

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NEW BRUNSWICK)**

BETWEEN:

**COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA,
LOCAL 30**

Appellant (Appellant)

- and -

IRVING PULP & PAPER, LIMITED

Respondent (Respondent)

FACTUM OF THE RESPONDENT

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(Pursuant to Rule 42 of the Rules of the Supreme Court of Canada, S.O.R./2002-156)

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PART I—OVERVIEW AND STATEMENT OF FACTS

1. Overview

1. This is an appeal by the Union from a decision of the New Brunswick Court of Appeal, which unanimously quashed a ruling in which the majority of an arbitral board (the “Board”) set aside the random alcohol testing component of a policy (the “Policy”) implemented by Irving at its kraft paper mill (the “Mill”) in Saint John, New Brunswick. The Court of Appeal concluded that the Board’s ruling was both unreasonable and incorrect.¹ Irving submits that both aspects of the Court’s decision should be affirmed.

2. As to *correctness*, the Board was not entitled to deference here. The Policy does not form part of the Collective Agreement, and was not challenged on the basis of any provision of the Collective Agreement itself. Accordingly, the Board’s decision, based solely on Irving’s supposed common law obligation to formulate reasonable workplace rules, did not engage the core or even the periphery of its expertise, which lies in resolving interpretive disputes under collective agreements.

3. As to *reasonableness*, the Board’s decision was unreasonable for two (2) reasons, each of which is sufficient to dispose of this appeal:

4. *First*, the Board erred in principle because the judicial and arbitral case law confirms that employers in inherently dangerous workplaces like the Mill are *not* required to lead evidence of a *pre-existing* alcohol problem to justify their testing policies. That should have governed this case. However, the Board held that this principle was inapplicable because the Mill was not “ultra” dangerous, creating a distinction between dangerousness and ultra-dangerousness that has no foundation in the jurisprudence.

5. *Second*, the Board had *no evidence* to support its critical conclusions and inferences that:

- (a) the Mill was not “ultra” dangerous;
- (b) there was no pre-existing alcohol problem at the Mill;
- (c) the absence of positive test results meant there was no alcohol risk at the Mill; and
- (d) Irving’s decision to limit the testing to 10% of safety-sensitive employees meant it believed there was no alcohol risk at the Mill.

¹ Appellant’s Record (“AR”), Vol. I, Tab 2(e), NBCA Decision, paras. 8, 26-27 and 57.

6. Additionally, the Board *failed to consider* two relevant factors:
- (a) the primary goal of the Policy is to *deter* the use of alcohol at the Mill; and
 - (b) the Policy only mandates random *alcohol* testing, not random *drug* testing.
7. Accordingly, Irving respectfully requests that the Union's appeal be dismissed.

2. Statement of Facts

8. The Mill is located in the centre of Saint John.² By virtue of its location, and the work carried on there, the Mill presents significant risks to Irving's employees and property, the environment and the general public. Leo Moorehouse, a 37-year employee of Irving,³ gave the following evidence, which the majority of the Board found had "significant support":⁴

It is heavy industry. It is a kraft pulp mill. Its probably *as close as you get to a chemical plant.* There are *a lot of chemicals.* There's a lot of them required for process. There's *high pressure steam lines.* There's *many, many motors and pumps.* There is *much rotating equipment.* It generates its own power so there are *high voltage lines* feeding the plant and of course the plant could export some power.⁵

9. The dissenting member of the Board summarized Mr. Moorehouse's testimony this way:

... As Mr Mo[o]rehouse testified, a Kraft Pulp mill is *largely a chemical plant in its operation.* It contains, generates and utilizes *many deadly chemicals and gases* as well as many other workplace risks involving *moving machinery and equipment, high-pressure boilers, high-voltage electricity* etc. Mr Morehouse testified that serious personal injury and *death can occur, and has occurred, in this Kraft Pulp mill.* ...⁶

10. Accordingly, it is uncontroverted that the Mill is a dangerous work environment. As the majority of the Board stated after reviewing the evidence:

I conclude from these entries and from an examination of the exhibit and other evidence as a whole that *the operation of the plant under normal circumstances carries with it the risk that certain malfunctions could have repercussions going well beyond the safety of the actor who caused the incident.* On the whole of the evidence, I accept that *the mill in normal operation is a dangerous work environment.*⁷

² AR, Vol. I, Tab 2(e), NBQA Decision, para. 1; AR, Vol. IV, Tab 4, Affidavit of Garry Sudal, sworn 16 February 2010 ("Sudal Affidavit"), Ex. 19, Board Dissent, p. 86. All references to the Board Decision and Dissent herein are to the *final* Board Decision and Dissent in Exs. 18 and 19 of the Sudal Affidavit at Vol. IV, Tab 4, p. 1 *et seq* of the AR, since the Board Decision and Dissent in Vol. I, Tabs 2(a) and 2(b) of the AR are *draft* versions which contain material variations from the final versions (compare, e.g., consecutive pps. 69-70 of Vol. I and consecutive pps. 68-69 of Vol. IV). As well, all page references to all volumes of the AR herein are to the consecutive numbers at the top of each page.

³ AR, Vol. I, Tab 2(c), NBQB Decision, para. 51.

⁴ AR, Vol. IV, Tab 4, Sudal Affidavit, Ex. 18, Board Decision, p. 61.

⁵ AR, Vol. IV, Tab 4, Sudal Affidavit, Ex. 18, Board Decision, p. 61, *emphasis added*.

⁶ AR, Vol. IV, Tab 4, Sudal Affidavit, Ex. 19, Board Dissent, p. 86, *emphasis added*.

⁷ AR, Vol. IV, Tab 4, Sudal Affidavit, Ex. 18, Board Decision, p. 64, *emphasis added*.

11. Indeed, the majority of the Board noted that the Mill has the potential for “*catastrophic failures*”.⁸

12. On February 1, 2006, after four months’ notice and several informational sessions,⁹ Irving adopted the Policy. Its purpose was to “*minimiz[e] the risks* associated with our operations in order to *ensure a safe, healthy and productive workplace*” at the Mill,¹⁰ as is required of Irving under s. 217.1 of the *Criminal Code* and ss. 9(1) and 11 of the *New Brunswick Occupational Health and Safety Act*. To this end, the Policy provides, as part of a comprehensive approach, that certain employees undergo random alcohol testing:

[V](iii) Alcohol and Drug Testing

Employees are subject to testing for alcohol and designated drugs under the following circumstances:

...
(c) Random Testing: *Employees in Safety Sensitive Positions will be subject to unannounced random tests for alcohol.* In addition, applicants to a Safety Sensitive Position must pass an alcohol and/or drug test before entry to the position or re-entry to the position where they have participated in a treatment program.¹¹

13. The random alcohol testing is thus limited to employees in “Safety Sensitive Positions”. These Safety Sensitive Positions are defined in the Policy as follows:

[II](viii) *Safety Sensitive Position* is a position which the Company determines has a role in the operation where *impaired performance could result in a significant incident affecting the health and safety of employees, customers, customers’ employees, the public, property or the environment.*

...
*The list of safety sensitive positions can be found at Appendix I. ...*¹²

14. The Safety Sensitive Positions listed in Appendix I, which is annexed as the Appendix to this Factum, are each accompanied by risk assessments. Many of the positions are identified as posing risks to the employee, other employees, Irving’s property, customers and suppliers, the environment and even the *general public*. The relevant risks include those presented by:

(a) the use of *hazardous and caustic chemicals and materials*, such as sulphuric acid, sulphur dioxide, formaldehyde, nitric acid, sodium hydroxide, hydrogen peroxide and methanol;

⁸ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 64.

⁹ AR, Vol. II, Tab 4, Sudul Affidavit, Exs. 1(6), 3 and 4, pps. 67-68 and 153-193.

¹⁰ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(7), p. 70, Art. I, *emphasis added*.

¹¹ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(7), p. 76, Art. V(iii)(c), *emphasis added*.

¹² AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(7), p. 71, Art. II(viii), *emphasis added*.

- (b) the use of *flammable substances*, including natural gas, propane and bunker fuel oil;
- (c) interaction with *heavy, automated and often rotating equipment*, such as railcars, cutting blades, chip pads, high pressure steam valves, high pressure hydraulic systems, turbine generators, gas testing equipment, forklifts, clamp trucks, welding machines, cutting torches, and the heaving rigging and operation of overhead cranes;
- (d) contact with the Mill's *13,800 volt electrical system*; and
- (e) the operation of a *high pressure boiler* worth approximately \$350 million, described as the "*most dangerous piece of industrial equipment there is*" with a "*high potential for explosion*".¹³

15. Thus, as the majority of the Board itself recognized upon reviewing this evidence:

It is evident from a review of the detail in Exhibit 1(8) that *the Irving Plant is one in which great care must be taken with safe work practices*. There are perceived *risks and dangers* in the operations performed *both to the incumbent, and to others, as well as to the environment and to property*.¹⁴

16. There are a number of other salient points here in relation to the Irving random alcohol testing regime:

17. *First*, the Policy does balance the management interests of Irving in a safe workplace with the privacy of employees, by providing that not all Mill employees in safety sensitive positions are to be tested. To the contrary, *only 10%* of the 334 such employees are randomly tested in any 12-month period.¹⁵

18. *Second*, the testing is carried out by *breathalyzer*, which is both less physically intrusive than blood or urine tests, and can specifically detect on-the-job impairment.¹⁶

19. *Third*, the Policy is not zero-tolerance; there are other remedial steps available beyond outright dismissal.¹⁷ As recognized by the majority of the Board:

¹³ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(8), pps. 86-104, *emphasis added*.

¹⁴ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 60, *emphasis added*.

¹⁵ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 4; AR, Vol. I, Tab 2(e), NBCA Decision, para. 1; AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 4, p. 193.

¹⁶ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 69-71; AR, Vol. I, Tab 2(e), NBCA Decision, para. 1; AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(7), Appendix III, p. 83. Testing occurs through a saliva strip or breath test, which is then confirmed by a calibrated breathalyzer. Urine and blood tests for alcohol are not used for random testing, but only for reasonable cause or post-incident testing.

¹⁷ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(7), p. 78, Art. VI(ii)(a)

...*the rule is not a zero-tolerance proposition. That is, instead of a "one size fits all" punishment for a found violation, the policy preserves the case by case treatment of each violator, and leaves open the road to the application of normal progressive discipline and just cause principles to each offender. This is an important feature. Case by case consideration of violations and violators respects the distributive nature of the just cause protection and sees to it that penalty in each case is judged on its own particular merits.*¹⁸

20. **Fourth**, the Policy is similar to the random alcohol testing policies adopted by other high-risk employers. The expert evidence before the Board was that:

Random Testing: *Random alcohol and drug testing has been introduced in some companies for the highest risk operations as a deterrent to use and a reinforcement of the policy requirements. The testing would normally be limited to safety-sensitive positions, individuals would be registered in a "pool", and a computer program usually managed by a third party operation would randomly select dates and names for testing.* Once tested, the individual's name would be returned to the ["pool"] and may be selected again at any time. The company determines in advance the annual selection rate (total number of test[s] that would be done in a given year).¹⁹

21. **Fifth**, the Policy is consistent with the New Brunswick Human Rights Commission's *Guideline on Drug and Alcohol Testing in the Workplace*:

Testing for alcohol is a different matter [than random drug tests] since such tests can determine the level of present impairment. If an employer advises that *random alcohol testing* is a condition of employment for *people in safety sensitive positions*, then *said employees may be tested for alcohol consumption.* ...²⁰

22. **Sixth**, the Collective Agreement did not prohibit or even specifically address random alcohol testing.²¹ To the contrary, the Collective Agreement emphasized the importance of promoting employee safety and of protecting Irving's property and the environment from workplace accidents:

1.02 The parties and each member of the bargaining units shall abide by the terms and conditions of this agreement and fully co-operate to:

(A) *Promote the safety and welfare of the employees and prevent accidents;*

...

