

13.4.2 Drug and Alcohol Testing

Arbitrators have generally held that the arbitral approach to employer rules concerning searches of employees should be applied by analogy to drug and alcohol testing. In short, when assessing whether the *KVP* criteria have been met (see Chapter 13.3), the arbitrator must determine the reasonableness of the rule or policy by weighing the interference with employees' privacy against the legitimate business interests of the employer. In his seminal decision in *Canadian Pacific Ltd. and U.T.U.* (1987), 31 L.A.C. (3d) 179, Arbitrator Michel Picher ruled that even safety-sensitive employers such as railroads could not encroach on the privacy and dignity of employees by subjecting them to random and speculative drug testing. The employer's legitimate business interests will justify testing only where there are reasonable grounds to believe that an employee may be impaired by drugs or alcohol while on duty. Where good and sufficient grounds do exist, the employee may be subject to discipline for refusing to comply with a directive that he or she undergo testing.

Key Passage

Arbitrator Michel Picher: —

*Canadian
Pacific*

There are, as yet, no regulations in Canada comparable to those governing drug testing in the American railway industry. However, boards of arbitration in Canada have, on a number of occasions, found drug use and involvement with drugs to be grounds for discipline, and in some cases for discharge, particularly in the field of transportation. As noted above, in [Canadian Railway Office of Arbitration], this Office found that the possession of marijuana while on duty justified the discharge of an employee. Similar conclusions have been drawn in other parts of the transportation industry. For example, it was found by the arbitrator in *Air Canada and I.A.M., Lodge 148* (1973), 5 L.A.C. (2d) 7 (Andrews), that trafficking in marijuana was incompatible with the grievor's continued employment as an aircraft maintenance mechanic. However, in another case, the mere possession of a small quantity of marijuana while off duty was not seen as sufficient to justify discharge: *Air Canada and I.A.M.* (1975), 10 L.A.C. (2d) 346 (Morin). Understandably, the cases treat off-duty trafficking more seriously than possession. Apart from the more serious criminal ramifications impacting on an employee's reputation, that approach reflects a natural concern about a person whose involvement with drugs extends to producing it or selling it for profit. It is not unnatural to harbour concerns that the profit motive may cause the individual's trafficking activities to spread into the workplace.

Case Summary

Grievance: Alleged unjust discipline; alleged unjust dismissal.

Facts: The grievor, a train conductor, was criminally charged with the cultivation of marijuana when the police found 104 marijuana plants growing in his backyard. The employer attempted to investigate the matter, but the grievor refused to answer any questions or to take a drug test. After having spent six months on indefinite suspension, the grievor finally stated that he had no involvement with the use or cultivation of marijuana, and that his wife had grown the plants without his knowledge. At that point the employer dismissed him. The union filed a grievance against both the suspension and the discharge. The grievor had a previous conviction for possession of marijuana, but the new charges were eventually dismissed because of excessive delay.

Issues: (1) Does refusal to take a drug test constitute just cause for discipline? (2) When does an employee's off-duty misconduct justify dismissal?

Decision: Arbitrator Michel Picher denied the grievance. Where the employer is a public carrier, and there are reasonable and probable grounds to believe that an employee whose responsibilities are inherently safety-sensitive is impaired while on duty, the employer has the right to require that a drug test be taken. Refusal on the employee's part may give rise to discipline. In this case, the arbitrator held, the employer was justified in suspending the grievor pending the completion of its investigation. Although the laying of a criminal charge does not in itself warrant the suspension of an employee, particularly where the conduct in question is not work-related, situations in which the conduct seriously affects the employer's legitimate interests may call for a disciplinary response. The employer had reasonable grounds for suspecting that the grievor was heavily involved in drug culture, and his failure to cooperate with the investigation gave no reassurance that his work performance would remain unimpaired. Furthermore, in the face of overwhelmingly incriminating evidence, it was incumbent on the grievor to provide a full and credible explanation. Arbitrator Picher concluded that the grievor's lack of candour and his refusal to undergo a drug test left the employer with no choice but to terminate his employment.

Citation: *Canadian Pacific Ltd. and U.T.U.* (1987), 31 L.A.C. (3d) 179 (M.G. Picher).



There are no reported decisions on the issue of drug testing for employees in Canada of which the arbitrator is aware. There are, however, some general principles which are instructive. It is well established that an employer does have the right to require an employee to submit to a medical examination where the purpose of such an examination is to confirm that he or she is physically fit to perform assigned work in a safe manner. That conclusion is confirmed in a number of arbitral awards: see, e.g., *Monarch Fine Foods Co. Ltd. and Milk & Bread Drivers, Dairy Employees, Caterers & Allied Employees, Local 647* (1978), 20 L.A.C. (2d) 419 (M.G. Picher); *Oil, Chemical & Atomic Workers, Local 9-593 and BP Oil*

Ltd. (1972), 24 L.A.C. 122 (Palmer); *U.S.W.A., Local 6571 and Lake Ontario Steel Co. Ltd.* (1970), 22 L.A.C. 206 (Hanrahan).

Does an employer's right to require an employee to undergo a fitness examination extend to requiring a drug test? I am satisfied that in certain circumstances it must. Where, as in the instant case, the employer is a public carrier, and the employee's duties are inherently safety sensitive, any reasonable grounds to believe that an employee may be impaired by drugs while on duty or subject to duty must be seen as justifying a requirement that the employee undergo a drug test. Given contemporary realities and the imperative of safety, that condition must be seen as implicit in the contract of employment, absent any express provision to the contrary.

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What guidance do the foregoing considerations provide in the instant case? It appears to the arbitrator that a number of useful principles emerge. The first is that as an employer charged with the safe operation of a railroad, the company has a particular obligation to ensure that those employees responsible for the movement of trains perform their duties unimpaired by the effects of drugs. To that end the company must exert vigilance and may, where reasonable justification is demonstrated, require an employee to submit to a drug test. Any such test must, however, meet rigorous standards from the standpoint of the equipment, the procedure and the qualifications and care of the technician responsible for it. The result of a drug test is nothing more than a form of evidence. Like any evidence, its reliability is subject to challenge, and an employer seeking to rely on its results will, in any subsequent dispute, bear the burden of establishing, on the balance of probabilities, that the result is correct. The refusal by an employee to submit to such a test, in circumstances where the employer has reasonable and probable grounds to suspect drug use and a risk of impairment, may leave the employee liable to removal from service. It is simply incompatible with the obligations of a public carrier to its customers, employees and the public at large, to place any responsibility for the movement of trains in the hands of an employee whom it has reasonable grounds to suspect is either drug-dependent or drug-impaired. In addition to attracting discipline, the refusal of an employee to undergo a drug test in appropriate circumstances may leave that employee vulnerable to adverse inferences respecting his or her impairment or involvement with drugs at the time of the refusal. On the other hand, it is not within the legitimate business purposes of an employer, including a railroad, to encroach on the privacy and dignity of its employees by subjecting them to random and speculative drug testing. However, where good and sufficient grounds for administering a drug test do exist, the employee who refuses to submit to such a test does so at his or her own peril.

