever the law may be in other countries, there is no law in Canada which gives to the Company any lawful authority to compel the surrender of saliva by a buccal swab. Nor, he argues, can a board of arbitration grant that authority.

78 Counsel argues that it is counter-intuitive that the power of police authorities to gather bodily samples by buccal swab is available only by reason of clear statutory provisions enacted by Parliament, in the *Criminal Code*, while the Company asserts that its ability to do the same flows simply from the contract of employment. That, counsel submits, cannot be an accurate reflection of the law. Further, with respect to the discretion of police, as for example in R.I.D.E. program breathalyser testing, counsel stresses that police officers in Canada cannot require a driver to provide any breath sample until such time as the officer first forms a reasonable cause belief that the person may be impaired. In light of that constraint, he questions the basis upon which the Company can assert a right to randomly and intrusively test employees for drugs, without any threshold requirement of reasonable cause.

79 While acknowledging that the criminal cases reviewed deal with *Charter* rights, Counsel for the Union reminds the Board that arbitrators have, particularly in dealing with issues of privacy, reasoned by analogy from the *Charter* jurisprudence, such as in cases involving surveillance and the search of employees. In that regard he cites *Labatt Ontario Breweries (Toronto Brewery) v. Brewery, General & Professional Workers Union, Local 304* (1994), 42 L.A.C. (4th) 151 (Ont. Arb.) (Brandt), where it was held that video surveillance tape taken of an employee in his private life was inadmissible in evidence.

80 In approaching the *Charter* jurisprudence counsel stresses that it is important to recall that the employees in the refinery at hand, being compelled to undergo buccal swab testing and the surrender of bodily fluids under the threat of discharge, have done nothing wrong, have no prior record of involvement with drugs and have given their employer no reasonable cause to suspect any wrongdoing on their part. By comparison, he notes that the *Criminal Code* and *Charter* jurisprudence give extensive protections to safeguard the privacy rights of an accused, safeguards which do not exist with respect to the invasive procedures which the Company utilizes in the random and unannounced testing of all of its employees. The Union-submits that the *Charter* jurisprudence cited above compellingly supports, by analogy, the

position of the Union in the case at hand, namely that the forced obtaining of body fluids by buccal swab is tantamount to an assault and constitutes an unwarranted invasion of the privacy of the individual and a violation of the dignity of the employee, contrary to the collective agreement.

B — Company's Supplementary Submission

81 Counsel for the Company takes a very different view. He cites *R. v. B. (S.A.)* as judicial authority for the proposition that the oral fluid testing conducted by the Company is "minimally intrusive" and on balance represents a reasonable and appropriate means of managing risk in a safety sensitive environment consistent with the collective agreement. Counsel further distinguishes the decision of Arbitrator Charney, emphasizing the difference between medical treatment, which was the issue there under consideration, and testing. He also notes that Arbitrator Charney departed from the balancing of interests approach generally accepted in the arbitral jurisprudence concerning the right of an employer to demand an alcohol or drug test of an employee who occupies a safety sensitive position.

82 Counsel argues that the fundamental premises which underlie the *Charter* cases, such as *R. v. Stillman* , are vastly different from those which operate in the labour relations context. The *Charter* protections and related principles dealt with in the criminal cases deal with the all-important protections of the individual relative to the powers of the state, rather than the contractual rights which run between employer and employee. In approaching the latter, he stresses that the employer's interest in ensuring a safe workplace involves obligations, including extensive legal obligations, to protect employees and the public by the enforcement of safe practices, failing which the employer is subject to the application of common law doctrines of vicarious liability as well as to statutory sanctions.

83 Counsel also notes that in cases such as *Stillman* , the purpose of administering a buccal swab is substantially different than for the oral fluid testing conducted by the Company. In the criminal context the object is to obtain a DNA sample, with the potential to disclose a broad range of information about the individual who is the subject of the test. In contrast, he submits, the sole purpose of the oral fluid test administered by the Company is to gain information with respect to possible impairment by the use of cannabis. Moreover, he argues, the method by which the Company seeks to contractually enforce drug testing cannot be compared to the force exercised by the police in *Stillman* , characterized by the majority of the Supreme Court of Canada as "the abusive exercise of raw physical authority". Very different considerations arise, he submits, when the impugned conduct essentially compels an individual to incriminate himself or herself by providing bodily samples to the state. The issues at stake in the criminal and *Charter* cases are not, to that extent, analogous or comparable to the issues before this Board with respect to the application of the collective agreement.

84 Counsel for the Company nevertheless submits that the cases, and in particular *R. v. B. (S.A.)* , are a useful authority with respect to approaching the balancing of interests in the grievance at hand. In that case, while the Court recognized that the taking of bodily samples may constitute a significant intrusion on the privacy and dignity of the individual, it did comment on the limited intrusiveness of oral fluid testing. In that case, at para. 44 of its decision, the majority of the Court characterized the taking of a buccal swab as "quick and not terribly intrusive". Unlike urinalysis, counsel highlights, the buccal swab test does not require that an individual reveal a part of the body which is not normally exposed to view. That perspective, in part, led the Court to conclude that the collection of DNA samples by means of a warrant under the *Criminal Code* does not amount to "an intolerable affront to the physical integrity of the person."

85 Counsel submits that that conclusion is consistent with the Company's own view that oral fluid testing is, if anything, substantially less intrusive than the previously used method of urinalysis. He submits that the taking of a buccal swab respects privacy, is reasonable in the circumstances, and is no more intrusive than breathalyser testing, upheld by the Ontario Court of Appeal in *Entrop* and recognized by the current Ontario Human Rights Commission Policy on alcohol and drug testing as "minimally intrusive" (Ontario Human Rights Commission, *Policy on Alcohol and Drug Testing* (Sept. 2000) at p. 6). Also, with respect to the scope of privacy interests, counsel for the Company notes the difference between urinalysis testing and the use of the buccal swab. A concern, he acknowledges, expressed by some arbitrators with regard to urinalysis testing is that urine samples might be used to detect information about the

presence of substances in an employee unrelated to impairment on the job, such as medications which might normally be protected by rules of medical confidentiality. He stresses that the only information disclosed through the oral fluid test, as administered by the Company, is the level of THC in the individual, so as to show likely impairment on the job. In contrast, as acknowledged by the Court in *R. v. C. (R.)* , the taking of a bodily substance for DNA purposes represents a high degree of intrusion because, in the words of the Court, at para. 27 "... An individual's DNA contains the 'highest level of personal and private information' ... capable of revealing the most intimate details of a person's biological makeup." Counsel also notes the comment of the Court at para. 28 to the effect that "... Without constraints on the type of information that can be extracted from bodily substances, the potential intrusiveness of a DNA analysis is virtually infinite." He submits that that concern simply does not arise under the Company's policy to utilize buccal swabs for the detection of THC in the blood at levels of 10 nanograms per millilitre or higher. He submits that, like a breathalyser test, the only fact that the oral fluid test discloses is highly relevant to the employer's interest, namely whether the employee is likely to be impaired by cannabis while operating in a safety sensitive environment. As applied by the Company, he characterized the buccal swab test as minimally intrusive both from the physical and the informational standpoint.

86 Finally, counsel for the Company maintains that the decision of Arbitrator Charney in the *St. Peter's Health Systems* case is not instructive to the issues before this Board. He stresses that the matter dealt with by Arbitrator Charney concerned enforced medical treatment and not drug testing. That award did not, therefore, follow the established reasonableness, balancing of interests approach which has been consistently applied by arbitrators in Canada with respect to the issue of drug testing among safety sensitive employees. Counsel notes, as well, that Arbitrator Charney recognized the distinction between medical treatment and medical testing. He emphasises that Canadian arbitration jurisprudence has uniformly rejected the arguments made by trade unions to the effect that drug testing is only permissible where it is authorized by statute or by express contractual consent. That approach, he says, was rejected in favour of the balancing of interests approach which, he argues, favours the random drug testing policy adopted by the Company.

