

April 24, 2007

The following Schedule is a summary of relevant legislation and case law forming the basis for an Independent Legal Opinion by **Andrew Robertson, MacLeod Dixon LLP** to be included as part of the Enform *Alcohol and Drug Policy Model for the Canadian Upstream Petroleum Industry* (now in the final stages of review and expected to be published later in 2007). This is not offered as legal advice concerning any particular alcohol or drug issue. Interested parties are advised to seek legal advice based on their own specific circumstances and issues.

A summary of the leading cases is set out below, in the chronological sequence of their release, to assist the reader in understanding the development of the law up to this time.

Case law

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

In this very early "drug testing" case, the Bank's policy required mandatory drug testing of all new and returning employees. Employees who refused to submit to the test were dismissed. Employees who tested positive and were drug dependent were offered rehabilitation services (at the Bank's expense), but could lose their employment if they refused to take advantage of the services or if rehabilitation efforts proved unsuccessful. Casual users who tested positive on at least three occasions could also lose their jobs.

The Federal Court of Appeal found the Bank's mandatory drug-testing policy was a prohibited discriminatory practice. Although the tests mentioned below for determining whether a particular policy is in compliance with human rights law had not yet been clearly enunciated, it is probably correct to say that the consistent reasoning between the two members of the court who agreed in the result (but not as to all of their reasons) was that the policy was not "reasonably necessary" to achieve the intended purpose of obtaining a drug-free workplace.

This decision is not a strong precedent for our current purposes because of the following factors:

- (a) the case was decided using a "direct discrimination / adverse discrimination" analysis later abandoned by the Supreme Court of Canada;
- (b) there were no "safety-sensitive" employees involved, so the risk of accident causing injury or physical damage was not a consideration;

- (c) there does not appear to have been an incident, accident, positive test result or refusal to take the test that led to the court challenge: it was brought by the Canadian Civil Liberties Association, meaning that the case was heard and decided without a clear factual basis and apparently without expert evidence as to the drugs involved, their effect on workers, or appropriate treatment.

2. *Procor Sulphur Services and C.E.P, Loc. 57 79 L.A.C. (4th) 341 Ponak, (1998).*

In this arbitration case, a safety-sensitive employee had been convicted of possession and cultivation of marijuana, and as a result the employer – who did not have a formal drug testing policy – had required mandatory random drug tests over a period of two years. The employee filed a grievance.

The arbitration panel concluded that in light of the conviction for cultivation of marijuana and possession of significant quantities of the drug, as well as the safety-sensitive position held by the employee, random testing was appropriate, although the panel reduced the period over which random testing would be allowed.

The arbitration panel stated the following:

Except in the most safety-sensitive of positions, or where the law requires it (and these may be one and the same), this does not give an employer the right to test employees at will. Reasonable and probable grounds must exist of an impairment risk The value placed on our personal privacy generally outweighs the right to test simply because some employees, sometimes might be abusing alcohol or drugs and coming to work impaired. The balance is however when an employer has good reason to suspect that the risk factor of impairment has been increased for an employee who occupies a safety-sensitive position.

The panel had considered, as an alternative, referral to the employee assistance plan. They rejected this alternative because the employee was adamant that he did not have a drug problem and this denial did not make him a good candidate for such referral, which would require voluntary participation.

3. *Trimac Transportation Services - Bulk Systems and T.C.U., 88 L.A.C. (4th) 237 (Burkett 1999).*

This labour arbitration decision was decided approximately seven months before the Ontario Court of Appeal decision in *Entrop v. Imperial Oil*, but relied in part on the Ontario Divisional Court decision in *Entrop* which was partly reversed at the Court of Appeal level.

The sole arbitrator noted that in an earlier interim award he found that he lacked jurisdiction to deal with pre-employment drug and alcohol testing, so

the decision focused only on mandatory random drug and alcohol testing, and whether it violated the collective agreement.

The employer was a trucking company, and the policy required mandatory random testing of its drivers. The arbitrator found that it violated the collective agreement. The arbitrator noted that there was not a single incident from 1990 to 1996 where a driver had been found under the influence while operating a company vehicle. He recognized that the introduction of testing had led to the reduction in positive results for both pre-employment and random testing and the rate of "positives" was lower than at least some other Canadian trucking firms, but that a positive drug test result does not establish present impairment.