The decision of Arbitrator Brent in *Provincial-American Truck Transporters and Teamsters, Local 880* (1991), 18 L.A.C. (4th) 412, applies the principles developed in *Canadian Pacific*. In this case, the

employer attempted to extend the medical examinations broadly authorized by the collective agreement to include mandatory universal drug and alcohol testing of employees. The arbitrator ruled that the employer did not have the right to compel an employee's submission to such a test unless it had reasonable grounds for believing that his or her fitness to perform job duties safely was impaired by drugs or alcohol. Furthermore, in the absence of specific authorization in the collective agreement, mandatory universal testing is permissible only where the employer proves that it has a drug or alcohol problem in the workplace which cannot be combated using less invasive means.

Key Passage

Gail Brent, Chair: —

Let us first look at the policy alone in the context of the collective agreement which existed between the parties, and do so without considering the effect that any legislation might have on the issue of drug testing. We should note that the policy here before us is one that (a) is not required as a part of any government program in order to ensure licensing or certification of drivers, (b) is mandatory and universal, and (c) is not triggered by any reasonable cause to suspect a particular driver of substance abuse and/or impairment. Generally speaking, this is an area which is analogous to employee searches. Some of the cases cited to us, such as [*Marystown Shipyard Ltd. and M.W.F., Local 20*, unreported, August 31, 1989 (Browne)], and [*Lornex Mining Corp. Ltd. and U.S.W.A., Local 7619* (1983), 14 L.A.C. (3d) 169 (Chertkow)], dealt with employee searches. The accepted position regarding searches appears to be that employers can search employees if there is either an express or implied term of the collective agreement allowing such searches, or if there is a real and substantial suspicion of theft by a particular employee who consents to the search (see *Lornex*, at pp. 181-82). It is also accepted that if there is a theft problem which cannot be otherwise controlled, then a well publicized and objective system of searches could be invoked (see *Marystown*, at pp. 38-40 and *Lornex*, at p. 183).

*Provincial-
American Truck
Transporters*

In setting out these guidelines for searches, arbitrators have been sensitive to the arguments made that employee privacy must be respected. Absent a real theft problem, there is a reluctance to allow employee privacy to be invaded without some clear indication that such an invasion is a condition of employment.

The authorities cited to us which dealt with testing urine for the presence of both legal and illegal substances recognize that such testing compromises the privacy of the individual just as a search would do. There is a further aspect to the privacy argument in that, even assuming that the urine specimen is not used to determine anything other than whether there has been any

Case Summary

Grievance: Validity of workplace rule.

Facts: Drivers employed by the company were required to maintain a valid licence in Canada and the United States. The licensing requirements of both countries included periodic medical examinations, but not alcohol or drug testing. Nevertheless, the employer mandated that, in conjunction with the U.S. physicals, all drivers would have to submit a urine specimen to be tested for alcohol or drug use. The union filed a grievance objecting to the policy.

Collective Agreement: "Any medical examination requested by the Company shall be promptly complied with by all employees, provided, however, that the Company shall pay for all such examinations" (art. 13).

Issue: Can the employer require mandatory universal drug and alcohol testing of employees?

Decision: A board of arbitration chaired by Gail Brent allowed the grievance. In the board's view, mandatory universal drug testing was analogous to employee searches, since both compromise individuals' right to privacy. Arbitrators have been reluctant to permit employers to conduct employee searches unless the collective agreement confers a right to do so, or unless there is a real problem of theft in the workplace. While, in the board's opinion, art. 13 was broad enough to authorize drug and alcohol testing, it did not amount to a general waiver of employees' right to privacy. Accordingly, where the employer has reasonable grounds for believing that a particular employee's ability to perform work safely is impaired by the use of drugs or alcohol, it can invoke art. 13 to require submission to a test. Where the employer seeks to introduce mandatory testing of all employees, there must be evidence of a substance abuse problem in the workplace which cannot be combated by less intrusive means. In this case, the board held, there was nothing to suggest that the existing system of medical examinations had proven inadequate, or that substance abuse was having an adverse effect on the employer's operations.

Citation: *Provincial-American Truck Transporters and Teamsters, Local 880* (1991), 18 L.A.C. (4th) 412 (G. Brent).



past ingestion of alcohol and/or drugs, such testing necessarily involves the employer in an inquiry into what an employee is doing in his/her off-duty hours. Most reasonable people would probably consider that it was none of their employer's business if they happened to drink wine or beer with their meals away from work or enjoy a drink or two in their off-duty hours. Therefore, what one would expect, absent some term in the collective agreement, is an arbitral response to drug testing which is similar to that taken to employee searches and to employer interest in off-duty conduct.

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There is no doubt that a carrier using the public highways must be very sensitive to safety, and that impaired drivers can jeopardize the lives and property of many others. No one wishes to make light of that, nor to

downplay the obligation which both the company and the drivers have to ensure that work is performed safely. Neither the union nor the company has any wish to send impaired drivers onto the public highways. Although public policy is often a difficult thing to determine, Canadian jurisdictions have made clear policy statements indicating a desire to rid the roads of impaired drivers. Having said that, the public good does not necessarily require a wholesale disregard for personal liberty. Is there any reason then to treat the issue of drug and alcohol testing as being so different from searches to prevent employee theft — cases where the interests of the employer in safeguarding his property and the privacy interests of the employees have been balanced for years? We think not.

