Safety Sensitive Work
Disability and Accommodation
Use of Medical Cannabis

AN ARBITRATION INVOLVING

LOWER CHURCHILL TRANSMISSION CONSTRUCTION EMPLOYERS' ASSOCIATION INC.
('ASSOCIATION')
representing
VALARD CONSTRUCTION LP
('EMPLOYER')

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
and
IBEW, LOCAL UNION 1620
('UNION')

REGARDING THE GRIEVANCE OF
HAROLD 'SCOTT' TIZZARD
('GRIEVOR')

DECISION & AWARD

For the Employer: **Darren Stratton,**
Legal Counsel

For the Union: **Daria Strachan,**
Legal Counsel

JOHN F. ROIL, QC
ARBITRATOR

APRIL 30, 2018

INTRODUCTORY

A prior hearing on a preliminary issue of timeliness was conducted on June 8, 2017. The merits portion of the arbitration hearings were conducted in St. John's, NL on July 11, 12, 13, November 30 and December 1, 2017, January 3, 4, 5, 8 and 9, 2018. Final verbal submissions from counsel were made in videoconference on March 29, 2018.

The Lower Churchill Project involves the development of a hydroelectric generating facility and related infrastructure in Labrador together with the transmission lines necessary to carry the power so generated from Labrador to consumers in NL and elsewhere in North America. Nalcor Energy ('Nalcor'), a Provincial Crown Corporation, is the owner of the Project. The portion covering construction of the transmission line corridor ('the Project') is designated as a 'Special Project' under the laws of Newfoundland and Labrador. Pursuant to a Special Project Order, all employers operating on the construction of the corridor are represented in labour relations by the Lower Churchill Transmission Construction Employers' Association ('the Association') and all bargaining unit employees working on the Project are represented in labour relations by the International Brotherhood of Electrical Workers and IBEW, Local Union 1620 ('the Union' or sometimes 'IBEW').

A Special Project Collective Agreement (the 'Project Agreement') exists between the Employer and the Union covering all work on the Project.

This dispute involves the Grievance of Harold 'Scott' Tizzard (the 'Grievor') who applied for employment with Valard Construction LP ('Valard' or 'the Employer'), one of the major contractors working on the Project. The Grievor, who is a member of the Union, claims that the Employer has wrongfully refused to provide an employment accommodation arising from his disability.

At the commencement of the hearing, the Parties agreed that:

1. The Arbitrator had jurisdiction to deal with the issues in dispute.

2. The prior steps in the grievance procedure had been followed or had been waived, except for issues raised in the preliminary issue.
3. All witnesses would be excluded prior to giving their own evidence, except those qualified as expert witnesses who would be permitted to hear the evidence of other experts.
4. The Arbitrator's notes and any exhibits would constitute the record of the proceedings.

Many documents were placed into evidence as exhibits, some with the consent of the Parties and some as adduced through witnesses. Some exhibits were put into the record during the hearing on the preliminary issue and some during the merits portion. The complete list of exhibits is attached as Schedule 'A'.

At the merits hearing, a total of 13 witnesses were called to provide *viva voce* evidence.

The Union: Harold 'Scott' Tizzard, the Grievor
Kevin Mullins, Project Representative, IBEW Local 1620
Adam Kean, a construction superintendent for H.J. O'Connell Construction
Dr. Alia Norman, a medical physician practicing in St. John's, NL
Dr. Mark Ware, a medical physician practicing in Montreal, QC
Tracy Avery, IBEW employee

The Employer: Tim Brower, Manager, Labour Relations, Valard Construction LP
Lorne Bennett, HR Manager, Pennecon Group of Companies
Julianne German, contracted Labour Relations Consultant (via teleconference)
Dr. Matthew Burnstein, a medical physician practicing in Toronto, ON
Dean Seifried, Safety Supervisor, Valard Construction LP
Gregory Johnstone, a pharmacologist from Halifax, NS
Jessica Cahill, Valard Labour Relations Site representative.

THE ISSUE

The Grievor suffers from medical conditions causing him pain and has been authorized by a physician to use medically-authorized cannabis for the management of that pain. The question for resolution is whether the Employer, Valard, failed to accommodate a disability of the Grievor in employment at the Project.

A preliminary issue on the timeliness of the Grievance was raised by the Employer. Following hearings on that issue, the Employer's objection was dismissed and an award was issued on June 14, 2017. The conclusion of that award includes the following outcome:

> *In the context of all of that discussion and correspondence, I have no difficulty in concluding, based on the unique facts of this case and on the continuing discussion between the Parties about the Grievor needing to supply answers to the Employer's many questions concerning his use of medically directed marijuana, that the time for filing the Grievance did not expire prior to its filing on March 27, 2017. To conclude otherwise would be to ignore the continuing discussion involving the Employer, the Association on its behalf and the Union, all of whom appeared to be struggling with how to deal with this new workplace issue and how much disclosure and medical information was achievable.*

Although in that decision and the quote above the term "medically directed marijuana" was used, please refer to the 'Note to Reader' at the opening of the 'Evidence' portion of this Award where a different phrase describing this product will be used.

THE PROJECT AGREEMENT

The following Articles of the Project Agreement (Consent 1) may affect the outcome of this dispute. For brevity, some portions of Articles not considered as relevant to the issue have been omitted:

> ***Article 7 – Hiring Provisions***
>
> *7.13 The Parties agree to the following:*
>
> *a) Employees shall be required to undergo a pre-employment medical examination or a pre-employment assessment to determine if such employee is fit to perform the applicable work. The Contractor and/or Association, in consultation with the Union, will determine the criteria for such medical examination or assessment to be performed by a physician or other qualified healthcare professional, as named by the Association.*
>
> *b)* (omitted)
>
> *c) Where it is not practical for a prospective worker to report to a physician or such other qualified healthcare professional named by the Association, the Association or Contractor may require the prospective worker to report to another physician to receive*

a pre-employment medical examination, in accordance with the criteria determined pursuant to Article 7.13(a), above.

d) (omitted)

Article 10 – Health and Safety

10.01 The Parties acknowledge that health and safety is a shared responsibility for every person participating in the Project. The parties acknowledge that a "safety first" culture and a healthy work environment will be the foundation of a successful Project.

10.02 All work shall be performed in accordance with the Occupational Health and Safety Act and in compliance with all Project Health and Safety regulations, rules, policies, standards or procedures a copy of which shall be provided to the Union. The Parties recognize that it is the responsibility of everyone to cooperate in the reduction of risk and exposure with the objective of eliminating accidents, health and safety hazards and advocating observance of all safety rules, standards, procedures, regulations and policies.

10.03 The Parties acknowledge and recognize the mutual value of improving, by all proper and reasonable means, the health and safety of the employees and will co-operate to promote health and safety.

10.04 to 10.10 (omitted)

10.11 The Parties agree to comply with the Workplace Health, Safety and Compensation Act of the Province of Newfoundland and Labrador.

10.12 (omitted)

Article 11 – Human Rights

11.01 The Parties agree to comply by the Newfoundland and Labrador Human Rights Act.

11.02 The Parties agree that there will be no contravention of this Agreement by the Contractor, Association or Union as a result of the Contractor complying with all obligations that benefit the Labrador Innu in this Agreement including but not limited to hiring priority, retention priority, cultural leave benefit or any other benefits or provisions.

Article 16 – Shop Stewards

16.01 Stewards shall be appointed by the Union Business Manager or his/her representative. Gender Equity and Diversity shall be considerations in the appointment of stewards. When a scheduled second and/or third shift occurs, stewards for such shift(s) may be appointed. Such appointments shall be confirmed in writing to the

Contractor and the Association. Stewards assigned to represent a particular shift will not retain their status if that shift is cancelled.

16.02 This Article 16 does not affect a Contractor's right to determine where and when employees work or what shifts they work on.

16.03 and 16.04 (omitted)

16.05 Stewards shall be the last employee laid off where the steward has the skill, ability and competency to perform the required work.

*16.06 and 16.07 (*omitted)

LEGISLATION

The provisions of some legislation and regulation of the Province also impacts the outcome of this dispute. Sections or subsections not relevant to the issues in dispute are omitted for brevity.

Human Rights Act, 2010

Prohibited grounds of discrimination

9. (1) For the purpose of this Act, the prohibited grounds of discrimination are race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income and political opinion.

(2) (omitted)

(3) Where this Act protects an individual from discrimination on the basis of disability, the protection includes the protection of an individual from discrimination on the basis that he or she

(a) has or has had a disability;
(b) is believed to have or have had a disability; or
(c) has or is believed to have a predisposition to developing a disability.

(4) (omitted)

Discrimination in employment

14. (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to

employment or a term or condition of employment on the basis of a prohibited ground of discrimination, or because of the conviction for an offence that is unrelated to the employment of the person.

(2) Subsection (1) does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

(3) An employer, or a person acting on behalf of an employer, shall not use, in the hiring or recruitment of persons for employment, an employment agency that discriminates against a person seeking employment on the basis of a prohibited ground of discrimination.

(4) to (10) (omitted)

Occupational Health and Safety Act

Specific duties of employers

5. Without limiting the generality of section 4, an employer

(a) shall, where it is reasonably practicable, provide and maintain a workplace and the necessary equipment, systems and tools that are safe and without risk to the health of his or her workers;

(b) shall, where it is reasonably practicable, provide the information, instruction, training and supervision and facilities that are necessary to ensure the health, safety and welfare of his or her workers;

(c) shall ensure that his or her workers, and particularly his or her supervisors, are made familiar with health or safety hazards that may be met by them in the workplace;

(d) shall, where it is reasonably practicable, conduct his or her undertaking so that persons not in his or her employ are not exposed to health or safety hazards as a result of the undertaking;

(e), (f) and (g) (omitted)

Specific duties of workers

7. A worker

(a) shall co-operate with his or her employer and with other workers in the workplace to protect

(i) his or her own health and safety,

(ii) the health and safety of other workers engaged in the work of the employer,

(iii) the health and safety of other workers or persons not engaged in the work of the employer but present at or near the workplace;

(a.1) (omitted)

(b) shall consult and co-operate with the occupational health and safety committee, the worker health and safety representative or the workplace health and safety designate at the workplace; and

(c) shall co-operate with a person exercising a duty imposed by this Act or regulations.

Occupational Health and Safety Regulations

Personal conduct

26. (1) A worker with a medically documented physical or mental impairment shall not be assigned to work where those impairments endanger the health and safety of that worker or other workers.

(2) An employer, supervisor or worker shall not enter or remain on the premises of a workplace or at a job site while his or her ability to perform work responsibilities is impaired by intoxicating substances or another cause that endangers his or her health or safety or that of other workers.

(3) and (4) (omitted)

THE EVIDENCE

Note to reader:

In the evidence and the literature on the subject, medically authorized cannabis products are often referred to as medical marijuana (sometimes spelled 'marihuana'). For the purposes of this award, the word 'cannabis' or the expressions 'medical cannabis' or 'medically authorized cannabis' will be used to avoid confusion with recreational marijuana products about to become legally available in Canada. The cannabis plant is the origin of all these products.

Since 13 witnesses provided many facts and sometimes their opinions in 11 hearing days over a period of 7 months, a review of the salient evidence of each witness is necessary. Some repetition is inevitable.

Harold 'Scott' Tizzard (the Grievor)

The Grievor is 48 years old and lives in Torbay, NL. He has been employed in various aspects of the construction industry across Canada over the years as mason's helper, labourer and similar semi-skilled construction activities. During that time he has suffered pain from the affects osteoarthritis and Crohn's disease, ultimately diagnosed by his family Physician, Dr. Leslie Doody in or about 2008. After unsuccessfully attempting over a period of years to treat both conditions with conventional medications and therapies, the Grievor was finally referred by Dr. Doody (Exhibit C 4-15) to the Cannabinoid Medical Clinic, St. John's in April 2016 (Exhibit C 4-20). He had trialed Nabalone, a synthetic medication made to simulate the ingredients found naturally in the cannabis plant, but reported feeling too impaired the next day to drive and that it gave him a "*hangover*". He had also trialed many other conventional pain relief medications.

The Grievor did acknowledge having intermittently used recreational marijuana while he lived in BC a number of years earlier, but stated that he did not venture into recreational marijuana use in NL because he was working in construction and was aware that the use of recreational marijuana might disqualify him from such work in this Province.

After meeting with Dr. David Flusk initially at CMC, and subsequently by Dr. Alia Norman, and following completion of a number of questionnaires, the Grievor was issued by the CMC an authorization to acquire cannabis to manage the pain arising from his medical conditions. That authorization was directed to Tilray, an licenced provider of medical cannabis across Canada. The product was purchased online and he was limited in the amount he could purchase in any month in terms of both total grams and THC content. The Grievor was authorized by his Tilray card (Exhibit HST 1) to purchase per month a total of 45 grams of cannabis having a THC level of less than 20%, although the level of THC was subsequently increased slightly to 22%. He

consumes 1.5 grams inhaled by vaporization each evening and finds relief from his chronic pain with this pattern of use. He reports no signs or feelings of impairment on the following morning. His authorization has to be renewed every 3 months and has been renewed consistently since early in 2016.

During the 2015-2016 timeframe, the Grievor sought and obtained employment at the Project through H.J. O'Connell Construction Limited, a subcontractor working at the Soldiers' Pond site on the Avalon Peninsula. He worked as a Utility Person from June, 30, 2015 until September 30, 2016 (Exhibit HST 3). The Grievor reported his evening medical cannabis consumption, which had been authorized in the spring of 2016, to his supervisor, Adam Kean, who took no issue with his use of that product in the evenings after work, even though the Grievor was working during the subsequent daytime hours. The Grievor also testified that he had been appointed as shop steward on behalf of the Union on July 11, 2015 and served in that capacity at the site throughout his employment with H.J. O'Connell. His employment with that company ended due to a shortage of work in September 2016.

The Grievor became aware of a posted labourer job at Valard in the fall of 2016 (Exhibit C 4-1) and decided to seek the position. It was for foundation formwork, a task he felt well within his skills. In early November, he was referred by the Union for a vacant position (Exhibit C4-5) and was accepted by Valard for employment (Exhibit C 4-3) effective November 9, 2016, subject to a satisfactory drug and alcohol test. Such tests are a normal requirement for work at the Project. He spoke to Kevin Mullins from the Union about his cannabis authorization and was told to simply show his Tilray card to the testing agency. At the test conducted on November 16, the technician told him that "*we don't take those here",* referring to the Tilray card. He was told that he would probably fail his urine test because of his use of medical cannabis, but that he should show that card to Valard.

Having heard nothing further about his referral and after some friends who had been referred around the same time had started employment, the Grievor decided to contact Valard to see

what was happening. He was told by Jessica Cahill of Valard to go to his doctor and get a note confirming his "*prescription"* for medical cannabis. He saw Dr. Norman shortly thereafter, received a note on November 24 (Exhibit C 4-10) confirming his authorized medical use of cannabis and gave it to Brian Pickford of the Union to forward to Cahill. The Grievor was told that Valard did not accept Dr. Norman's note as adequate and shortly thereafter he received from the Union a questionnaire (Exhibit C4-11) prepared by a Dr. Burnstein who was advising Valard. The Grievor gave that questionnaire to Dr. Norman for her response when he saw her on December 1, 2016.