The arbitrator focused on balancing the employer's right to investigate suspected wrongdoing with the employee's right to personal privacy. He reviewed arbitrator awards to date and stated:

There is not a single award, therefore, that has given effect to an employer right to implement mandatory random drug testing. In every case, the employer interest in implementing such a regime has been found insufficient to justify the intrusion into employee privacy such that its policy has been rendered unenforceable.

He refused to consider evidence of drug use as it relates to the general population at large, to the trucking industry generally, or to other operations of the employer, as establishing a justification for the implementation of mandatory random drug testing.

Of great significance in this case is that the union had not agreed to the random drug testing policy; management attempted to justify the policy under the "management rights" clause in the collective agreement. *Without the union's agreement*, the arbitrator found the random testing policy unenforceable.

Considering human rights legislation, the arbitrator also concluded that the policy was not "reasonable", and therefore not enforceable.

4. *Entrop v. Imperial Oil Ltd.*, 50 O.R. (3d) 18 (C.A. 2000).

This case began as a series of decisions by a Board of Inquiry dealing with a complaint by an employee who was employed in a safety-sensitive position and who was required, by Imperial Oil's policy, to disclose that he was a recovering alcoholic. He had not had a drink in over seven years, but when his prior history of alcohol abuse was disclosed, he was reassigned to another job.

The policy was found to violate Ontario's human rights legislation, and that decision was appealed to the Ontario Divisional Court and then to the Court of Appeal.

Of importance is that there were none of the following factors present in the case:

- (a) an incident such as a near miss,
- (b) an accident,
- (c) any drug use at all,
- (d) any complaint about the random or other testing requirements set out in Imperial Oil's policy, or
- (e) any objective basis to think there had been any impairment by alcohol or a drug at work.

Nonetheless, the Board of Inquiry launched into a complete analysis of Imperial Oil's alcohol and drug testing policy.

The Court of Appeal found that the Board of Inquiry did not have the jurisdiction to address most of the issues that she did, but in light of the fact that the issues had already been argued before the Board, the Divisional Court, and now the Court of Appeal, that Court also addressed all of the issues, although there was no factual application on which to base most of the analysis.

The Court found that the alcohol and drug testing policy was, on its face, discriminatory – in violation of the human rights legislation.

The Court adopted a three-step test that the Supreme Court of Canada had set out in *Meiorin*, [1999] 3 S.C.R. 3 to determine whether a standard (in this case, the alcohol and drug policy) that was, on its face, discriminatory, a "*bona fide* occupational requirement". If the alcohol and drug policy is found to be a *bona fide* occupational requirements then it was justified.

The test for this is:

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

In simpler terms, and in the context of a policy designed to reach an alcohol and drug-free workplace, the test may be summarized this way:

- (1) there must be a rational connection between the policy and the job,
- (2) the policy must have been created in good faith,
- (3) the policy must be reasonably necessary to achieve an alcohol and drug-free workplace, and

- (4) there must be no other practical alternative to accommodating the disabled (in this case, addicted) person without "undue hardship".

The Court had little difficulty accepting that the first two steps of the test had been met. The discussion focused on the third test.

The Court had little difficulty with alcohol testing. It has long been accepted that breathalyzer and other tests provide results that show a very strong correlation with impairment.

The same was found not to be true of drug testing. A positive test for drugs does not demonstrate impairment, it only demonstrates relatively recent (within a few weeks) use of the drug.

The Court found pre-employment drug testing and random drug testing is in violation of the human rights legislation because it cannot measure present impairment and also because the sanction for failing pre-employment and random drug testing was too severe for those in safety-sensitive positions: refusal to hire or termination of employment. The "no presence" of drug metabolics was found to be "too arbitrary".

Alcohol testing, in contrast, was found to be a reasonable requirement but only if Imperial Oil met its duty to accommodate in the form of supporting a treatment or rehabilitation program.

Post-accident, incident or near miss alcohol testing was found to be reasonable, and post-accident, incident or near miss drug testing was also found to be reasonable "if Imperial Oil could establish that it was necessary as one facet of a larger assessment of drug abuse" – a factor that was left unexplained.

Both alcohol and drug testing for certification for safety-sensitive positions and post-reinstatement were found permissible if Imperial Oil "can establish that testing is necessary as one facet of a larger process of assessment" of alcohol or drug abuse.