IV — Decision

87 There is no real dispute with respect to the facts which are before us. It is common ground that the Nanticoke refinery is a highly safety sensitive workplace. The evidence confirms that drug testing, initially by way of urinalysis and more recently through oral fluid drug testing, has been conducted at the refinery since 1992, with a brief suspension following the decision of the Ontario Court of Appeal in *Entrop* .

88 In a period spanning more than fifteen years there has never been a case of an employee being found to be impaired by drugs at work. Indeed, there was only one instance of a positive urinalysis test, said to have occurred prior to the certification of the Union in 1995, a case which because it involved a urinalysis test, could not confirm impairment while at work, although it did indicate that the employee in question had used marijuana at some point in his personal life. Since then, through thousands of drug tests, there has not been a single positive result, whether through urinalysis or through the current use of the buccal swab. While the evidence before us supports the conclusion that there has been some increase in the frequency of use of cannabis generally in Canadian society over the last two decades, there is no evidence whatsoever of any significant degree of cannabis use among the workforce at the Nanticoke refinery. Indeed, the evidence tends to the contrary, revealing the picture of a mature and safety conscious workforce with almost no record of drug use or abuse.

89 Nor is the evidence concerning the Company's current method of administering random, unannounced drug testing disputed. By means of a computer program, apparently administered from Houston, employees are called upon to undergo both alcohol and drug testing when they are identified to do so, something which happens not less than once a year. The drug test is by means of a buccal swab which is used to identify only impairment by the use of cannabis, utilizing the cutoff point of 10 nanograms per millilitre of blood. It is not contested that the results of the oral fluid drug tests do disclose impairment by the use of cannabinoids. However, the condition of impairment is not known at the time the test is administered, but only when the test result is received, a number of days after the test is administered, once the laboratory analysis is completed in Houston.

90 The first issue to be addressed is whether the administration of mandatory, random, unannounced drug tests by means of the buccal swab method is a violation of the collective agreement, as alleged by the Union. Secondly, this Board must determine whether the post-incident drug testing policy of the Company contravenes the collective agreement and whether the mandatory consent form required of employees is also a breach of the agreement. In addition, the Union challenges whether the mere presence in the body a drug or its metabolite can properly be a violation of the Company's policy.

91 Before approaching these issues we consider it important to review briefly the evolution of Canadian arbitral jurisprudence with respect to the right of an employer, in a safety sensitive industry, to demand that an employee undergo a drug test. The first reported case relating to drug testing is *Canadian Pacific Ltd. v. U.T.U.* (1987), 31 L.A.C. (3d) 179 (Can. Arb.) (M.G. Picher). That grievance involved the discharge of a railway conductor who was found to be involved in the large scale growing of marijuana plants at his residence. The arbitrator ruled that the Company was justified in seeking to have the employee take a drug test in the circumstances disclosed. In that case the arbitrator reasoned and concluded as follows, at pp. 185-87:

> 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.* ***Monarch Fine Foods Co. Ltd.*** *(1978), 20 L.A.C. (2d) 419 (M.G. Picher);* ***B.P. Oil Ltd.*** *(1972) 24 L.A.C. 122 (Palmer);* ***Lake Ontario Steel Co. Ltd.*** *(1970) 22 L.A.C. 206 (Hanrahan)*).
>
> 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.
>
> 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, Regulation 409 of the Air Regulations under the *Aeronautics Act* (*C.R.C. 1978 c.2*) 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 section 5.5 of the *Aeronautics Act*, (*S.C. 1985 c.28*), 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.
>
> 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 stand-point 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.**
>
> [emphasis added]

92 In the nearly twenty years since the above decision in *CP Rail* the preponderance of Canadian arbitral jurisprudence has not varied from the conclusion that in a safety sensitive industry, where there is reasonable cause to do so, absent any contrary provision in a collective agreement, it is open to an employer to require that an employee undergo a drug test. From the outset it was recognized that to conduct a drug test is an extraordinary and intrusive measure, justified only by the touchstone condition of reasonable cause. The notion that under a collective bargaining regime based on bargaining between union and employer it is implicitly open to an employer to subject all employees, regardless of cause, to speculative, random drug testing has been all but universally rejected.

93 Reasonable grounds as a necessary basis for drug testing was again affirmed in *Canadian National Railway v. U.T.U.* (1989), 6 L.A.C. (4th) 381 (Can. Arb.) (M.G. Picher). In that case, an employee with a record of drug use agreed to periodic drug testing, but failed to appear at a particular drug testing appointment, as a result of which he was terminated. While the arbitrator found that in the circumstances the grievor's failure to appear for the drug test was explained and justified, the award nevertheless confirmed the reasonable cause approach to drug testing in a safety sensitive workplace, rejecting the concept of speculative, random drug testing for all employees. At p. 387 the arbitrator reviewed the final paragraph of the *C.P. Rail* award, above, and commented as follows:

> As may be gleaned from the foregoing, 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.

94 The foregoing approach was adopted by the board of arbitration which was called upon to review the alcohol and drug testing policy of the instant Company, in that case relating to its IOCO refinery in British Columbia: *Esso Petroleum Canada v. C.E.P., Local 614*, [1994] B.C.C.A.A.A. No. 244 (B.C. Arb.) (McAlpine). That award confirmed the balancing of interests approach and the right of the employer to demand alcohol and drug testing where it has reasonable cause to do so. The board expressly rejected, however, the legitimacy of random alcohol and drug testing for employees generally, although that measure was deemed appropriate in the context of an employee undergoing rehabilitation for an acknowledged alcohol or drug use problem, and then only for a limited period of time. The majority in that case also struck down the consent form for drug tests which employees were required to sign. In that regard the board commented at para. 237: "Viewed realistically, the test has been imposed by management. The employee may not have consented to the test at all." The majority ruled that it would be sufficient for the Company to have the employee sign a form of acknowledgement, rather that a form of consent.

95 The issue of mandatory, random and unannounced alcohol or drug testing was thoroughly reviewed by Arbitrator Burkett in the *Trimac* award, a case which arose in the safety sensitive trucking industry. He cited a number of precedents confirming that the random, unannounced alcohol or drug testing of all employees is not within the unfettered prerogatives of management in a collective bargaining regime. In addition to the 1989 *CNR* case, cited above, he referred to the following awards where such policy provisions were struck down: *Provincial-American Truck Transporters v.*

Teamsters, Local 880 (1991), 18 L.A.C. (4th) 412 (Ont. Arb.) (Brent); *C.H. Heist Ltd. v. E.C.W.U., Local 848* (1991), 20 L.A.C. (4th) 112 (Ont. Arb.) (Verity); *Procor Sulphur Services v. C.E.P., Local 57* (1998), 79 L.A.C. (4th) 341 (Alta. Arb.) (Ponak); *Esso Petroleum Canada v. C.E.P., Local 614* (1994), 56 L.A.C. (4th) 440 (B.C. Arb.) (McAlpine); *Metropol Security v. U.S.W.A., Local 5296* (1998), 69 L.A.C. (4th) 399 (Ont. Arb.) (Whitaker); and *I.U.O.E., Local 793 v. Sarnia Cranes Ltd.*, [1999] O.L.R.B. Rep. 479 (Ont. L.R.B.).