The Grievor testified that he was "*having trouble getting Dr. Norman to fill out the questionnaire"*, so he decided to see his family physician, Dr. Doody who then completed a note about his condition and treatment (Exhibit C 4-15) on December 21, 2016 which he also gave to Kevin Mullins. The Grievor finally succeeded in getting Dr. Norman to complete a further medical note (Exhibit C 4-20) on January 13, 2017.

Since he had not at that point been put to work on the labourer position he had applied for in November 2016, and having been told by Mullins that the original labourer position had been cancelled, the Grievor decided to apply for another posted position, that of Assembler (Exhibit C 7), which involved assembling pieces of steel for the transmission line towers. He applied for this position in early February 2017 but was "*turned down"* for this posting as well on February 17. Following this rejection, he was asked by Mullins if he would see a Substance Abuse Specialist at Eastern Health for an assessment which the Employer had requested. When he attended at Eastern Health's facility, the Grievor reported that they laughed at him and told him he didn't have an *"addiction"*, he had a "*prescription"* and that he was wasting their time by being there. He stated that he didn't really expect any help from this consultation, but he would do anything to get the ability to go to work.

Finally in frustration, the Grievor decided to go off his medical cannabis and get a new drug test, so he tolerated more than 5 weeks of pain to clear the THC from his body. He then

applied in early April for a job as a general labourer with Pennecon, another subcontractor working on the Project. He stated that Lorne Bennett told him over the phone that he had passed the test and that he should report for work on April 14, 2017, but at the last minute he received another call telling him not to report for work. The Grievor explained that, according to Bennett, Nalcor had "*red-flagged*" him because of his medical cannabis, that he was not permitted access to the Project site, and that "*nobody was allowed to hire*" him for that Project.

Following this rejection, the Grievor did not attempt to get employment at the Project again and left the issue to be resolved through his Union.

The Grievor was unsuccessful in finding any alternate employment until he was hired in November 2017 by a friend who operated a business known a K2 Builders. From that non-union employment, he was able to earn in gross pay the sum of $7,912.00 for the period November 11 to November 29, 2017 (Exhibit HST 4). He admitted to not initially looking for a non-union job because the wages were so much lower than at the Project.

Dr. Alia Norman

Dr. Norman received her Doctor of Medicine in 2001, then began her residency for and became a Radiation Oncologist in 2006. From September 2006 to June 2014, she practiced as a Radiation Oncologist at Eastern Health (Exhibit AN 1). Because of excess job stress and for other personal reasons, she decided in 2014 to leave that area of practice and pursue employment at the CMC. Dr. Norman had seen the benefits that cannabis and related products, such as Nabalone, had achieved in alleviating pain in cancer patients, especially in the feedback she received from those patients. She stated that, in addition to in-house training and familiarity in consulting provided by other physicians at CMC, she had taken a two-day conference on safety and public health issues related to the use of medical cannabis. She described CMC's practice as a "*consultative-based service*". She has seen over 1000 patients at CMC since commencing her practice there.

(Dr. Norman was not qualified as a witness to provide opinion evidence beyond her expertise as a general medical practitioner having some exposure to the use of medical cannabis from her current practice.)

The CMC in St. John's has over 2,260 patients and the physicians there determine whether cannabinoids are appropriate for each patient. About 25% of referrals are determined to be not appropriate for cannabis use. In such cases, other medications are recommended for the patients. Only in exceptional cases are patients authorized to use more than 3 grams per day.

Dr. Norman began seeing the Grievor at the Clinic in 2016 after his initial consultation which had been with Dr. Flusk. She agreed that Nabalone had not worked for him and explained that the route for administration of his cannabis was important in determining how long its effect would continue. The vaporization process maximized the therapeutic effect for about 30 minutes and, in her view, the "*significant effect is gone is about 2 hours".* She described the effect of the THC in cannabis as impacting co-ordination, mood, alertness, appetite, focus and train of thought. She did acknowledge that in some studies on the use of cannabis products, where the study involved examining higher cognitive function, the "*executive assessment may still involve some level of impairment"* on the day following the use of cannabis. Dr. Norman agreed that it was still a *"controversial area"* and that *"not all studies are consistent within the scientific literature"* and further that *"there could be some residual impairment".* Many medications, she explained, affect cognition, not just cannabis, and it is not unusual for there to be impacts from such medications on the day following their use.

In terms of avoiding activities after using medical cannabis, Dr. Norman's standard recommendation for patients is to avoid certain activities, such as driving, for 4 hours after inhalation or 6 hours after oral ingestion. She takes this procedure as acceptable based on the 'Guidelines the College of Family Physician of Canada' (Exhibit AN 3). It was from these Guidelines that she made the recommendation to the Grievor that he not drive a vehicle until 4 hours after his use of vaporized cannabis. She recalled that she had reviewed the two job

descriptions of Utility Worker and Assembler brought to her by the Grievor as indicative of the duties the Grievor was to perform at work, but she did not feel the *"level of impairment remaining on the day after he used cannabis would affect his job performance".* Dr. Norman had seen the Grievor on nine occasions within a year, which was more than the usual number of repeat patient visits for that period of time. She did acknowledge, however, that she had not personally visited the workplace and was not personally familiar with the various activities and risks associated with construction at an industrial site such as the Project.

Dr. Norman acknowledged receipt of Dr. Bernstein's questionnaire (Exhibit C 4-11) in late November 2016 and admitted that her response letter of January 13, 2017 was her only reply to those inquiries. When asked why she did not answer each and every question contained, she explained that she did not believe that the answers to all of those questions were within her "*scope of practice"* and explained that concern to the Union in her e-mail to Mullins on December 16, 2016 (Exhibit AN 4). She felt that Dr. Burnstein's questionnaire was *"confrontational"* and that she also *"took offence at the questions and tone*" of that document.

Dr. Norman ultimately recommended to the Union in an e-mail on December 16, 2016 (part of Exhibit AN 4) that an evaluation of the Grievor's ability to do a specific job should be performed by a specialized company known as Rapid Interactive Disability Management ('RIDM') which operated at Quebec City (where the Grievor occasionally visited for family reasons) and other locations in Canada, but to her knowledge that service was not available within NL.

When asked about whether the amount or extent of cannabis usage over a time period could affect a person's functional performance, Dr. Norman agreed that full clearance of those affects could take longer and that *"regular users"* often require higher levels of THC to achieve a therapeutic effect.

Adam Kean

Kean was a Superintendent employed by H. J. O'Connell which was contracted to the Project at the Soldiers' Pond Station on the Avalon Peninsula. He was a non-union employee and considered himself a part of management. He confirmed that the Grievor had then been employed by O'Connell for the Project and had worked under his direction during portions of 2015 and 2016 as a part of a composite crew working on concrete placement. He felt the Grievor was a *"great worker, skilled and knowledgeable".* He had not known the Grievor previously.

The Superintendent explained that he knew the Grievor was struggling with his illnesses and that he could see the pain in his face on some days. Then one day the Grievor explained that he had begun to use medical cannabis to get relief from that pain. Kean's understanding was that the Grievor was using cannabis in the evenings only and Kean felt that the worksite could accommodate this usage because there was no change in the Grievor's pattern of work performance. Kean experienced no safety incidents and explained that "*Scott was always safe"*.

Kean acknowledged that he did not explain to his Project Manager that the Grievor was using medical cannabis, but he had discussed it with Matt Bailey, the other superintendent supervising the Grievor's work on another shift. He explained that, if he had seen any effect from the use of cannabis on the Grievor's work, he would have raised the issue to another level within the company, but that had not happened. Kean felt that the Grievor was still "*100% safe"*.

Kevin Mullins

Holding a certificate in Safety Engineering and Technology and having served as a safety representative for contractors in NL and elsewhere in Canada for many years, Mullins served as a representative on the Union since 2016, joining the IBEW in February 2016 as Site Representative for the Project.

Mullins explained that the Union had concerns in the spring of 2016 about Nalcor's 'Drug and Alcohol Standard' (Exhibit KM 2). The Union felt that the newly revised Standard was negatively impacting its members. Planned discussions with the Employer were scheduled, but never took place, delayed at the request of David Clark because of other discussions that Nalcor was having with the RDTC, the body representing union workers on the related Muskrat Falls Project. Mullins felt that the 'B1 edition' of the Standard was still operative while the 'B4 edition' was under discussion.

Mullins assumed duties related to the Grievor's dispute from Brian Pickford on November30, 2016 when he was asked to look at the amount of information being requested regarding the Grievor's use of medical cannabis. He worked with the Grievor in attempting to get additional information from Dr. Norman and Dr. Doody. Dr. Doody's medical note of December 21, 2016 about the Grievor was sent to the Association, not to Valard directly, because it was felt that this fact situation involved issues that might affect other workers, not just the Grievor. Mullins also spoke to Dr. Norman about getting additional responses to the questionnaire prepared by Dr. Burnstein. A response (Consent 4-21) was finally received from Dr. Norman in mid-January 2017 and was sent to the Employer's Tim Brower on January 18 (Consent 4-22). Mullins did not recall if he had actually explained to the Employer the fact that Dr. Norman was not comfortable in answering all of questions contained in the questionnaire.

At about the same time, the issue of the Grievor's attempt to secure an 'Assembler' job at the site came up. Mullins asked Brower by e-mail on January 20, 2017 (Consent 4-25) if the Employer was *"comfortable that Scott can bid without reservation"* for that position. He provided a copy of the Assembler job description to the Grievor so that the Grievor could ask his physician to comment on his ability to perform that role. Dr. Norman's report of March 1 (Consent 4-36) was the response. Although the Employer did not formally respond to that request about employability, Mullins explained that David Clark of the Association had asked for a full discussion and disclosure on the Grievor's file. Accordingly, on February 6, 2017 by e-

mail (Consent 4-25) the Union's entire documentation on the Grievor's medical situation was sent to Clark and other representatives of both the Association and Nalcor so that a discussion could take place and a decision could be made. With no decision forthcoming and not being aware of any assessment of the Grievor's employability being made by the Employer, on February 20, 2017 Mullins requested a pre-grievance meeting (Consent 4-32).

At about the same time, the Employer requested through the Union that the Grievor, having tested positive for cannabis, undergo a Substance Abuse Evaluation ('SAE') pursuant to Section 10 of Nalcor's Drug and Alcohol Standard. Mullins scheduled an assessment at Eastern Health's facility, but was told by the Grievor that the SAE personnel would not complete the assessment because there was no evidence of substance abuse. Mullins advised the Employer of this outcome by letter of March 14, 2017 (Consent 4-40). Throughout this extended process of discussion and document exchange, Mullins noted that the Employer had never requested that an Independent Medical Evaluation ('IME') or Functional Capacity Assessment ('FCA') be completed to determine the Grievor's fitness for any particular employment position. That process Mullins considered as essential to a determination of whether a worker could perform a job with some accommodation being made for his medical condition and treatment.

Mullins was aware of the Grievor's unsuccessful attempt to obtain employment with Pennecon, another employer working at the site. On March 24, 2017, Mullins signed and filed the Grievance (Consent 2) on behalf of the Grievor.

Tim Brower

Brower was a LR Consultant for Valard during the Employer's work on the Project, providing support to the management team but reporting to the Director of HR and to the CEO. He was responsible for the day-to-day labour relations issues on the Project.

Brower explained that the job schedule for a labourer on the Project is 20 days on, with 8 days off, allowing for 10-11 work hour days, exclusively on the day shift.

He explained that the Grievor was offered employment on November 9, 2016, subject to medical fitness and drug and alcohol testing, as is done for all employees. He became aware of the result of the Grievor's drug test sometime after November 21, 2016 by e-mail from the Union's Brian Pickford (Consent 4-13). He then contacted the Association's representative, David Clark, seeking advice on how to proceed and was told it would be prudent for Valard to seek direction from Dr. Matthew Burnstein, a medical consultant from Ontario with whom Clark had worked but with whom Brower was not previously familiar. Dr. Burnstein's initial advice to him was that there was insufficient information to determine the Grievor's ability to work in a safely-sensitive position, so the consultant sent him a list of questions for the Grievor's physician to complete (Consent 4-13). When a reply from Dr. Norman was not received by December 2017, Brower assumed that the Grievor had *"gone away"* and asked Dr. Burnstein to close his file and invoice Valard accordingly for his efforts on its behalf to that date.

Brower explained that Dr. Doody's note of December 21, 2017 (Consent 4-15) about the Grievor's diagnosis and his referral to the CMC was not seen by him until sometime in February 2017. He recalled that Dr. Norman's second note dated January 13, 2017 (Consent 4-20) was seen by him in February or March when he received it from Andrea McNiven, a support person from David Clark's office in NB. Brower explained that he was still not personally comfortable in putting the Grievor to work in February 2017 even though he had received more medical information from the January 13, 2017 response of Dr. Norman than he had previously. He felt that Valard should not put the Grievor to work until it had answers to all of the questions posed in Dr. Burnstein's questionnaire. He did share Dr. Norman's January 13 note with Dr. Burnstein and received the consultant's response by e-mail (Exhibit TB 2) on February 14. Because Dr. Burnstein was still not satisfied with the information provided, Valard continued to refuse to put the Grievor to work in any safety-sensitive position.

Dr. Norman's third report dated March 1, 2017 was received by Brower from Mullins in an e-mail (Exhibit TB 3) in mid-March together with the response regarding the Grievor's inability to get the SAE Assessment. Brower explained that the Employer had requested that assessment

because Nalcor's Drug and Alcohol Standard required an assessment if a worker failed a drug test, but Brower did not specifically recall requesting that assessment be made. Brower was aware of no evidence of any substance abuse issues involving the Grievor, so he questioned the relevance of that type of assessment.

On March 14, Brower requested a further consent for the release of medical information be obtained from the Grievor and also noted that, according to Dr. Norman's March 1 note, there had been a change in the percentage of THC in the Grievor's authorized use as recommended by Dr. Norman. The response e-mail from Mullins (Exhibit KM 8) on March 22 indicated that the Grievor was refusing to sign a further consent form, although a copy of his Tilray Patient Card was then provided to the Employer. Brower does not believe that any further information about the Grievor's medical condition was received by the Employer after March 22, 2017.

Brower explained that safety was paramount to Valard, as the company was statutorily required to provide a safe workplace for all workers and, even with the information provided by the Grievor and his physicians, the Employer did not accept Dr. Norman's assertion that a 4-hour window from usage of medical cannabis to working would be sufficient to ensure safe work by the Grievor. Brower confirmed that no request for any medical assessment of the Grievor's condition was made by Valard, other than the requested information from Dr. Burnstein's questionnaire. He did not ask Dr. Burnstein to physically examine the Grievor. He also agreed that he shared much of the Grievor's medical information provided from the Union with Dr. Burnstein, as well as David Clark, Julianne German, Andrea McNiven (all three persons within the Association), and a number of individuals responsible for employment and safety issues within the Valard organization. He agreed that Valard has in the past accommodated other workers having disability issues.

Brower was of the view that all work on the Project was complete for Valard on or about November 16, 2017 as this was the "*corporate message"* that he received at about that time, so in his view no "*craft workers"* would be working on site after that date.