5. *Construction Labour Relations and C.J.A., Locals 1325 and 2103, 96 L.A.C. (4th) 343 Beattie, (2001).*

In this arbitration decision, the former version of the Construction Owners' Association of Alberta's *Canadian Model* was the policy being addressed. A worker employed by Kellogg Brown & Root had a minor accident with a knife, required five stitches to his hand, and could not explain the accident except that it was "silly" and "stupid". He was asked to take the alcohol and drug test, in accordance with the policy, because use of alcohol or drugs could not be ruled out. He refused, because (as he asserted) he was a recreational user of marijuana.

He was dismissed and he filed a grievance.

The dismissal was upheld and those applicable provisions of the policy were found to be enforceable.

Of great importance to the arbitration panel was that *the union had endorsed the policy*, which was viewed by both parties, and the industry, as very important in ensuring safety on the worksite. The panel noted that:

It is not difficult to imagine circumstances in which, particularly given a Union endorsed Policy, the Employer could be faulted for not having insisted on a test of a person who subsequently acknowledged being a user of marijuana.

(My emphasis.)

The grievance was dismissed.

6. *Fluor Constructors Canada Ltd. and I.B.E.W., Local 424* (Elliott, 2001).

This arbitration award also dealt with a demand for a drug test and the employee's refusal under the *Canadian Model for Providing a Safe Workplace*.

An employee was reported to have said to another person that he used marijuana every night. He was required to take an alcohol and drug test but he refused. He was dismissed and he grieved. His grievance was dismissed.

The arbitrator reviewed the history of the *Canadian Model* as it was drafted at that time, and noted that the issue was whether there was just cause for dismissal, not whether he was considering issues of discrimination or of a bona fide occupational requirement defence. He noted that the *Canadian Model* had been adopted, by reference, as part of the Collective Agreement. Accordingly, he was of the view that the right to intrude on an employee's privacy by requesting a drug test in certain circumstances had been agreed to.

The arbitrator reviewed the decision of Arbitrator Burkett in *Trimac Transportation Services* and distinguished it, because in the *Trimac* case Arbitrator Burkett's rule applied only "absent express language in the collective agreement", and in the case before him Arbitrator Elliott found that there was "express language", in the form of the Canadian Model.

He also commented about "shifting values" in society:

I view the Canadian Model as seeking to create a new environment in the construction industry. The new training, educational, rehabilitative regime, and the rules for testing, signal a change in the industry as significant in its way as drinking/driving laws were for driving Canadians.

It should be noted that the *Canadian Model*, as it was drafted at that time, did not provide for random drug testing.

7. *J.D. Irving Ltd. v. Communications, Energy and Paperworkers' Union, Local 104 and 1309 (Drug and Alcohol Policy Grievance)*, 111 L.A.C. (4th) 328 (Picher, 2002).

This case involved a union grievance relating to an employer-imposed alcohol and drug policy. The policy was generally found to be valid.

The arbitration panel considered the definition of "safety-sensitive" and rejected the union's submission that a position should not be considered to be "safety-sensitive" where the worker is under the ongoing supervision of foremen or supervisors. The panel stated as follows:

In our view for the purposes of drug and alcohol testing the identification of safety-sensitive positions is more usefully achieved by asking what consequences are risked if the person performing a particular kind of work does so impaired by drugs or alcohol. In the case of a person with entirely clerical functions there may be no meaningful risk of adverse consequences, from the standpoint of the safety of other employees, the public or of the property and equipment of the employer, or of anyone else. Conversely, if the answer to the question is that the performance of the job by a person impaired by drugs or alcohol risks the safety of the employee, other employees or persons generally, or the safety of property and equipment, the work must be recognized as safety sensitive, regardless of the degree of supervision which may attach.

In any industrial enterprise, a policy as important as the drug and alcohol policy under consideration in this case must have clear parameters of application. Whether a particular task is qualified as safety sensitive cannot, in our view, be made to depend on the number of supervisors on duty, much less on such unpredictable factors as whether a supervisor is called away to a meeting, or to deal with a problem elsewhere in the plant at any given point in time. It is the work of the employee, the nature of the equipment that he or she operates and the nature of the material he or she handles which must be at the core of the determination of whether his or her position is safety sensitive.

It should be stressed that the foregoing approach to this issue does not, obviously, give the Company carte blanche in defining safety-sensitive positions. Whether a position is safety sensitive for the purposes of the policy must be determined on a case-by-case basis, having regard for the factors touched upon above.

8. *Fraser Lake Sawmills Ltd. v. IWA Canada, Local I-424*, 2003 CLLC 143, 417 (B.C.L.R.B.).