At pp. 270-271 Arbitrator Burkett commented as follows:

> The Company relies on the management rights clause here as distinguishing this case from those dealt with in the awards cited herein. The management rights clause in the collective agreement(s) here expressly assigns to management the right to determine the qualifications of an employee to perform the work and to make, publish and enforce rules for the promotion of safety. It is the position of the Company that in implementing mandatory random testing it was acting within its express authority to make rules for the promotion of safety and to assess qualifications to perform the work of the position. While the management rights clause here is more specific than most others in its elaboration of the right to make to make rules for the promotion of safety and the right to determine qualification, this elaboration does not constitute express authority to unilaterally impose mandatory random drug testing without challenge. In the first place, the express right to determine qualifications to perform refers to the educational, licensing and other qualifications required to hold a position. It does not encompass fitness to perform; that is the mental and physical capacity of an employee to perform the duties of the position. The latter remains as an implied management right subject to the balancing of impacts discussed herein. As importantly, the express right to make rules for the promotion of safety, while it pertains to the subject matter at hand, cannot be read as constituting a grant of authority to invade employee privacy to the extent caused by mandatory random drug testing. There is a myriad of rules that relate to safety in the workplace that do not invade employee privacy. Clearly, the employer has the express authority to make and enforce these rules. However, it would require a quantum leap to conclude that by assigning to management the express right to make and enforce rules for the promotion of safety, the intention was to give management the express right to unilaterally enforce mandatory random drug testing without challenge and thereby to override employee privacy rights in the manner described. Absent an express reference to mandatory random drug testing, this is a leap that I cannot make. Where privacy rights are impacted to the extent caused by mandatory random drug testing, express reference to mandatory random drug testing would be required to evidence such an intention. Absent an express grant of authority to management to impose mandatory random drug testing, the employer acts on the basis of an implied right that is subject to challenge under the just cause provision as an unwarranted invasion of employee privacy.

96 Arbitrator Burkett noted that the urinalysis test system being used by Trimac could not determine impairment, and tended to provide information involving personal lifestyle choices made within the employee's private life, and not at work. That fact, coupled with the lack of any evidence of a serious alcohol or drug related problem in the workplace, also prompted him to rule against the policy of mandatory, random drug testing. At pp. 275-76 he commented:

> ... However, in contrast to the medical examination cases where a health risk was established, there is no evidence here of any behaviour pattern that would support the conclusion that there exists a safety risk by reason of either the immediate or residual effects of drug taking within this bargaining unit. Furthermore, in contrast to the medical examination cases where the medical examination was the only means of identifying individuals who posed a safety risk by reason of ill health, the urinalysis drug test here cannot identify impairment at work and, therefore, does not serve a legitimate business purpose as would override employee privacy rights.
>
> Having regard to all of the foregoing, it must be found that under this collective agreement and on these facts, the Company policy of requiring its drivers to submit to mandatory random drug testing is unenforceable.

Finally, in his conclusion, at p. 278, Arbitrator Burkett stated:

> Whatever might be said of the accommodation aspects of the Company's drug and alcohol testing policy, it has been found that the requirement upon the employees of Bulk Systems to submit to random drug testing is not reasonable and, therefore, not enforceable. The Company has failed to discharge the onus upon it of establishing that the policy is rationally and necessarily connected to its legitimate business interests. The Company has failed to establish any pre-existing experience or incidents within this bargaining unit as would support the need for mandatory random drug testing of all bargaining unit employees. Furthermore, urinalysis, the mechanism used to detect drug use, does not establish whether an employee is under the influence at work. Finally, insofar as the Company has based its need for mandatory random drug testing on the risk caused by the delayed or residual effects of drug taking, it has failed to establish that the level of risk so caused meets the threshold necessary to establish an overriding business interest and, thereby, to legitimize the resultant invasion of privacy.

97 Perhaps the best brief summary of the approach of Canadian arbitral jurisprudence to prefer reasonable cause testing to random drug testing among unionized employees in a safety sensitive industry is the following comment by Arbitrator Ponak in the *Procor Sulphur* Award, at p. 348:

> The value placed on our personal privacy generally outweighs the right to test simply because some employees, sometimes might be abusing alcohol or drugs and coming to work impaired. The balance tips, however, when an employer has good reason to suspect that the risk factor of impairment has been increased for an employee who occupies a safety sensitive position.

98 It is fair to say that over time the arbitral jurisprudence in Canada has developed relatively clear lines as to what constitutes an acceptable drug and alcohol testing policy in a safety sensitive workplace which is governed by a collective bargaining regime. That approach is well represented in the following awards: *Trimac Transportation Services - Bulk Systems v. T.C.U.* (1999), 88 L.A.C. (4th) 237 (Can. Arb.) (Burkett); *Canadian National Railway v. CAW-Canada* (2000), 95 L.A.C. (4th) 341 (Can. Arb.) (M. Picher); *Dupont Canada Inc. v. C.E.P., Local 28-0* (2002), 105 L.A.C. (4th) 399 (Ont. Arb.) (P.C. Picher); *J.D. Irving Ltd. v. C.E.P., Locals 104 & 1309* (2002), 111 L.A.C. (4th) 328 (N.B. Arb.) (M.G. Picher).

99 The foregoing jurisprudence has come to be viewed as tantamount to a Canadian code for drug testing in a safety sensitive workplace governed by collective bargaining, the regime by which terms and conditions of employment must be negotiated between employers and unions. They have become widely accepted and applied. Indeed, the drug testing policies and limitations fashioned within that jurisprudence came to be recognized as the "Canadian model" as adopted in the construction industry in Alberta (see *Construction Labour Relations v. I.U.O.E., Local 955* (2004), 129 L.A.C. (4th) 1 (Alta. Arb.) (Beattie).

100 At the risk of oversimplification, the "Canadian model" for alcohol or drug testing in a safety sensitive workplace as developed in the arbitral jurisprudence generally contains a number of elements as summarized below:

- 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.

• The cases generally recognize that an employee's refusal or failure to undergo an alcohol or drug test in the three circumstances described above may properly be viewed as a serious violation of the employer's drug and alcohol policy, and may itself be grounds for serious discipline. The failure or refusal to take an alcohol or drug test, however, like the registering of a positive test, does not necessarily justify automatic termination. The appropriate disciplinary sanction in such a case remains subject to the general just cause provisions of the collective agreement and is an issue to be determined on a case by case basis, having regard to all of the relevant facts.

101 As set out above, a key feature of the jurisprudence in the area of alcohol or 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 of 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.

102 The only case of which we are aware which has gone in the opposite direction is the Alberta decision of Arbitrator Christian in the award concerning the Imperial Oil Strathcona refinery unit, an unreported decision cited above. A review of that award indicates that its primary thrust was to focus more narrowly on the right of the Company to conduct random, unannounced breathalyser tests for the detection of alcohol impairment. It concerned the termination of an employee for having failed a breathalyser test. As noted above, for reasons expressed in our preliminary award, we have found that the Union local before us has effectively accepted the legitimacy of random breathalyser testing, not having grieved such tests since the certification of the Union at Nanticoke in 1995. That circumstance is to be distinguished from the dispute before us, relating as it does to the introduction of a new form of random drug testing by the analysis of oral fluids, in May of 2003.