Lorne Bennett

Bennett is the Corporate HR Manager for the Pennecon Group of Companies, reporting to the CEO on LR and HR issues. He observed that he is not a "*safety manager*" for that Group.

In April 2017, Pennecon Heavy Civil Limited was performing excavation and related ground work at the Soldiers' Pond site for the Nalcor Project. He was aware that the Grievor had applied for employment with Pennecon in 2017 on that Project.

Bennett explained that the Grievor had been scheduled for orientation to commence work for Pennecon until the company was alerted by an e-mail (exhibit LB 1) from David Clark's office that the Grievor had filed a grievance about his failure to attain employment with Valard. That e-mail also advised him that it was the Association's position "*based on expert opinion"* that a worker *"should not be working in a safety-sensitive position for a minimum of 24 hours after the use of medical marijuana"* and further that any contractor on the Project should require "*written confirmation from both Mr. Tizzard and the IBEW that Mr. Tizzard is no longer using medicinal marijuana and that should he commence using medicinal marijuana he will immediately inform the Contractor".* Based on this advice, Bennett concluded that Pennecon should abide by the Association's advice, so the Grievor was never scheduled for orientation. Bennett's concern about the Grievor was that he had only temporarily stopped using medical cannabis in order to pass his pre-employment drug test for Pennecon and that he could recommence using cannabis regularly after gaining employment with Pennecon.

Bennett recalled speaking to the Grievor on two occasions during the evening of April 12, 2017 about the Grievor's desire to work at the site. In the initial conversation, Bennett advised the Grievor that he had concerns about his use of medical cannabis. After speaking with Clark and being fully aware of the Association's and Nalcor's position, Bennett called the Grievor back and advised him not to report for the orientation until Pennecon received the assurances that the Association wanted about the Grievor not using medical cannabis. Those written assurances were not subsequently received. Without receiving such undertakings and because site access

was Nalcor's domain as site owner, Bennett understood that no contractor on the Project could employ the Grievor in a safety-sensitive position while he was using medical cannabis.

When asked whether Pennecon had considered offering the Grievor an accommodation for his medical condition, Bennett explained that, when Pennecon became aware of the *"bigger picture going on between Clark and the Union",* it decided that Pennecon would want further *"information from the attending physician before considering any accommodation"* for the Grievor.

Julianne German

German is a contractual "*LR support person*" who works from David Clark's office in Fredericton, NB. She has served as an employer LR representative for the Project.

German explained that Nalcor's Drug and Alcohol Standard is issued to all contractors and unions engaged in any aspect of the overall Muskrat Falls Project to ensure compliance by all workers. The initial version has been revised a number of times. She explained that the 'B5 version' (Consent 2) is currently in effect despite concerns being raised by the RDTC, the association of unions for the Muskrat Falls Project, and the IBEW representing all union workers on the Transmission Line Project. She acknowledged that changes have been made regarding cannabis definitions since the earlier 'B4' version (Consent 5).

German also provided copies of e-mail exchanges (Exhibit JG 1 and 2) on February 13-14, 2017 between Clark and the IBEW regarding the Grievor's situation and his use of medical cannabis. She also explained that either she or Clark had added the Grievor's name to Nalcor's 'Restricted Site Access Matrix' which list indicates that a person is not generally permitted to work on the Project unless conditions regarding the employability of that person have changed.

German also gave evidence about the exchange of e-mails in early February 2017 (Exhibit JG 2) about the attachments which disclosed the Union's file on the Grievor's medical condition and

indicated the Employer's concerns about Dr. Burnstein's questionnaire not being fully answered.

Dean Seifried

As a Safety Advisor and Safety Supervisor for Valard at the Project in 2015 and 2016, Seifried was responsible for compliance with occupation health and safety regulations. He had worked on many areas of the transmission line corridor and was familiar with site conditions experienced during construction. In that capacity he was generally familiar with the daily activities of Utility Workers and Assemblers, the two positions sought by the Grievor. He explained that labourers often use hydraulic tampers, generators, heaters, air compressors, vibrators, drills, pumps and other pieces of small equipment. They work in close vicinity to larger pieces of construction equipment such as excavators, 'zoom-booms', dozers, trucks and other vehicles in situations where vehicle congestion can present a safety factor. He also explained that during this construction activity there can be many physical risks, including tripping hazards, excavations, concrete and rock, mud and bog, together with adverse weather conditions which exacerbate the normal daily physical risks. On the Assembler role, he identified the additional risk of 'pinch points' where bodily injury can occur when assembling the large pieces of steel used to make the transmission towers.

Seifried also put into evidence statistics which he had calculated based on injuries at the site, categorized into 'injury by work discipline' (Exhibit DS 1) and 'injury by anatomical region' (Exhibit DS 2) as well as photographs which he had taken showing typical field conditions at a number of locations taken on various dates. These photos, he suggested, would be indicative of the range of conditions that labourers would experience daily when working in the position of Utility Worker and Assembler.

Seifried explained that he had not been involved in the Grievor's case and he was not personally aware of any accommodation efforts undertaken to employ any workers with disabilities on the Project.

Dr. Matthew Burnstein

A general physician, licenced to practice in Nova Scotia and Ontario, Dr. Burnstein also has specific training in Impairment and Disability Evaluations, Occupational Medicine. He is also a certified Independent Medical Examiner ('IME'). Dr. Burnstein is currently the Medical Director of Occupational Health at the 'Appletree Clinics', a series of private clinics in Ontario where he practices family medicine, which he explained had *"expanding into occupational health*". He practices as an "*Occupational Health Medical Consultant*", but does not hold Royal College certification in Occupational Medicine. He has only limited training in or exposure to the possible impacts that cannabis can have on a person's ability to perform work.

(Following questioning from both Parties about his professional credentials, Dr. Burnstein was declared qualified to give opinion evidence in this matter on occupational health and disability management issues, for which area of practice he does have some relative expertise and training and for which reason he had been retained by the Employer on the matter in dispute. That qualification did not, however, extend to his providing opinion evidence on the uses for and impacts of medical cannabis, except to the extent that any general practitioner is able to determine if patients should be permitted to use medical cannabis as a treatment modality.)

Dr. Burnstein was retained in an e-mail from Brower on November 24, 2016 to advise Valard on how it should respond to a worker who wanted to work in a safety-sensitive position while using medical cannabis. The safety impact arising from such cannabis use was his focus. He sent Brower the questionnaire (Consent 4-11) which he had developed based on similar forms created by him in the past for *"similar cases*". He then had Dr. Norman's note of November 24, 2016 (Consent 4-10) as his only knowledge of the Grievor's condition and use of cannabis. Dr. Burnstein also received from Brower the job description for Utility Person (Consent 4-1) at the same time. He expected a response from Dr. Norman to be sent back to him directly, based on his prior experience with other physicians. He explained that he needed the answers to his questions to determine whether cannabis use was the only alternative for treatment of the Grievor's medical conditions. He explained that he has experienced good cooperation with

other physicians in the past in completing similar questionnaires. In Dr. Burnstein's view, *"it is good practice to use drugs that we know and better trust than to use something novel".* Dr. Burnstein relied on Guidance from the College of Physicians and Surgeons of NL (referred to later as the 'NL Guidance') (Exhibit MB 6) to advise him in reaching this conclusion about how and when cannabis should be used.

In Dr. Burnstein's view, an employer has the final responsibility to ensure worker safety. "*Doctors determine impairment, employers determine disability*" was his understanding of the respective roles. He explained how the answer to each of his 20 questions in the questionnaire would help him advise the Employer on how and if an accommodation could be achieved for the Grievor. Having received no response from Dr. Norman by mid-December 2016, Dr. Burnstein wrote to Brower on December 1 and asked what was happening. He was then told by Brower to close his file and invoice Valard for his services to that date.

When asked in evidence when he saw the note dated December 21, 2016 from Dr. Doody about the reasons for the Grievor's referral to the CMC, he responded that "*I have not seen that document previously."*

Dr. Burnstein was re-engaged on this matter when he received an e-mail on February 13, 2017 from Brower telling his that the Grievor had *not "gone away."* Brower also provided him at that time with Dr. Norman's second report of January 13, 2017 (Consent 4-20) which he had not seen previously. He commented that, while the physician had *"addressed many of the issues*" in his original questionnaire, she did not *"address the question of determination of functional limitations or Health Canada's Guidance on duration of impairment".* For that reason, Dr. Burnstein provided the following advice to Valard in his reply on February 14 (Part of Exhibit TB 2):

> *"Given the inability to accurately determine impairment, a blanket approach to no use of THC containing marijuana within 24 hours of safety sensitive work is a common approach. Where someone requires marijuana due to a medical disability, accommodation needs to be considered….."*

Dr. Burnstein did observe, however, that he did not believe that the Grievor had *"reached the end of the* (medication) *road*" before being advised to use medical cannabis for relief from his pain. He was also concerned that, if Dr. Doody was the primary physician for the Grievor, Dr. Doody should have determined the use of cannabis, in accordance with NL Guidance. He also felt that the Guidance from the College of Family Physicians of Canada on the use of Cannabis for Chronic Pain (Exhibit AN 3) did not support the use of medical cannabis for the treatment of pain from osteoarthritis, one of the Grievor's underlying conditions for which cannabis had been authorized by the CMC.

Dr. Burnstein was of the view that the Grievor's usage/dosage level of 1.5 grams per day with a THC content of up to 20% was *"pretty heavy".* He commented that a THC level of 7% was once considered as a high level, but acknowledged that THC levels have increased significantly in recent years. He also felt that performing safety-sensitive work or the use of equipment after taking cannabis should require a 24-hour waiting period, rather than simply a 4-hour period.

The next involvement of Dr. Burnstein in this matter was when he received another e-mail (Exhibit MB 8) from Brower on March 8, 2017, advising him that the Grievor had applied for the new position of Assembler. Wanting additional information from Dr. Norman, Dr. Burnstein then sent her a fax (Exhibit MB 8) on March 14, 2017 seeking answers to an additional 14 questions about the Grievor' s diagnosis and treatment regime. No reply from Dr. Norman was ever received by him to that additional list of questions. He did not receive Dr. Norman's third note of March 1, 2017 about the Grievor's slightly increased THC dosage (Consent 4-36) except in preparation for the hearing.

On March 16, 2017 Dr. Burnstein sent another note to Brower asking "*what's going on*?" but was not involved further in this issue until being asked to give evidence for the hearing. He has never treated or examined the Grievor in any capacity at any time. He did not recommend to the Employer that an IME be prepared to assess the Grievor's condition and/or disability.

Dr. Burnstein also explained that "*in medical-legal cases*", he does not like to rely on verbal comments, which is why he uses the questionnaire format when dealing with other physicians. He explained that he has experienced good co-operation in the past when using such documents to elicit responses from treating physicians. He admitted that he was unlikely to change his opinion on cannabis use here, based on the high THC levels and the large daily usage level directed by Dr. Norman. He did not feel that the Grievor would be able to work appropriately in a safety-sensitive position following only 4 hours after that amount of cannabis. He felt that there would *be "probable impairment*" within a 24-hour period from such levels.

Gregory Johnstone

Johnstone holds a Master of Science Degree with a specialty in Pharmacology and Toxicology. He is the owner of PharmaTox Inc., a consulting company involved in advising clients on the adverse effects of various drugs and chemicals. He was retained by the Employer to provide evidence in this matter, but was not earlier involved in the case. He also operates 'Integrated Safety Services', a related entity with a focus on workplace hazards and risk. Johnstone's curriculum vitae document (Exhibit GJJ 1) contains the details of many studies and articles on drug and alcohol impacts on individuals, especially from a product-abuse focus. Johnstone is not a medical doctor and did not specifically measure the effects of medical cannabis on the Grievor's work performance.

(Following questioning from both Parties about his professional credentials, Johnstone was qualified to give opinion evidence in this matter on the area within in his specific area of expertise, that is, the pharmacological and toxicity impacts of cannabis products on human behaviour and performance.)

At Valard's request, Johnstone prepared a Report (Exhibit GJJ 2) "*to inform the stakeholders"* about the impacts of cannabis consumption in the context of a safety-sensitive workplace, answering seven specific questions which had been put to him by the Employer. After some

preliminary commentary about the effects of cannabis on the Endo-Cannabinoid system in the human body, Johnstone reached, inter alia, the following conclusions:

1. THC can have calming, sedating, slowing and other effects on the cognitive, executive memory, attention and other systems within the body, including the immune system. There is a complex inter-relationship between the immune system and the Endo-Cannabinoid system. THC can also have interactions with other drugs producing impairment when used together by the individual.

2. Understanding the measurement of THC in the body is currently at a stage where testing of THC content in urine provides the best indication of the presence of THC in the body, but this does not provide a good correlation to impairment of that person's performance from that THC. Drug Recognition Expert ('DRE') training is available for police and other law enforcement personnel in some areas in Canada, but is not widely available in Canada. That training must then be combined with employment supervisor knowledge in order to reach specific conclusions about impairment of work in individual cases. The uncertainty that increased risk from cannabis creates in a worker is a genuine workplace safety issue.

3. The effects of cannabis on bodily function include impacts on sensory and perception ability, self-awareness, reduced vigilance, reduced and delayed reaction time, short-term memory, sedation and fatigue, euphoria and distraction, although not every effect for every user occurs in every case.

4. Time frame for impairment depends on a large number of factors including whether the user has a "*body load"* of THC from longer term use. Higher percentages of THC can lead to possible impairment of some functions for up to 7 days. Because measurement of impairment is difficult in terms of knowing whether that entire "*body load"* is measured, caution is the correct approach in determining possible impairment on any one occasion.

5. The effects of combining authorized THC use with authorized or unauthorized use of other medications is significant. Johnstone's assumption is that some users of medical cannabis will supplement their authorized amount of cannabis with additional marijuana obtained from unauthorized sources. This presents a "*very significant workplace health and safety issue"*.

6. Safety principles relative to any drug use dictate that a precautionary principle should be invoked so that the burden of proof that such use is not harmful or risky should fall of those taking the cannabis. In that vein, he noted that Health Canada has recommended to doctors that "*patients not drive, operate complex and dangerous equipment or work in safety sensitive jobs until at least 24 hours following the use of any amount of cannabis".*

7. In a work cycle of 20 days of work, 10 hours per day, the combination of work intensity and use of cannabis would create "*accumulated physical fatigue and probable other sources of impairment towards the end of the 20 day cycle".*

In his *viva voce* evidence, Johnstone stated that *the "blunting effect"* of THC on the body's responses could create longer term impact on performance and that higher THC levels, such as the 20% authorized for the Grievor's medical cannabis, bring an even higher risk of dependency and an increase in the work performance risk.

Finally, Johnstone concluded that the current absence of impairment measurement tools in the workplace means that the burden is on an employer to ensure safety by not permitting an employee to perform safety-sensitive work while taking medical cannabis. In his view, there are too many parameters or variables present to allow the average workplace person to assess subtle impairment caused by the daily use of medical cannabis.