This was a decision in December of 2002 by the B.C. Labour Relations Board. The Board reflected on the fact that the "common law of arbitration" in connection with addiction in the workplace is in a state of development, and noted that where workplace misconduct is related to an addiction, it is often a

"hybrid" mix of causes, being a mix of addiction-driven conduct (which is non-culpable) and voluntary conduct (which is culpable conduct).

The Board also noted that addiction is a treatable illness and the individual has a responsibility in respect of his treatment in the context of the employer's duty to accommodate.

Referring to a decision of the B.C. Court of Appeal in *Canadian Airlines International Ltd. v. C.A.L.P.A.*, [1998] 1 W.W.R. 609, where an arbitrator had reinstated a pilot dismissed for using marijuana both on and off duty and transporting it via the company aircraft, the Board noted that the Court of Appeal had reminded the labour relations community that there are limits to what can be tolerated and found to be reasonable, particularly in respect to safety-sensitive matters.

The Board quoted with apparent approval a passage from an early arbitration decision (*Raven Lumber Ltd.*, 23 L.A.C. (3d) 357 (Munroe, 1986)):

However, if an employee's alcoholism cannot *per se* be regarded as a proper basis for his dismissal, nor can it be allowed to actually enhance the employee's tenure.

As the Board put it:

The presence of an addiction or dependency does not necessarily immunize an employee from disciplinary or corrective action. The extent to which an individual should be held responsible for workplace misconduct needs to be reached having regard to all the circumstances of the case.

The circumstances that the Board said should be taken into account by arbitrators in reviewing disciplinary steps taken against employees whose misbehaviour is related to a dependency are the following:

- (a) the special nature of the disease of addiction in relation to the specific circumstances of the cases,
- (b) the compulsion associated with an addiction,
- (c) the nature and seriousness of the misconduct,
- (d) the impact beyond the individual grievor, including the risk posed to the employer and the impact on others in the workplace such as employees or the public,
- (e) the need for deterrence,
- (f) the employer's efforts to help the employee deal with the addiction,
- (g) steps taken by the employee to deal with the disease,
- (h) the grievor's employment record, and
- (i) other relevant considerations.

The Board stated that arbitrators must be allowed flexibility "to approach uses of addiction-related misconduct in a manner that is just, practical, and

responsive to all of the different considerations that may be relevant to the particular case".

9. *Alberta v. Elizabeth Metis Settlement*, 19 Alta. L.R. (4th) 71 (Q.B. 2003), reversed on other grounds, May 20, 2005 (C.A.).

The Court of Queen's Bench dismissed an appeal from a decision of a Human Rights and Citizenship Commission panel member who had dismissed two complaints arising from refusal to take workplace alcohol and drug tests. The two employees were not in safety-sensitive positions except for some occasional driving. The case does not seem to have been decided with particular emphasis on the basis of the employees occupying safety-sensitive decisions.

A remote Metis settlement had serious problems with alcohol and drug abuse in the community. The Metis Settlement Council had introduced alcohol and drug testing as a means of addressing the community-wide problems, because there was a perception that Council staff were users, were under the influence, or were missing work due to drug or alcohol use. The Council wanted its employees to be on their best behaviour.

One of the employees who refused had a known history of addiction problems. The other did not.

The Court concluded that their dismissal for refusing "random" alcohol and drug tests was justified.

Although the Alberta Court indirectly questioned whether the *Entrop* decision represents the law in Alberta (she said, "To the extent that *Entrop* applies at all in Alberta ...") the court generally followed the Ontario Court of Appeal's approach in its analysis, but noted that public information and policies created by the Director of the Human Rights and Citizenship Commission based on the decision in *Entrop* do not have the force of law. As well, the judge said that those public information sheets and policies of the Alberta Human Rights and Citizen Commission "considerably overstate the conclusions" reached in *Entrop*.

The alcohol and drug policy offered treatment to those who failed the tests. The Settlement had a history of funding substance abuse rehabilitation. The Court found it difficult to fault an employer for failing to offer appropriate drug or alcohol treatment to someone who had refused the test, based only on a presumption that the employee must have some type of substance abuse problem – merely because she refused the test.

Of importance is that the tests were close to being random tests, but were not "random" tests as is usually contemplated. The employees were given about three weeks' notice. They refused. They were given approximately two

weeks' notice of a further test requirement. They refused, and then they were dismissed.