The management rights clause of this collective agreement (art. 3.1) contains the phrase “customary prerogatives of Management”. It was argued by the union that because drug testing was not a customary prerogative of management the company could take no comfort in those words. Surely that is not the case. That phrase does not on its face purport to limit the company to carrying on its business in the same way it has always done, rather it confirms that the company has the right to exercise the normal sort of management functions subject to the terms of the collective agreement. In this collective agreement there are rules and regulations concerning employee conduct, and the parties have specifically agreed that their presence does not prevent the company from unilaterally imposing other rules provided they do not conflict with any of the rules in the collective agreement. The unilateral rule regarding drug and alcohol testing does not conflict with any rule appended to the collective agreement. The company did, however, neglect to give the union the required 30 days’ notice of such change; therefore, even if the rule is found to be otherwise appropriate, the company did fail to comply with that aspect of its introduction.

Article 13 specifically gives the company the right to request medical examinations. There is nothing in that article that limits those examinations to the ones which are required by the various licensing bodies. In fact, the presence of both arts. 13.1 and 13.2(f) suggests that the licensing examination is just a particular instance of a circumstance in which the company can require the driver to be examined by a physician. The language in art. 13 is certainly broad enough to allow for drug and alcohol testing. There is nowhere in the collective agreement any specific provision making drug and alcohol testing a condition of employment.

Accepting then that the search analogy is appropriate, and that the collective agreement here is broad enough to allow the company to make drug and alcohol testing part of a medical examination, what then is the result? If there is reason to demand a test, then a test can be demanded. That is, if a particular employee gives the company reasonable grounds for believing that his/her fitness to perform the job safely is impaired by use of alcohol or drugs, then the company should be able to test as part of its rights under art. 13. If mandatory universal testing is to be justified, absent a specific term allowing it, then there should at least be evidence of a drug and/or alcohol problem in the workplace which cannot be combated in some less invasive

way. In this case we have no such evidence. As a consequence, it would not be a reasonable interpretation of art. 13 to give it a meaning which would allow such a serious intrusion into the off-duty conduct and privacy of the employees. Article 13 does not, in our view, generally waive the employees' right to privacy where there is no reasonable basis for demanding a drug test. Much clearer language would be required to do that.

Looking at the issue from another perspective, it has long been recognized that unilaterally imposed rules must meet certain criteria. Those criteria were catalogued in *KVP, supra*, which has been cited ever since as a leading authority. One criterion which must be satisfied is the reasonableness of the rule. In this case, it is difficult to satisfy the reasonableness test, even accepting the obvious safety concerns and public duty, for the following reasons. The testing was done before the U.S. regulations became effective, and even had they been effective, Canadian drivers are exempt from their application at least until 1992. There was no evidence of any adverse impact on the company's operations by reason of substance abuse among employees. There was no evidence of any problems regarding impaired drivers which were not being adequately addressed by the existing rules and regime of physical examinations. There was nothing to suggest that the existing method of certification by the physician that the employee was not addicted to alcohol or drugs was ineffective in keeping such drivers employed by the company off the road.

There has never been any practice of testing urine for the presence of drugs or alcohol which has been accepted by the union. Based on all of the evidence, it would certainly appear that drivers were required to give urine specimens to be tested for the presence of other things which could aid in the diagnosis of some illness or condition which could affect a revocation of their driving licences. The fact that a urine specimen was taken in the past for a particular purpose does not mean that there has been any consent to use that specimen for anything other than the purposes of the licence examination. There was never any policy of universal, mandatory drug testing of drivers prior to 1988.

For all of the reasons set out above, we conclude that the company's policy of drug testing was an unreasonable one which was not otherwise saved by any provision of the collective agreement and so should not be upheld.

Drug and alcohol testing policies may also be subject to challenge on the ground that they constitute either direct or adverse-effect discrimination because of disability, contrary to human rights legislation. In this regard, several decisions of human rights tribunals and boards of arbitration have recognized alcoholism or drug dependency as a "disability". In *Metropol Security and U.S.W.A., Local 5296* (1998), 69 L.A.C. (4th) 399 (Whitaker), one of the first arbitration rulings to consider these issues, the parties disagreed as to the nature of the discriminatory impact of the employer's mandatory drug testing policy.

The union contended that the policy amounted to a form of direct discrimination against disabled employees, and could therefore be excused only if the employer succeeded in establishing a *bona fide* occupational qualification (BFOQ). The employer, by contrast, argued that at most the impugned policy gave rise to adverse-effect or indirect discrimination. The policy, accordingly, could be justified if the employer demonstrated that it had satisfied its statutory duty to accommodate employees addicted to drugs or alcohol to the point of undue hardship. In Arbitrator Whitaker's opinion, *regardless* of whether the discrimination was direct or indirect, the employer was obligated to prove that the policy was *reasonable*, thus adapting the *KVP* criterion to the determination of human rights disputes.

Key Passage

Arbitrator Kevin Whitaker: —

The union attacks the testing policy on two grounds, that it is a breach separately of both sub-arts. 4.02 and 6.02(b). It is probably the case that if a rule is in breach of statute such as the [Ontario *Human Rights Code*], it will be unreasonable. In any event, for reasons explained below, the issue of whether testing is a breach of either 4.02 or 6.02(b), turns on whether the policy is reasonable.

*Metropol
Security*

There are a number of reported arbitral awards which deal with the issue of mandatory drug and alcohol testing. These cases deal with whether testing reasonably balances an employee's right to privacy as against the employer's right to manage the work process, or alternatively, whether a refusal to submit to testing justifies discipline. None of these authorities determine whether drug or alcohol testing is in breach of the *Code* or comparable legislation.

In *Canadian National Railway Co. and U.T.U.* (1989), [6 L.A.C. (4th) 381], Arbitrator M.G. Picher dealt with the issue of whether a refusal to submit to testing warranted dismissal. At p. 387, after having reviewed the arbitral authorities dealing with drug testing generally, he commented:

As may be gleaned from the foregoing, the right that an employer may have to demand that its employees be subjected to a drug test is a singular and limited exception to the right of freedom from physical intrusion to which employees are generally entitled by law. As such it must be used judiciously, and only with demonstrable justification, based on reasonable and probable grounds.

In [*Provincial-American Truck Transporters and Teamsters, Local 880* (1991), 18 L.A.C. (4th) 412 (Brent)], the issue was whether compulsory prearranged drug testing of truck drivers who drove through the U.S. was permitted under the collective agreement. The collective agreement provided for medical examinations to be performed on drivers at the instance of the employer. It was silent on the issue of drug testing.