103 In approaching this highly sensitive issue we consider it important to bear in mind the overall legal context within which the preponderant arbitral principles, as reflected in cases such as *CN, Dupont* and *Trimac*, gradually emerged. Neither the Parliament of Canada nor any of the provincial legislatures has legislated to grant to employers the statutory or regulatory authority to conduct alcohol or drug testing. That is to be contrasted with the drug testing regime in the Unites States, which is highly legislated and regulated, essentially allowing much broader scope for the alcohol or drug testing of employees than is the case in Canada. It is not unreasonable to conclude that Canadian legislators have taken cognizance of the jurisprudence above, appreciating that in Canada arbitral principles have recognized the right of an employer, particularly in a safety sensitive industry, to conduct alcohol or drug testing of its employees where there is reasonable cause to do so, or where an incident or accident would justify it, or as part of rehabilitative, continuing employment agreement.

104 As the cases would indicate, the "Canadian model" has gained broad acceptance within safety sensitive industries in Canada. The reported jurisprudence is devoid of any serious incidents or accidents attributed to workplace drug use. That would suggest, as a general rule, that the balancing of interests approach evolved by Canadian arbitrators has been an appropriate, measured and ultimately effective response in balancing the rights of employers and employees in this sensitive area. While it is obviously for each employer to decide which course it feels is appropriate for its enterprise, the fact remains that a significant number of major employers in highly safety sensitive industries in Canada have founded their alcohol and drug testing policies on principles of reasonable cause and have not attempted to force upon their

employees mandatory, random, unannounced drug testing. To the extent that those employers and industries have functioned well and have operated safely without apparent difficulty by holding to reasonable grounds as the basis for demanding a drug test, there is little reason to conclude that random, unannounced drug testing of all employees is, of necessity, an essential element for a successful alcohol and drug policy.

105 There can be no doubt about the good faith intention of the Company in the case at hand. It has for many years openly espoused random alcohol or drug testing as an essential part of its chosen policy in the promotion of safe workplace practices. Because of its view of the deterrent value of random testing, it has followed that approach since 1992, suspending it only with respect to drug testing after the decision of the Ontario Court of Appeal in *Entrop* . It now maintains that, based on the reasoning of the Court in *Entrop* , it can properly utilize oral fluid drug testing on a random, unannounced basis as part of its current alcohol and drug policy. It therefore becomes extremely important to analyse closely the decision of the Ontario Court of Appeal in *Entrop* .

106 Firstly, and in our view importantly, *Entrop* did not involve the interpretation, application or administration of the terms of a collective agreement, as does the case before us. That case involved a human rights complaint brought by an individual employee, an acknowledged alcoholic, Martin Entrop, employed at the Company's Sarnia refinery. Upon the introduction of the Company's alcohol and drug policy in 1992, Mr. Entrop disclosed that he was a recovering alcoholic, and had not had a drink in over seven years. Because he was re-assigned to another job as a result of that declaration, although he was eventually reinstated into his prior position, he filed a complaint with the Ontario Human Rights Commission alleging discrimination against him by reason of a protected handicap, contrary to section 5(1) of the *Ontario Human Rights Code*, R.S.O. 1990, c.H.19, as amended. The chair of the board of inquiry enlarged the complaint to examine virtually all aspects of the Company's alcohol and drug policy. After a number of decisions, and extensive judicial review, the *Entrop* complaint came to be examined by the Ontario Court of Appeal. Writing for a unanimous three judge panel, Laskin J.A. acknowledged a degree of discomfort in the Court reviewing virtually all aspects of the Company's alcohol and drug policy, given the more narrow origins of the original complaint. He indicated, however, that because the broader issues had been fully canvassed by the parties the Court would deal with the full range of issues considered by the chair of the Board of Inquiry.

107 As reflected in the Court's decision, the Board of Inquiry's eighth and last decision dealt, among other things, with the incapability defence arising under section 17(1) of the *Code*. That is reflected, in part, in the Court's characterization of the history of the litigation which came before it. At paras. 31 and 32 Laskin, J.A. partly sets the parameters for the Court's own analysis by stating the following:

> [31] In this eighth and last interim decision the Board considered the legality of the parts of the policy dealing with alcohol or 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).
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> [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, breathalyser 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 breathalyser testing or on its legality for cause or post-incident.

108 As is evident from the foregoing, and as is manifest from the decision of the Court of Appeal in *Entrop* , the focus of the Court's decision was to consider the narrow application of the *Code* to the Company's drug and alcohol

policy, with particular regard to available defences, including incapability, the determination of *bona fide* occupational requirements (BFOR) and issues of accommodation.

109 As part of its analysis to determine whether the Company's policies violated the *Human Rights Code*, the Court applied the tests developed by the Supreme Court of Canada in the *Meiorin* case, *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.*, [1999] 3 S.C.R. 3 (S.C.C.). On that basis, at paras. 96 through 99, the Court of Appeal found that the urinalysis drug testing utilized by the Company was not reasonably necessary to accomplish the Company's purpose of achieving safety by identifying employees who are impaired. Laskin, J.A. reasoned and concluded as follows:

> [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.
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> [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?
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> [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.

In contrast, the Court of Appeal in *Entrop* confirmed the legitimacy of random breathalyser testing for the purposes of the *Human Rights Code*, essentially because the breathalyser test can show impairment and to that extent was demonstrated to be a reasonable standard to detect incapability. At paras. 110 and 111 the Court commented:

> [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:
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> > 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.

110 It is important to stress that in considering the issue before it, the Court in *Entrop* never looked beyond those legal concepts and considerations central to the task before it, namely the interpretation and application of the rights and obligations of an employer under the provisions of the *Ontario Human Rights Code*. It dealt specifically with the application of the *Human Rights Code* to an acknowledged recovering alcoholic and not with the application of a collective agreement. Critically, the Court was never called upon to consider whether the Company's policy might violate the express or implied terms of a collective agreement, including a provision such as article 3.02 of the instant collective agreement protecting the dignity of employees, including employees who are not disabled or perceived to be disabled. Understandably, therefore, the Court of Appeal in *Entrop* made no reference to the extensive body of arbitral jurisprudence in Canada dealing with the balancing of interests approach and the "for cause" analysis overwhelmingly endorsed in the preponderant arbitral jurisprudence concerning alcohol and drug testing. The Court of Appeal in *Entrop* was focused solely on the interpretation of the *Human Rights Code.* It did not address the interpretation of a collective agreement and thereby did not address the impact of the widely accepted principles of drug testing under the "Canadian model" in a workplace governed by a collective agreement. In approaching this issue it is important to remember that that which is permissible under human rights legislation may not be permissible under a collective agreement. It may also be noted that in its conclusions the Court held that the Board of Inquiry had no jurisdiction to deal with the drug testing provisions of the Company's policy, a finding which tends to give the qualification of *obiter* to the Court's analysis and conclusions with respect to random drug testing.

111 In the result we are of the view that, in keeping with common law principles, the issues before the Ontario Court of Appeal in *Entrop* , albeit similar, are not on all fours with those which we are called upon to decide in the case at hand. We are concerned with rights and obligations arising under a collective agreement, not under a human rights code. It is manifestly open to a trade union and an employer to agree, within the terms of their collective agreement, to sets of rights and obligations which might be greater than those found in statutes of general application intended to provide minimal protections in respect of individual rights, such as employment standards legislation and human rights codes.

112 As indicated above, the Company takes the view that the decision of the Court of Appeal in *Entrop* effectively trumps the well established arbitral jurisprudence which has consistently struck down random alcohol and drug testing in a safety sensitive workplace. The Company reasons that the oral fluid drug test which it now administers is fully analogous to the breathalyser test, to the extent that it can detect impairment. On that basis, it reasons that it conforms to the Court of Appeal's decision in *Entrop* and is therefore permissible.