(D) *Protect the property of the Company;*

...

(F) The Company and the Union will mutually *promote environmental protection* through education and awareness.

...

30.01(A) Management recognizes its *responsibility to provide a safe working environment for its*

¹⁸ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 53-54, *emphasis added*.

¹⁹ AR, Vol. III, Tab 4, Sudul Affidavit, Ex. 6, p. 24, *emphasis added*.

²⁰ New Brunswick Human Rights Commission, *Guideline on Drug and Alcohol Testing in the Workplace* (updated May 6, 2011) at 3, Respondent's Authorities ("RA"), Tab 63, *underlining in original, bolding and italics added. vide* Canadian Human Rights Commission, *Policy on Alcohol and Drug Testing* (revised October, 2009) at 7, RA, Tab 60.

²¹ The Collective Agreement between Irving and the Union was for the period May 1, 1998 to April 30, 2006. Though the parties have since entered into a new collective agreement for May 1, 2006 to April 30, 2016, the earlier Collective Agreement was in place at the time of the events giving rise to the grievance before the Board, and hence governs this dispute.

employees. It is, therefore, the firm and continuing policy of this Company to *establish safe working methods and practices* and to comply with all the requirements of the New Brunswick Occupational Health and Safety Commission.²²

23. The Collective Agreement also contained *no recognition of any privacy rights for unionized employee*, and provided in relation to the Board that:

10.08 *A board shall not have any power to alter or change any of the provisions of this agreement or to substitute any new provisions for any existing provisions* nor to give any decision inconsistent with the term or provisions hereof.²³

24. At the same time, the Collective Agreement *expressly recognized Irving's right to operate the Mill and to adopt Mill Rules which would not form part of the Collective Agreement itself*:

4.01 The Union recognizes and acknowledges that *it is the right of the Company to operate and manage its business subject to the terms and provisions of this agreement*.

...

28.01 *The Company shall publish a list of the Mill Rules* and issue a list of these Mill Rules, in writing, to the Union with up-to-date changes. *The Company Mill Rules do not form part of the Collective Agreement*.²⁴

25. On March 13, 2006, Mr. Perley Day, a millwright in a safety sensitive position at the Mill, was randomly selected by the off-site computer responsible for identifying the test subjects, and took a breathalyzer test.²⁵ As the majority of the Board observed:

*...Mr. Day, then, is employed in a job noted as showing one of the highest risks in the plant. ...*²⁶

26. On April 12, 2006, Mr. Day grieved the random alcohol testing Policy to the Union on the basis that there were no reasonable grounds to test him.²⁷

27. However, the evidence established that there were *eight (8) documented alcohol incidents* at the Mill during the period between 1991 and 2006, *the last one just weeks before the Policy was implemented in February, 2006*. These included five (5) incidents in which employees attended the Mill under the influence of alcohol, two (2) incidents in which employees consumed alcohol on company premises, and one (1) incident in which an employee was seen at the local liquor store during working hours.²⁸ In addition to these eight documented incidents, Mr. Moorehouse testified

²² AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(1), pps. 9 and 51, Arts. 1.02 and 30.01(A), *emphasis added*.

²³ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(1), p. 15, Art. 10.08, *emphasis added*.

²⁴ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(1), pps. 10 and 50, Arts. 4.01 and 28.01, *emphasis added*.

²⁵ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 5.

²⁶ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 57 (and p. 5), *emphasis added*.

²⁷ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 5-6.

²⁸ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(15), p. 121.

that there were *several other undocumented alcohol incidents* at the Mill prior to 2006. As summarized by the majority of the Board, who “accept[ed] what Mr. Moorehouse said”:²⁹

... Mr. Moorehouse said that Exhibit 1(15) was “*by no means an exhaustive list*”. He gave evidence that *others, not on the list, had been found in similar circumstances but had been sent or had been taken home*, assisted into a 28 day rehabilitation recovery program, and so on. *He claimed to have “witnessed that on a lot of occasions”*.³⁰

28. There was also expert evidence before the Board that *79% of Canadian adults are current drinkers*, and that the percentages of New Brunswick residents who are weekly or monthly heavy drinkers, or who drink at hazardous levels, are even higher than the national averages.³¹

29. Further, the Policy succeeded in *detering* alcohol-related incidents at the Mill. From its implementation in February, 2006 until the Board hearing in November, 2008, there were *no positive alcohol tests* out of the 114 administered during that period,³² and *no further recorded situations of alcohol abuse* at the Mill.³³

30. The evidence of Barbara Butler, an expert in workplace alcohol policies who was engaged by Irving to help develop the Policy,³⁴ was that the principal goal of random alcohol testing policies is in fact *deterrence*.³⁵ The majority of the Board accepted the following aspects of her testimony:

Ms. Butler, in both her document and in evidence, also addressed comment on the theoretical underpinning of random alcohol testing, and identified the population intended to be affected by it. Some points were:

- *random alcohol testing is based or partly based on deterrence theory*:

- ... *Random alcohol and drug testing* has ... been *introduced ... as a deterrence to use* and a reinforcement of policy requirements ... (Butler document, p. 6, item 5);

- ... the basic premise [of *deterrence* theory] is that it is possible to *dissuade people from committing a particular act* if they perceive that there is a clear consequence for their actions ... (Butler document, p. 7, item 6.)

- ... in other words, *it's a deterrent* ... (direct examination); ...³⁶

31. This goal of deterrence is expressly recognized in the Policy itself:

²⁹ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 67.

³⁰ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 66, *emphasis added*.

³¹ AR, Vol. III, Tab 4, Sudul Affidavit, Ex. 6, pps. 21-22.

³² AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 68; AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(14), pps. 119-120.

³³ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 19, Board Dissent, p. 87.

³⁴ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 54; AR, Vol. III, Tab 4, Sudul Affidavit, Ex. 5, pps. 1-18.

³⁵ AR, Vol. III, Tab 4, Sudul Affidavit, Ex. 6, pps. 25-26 and 29.

³⁶ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 55, *emphasis added*.

V(i)(a) Prevention: *This policy stresses the importance of prevention* and early identification of potential problem situations. ...³⁷

PART II—QUESTIONS IN ISSUE

32. There are two issues before this Court:
- (a) Is the standard of judicial review applicable to the Board's decision correctness or reasonableness?
 - (b) Does the Board's decision fail to meet the applicable standard?

PART III—STATEMENT OF ARGUMENT

1. The Standard of Judicial Review is Correctness

33. It is submitted that the standard of review applicable to the Board's decision is correctness.

34. In *Dunsmuir*, this Court set out a two-part test for determining the standard of review applicable to administrative decisions:

In summary, the process of judicial review involves two steps. *First*, courts ascertain *whether the jurisprudence has already determined* in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. *Second*, where the first inquiry proves unfruitful, courts must proceed to an *analysis of the factors* making it possible to identify the proper standard of review.³⁸

35. As to the *jurisprudence*, the Union cites two cases in which appellate courts have applied a standard of reasonableness to arbitral decisions about employer alcohol or drug testing policies.³⁹ However, both cases turned upon the arbitrator's *interpretation of a collective agreement*.⁴⁰ Here, there was no issue of the interpretation of the Collective Agreement. Instead, the Board decided the grievance based solely upon Irving's supposed common law obligation to formulate "reasonable" workplace rules under the so-called "KVP" test:

... It is *competent for the parties to agree on explicit language to permit/regulate alcohol and drug testing* in the workplace. It is common ground that *these parties have not done so*. ...

...

This is not a case where the parties have agreed on contract language on alcohol and drug testing, only to fall out later over its meaning. The Policy is not part of the agreement. It is an exercise in employer rule making; a set of written, compulsory, unilaterally imposed requirements. It is recognized by arbitrators that an employer's powers to manage its enterprise include the right to make

³⁷ AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(7), p. 74, Art. V(i)(a), *emphasis added*.

³⁸ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 62, RA, Tab 14, *emphasis added*.

³⁹ See para. 35 of the Union's Factum.

⁴⁰ *United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co.*, 2009 ABCA 84 at paras. 1 and 30, Appellants' Authorities ("AA"), Tab 16; *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900*, 2009 ONCA 420 at paras. 1 and 26, RA, Tab 21.

rules for its employees. ... *This agreement expressly contemplates that this will occur.* Article 24.02(A) provides that an employee may be discharged or otherwise disciplined "who ... violates any of the *mill rules* ...".

...

... Since *there is no bargain with the union on random alcohol testing in the agreement*, the random alcohol testing rule is *not formally inconsistent with the collective agreement*. ...

...

... Since *the union has not bargained a relevant limitation*, it follows that *the employer can make and enforce rules regarding alcohol in the workplace*, but *subject always to the KVP rules*.⁴¹

36. Indeed, neither of the two rights at stake here, i.e., Irving's right to manage its business or the employee's right to privacy, even arose under the Collective Agreement itself:

Because of the way the case was argued, the focus of HRM/NSUPE was on the existence and nature of the employee's right to privacy; little was said about the nature of *the employer's right to operate the business*. However, its relevant features for purposes of this discussion are not problematic and quickly may be summarized. Two things can be said with confidence of this right. The first is that it is *not granted or created by Article 4.01. Article 4.01 creates no rights. Rather, it recognizes their existence*: "The union *recognizes and acknowledges* ...". *Just as the employee's right to privacy does not come from the employer, the right of an employer to operate its enterprise self-evidently does not come from its workforce*, their union or from the collective bargaining relationship. *It pre-exists that web of relationships*.⁴²

37. Thus, the traditional deference extended to labour arbitrators when interpreting collective agreements,⁴³ which is based on the fact that "the *interpretation of collective agreements*... is at the *core of an arbitrator's expertise*",⁴⁴ has no application here. As this Court stated in *Bradco*:

...the rationale for deferring to an arbitrator's interpretation of a collective agreement does not necessarily apply to afford deference to a finding of law made by the arbitrator, when this involves interpretation of a statute or a rule of the common law. Generally, these are *not matters within the expertise of the arbitrator*, and in the absence of legislative intention that deference should be paid to findings of law made by an arbitrator, such findings would be *reviewable on a standard of correctness*. ...⁴⁵

⁴¹ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 8, 19-21 and 48, *emphasis added*. See also AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 19, Board Dissent, p. 80.

⁴² AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 17, *emphasis added*.

⁴³ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 68, RA, Tab 14; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 S.C.R. 708 at paras. 8 and 19, RA, Tab 31; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616 at para. 42, RA, Tab 32.

⁴⁴ *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609 at para. 29, RA, Tab 55, *emphasis added*. *vide United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 339, RA, Tab 52.

⁴⁵ *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 336 (and 337), RA, Tab 52, *emphasis added*. *vide: Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 at 266-267 and 269, RA, Tab 12; and *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487 at para. 39, RA, Tab 50. *cf. Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616, RA, Tab 32, where this Court applied a standard of reasonableness to an arbitrator's decision applying the "arbitral remedy" of estoppel (para. 28). However, *Nor-Man* is distinguishable since, as noted at paras. 38 and 55, it did not involve a question of central importance to the legal system as a whole that was outside the arbitrator's specialized area of expertise, unlike this case, as discussed below. Further, the decision in *Nor-*

38. There is also at least one appellate case, *Goodyear*, in which the Court applied a standard of *correctness* when reviewing a labour arbitrator's decision about the validity of a random alcohol and drug testing policy, where the issue was not whether the policy violated a collective agreement but whether it violated *external privacy rights*:

The *correctness* standard *is the applicable standard of review*. In *Desnoyers*, Rochette, J.A., writing on behalf of the Court, stated: [TRANSLATION] "The matter before us *involves human rights and is outside the customary realm of the arbitrator's specialized jurisdiction*. Our analysis *must be guided by the correctness test*".⁴⁶

39. Pursuant to *Goodyear*, the jurisprudence supports the correctness standard in this case.

40. As to the remaining *Dunsmuir factors*,⁴⁷ there are four (4) reasons why these factors indicate that correctness is the appropriate standard of review in the context of this appeal:

41. *First*, the balancing of employees' common law privacy rights with Irving's management rights, where no provision of the Collective Agreement is at issue, is beyond the grievance arbitrator's purpose and expertise.⁴⁸ It is submitted that the Court of Appeal below was correct in saying the following:

...the question posed raises a *pure question of law*, one that seeks to strike a *reasonable balance between an employer's legitimate interest and obligation to provide a safe workplace and the privacy and dignity interests of employees* or, in some instances, their freedom from discrimination. As such, the case raises a *question of general importance in the law* over which the arbitration board *cannot assert a greater relative expertise than the courts*. ...