Case Summary

Grievance: Validity of workplace rule.

Facts: The employer successfully bid for a contract to provide security services to a customer. At the customer's insistence, the contract included a provision obligating the employer to conduct random drug and alcohol testing of employees working on its sites. Employees who did not work on the customer's sites were not subject to testing. There was no dispute between the parties that alcohol or drug addiction constitutes a "handicap" for the purposes of human rights legislation. The union grieved the requirement for testing.

Collective Agreement: Article 6.02 of the agreement gave the employer the right "to make, alter and enforce reasonable rules and regulations to be observed by employees". Article 4.02 obligated both parties to observe the provisions of the Ontario *Human Rights Code*.

Legislation: The Ontario *Human Rights Code* prohibits discrimination on the ground of handicap, except where the discriminatory "requirement, qualification or factor in question is reasonable and *bona fide* in the circumstances".

Issue: Can the employer require drug and alcohol testing of employees because a customer demands it?

Decision: Arbitrator Kevin Whitaker allowed the grievance. In the absence of contractual provisions dealing with the issue, he held, the employer may test its employees for drug or alcohol use if it constitutes a reasonable exercise of management's authority to make and enforce rules. Similarly, even accepting the employer's argument that any discrimination contrary to the *Human Rights Code* was only indirect or constructive, the employer has the burden of establishing that its policy is reasonable and *bona fide*. In this case, there was no evidence of substance abuse in the workplace, performance problems among employees or anything inherent in the work itself which would require testing. The testing was required, not by law, but by a customer. In the arbitrator's view, however, a customer's demand cannot render reasonable a rule that would otherwise be unreasonable, particularly where it involves a degree of physical intrusion. The employer's policy, therefore, violated ss. 6.02 and 4.02 of the collective agreement, as well as the *Human Rights Code*.

Citation: *Metropol Security and U.S.W.A., Local 5296* (1998), 69 L.A.C. (4th) 399 (K. Whitaker).



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The grievance was allowed on the theory that testing was a unilaterally imposed rule, not reasonably justified. In deciding this point, the arbitrator had regard to the following:

- (1) evidence of actual substance abuse;
- (2) evidence of whether existing performance measures or less invasive monitoring processes were inadequate;
- (3) whether testing was required by statute or regulation.

Provincial-American Truck Transports is representative of the arbitral jurisprudence. In the absence of any contractual language dealing with drug or alcohol testing, it is permitted if it is a reasonable exercise of management's authority to make and enforce rules. Given the express requirement of "reasonableness" in sub-art. 6.02(b), this analysis applies here. In other words, testing will be a breach of 6.02(b) if it is unreasonable.

I now turn to the appropriate test under the *Code*.

The union argues that the discrimination in this case is direct and relies on the decision of a board of inquiry under the *Code* in [*Entrop v. Imperial Oil Ltd.* (No. 8) (1996), 27 C.H.R.R. D/210] in this regard. If discrimination is direct, s. 17 of the *Code* applies. Section 17(1) and (2) provides:

Handicap

17(1) A right of a person under this Act is not infringed for the reason only that the person is incapable of performing or fulfilling the essential duties or requirements attending the exercise of the right because of the handicap.

Accommodation

(2) The Commission, a board of inquiry or a court shall not find a person incapable unless it is satisfied that the needs of the person cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

On the union's theory, if discrimination is direct, the employer has the burden of establishing a *bona fide* occupational requirement under s. 17(1), failing which, the defence of accommodation in s. 17(2) is not available.

The employer as noted, takes the position that the discrimination here is indirect. It is argued that where discrimination is indirect, a *bona fide* occupational requirement need not be established. Further, it is argued that where indirect discrimination is accommodated, it is not in breach of the *Code*. The employer relies on the decision of the Federal Court (Trial Division) in [*Canadian Human Rights Commission v. Toronto-Dominion Bank* (1996), 112 F.T.R.] for these propositions.

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On the employer's theory, the discrimination is indirect. "Indirect" discrimination is not a term used in the *Code*. The correlative term under the *Code* is "constructive" discrimination. This is discrimination which flows from the effects of rules or requirements that are not themselves discriminatory on the basis of any prohibited grounds. This type of discrimination is "adverse effect" as that term is used in *Toronto-Dominion Bank*. Constructive discrimination is referred to in s. 11 of the *Code*. Sections 11(1) and (2) provide:

Constructive discrimination

(11)(1) A right of a person under Part I is infringed where a requirement, qualification, or factor exists that is not discrimination on a

prohibited ground but that results in the exclusion, restriction or preference of a group of persons who are identified by a prohibited ground of discrimination and of whom the person is a member, except where,

- (a) the requirement, qualification or factor is reasonable and *bona fide* in the circumstances; or
- (b) it is declared in this Act, other than in section 17, that to discriminate because of such a ground is not an infringement of a right.

Idem

(2) The Commission, a board of inquiry or a court shall not find that a requirement, qualification or factor is reasonable and *bona fide* in the circumstances unless it is satisfied that the needs of a group of which the person is a member cannot be accommodated without undue hardship on the person responsible for accommodating those needs, considering the cost, outside sources of funding, if any, and health and safety requirements, if any.

It is clear from s. 11 that even where discrimination is not direct but is constructive, an employer must demonstrate that the rule or requirement is “reasonable” and “*bona fide*” in the circumstances. It is arguable that an employer’s burdens under ss. 11 and 17 are different in that the terms “essential duties” and “reasonable and *bona fides*” are not equivalent. This point was not made, however, by the union as it did not argue in the alternative that the discrimination was indirect.

Even if the employer is correct in that the discrimination in this case is indirect or “constructive”, to use the language of s. 11, the employer has the burden of establishing both “reasonableness” and “*bona fides*”. Even if the policy is a *bona fide* occupational requirement, it must also be reasonable. This means that if the testing policy is not reasonable, it is constructive discrimination in breach of the *Code*, and the issue of whether the discrimination is direct need not be determined. This returns the analysis to the same question to be decided under the arbitral jurisprudence absent any consideration of the *Code* — is the rule or policy reasonable?