113 For a number of reasons we cannot agree. Firstly, as it is administered the buccal swab test does not equate to the breathalyser. The breathalyser test gives an immediate reading of impairment and serves the Company's interest in safety by preventing the individual who yields a positive result from proceeding to work in the highly safety sensitive

environment of the refinery. That is not what transpires with respect to the cheek swab. As noted above, the employee who is randomly tested by the oral fluid test is not identified as impaired at the moment of the test. The result of the test is revealed only a considerable number of days later, when the laboratory process in Houston is complete and a report is finally forwarded to local management. In other words, in contrast to what happens under the breathalyser test, the employee who is impaired by drugs and is randomly required to give a saliva sample is immediately sent back to work in the highly safety sensitive environment of the refinery. To that extent the test does not pass muster under the *Entrop* analysis as a test reasonably necessary to immediately ensure safety in the workplace, even accepting that *Entrop* is applicable, which we do not.

114 Secondly, and in our view more importantly, subjecting all employees to random drug testing by means of a buccal swab test simply cannot be reconciled with the well established, predominant Canadian arbitral jurisprudence which holds that, in a safety sensitive working environment, drug and alcohol testing can be required of an individual employee by his or her employer only where there is reasonable and probable cause to do so, or where there has been an accident or incident which would justify such a measure. That general conclusion is doubly supported by the language of the instant collective agreement which extraordinarily contains an express provision which commits the Company to a workplace "... where individuals are treated with respect and dignity." as articulated in article 3.02 of the collective agreement.

115 In approaching our analysis of the law we deem it important to start with first principles. At common law, absent certain narrowly defined exceptions, an employer could not assert at will the right to subject its employees to medical or physical tests or examinations, absent consent. That has long been recognized in Canadian arbitral jurisprudence, and is reflected in the following passage from the award in *Monarch Fine Foods Co. v. Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 L.A.C. (2d) 419 (Ont. Arb.) (M.G. Picher) at p. 421:

> It is well established that persons do not by virtue of their status as employees lose their right to privacy and integrity of the person. An employer could not at common law assert any inherent right to search an employee or subject a employee to a physical examination without consent. Thus there is nothing that can be described as an inherent management right to subject an employee to what would otherwise be a trespass or an assault upon the person.

As recognized in the *Monarch* award, it does remain available to an employer, in a proper case, to direct that an employee undergo medical certification to verify his or her fitness to perform the duties of the work which is assigned to them. That might, for example, be the case when an employee returns to physically arduous work after a serious injury. In the *Monarch* case, however, where there was no question of an employee's fitness to work, the board found that the employer could not subject an employee to a medical examination, the sole purpose of which was to determine whether he was telling the truth about an injury which caused him to return late from a vacation.

116 For reasons which are apparent in the jurisprudence reviewed above, arbitrators have not held to the narrow line of characterizing an alcohol or drug test as a from of coerced assault in considering the legitimacy of alcohol and drug testing in the workplace, as regards employees who work in safety sensitive positions under a collective bargaining regime. Rather, they have consistently adopted a balancing of interests approach, seeking fairly to allow employers that margin necessary to ensure safety while preserving to employees, particularly to employees who have given no reason for suspicion of impairment, a modicum of dignity and privacy. That balancing is at the heart of the jurisprudential direction taken by arbitrators in Canada. It would, I think, be fallacious to believe that arbitrators have ruled against random drug testing merely because the predominant form of testing, urinalysis, could not prove impairment. Whatever analysis might be appropriate to the determination of *bona fide* occupational requirements for the purposes of human rights legislation, in considering the limits of managerial authority under collective agreements in Canada, boards of arbitration have ruled against random testing, whether by breathalyser or otherwise, as a matter of defining the appropriate limits of the contractual rights of the employer and the corresponding obligations of the employee.

117 We believe that approach to be considered and responsible. The dignity, integrity and privacy of the individual person is among the most highly prized values in Canadian society. Employment is a large part of the human experience, normally spanning the better part of an adult life. The place of a person in his or her profession, trade or employment

is therefore a significant part of his or her humanity and sense of self. That reality is deeply reflected in the law of employment and labour relations in Canada. It is therefore not surprising that, as contrasted with developments in other countries, the federal and provincial governments in Canada have not rushed to enact legislation or regulations authorizing employers to alcohol or drug test their employees. Nor is it surprising that boards of arbitration have been careful to seek a balance which protects the privacy and dignity of employees in this area.

118 Indeed, such laws as do exist in Canada with respect to the random substance testing of individuals are extremely limited and highly protective of individual rights. As noted above, police authorities who operate a roadside breathalyser testing program cannot randomly test motorists. Before any motorist is tested under such a program, the constable involved must form some opinion as to whether there is a likelihood that the individual to be tested is impaired. Where there is no reasonable cause for that conclusion, no breathalyser test is conducted. In other words, such breathalyser testing which has been legally authorized in Canada is in fact a form of "for cause" testing, and not purely random alcohol testing. We believe that it should not be lightly inferred that by the mere fact of an employment contract an employer can assert an extraordinary authority which government itself does not claim.

119 Moreover, where the interests of the state do extend to the taking of bodily fluids, there are extensive safeguards built in. The common law right of the Crown to obtain bodily fluids upon a serious criminal investigation, and the provisions of the *Criminal Code of Canada* which govern DNA collection from criminal suspects and convicted offenders are highly refined instruments, laden with protections for the individual, including judicial oversight. To the extent that the obtaining of oral fluids by means of a buccal swab in the context of a criminal investigation can only be accomplished by obtaining a judicial warrant, it becomes difficult to understand on what basis a private employer can assert the right to obtain the same material by random search, without at least the minimal justification of reasonable cause.

120 Nor are we impressed with the suggestion that a buccal swab, and the extraction of oral fluids for laboratory analysis, is not itself intrusive. Certainly the results available to the holder of a sample can be highly intrusive, to the extent that they can open the door to the entire DNA mapping of the individual concerned. We appreciate that the Company in the instant case does not make such use of the samples which it collects by its random drug testing program. The fact remains, however, that the individual employee is left with little more than the employer's declaration: "Trust me, I will use this sample of your bodily fluid only for the reasons I have explained." In our view, absent reasonable cause, no employee in Canada should be subjected to that scenario without clear contractual consent or the extraordinary and constitutionally justified provision of a statute or regulation.

121 Imperial Oil believes, in good faith, that randomly drug testing all of its employees will have a deterrent effect. The expert testimony, largely unchallenged, tends to affirm that view. But the value of deterrence is but one element to be weighed in the balancing of interests. No doubt corporal punishment would also have a deterrent effect, but a free and civilized society puts limits on the value of deterrence. In a safety sensitive workplace, the assessment of the legitimacy of the random drug testing of all employees, including innocent employees, must involve some balancing of the employer's interest in deterrence against the countervailing interest of employees in being treated with dignity and respect.

122 That balancing must also be done against the background of the extensive industrial relations experience of close to twenty years in Canada. That experience, revealed in the cases cited, demonstrates the success of the established Canadian model for alcohol and drug testing in a safety sensitive workplace. As reflected in the arbitral jurisprudence that system, readily accepted by employers such as CN, Dupont and Irving, appears to have allowed major industrial employers to achieve their safety goals without imposing random unannounced alcohol or drug testing on their safety sensitive employees. The success of those employers, achieved in equally safety sensitive industries without recourse to random drug testing, seriously questions the credibility of the argument of counsel for the Company suggesting that past random testing is responsible for the absence of drug related incidents in the refinery. In the final analysis, in balancing the interests of the parties, a question to be considered is not merely whether the extreme approach of random drug testing for all employees is effective, but also whether it is necessary or justified. The experience of other employers in a variety of safety sensitive industries would appear to suggest that it is not.