...

Certainly, the Supreme Court has yet to accord deference to an administrative tribunal with respect to *questions of law umbilically tied to human rights issues*... Indeed, *if one looks to the arbitral jurisprudence, one is struck by the reliance on judicial opinions touching on the matter*. The overlap *reflects the general importance of the issues in the law and of the need to promote consistency and, hence, certainty, in the jurisprudence*. ...⁴⁹

42. In *Dunsmuir*, this Court held that questions such as these are reviewable on a standard of correctness:

Man did not engage matters of public and environmental safety, as does this appeal, but involved a dispute over employee vacation benefits.

⁴⁶ *Local 143 of the Communications, Energy and Paperworkers Union of Canada v. Goodyear Canada Inc.*, 2007 QCCA 1686 at para. 13 (and 38), RA, Tab 26. *vide Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 at para. 11, RA, Tab 10 ("*where the decision to be made by an administrative body has a human rights dimension*, this has generally *lessened the amount of deference* which the Court is willing to accord the decision").

⁴⁷ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 64, RA, Tab 14.

⁴⁸ *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 at paras. 21-22, RA, Tab 25.

⁴⁹ AR, Vol. I, Tab 2(e), NBCA Decision, paras. 5 and 23 (and 21-22), *emphasis added*.

... *A question of law that is of “central importance to the legal system . . . and outside the . . . specialized area of expertise” of the administrative decision maker will always attract a correctness standard (Toronto (City) v. C.U.P.E., at para. 62). ...*⁵⁰

43. It is noteworthy that the *CUPE* case cited in this passage from *Dunsmuir* involved a judicial review application from the decision of a **labour arbitrator**. Nonetheless, this Court in *CUPE* found the arbitrator’s decision to be reviewable on a standard of correctness:

...the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487, where he said, at para. 39:

It has been held on several occasions that *the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of “outside” legislation. The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard...* . An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result.⁵¹

44. **Second**, the Board is different from the New Brunswick Labour and Employment Board, which is charged with overseeing the administration of labour legislation and policy throughout the province. Instead, it is an *ad hoc* panel constituted to determine a single dispute under the Collective Agreement. In *Dayco*, this Court stated:

... *An arbitrator’s expertise* is in a limited sense related to labour relations policy, but it must be conceded that it *falls short of the wide ranging policy-making function sometimes delegated to labour boards*, as in *Paccar*, supra. In short, *an arbitration board falls towards the lower end of the spectrum of those administrative tribunals charged with policy deliberations to which the courts should defer. ...*

In the present case, the *Labour Relations Act* clearly assigns a *general supervisory role to the Ontario Labour Relations Board. ... In contrast, the arbitrator’s role is confined to the resolution of grievances under a collective agreement*. In my view, the *relative expertise of board members and arbitrators* must be presumed to be *commensurate with the scope of these divergent statutory mandates*.⁵²

⁵⁰ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 55 (and 60), RA, Tab 14, *emphasis added. vide Canada (Canadian Human Rights Commission) v. Canada (A.G.)*, [2011] 3 S.C.R. 471 at para. 22, RA, Tab 6 (“our Court has reaffirmed that **general questions of law** that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise, must still be **reviewed on a standard of correctness**, in order to **safeguard a basic consistency in the fundamental legal order of our country**”).

⁵¹ *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 at para. 14 (and 15), RA, Tab 49, *underlining in original, bolding and italics added. vide Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 at paras. 21 and 23, RA, Tab 25.

⁵² *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 at 266, RA, Tab 12, *emphasis added. vide United Brotherhood of Carpenters and Joiners of America, Local 579 v. D Construction Ltd.*, [1993] 2 S.C.R. 316 at 336-337, RA, Tab 52. *cf.*: *Voice Construction Ltd. v. Construction & General Workers’ Union, Local 92*, [2004] 1 S.C.R. 609 at para. 28, RA, Tab 55; and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 68, RA, Tab 14.

45. **Third**, s. 55(1) of the applicable New Brunswick *Industrial Relations Act* contains only a **limited privative clause** in respect of labour arbitrators, stating simply that the Collective Agreement must provide for the “final and binding” settlement of disputes “by arbitration or otherwise”.⁵³ That may be contrasted with ss. 62(5) and 131(2), which contain strong privative clauses in respect of decisions by the Minister and the Labour and Employment Board. As this Court stated in *Dayco*:

... Here, *the privative clause in s. 108 applies only to the board*, and there is no comparable provision with respect to the arbitrator. *The union contends, however, that the phrase “final and binding ... between the parties” in s. 44 constitutes a privative clause*, a contention accepted by the Court of Appeal. *However*, the most that can be said for the phrase is that *it has limited privative effect on the issues in this appeal*. ...

Whatever the status of the clause in s. 44, the section should be *contrasted with the strong and explicit privative clause in s. 108 protecting decisions of the Labour Relations Board*. Clearly, *if the legislature had intended to mandate the same judicial deference to an arbitrator as to the board, it could simply have brought the arbitrator under the shelter of s. 108*. That is not the case, and I am left with the conclusion that *the legislation contemplates a more limited shield against judicial review for decisions of an arbitrator*. ...⁵⁴

46. **Fourth**, it is submitted that the Legislature did not intend the Board to receive judicial deference on matters about which an incorrect decision could threaten the safety of the public, the environment or Irving’s employees.⁵⁵ As Bennion writes:

A type of mischief which is often the subject of modern legislation is *danger to the safety of industrial workers*. The court will be *reluctant to read an Act as requiring one danger to be obviated at the cost of creating another*.⁵⁶

47. It is therefore submitted that the standard of review is correctness.

2. The Board’s Decision Is Both Incorrect and Unreasonable

A. The Board Applied the Incorrect Legal Test

48. The Board applied the wrong legal test by requiring Irving to provide evidence of a pre-existing alcohol problem at the Mill. Once the Board concluded that the Mill was a “dangerous work

⁵³ *St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704 at 723-724, RA, Tab 48. See also the Collective Agreement, which simply states that a finding by a majority of the Board will be “binding” on both parties, not even that it will also be “final”: AR, Vol. II, Tab 4, Sudul Affidavit, Ex. 1(1), p. 15, Art. 10.06.

⁵⁴ *Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)*, [1993] 2 S.C.R. 230 at 263-264 (and 268), RA, Tab 12, *emphasis added*. *vide Alberta Union of Provincial Employees v. Lethbridge Community College*, [2004] 1 S.C.R. 727 at para. 16, RA, Tab 2 (“the ‘final and binding’ clause in Art. 12.16 of the collective agreement provides only a “limited shield against judicial review” in light of this Court’s review of a similar clause in *Dayco*”). *cf. Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079 at para. 59, RA, Tab 7.

⁵⁵ *Peacock v. Norfolk (County)* (2006), 81 O.R. (3d) 530 (C.A.) at paras. 60 and 107, RA, Tab 33. *vide Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paras. 30 RA, Tab 14 (“determining the applicable *standard of review* is accomplished by establishing *legislative intent*”). See also AR, Vol. I, Tab 2(e), NBCA Decision, para. 5 (“some might argue that at its core *this appeal is of importance to the public at large* having regard to the *location of the kraft mill*”).

⁵⁶ F.A.R. Bennion, *Bennion on Statutory Interpretation: A Code*, 5th ed. (London: LexisNexis, 2008) at 1007, RA, Tab 61, *emphasis added*.

environment” with a potential for “catastrophic failures”,⁵⁷ it should have limited its inquiry to whether the Policy was a proportionate response to the dangers inherent at the Mill, which was the case here since the testing is by breathalyzer, it is limited to 10% of safety-sensitive employees and it is not zero-tolerance. As the Court of Appeal said below:

... Evidence of an existing alcohol problem in the workplace is unnecessary once the employer's work environment is classified as inherently dangerous. Not only is the object and effect of such a testing policy to protect the safety interests of those workers whose performance may be impaired by alcohol, but also the safety interests of their co-workers and the greater public. Potential damage to the employer's property and that of the public and the environment adds yet a further dimension to the problem and the justification for random testing. As is evident, *the true question is whether the employer's workplace falls within the category of inherently dangerous.* ...⁵⁸

49. In *Skinner*, the U.S. Supreme Court held that federal regulations requiring drug and alcohol testing of railroad employees were not “unreasonable searches and seizures” contrary to the Fourth Amendment, since the safety-sensitive nature of their employment gave the employees a diminished expectation of privacy. Such testing was valid *even in the absence of individual suspicion* about the employee, and *even though there was no evidence of a pre-existing drug problem* on the particular railroads in question:⁵⁹

... It is undisputed that these and other *covered employees are engaged in safety-sensitive tasks.*

...

More importantly, *the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety*, a goal dependent, in substantial part, on the health and fitness of covered employees. ...

... As the dissenting judge below noted: "The reason is obvious. An idle locomotive, sitting in the round-house, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." 839 F. 2d, at 593. *Though some of the privacy interests implicated by the toxicological testing at issue reasonably might be viewed as significant in other contexts, logic and history show that a diminished expectation of privacy attaches to information relating to the physical condition of covered employees* and to this reasonable means of procuring such information. We conclude, therefore, that the testing procedures contemplated by Subparts C and D *pose only limited threats to the justifiable expectations of privacy of covered employees.*⁶⁰

⁵⁷ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 64 (and p. 60).

⁵⁸ AR, Vol. I, Tab 2(e), NBCA Decision, para. 52, *emphasis added. vide Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115*, 2006 BCCA 58 at para. 38, RA, Tab 24 (“There is no dispute that an open pit mining operation is a *safety-sensitive work environment*, and that an employee impaired by drugs poses a safety risk not only to him or herself, but also to other employees. The concept of “*undue hardship*” *has to be considered with those safety concerns in mind*”).

⁵⁹ *Veronia School District 47j v. Acton*, 515 U.S. 646, 663 (1995), RA, Tab 54 (“*in Skinner... we upheld the Government's drug-testing program* based on finding of drug use by railroad employees nationwide, *without proof that a problem existed on the particular railroads whose employees were subject to the test*”).

⁶⁰ *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 620, 627-628 (and 624-625) (1989), RA, Tab 47, *emphasis added. vide British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3 at para. 64, RA, Tab 4 (“in a *highly regulated industry*, such as the securities market, the individual is aware, and accepts, justifiable state intrusions. ... As such, an individual engaging in such activity has a *low expectation of privacy* in business records”). *cf.: Esso Petroleum Canada v. Communications, Energy & Paperworkers' Union*,

50. Similarly, in *Von Raab*, released concurrently with *Skinner*, the U.S. Supreme Court held that it did not violate the Fourth Amendment for customs officials to be subjected to *suspicionless* drug tests, even though there was *no history* of drug problems among this group of employees:⁶¹

We think *Customs employees* who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise *have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test*. Unlike most private citizens or government employees in general, employees involved in drug interdiction *reasonably should expect effective inquiry into their fitness and probity*. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. ... *While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.*

...[P]etitioners point out that the Service's testing scheme was not implemented in response to any perceived drug problem among Customs employees...