<u>Dr. Mark Ware</u>

Dr. Ware holds a Bachelor of Science in Medicine as well as a Master of Science in Epidemiology. He has significant experience as a pain physician and holds faculty status in both Anesthesia and Pharmacology at McGill University. He has been involved in numerous studies on the medical use of cannabinoids and is currently the Executive Director of the Canadian Consortium for the Investigation of Cannabinoids. Dr. Ware has not, as a physician, examined or assessed the Grievor in relation to this dispute. His Curriculum Vitae (Exhibit MW 2) contains many references to his professional activities and writings relating to the study of cannabinoids for medical use.

(Following questioning from both Parties about his professional credentials, Dr. Ware was qualified to give opinion evidence in this matter on patient pain management and the use of cannabis and the effects which it may have on human performance, although his expertise on such impacts in workplace related safety is more limited.)

Dr. Ware was retained by the Union to provide a Report (Exhibit MW 1) into the Report offered by Mr. Johnstone. Dr. Ware's Report is, in essence, a critique of Johnstone's Report, and focused on four main areas:

1. Cannabis and the endocannabinoid system – Dr. Ware uses the term cannabis instead of marijuana and believes that the Johnstone Report fails to recognize the "*tremendous advances in our understanding of the role of the ECS* (Endo Cannabinoid System) *in pain management".*

2. Medical and non-medical cannabis use – Dr. Ware takes issue with Johnstone's conclusion that a "*chronically elevated THC levels will increase the probability of impairment",* stating that there is no evidence to support that conclusion and that such statement undermines the credibility of Johnstone's Report. Dr. Ware concludes that Johnstone's statements have no scientific basis and adds that the implication that persons using cannabis regularly are at higher risk of workplace impairment is simply wrong.

3. Use of cannabis outside of the legal framework – Dr. Ware does not support the view that users of medical cannabis will advance to supplementing their medical product with recreational marijuana. Noting that there are over 200,000 patients registered for use of medical cannabis in Canada, he comments that there is no follow up or monitoring of these patients by Health Canada and that "*for many conditions, the efficacy of cannabis as a therapy has never been studied at all".* He criticises the Johnstone Report for relying on studies that are mainly based on recreational marijuana use when the issue here is cannabis use for medical purposes.

4. Safety considerations – Dr. Ware suggests that the safety implications for regular users of medical cannabis are not dissimilar from the same issues arising for regular users of prescription drugs. He also disputes Johnstone's *"framework for interpreting risk"* and concludes that such framework has not been accepted in epidemiological studies.

Dr. Ware then continues in his Report to comment on some of the questions posed to and answered by Johnstone's report. Dr. Ware concludes that some of Johnstone's *"rather simplistic statements"* do not reflect accurately the complexity of the data from which those statements are derived. He agrees that *"there is uncertainty in understanding risks of cannabis use and the workplace*", but then disputes Johnstone's conclusion that *"it is in fact a real safety hazard".* Dr. Ware prefers to conclude that *"risk has to be evaluated on a case by case basis".* Dr. Ware also objects to Johnstone's conclusion or "*conjecture"* that users of medical cannabis will likely or possibly use recreational marijuana to supplement their medical products.

Finally, in his Report and in response to the question of how the Grievor's work cycle might impact his use of medical cannabis, Dr. Ware suggests that he would *"defer to Mr. Tizzard's treating physician, Dr. Alia Norman, who authorized Mr. Tizzard's use of medical cannabis and assessed his fitness for work."*

In his *viva voce* evidence, Dr. Ware agreed that the role of cannabis in pain treatment is not just that it *"makes you feel better*", rather that there is *"real pharmacology happening"* in terms of its effect on the body's Endo Cannabinoid system. He also cautioned that most of what medicine knows about the effects of cannabis use on performance arises from studies based on recreational marijuana, not strictly on medicinal use, noting that patients with chronic illness react differently to cannabis than healthy persons. From that he concludes that the *"safety issues may not be the same".* He suggests that there is literature to support that some users have *"self-awareness"* of their ability to drive and perform difficult tasks, while at the same time he does admit that there is also literature to support the conclusion that some users have a lack of awareness. In each case, he suggests that the attending doctor and patient should together determine the patient's ability to perform a task, adding that there is *"a way in our environment that the risks can be evaluated".* He did acknowledge that the likelihood of *"adverse effects*" increases with an increase in the level of THC in the cannabis, assuming *"all other factors remaining the same".*

Tracy Avery (evidence limited to the issue of damages.)

Avery had initially worked for Valard on the Transmission Line Project, but on completion of that Project, she commenced employment for the Union on the separate Maritime Link Project. She is responsible for financial work, audits, etc.

Avery confirmed that the initial hiring date of the Grievor, according to the signed Approval request form (Exhibit TA 1), was November 6, 2016 and that the *"alleged breach date"* according to the Grievance was November 21, 2016.

In the demobilization process that followed the winding down of work as the Project completed, Avery stated that the last foundation labourer working was Duke Osmond who was demobilized from the site on November 29, 2017 (Exhibit TA 2).

According to Avery, the method by which overtime was calculated, as contained in the Project Agreement, was amended by the Parties in a signed Memorandum of Agreement (Exhibit TA 3). Based on all of this information, Avery then calculated the amount of compensation she believes the Grievor would be entitled to had he been employed from November 6, 2016 to November 29, 2017 (Exhibits TA 4 and 5). The total amount is $122,119.50, after deducting mitigation income earned by the Grievor from his employment with K2 Builders..

Although not contained in her evidence, during the submissions stage of the proceedings, the Union revised its calculations on the amount of the Grievor's entitlement, based on revisions to the increasing wage rates then available to him. The amount now claimed by the Union for his loss of income is $140,770.81. The Employer did not take issue with the accuracy of those recalculations, but did not admit that any monies were owed as the result of the Grievance.)

Jessica Cahill (evidence limited to the issue of damages.)

Cahill worked for Valard as a site labour relations person for 3.5 years. In that capacity, she was responsible for putting together the various Job Request Forms (e.g. Consent 4) on behalf of Valard which were then sent to the IBEW so that workers could be referred and hired.

Cahill was aware of the work crew that the Grievor was to be sent to when he was initially hired for the Utility Person position. That group was the earth foundation crew led by Clifford Furlong (Exhibit JJC 1). She was aware that the Grievor had a problem with part of his drug test and was not being sent to work for that reason. She explained that, had he been able to work with that crew, the Grievor would have commenced work on December 1, 2016, he would have been laid off for Christmas break from December 21, 2016 to January 23, 2017, and then returned on January 24 until a short breakup (for site and weather conditions) in approximately March or April, returning finally to work until that crew's final day of July 31, 2017. In Cahill's view, the Grievor would not have been entitled to be sent to work on another crew once that final layoff of his original crew happened.

Cahill acknowledged that the Union appointed various members to the position of Shop Steward and the Employer would then be informed of the names. She estimated that more than 10 shop stewards were appointed by IBEW for this Project.

Cahill referred to the MOU regarding final layoffs (Exhibit TA 6) which indicated that a worker had to demonstrate six months of on-the-job experience in a role with Valard before that worker could then bump another worker from that position. Regarding the continuing work of Duke Osmond, another labourer employed on the Project, Cahill was unable to say if the Grievor could have bumped Osmond had the Grievor was working as shop steward during that time.

After the close of her evidence, following the giving of an undertaking, Cahill provided the names of a Valard crew working from July 29 to November 29, 2017 (Exhibit JJC 2). With that crew and within that time period, Duke Osmond had been employed as a labourer.

THE PARTIES' POSITIONS

The Union

The Union asserts that the Grievor was a qualified and experienced person who had worked on the Project previously without conditions associated with his medical condition and treatment with medical cannabis. He was offered employment by Valard. He informed the Employer that he was then treating his chronic pain with medically authorized cannabis. If the Employer had concerns about the treatment of his disability, it concurrently had a duty to accommodate him in employment. Despite the assurance Grievor's physician that he was fit for duty following four hours subsequent to taking his evening cannabis, the Employer refused to employ him or offer him any accommodation which would allow him to start work. The Employer sought unnecessary medical information which was simply designed to obstruct the Grievor's employment. His disability was never accommodated and he was never individually assessed for his fitness to work.

According to the preponderance of medical evidence produced at the hearing, the Grievor was fit for employment even though he was using medical cannabis in the evenings.

The *Human Rights Act* of NL prohibits discrimination in employment on the basis of a disability. The duty to accommodate any disability is enshrined in law and jurisprudence. The Union asserts that the Employer had a duty to individually assess the Grievor's ability to perform work at the Project and that it failed in that duty, leaving it responsible to pay damages to the Grievor based on his loss of earnings.

The Employer also breached the Grievor's rights in the manner in which it mishandled the Grievor's private medical information. That information was provided by the Employer to

persons who did not require access to that private medical information in the accommodation process.

The Union states that the Grievance has been made out and claims damages from the Employer, calculated as (a) $45,000 in general damages for the violation of his human rights, plus (b) damages for loss of income calculated at $140,770 after deduction of his mitigation income.

In support of its position on these issues, the Union relied on the following authorities:

1. *Access to Cannabis for Medical Purposes Regulations, SOR/2016-230*
2. *ADGA Group Consultants Inc. v. Lane et al*, 2008 CanLII 39605 (ON SCDC)
3. B*.C. (PSERC) v. BCGSEU ('Meiorin'),* 1999 CanLII 652 (SCC)
4. *B.C. Superintendent of Motor Vehicles v. B.C. (H.R.C.) (Grismer)* 1999 CanLII 646 (SCC)
5. *Brown v. Bechtel Canada and another*, 2016 BCHRT 170 (CanLII)
6. *CUPE Local 4400 v. Toronto District School Board,* 2016 CanLII 26730 (ON LA)
7. *IWA-Canada v. Weyerhaeuser Co.,* 2004 CarswellBC 2039
8. *M obo another v. V Gymnastics Club*, 2016 BCHRT 169
9. *Moore v. British Columbia (Education*), [2012] S.C.R. 360
10. *The City of Calgary v. Canadian Union of Public Employees (CUPE 37)*, 2015 CanLII 61756 (AB GAA)
11. *International Brotherhood of Electrical Workers, Local Union 1620 v. Lower Churchill Transmission Construction Employers' Association Inc.,* 2017 CanLII 59779 (NL LA)
12. *Bottiglia v. Ottawa Catholic School Board, 2017 ONSC,* 2017 CarswellOnt 7627
13. *Canadian Bank Note Co. and IUOE, Local 772,* 2012 CarswellOnt 10489,
14. *Mechanical Contractors Assn. Sarnia and UA, Local 663 (Alcohol and Drug Testing),* 2013 CarswellOnt 18985
15. *O.N.A. v. St. Joseph's Health Centre, 2005 CarswellOnt 2981*
16. *Parry Sound (District) Welfare Administration Board v. OPSEU Local 324,* 2003 SCC 42
17. *Muskrat Falls Employers' Association Inc. and Resource Development Trades Council of Newfoundland and Labrador,* 2016 CarswellNfld 143
18. *Providence Care, Mental Health Services and OPSEU, Local 431 (Winton),* 2011 CarswellOnt 15998
19. *Human Rights Act, 2010,* R.S.N.L. 2010, Chapter H-13.1
20. "*Medical Marijuana IMEs*", Rapid Interactive Disability Management Ltd., RIDM.NET

The Employer

The Employer argues that the two positions sought by the Grievor at the Project were both safety-sensitive. Therefore, it was essential for the Employer to determine his ability to work without impairment. The Employer has an obligation under legislation to all workers to ensure a safe workplace. Allowing a person to work while impaired is specifically prohibited in law.

The implications of cannabis use must be carefully examined. All of the witnesses who gave opinion evidence noted that impairment was an expected consequence of using cannabis and that measuring the length of time that impairment existed after use was quite difficult. The percentage of THC content in the cannabis also affects the length of time impairment can be expected, so significant impairment can certainly last up to 24 hours after use of cannabis with those higher THC levels. In addition to the testimony of the witnesses, the professional guidance from the College of Family Physicians of Canada, Health Canada and the NL College of Physicians and Surgeons all point to longer impairment times than simply 4 hours. Impairment can occur for up to 24 hours.

The Employer claims that it has met its obligation to individually assess the Grievor's individual case to the extent that it was able because of the limited cooperation and information from the Grievor's physician. In any event, it states that the safety risks added to the workplace by the Grievor's use of medical cannabis brought the Employer to the point of 'undue hardship'. The risks of work impairment arising from his daily cannabis use are real, documented by the available medical information and the Employer's inability in a practical way to measure impairment from cannabis is an impediment, especially in remote worksites, such as those found in the Project.

The Grievor's prior work for another employer on other aspects of the Project does not, in the Employer's view, demonstrate evidence of safe work. The fact that such work experience was without incident is not evidence that there was no residual impairment in his performance

arising from his medical cannabis use. He may simply have been fortunate that an incident did not occur.

Undue hardship exists in the form of increased workplace safety risk. The Employer could not employ the Grievor in a safety-sensitive position while he was using medical cannabis every evening. The Employer submits that the Grievance should therefore be dismissed.

The Employer denies that it violated the Grievor's privacy rights in the extent of its sharing of his medical information since he had consented to its use to determine his employability. Such information was only shared with persons who were either representing the Grievor or making decisions about his ability to work on the Project.

In the alternative, if the Grievance is not dismissed, the Employer disputes the Grievor's claim to general damages as there is no support for such a claim based on the evidence presented. The Employer also disputes the Union's suggested calculation of damages arising from lost income. The Employer denies he was entitled to claim preferred seniority status as a shop steward or that there is evidence that he would have ever been appointed as a shop steward at the Project.

In support of its defence to the Grievance, the Employer submitted the following legislation and arbitral authorities:

1. *Canadian National Railway and CAW, Local 100 (Workplace Alcohol and Drug Policy)*, 2010 CarswellNat 6164.
2. *Re Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Uprichard)*, 2016 CarswellNfld 213.
3. *Occupational Health & Safety Act*, R.S.N.L. 1990, c. O-3.
4. *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CarswellAlta 149.
5. D'Andrea, J., *Illness and Disability in the Workplace*, (Toronto: Thomson Reuters Canada, 1995, loose-leaf), ch 4 at s 4:4510. Online: WestlawNext Canada (accessed 2 February 2017).
6. *Re G&K Services Canada Inc. and UFCW, Local 206,* 2013 CarswellOnt 8450.
7. *Re City of Toronto and CUPE, Local 79*, 2016 CanLII 79683.

8. *Morgosh v. Ottawa (City)*, 1989 CarswellOnt 3397.
9. Tarnopolsky, *Discrimination and the Law*, revised edition (Toronto: Thomson Reuters, 2004, 2017) (loose-leaf updated 2018, release 2), Ch. 15, Appendix A.
10. *McEvoy v. Best of Care Ltd.*, 2005 CarswellNfld 400.
11. *Malone v. City Wide Taxi*, 2016 CarswellNfld 533, 83 C.H.R.R. D/99.
12. *St. John's (City) v. Newfoundland & Labrador (Human Rights Commission),* 2011 CarswellNfld 187, 2011 N.L.T.D. (G) 83.
13. *McDonald v. Dental and Hearing Crafts Ltd.*, [2009] N.L.H.R.B.I.D. No. 5.
14. *Harvey v. Woodford Training Centre Inc.*, [2009] N.L.H.R.B.I.D. No. 1.
15. *Sparkes v. Newfoundland (Ministry of Health and Community Services)*, [2002] N.H.R.B.I.D. No. 7.
16. *Halsbury's Laws of Canada – Discrimination and Human Rights*, (Markham, Ont: Lexis Nexis Canada, 2014) at para HDH-316 'Lost wages'.