123 For these reasons, the analysis which we are compelled to engage in is substantially different from that engaged in by the Court in *Entrop* . That case, which involved the treatment of a recovering alcoholic, concerned whether random testing could be a BFOR in the safety sensitive environment of the Sarnia refinery, for the purposes of the *Ontario Human Rights Code*. Our inquiry is to determine whether the collective agreement, negotiated between the parties against the background of the preponderant arbitral jurisprudence, allows the Company to randomly drug test employees whom it has no reason to believe are impaired by cannabis.

124 As reflected in the authorities reviewed above, any drug testing of an employee is a highly extraordinary measure which, even in a safety sensitive environment, can only be resorted to where justification is established. In the case at hand the justification cannot be characterized as the immediate prevention of impaired employees working in the refinery. As explained above, the manner in which the test is taken and analysed over a period of days is such that the impaired employee is not in fact detected as impaired at the moment of the test, as would be the case with a breathalyser test. The employer interest that is served, therefore, has more to do with detecting violators of the policy after the fact, in addition to overall deterrence, rather than with immediate safety.

125 Moreover, while the case is not before us, we have grave doubts as to whether the Company could randomly administer drug tests, even if it could be shown that the test would reveal impairment on the spot. The question would remain as to the basis upon which an employer, absent reasonable cause, could assert such an extraordinary right, a right which is available to police authorities for the purposes of criminal and highway traffic law only after they satisfy the threshold test of reasonable cause. In a society based on respect for the integrity and dignity of the individual, an employer must bear a heavy onus of justifying resort to such a measure. We are not persuaded that standing alone the Company's goals of deterrence and behaviour modification, however well intended, are sufficient to discharge that onus

126 Nor are we persuaded by analogies made with respect to camera surveillance or the periodic search of the personal effects or lunch boxes of employees. With the greatest respect to the argument made by counsel for the Company, we view the surrender of bodily substances, whether by breath, urine, oral fluids or otherwise, as a far more serious matter. In this area, absent contractual or statutory consent or reasonable cause, an individual's expectation of privacy should be respected. Failing to accord such respect goes to the dignity of the person. In our view, that aspect of the Company's policy which subjects employees to mandatory, random, unannounced drug testing, in circumstances which have nothing to do with reasonable cause, cannot be squared with the undertaking in article 3.02 "to treat employees with respect and dignity." Nor can it be justified, even absent the language of article 3.02 of the collective agreement, on a responsible application of the balancing of interests approach in a safety sensitive environment that has carefully evolved over the decades within the arbitral jurisprudence in Canada. In our view, given the wide acceptance of the established arbitral jurisprudence, at this point in time it would require clear and unequivocal contractual language to cause a board of arbitration to conclude that employees, through their union, have consented to random and speculative drug testing of their bodily fluids at the will of their employer. That is clearly not the case on the evidence before us.

127 It may well be that the balancing of interests approach, which we favour, 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. In the case at hand, however, the evidence is manifestly to the contrary. The record of close to two decades in the Nanticoke refinery does not include one substantiated case of an employee working impaired by reason of the consumption of a drug. Nor is there any significant evidence of drug use generally within the workforce away from work, or within the surrounding community. In these particular circumstances we are compelled to conclude that the employer has not discharged the onus of justifying its policy and to find that subjecting innocent employees to mandatory, unannounced, random drug testing is an unwarranted intrusion on their privacy and is an unjustifiable affront to their dignity.

128 For these reasons, as regards the first issue, the Board finds and declares that that part of the Company's Alcohol and Drug Policy which mandates random, unannounced drug testing is contrary to the collective agreement, and must be struck down.

129 With respect to the issue of the consent form, given the Board's conclusion on random drug testing, it is obviously not necessary to deal with consent to the extent that it might relate to an employee being subjected to a random and unannounced drug test. What of the other occasions for testing? As the established arbitral jurisprudence confirms, the for cause and post-incident drug testing which form part of the Company's policy are a legitimate and appropriate feature of that policy, as is the random and unannounced drug testing which may legitimately form part of a continuing contract of employment and the rehabilitation of an employee clearly identified as having an alcohol or drug use problem. What, then, are we left with? If, as we believe, the Company can properly require an employee to undergo drug testing where there is reasonable cause to do so, or in a post-accident or post-incident situation, as well as in the context of a rehabilitative agreement, why is it unreasonable to expect an employee to sign his or her consent to such a test? To the extent that the test is lawful and consistent with the collective agreement, the employee cannot properly withhold consent. Given the highly delicate nature of the drug and alcohol testing process, and the need to properly document what transpires, in those circumstances we do not consider that it is inappropriate for the Company to require that an employee sign a consent form.

130 It obviously remains available to the employee to resort to the grievance and arbitration provisions of the collective agreement if he or she believes that proper cause did not in fact exist for a particular test. In a safety sensitive context, for the individual employee to give consent by signing a form is little more than acknowledging that the collective agreement gives to the Company the right to conduct drug tests in circumstances of reasonable cause or post-accident / post-incident, or in the separate context of a continuing employment contract which governs an employee undergoing rehabilitation. Nothing in signing such a consent prejudices the ability of the individual to "obey now and grieve later", challenging the reasonableness of the test to fully protect his or her rights under the collective agreement. In these circumstances, and particularly having regard to our conclusion with respect to voiding the random drug testing program, we see little merit in the position of the Union that we should find that the Company's requirement that employees sign a consent form upon giving a test sample should be struck down as contrary to the collective agreement. That aspect of the grievance is therefore denied.

131 We are likewise not persuaded by the Union's submissions concerning the post-accident / post-incident aspect of the plan. The Union essentially objects to the breadth of discretion given to local supervisors in deciding whether a given set of facts justifies resorting to an alcohol or drug test. We cannot agree. A review of section 3.5 of the current Alcohol and Drug Program Administrative Guidelines, which deals with post-incident testing, reveals what we view as a very considered and responsible managerial approach. Under the heading "Criteria for Conducting Post-Incident Tests" the current policy reads as follows:

> Supervisors, managers and other company representatives authorized to order post-incident tests are expected to exercise careful judgement in deciding when to conduct a test and which workers to test. As a general statement, testing must be conducted after all significant incidents, as defined below, unless there is clear evidence that worker performance could not have been a potential contributing factor. Because post-incident testing is an investigative procedure, testing is required even in the absence of direct evidence or suspicion of alcohol or drug misuse.
>
> It is not necessary to conduct a post-incident test if there is clear evidence that the acts or omissions of employees could *not* have been a contributing factor (e.g., obvious structural failure, not detectable or preventable with normal maintenance and inspection procedures; bird strikes on an aircraft). By the same reasoning, it is not necessary to test all employees associated in some way with a particular incident. Normally, the preliminary phase of the incident investigation will indicate which individuals had a reasonable possibility of being directly involved in the chain of acts or omissions leading up to the event. If there is doubt, it is better to include a particular individual than to forfeit the opportunity to obtain a potentially important piece of information for the investigation.

> Post-incident testing may be conducted at management discretion for near misses or lower-level incidents if they are considered to have had a significant potential for more serious consequences. However, reasoned judgements are required in such cases to avoid treating employees in an arbitrary fashion or discouraging them from reporting lower-level incidents or near-misses.
>
> For significant incidents or near misses that could have contributed to a significant incident which meet the criteria below, the onus is on the company representative to demonstrate and document that a test is *not* necessary. Where lower-level incidents or near misses are concerned the onus is on the representative to show and document that a test *is* appropriate.
>
> [italics in the original]

132 The Company is responsible for administering a highly safety sensitive working environment. Arbitral jurisprudence recognizes that it can legitimately utilize drug testing in post-accident or post-incident situations, as a means of investigating what may have occurred. In our view the guideline reproduced above does not represent an excessive or improper abuse of that managerial authority. On the contrary, it is written in a fashion which alerts the supervisor to the limits which should be applied to the exercise of the Company's discretion and expressly directs managers to avoid treating employees arbitrarily, or in such a manner as to discourage employees from reporting incidents. In our view the evidence does not support any record of abuse of the authority of management to conduct post-incident drug and alcohol tests, and we can therefore see no basis upon which we should grant this aspect of the grievance. Therefore, it must also be denied.