The Metis Settlement's policy stated as follows:

As part of the Drug and Alcohol Policy, [the Settlement] may conduct the following types of drug and alcohol testing: ...

c) Reasonable Cause:

Where a supervisor has reasonable cause to believe an employee has acted in contravention of this Policy

g) Periodic or Site Specific Testing:

Where due to the nature of sensitive work assignments, employees whose job duties could affect personal safety, co-workers safety, the safety of the public or the safety of the environment

An employee who:

b) refuses to submit to an alcohol / drug test

is in violation of this Policy and is subject to disciplinary action including termination of employment for cause

The Court referred to other provisions in the policy that provided for the potential for "further random drug / alcohol testing" after reinstatement.

This reference is significant because although there is very little analysis of why these "random drug / alcohol" tests were found to be a *bona fide* occupational requirement, when the Ontario Court of Appeal had stated in *Entrop* that random drug tests were not, the conclusion seems clear: where there is some compelling reason arising from circumstances, a policy allowing random alcohol *and* drug tests will be found to be a *bona fide* occupational requirement. In this case, the unique circumstances of (a) a remote community, (b) with a serious addiction problem in the community, (c) where the only jobs, to a great extent, were working for the Settlement, and (d) those who held even clerical positions were role models for the community, the policy was justified, and so was the dismissal of those who refused the test.

On May 20, 2005, the Court of Appeal of Alberta reversed the decision, on the grounds that the Court of Queen's Bench had not considered the threshold issue of whether the policy applied to the Complainants (that is whether there was a basis for demanding the tests at all), and remitted the case back to a human rights Panel Member for re-hearing to give the Settlement an opportunity to justify the demands on other grounds.

10. *Milazzo v. Autocar Connaisseur Inc.*, [2003] C.H.R.D. No. 24.

This decision of the Canadian Human Rights Tribunal in late 2003 arose out of a complaint by a coach driver, Mr. Milazzo, who was dismissed after the results of a drug test came back positive for marijuana metabolites. When he was told the results of the drug test, Mr. Milazzo said he was "ready to go to rehab for what happened," but although he testified at the human rights hearing, he gave no evidence that he suffered from a drug-related disability. No attempt was made by the employer to ascertain whether Mr. Milazzo suffered from a substance abuse disorder or was merely a casual user of marijuana.

Oddly, the decision says that Autocar viewed Mr. Milazzo's test as a "pre-employment" test, although at the time of the drug test he had worked for the company about five years. Apparently his pre-employment test, required by the policy, had been missed. The test appeared to Mr. Milazzo to have been part of a move to test all drivers. Until then, only drivers who drove to the U.S. had been tested because of the U.S. requirements to test coach drivers. In any event, the policy required random alcohol and drug tests.

Significant expert testimony on drug use, addiction and treatment was presented by both Autocar and the Human Rights Commission. This factor is important, because the expert evidence presented conflicts with the statements about drug testing in the *Entrop* case. In particular, the expert for the employer stated that it is improbable that an individual who was a casual user would still test positive for the presence of cannabis metabolites even five days after his last use. Mr. Milazzo claimed his last use was "several weeks" before the test. If this were true, the continuing presence of cannabis metabolite in his urine suggested long-term use.

The Tribunal found that the evidence did not establish that Autocar perceived Mr. Milazzo to suffer from a drug-related disability. This is also important, because in both *Entrop* and *Elizabeth Metis Settlement* the Courts presumed that the employer perceived that any employee who tested positive suffered from a dependence.

The evidence demonstrated that there had been a history of drivers abusing alcohol or drugs; that the workplace was somewhat transient; that since the drivers were often out of town their activities were difficult to monitor; that drivers occasionally had to take routes to the U.S. (where testing is mandatory); and the evidence suggested that the use of drugs by drivers in the transportation industry is a real problem, with significant implications for public safety.

The Tribunal concluded that a positive drug test result is a "red flag", assisting in identifying drivers who are at an elevated risk of accident. As well, the presence of a drug testing policy will serve to deter employees from using alcohol or drugs in the workplace.

Accordingly, the Tribunal held that Autocar's drug testing policy was reasonably necessary.

Nonetheless, the Tribunal found the policy to be lacking because it did not allow for the accommodation of dependent employees. The pre-employment testing was allowed, but the employer was not entitled to automatically withdraw offers of employment without first addressing the issue of accommodation. They recognized that no accommodation may be possible in some cases, such as in the case of a short-term hiring.