ANALYSIS

The starting point for an analysis of the issues arising from the Grievance is to develop a general chronicle of events. The Grievor's attempt at achieving employment was extended over almost four months. The Union claims that the Employer was "*dragging its heels"* in the process of considering the impact of the Grievor's medically-authorized cannabis on his employment, while the Employer places blame on delayed responses from the Union, the Grievor and/or his physician. Undue delay is not an issue which needs to be considered in the current context, unless it displays a bad faith intention.

Facts and Timeline

The Grievor is a person who suffers from pain and the associated consequences of a diagnosis of Crohn's disease and osteoarthritis. His physician had attempted to alleviate this pain with a number of conventional medications, but because of the adverse impacts from the Crohn's disease, these medications were either unsuccessful or caused additional discomfort to his stomach. As a consequence, he was referred to the CMC in 2016 for an assessment which determined that medically-authorized cannabis may provide relief. His cannabis intake has been adjusted from the original THC percentage to higher levels. During the times relevant to this proceeding, he was authorized to ingest by vaporization up to 1.5 grams of cannabis daily having THC levels of up to 22%. His physician directed that intake be in the evenings only. The

Grievor reported that his pain was alleviated, he slept better and that he was better able to tolerate his pain without using medication during the daytime hours. In his view, he did not experience impairment of his functioning during daytime working hours. There is no evidence that he used additional amounts of recreational marijuana to augment his authorized amounts. This regime of pain management was in place prior to his attempts in late 2016 and early 2017 to secure employment with Valard at the Project.

On November 9, 2016, after referral by the Union, the Grievor was accepted by the Employer for employment in the position of Utility Person (a labourer role) at the Project, subject to satisfactory pre-employment drug and alcohol screening, a requirement for all employees. On Nov. 21, the Grievor completed his drug screening, performed by an external agency. The Employer and the Union were informed by that agency on November 21 that his drug test was positive, but precise reasons for that failure were initially undefined. The Employer learned a few days later that the Grievor held an authorization for the use of medical cannabis and that the THC in that cannabis was the ingredient revealed in the drug test.

Once the Employer became aware that medically-authorized cannabis was involved, it retained the services of Dr. Burnstein, an independent medical consultant, to advise it on the impact that cannabis use may have on workplace safety at the Project.

In response to the Employer's request for information about his medical cannabis, the Grievor requested Dr. Norman, the physician at CMC who was managing and monitoring his use of cannabis, to provide information to the Employer. On November 24, Dr. Norman confirmed in a letter ('Norman's 1st medical report') that the Grievor was taking medical cannabis for relief from his pain due to Crohn's disease and osteoarthritis. No details of dosage were then revealed, but the letter did advise that the cannabis was to be used in the evenings only. In that Report, Dr. Norman recommended a 4-hour driving restriction, but did not have any *"concerns about daytime function".*

Norman's 1st medical report was reviewed by Dr. Burnstein and found to be unsatisfactory to him in terms of the details it provided. At his direction, Valard requested that the Union have Dr. Norman complete an additional 20-point questionnaire ('Burnstein's questionnaire') which Valard's consultant had prepared. The 3-page document contains 20 questions in a 'fill in the blanks' format for replies to be inserted for each of the questions asked. Burnstein's questionnaire required the receiving physician to answer not only questions about the diagnosis and treatment, but also about the extent to which Dr. Norman was aware of any workplace safety impacts from the Grievor's use of his cannabis. One of the questions was – "*What is the impact on Scott Tizzard's ability to work safely in the event he deviates from taking the authorized dosage in the intervals recommended?"* Another question challenged her conclusion that 4 hours after inhalation was adequate before driving, instead of 24 hours which the questionnaire suggested was more appropriate. Dr. Norman was understandably concerned about her responsibility in making commentary beyond confirming the provision of strictly medical information. She commented to the Union about her concerns regarding her *"scope of practice"* in answering all of the questions posed. I accept her concerns as being professionally legitimate and agree that Burnstein's questionnaire was somewhat confrontational in tone. From the outset it created an atmosphere which was not collegial and, in turn, delayed any response.

It was not until January 2017 that Dr. Norman prepared her second letter ('Norman's 2nd medical report'), but in the interim the Grievor, attempting to provide as much information as possible to the Employer about his condition, on Dec. 21, 2016 obtained from his personal physician, Dr. Doody, some additional information ('Doody's medical note') which mentioned the Grievor's earlier *"multiple ineffective trials of pain medication"* and his referral to the CMC. Doody's medical note was promptly given to the Union by the Grievor, but it was not forwarded by the Union to the Employer until sometime in February 2017. In fact, Doody's medical note was never referred by the Employer to Burnstein for his consideration. That lapse of communication may not have affected the outcome materially, but it was one of the many missteps that occurred.

On Dec. 22, 2016 the Union requested the Employer to consider the information already provided (which by then was only the information from the testing facility and Norman's 1st medical report as the Employer did not then have Doody's medical note) and consider hiring the Grievor. The Union asserted that the Grievor's use of medical cannabis had been initially disclosed to the testing facility on Nov. 16, so one month later it expected a decsion to be made about his employability. Given the disclosure to that date, that expectation was unreasonable.

The normal Christmas work break appears to have impacted both the Union's and the Employer's efforts to advance the issue of the Grievor's employability. That delay, together with the delay in receiving Norman's 2nd medical report, affected the timing of the Employer's response.

On Jan. 13, 2017, Norman's 2nd medical report, which did contain additional details of the Grievor's medical condition, his cannabis authorization and dosage, was prepared. This report was, in my view, Dr. Norman's best effort in responding to as many of the questions from Burnstein's questionnaire as she felt comfortable answering, although her reply did not address the safety and work related issues. In his evidence, Dr. Burnstein commented that it answered in spirit many of his concerns and did provide useful information, but not on every issue. Norman's 2nd medical report was not, however, delivered to Dr. Burnstein by the Employer until somewhat later.

On January 18, 2017 the Employer acknowledged receipt of the Norman's 2nd medical report and offered to respond once Valard's Safety Team had reviewed it. No mention was then made of Dr. Burnstein's continuing involvement. Without awaiting that formal response, on January 20 the Union advised Valard that the Grievor was considering bidding on a newly-posted Assembler position and asked Valard if it was "*comfortable that Scott can bid without reservation"* on that position. In response, the Employer expressed its view in an e-mail to the Union that *"Valard is not comfortable that Scott Tizzard can work safely ….. while under the medication that his doctor has directed"*, but the Employer offered that it would have a more *"formal response*" just days later. That intended formal response was never delivered because

the issue of medical cannabis use gained focus with not just the Employer, but also with the Association and Nalcor.

On January 24, the Employer presented the Union with another medical 'Request for Release' Form for the Grievor to complete. That document was never signed by the Grievor who by that time was understandably becoming irritated with the slow progress.

On February 1, the Union e-mailed the Employer asking again for a formal response on the Grievor's employment status "*post disclosure of medical marijuana".* Brower from Valard replied that a response was drafted and was "*getting company approval*". That approval was, however, interrupted by the Association's growing interest in the whole scenario. Neither Nalcor nor the Association had determined how they would handle work issues involving workers using medical cannabis. The Grievor's situation had become something of a test case.

There was then a concern raised over whether the Employer and others had all of the information available about the Grievor's medical condition and treatment regime. On February 6 the Union forwarded to the Association's Clark "*in the interest of full disclosure"* all "*documents collected with respect to Harold 'Scott' Tizzard*". Even that communication was delayed in receipt because of electronic transmission issues but the complete file was finally delivered. A fuil and complete file was ultimately received by the Association.

Whether to test the Employer's resolve regarding its resistance to employing the Grievor or to set up another line of argument in case delay had prejudiced the Union's pursuit of his original Utility Person job, on February 16 the Union once again asked the Employer to consider the Grievor for a newly-posted position of Assembler. One day later, Valard responded that it "*will not be considering"* the Grievor for employment and noted that it is "*still waiting for a satisfactory response"* from the Grievor's physician, noting that the information received to date "*does not meet* (Dr. Burnstein's) *standards or requirements".* By that date, Dr. Burnstein had received Norman's 2nd medical report from the Employer, but he wanted more.

Somewhat inexplicably, later in February the Employer requested and the Union agreed that the Grievor should undertake a substance abuse evaluation (SAE), apparently all under the guise of it being a requirement of Nalcor's Drug and Alcohol Standard. This request was, not surprisingly, a wasted effort once the health professionals who were to perform the evaluation realized that the Grievor was authorized to use medical cannabis and that he was not a substance abuser. The Grievor's unrewarded patience and co-operation in this errand are commendable, but the process added nothing to the assessment of his disability and his use of authorized cannabis for pain relief. The request for assessment displays the simple fact that few individuals involved in this discussion about cannabis use really understood the nature of a physician's authorization. Medically authorized use is not substance abuse.

Dr. Norman prepared another yet medical report ('Norman's 3rd medical report') on March 1 regarding the Grievor's ability to work safely in the Assembler position, commenting that his cannabis medication use in the evening was *"very unlikely to impair any of the listed job functions".* Not surprisingly, that report did nothing to allay the Employer's concerns about the Grievor's ability to work safely. In fact it exacerbated some concerns because it noted that his cannabis THC levels were now increased up to 22% from 20%.

On Mar. 4, 2017 the Union observed to the Employer that "*there have been many discussions between all stakeholders"* and that the Parties had "*agreed to proceed with formal process to resolve"* the dispute. Still, no grievance had been filed. The Union ultimately wrote Valard on March 14 advising of the Grievor's unsuccessful attempt on February 21 to have the SAE performed, but by this date, a grievance was inevitable. The Grievance as filed is dated March 24 and was e-mailed on March 27 by the Union to various parties, including the Employer.

It is clear that both sides in this issue were struggling with how to manage the impact that the use of medically-authorized cannabis would have on the ability of the Grievor to work safely as a labourer at the Project. The Union did not denounce the Employer's initial inquiries; rather, it attempted to provide a reasonable level of information. But the level of information communicated ultimately did not satisfy the Employer's demands.

In the course of evidence and argument, the question of Nalcor's Drug and Alcohol Standard was raised, including which 'edition' was in effect at the time. In my view, all of that has no import in this case. That Standard would not enable the Employer to avoid or change its obligations to an employee who has a disability and is using medically-authorized cannabis for treatment of that disability. The absence or presence of any employer drug and alcohol policy cannot usurp an employer's obligation to avoid discrimination.

To determine the rights of the Parties to this dispute, a series of issues must be addressed.

Were the labourer positions 'safety-sensitive'?

There was some attempt by the Union to characterize the two positions sought by the Grievor as only vaguely safety-focused. One position was Utility Person and one was Assembler, both effectively labourer-level functions. Both categories required a relatively low level of training and expertise, but they did involve working sometimes with motorized equipment in close proximity to larger operating pieces of heavy equipment in field and weather conditions that were often demanding. This transmission corridor was constructed in raw, once-forested territory into which huge towers to carry electrical lines were being installed. The terrain changed from site to site as the progress of the transmission line corridor continued. They were almost always remote worksites having minimal services.

The Project Agreement clearly has an intended focus on the importance of safety. Article 10 provides the expression of the Parties' intent. That the Project in the overall is a safety-sensitive industrial undertaking cannot be questioned. But not every job within that enterprise is necessarily deemed safety-sensitive as a consequence. There is some guidance available from arbitral jurisprudence. In *IWA-Canada v. Weyerhaeuser Co.,* a case cited by the Union, Arbitrator Taylor made the following comments at paragraph 133-134, there in relation to the propriety of drug and alcohol testing:

> *"An inherently safety sensitive industry and a safety sensitive position within an operation must be distinguished. Neither depends upon the other for its existence. For example, though open pit mining was determined by Arbitrator*

> *Hope in* Fording Coal Ltd*. to be a safety sensitive industry, not all positions could be deemed safety sensitive (para. 25).* CN Rail *made the same distinction holding that the employer had not demonstrated that drug and alcohol testing 'is a reasonable or necessary incursion into the privacy of employees who hold non-risk sensitive positions…' (p. 400).*
>
> *The designations of inherently 'safety sensitive' industries and 'safety sensitive positions' have different purposes. An employer, designated inherently safety sensitive, is not required to prove the existence of a drug and alcohol problem in the workplace as a pre-condition to the introduction of a substance abuse policy. The designation of a position as 'safety sensitive' determines to which employees the testing policy will apply."* (Emphasis added)

The evidence at the hearing, particularly that of witness Dean Seifried and his photographs illustrating labourer work being performed at various sites within the Project, proves adequately that every labour job function at such sites should be considered as safety-sensitive. The functions associated with the labourer position, while not requiring as much skill, dexterity or mental focus as some other roles, such as a heavy equipment operator, still demand the worker's undivided focus and a high requirement for mental alertness. Injury to oneself or to one's co-workers would inevitably occur if such workers were not able to bring their minds at all times to the requirement of safety. The various job sites for the Project, scattered across the Province reveal the harsh terrain and the wide variety of weather conditions experienced by Project workers every day and in every season. It is inherently hazardous work for all who go there, not just those having the highest-rated skillsets.

I have no difficulty whatsoever in concluding that the two work positions, Utility Worker and Assembler, applied for by the Grievor at the Project in 2016 and 2017 were legitimately considered, in every way, as safety-sensitive. The question of risk and work safety will need to be examined again later.

The Existence of a Disability

Here the Employer has sensibly conceded that the Grievor is a person with a disability and therefore entitled to the protection offered by the *Human Right Act, 2010.* There can be no

doubt that he fits within the definition under Section 10 of a person having a disability and is entitled not to be discriminated against in employment because of that disability.

Once an employer encounters a worker with a disability which may affect the person's ability to work and a bona fide occupational requirement ('BFOR') creates obstacles for that worker, the law requires a process of accommodation to be undertaken.

Dr. Norman's medical note of November 24, 2016 was reviewed by the Employer on November 25. At that point, it would have been clear to both Parties that the Grievor was under a disability (i.e., his medical condition and its treatment) and that he was entitled to be accommodated in his employment, to the extent required by law.

The Duty to Accommodate

The law is well settled on an employer's obligations to workers with disabilities. In 1999, the Supreme Court of Canada set the three-step '*Meiorin*' test in *B.C. (PSERC) v. BCGSEU*. Then-Justice McLachlin, speaking for the Court, made these often-cited comments at paragraph 54 about the BFOR requirement and the role of 'undue hardship' in the accommodation process:

> *"Having considered the various alternatives, I propose the following three-step test for determining whether a* prima facie *discriminatory standard is a BFOR. An employer may justify the impugned standard by establishing on the balance of probabilities:*
>
> *(1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;*
>
> *(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and*
>
> *(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant <u>without imposing undue hardship upon the employer</u>."* (Emphasis added)

That almost 20-year old judicial standard has been cited with approval in many cases and has been clarified in subsequent application to other fact situations. Justice McLachlin actually restated the *Meiorin* test later that same year and clarified the third requirement from *Meiorin* in *B.C. Superintendent of Motor Vehicles v. B.C. (H.R.C.) ('Grismer')* when she added, at paragraph 22, the following comment on accommodation:

> *"Failure to accommodate may be established by evidence of arbitrariness in setting the standard, by an unreasonable refusal to provide individual assessment, or perhaps in some other way. The ultimate issue is whether the employer or service provider has shown that it provides accommodation to the point of undue hardship."* *(Emphasis added)*

*T*he concepts of 'undue hardship' and 'individual assessment' themselves have received much judicial and arbitral commentary.