In this case, there is no evidence of substance abuse, performance problems, or anything inherent in the work itself which would require testing. Neither is there any concern that current monitoring processes or performance measures are inadequate. The testing is not required by law but by the employer’s customer who buys and specifies the types of services to be provided. Is testing justified because it satisfies a customer’s demand, even though there would appear to be no objective basis for the demand other than “this is part of the service contracted for”?

If one were to apply the reasoning in *Provincial-American Truck Transporters* to this case, absent the demand for testing by Imperial Oil, there is little doubt that the employer’s rule would be found to be unreasonable and therefore contrary to the collective agreement. The question then becomes,

does an otherwise unreasonable rule become reasonable, merely because the employer states that it was imposed at a customer's request?

The evidence on this point is clear. The employer has conceded that it would not on its own require testing in the circumstances, *but for* Imperial Oil's request. The employer does not require testing of employees who perform the same work at sites other than Imperial Oil's. Testing is not required by other employers in this industry. This employer has no plans to implement testing in the future. The employer did not suggest that testing is reasonably required, having regard to the work performed.

There may be a rational relationship between the rule and the fact that it exists in response to a client demand. Why would an employer not consider whether it could meet a particular client demand? The existence of a rational relationship between the fact of the demand and the imposition of a rule does not necessarily make the rule reasonable. There must be something more to the employer's justification. There must be some basis for the rule which relates to the type of work being performed. The work here is "security services". This is obvious from a review of the performance contract. The work is not the provision of persons who may test negative for drug or alcohol use.

No attempt is made to justify testing on the grounds that it is necessary to ensure a particular quality of service, or to deal with apparent performance problems. It is not argued, for example, that testing is becoming standard in the industry and that the employer must implement it in order to successfully compete. In fact, it appears to be just the opposite.

The essence of the employer's reasoning is that customer demand on its face renders the rule reasonable and that no further justification is required. I cannot agree in circumstances where the rule would otherwise be unreasonable, and particularly where it requires a degree of physical intrusion.

For these reasons, I find the employer's policy requiring testing to be unreasonable. The policy is therefore in breach of sub-art. 6.02(b) of the collective agreement. My finding that the policy is unreasonable also means that the employer has not made out a defence under s. 11(1)(a) of the *Code* and for that reason, the policy is in breach of sub-art. 4.02 of the collective agreement. It is worth noting in passing that boards of inquiry have found that "customer preferences" for practices that are otherwise contrary to the *Code*, cannot alone justify *bona fide* occupational requirements (*Imberto v. Coiffure* (1981), 2 C.H.R.R. D/392 (McCamus)).

In *Entrop v. Imperial Oil Ltd.* (2000), 189 D.L.R. (4th) 14, the Ontario Court of Appeal confirmed that mandatory drug and alcohol testing, including testing in pre-employment situations, is *prima facie* discriminatory on the prohibited ground of handicap or disability, and must satisfy the criteria for a BFOQ in order to survive a challenge under human rights legislation. The same was held to be true of a requirement for disclosure of any past or present substance

abuse problems. Applying the unified three-part test for establishing a BFOQ in *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U. (Meiorin)* (1999), 176 D.L.R. (4th) 1 (S.C.C.), the Court held that the drug testing provisions of the employer's policy were not reasonably necessary to ensure that employees are free from impairment on the job. This was so because, in the Court's view, urinalysis is not capable of demonstrating actual impairment, as opposed to the mere presence of drugs in an employee's metabolism. The requirement for random drug testing was also held to go beyond what was reasonably necessary insofar as the sanction for a single positive test result was automatic discharge, thus infringing the employee's right to individual evaluation and accommodation. By contrast, random alcohol testing through the administration of a breathalyzer was found to be capable of measuring current impairment. The Court held, consequently, that such testing can be justified as long as the employer meets its duty to accommodate the needs of employees who test positive. To meet this obligation of individual accommodation, the employer must consider sanctions less severe than automatic dismissal if an employee tests positive, and where appropriate enable the employee to seek treatment and rehabilitation.

Key Passage

Justice John Laskin: —

Entrop v. Imperial Oil

Determining whether a workplace rule violates the [Ontario *Human Rights Code*] is a two-stage process. At the first stage, the complainant must show that the workplace rule is *prima facie* discriminatory on a prohibited ground. If a *prima facie* case of discrimination is made out, at the second stage the burden shifts to the employer to justify the rule.

Therefore, the complainant must first show that the workplace rule contravenes s. 5(1) of the *Code*. Section 5(1) provides:

5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

For years, courts and human rights tribunals held that a contravention of s. 5(1) could occur in one of two ways: the contravention was characterized as "direct" discrimination if the workplace rule was discriminatory on its face; and "adverse effect" discrimination if the rule was neutral on its face but discriminatory in its effect on an employee or group of employees. Adverse effect discrimination has also been termed "indirect" or "constructive" discrimination.

Case Summary

Complaint: Alleged unlawful discrimination; validity of workplace rule.

Facts: To reduce safety risks at its two oil refineries, the employer introduced a comprehensive substance abuse policy which required pre-employment drug and alcohol testing for prospective employees, and random testing for existing employees. In accordance with the policy, the complainant, a recovered alcoholic, disclosed that he had a drinking problem more than seven years ago. He was immediately removed from his safety-sensitive position and assigned to an equal-paying but less desirable post. In response, he filed a complaint under the Ontario *Human Rights Code*, alleging that he had been discriminated against on the ground of handicap. Subsequently, the complainant was reinstated, but only on certain conditions, to which he also took exception. A board of inquiry ruled that the policy discriminated on the ground of handicap, contrary to the *Code*. The Ontario Divisional Court upheld the board's decision. The employer appealed to the Court of Appeal.

Legislation: The Ontario *Human Rights Code* prohibits discrimination on the ground of handicap, except where the discriminatory "requirement, qualification or factor is reasonable and *bona fide* in the circumstances".

Issues: (1) Does mandatory drug or alcohol testing violate human rights legislation? (2) Does mandatory disclosure of past or present substance abuse, reassignment and conditional reinstatement violate human rights legislation?