Petitioners'... contention evinces an unduly narrow view of the context in which the Service's testing program was implemented. Petitioners do not dispute, nor can there be doubt, that *drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American workplaces are immune from this pervasive social problem*, as is amply illustrated by our decision in *Railway Labor Executives*. ... *Detecting drug impairment on the part of employees can be a difficult task*, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments. ... In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, *the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.*⁶²

51. Canadian jurisprudence is to the same effect. While this Court has never considered random alcohol or drug testing by employers, it has frequently upheld random vehicle stops to check for sobriety as a justified intrusion upon individual rights under s. 1 of the *Charter*.⁶³ As Charron J. stated in *Orbanski*:

First, we are concerned here with the use of a vehicle on a highway. This Court has recognized that, *while movement in a vehicle involves a "liberty" interest in a general sense, it cannot be equated to*

Local 614 (1994), 56 L.A.C. (4th) 440 (McAlpine, Chair) at paras. 76-83, RA, Tab 17; and *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004* (2007), 90 C.L.A.S. 177 (Devlin) at paras. 286-287, RA, Tab 19.

⁶¹ *Veronia School District 47j v. Acton*, 515 U.S. 646, 663 (1995), RA, Tab 54 ("*in Von Raab... there was no documented history of drug use by any customs officials*").

⁶² *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 672-674 (and 675, footnote 3) (1989), RA, Tab 28, *emphasis added. vide R. v. Orbanski*, [2005] 2 S.C.R. 3 at paras. 25-26, RA, Tab 41. *cf. Chandler v. Miller*, 520 U.S. 305, 321-323 (1997), RA, Tab 11, where drug testing was found invalid under the Fourth Amendment when it was directed at persons *not* holding safety-sensitive positions.

⁶³ *R. v. Nolet*, [2010] 1 S.C.R. 851 at para. 25, RA, Tab 40 ("The Court has ruled on a number of occasions that pursuant to statutory authority, the police officers can randomly stop persons for 'reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle': *Ladouceur (Ont.)*, at p. 1287"). *vide: R. v. Hufsky*, [1988] 1 S.C.R. 621 at 633-637, RA, Tab 38; *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 at 1273-1276 and 1278-1289, RA, Tab 39; and *R. v. Decorte*, [2005] 1 S.C.R. 133 at para. 3, RA Tab 35.

the ordinary freedom of movement of the individual that constitutes one of the fundamental values of our democratic society. Rather, *it is a licensed activity that is subject to regulation and control for the protection of life and property*: see *Dedman v. The Queen*, [1985] 2 S.C.R. 2, at p. 35. The need for regulation and control of the use of vehicles on the highway is heightened both because of the high prevalence of the activity and its *inherent dangers*.

Second, *the effective regulation and control of this activity give rise to a unique challenge* when it comes to protecting users of the highway from the menace posed by *drinking and driving*. *This challenge arises from the fact that drinking and driving is not in and of itself illegal. It is only driving with an impermissible amount of alcohol in one's body, or driving when one's faculties are impaired, that is criminalized. The line between the permissible and the impermissible is not always easy to discern*, and the necessary screening can only be achieved through "field" enforcement by police officers. It follows that these officers must be equipped to conduct this screening, though with minimal intrusion on the individual motorist's Charter rights.

Third, the challenge in this area of law enforcement is increased by the fact that the activity in question is ongoing and the drinking driver who has exceeded permissible limits presents a continuing danger on the highway. *The aim is to screen drivers at the road stop, not at the scene of the accident. Hence, effective screening at the roadside is necessary to ensure the safety of the drivers themselves, their passengers, and other users of the highway*. Effective screening should also be achieved with minimal inconvenience to the legitimate users of the highway.

...
... *The legality and constitutionality of random vehicle stops pursuant to general statutory vehicle stop powers was confirmed in Ladouceur...*

It is also settled law that the police have the authority to check the sobriety of drivers. This authority was found to exist at common law in *Dedman*. ...⁶⁴

52. In the pre-Charter case of *Dedman* cited in *Orbanski*, Le Dain J. found that random vehicle stops to check for sobriety under the R.I.D.E. program were also "reasonable" at common law:

... *The interference with liberty* must be necessary for the carrying out of the particular police duty and it *must be reasonable*, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. *Because of the seriousness of the problem of impaired driving*, there can be *no doubt about the importance and necessity of a program to improve the deterrence of it*. The right to circulate on the highway free from unreasonable interference is an important one, but it is, as I have said, a *licensed activity subject to regulation and control in the interest of safety*. *The objectionable nature of a random stop is chiefly that it is made on a purely arbitrary basis*, without any grounds for suspicion or belief that the particular driver has committed or is committing an offence. It is this aspect of the random stop that makes it capable of producing unpleasant psychological effects for the innocent driver. *These effects, however, would tend to be minimized by the well-publicized nature of the program, which is a necessary feature of its deterrent purpose. Moreover, the stop would be of relatively short duration and of slight inconvenience*. Weighing these factors, I am of the opinion that *having regard to the importance of the public purpose served, the random stop, as a police action necessary to the carrying out of that purpose, was not an unreasonable interference with the right to circulate on the public highway*. It was not, therefore, an unjustifiable use of a power associated with the police duty, within the *Waterfield* test. I would accordingly hold that *there was common law authority for the random vehicle stop for the purpose contemplated by the R.I.D.E. program*.⁶⁵

⁶⁴ *R. v. Orbanski*, [2005] 2 S.C.R. 3 at paras. 24-26 and 40-41 (and 1-4), RA, Tab 41, *emphasis added*.

⁶⁵ *R. v. Dedman*, [1985] 2 S.C.R. 2 at 35-36, RA, Tab 36, *emphasis added*.

53. While the Union cites a handful of cases in its Factum for the proposition that random alcohol testing has been rejected by Canadian arbitrators absent evidence of reasonable cause, those cases are distinguishable.

54. *First*, in the *Goodyear* decision from the Quebec Court of Appeal cited at paragraph 98 of the Union's Factum, the Court held that the workplace was *not even dangerous*:

Goodyear operates a tire manufacturing plant in Valleyfield. *The business itself has nothing of the dangerousness that would require special protective measures for the public and the company's employees.* However, the arbitrator identified 147 motorized vehicle and mill operator positions requiring a high level of concentration and perfect perception. He called them [TRANSLATION] "safety-sensitive positions".⁶⁶

55. *Second*, the *Nanticoke* case cited at paragraphs 76-80 and 97 of the Union's Factum only involved challenges to random *drug* testing policies by blood, urine or buccal swabs, not random *alcohol* testing by breathalyzer. This distinction, which is acknowledged in the Union's Factum itself,⁶⁷ was emphasized by Arbitrator Picher in *Nanticoke*:

...[T]his grievance does not concern alcohol testing...

...

... On the whole, we are satisfied that their evidence does confirm, beyond any real controversy, that *the cheek swab test introduced by the Company as part of its random and unannounced drug testing* policy does accurately detect actual impairment in the subject tested at the time the test is taken. It should be noted, however, that the process *cannot be analogised to the breathalyser test. While the breathalyser yields an immediate result readable by the technician administering the test, there is no immediate reading of a result or confirmation of actual impairment with the oral fluid drug test.* As that test is administered, *the sample must be sent to a laboratory*, in the case of the Company in Houston, for analysis before any result is known. In fact, as discussed below, *an employee who is impaired by cannabis consumption at the time he or she takes an oral fluid drug test may, in all likelihood, be sent immediately to work in a safety sensitive position, the result of the test being known only many days later.* ...

...

... As noted above, for reasons expressed in our preliminary award, we have found that *the Union local before us has effectively accepted the legitimacy of random breathalyser testing*, not having grieved such tests since the certification of the Union at Nanticoke in 1995. *That circumstance is to be distinguished from the dispute before us, relating as it does to the introduction of a new form of random drug testing by the analysis of oral fluids*, in May of 2003.⁶⁸

⁶⁶ *Local 143 of the Communications, Energy and Paperworkers Union of Canada v. Goodyear Canada Inc.*, 2007 QCCA 1686 at para. 24, RA, Tab 26, *emphasis added*.

⁶⁷ See para. 77 of the Union's factum.

⁶⁸ *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Lussier Grievance)* (2005), 157 L.A.C. (4th) 225 (Picher, Chair) at paras. 9, 27 and 102 (and 2, 113 and 124), *aff'd*, [2008] O.J. No. 489 (Div. Ct.), *aff'd* (2009), 96 O.R. (3d) 668 (C.A.), RA, Tab 20A, *emphasis added*. *cf.* paras. 116, 118 and 126. A similar distinction is drawn in *United Transportation Union v. Canadian Pacific Ltd. (Hutchinson Grievance)* (1987), 31 L.A.C. (3d) 179 (Picher) at paras. 10-11, RA, Tab 53, a case cited at paras. 65-72 of the Union's Factum.

56. Indeed, in the appeal from the *Nanticoke* decision, the Ontario Court of Appeal described the *Nanticoke* employer's random **alcohol** testing policy as "legitimate" and as having been "approved in *Entrop*", and also cited the earlier Alberta ruling in *Strathcona*⁶⁹ which upheld the *Nanticoke* employer's random alcohol testing policy under the *KVP* test:

The fact that *Imperial's Policy*, in contrast to the testing policies of other employers, **legitimately permits random breathalyser alcohol testing** was front and centre to the entire hearing before the Board. The Majority's reasons afford no evidence that it somehow lost sight of this **important factor** when analyzing the provisions of the Policy and the Collective Agreement. On the contrary, the Majority expressly recognized that the Board's preliminary award and **an earlier arbitration case in Alberta** had both **addressed Imperial's right to conduct random breathalyser tests for the detection of alcohol impairment...**

Moreover, the Majority was alert to Imperial's contention that its random oral fluid drug testing was analogous to **the random alcohol breathalyser testing approved in Entrop**. As it was entitled to do, the Majority considered, and rejected, this contention on the basis of the evidence before it that oral fluid drug testing in fact did not permit immediate detection of drug impairment on-the-job...⁷⁰

57. *Entrop* is important here because Laskin J.A. recognized that random **alcohol** testing "stand[s] on a different footing" than random **drug** testing for the purposes of the Ontario *Human Rights Act*.⁷¹ This was **before** the **obiter** relied on by the Union herein from the subsequent arbitral decision, made in relation to the same policy as in *Entrop*, in *Nanticoke*. Based on this distinction, Laskin J.A. found the random **drug** testing component of the employer's policy did **not** meet the applicable test, even though its random **alcohol** testing component **did**:

... **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. ...

...

... **[D]rug 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**

⁶⁹ *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.* (unreported) (27 May 2000) (Christian, Chair), AA, Tab 3.

⁷⁰ *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Lussier Grievance)* (2009), 96 O.R. (3d) 668 (C.A.) at paras. 60-61, RA, Tab 20 C, *emphasis added*.

⁷¹ *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (C.A.) at para. 106, RA, Tab 16. While the within appeal does not involve a challenge to the Policy based on human rights legislation, the test applied by the Court of Appeal in *Entrop* involves considerations which are similar to the *KVP* test relied on by the Union: H.M. Smith and J.L. Anthony, "Walking the Centre Line: Balancing an Employee's Right to Privacy in Drug and Alcohol Policies in the Atlantic Offshore Oil Industry" (2003) 26 *Dalhousie L.J.* 591 at 613, RA, Tab 62.

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 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, 0.04 per cent. Studies indicated that *with a blood alcohol concentration of 0.04 per cent most individuals show discernible signs of impairment*. ...

...

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"* ...such testing is consistent with the Commission's policy statement.⁷²

58. The U.S. Supreme Court also distinguished between breath and drug tests in *Skinner*:

...chemical analysis of *urine*, like that of *blood*, can *reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic*.