133 The Union also submits that the Company cannot properly make the mere presence in the body of a drug or drug metabolite a violation of the drug and alcohol policy, as it purports to do in second F1 (b). We do not see the need to comment extensively on that issue. Obviously all employees remain fully protected by the just cause provisions of the collective agreement. For some employees, the mere presence in the body of a metabolite may not prove impairment at work or the contravention of any legitimate employer interest. On the other hand, it may be that the presence of a drug metabolite in the body is relevant to determine whether an employee who is subject to the more stringent restrictions of an agreed rehabilitative program has violated the terms of his or her ongoing employment contract. Whether the presence of a drug or a metabolite of a drug in the body is grounds for discipline is a matter best determined on a case by case basis. To that extent, and subject to its application, the bare language of section F1 (b) of the policy does not violate the collective agreement.

134 For all of the foregoing reasons the grievance is allowed, in part. The Board finds and declares that the Company's Alcohol and Drug Program, to the extent that it contemplates the mandatory, random, unannounced drug testing of employees, absent reasonable cause, violates the collective agreement. That aspect of the policy is therefore declared null and void and the Company is directed to cease applying it and to forebear from imposing discipline against any employee for failing to comply with that aspect of the policy. We find that the Union's challenge to the use of the consent form in respect of drug tests in other situations and its objection to the policy as regards the discretion of managers to order post incident testing do not violate the collective agreement. Nor does the provision of the policy dealing with the presence in the body of a drug or a drug metabolite, given the just cause protections of the collective agreement.

135 We retain jurisdiction for the purposes of resolving any issue which may arise with respect to the interpretation or implementation of this award, and with respect to disposing of any other grievances or disputes which may remain to be heard.

***R.C. Filion Member*:**

I agree with the majority's findings in the following three respects.

(a) The Company can legitimately utilize drug testing in post-accident or post-incident situations;

(b) It is appropriate for the Company to require employees to sign a consent form for tests that are lawful and consistent with the Collective Agreement;

(c) The language of section F1.(b) of the Company's Policy does not violate the Collective Agreement.

I must, however, disagree with the majority's conclusion concerning random drug testing for the following reasons.

It is beyond dispute that there are inherent risks in operating a refinery. Products refined from crude oil are highly flammable. The chemical by-products of crude oil refining are corrosive and dangerous.

As one would expect, safety at the Nanticoke Refinery is the Company's number one priority. Safety is emphasized in the Collective Agreement (Article 19.01). The Company's safety policy is consistent with its obligations under the Ontario *Occupational Health and Safety Act*, section 25 of which requires an employer to "take every precaution reasonable in the circumstances for the protection of a worker". Maintaining a safe workplace is an affirmative obligation imposed on employers in Ontario. Safety violations are strict liability offences giving rise to substantial penalties.

It is clear that the use of cannabis can create serious safety risks at workplaces such as the Nanticoke Refinery. The expert evidence confirms that the use of cannabis produces a wide range of mental and physiological effects, including the impairment of many functions critical to the safe performance of work-related tasks. The expert evidence also supports the following propositions:

- Workplace injuries are frequently associated with the use of alcohol and drugs, including cannabis.
- The use of cannabis in Ontario and throughout Canada is significant and increasing.
- The experience in the Region in which Nanticoke is located is consistent with the overall pattern for Ontario.
- There is no reason to believe that cannabis use among working adults is different from that in the community generally.
- Random drug testing is an effective deterrent to behaviour which may cause injury.
- Since random drug testing was introduced in certain workplaces in the United States, drug use, as indicated by positive test results, has dropped dramatically.

The Company introduced its Alcohol and Drug Policy in 1992. The objectives of the Policy are to create a safe work environment by reducing the risk of accidents in which drugs and alcohol are a contributing factor; and to deter the use of alcohol, drugs and other substances where such use may negatively affect work performance and safety. The Policy also contains a commitment to individualized treatment and rehabilitation for employees with a substance abuse or dependence problem.

The Policy provides for various types of alcohol and drug testing which have either not been challenged or have been found by the majority to be compliant with the Collective Agreement. These include post-incident testing, reasonable cause testing, rehabilitation testing and initial entry testing. The Policy also provides for random testing, but only for employees in safety-sensitive positions and specified positions. Safety-sensitive positions are defined as those where impaired performance could result in a catastrophic accident and have no direct or very limited supervision. Specified positions are those which have significant ongoing responsibilities for decisions or actions likely to affect the safe operations, finances or reputation of the Company.

Employees are selected for random drug testing through a computer program which is totally objective. No manager or supervisor has any authority to order a random test. All employees in the random pool are selected at least once per year. The Test Administrator at Nanticoke is notified electronically of which employees have been selected for random

testing. These employees are then contacted to see the Company nurse for testing. Both a breathalyser test for alcohol and an oral fluid test for cannabis are administered.

Oral fluid is collected by using an apparatus which is widely used in safety-sensitive industries. Its effectiveness is well established. An absorbent pad is placed in the mouth for two minutes, and then inserted into a preservative solution, sealed and sent to a laboratory in Mississauga for analysis. The employee who gave the oral fluid sample is identified by employee number only. A positive test is reported where the level of THC, the active ingredient in cannabis, in the oral fluid sample is 10ng/mL or higher. Otherwise, the test is reported as negative. All that is reported is that the test is negative or positive for cannabis. The actual level of THC is not reported. Nor is information provided as to any other substances that might be present in the oral fluid.

If the test is negative, the result is reported to the Company's Alcohol and Drug Program Administration Group (ADPAG). If the test is positive, the result is reported to the Company's Medical Review Officer (MRO), before it is communicated to the Company. The MRO verifies the chain of custody and undertakes an investigation that includes consultation with the employee to determine if there is some explanation for the positive result. The employee may also request a re-analysis. If the MRO confirms the positive result, the ADPAG is notified, and in turn advises the Test Administrator at Nanticoke. Local Management is then advised, and contacts the employee. The action that is taken following a positive result varies with the circumstances. An employee who has a substance abuse or dependence problem is offered treatment and after care. Any disciplinary action is assessed based on the facts of the particular case.

Unlike urinalysis, oral fluid testing can be used to detect likely impairment from cannabis, which typically persists for at least four hours after smoking. According to the expert evidence which we heard, testing for THC in oral fluid using a cut-off of 10ng/mL shows likely impairment for cannabis in more than 90% of cases, in the same way that a breathalyser reading of 0.04% shows likely impairment from alcohol.

Having regard to the evidentiary background set out above, it is my view that random drug testing is permissible under the Collective Agreement for essentially two reasons. First, random alcohol testing is not in dispute in these proceedings and there is no qualitative difference between an alcohol test by taking a breath sample and a drug test by taking an oral fluid sample. They are both minimally intrusive. Second, the Company's oral fluid test is in keeping with what is permissible pursuant to the Ontario *Human Rights Code*, as determined by the Ontario Court of Appeal in the *Entrop v. Imperial Oil Ltd.*[2000 CarswellOnt 2525 (Ont. C.A.)] decision. It is difficult to conceive how a drug testing process which complies with the Ontario *Human Rights Code* can, at the same time, violate the "respect and dignity" clause in the Collective Agreement.