Decision: The Court allowed the appeal in part. In its view, the requirements for pre-employment and random testing were *prima facie* discriminatory, since any person who tested positive faced employment sanctions, and such persons were protected under the *Code* as either actual or perceived substance abusers. The issue, therefore, was whether testing for drugs or alcohol could be justified as a *bona fide* occupational qualification. Applying the three-step analysis set out by the Supreme Court of Canada in *Meiorin* and *Grismer*, the Court held that the policy's objective of minimizing safety risks due to impairment was rationally connected to the performance of work. As well, the employer had adopted the policy in an honest and good-faith belief that testing was necessary to accomplish this purpose, thereby satisfying the second part of the test. However, testing for drug use failed to meet the third part of the test, since it was not shown to be reasonably necessary to accomplish the employer's objective. According to the Court, drug testing was fundamentally flawed because it is unlikely to reveal actual impairment. Moreover, as the employer had not established that lesser penalties would be ineffectual in minimizing the risk of impaired job performance, the sanction of automatic dismissal for a single positive test was too severe and not sufficiently tailored to individual capabilities. By contrast, because alcohol testing does reliably indicate impairment, the testing of employees in safety-sensitive positions was a reasonable requirement. However, as with drug testing, automatic dismissal was inconsistent with the employer's duty to accommodate handicapped employees to the point of undue hardship. Accordingly, the Court ruled that alcohol testing was permissible, provided the penalty for a positive test is tailored to the employee's individual circumstances. Turning to the policy's mandatory disclosure, reassignment and conditional reinstatement provisions, the Court upheld the board's decision that they violated the *Code*, as they were not necessary to ensure that employees working in safety-sensitive positions were unimpaired by alcohol or drugs.

Citation: *Entrop v. Imperial Oil Ltd.* (2000), 189 D.L.R. (4th) 14 (Ont. C.A.).



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However, increasingly, tribunals, courts and academics have doubted the continuing validity of the distinction between direct and adverse effect discrimination. Then, late last year, after this appeal was argued, the Supreme Court of Canada, in two ground-breaking decisions — *British Columbia (Public Service Employee Relations Commission) v. B.C.G.E.U.* (1999), 176 D.L.R. (4th) 1 (“*Meiorin*”), and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* (1999), 181 D.L.R. (4th) 385 (“*Grismer*”) — erased the distinction between direct and adverse effect discrimination and prescribed a single three-step test, which the employer must meet to justify a *prima facie* case of discrimination.

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In *Meiorin*, at pp. 24-25, the Court proposed that an employer could justify a *prima facie* discriminatory workplace rule or standard by meeting a three-step test:

Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR [*bona fide* occupational requirement]. An employer may justify the impugned standard by establishing on the balance of probabilities:

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

If the three-step test is met, the workplace rule is a BFOR.

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The workplace rules that lie at the heart of Imperial Oil’s Policy are the provisions for pre-employment drug testing and random alcohol and drug testing for employees in safety-sensitive positions. The Board concluded that these provisions breached the *Code*, and her conclusion was upheld by the Divisional Court. Imperial Oil submits that these provisions do not breach s. 5 but that, even if they do, they are justified because they are *bona fide* occupational requirements. I agree that the drug testing provisions of the Policy violate the *Code*. However, I disagree with the Board and the Divisional Court on random alcohol testing. The important difference between alcohol and drug testing is that a positive drug test does not demonstrate impairment; a positive breathalyzer reading does. I therefore think that random alcohol testing for safety-sensitive positions, though

prima facie discriminatory, can be justified providing the sanctions for a positive test are individually tailored. With this brief background, I will discuss the application of the *Meiorin* test to these provisions.

- (a) Are these provisions *prima facie* discriminatory on the ground of handicap?

Section 5(1) of the *Code* guarantees every person “a right to equal treatment with respect to employment without discrimination because of . . . handicap”. “Because of handicap” is defined very broadly in s. 10 of the *Code*, both in respect of what conditions constitute a handicap and who can claim protection against handicap discrimination:

“because of handicap” means for the reason that the person has or has had, or is believed to have or have had

- (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, including diabetes mellitus, epilepsy, any degree of paralysis, amputation, lack of physical coordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or on a wheelchair or other remedial appliance or device,
- (b) a condition of mental retardation or impairment,
- (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
- (d) a mental disorder, or
- (e) an injury or disability for which benefits were claimed or received under the *Workers' Compensation Act*;

This definition provides protection to persons who have a handicap, persons who had a handicap but no longer suffer from it, persons believed to have a handicap whether they do or not, and persons believed to have had a handicap, whether they did or not. In other words, the definition protects those who have or have had an actual or perceived handicap.

The Board found, on uncontradicted expert evidence, that drug abuse and alcohol abuse — together substance abuse — are each a handicap. Each is “an illness or disease creating physical disability or mental impairment and interfering with physical, psychological and social functioning”. Drug dependence and alcohol dependence, also separately found by the Board to be handicaps, are severe forms of substance abuse. Therefore, on the findings of the Board, which are not disputed on this appeal, substance abusers are handicapped and entitled to the protection of the *Code*.

A person who tests positive on a random alcohol or drug test may be a casual user, not a substance abuser, and may, therefore, not actually be handicapped. But the Policy treats even casual or recreational users as substance abusers. The Policy’s Administrative Guidelines, which are “intended to provide additional details, interpretative guidance and

administrative procedures” in support of the Policy, list the following categories of substance abusers:

CATEGORIES OF SUBSTANCE
ABUSERS

EXPERIMENTER	An individual who experiments with alcohol or drugs, usually out of curiosity.
RECREATIONAL USER	A person who uses and gets “high” on alcohol or drugs at special occasions, <i>e.g.</i> parties.
REGULAR USER	One who adopts a constant pattern of alcohol or drug abuse while attempting to maintain normal day-to-day activities.
BINGE USER	An individual who consumes alcohol or drugs in an uncontrolled manner for short periods of time and then abstains until the next binge.
DEPENDENT USER	A dependent, or addicted, user has become psychologically or physically dependent on the use of drugs, characterized by a progressive loss of control despite either a desire to reduce intake or knowledge or recurring disturbances in health, work or social functioning.

The Guidelines then state: “In the cycle of substance abuse, users frequently begin by experimenting with drugs and progress to the dependent user stage later on”.