...

The *breath tests* authorized by Subpart D of the regulations are even *less intrusive than the blood tests* prescribed by Subpart C. *Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment*. *Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more*. Like the blood-testing procedures mandated by Subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, *breath tests reveal no other facts in which the employee has a substantial privacy interest*. ... In all the circumstances, *we cannot conclude that the administration of a breath test implicates significant privacy concerns*.⁷³

59. These differences between drug and alcohol testing distinguish the *Nanticoke* and *Canadian Pacific* drug cases relied on by the Union,⁷⁴ as well as the other pre-*Entrop* cases where arbitrators conflated random drug and alcohol testing,⁷⁵ often in the context of challenges to drug testing policies alone.⁷⁶ They are also reflected in the arbitral jurisprudence itself. While there is not a single case in which a Canadian arbitrator has upheld a random drug testing policy under the *KVP*

⁷² *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (C.A.) at paras. 86, 99, 106 and 111, RA, Tab 16, *emphasis added*. *vide Navistar Canada, Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 504 (Substance Abuse Grievance)* (2010), 195 L.A.C. (4th) 144 (Newman) at para. 69, RA, Tab 29.

⁷³ *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 617, 625-626 (1989), RA, Tab 47, *emphasis added*.

⁷⁴ B. Johnston and T. Erskine, "Testing the Limits: Alcohol & Drug Testing for Offshore Employees" (2001) 24 Dalhousie L.J. 316 at 327 and 331, RA, Tab 58 ("*Despite decisions which have held random drug testing to be either unreasonable or discriminatory, random alcohol testing is now considered acceptable*"); C. Pierce, "Balancing Employer Policies and Employee Rights: The Role of Legislation in Addressing Workplace Alcohol and Drug Testing Programs" (2008) 46 Alta. L. Rev. 141 at 160, RA, Tab 59 ("*while random alcohol testing has been found to be reasonable, the law regarding random drug testing is uncertain*").

⁷⁵ *Esso Petroleum Canada v. Communications, Energy & Paperworkers' Union, Local 614* (1994), 56 L.A.C. (4th) 440 (McAlpine, Chair), *aff'd*, [1996] B.C.L.R.B.D. No. 257 (Young, Longpre and Mullin, Vice-Chairs), RA, Tab 17; *Metropol Security, a division of Barnes Security Services Ltd. v. United Steelworkers of America, Local 5296 (Drug and Alcohol Testing Grievance)* (1998), 69 L.A.C. (4th) 399 (Whitaker), RA, Tab 27.

⁷⁶ *Re Sarnia Cranes Ltd.*, [1999] O.L.R.D. No. 1282 (Shouldice, Vice-Chair) at para. 51, RA, Tab 44; *Trimac Transportation Services - Bulk Systems v. Transportation Communications Union* (1999), 88 L.A.C. (4th) 237 (Burkett) at paras. 1 and 75, RA, Tab 51.

principles, there are *at least four cases* in which random alcohol testing policies involving safety-sensitive employees have been permitted to stand, in addition to *Entrop* itself:⁷⁷

- (a) in the *Strathcona* case cited by the Court of Appeal in *Nanticoke*, Arbitrator Christian upheld a random alcohol testing policy for safety-sensitive refinery employees;⁷⁸
- (b) in *Greater Toronto*, Arbitrator Devlin upheld a random alcohol testing policy for safety-sensitive airport employees;⁷⁹
- (c) in *J.D. Irving*, the Board upheld a policy by Irving's parent company virtually identical to the present one, without suggesting that its random alcohol testing component – which it quoted in the decision – was invalid,⁸⁰ and
- (d) in the *Irving Policy Grievance* case decided shortly before the decision of the Board, Arbitrator Bladon observed that *the random alcohol testing component of this Policy itself* was “warranted by virtue of [the employee’s] safety sensitive position of employment” and was “in line with the Canadian model”.⁸¹

60. The *Strathcona* case is particularly significant, since Arbitrator Christian upheld a random alcohol testing policy for safety-sensitive refinery employees even though *the employer’s witness “was not aware of any incident at the Strathcona Refinery that was caused by substance abuse”, and could identify only “one post-incident test at the Strathcona Refinery that was positive”*.⁸² The sole “evidence” of a problem at the refinery was the grievor’s own positive test, and a cross-country

⁷⁷ *cf. Petro-Canada Lubricants Centre (Mississauga) v. Communications, Energy and Paperworkers Union of Canada, Local 593 (Alcohol and Drug Policies Grievance)* (2009), 186 L.A.C. (4th) 424 (Kaplan), RA, Tab 34, which is distinguished in the NBCA Decision: see AR, Vol. I, Tab 2(e), NBCA Decision, para. 49.

⁷⁸ *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.* (unreported) (27 May 2000) (Christian, Chair) at 82, AA, Tab 3 (“*breathalyser testing is minimally intrusive of privacy*”).

⁷⁹ *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004* (2007), 90 C.L.A.S. 177 (Devlin) at para. 267 (and 270 and 274), RA, Tab 19 (“*I cannot conclude that the implementation of random alcohol testing of employees in safety-sensitive positions was unreasonable. As noted previously, such testing involves the use of a calibrated breathalyzer, which can accurately detect impairment*”).

⁸⁰ *J.D. Irving v. Communications, Energy and Paperworkers’ Union, Local 104 and 1309 (Drug and Alcohol Policy Grievance)* (2002), 111 L.A.C. (4th) 328 (Picher, Chair) at para. 4, RA, Tab 23.

⁸¹ *Irving Paper, Division of J.D. Irving Ltd. v. Communications, Energy and Paperworkers Union of Canada (Policy Grievance)* (2007), 165 L.A.C. (4th) 107 (Bladon) at para. 16, RA, Tab 22, *emphasis added*.

⁸² *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.* (unreported) (27 May 2000) (Christian, Chair) at 57, AA, Tab 3, *emphasis added*.

survey of all the employer's employees that did not even identify them by workplace and reported only a "small" incidence rate.⁸³ Yet Arbitrator Christian stated:

*The question is whether there is evidence upon which the Employer could rationally conclude that alcohol and drug use might cause catastrophic damage at the Strathcona Refinery. We agree with Arbitrator Beatie in *Glenbow* that an Employer does not have to wait for a "serious incident of loss, damage, injury or death" to occur before taking action. Likewise, given the inherent risks at the Refinery, the Employer is not bound to bide its time, patiently building a case in favour of random testing, one incident after another.*

We are of the view that the Canadian Facts Survey provides cogent information about the views of the employees at the Strathcona Refinery. We accept that management was legitimately concerned about the threat to safety given the views expressed by the employees. We accept that the survey provides a rational and sufficient foundation for the random testing Policy.

We believe this case is analogous to the *Glenbow* and *Canada Post* cases. *Here there is a problem or potential problem* which justifies the Employer in implementing a process which results in screening all employees. ...⁸⁴

61. *Third*, the *Canadian National* decision cited at paragraphs 73-75 of the Union's Factum is distinguishable on two grounds. *First*, it was not concerned with *random* testing at all,⁸⁵ as is acknowledged in the Union's factum.⁸⁶ *Second*, and of great importance, *Canadian National was decided prior to Entrop*, and thus prior to the Ontario Court of Appeal's clarification of the distinction between drug and alcohol testing.

62. It is also significant that Arbitrator Picher in *Canadian National* stated:

... As a number of the arbitral awards reflect, it is generally accepted that in analyzing the reasonableness of a drug and alcohol testing policy for the purposes of *KVP standards*, there may be a *burden upon the employer to first demonstrate the need for such a policy*, including an examination of whether alternative means for dealing with substance abuse in the workplace have been exhausted. While I do not disagree with those principles, I believe *a note of caution should be registered*, particularly with respect to that requirement. It seems to the Arbitrator that *there are certain industries which by their very nature are so highly safety sensitive as to justify a high degree of caution on the part of an employer without first requiring an extensive history of documented problems of substance abuse in the workplace. Few would suggest that the operator of a nuclear generating plant must await a near meltdown, or that an airline must produce documentation of a sufficient number of inebriated pilots at the controls of wide-body aircraft, before taking firm and forceful steps to ensure a substance-free workplace*, by a range of means that may include recourse to reasonable grounds drug and alcohol testing. *The more highly risk sensitive an enterprise is, the*

⁸³ *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.* (unreported) (27 May 2000) (Christian, Chair) at 59, AA, Tab 3.

⁸⁴ *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.* (unreported) (27 May 2000) (Christian, Chair) at 73, AA, Tab 3, *emphasis added*.

⁸⁵ *Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (2000), 95 L.A.C. (4th) 341 (Picher) at para. 135, RA, Tab 8.

⁸⁶ See para. 73 of the Union's factum. See also AR, Vol. I, Tab 2(e), NBCA Decision, para. 39.

more an employer can, in my view, justify a proactive, rather than a reactive, approach designed to prevent a problem before it manifests itself. While more stringent thresholds may fairly be applied in non-safety sensitive work settings, as for example among clerical or bank employees, *boards of arbitration should be cautious before requiring documented near disasters as a pre-condition to a vigilant and balanced policy of drug and alcohol detection in an enterprise whose normal operations pose substantial risks for the safety of employees and the public.*⁸⁷

63. It is submitted that these comments by Arbitrator Picher apply here. As recognized in *Strathcona*, employers in inherently dangerous workplaces should not have to wait until an institutional alcohol problem develops before implementing random alcohol testing for employees in safety-sensitive positions. The *Canadian National* principle should apply in this context as well.

64. Indeed, this was recognized by the Board itself, as with both levels of court below:

There are numerous statements in the cases to the effect *that an employer, to be successful, must lead evidence of a problem existing in its own workplace*, but as a general statement I think this *is somewhat overbroad. Evidence of risk may be available from the nature of the industry itself.* The cases recognize a *lighter burden of justification on an employer engaged in the operation of an ultra-hazardous endeavour.*⁸⁸

65. The difficulty in this case is not with the principle that an employer does not have to lead evidence of a prior alcohol abuse problem at the plant before introducing random alcohol testing in a safety sensitive position. Both the majority and dissent in the Board accepted that. The difficulty is the *degree* of dangerousness required. All of the cases discussed above, including Arbitrator Picher's comments in *Canadian National* about dangerous workplaces, speak of "dangerous". Here, the Board held that the Mill is indeed dangerous.⁸⁹ However, it went on to adopt the super-added qualification, for the first time in the jurisprudence, that it be "ultra" dangerous:

... The cases recognize a lighter burden of justification on an employer engaged in the operation of an *ultra-hazardous* endeavour.

...

The subtext of Mr. Moorehouse's remarks - his attempt to pull the Irving operation level with the dangers posed by a chemical plant - was not persuasive. His evidence on this point was conclusionary to the effect that this plant belongs in the category of *ultra-dangerous* operations, to which he believes chemical plants belong. On the evidence I have, *I do not share that conclusion.* There is *not*

⁸⁷ *Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (2000), 95 L.A.C. (4th) 341 (Picher) at para. 195, RA, Tab 8, *emphasis added. vide Re Ottawa Fibre Inc. and E.C.W.U., Local 1541* (1992), 29 C.L.A.S. 22 (Abbott) at para. 37, RA, Tab 43 ("in an *industrial setting of danger*, repeated emergencies, stress and frequent injuries to employees, it surely is *unreasonable to expect employers to wait* until one or another of their employees demonstrates impairment through alcohol or drug ingestion before discipline can be justified").

⁸⁸ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 46, *emphasis added. vide:* AR, Vol. I, Tab 2(c), NBQB Decision, paras. 63 and 65; AR, Vol. I, Tab 2(e), NBCA Decision, paras. 7-8; *Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.* (unreported) (27 May 2000) (Christian, Chair) at 63 and 73, AA, Tab 3; and *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Lussier Grievance)* (2005), 157 L.A.C. (4th) 225 (Picher, Chair) at para. 102, aff'd, [2008] O.J. No. 489 (Div. Ct.), aff'd (2009), 96 O.R. (3d) 668 (C.A.), RA, Tab 20A.