The random testing was allowed, provided the policy was amended to allow for accommodation by rehabilitation of those employees who can establish that they suffer from a substance-related disability.

As Mr. Milazzo had not proven that he had a disability, his personal complaint was dismissed.

11. *Brotherhood of Locomotive Engineers v. Canadian Pacific Railway Co.*, [2003] A.J. No. 513 (Q.B. April 28, 2003).

In this application for judicial review of an arbitrator's decision, the arbitrator had framed the issue before him to be whether the employer had reasonable grounds to require a drug test, after police had found illegal drugs at the residence of the employee.

The judge, confirming the arbitrator's decision on this point, stated the following:

While recognizing the fallibilities of drug testing and the general unreliability of results as measuring actual impairment at the time of the test, there is no other objective method by which an Employer can obtain information concerning drug use by an employee. Although a positive test result will not necessarily determine impairment at a particular time, it may lead to further investigation. At the very least, it is one indication, albeit not necessarily a reliable one, that the employee has taken a substance that may impair his ability to carry out his duties. From the Employer's perspective, this information becomes crucial in assessing whether further investigation must be undertaken to ensure that an employee in a safety sensitive position is capable of properly carrying out his duties.

Accordingly, and while the Entrop decision and the policy of the Canadian Human Rights Commission both properly reject as discriminatory any attempts by an employer to conduct pre-employment and random drug testing, neither prohibits an employer from requiring an employee in a safety sensitive area to take a drug test where there is some evidence that the employee may have been a party to a drug offence.

It should be noted that the comments about pre-employment and random drug testing were *obiter dicta*, and in fact the issues were dealt with in other,

later, Queen's Bench cases that had to address them: *Elizabeth Metis Settlement* (random) and *Chiasson* (pre-employment).

12. *Suncor Energy Inc. v. Communications, Energy and Paperworkers Union, Local 707*, [2004] A.G.A.A. No. 35 (Jones).

In this grievance arbitration, an employee in a safety-sensitive position was dismissed after refusing to submit to an alcohol and drug test after a minor accident, following a mediated return to work arising from a charge of possession of marijuana and psilocybin ("magic mushrooms"). He asserted that the requirement offended human rights legislation, although he insisted that he did not have a substance-abuse problem.

In light of his insistence that he did not have a substance-abuse problem, the arbitrator held that the employer did not have a duty to accommodate. The employer also did not believe that he had a substance-abuse problem.

In the circumstances of this case, his prior mediated return to work specifically contemplated that the employer would have the right to test the grievor on demand in the event of any incident that raised a reasonable suspicion that he might have been impaired at work.

The grievance was dismissed.

13. *Union des chauffeurs de camions, hommes d'entrepot et autres ouvriers, teamsters Quebec, local 106 (FTQ) v. Dufresne*, [2004] J.Q. No. 5013 (C.S. May 4, 2004).

In this application for judicial review of a labour arbitration decision, the employee had refused to submit to an assessment of his dependency, after having tested positive for drug metabolites in a random drug test. However, in addition to the test results, the employee had admitted drug use.

The arbitrator rejected the employee's grievance of his dismissal. The Superior Court upheld the arbitrator's decision; the dismissal was found to be proper. The Court found that the grievor had been terminated for refusing the test, not for his drug use. This decision appears to conflict directly with *Elizabeth Metis Settlement*, para. 42.

14. *Construction Labour Relations v. International Union of Operating Engineers, Local 955* (Beattie, May 25, 2004).

This grievance arose from a dismissal of an employee with no record of discipline or safety infractions after a "near miss", where a crane he was operating knocked off a live elevated light fixture in a potentially dangerous area. He refused an alcohol and drug test required by the employer under the previous draft of the *Canadian Model*.

The arbitration panel noted that termination is not the only disciplinary response to a refusal to test.

The employer's investigation into the incident was found to be "perfunctory". There was no consideration of whether there were "reasonable grounds" for not requiring a test, and, if there had been, the employee should not have been required to test. Given the superficial investigation and the recognized need for a subsequent more detailed "root cause" investigation, the grievor should have been suspended for his refusal to test pending the "root cause" investigation.

The employee was re-instated.

15. *Construction Labour Relations v. International Association of Heat and Frost Insulators and Asbestos Workers, Local 110* (Beattie, October 26, 2004).

This grievance award arose from a dismissal of workers who refused a urine test (alcohol and drug) after been accused of smoking marijuana during their lunch break.