Thus, though the social drinker and casual drug user are not substance abusers and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the Policy. In other words, Imperial Oil believes that any person testing positive on a pre-employment drug test or a random drug or alcohol test is a substance abuser. Because perceived as well as actual substance abuse is included in the definition of “handicap” under the *Code*, anyone testing positive under the alcohol and drug testing provisions of the Policy is entitled to the protection of s. 5 of the *Code*. Imperial Oil applies sanctions to any person testing positive — either refusing to hire, disciplining, or terminating the employment of that person — on the assumption that the person is likely to be impaired at work currently or in the future, and thus not “fit for duty”. Therefore, persons testing positive on an alcohol or drug test perceived or actual substance abusers — are adversely affected by the Policy. The Policy provisions for pre-employment drug testing and for random alcohol and drug testing are,

therefore, *prima facie* discriminatory. Imperial Oil bears the burden of showing that they are *bona fide* occupational requirements. See *Canadian Civil Liberties Ass'n v. Toronto Dominion Bank* (1998), 163 D.L.R. (4th) 193 (F.C.A.).

(b) Are these testing provisions justified as BFORs?

The question is whether Imperial Oil can justify these *prima facie* discriminatory workplace rules as BFORs under the three-step test in *Meiorin*. The Board held that, because these provisions were discriminatory on their face — the discrimination was direct — Imperial Oil could not rely on the BFOR defence under s. 11 of the *Code*; the only defence available was under s. 17. Moreover, *Meiorin* has eliminated the distinction between direct and adverse effect discrimination for the provisions of the Policy challenged in this case, thus permitting Imperial Oil to rely on s. 11 as well as s. 17. As I have said earlier, the three-step test in *Meiorin* applies to either defence. As in most cases, whether Imperial Oil can meet the test turns on the third step.

(i) *Has Imperial Oil adopted alcohol and drug testing for a purpose rationally connected to the performance of the job?*

Meiorin tells us that the first step focuses not on the validity of the particular challenged workplace rules but on their more general purpose. The stated purpose or objective of the Policy “is to minimize the risk of impaired performance due to substance use” in order “to ensure a safe, healthy and productive workplace”. This general purpose is rationally connected to the performance of the work at Imperial Oil’s two refineries. Common sense and experience suggest that an accident at a refinery can have catastrophic results for employees, the public and the environment. Promoting workplace safety by minimizing the possibility employees will be impaired by either alcohol or drugs while working is a legitimate objective. Imperial Oil has met the first step of the *Meiorin* test.

(ii) *Did Imperial Oil adopt these testing provisions in an honest and good faith belief that they were necessary to accomplish the company’s purpose?*

The second step is the subjective element of the test. The Board found that Imperial Oil developed and implemented the challenged provisions of the Policy honestly and in good faith. That finding is reasonably supported by the evidence. Imperial Oil consulted widely with its employees and with experts in both occupational health and safety and substance dependency. It assembled one of Canada’s most comprehensive databases on workplace alcohol and drug abuse. Imperial Oil has met the second step of the *Meiorin* test.

(iii) *Are these testing provisions reasonably necessary to accomplish Imperial Oil’s purpose?*

This third step of the *Meiorin* test focuses on the means Imperial Oil has used to accomplish its purpose. The question is whether Imperial Oil has shown that the alcohol and drug testing provisions of the Policy are reasonably necessary to identify those persons who cannot perform work

safely at the company's two refineries because they are impaired by alcohol or drugs. To meet this third requirement Imperial Oil must show that it cannot accommodate individual capabilities and differences without experiencing undue hardship. The phrase "undue hardship" suggests that Imperial Oil must accept some hardship in order to accommodate individual differences.

An employer's workplace rule may fail to satisfy the third step in the *Meiorin* test in several ways. For example, the rule may be arbitrary in the sense that it is not linked to or does not further the employer's legitimate purpose; the rule may be too broad or stricter than reasonably necessary to achieve the employer's purpose; the rule may unreasonably not provide for individual assessment; or the rule may not be reasonably necessary because other means, less intrusive of individual human rights, are available to achieve the employer's purpose.

I turn now to whether Imperial Oil's alcohol and drug testing provisions are reasonably necessary. As the Board held, Imperial Oil has the right to assess whether its employees are capable of performing their essential duties safely. An employee working in a safety-sensitive position while impaired by alcohol or drugs presents a danger to the safe operation of Imperial Oil's business. Therefore, as the Board found, "freedom from impairment" by alcohol or drugs is a BFOR. An employee impaired by alcohol or drugs is incapable of performing or fulfilling the essential requirements of the job. The contentious issue is whether the means used to measure and ensure freedom from impairment — alcohol and drug testing with sanctions for a positive test — are themselves BFORs. Are they reasonably necessary to achieve a work environment free of alcohol and drugs?

I deal with drug testing first. The drugs listed in the Policy all have the capacity to impair job performance, and urinalysis is a reliable method of showing the presence of drugs or drug metabolites in a person's body. But drug testing suffers from one fundamental flaw. It cannot measure present impairment. A positive drug test shows only past drug use. It cannot show how much was used or when it was used. Thus, the Board found that a positive drug test provides no evidence of impairment or likely impairment on the job. It does not demonstrate that a person is incapable of performing the essential duties of the position. The Board also found on the evidence that no tests currently exist to accurately assess the effect of drug use on job performance and that drug testing programs have not been shown to be effective in reducing drug use, work accidents or work performance problems. On these findings, random drug testing for employees in safety-sensitive positions cannot be justified as reasonably necessary to accomplish Imperial Oil's legitimate goal of a safe workplace free of impairment.

The random drug testing provisions of the Policy suffer from a second flaw: the sanction for a positive test is too severe, more stringent than needed for a safe workplace and not sufficiently sensitive to individual capabilities. This aspect of the Policy's provisions on random drug testing was not addressed

by the Board. However, the Administrative Guidelines specify the consequences of a Policy violation. Employees in non-safety-sensitive jobs who test positive are subject to progressive discipline, which consists of a warning, a three-to-five day suspension without pay, and termination. But for employees in safety-sensitive positions who test positive for drugs or alcohol, the Guidelines provide only one sanction: termination of employment.

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Automatic termination of employment for all employees after a single positive test is broader than necessary. In some cases termination may be justified; but in others, the employee's circumstances may call for a less severe sanction. Imperial Oil failed to demonstrate why it could not tailor its sanctions to accommodate individual capabilities without incurring undue hardship.

Pre-employment drug testing suffers from the same two flaws: a positive test does not show future impairment or even likely future impairment on the job, yet an applicant who tests positive only once is not hired.