⁸⁹ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 64.

*a sufficient case made out to put the operation of this kraft pulp mill in the same category of risk as a nuclear plant, an airline, a railroad or a chemical plant, or like industries.*⁹⁰

66. There was no support for this requirement in the jurisprudence. Far from restricting *Canadian National* to workplaces that are “ultra” dangerous, Canadian arbitrators have recognized that a wide variety of workplaces are “dangerous” or “safety-sensitive” within the meaning of this case law. These include a railway operation,⁹¹ an open-pit mine,⁹² a nylon intermediates plant,⁹³ a sawmill,⁹⁴ a food production plant,⁹⁵ an airport,⁹⁶ a petrochemical facility,⁹⁷ an auto parts storage and shipping warehouse,⁹⁸ a concrete delivery truck⁹⁹ and an aluminum smelter.¹⁰⁰

67. Indeed, many of these workplaces shared the *same dangers as the Mill*. In *Dupont*, Arbitrator Picher held that a nylon intermediates plant was inherently dangerous:

The evidence given by both the Union and the Company witnesses was consistent in describing the workplace and the manufacturing function carried out therein as “*inherently dangerous*”. The uniform testimony reveals that *the manufacturing processes involve the use of explosive, flammable, caustic and corrosive materials and chemicals*. These materials and chemicals are subjected to extremely high pressures and temperatures and are *subject to explosion* if improperly treated. ...

...

... As we have found, above, the entire bargaining unit workforce occupies positions that are properly characterized as highly “safety sensitive”. *In these circumstances, the Board cannot accept the submission of the Union that the Company must show that it has a safety problem precipitated by drug and/or alcohol abuse before it can justify the implementation of a Drug and Alcohol Policy* involving reasonable cause drug and alcohol testing. ...¹⁰¹

⁹⁰ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 46 and 65, *emphasis added*.

⁹¹ *Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)* (2000), 95 L.A.C. (4th) 341 (Picher) at paras. 175 and 196, RA, Tab 8.

⁹² *Fording Coal Ltd. v. United Steelworkers of America, Local 7884*, [2002] B.C.C.A.A. No. 9 (Hope) at paras. 23-24, RA, Tab 18.

⁹³ *Dupont Canada Inc. v. Communications, Energy Paperworkers Union of Canada, Local 28-0 (Drug and Alcohol Policy Grievance)* (2002), 105 L.A.C. (4th) 399 (Picher, Chair) at paras. 6-7 and 16-18, RA, Tab 15.

⁹⁴ *Weyerhaeuser Co. v. Industrial, Wood and Allied Workers of Canada* (2004), 127 L.A.C. (4th) 73 (Taylor) at paras. 126-134, RA, Tab 57.

⁹⁵ *ADM Agri-Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 195 (Substance Abuse Policy Grievance)*, [2004] C.L.A.D. No. 610 (Springate) at paras. 4-6 and 78-79, RA, Tab 1.

⁹⁶ *Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004* (2007), 90 C.L.A.S. 177 (Devlin) at para. 222, RA, Tab 19.

⁹⁷ *Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Lussier Grievance)* (2005), 157 L.A.C. (4th) 225 (Picher, Chair) at para. 87, aff'd, [2008] O.J. No. 489 (Div. Ct.), aff'd (2009), 96 O.R. (3d) 668 (C.A.), RA, Tab 20A.

⁹⁸ *Navistar Canada, Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 504 (Substance Abuse Grievance)* (2010), 195 L.A.C. (4th) 144 (Newman) at para. 63, RA, Tab 29.

⁹⁹ *Dufferin Concrete v. Teamsters, Local 230 (Luck Grievance)* (2010), 200 L.A.C. (4th) 381 (Kaplan) at para. 7, RA, Tab 13.

¹⁰⁰ *Rio Tinto Alcan Primary Metal (Kitimat/Kemano Operations British Columbia) v. National Automobile, Aerospace Transportation and General Workers of Canada (CAW-Canada) Local, 2301 (Drug and Alcohol Grievance)* (2011), 204 L.A.C. (4th) 265 (Steeves) at para. 6, RA, Tab 45.

¹⁰¹ *Dupont Canada Inc. v. Communications, Energy Paperworkers Union of Canada, Local 28-0 (Drug and Alcohol Policy Grievance)* (2002), 105 L.A.C. (4th) 399 (Picher, Chair) at paras. 7 and 16 (and 18), RA, Tab 15, *emphasis added*.

68. The same principle was applied to a logging company in *Weyerhaeuser*, whose operations included *sawmills* similar to the Mill itself:

In support of its contention that the industry in which the Company is engaged is inherently safety sensitive, the Company made the following uncontroverted submission:

...
Sawmills operate using a variety of oils and *chemicals which would be harmful to the environment* if not properly contained and used. Further environmental risks are posed if processes which control the emissions of dust, steam, and wood waste products are not properly monitored and operated.

Modern mills have many safety features that older mills lacked, but they also tend to be far more automated and move materials much faster. Many pieces of equipment in Weyerhaeuser's mills operate by pre-programmed logic controls. This means that *machinery can suddenly function even if there is no local operator actually present*. This presents a *constant danger as employees must be aware of this potential at all times*. ...

The *machinery in sawmills is extremely powerful, often exceedingly sharp, and operates at high speed and fairly automatically*. The power used to run the machinery is equally *impressive and inherently dangerous*. Large heavy duty loaders are both powerful and often have limited visibility. Machinery in mill processes typically *use very large electrical current to operate*, and is increasingly complex. These factors also pose safety hazards and potential for injury or accident.

Sawmills continue to produce very serious industrial injuries including fatalities. There is also *potential for environmental damage* through the potential for spillage of chemicals such as wood preservatives and paints or the malfunction of pollution control systems. *These risks are magnified by the automated nature of modern mills, where there is often no person present to observe workers or the operation of automated equipment and processes*. In every mill *the risk of fire is a constant threat, both to the mill itself and to surrounding communities and ecosystems*.

...

The authorities do not limit the right of employers to enact testing policies to nuclear reactors, railways, mines and chemical plants. It was applied to sawmills in *Irving* although there is no discussion with respect to this point and no reasoning is provided.

...

In my view, the Weyerhaeuser operations *constitute an industry which by its very nature is inherently safety sensitive* such that it "*justifies a high degree of caution on the part of the employer without first requiring an extensive history of documented problems of substance abuse in the workplace*" (*CN Rail*, p. 377). ...¹⁰²

69. Accordingly, the arbitral jurisprudence is clear that an employer does not have to demonstrate a pre-existing alcohol problem before introducing a testing policy at an inherently dangerous

¹⁰² *Weyerhaeuser Co. v. Industrial, Wood and Allied Workers of Canada* (2004), 127 L.A.C. (4th) 73 (Taylor) at paras. 126-127 and 129 (and 130 and 134), RA, Tab 57, *emphasis added*. *vide J.D. Irving v. Communications, Energy and Paperworkers' Union, Local 104 and 1309 (Drug and Alcohol Policy Grievance)* (2002), 111 L.A.C. (4th) 328 (Picher, Chair) at paras. 8-9, RA, Tab 23. Most recently, in *Navistar Canada, Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada), Local 504 (Substance Abuse Grievance)* (2010), 195 L.A.C. (4th) 144 (Newman) at para. 63, RA, Tab 29, Arbitrator Newman held that an auto parts storage and shipping warehouse was safety-sensitive given its use of *forklifts* and *heavy machinery*, equipment which is also in use at the Mill.

workplace like the Mill. In requiring Irving to show the Mill was not only dangerous, but “ultra” dangerous, the Board applied an incorrect legal test, and reached a decision that was unreasonable. As this Court said in *Németh*:

...in order for a decision to be reasonable, it must relate to a matter within the Minister's statutory authority and *he must apply the correct legal tests to the issues before him*. As LeBel J. said on behalf of the Court in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at para. 41:

*[T]he Minister must, in reaching his decision, apply the correct legal test. The Minister's conclusion will not be rational or defensible if he has failed to carry out the proper analysis. ...*¹⁰³

70. It is also telling that the Board offered no reasons about when an inherently dangerous workplace would become “ultra” dangerous. The close similarities between the Mill and the workplaces which meet the *Canadian National* test in the cases quoted above illustrate that a distinction between “ultra” dangerousness and dangerousness is unreasonable. This Court has rejected the kind of “distinction by degrees” drawn by the Board here. Indeed, it was the decision to abandon such a distinction that lay at the heart of *Dunsmuir*:

...notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of *patent unreasonableness* and *reasonableness simpliciter*, a review of the cases reveals that *any actual difference between them in terms of their operation appears to be illusory*. ... Indeed, even this Court divided when attempting to determine whether a particular decision was “patently unreasonable”, although this should have been self-evident under the existing test... *Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing* between a patently unreasonable and an unreasonable decision. As Mullan has explained:

[T]o maintain a position that it is only the “clearly irrational” that will cross the threshold of patent unreasonableness while irrationality simpliciter will not is to *make a nonsense of the law. Attaching the adjective “clearly” to irrational is surely a tautology. Like “uniqueness”, irrationality either exists or it does not. There cannot be shades of irrationality.*¹⁰⁴

B. The Board Unreasonably Found the Policy Did Not Meet the Test

71. Even if the Board did apply the correct legal test in requiring Irving to establish either that the Mill was “ultra” dangerous or that there was a pre-existing alcohol problem, its finding that Irving failed to justify the Policy under this test was also unreasonable.

¹⁰³ *Németh v. Canada (Justice)*, [2010] 3 S.C.R. 281 at para. 10 (and 3, 58 and 115), RA, Tab 30, *underlining in original, bolding and italics added. vide Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, [2003] 3 S.C.R. 77 at para. 58, RA, Tab 49.

¹⁰⁴ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 41, RA, Tab 14, *emphasis added. vide R. v. Ipeelee*, 2012 SCC 13 at para. 86, RA, Tab 37.

72. **First**, no witness testified as to the characteristics of “ultra” dangerous workplaces, or as to the differences between the Mill and “ultra” dangerous workplaces like railroads and chemical plants. Indeed, the only evidence before the Board was overwhelmingly to the contrary. It was undisputed that, like the railroad and chemical plant referred to by the Board, the Mill involved the use of railcars and hazardous chemicals. Further, Mr. Moorehouse, a 37-year Irving employee, testified that the Mill is “*as close as you get to a chemical plant*”.¹⁰⁵ That evidence was not only uncontradicted, but was found to possess “significant support” by the Board.¹⁰⁶

73. Yet the Board said:

The subtext of Mr. Moorehouse's remarks - his attempt to pull the Irving operation level with the dangers posed by a chemical plant - was not persuasive. His evidence on this point was conclusionary to the effect that this plant belongs in the category of *ultra-dangerous* operations, to which he believes chemical plants belong. On the evidence I have, I do not share that conclusion. ***There is not a sufficient case made out to put the operation of this kraft pulp mill in the same category of risk as a nuclear plant, an airline, a railroad or a chemical plant, or like industries.***¹⁰⁷

74. This conclusion was unreasonable given the evidence outlined above.¹⁰⁸ As the Court of Appeal held below:

... The board held that Irving had failed to establish a “sufficient case” that its kraft mill could be placed in the same *ultra-dangerous* category of risk such as a “nuclear plant, an airline, a railroad or a chemical plant”. In my view, ***the finding that a kraft mill does not fall within the same category as a railroad or chemical plant is simply “unreasonable”.***

... If a *railway company* which *transports hazardous materials* to various workplaces is entitled to adopt a policy with respect to random alcohol testing then it should follow that a company which uses those materials in its operations is equally entitled to do so. Indeed, the *Irving kraft mill uses hazardous materials such as chlorine dioxide, sulphuric acid, hydrogen peroxide, liquid and gaseous oxygen and methanol.* Moreover, *Irving's employees are responsible for loading and unloading chemicals from rail cars* and other types of vehicles. In short, it makes no sense that a railway operation is entitled to adopt a policy of random alcohol testing, but the customer who uses the toxic chemicals in its manufacturing process is not. When the facts are so viewed, the *evidence of Irving's witness, Mr. Moorehouse, to the effect that a kraft mill is as close to a chemical plant as one can get makes eminent good sense* and, as we know, refineries and *chemical plants are treated in the arbitral jurisprudence as inherently dangerous* work sites.