As a public policy issue, the courts have concluded that the assumption of some risk in the workplace (or in society generally) is acceptable within the accommodation process. The risk of injury or harm from ordinary inattention is a normal risk in the workplace. In other words, in the accommodation of a worker with a disability, it is not required that all risk from that person's work must be eliminated completely. In *Grismer,* the B.C Superintendent of Motor Vehicles refused to issue a driver's licence because of Grismer's visual impairment. The Court observed (at page 892-893) that highway safety was a legitimate concern, but that the Superintended had failed to accommodate the driver because of its failure to individually assess Grismer's capability in the context of overall public safety:

> *"The onus was on the Superintendent, having adopted a* prima facie *discriminatory standard, to prove that incorporating aspects of individual accommodation within the standard was impossible short of undue hardship. The Superintendent did not do so. On the facts of this case, the Superintendent's blanket refusal to issue a driver's licence was not justified. He fell into error in this case not because he refused to lower his safety standards (which would be contrary to the public interest), but because he abandoned his reasonable approach to licencing and adopted an absolute standard which was not supported by convincing evidence. The Superintendent was obliged to give Mr. Grismer the opportunity to prove whether or not he could drive safely, by*

> *assessing Mr. Grismer individually. It follows that the charge of discrimination under the* Human Right Act *was established.* " (Emphasis added)

And further:

> "*If the government agency can show that accommodation is impossible without risking safety or that it imposes some other form of undue hardship, then it can maintain the absolute prohibition. If not, it is under an obligation to accommodate the claimant by allowing the person an opportunity to show that he or she <u>does not present an undue threat to safety</u>."* (Emphasis added)

The requirement for individual assessment has also received arbitral comment and clarification. In *Muskrat Falls Employers' Association Inc. and Resource Development Trades Council of Newfoundland and Labrador,* a 2016 award which I issued, reference was made to the comments of well-known Arbitrator William Kaplan who, in *Chatham-Kent (municipality) and CUPE (Bossencer) [2016] O.L.A.A. No. 1,* provided this explanation of 'individuality' at paragraph 11, commenting on the role of the Union as well as that of the Employer:

> *"As an employee with a disability, the grievor is entitled to accommodation and what that means is that the workplace parties must consider his disability and determine whether he can be accommodated in his position up to the point of undue hardship. What happened here instead was the blanket application of the Minutes of Settlement. This is the direct antithesis of what the accommodation obligation requires. <u>The essence of accommodating people with disabilities is individualization. The union, the employer and the employee must be involved and all options must be considered.</u> That did not happen here."* (Emphasis added)

Thus, any inquiry into accommodating a worker with a disability in a unionized environment entails a search on the various possible work options available for that worker. Accordingly, the somewhat convoluted facts of this case must be analysed to see if these general rules of accommodation are satisfied. How did the Employer, the Union and the Grievor respond here?

In determining whether an accommodation could be found, the Employer was entitled to have reasonable medical information, sufficient to determine how, if at all, the Grievor could safely work onsite. The BFOR was that a labourer must be able to perform work in a safe manner. Norman's 1st medical report was clearly insufficient to make that determination. The Employer

was entitled to seek more information and it did so promptly. The burden was then on the Union and the Grievor to provide reasonable additional medical evidence of the Grievor's condition and the type and extent of the medication he used to alleviate that condition. The use of any medication which might affect a worker's ability to work safely is a necessary ingredient in determining if and how an accommodation can be provided.

Dr. Burnstein, consultant for the Employer, developed a list of 20 questions which he wanted answered by Dr. Norman, the Grievor's physician. Dr. Norman was not prepared to respond promptly. So before the Christmas break, the Union was unable to provide information sufficient to satisfy the Employer's demands because the Grievor was having difficulty having his physician answer the questions posed by Dr. Burnstein. Given the extensive questions asked in the questionnaire, a delay in the Union's ability to respond is understandable.

The conversations in early 2017 about the Grievor's individual medical condition/grievance rights and his medication quickly expanded into a discussion between the Union, the Employer and others about the larger topic of how employees might be able work safely on the Project while using medically-authorized cannabis products. The lines between (a) addressing directly the Grievor's case and (b) addressing the larger workplace safety issue quickly blurred. Perhaps not surprisingly, the conversation about the use of medical cannabis products by workers and how the disclosure of them should happen also came to the attention of the Association and the Project owner, Nalcor. In the context of cannabis use being an emerging concern for workers and employers generally, that transition of focus was not surprising.

By January 13, 2017 Dr. Norman had answered some of the questions about the type and extent of the medication, but this information was not actually delivered to the Employer's advisor until later. In any event, on January 20, the Employer had then concluded that "*Valard is not comfortable that Scott Tizzard can work safely as a Utility Technician while under medication that his doctor has directed".* The Employer's position had been determined and, in spite of receiving additional information, did not subsequently change. Dr. Burnstein did not

receive Norman's 2nd medical report from Brower until February 13, subsequent to the Employer's conclusion about its lack of *"comfort"* in hiring the Grievor. It is clear that the Employer was, from the outset, taking Dr. Burnstein's conservative approach about employing workers using medical cannabis. It wanted a longer period of time from the use of cannabis to reporting for work.

On or about January 20, the Grievor expressed interest in another labourer position with the Employer. That new interest generated a response from the Employer on February 16 that *"Valard will not be considering Scott Tizzard for employment in the positions above.....Valard is still waiting for a satisfactory response from Scott's physician pertaining to the first time he was dispatched."* By that date, Brower had spoken to Dr. Burnstein about the details and deficits of Norman's 2nd medical report, so the "*still waiting*" comment apparently reflects the fact that Dr. Norman had not answered all of the questions posed.

On or about February 1, the Employer had apparently made a final decision about Grievor, but the Association intervened when Clark asked Valard not to respond. That intervention was not surprising, given the focus that this case had achieved. Through the month of February 2017, various conversations about the Grievor's case continued, including a discussion about *"Medically Directed Marijuana (Scott Tizzard)"* in a non-grievance meeting held during that month. The Union wrote directly to the Association's Clark on February 22 asking that *"the employer accept the previous disclosure as reasonable and end the delay on hiring Mr. Harold "Scott" Tizzard immediately"*. While not expressed clearly in its communication to the Union, workplace safety involving the Grievor's use medical cannabis was clearly the concern for the Employer. There was no attempt by either party to discuss other possible jobs open to the Grievor which might not have been safety sensitive.

The role of the Union must not be overlooked here. As stated in the *Chatham-Kent* case above, while the Employer may have the primary obligation to consider accommodation options or opportunities, the Union also has a part to play in the process. Here, the Union represented

workers in all bargaining unit positions on the Project, so it would have been aware if there were any other positions, perhaps not safety-sensitive, into which the Grievor could have found employment if potential impairment from cannabis was a problem. The only evidence called about other job functions were other labourer and higher-rated skills on the "*work teams*". From the outset, the Union was entirely focused on the Grievor achieving a normal labourer job at the Project. The Employer seemed intent at all times in considering only that safety was a concern in the two labourer positions being sought. Nobody mentioned possible accommodation involving the Grievor being placed in other jobs. I must conclude that none existed.

In his evidence, Dr. Bernstein suggested a possible accommodation route could have been considered, which would be changing the Grievor's medical treatment for pain. In other words, change the medication, not the job in order to eliminate the workplace hazard. I am satisfied, based on the evidence before me, that the Grievor and his attending physicians had already exhausted other conventional medication routes for the reduction of his osteoarthritic pain. His unique combination of osteoarthritis and Crohn's disease made conventional medications either ineffective or they aggravated his stomach problems. He had trialed many alternative therapies and medications. I do not dispute that his last-resort decision to use cannabis was a worthwhile route for him and his physicians to pursue. Accommodation could not reasonably be found in this case by changing the Grievor's medication.

Accordingly, the focus must turn to whether accommodation could be found in the Grievor being able to work safely in the two positions for which he applied. The whole issue of impairment from his cannabis use then arises.

<u>The Medical/Pharmacological Evidence</u>

During the course of the hearing, questions arose as to the extent to which the various medically or scientifically qualified witnesses could offer opinion evidence about cannabis and workplace safety. The decision in the case of *Westerhof v. Gee Estate*, 2015 CarswellOnt 3977

was brought to my attention by legal counsel. That decision differentiated between (a) independent or 'non-party experts', who give opinion evidence without having been involved in the facts in dispute, and (b) 'participant experts' who have expertise but were also involved in the disputed fact situation. While that case was considered in the context of Ontario legislation, the Court of Appeal's observations at paragraph 64 about the role such witnesses can play in any rights adjudication are worthwhile:

> *"As with all evidence, and especially all opinion evidence, the court retains its gatekeeper function in relation to opinion evidence from participant experts and non-party experts. In exercising that function, a court could, if the evidence did not meet the test for admissibility, exclude all or part of the opinion evidence of a participant expert or a non-party expert or rule that all or part of such evidence is not admissible for the truth of its contents."* (Emphasis added)

With that approach in mind, the evidence of the various qualified and specialized witnesses must be evaluated. Before looking at that evidence, however, some of the professional guidance available to medical practitioners must be considered because it clearly had impact on the witnesses' opinions.

The cannabis plant contains many ingredients, but those most often referred to as having therapeutic effect are THC and CBD. Of those two ingredients, THC is known to have more effect on judgment and motor skills. While not by any means the same effect as with alcohol, THC can and does cause impairment. That point is without dispute.

Health Canada in May 2013 issued its '*Information for Health Care Professionals'* on cannabis and cannabinoids (the 'Health Canada Guidance'). That 152-page document contains many references to studies and provides advice and warnings to professionals. Its caution on '*Occupational hazards'* includes the following statement:

> *"Patients using cannabis should be warned not to drive or to perform hazardous tasks, such as operating heavy machinery, because impairment of mental alertness and physical coordination resulting from the use of cannabis or cannabinoids may decrease their ability to perform such tasks…. Depending on*

> *the dose, impairment can last for over 24h* (hours) *after last use because of the long half-life of….THC."* (Emphasis added)

On the topic of '*Drug screening tests'*, the following caution is added:

> *"Because of the long half-life of elimination of cannabinoids and their metabolites, drug tests screening for cannabinoids can be positive for weeks after last cannabis/cannabinoid use…….. depending on the sensitivities of the tests used."*

One year later in 2014, the College of Family Physicians of Canada issued its own '*Preliminary Guidance*' on '*Authorizing Dried Cannabis for Chronic Pain and Anxiety'* (the 'CFPC Guidance'). In the section '*Strategies to prevent harm',* 'Recommendation 10' states (with emphasis in bold from that document):

> ***"Patients taking dried cannabis should be advised not to drive for at least***
>
> ***a) Four hours after inhalation…..***
>
> ***b) Six hours after oral ingestion….***
>
> ***c) Eight hours after inhalation or oral ingestion if the patient experiences euphoria.***
>
> *Cannabis use prior to driving is an independent risk factor for motor vehicle accidents. Patients should be advised not to drive for a minimum of four hours after inhalation or a minimum of six hours after oral ingestion; they should also abstain from driving for a full eight hours if they experience euphoria.*
>
> *However, note that 'Health Canada states that the ability to drive or perform activities requiring alertness may be impaired for up to 24 hours following a single consumption'.*
>
> *Furthermore, physicians considering authorized dry cannabis at doses higher than the current evidence supports (an inhaled dose of 100-700 mg of no more than 9% THC cannabis daily) are strongly advised to:*
>
> - *Discuss the decision to increase the dosage, either approaching or exceeding 3.0 g/day level, with a trusted and experienced colleague*

- *Document in the patient's record the reasons that support the increased dosage"* (Emphasis by underlining added)

In the Table of licenced cannabis producers in Canada that is attached to the Guidance, the company 'Tilray', which supplied cannabis to the Grievor, is shown as having "*no strains 9% or less"* of THC. The Grievor was ultimately using cannabis with up to 22% THC content.

In this Province, the College of Physicians and Surgeons of Newfoundland and Labrador also issued professional advice in 2014 in the form of an *'Advisory to the Profession and Interim Guidelines – Marijuana for Medical Purposes*' (the 'NL Guidance'). Their 10-page document offers the following comment under the subject of the '*College's Expectations Regarding Prescribing of Marihuana':*

> *"The physician should only issue a medical document* (to enable to acquisition of medical cannabis) *to a patient if the physician is the primary treating physician for that patient, and only if the patient is actually treating the patient for the medical condition for which marijuana for medical purposes is prescribed."*

In the 'Questions and Answers' portion of the NL Guidance, the following topic, in the form of a statement and reply, is addressed (emphasis in bold from that document)"

> ***"My patient wishes to use medical marijuana but is in a safety-sensitive occupation****.*
>
> *Health Canada advises that patients using cannabis should be warned not to drive or to perform hazardous tasks such as operating heavy machinery. Depending on the dose, impairment can last for over 24 hours after last use because of the long half-life of…..THC. Pending data that says otherwise, the College suggests that the same applies to safety-sensitive occupations such as health professions and the supervision of children."* (Emphasis added)

All of the expert witnesses recognized these three Guidance documents as being the currently available advice to the medical profession, although many studies continue to take place in science and medicine's attempt to understand the pharmacological and physiological impacts of inhaling or vaporizing, as one witness described it, *"a little dried flower*". Unlike drugs given a Drug Identification Number (DIN), cannabis is not scientifically made in a laboratory and has

not been subject to the normal and rigorous double-blind studies conducted before conventional drugs are made available by prescription only from Canadian pharmacies. That is not to say that there have not already been many scientific studies of cannabis products, or that these products do not have beneficial therapeutic effect, but there is still much to be learned about the impact of cannabinoids and their many constitution elements, not just the TCH or the CBD which have been the primary focus in much of the research to date. More recent research and direction is now available on the subject, this time arising from a Federal Government Task Force Report, a document referred to later in this award.

Dr. Norman is a trained general physician, specialized in radiation oncology, not cannabinoids. She has decided to pursue a career in dispensing medically-authorized cannabis products, understandably driven by the empirical evidence she had gained from her cancer patients over her years of practice. She did not profess to have, nor do I consider her as having a high level of knowledge and understanding of the complexities of cannabis products and impairment. Her training on cannabinoids is, in fact, quite thin. She had some on the job mentoring and a two-day course on cannabis and safety. In Canada, any licenced physician can authorize the use of medical cannabis, but many physicians choose to refer their patients to the limited number of practitioners who restrict their practice to that area. Dr. Doody made a referral to the CMC where Dr. Norman practices. It appears that the practice that has developed here in this Province is not entirely consistent with the spirit of the NL Guidance which would suggest that Dr. Doody should have been the dispensing doctor. That issue had been identified as a concern of Dr. Burnstein. It does create a complicating factor in reliance on a dispensing physician's opinion.