A security guard was found to have been coerced into writing a false report stating that she had smelled marijuana.

In light of the obviously flawed investigation, the grievors were re-instated.

16. *Halter v. Ceda-Reactor Limited*, (Alberta Human Rights Panel, May 16, 2005).

The employer conducted a drug test on all members of a work crew on the basis that drug use amongst some of the workers was suspected. The Complainant had been using marijuana regularly for several months, and (along with 6 others of a total of 14 workers) tested positive for cannabis metabolites. He filed a human rights Complaint when he was terminated from his position.

There was no direct evidence of dependence on marijuana, and the case was assessed from the perspective of perceived dependence. The Panel Member concluded that the "random test was administered on the premise that all members of [the crew] were perceived to be potential substance abusers." The Panel Member referenced *Entrop*, but the decision ultimately rested on the failure of the employer to accommodate the Complainant when he tested positive, because the policy in question did not have "a comprehensive, inclusive policy which has a range of components necessary to meet the requirements established in *Entrop*", and because the Employer took no other steps to accommodate him: no offer of assistance was made, and no re-allocation to a non-safety-sensitive position until he could demonstrate a drug-free sample.

17. *Chiasson v. Kellogg, Brown & Root (Canada) Company*, (Alberta Human Rights Panel Member, June 7, 2005), *rev'd* 2006 ABQB 302 May 29,

2006 (cited as *Alberta (Human Rights and Citizenship Commission) v. Kellogg, Brown & Root (Canada) Company*).

The Complainant had been required to undergo a pre-employment alcohol and drug test as a condition of his employment, but was allowed to commence work awaiting the results of the test. The results were positive for cannabis metabolites and he was terminated. He filed a human rights Complaint.

The panel member heard evidence from him that he was only a recreational cannabis user, and no evidence to the contrary was presented. As well, there was nothing to show that the employer suspected him of serious drug use or of work impairment. As there was no evidence of a disability, real or perceived, the Complaint was dismissed. The Panel commented that if he had shown a disability, then the *Meiorin* test would not have been met, because (quoting from *Milazzo*), "employers are not entitled to automatically withdraw offers of employment, without first addressing the issue of accommodation.

This case was heard by the Alberta Court of Queen's Bench on appeal, and the decision was reversed on May 11, 2006, the decision having been filed May 29, 2006. It is cited as *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root (Canada) Company*, 2006 ABQB 302. It is currently under appeal to the Court of Appeal.

In her reasons, Madam Justice Sheila Martin concluded that KBR did not demonstrate the reasonable necessity of having all employees meet the single standard of a pre-employment drug test. She noted that pre-employment urine tests do not test for non-impairment at work, and she felt that there are other much more direct, effective, efficient and individual methods for employers to monitor impairment at work. She concluded that as the policy provided for automatic termination without any accommodation, KBR had violated the human rights legislation and was required to pay damages to Mr. Chiasson.

18. *C.E.P., Local 707 v. Suncor Energy Inc.*, 2005 CarswellAlta 971, (Q.B. June 30, 2005).

In this application for judicial review of a labour arbitrator's decision upholding the dismissal of an employee, the Court considered the employee's past drug and alcohol abuse and his denial of having a problem until faced with dismissal.

The parties agreed that in the circumstances of the case the employer had just cause to terminate; the issue was whether, in the facts of the case, the employer had discharged its duty to accommodate to the point of undue hardship. In the facts of this case, the arbitrator had concluded that the employer had done so. The judge agreed.

The Court quoted, with approval, a passage from a 1991 arbitration award (*Westar Timber Ltd. v. I.W.A. - Canada, Local 1-424*) where it was noted that unions who feel obliged to prosecute a grievance, and arbitrators who direct reinstatement, may be engaged in "enabling" behaviour - that is, allowing the employee with the addiction to avoid being held accountable for their actions.

As well, the judge cited a 1998 decision from the Alberta Court of Queen's Bench (*United Nurses of Alberta, Local 2 v. Red Deer Regional Hospital*) where the judge in that case noted that:

collective agreement provisions and policies that encourage employees to use employee assistance programs would be less effective if employers were required to reinstate employees who refused to access the programs until they were discharged.

19. *Health Employers Assn. of B.C. (Kootenay Boundary Regional Hospital) v. B.C. Nurses' Union*, 2006 BCCA 57 (Feb. 14, 2006).