The facts of the present case also reveal a *kraft mill with a \$350 million pressure boiler which has a “high potential” for explosion.* The potential impact on the environment of a major catastrophe, such as a chemical spill, has never been challenged. The *intra-city location of the kraft mill and its*

¹⁰⁵ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 61, *emphasis added*.

¹⁰⁶ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 61.

¹⁰⁷ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 65, *emphasis added*.

¹⁰⁸ *W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740*, [1990] 3 S.C.R. 644 at 687-688 and 693, RA, Tab 56; *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487 at para. 44 (and 47 and 78), RA, Tab 50; *Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454*, [1998] 1 S.C.R. 1079 at para. 66, RA, Tab 7.

proximity to the St. John River and Bay of Fundy would cause concern for any environmentalist. Indeed, at one point *the board accepts that* incorrect configuration of plant control systems by certain employees is noted as having a *potential for "catastrophic failures"*. ...¹⁰⁹

75. Indeed, the Board did not even explain *why* it concluded that the Mill fell outside the category of "ultra" dangerous operations, but simply *asserted* this as a fact. In the absence of any explanation for this finding, its decision cannot meet the level of transparency, justification and intelligibility required of reasonable decisions in *Dunsmuir*.¹¹⁰ As Erb J. stated in *Intercare*:

Because *the Arbitrator's reasons do not disclose how she arrived at her findings* on credibility and reliability *in the context of the totality of the evidence before the Board*, her decision *cannot be said to be "transparent, justifiable and intelligible"* in accordance with direction of the Supreme Court of Canada in *Dunsmuir*. I find that *the standard of review of "reasonableness" has not been satisfied*.¹¹¹

76. Further, the only evidence was that the Mill *did* have a pre-existing alcohol problem.¹¹² Mr. Moorehouse testified that there were eight (8) documented alcohol related incidents prior to the introduction of the Policy in 2006, and "a lot" of other undocumented ones.¹¹³ Yet the Board simply dismissed this testimony as "not persuasive" and as not "indicative of a significant problem" at the Mill.¹¹⁴ As noted by the dissenting member of the Board:

...a history of alcohol abuse in this plant was submitted and is partially outline in Exhibit 1(15). The employer's witness testified that this was "by no means an exhaustive list" *This history should not be dismissed lightly as it does point to evidence of a problem in this workplace*. It is interesting to note that the last recorded case was in January 2006 just weeks before the implementation of the policy and the random alcohol testing. ...¹¹⁵

77. *Second*, the Board's decision was also unreasonable since it was based on two inferences which lacked evidentiary support.¹¹⁶

78. The *first unfounded inference* was that the absence of positive test results meant there was little alcohol risk at the Mill. According to the Board:

It is also a fact that *from the February 1, 2006 implementation of the Policy to the date of the hearing* - a period of 22 plus months - *there had been no positive random alcohol tests at the plant*

¹⁰⁹ AR, Vol. I, Tab 2(e), NBCA Decision, paras. 26 and 55-56, *emphasis added*.

¹¹⁰ *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 47, RA, Tab 14.

¹¹¹ *Canadian Union of Public Employees, Local 8 v. Intercare Corporate Group Inc.*, 2010 ABQB 387 at para. 43 (and 40), RA, Tab 9, *emphasis added*.

¹¹² AR, Vol. I, Tab 2(e), NBCA Decision, para. 27; AR, Vol. I, Tab 2(c), NBQB Decision, paras. 65-72.

¹¹³ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 66.

¹¹⁴ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 67.

¹¹⁵ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 19, Board Dissent, p. 87, *emphasis added*.

¹¹⁶ *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487 at paras. 45, 48, 61 and 65, RA, Tab 50.

and no positive tests for reasonable cause. ... Mr. Moorehouse believes this lack of positive testing occurs because of the deterrent effect of the policy. Perhaps so, but on his own record evidence the opposite could just as easily be the case, so there is nothing but a correlation. No causal inference favourable to the employer is available from such evidence.

*This evidence gives a push in the direction of the conclusion that the employer belongs at the lower end of the scale in terms of the existence of incremental safety risk posed by alcohol use. ...*¹¹⁷

79. This conclusion about the Mill falling at the “lower end of the scale” in terms of risk is not reasonably supported by the absence of positive test results. To the contrary, those test results suggest that the Policy *succeeded* in deterring alcohol use. The Board’s reasoning here discloses the very error highlighted by the U.S. Supreme Court in *Von Raab*:

... [P]etitioners point out... the program actually has not led to the discovery of a significant number of drug users. ...

...
*The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. ... The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal. ... [Nor would we think, in view of the obvious deterrent purpose of these searches, that the validity of the Government's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program. ... When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success. ...]*¹¹⁸

80. The *second unfounded inference* was that Irving itself viewed the Mill as not posing a significant alcohol risk given that it limited the testing to 10% of its safety-sensitive employees:

There is some *indirect evidence* from which the *inference can be drawn that plant management does not regard the incremental safety risk posed by alcohol in this plant as being high* among the incumbents in the safety sensitive positions. Management sets the testing parameters, including the percentage of safety sensitive employees to be tested. *Because the random alcohol testing policy is based upon deterrence, the percentage chosen for testing represents its estimate of what is required to achieve that goal.*

Ten percent per year seems to be at the low end of the ranges disclosed by the evidence. ...¹¹⁹

¹¹⁷ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 68-69, *emphasis added*.

¹¹⁸ *National Treasury Board Employees Union v. Von Raab*, 489 U.S. 656, 673-675 and footnote 3 (1989), RA, Tab 28, *emphasis added*. *vide* AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 19, Board Dissent, p. 87 (“The fact that there have been *no positive tests* or, more importantly, *no further recorded situations of alcohol abuse* in the plant, *reflects that the deterrence factor* as described in Barb Butler’s testimony *is working*”).

¹¹⁹ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 67-68, *emphasis added*.

81. However, the fact that testing is limited to 10% of the safety-sensitive employees indicates nothing more than that Irving sought to design a Policy which was minimally intrusive. As the dissenting member of the Board observed:

... I respectfully submit that *a more proper interpretation of this decision would be that choosing 10% of the population achieves the desired effect of deterrence while keeping the policy less intrusive on the privacy rights of employees.*¹²⁰

82. Further, the expert evidence before the Board emphasized the importance of *employer discretion* in formulating workplace testing policies:

Each company must decide what will work best; there is no model policy. Programs should be tailored to meet the specific needs of the workplace, and should be seen as a reasonable and responsible response to those stated needs. ...

...
...Employers must assess the risk potential in *their business*, and the ramifications of an accident or incident in which alcohol or drug use may be a contributing factor, and consequences together to meet *their specific requirements.* ...¹²¹

83. In questioning whether a significant alcohol risk at the Mill could actually be deterred through a 10% testing group, the Board second-guessed Irving's exercise of business judgment. The B.C. Supreme Court cautioned against this in *Bank of British Columbia*:

... Management must, of course, have acted genuinely. They must not have manipulated the terms of the Agreement to defeat the legitimate rights of employees. In making that assessment, however, *the arbitrators must not infringe upon the right of management to assess a given situation, and to make a business judgment. The arbitrators must not weigh the evidence and substitute their own opinion for that of management.* ...¹²²

84. Similarly, in *Sisters of St. Joseph*, the Ontario Court of Appeal stated:

The managers of the hospital are experts in their field, just as the Board is expert in its field. *Given the clear management rights clause in this case, and given no allegation of bad faith, the Board should not have made its own management decisions and imposed them on the hospital.* ...¹²³

85. *Third*, the Board failed to consider at least two relevant factors.¹²⁴

86. As to the *first relevant factor*, the Board held that Irving was unlikely to benefit from the Policy by detecting impaired employees, such that the Policy was disproportionate to its intrusion

¹²⁰ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 19, Board Dissent, p. 87, *emphasis added*.

¹²¹ AR, Vol. III, Tab 4, Sudul Affidavit, Ex. 6, pps. 19 and 30, *emphasis added*.

¹²² *Bank of British Columbia v. Union of Bank Employees*, [1982] B.C.J. No. 1577 (S.C.) at para. 34 (and 42), RA, Tab 3, *emphasis added*.

¹²³ *Sisters of St. Joseph of the Diocese of London in Ontario v. Service Employees Union, Local 210*, [1997] O.J. No. 3140 (C.A.) at para. 15, leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 504, RA, Tab 46, *emphasis added*.

¹²⁴ *C.U.P.E. v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 at 237, RA, Tab 5; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591 at paras. 75 and 79-80, RA, Tab 25.

upon employee privacy rights.¹²⁵ This finding, which was again unsupported by any evidence, ignores that the primary goal of the Policy is to *deter* and not simply detect the use of alcohol.

87. Indeed, the relevance of deterrence to random alcohol testing policies such as this was emphasized by the Ontario Court of Appeal in *Entrop*. As here, the random alcohol testing in *Entrop* was carried out by breathalyzer, and was limited to employees in safety-sensitive positions having a blood-alcohol level in excess of 0.04%. In holding that such a policy would meet the Ontario *Human Rights Act* test of reasonableness, Laskin J.A. focused on the need for deterrence:

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. ...

...

*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.*¹²⁶

88. The U.S. Supreme Court in *Skinner* also emphasized the importance of deterrence, and found that the court below erred in invalidating testing requirements without taking this into account:

While no procedure can identify all impaired employees with ease and perfect accuracy, the FRA regulations *supply an effective means of deterring employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place.* ... The railroad industry's experience with Rule G persuasively shows, and common sense confirms, that the customary dismissal sanction that threatens employees who use drugs or alcohol while on duty cannot serve as an effective deterrent unless violators know that they are likely to be discovered. *By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect* of the administrative penalties associated with the prohibited conduct... *concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.*

...

... The court also failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it. Because the record indicates that blood and urine tests, taken together, are highly effective means of ascertaining on-the-job impairment and of deterring the use of drugs by railroad employees, we believe *the Court of Appeals erred in concluding that the*

¹²⁵ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, p. 72.

¹²⁶ *Entrop v. Imperial Oil Ltd.* (2000), 50 O.R. (3d) 18 (C.A.) at paras. 107-108 and 110, RA, Tab 16, *emphasis added*.

*postaccident testing regulations are not reasonably related to the Government objectives that support them.*¹²⁷

89. This Court made similar comments regarding the importance of deterrence when upholding the validity of random vehicle stops under s. 1 of the *Charter* in *Ladouceur*:

In my view the *random stop* is rationally connected and carefully designed to achieve safety on the highways. The stops *impair as little as possible the rights of the driver*. In addition, *the stops do not so severely trench on individual rights that the legislative objective is outweighed by the abridgement of the individual's rights*.

... *There must be a real element of risk of detection* of driving by unlicensed drivers for the suspension of a licence to be an effective remedy. *Random stops supply the only effective deterrent*.