In this Court Imperial Oil submitted that the Board mischaracterized the underlying workplace standard the company sought to achieve by drug testing. The Board characterized the standard as "freedom from impairment". Imperial Oil argued that the standard is what the Policy says, "no presence" of drugs or their metabolites. Imperial Oil contended that in the interests of safety it is legitimately entitled to adopt a "no presence" standard, that does not depend for its efficacy on the discovery of impairment.

There are two answers to Imperial Oil's submission. First, the Board's finding that the standard was "freedom from impairment" by drugs is a finding of fact, which is reasonably supported by the evidence and thus is entitled to deference. Second, the "no presence" standard does not assist Imperial Oil because it too is arbitrary, again for the reason that a positive drug test does not demonstrate incapability to perform the work safely. Therefore, the drug testing provisions of the Policy are not BFORs.

The provisions for random alcohol testing for employees in safety-sensitive positions stand on a different footing. Breathalyzer testing can show impairment. The expert evidence at the hearing confirmed the reliability and utility of breathalyzer testing to measure alcohol impairment, and the Commission conceded its reliability and utility. The Commission also took no issue with the standard used by Imperial Oil, .04 percent. Studies indicated that with a blood-alcohol concentration of .04 percent most individuals show discernible signs of impairment. Admittedly the effects of alcohol on an individual will vary depending on a wide array of factors: size, age, sex, body metabolism, body fat, the amount of food in the stomach, acquired tolerance, stress and fatigue. Despite individual variability, we use a bright line standard — 80 milligrams of alcohol in 100 millilitres of blood — in the criminal law for drinking and driving offences. The standard used by Imperial Oil was reasonable to ensure workplace safety.

Despite the overwhelming expert evidence and the Commission's concession, the Board seemed unconvinced of the utility of breathalyzer

testing to measure impairment. Moreover, she disagreed that random alcohol testing was reasonably necessary for employees in safety-sensitive positions. She held that “the provisions of the Policy that provide for random alcohol testing are unlawful because [Imperial Oil] failed to prove such screening is reasonably necessary to deter alcohol impairment on the job”. In her opinion other less drastic means existed to deter alcohol impairment on the job. Those means included various kinds of employee supervision and assessment programs.

I find the evidence the Board relied on weak and her reasoning unpersuasive. The Board gave great weight to the evidence of Dr. Shain, the head of workplace programs at the Addiction Research Foundation, even though he had no practical experience with drug and alcohol testing in the workplace. Dr. Shain thought that other programs were more effective in eliminating alcohol abuse. In his opinion, properly trained supervisors had a “very high likelihood of being able to detect impairment” on the job. His opinion fails to appreciate that Imperial Oil does use trained supervisors to detect impairment, but in conjunction with breathalyzer testing. Most important, however, Dr. Shain’s opinion fails to adequately appreciate that a safety-sensitive position is one that by definition has no direct or very limited supervision.

Relying exclusively on supervisors to detect impairment raises additional concerns, also addressed in the expert evidence before the Board. Supervisors have other duties; at Imperial Oil their primary focus is to direct the manufacture of petroleum products. Supervisors are often unwilling to confront employees with an alcohol problem, or at least to do so constructively. And, increased supervision may lead to harassment of or even discrimination against some employees. Random testing is seen by many experts to be fairer to employees because of its objectivity.

Imperial Oil can legitimately take steps to deter and detect alcohol impairment among its employees in safety-sensitive jobs. Alcohol testing accomplishes this goal. For employees in safety-sensitive jobs, where supervision is limited or non-existent, alcohol testing is a reasonable requirement.

The Commission’s “Policy Statement on Drugs and Alcohol Testing” recognizes that an employer can administer alcohol testing to its employees without contravening the *Code*. The Commission’s Policy Statement provides:

If workers will be required to undergo drug and alcohol testing during the course of their employment — on the grounds that such testing, at the time that it is administered, would indicate actual impairment of ability to perform or fulfil the essential duties or requirements of the job, as opposed to merely detecting the presence of substances in the system — the employer should notify them of this requirement at the beginning of their employment.

Because alcohol testing does indicate “actual impairment of ability to perform or fulfil the essential duties or requirements of the job, as opposed to merely detecting the presence of substances in the system” and because

Imperial Oil's Policy fairly notifies employees in safety-sensitive positions that they will have to undergo random alcohol testing, such testing is consistent with the Commission's Policy Statement. I think it significant that the intervener, who vigorously opposed drug testing, took no position on alcohol testing in the workplace.

However, random alcohol testing, though reasonable for employees in safety-sensitive jobs, will not satisfy the third step of the *Meiorin* test unless Imperial Oil has met its duty to accommodate the needs of those who test positive. The Policy's Guidelines provide for dismissal from employment following a single positive test. The Board did not discuss the question of individual accommodation following a positive breathalyzer test. However, for the reasons I discussed in connection with drug testing, dismissal in all cases is inconsistent with Imperial Oil's duty to accommodate. To maintain random alcohol testing as a BFOR, Imperial Oil is required to accommodate individual differences and capabilities to the point of undue hardship. That accommodation should include consideration of sanctions less severe than dismissal and, where appropriate, the necessary support to permit the employee to undergo a treatment or a rehabilitation program.

I would therefore set aside the Board's conclusion that random alcohol testing for employees in safety-sensitive positions breaches the *Code* and in its place hold that this testing is a BFOR provided the sanction for an employee testing positive is tailored to the employee's circumstances.

Cross-References

D.J.M. Brown & D.M. Beatty, *Canadian Labour Arbitration* (3d ed.): 7:3625.

S. Krashinsky & J. Sack, *Discharge and Discipline*, vol. II: 2(8).

Recent Cases

Toronto Dominion Bank v. Canada (*Canadian Human Rights Commission*) (1998), 163 D.L.R. (4th) 193 (F.C.A.).

Construction Labour Relations Ass'n (Carpenters Provincial Trade Division) and C.J.A., Local 1325, L.A.N. May/June, 2001 (A.V.M. Beattie).
Canadian National Railway Co. and C.A.W., L.A.N. September/October, 2000 (M.G. Picher).

Trimac Transportation Services and Transportation Communications Union, H.S.L.R. January/February, 2000 (Burkett).

13.4.3 Video Surveillance

In the past decade, there have been a large number of arbitral awards which address the use of video surveillance of employees, both inside and outside the workplace. There are two primary issues that arise in this context. The first is the procedural issue of the admissibility in