This case did not deal with drug testing, but the discharge by the employer of the duty to accommodate by an employer. The case was originally dealt with by a labour arbitrator. Her decision was appealed to the B.C. Court of Appeal.

The employee suffered from drug addiction and had a consequent disability and it was alleged that the employer had failed to accommodate the employee's disability. The employee had previously signed a last chance agreement but not with the Kootenay Boundary Regional Hospital as employer, so the arbitrator (and ultimately the Court of Appeal) held that the Hospital could not rely on it. However, the Hospital could rely on the fact that he had been given two previous opportunities to rehabilitate his addiction, had relapsed, and had failed to take the necessary steps to address the relapse. The Court held that the dismissal was proper.

The Court discussed, with apparent approval, the *Fraser Lake Sawmills* decision of the Labour Relations Board regarding the "hybrid" nature of misbehaviour relating to addictions.

As well, the Court stated that:

to establish a *prima facie* case of discrimination, an employee must establish that he or she had (or was perceived to have) a disability, that he or she received adverse treatment, and that his or her disability was a factor in the adverse treatment

In closing, the Court stated:

Addiction, as a treatable illness, requires an employee to take some responsibility for his rehabilitation program Mr. Bergen failed to discharge that duty, and the duty to accommodate was exhausted.

20. *Imperial Oil Ltd. v. Communications, Energy & Paperworkers Union of Canada (CE&PUC), Local 900*.

This case was a policy grievance challenging Imperial Oil's introduction of random "cheek swab" testing for marijuana impairment. The union had not agreed to this change in the policy. The arbitration panel held that the cheek swab test tested for actual impairment by marijuana.

After a detailed review of arbitration board decisions, the board concluded (with one dissent) that the random marijuana testing was not allowed by the collective agreement in question. The arbitration board noted (para. 122) that in some circumstances random testing might be allowed, such as where an employer could show that there was "an out-of-control drug culture taking hold in a safety sensitive workplace", but those circumstances did not exist in the case before them.

21. *Weyerhaeuser co. Ltd. v. Ontario (Human Rights Commission)*, (Ont. Divisional Court, Feb. 21, 2007).

This case was an application for judicial review of a Human Rights Commission decision that arose out of a complaint by a recreational drug user who had been required to submit to an alcohol and drug test after being conditionally offered employment by Weyerhaeuser, which he failed. The offer was withdrawn and he filed a complaint with the Commission. The Tribunal ruled, in an interim decision, that it had jurisdiction over the complaint and that it had jurisdiction to review Weyerhaeuser's policy of pre-employment drug testing for safety-sensitive positions. Weyerhaeuser asked the Court to prohibit the Tribunal from dealing with the matter further.

The Court allowed the application and prohibited the Tribunal from proceeding. They held that "the mere existence of a drug testing policy" is not evidence of discrimination on the ground of perceived disability. As the Weyerhaeuser policy did not contain provisions for automatic withdrawal of the offer in the event of a positive test, and the employer was not shown to have perceived the applicant to have a dependency, the Commission did not have jurisdiction to proceed. Both the *Entrop* and the *Chaisson* decisions were distinguished.

22. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 488 v. Bantrel Constructors Co.*, (P. Smith, chair, March 21, 2007).

This case dealt with a challenge by three unions of the pre-access testing policy imposed by Petro-Canada on its sub-contractors before unionized tradesmen (and other employees of the sub-contractors) would be allowed access to the Petro-Canada site.

The Arbitration Board took into account the evidence before them to the effect that drug use on construction sites is a problem, and the introduction of pre-access testing on the Syncrude site in Fort McMurray has led to fewer

incidents and greater use of Employee and Family Assistance Plan substance abuse counseling. Most importantly, the Board took into account the changing emphasis in the law on risk management and the strengthening of safety related provisions in the Occupational Health and Safety Act and the criminalization of certain conduct in the Criminal Code, and dismissed the grievances.

The Board went on to say that although they were not asked to determine the reasonableness of a pre-employment testing policy (the case before them dealt only with testing of existing employees), "it is not possible to separate the issue of pre-employment testing from the issue of applying such testing to current employees." They concluded that at least a *prima facie* case was made out for the reasonableness of pre-employment testing. (The board also mused that it may be viewed as unreasonable not to test all employees.)

They also held that the pre-access testing approach did not represent an unreasonable intrusion into employees' privacy.

They recognized that pre-access testing did not measure current impairment, but that, "it measures some degree of drug and alcohol use which is more than incidental given the cut-offs contained in the policy."