The Company first introduced random alcohol and drug testing in 1992. It became the subject matter of a number of decisions by a Board of Inquiry under the Ontario *Human Rights Code* involving Martin Entrop, an employee of the Company at its Sarnia Refinery. The matter ultimately reached the Ontario Court of Appeal which found that the Company "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". The Court also found, however, that drug testing by way of urinalysis suffered from one fundamental flaw. It could not measure present impairment — only past drug use. For that reason, the Court held that random drug testing could not be justified as reasonably necessary to accomplish the Company's goal of a safe workplace free of impairment.

As a result of the Court of Appeal's Judgment, the Company continued to administer random alcohol testing by means of breathalyser tests but no longer required employees to undergo random drug tests by means of urinalysis. By May 2003, however, the Company had become aware of an oral fluid drug testing method which could detect cannabis impairment. Although the new oral fluid test has been challenged by way of these grievance and arbitration proceedings, there is no indication that it has been challenged under the Ontario *Human Rights Code*. That is presumably because it is acknowledged that a random drug testing regime which detects actual impairment complies with the *Code*.

In our preliminary award dated February 20, 2005, we found that the Union could proceed with its challenge to the new oral fluid testing program. But we also ruled that the grievance was inarbitrable insofar as it relates to random alcohol testing. At pages 5 and 6 of our preliminary award, we stated as follows:

> Having considered the submissions of the parties we consider that we are able to make rulings which will appropriately define the scope of the issues to be argued. Firstly, we are satisfied that it would be inequitable, and indeed inconsistent with the parties' own interpretation of the collective agreement, to now entertain the grievance to the extent that it seeks to challenge the administration of random alcohol breathalyser tests in the work place. We consider it significant that the Company has followed that practice since 1992. The practice was in place when the Union negotiated its first collective agreement in 1996. Given that the Union filed no grievance against that aspect of the Company's policy from 1996 until 2003, a period of close to seven years, we are satisfied that the parties must be taken to have mutually accepted that random breathalyser testing was acceptable under the provisions of the collective agreement. By essentially acquiescing in the longstanding practice of the Company in this regard, the Union must be taken to have waived any objection which it might have to that practice. We are therefore satisfied that the scope of the grievance before us does not extend to entertaining evidence or argument concerning the Company's long unchallenged practice of administering random breathalyser tests for the purpose of alcohol testing in the workplace.

One of the elements setting this case apart from the earlier arbitration awards referred to in the majority's decision is the Union's acquiescence to the imposition of random alcohol testing by way of a breathalyser. Accordingly, randomness in itself should not be an issue in this case. With randomness per se having been eliminated as a basis for challenge, the only way to distinguish random drug testing from random alcohol testing is to determine if an oral fluid drug test is so much more intrusive than a breathalyser test for alcohol, so as to render one a violation of the collective agreement but not the other. Employees will continue to be randomly tested for alcohol by a breathalyser. It is difficult to understand how the addition of a short oral fluid test can turn an exercise which is otherwise acceptable into one which violates the Collective Agreement.

In my view, there is no qualitative distinction between the two. Oral fluid testing is no more intrusive than taking a breath sample. The Supreme Court of Canada has stated in a different context that a "buccal swab is quick and not terribly intrusive" (*R. v. B. (S.A.)*, [2003] 2 S.C.R. 678 (S.C.C.) at para. 44). It is not nearly as intrusive as urinalysis, which gave the employer information about the presence of drugs in the body unconnected with impairment on the job. Urinalysis intruded unnecessarily into employees' privacy and their life style preferences away from work. This was a factor that tilted the balance against random testing in earlier cases.

All of the arbitration decisions referred to by the majority involved drug testing by urinalysis. This is the first case pertaining to random oral fluid drug testing. Oral fluid testing is reliable and minimally intrusive. A positive oral fluid test shows impairment. Although there is a delay in allowing the Company to be informed of a positive test, the company still becomes aware that an employee was impaired while at work and can take measures to prevent a recurrence. Surely, the delay factor, which appears to have been relied upon by the majority, cannot be the tipping point between a permissible and prohibited drug testing regime.

The majority has found that the oral fluid test does not "pass muster under the *Entrop* analysis as a test reasonably necessary to immediately ensure safety in the workplace". I disagree with that interpretation of the *Entrop* Judgment. Immediacy was not referred to as a factor in *Entrop* . The issue was whether the drug test demonstrates that the employee is incapable of performing the essential duties of the position. Although it would obviously be preferable if the oral fluid test provided the Company with immediate feed back concerning impairment, as does a breathalyser test, the Company soon learns whether or not an employee was impaired while at work. This information undoubtedly enhances the Company's ability to provide a safer workplace by dealing appropriately with that employee in whatever manner is appropriate to prevent recurrence.

The majority has referred to the provisions of the *Criminal Code of Canada* which govern DNA collection from criminal suspects and the need for a judicial warrant, stating "it becomes difficult to understand on what basis a private employer can assert the right to obtain the same material by random search, without at least the minimal justification of reasonable cause". In my view, the *Criminal Code*, and the cases which apply to it, pertain to an entirely different context - the criminal law rather than the workplace. The criminal law pertains to a completely different set of interests — those of the state in criminal law enforcement and those of the individual relative to the state, rather than those of employer/employee relationship and the employer's moral and legal obligation to provide as safe a workplace as possible. Employers are subject to affirmative legal duties to take all reasonable steps to ensure the safety of their employees. They are also responsible, both through the common law doctrine of vicarious liability and under statute, for any harm caused by the acts or omissions of their employees.

The majority places great reliance on the "respect and dignity" provision in the Collective Agreement. The Ontario *Human Rights Code* is all about respect and dignity. If the Company's Policy complies with the *Code*, it cannot at the same time violate the requirement of respect and dignity. Placing emphasis on safety and deterrence with respect to safety-sensitive positions in a high risk working environment is in no way disrespectful or undignified to employees.

Much of the Union's evidence was to the effect that there are no drug problems at the Refinery which justify random drug testing. The majority has found as a fact that "in a period spanning more than fifteen years, there has never been a case of an employee being found to be impaired by drugs at work". That finding is consistent with the proposition that random drug and alcohol testing is an effective deterrent. It must also be remembered that, until 2003, drug testing by way of urinalysis was not capable of showing actual impairment.

To complete the evidentiary picture, however, it is significant that at least two bargaining unit employees (Lussier and McNeil) failed breathalyser tests. Before the Union was certified in 1995, an employee named Haskett failed a random urinalysis test for drugs and admitted to having smoked marijuana. The Union's witnesses, Messrs. Fletcher and Punchak, while stating that the workforce at the Refinery is like "a family" whose members take care of each other and would not endanger one another by substance abuse in the workplace, also acknowledged that there could be drug and alcohol problems at the Refinery of which they were unaware and certainly could not guarantee otherwise.

In my view, random drug testing for impairment by cannabis using oral fluid testing represents a reasonable and appropriate means of reducing risk and promoting workplace safety. The Company has a legitimate interest in detecting and deterring impairment. Random oral fluid testing accomplishes these objectives. It shows likely impairment. It is an effective deterrent. It intrudes in only a limited way on employees' privacy. It does not contravene the Ontario *Human Rights Code*. It is not inconsistent with the respect and dignity clause or any other provision of the Collective Agreement. One of the best manifestations of respect and dignity for employees is to provide them with the safest possible working environment.

Accordingly, I would dismiss the grievance in its entirety.

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