In any event, Dr. Norman authorized the Grievor to use cannabis for the relief of his pain. She saw the Grievor on nine occasions over eight months during 2016 and 2017 and was satisfied that he was achieving pain relief. She authorized 1.5 grams per day of herbal cannabis with a THC content of up to 20% (increased in April 2017 to 22%), to be vaporized in the evenings with a 4-hour restriction or limitation on driving. In her professional opinion, and using her

understanding of the Health Canada Guidance about restrictions on driving after vaporization, she did not have any concerns about his "*daytime function"* with evening use. She was aware of the details of the Grievor's work only to the extent of her conversations with him and her reading of the two job descriptions that he gave to her. She admitted no specialized understanding of heavy industrial worksites or their associated risks. She did admit in her *viva voce* evidence that some studies on the use of cannabis indicated that some persons may have residual impact on their "*executive function*" for a longer period of time. In the end, however, she maintained her belief that the Grievor was able to perform safely at daytime work, even with his evening use of the dosage she authorized. It is worthy of note that the driving restriction in the Guidance of *"at least 4 hours*" seems to have become interpreted by her as "four hours after inhalation is adequate", but they are not the same standard. Dr. Norman did not appear concerned about the possible 24-hour exclusion period also mentioned in the all of the Guidance.

Given her limited understanding of the Grievor's worksite demands and her relatively lower understanding of the long-term impacts regarding inhalation of relatively higher THC content cannabis, I am not comfortable with her conclusion that the Grievor would be able to work safely on a daily basis as a labourer at the Project after only four hours from his use. Admittedly, more than four hours would normally pass from his evening use to his daytime schedule, but not 24 hours. Dr. Norman was, however, the only physician in this fact situation who personally examined, assessed and diagnosed the Grievor, so her opinion is a factor.

Dr. Burnstein was a participant expert, retained by the Employer to advise it on the process of assessing whether the Grievor could work safely while using medical cannabis. Dr. Burnstein had a reasonable understanding of the impact that impairment has on human performance and the role that safety plays in a workplace environment, but he too had limited expertise in cannabis products. My greater concern about his evidence is that he displayed a negative and fixed mind from the outset in his advice to the Employer, creating obstacles for the acquisition of information about the Grievor's medical condition and treatment rather than opportunities

for collaboration. I agree with Dr. Norman's opinion that his questionnaire was confrontational. It challenged Dr. Norman's decision to place the Grievor on a cannabis regime. I am not surprised that Dr. Norman was resistant to answering some of the questions and that his approach delayed the accommodation process.

I accept Dr. Burnstein's conclusion that the inability to measure accurately the extent of daily impairment, due to a lack of available monitoring, would be a legitimate concern when employing a person taking medical cannabis and working in any safety-sensitive position. If risk is to be managed, an employer must be able to measure the impact of that cannabis on the performance of the worker. The ability to measure potential impairment is important, given that conventional blood and urine tests indicate the presence of THC in the body, but do not indicate recent or current impairment levels.

Gregory Johnstone, a pharmacology expert who testified, was not involved in the accommodation process. He was clearly skilled and experienced in the pharmacological aspects of cannabis as a substance capable of causing impairment in an individual's cognitive and motor skills. I accept his concerns about the adverse impact that cannabis can have on human performance and that the current level of technology regarding measuring impairment in regular users of cannabis products is inadequate to draw reliable conclusions. An employer cannot make hiring decisions simply based on information from clinical studies. I was concerned however, with Johnstone's speculative assertion that users of medical cannabis are likely to augment their authorized dosage with non-medical or recreational marijuana. Such speculation is not helpful or instructive. There is no evidence to support any conclusion that the Grievor here was likely to add to his use of medically-authorized cannabis.

Dr. Ware, another non-participant expert witness, was clearly the most highly qualified person who testified in this case in terms of cannabis knowledge and understanding. The constituent elements of his curriculum vitae are impressive. He has been involved in numerous studies and journal articles on cannabis, he was a contributor in the preparation of the Health Canada

Guidance and, in November 2016, he was appointed vice-chair of a Task Force set up to advise the Federal Government on Cannabis Legalization and Regulation.

That Task Force Report is the most recent independent information available about the measurement of impairment from the use of cannabinoids. While that Report was undertaken as a consequence of the Federal Government's decision to make marijuana legally available for recreational in Canada sometime in 2018, the Task Force had the following advice to Government at page 29, in Chapter 2 - entitled '*Minimizing Harms of Use'* - under the topic '*Workplace safety*':

> *"The concerns expressed on workplace safety reinforce the urgent need for research to reliably determine when individuals are impaired. As we will see in Chapter 4, which addresses impaired driving, the ability to determine impairment with cannabis – through technology or specialized training – is not as advanced as our ability to measure the relationship between consumption and impairment with alcohol."* (Emphasis added)

At Chapter 4 of the Report, under the heading of '*Impaired driving'*, the following observations are also very helpful, even recognizing that the authors were then speaking primarily of setting a '*per se'* THC limit (like .08 in blood is for assumed alcohol impairment) and the inability of law enforcement officials to monitor safety in the context of driving while impaired by marijuana use:

> *"The use of SFSTs (*Standard Field Sobriety Tests*) and DRE (*Drug Recognition Expert) *evaluations will continue to be the primary tool used by law enforcement to enforce cannabis-impaired driving laws until such time that a scientifically supported* per se *limit is established and a reliable roadside testing device is available for use. However, as noted by stakeholders, investment in DRE training and staffing is currently insufficient. Significant and additional resources are required to better equip law enforcement to detect impaired drivers and enforce the rules."*

There was no evidence given at the hearing which addressed these concerns about the Employer's monitoring ability in the context of managing risk at the Project. There is no evidence that drug recognition experts, who hold specialized training to detect more subtle

forms of performance impairment, are readily available to an employer in this Province. If they are in insufficient supply for law enforcement agencies, employers are obviously less able to find such limited resources.

Dr. Ware's report and evidence in this case was primarily designed as a challenge to some of the conclusions in Johnstone's Report and there were undoubtedly some interpretations by Johnstone with which Dr. Ware legitimately disagreed. That being said, I am uncomfortable with Dr. Ware's final conclusion, unrelated to the main focus of his criticisms, contained in the last paragraph of his report:

> *"Therefore, in the response to the last question regarding workplace safety implications of using cannabis….., in the absence of conclusive evidence of workplace impairment following medical cannabis use, I defer to Mr. Tizzard's treating physician, Dr. Alia Norman, who authorized Mr. Tizzard's use of medical cannabis and assessed his fitness to work. Assessing an individual's fitness to work should be performed on a case-by-case basis."*

The Task Force Report (referred to earlier) in which Dr. Ware participated had highlighted the difficulty in monitoring safety on the highways because of limited availability of testing methods and technology, so his requirement for "*conclusive evidence of workplace impairment*" about the Grievor places an unrealistic and unachievable burden on the Employer. While I agree that assessing fitness of any individual must be done on a case-by-case basis – indeed, that is the requirement in the process of accommodation – I do not agree that Dr. Norman was sufficiently skill-setted to adequately assess the increased workplace risks associated with impairment of a worker employed as a labourer on the Project. Her limited understanding of this hazard filled workplace and the inability of the Employer to readily find means to assess impairment at the worksite are major concerns for me in accepting Dr. Ware's conclusion about Dr. Norman's ability to assess risk.

Some attempt was made by legal counsel to have me consider and pass judgment on conclusions from a number of scientific studies about cannabis and impairment undertaken by experts in various countries over the past 20+ years. Some of the conclusions of those studies

suggest a more lengthy impairment period arising from cannabis use, and others diminish the extent of impairment arising. Some studies were undertaken when THC levels were significantly lower than those currently contained in medically-authorized cannabis dosages. All studies involved recreational use of marijuana, not therapeutic. In my opinion, reliance on such studies is better left to those having a deeper understanding of their methodology and current utility rather than a labour arbitrator having no deep-rooted understanding of how such studies are conducted or how they are to be interpreted and compared. An arbitrator must rely on the advice from the witnesses who appeared and on the documentation prepared either for the case or designed for interpretation by non-scientific persons.

One additional aspect of accommodation must be discussed. The Union made great efforts to emphasise that no Independent Medical Examination was ever made of the Grievor at the request of the Employer and that no Functional Capacity Evaluation was ordered for him by the Employer. Those processes are often used to determine the restrictions and abilities of a person with a disability or injury. I am satisfied that the lack of reasonable ability to measure impairment in persons using cannabis – blood and urine tests do not measure current impairment plus the lack of specially trained individuals who can observe and measure impairment in one's judgment, motor skills and mental capacity – presents a risk of harm that cannot be readily mitigated. Some reference was made in evidence to a business called Rapid Interactive Disability Management Ltd. ('RIDM') which purports in its online website to measure human performance in the context of cannabis use. There was no evidence called to support the suggestion that this company is able do what the experts and documentation all agree is not yet able to be done using normally available resources within this Province. Website claims by businesses are not reliable evidence. The lack of having requested an IME or a FCA or an RIDM assessment is not fatal to the Employer's position in this case.

In the end, I have drawn the following conclusions from the Guidance, the specialized witnesses and their evidence:

1. The regular use of medically-authorized cannabis products can cause impairment of a worker in a workplace environment. The length of cognitive impairment can exceed simply the passage of 4 hours after ingestion. Impairment can sometimes exist for up to 24 hours after use.

2. Persons consuming medical cannabis in the evening may sincerely believe that they are not impaired in their subsequent daily functioning; they can, however, experience residual impairment beyond the shortest suggested time limits. The lack of awareness or real insight into one's functional impairment can be a consequence of cannabis use. In that context, a person may not experience 'euphoria' (as mentioned in the Health Canada Guidance), yet still not function, respond or react normally while impaired by cannabis use.

2. A general practicing physician is not in a position to adequately determine, simply grounded on visual inspection of the patient in a clinic and a basic understanding of patient's work, the daily safety issues in a hazardous workplace. Specialized training in understanding workplace hazards is necessary to fully understand the interaction between cannabis impairment and appropriate work restrictions in a given fact situation.

3. There currently are no readily available testing resources within the Province of Newfoundland and Labrador to allow an employer to adequately and accurately measure impairment arising from cannabis use on a daily or other regular basis.

These outcomes impact the determination of whether undue hardship may exist for the Employer here.

<u>Undue Hardship</u>

The accommodation process in the case of a worker with a disability requires an employer to consider whether the worker can be offered work on a meaningful basis without creating undue risk of harm to the worker, the employer, other workers and the public.

All of the evidence here surrounds the two labourer job postings – Utility Person and Assembler - sought by the Grievor. The Union clearly wanted him to be able to work in at least one of the

positions for which he applied. As there was no evidence called about other possible jobs or functions on the Project into which he might have been able to go without safety being a major concern, I must conclude that there were no positions which he could have filled that would not also pose significant safety concerns. In some disabled worker cases, an employer has been able to place a disabled worker into a lower-hazard function while an injury healed. For example, a steel worker could be placed in office work or as tool crib attendant when an injury would not allow the worker to climb a ladder or work safely around uneven terrain. There is no evidence before me that similar accommodations might have been possible here. In other words, it was an 'all or nothing' fact situation – either the Grievor could work safely in the positions he applied for or there was no work available. Thus, undue hardship comes into consideration in the context of his ability to safely perform in labourer roles only.

Should the Employer be required to compromise safety at the Project and assume the risk associated with cannabis impairment? The *Occupational Health and Safety Act* of our Province suggests otherwise. It even has a specific regulation prohibiting impaired workers. Regulation 28 (2) states:

> *An employer, supervisor or worker shall not enter or remain on the premises of a workplace or at a job site while his or her ability to perform work responsibilities is impaired by intoxicating substances or another cause that endangers his or her health or safety or that of other workers.* (Emphasis added)

The safety hazard that would be introduced into the workplace here by residual impairment arising from the Grievor's daily evening use of cannabis products could not be ameliorated by remedial or monitoring processes. Consequently, undue hardship, in terms of unacceptable increased safety risk, would result to the Employer if it put the Grievor to work. As previously stated, if the Employer cannot measure impairment, it cannot manage risk.

In coming to this conclusion, I am aware that my decision confronts and opposes the outcomes in other cases which were cited to me by Union counsel.

In *The City of Calgary v. Canadian Union of Public Employees (CUPE 37)*, a case involving the use of medically-authorized cannabis but where an unsubstantiated allegation of cannabis dependency prevailed, the arbitrator directed that the grievor there be sent back to work in a safety-sensitive position *"subject to random testing to measure influence or recent use of marijuana"…..*and further that he "*would be subject to random work performance monitoring in accordance with the employer Policy."* Those conditions were challenged by the employer nominee on the arbitration board who opined in a dissent:

> *"<u>One of the conditions of reinstatement set by the majority award is that he be subject to random substance testing</u>* to measure influence or recent use *<u>of marijuana. There was no evidence that, given his nightly consumption of marijuana, such testing is even scientifically possible</u>. Ms. Stordy did testify that testing was not done since he would always test positive. It is at best wishful thinking on the part of the majority that there is some method of testing, while he is at work, which could differentiate between his nightly consumption of marijuana and any use more recent than the night before. Ms. Stordy also testified that testing cannot measure impairment."* (Emphasis added)

Based on the evidence in this case, I share the dissenter's view that there is currently no effective or practical means to accurately measure impairment in the workplace from evening cannabis use. It may very well be that the extensive evidence called in this current hearing concerning the lack of testing for cannabis impairment was much more comprehensive and instructive than what was presented in *City of Calgary*. In any event, I choose not to follow the approach of that case.

In an similar vein, Arbitrator Oakley *in Re Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Uprichard),* was directed in judicial review to reconsider his outcome on discipline for a worker's non-disclosure of his medical cannabis use. The case involved Valard, the same Employer as in this case. In determining that reinstatement was an appropriate remedy, Arbitrator Oakley made this comment in paragraph 85:

> *"….. The obligation of Valard is to accommodate a disability to the point of undue hardship. An accommodation arrangement for the Grievor requires the participation of the Grievor, the Union and Valard. There is an obligation on all*

> *the parties to act reasonably in a co-operative effort to reach a suitable accommodation arrangement, in the event the Grievor is eligible for accommodation. I find that it would not be a reasonable accommodation for the Grievor to return to active duty and to continue with the same conduct as before his termination of employment, without any conditions. The conditions of an accommodation arrangement may include an agreement on the level of THC permitted and may provide for random testing to measure THC levels. Whether the Grievor should be required to modify his duties in the workplace or whether any modification of duties may be achieved without causing undue hardship, is a matter for the parties to discuss…."* (Emphasis added)

In light of the evidence about testing given in this case regarding the inability of *"random testing"* of THC levels to measure real impairment on the job, I continue to have the same reservations as expressed above in relation to the *City of Calgary* case.

Another case cited by the Union was *M obo another v. V Gymnastics Club*, a preliminary decision in an application to dismiss a matter before the British Columbia Human Rights Tribunal. The use of medical cannabis was also involved there. Because it was an interim decision only, the Tribunal declined to dismiss the application (at paragraph 53) because, to that point in the proceeding, the employer had not –

> *"provided evidence that it has engaged in any way to accommodate the complainant's disability other than complete abstention of her treatment option. It does so without providing evidence that this is required or that doing so would amount to undue hardship."*

Two comments are necessary. It would be interesting to know the final outcome of that case, which is not available to me. In any event, however, I am satisfied that the Employer here did consider undue hardship and presented evidence of risk to support its concerns.

It is also important here to consider the Union's evidence and submissions about the Grievor's prior work during the summer of 2016 on additional aspect of the Project when H.J. O'Connell, another contractor, was involved in the overall construction effort. The Union argues, with some underlying reasoning, that if he was able to work safely then while using medical cannabis, why would he not be safe for work now? The Employer responded that the Grievor

may have been simply fortunate that some mishap did not befall him at that time so that this evidence of his work with O'Connell might be more suggestive of good fortune rather than good risk management. An employer is not bound by the safety decisions of another employer, even with regard to the same physical workplace. The evidence called here about the Grievor's work was from a supervisor at H. J. O'Connell. Whether more senior management with that company would have supported that supervisor's assessment of risk remains unanswered. I do not find that evidence about prior work sufficiently compelling or adequate to usurp my own concerns about cannabis impairment and safety.

Conclusion on Accommodation Process

It is clear that a long period of time passed from the date that the Grievor was accepted for employment, but with positive result in his drug test, to the date that the Grievance was filed. During that period of time, the main focus of attention was on achieving from the Grievor's physicians a reasonable amount of information to allow the Employer to come to a conclusion about accommodation. As already said, some delay was in receiving some of that information from Dr. Norman. Some delay involved issues internal to each of the Employer and to the Association, while some involved delay in the Union forwarding information already received. Dr. Doody's report was never received by Dr. Burnstein. None of that delay constitutes bad faith. Throughout that period, the focus was on the Grievor's medical condition or its treatment and his ability to work without impairment and measure safety. I am satisfied that the requirement of accommodation, which demands individual assessment, has been met on these facts. Unlike the *Muskrat Falls* decision referred to by counsel and in which I was arbitrator, the Employer here did not make decisions about the Grievor based on a pre-existing corporate policy which dictated the outcome. In that *Muskrat Falls* case, workers with physical restrictions were offered limited employment hours based on a rigid schedule designed by that employer's policy, not based on the amount of work that a worker was able to undertake given that worker's physical limitations. The facts are very different here.

The Union has argued bad faith in the accommodation process on the part of the Employer. I have already stated my view that Dr. Burnstein's questionnaire was unnecessarily confrontational and that this may have delayed the acquisition of some information. But the necessary medical information did ultimately get conveyed to the Employer. Once the daily dosage in terms of grams and percentage of THC content was shared, the outcome of any assessment of the Grievor's case would have led a reasonable employer to conclude that there was an increased risk of harm from residual impairment and that no reasonable method to lessen that risk was available due to the lack of accurate measurement protocols. I find no evidence of bad faith.

This fact situation is by no means a textbook example of how an accommodation should be considered. The delays and missteps were numerous. I have, however, concluded that the Employer considered the appropriate issues and reached the correct outcome in this long and tortuous scenario. It is easy to have sympathy for the plight of the Grievor, but he has chosen a therapy which, while effective in terms of his pain relief, requires more research and knowledge than is currently possible in order to ensure an employer's ability to determine impairment in a construction environment.

Breach of Privacy Issues

The Union claims that the details of Grievor's personal medical history and treatment were inappropriately communicated to more persons than those necessary to deal with his employment situation. It seeks general damages as a result.

While it is true that a significant number of persons within Valard, the Association and the Project's owner, Nalcor, were made aware of the details of the Grievor's disability, I am satisfied that, if not expressly, then by necessary implication the Union on the Grievor's behalf understood and agreed that the Employer was sharing this information because all parties were struggling with the response to an issue which affected each of Valard, the Association and Nalcor in that a precedent was possibly being created. Understanding that the decsion on his

case would or could impact other workers, the Union sent to the Employer communication on the whole issue of a "*fair process for the disclosure of medical cannabinoids*" and other drugs. The Union implicitly consented to this wider than usual dissemination of information by its approach to using the Grievor's case to develop that new 'fair practice'. Despite awareness, it never once objected to the fact that additional persons within the Association and Nalcor were looking at this case. it is difficult for the Union now to maintain that the privacy of the Grievor's personal confidentiality was critical.

In his own evidence, the Grievor did not appear to oppose or object to a wider discussion about his medical condition while the entire process was evolving. He simply wanted to do what was necessary to achieve his one objective – *"I just want to work!"*

Accordingly, there is no basis to award damages for alleged breach of the Grievor's privacy.

DECISION & AWARD

As a result of the foregoing, the Grievance is denied.

The Employer did not place the Grievor in employment at the Project because of the Grievor's authorized use of medical cannabis as directed by his physician. This use created a risk of the Grievor's impairment on the jobsite. The Employer was unable to readily measure impairment from cannabis, based on currently available technology and resources. Consequently, the inability to measure and manage that risk of harm constitutes undue hardship for the Employer.

Dated at Corner Brook, NL this 30th day of April 2018.

(Original is signed)

_____

John F. Roil, QC

Arbitrator

SCHEDULE 'A' – LIST OF EXHIBITS

A number of exhibits were admitted by the consent of the Parties:

Consent 1: The Collective Agreement – May 1, 2012 to May 1, 2017
Consent 2: Grievance Form dated March 24, 2017
Consent 3: Employer's Reply to the Grievance dated April 28, 2017

The Parties submitted an Agreed Book of Documents during the hearing on the preliminary issue, although they had determined in advance that some documents in the Book would be excluded from consideration, plus some were subsequently ruled out or agreed to be inadmissible. All of those eliminated documents are marked as 'vacant'.

Consent 4-1: Valard Job Description for Utility Person General Labourer
Consent 4-2: E-mail Nov. 8, 2016 referring to Personnel Request Form re Grievor
Consent 4-3: E-mail Jan. 16, 2017 Valard to Grievor re Foundation Labourer Position
Consent 4-4: Personnel Request Form of Nov. 1, 2016 from Union to Valard re Grievor
Consent 4-5: E-mail Valard to Grievor Nov. 15, 2016 re D&A testing appointment
Consent 4-6: Generic D&A Specimen Testing Control Form
Consent 4-7: E-mail Nov. 21, 2016 Valard to Union seeking Labourer Replacement
Consent 4-8: E-mail Nov. 21, 2016 Union to Valard re update on employment of Grievor
Consent 4-9: E-mail Nov. 21, 2016 Valard to Union re Grievor unable to pass testing process
Consent 4-10: Medical Report Nov. 24, 2016 Cannabinoid Medical Clinic re Grievor
Consent 4-11: Questionnaire of Nov. 25, 2016 Burnstein to Norman re Grievor's prescription
Consent 4-12: Letter Nov. 25, 2016 Valard to Union re safety requirement for Grievor to work
Consent 4-13: E-mails Nov. 24-26, 2016 between Union and Valard re Grievor's medical status
Consent 4-14: (vacant)
Consent 4-15: Medical Report December 21, 2016 Dr. Doody re Grievor's medication
Consent 4-16: (vacant)
Consent 4-17: E-mails Jan. 9-13, 2017 Union and Valard re request for timeline extension
Consent 4-18: E-mails Jan. 10,m 2017 Union and Clark re scheduling discussion on Grievor
Consent 4-19: E-mails Jan. 12, 2017 internal to Union re timeline protection
Consent 4-20: Second Medical Report Jan. 13, 2017 Cannabinoid Medical Clinic re Grievor
Consent 4-21: Email Jan. 26, 2017 Union to Grievor re Cannabinoid Second Medical Report
Consent 4-22: E-mails Jan. 18-20, 2017 Union and Valard re Grievor's Second Medical Report
Consent 4-23: E-mails Jan. 24, 2016 Union and Valard re Grievor to complete Release Form
Consent 4-24: Letter Jan 25, 2017 Union to Valard re Process for Disclosure of Medical -
Consent 4-25: E-mails Jan 30, 20176 Union and Valard ES&H involved in Disclosure of Medical
Consent 4-26: (repeat of Consent 4-25)
Consent 4-27: E-mail Feb. 1, 2017 Union to Valard re status of Grievor's application
Consent 4-28: E-mail Feb 1, 2017 Valard to Union re timing of response to Grievor's application
Consent 4-29: E-mail Feb. 1, 2017 Clark to Union re request that Valard not respond
Consent 4-30: E-mails Feb. 6-10, 2017 Union and Clark re documents about Grievor
Consent 4-31: (vacant)
Consent 4-32: Union to Valard et al re Pre-grievance meeting request for Grievor
Consent 4-33: E-mail Feb. 22, 2017 Clark to Union with Notes of Bi-weekly Meeting

Consent 4-34: (vacant)
Consent 4-35: (vacant)
Consent 4-36: Medical Report of Mar. 1, 2017 from Dr. Norman re Grievor
Consent 4-37: E-mails Feb. 24 to Mar. 4, 2017 Union and Valard re meeting about Grievor
Consent 4-38: E-mail Mar. 8, 2017 Clark to union re outstanding items from bi-weekly meeting
Consent 4-39: E-mail Mar. 8, 2017 Clark to Union re Conf. Call on Pre-Grievance meeting
Consent 4-40: Letter Mar. 14, 2017 Union to Valard re SAE evaluation on Grievor
Consent 4-41: E-mails Mar.14, 2017 Union and Valard re Grievor's dosage conflict and Consent
Consent 4-42: E-mail Mar. 15, 2017 Clark to Union re Conf. Call on Pre-Grievance meeting
Consent 4-43: E-mail Mar. 16, 20917 Clark to Union re various o/s issues including Grievor
Consent 4-44: E-mails Mar. 21, 2017 Clark and Union re Open Tracking Log of issues
Consent 4-45: E-mail March 27, 2017 Union to Valard Grievance of March 24 (Consent 1)
Consent 4-46: (vacant)
Consent 4-47: (vacant)
Consent 4-48: (vacant)
Consent 4-49: (vacant)
Consent 4-50: (vacant)
Consent 4-51: E-mail April 19, 2017 Clark to Union re LR Rep Call Agenda
Consent 4-52: (vacant)
Consent 4-53: (vacant)
Consent 4-54: E-mail April 28, 2017 Clark to Union re Employer Step 3 Response to Grievance
Consent 4-55: Employer Step 3 Response (same as Consent 3)
Consent 5: Nalcor Drug and Alcohol Standard – 2016 edition
Consent 6: Nalcor Standard for Drug and Alcohol - 2012 B1 version
Consent 7: Valard Job Description for Assembler position

The following exhibits were adduced through witness evidence at the hearing on merits:

AN 1: CV of Dr. Alia Norman
AN 2: CMC Physician Referral Form from Dr. Doody (undated)
AN 3: College of Family Physicians of Canada's Guidance on Cannabis Use for Chronic Pain
AN 4: E-mail chain of December 15-16, 2016 between Mullins and Norman
AN 5: CMCs Confirmation of Grievor's appointment dates from April 2016 to March 2017
AN 6: Health Canada's Information for Health Care Professionals regarding medical cannabis

HST 1: Grievor's Tilray Patient Authorization Card
HST 2: Grievor's Pre-Access Urine Testing Control Form
HST 3: Letter of July 7, 2017 from H. J. O'Connell confirming Grievor's employment in 2015-16
HST 4: Grievor's pay stub from K2 Builders for employment from November 11-24, 2017.

KM 1: CV of Kevin Mullins
KM 2: E-mail exchange May 10 to June 15, 2016 between Clark, German and Mullins
KM 3: E-mail exchange July 5 and August 11, 2016 between German and Mullins
KM 4: Liaison Meeting Minutes of October 4, 2016
KM 5: E-Mails of February 6-7, 2017 to Clark with documents to complete Grievor's file
KM 6: Personnel Request Form re Tower Assembler position (subject to proof)
KM 7: E-mail of February 24, 2017 from Brower to IBEW with request for more information
KM 8: E-mail exchange of March 22, 2017 from IBEW to B rower with Grievor's Tilray Card

KM 9: E-mail of April 12, 2017 from Clark to IBEW re Pennecon labourer position
KM 10: Nalcor Drug and Alcohol Standard – September 2015 B3 version-

LB 1: E-mail exchange of April 12-14, 2017 between Pennecon and Clark re Grievor

JG 1: E-mail exchange of February 13, 2017 between IBEW and Clark
JG 2: E-mail exchange of February 13-14, 2017 between Clark and IBEW re Grievor

TB 1: E-mail of November 24, 2016 from IBEW to Brower re CMC note of same date
TB 2: E-mail exchange of Feb 13-14, 2017 between Brower and Burnstein
TB 3: E-mail (undated) - Mullins to Brower re CMC note and IBEW letter of March 14, 2017
TB 4: Job Request on November 30, 2017 for new Powerline Technician position
TB 5: E-mail chain November 22, 2017 to December 1, 2017 between IBEW and Employer

MB 1: CV of Dr. Matthew Burnstein
MB 2: NS WHSCC Appeals Tribunal Decision of January 31, 2011
MB 3: NS WHSCC Appeals Tribunal Decision of April 29, 2011
MB 4: NB WHSCC Appeals Tribunal Decision of September 5, 2002
MB 5: E-mail exchange of November 24, 2016 between Burnstein and Brower
MB 6: NL College of Physicians and Surgeons 'Advisory on Marihuana for Medical Purposes'
MB 7: E-mail (undated) from Brower to Burnstein re closing file on Grievor
MB 8: E-mail exchange February 13 to March 22, 2017 re response from Grievor's doctor
MB 9: E-mail of March 23, 2017 from Burnstein to Brower attaching new questionnaire
MB 10: Grievor's Consent to the Release of Medical Information - December 1, 2016
MB 11: Pilot Performance Study of December 1989 from Aerospace Medical Assn, USA.

GJJ 1: CV of Gregory J. Johnstone
GJJ 2: Letter of July 9, 2017 from PharmaTox Inc. to Employer's Legal Counsel

MW 1: Report dated October 27, 2017 from Dr. Mark Ware to Union's Legal Counsel
MW 2: CV of Dr. Mark A. Ware
MW 3: COMPASS Study of Cannabis for Management of Pain - accepted July 28, 2015
MW 4: Canada Task Force Framework for Legalization and Regulation of Cannabis – Dec. 2016
MW 5: 'COMPASS' Report Supplement on Cannabis for Management of Pain – (undated)

DS 1: Project Occupational Injuries by Discipline
DS 2: Project Occupational Injuries by Anatomical Region
DS 3: Photos of typical Assembly and Foundation work at Project

JJC 1: E-mail of November 25, 2016 from Budinski to Cahill re work crew membership
JJC 2: Valard employee crew list and earnings working from July to November 2017

TA 1: IBEW Approved Personnel Request Form re Grievor's Labourer position
TA 2: Nalcor Demobilization Form of December 12, 2017 for Duke Osmond, labourer
TA 3: Memorandum of Understanding (amending overtime entitlement)
TA 4: Tracy Avery's Calculations of loss of income for Grievor
TA 5: Summary of Grievor's loss of income claim
TA 6: Memorandum of Understanding (Layoff Dispute Resolution Process)