Deterrence is thus a critical aspect of the routine check. As Rehnquist J. put it in *Delaware v. Prouse, supra*, at p. 666, "an unlicensed driver who is not deterred [merely] by the prospect of being involved in a traffic violation or other incident requiring him to produce a license would be deterred by the possibility of being subjected to a spot check." In other words, *while a driver might be willing to chance driving without a licence where the factors leading to being caught are more or less within the driver's control, a random routine check is outside of this controllable range and might deter the unlicensed driver from getting behind the wheel.*¹²⁸

90. As to the *second relevant factor*, the Board effectively ignored the difference between random *drug* testing and random *alcohol* testing. While the Board acknowledged the distinction, and indeed cited this Court's finding in *Stillman* that breathalyzer testing is "*minimally intrusive*",¹²⁹ it then proceeded to contradict itself by holding:

The invasion of that privacy by the *random alcohol testing* policy is not a trifle. It *effects a significant inroad*. Specifically, it *involves a bodily intrusion and the surrender of bodily substances*. It involves *coercion and restriction on movement*. Upon pain of significant punishment, the employee must go promptly to the breathalyzer station and must co-operate in the provision of breath samples. As we saw with Mr. Day, there can be an element of public embarrassment. Taking its results together, the scheme *effects a loss of liberty and personal autonomy*. ...¹³⁰

91. Further, in its ultimate analysis of how the interests of Irving and its employees should be balanced, the Board relied on drug testing cases like *Nanticoke*,¹³¹ without considering whether Irving should be held to a standard of justification specific to alcohol testing.¹³² As Arbitrator Lavoie said in dissent:

¹²⁷ *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 629-630 and 632 (1989), RA, Tab 47, *emphasis added*.

¹²⁸ *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 at 1283-1284, RA, Tab 39, *emphasis added*. *vide R. v. Dedman*, [1985] 2 S.C.R. 2 at 35-36, RA, Tab 36.

¹²⁹ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 70-71. *R. v. Stillman*, [1997] 1 S.C.R. 607 at para. 90, RA, Tab 42 ("the *Criminal Code* provisions pertaining to *breath samples* are both *minimally intrusive* and *essential* to control the tragic chaos caused by drinking and driving").

¹³⁰ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 72-73, *emphasis added*.

¹³¹ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 24, 29-31, 35-36, 44 and 68.

¹³² AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 18, Board Decision, pps. 71-73.

There is a *clear difference in the standard required for drug testing in Canada versus alcohol testing* as related in various arbitration cases. The rights of the employer to introduce and enforced rules such as alcohol and drug testing needs to be balanced off the privacy interest of employees. Since drug testing does not measured impairment on the job, is not a same time measure and, is more intrusive then alcohol testing; *the standards for imposing mandatory random drug testing are much higher*. It is my respectful opinion that *this majority award applied this higher standard in reaching the conclusion that random alcohol testing in this plant is unreasonable.*¹³³

PART IV—SUBMISSIONS CONCERNING COSTS

92. Irving submits that it is entitled to the costs of this appeal.

PART V—ORDER SOUGHT

93. Irving requests that the appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 29th day of August, 2012.



Neil Finkelstein
Steven Mason
Brandon Kain
Byron Shaw

¹³³ AR, Vol. IV, Tab 4, Sudul Affidavit, Ex. 19, Board Dissent, p. 82, *emphasis added*.

APPENDIX – LIST OF SAFETY-SENSITIVE POSITIONS

IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
Woodyard Oper	Yes, Collision, isolated environment & working alone, high elevation - up on piles Heavy equipment operator-wheeled and tracked	Yes, maintenance repair workers are frequently in area At times cross paths on chip pad with other heavy equipment	No	No	Yes, some equipment damage	Limited, oil leak from equipment
Woodyard Relief (relieves the operator)	Yes, Collision, isolated environment, high elevation Same risks as operator; added duties include cleanup; relieves the operator	Yes, maintenance workers frequently in area	No	No	Yes, equipment damage ; could also leave small tools in equipment (conveyors & hoppers)	limited
leach Tech I	Yes, hazardous materials, corrosive, gas expected to direct others to trouble shoot hazardous leaks; opening and closing valves remotely which could compromise safety of other employees	Yes, works with other people, does lockouts, opens valves remotely	Yes, Maintenance personnel	No	Yes, runs a \$50 million facility, dangerous gasses, hazardous liquids & corrosive material	Yes, hazardous materials/ chemicals: chlorine dioxide, sulphuric acid, sodium chlorate, sodium hydroxide, hydrogen peroxide, liquid and gaseous oxygen, methanol
leach Tech II	Yes, chemical testing hourly Performs field duties; opening and closing valves (hands on) to collect samples of hazardous chemicals.	Yes, prepares equipment for others, checks lockouts in the field	No	No	Yes, chemicals	Yes, hazardous materials
rownstock Tech I	Yes, testing. Using caustic, high pressure. Hazardous chemicals include oxygen, caustic, running a pressure vessel (high pressure, high temperature); writing or verification of lockouts	Yes, lockout procedure, testing	No	No	Yes, huge potential for property loss	Yes
rownstock Tech II sst. Tech I	Yes Relieves in Tech I positions; Has testing responsibilities dealing with highly caustic liquors; sampling hot stock	Yes	No	No	Yes	Yes
igester Tech I	Yes, Pressure, high pressure steam, caustic liq.	Yes, people in the field affected by the opening &	No	No	Yes, has huge property and plant loss responsibility	Yes, from pressure vessel

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IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	Similar to Bleach Plant Tech I; operates 14 pressure vessels; high pressure steam; caustic liquors; opening and closing valves remotely. Potential for explosion	closing of valves			Significant property damage potential	explosion
Digester tech II	Yes, field position, rotates to tech I, around moving conveyor belts All of the Digester Tech I duties Performs field work; minor cleanup duties; troubleshooting; chip supply issues	Yes, maintenance work, lockout preparation	Yes, Repair personnel	No	Significant property potential	No
Digester Support Tech	Yes, clean up, stairs, conveyor belts, rooftops, climbing Performs many of Tech II duties but not duties of Tech I; operates valves in field	Yes, field work	No	No	No	No
Relief - Bleachery	Yes, same as Bleach I & II If trained, moves up to Bleach Plant Tech II position (not Tech I; generally speaking). Provides vacation relief for Tech II position	Yes	No	No	No	No
Relief-Brownstock	Yes, same as Brownstock I & II If trained, moves up to Brownstock Tech II; some field responsibilities; provides vacation relief	Yes	No	No	No	No
Finishing Tech I	Runs 2 pulp dryers; control room operator; helps with machine breaks and startup; around moving equipment at all times; hot stock or caustic exposure	Yes, hot stock and caustic, moving equipment	No	No	Yes, large potential for property damage	Limited environmental responsibility (stock overflow from chest; repulper going to river)
Finishing Tech II	Relieves for Tech I; runs #3 pulp dryer; responsible for screen room operation; rotating equipment, exposure to hot stock or caustic	Yes, directs others	No	No	Yes, property damage	No

IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employees	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
Finishing Tech III Backtender	Yes, working in isolation and working around equipment; works with maintenance and ensuring their safety - "most safety sensitive position in finishing"	Yes, directs others, start up process, lockouts, mechanical	No	No	No	No
Assistant Tech I	Yes, Drive forklifts, bale line, moving equipment	Yes			No	No
Assistant Tech II	Yes, Bale line responsibilities Large amount of moving equipment; danger to self and others; Drive forklifts	Yes, moving equipment	No	No	No	No
Finishing Relief	Yes, can go anywhere, rotating and moving equipment Utilized throughout the mill; could be called upon to help in Digester, Bleach Plant, Wood Yard; mostly in cleanup efforts but often in lockout (isolation) efforts to prepare equipment for maintenance, always around lot of rotating or moving equipment, conveyors, chemical exposure mill wide;	Yes, involved in cleanup, lockouts	No	No	No	Exposure to chemicals
Assistant Tech (shipping shed)	Yes, forklifts, loading railcars, heavy weights Driving clamp trucks or fork lifts; responsible for proper and safe loading rail cars or trailers for shipment	Yes, foot traffic in the area	No	No	Yes, property and equipment	No
Support Tech (shipping shed)	Yes, forklifts, loading railcars Driving clamp trucks or fork lifts; responsible for proper and safe loading rail cars or trailers for shipment; foot traffic limited in area but still high probability for danger or self or others; property and equipment damage potential; no risk to environment;	Yes, foot traffic	No	No	Rework, loads sent back (property)	No

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IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
Call Crew	Yes, does relief, works around moving equipment. Fire Watch Fall into same category as mill relief; go anywhere in mill; potential for exposure to all hazards; responsibilities include hole watch (confined spaces or special entry) and fire watch	Yes, can be anywhere, works around equipment	No	No	Yes, potential for equipment & property damage. Fire Watch - property damage	Some environmental responsibilities (medium risk)
Students (summer cleanup)	Yes, heights, cleaning Limited exposure to chemicals; work on elevated structures - Roof	Limited, could drop items onto others	No	No	No, do not handle chemicals	No
Pulp & Paper Tech students	Yes, same as Call Crew	Yes	No	No	No	No
Recovery Tech I	Yes, Operates high pressure boiler worth approx \$350 million; most dangerous piece of industrial equipment there is; Failure to follow procedures and monitor operating parameters has high potential for explosion; Operators work in a control room with another operator and may act as Relief Supervisor for the plant.	Yes, work closely with Recast Operators, directs the field operations / radio communication	Limited / No	Limited / some tours	Yes, Significant exposure for property damage	Environmental impact potential is high as they operate environmental systems (evaporators) for the mill; Work with chemicals (black liquor, green liquor, caustic, hydrochloric acid, weak wash; stripped off gases, SOG's, NCG's, concentrate; natural gas in boilers, bunker C, propane).
Recovery Tech II	Yes, Rotates through RTI position; Operates another high pressure bark boiler; operator turbine generator plant works closely with RTI throughout the shift; exposure/work with same	Yes, work closely with RTI, directs the field operations	Limited / No	Limited / some tours	Yes, similar to above	Yes, huge potential for environmental impact; run stripper system and reverse

IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	chemicals as RTI. May act as Relief Supervisor for the plant.					osmosis;
Recovery Tech III	Yes, Rotates through RTII position; This position is Field helper for the RTII; responsible for starting up and shutting down turbo generators and all field duties related to RTII job; trouble shoots problems in the field; chemical exposures same as RTI except for black liquor; May act as Relief Supervisor for the plant	Yes, potential for harm to others is significant due to equipment lockout responsibilities for maintenance & repairs; provides direction, and information to other employees, generators	No	No	Yes	Yes
Rec. Asst. Tech I	Yes, Field operator for Recovery Tech I; Relieves in RT group and may relieve RTI; monitors recovery boiler visually (and audibly) for leaks; performs lockouts;	Yes, monitors junior employees	Limited / no	Limited / no	Yes, Property damage/loss potential would be high.	Yes, responsible for environmental systems
Rec. Asst. Tech II	Yes, Relieves RATII; takes care of water (monitoring specs, testing for sodium silica, chemical addition, etc.) entering the boiler; works around the recovery boiler as a helper; works on spouts; works with sulphuric acid and caustic.	Yes, works with others as a helper, performs lockouts	Limited / no	Limited / no	Yes, high potential for property damage or loss (1991, 40 days)	Yes, chemicals
Relief	Yes, Relieve up into RAT jobs; perform lockouts once trained into RAT, perform Clean-up; extra jobs on shift; more dangerous to self than others unless relieving into RAT jobs; Trained for some duties in recaust technician including firing 8 gauge shotgun and assistance with nitric acid cleaning.	Yes, lockouts, firing a gun	Limited / no	Limited / no	Limited	Limited
Mill Crew	Yes, Same position description as Relief (work is scheduled weekly rather than following a shift); Relieves up to RATI.	Yes	Limited / no	Limited / no	Limited	Limited

IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
Recaust Tech I	Yes, Operates lime kilns and causticizing plant; high potential for damage; operates chemical plant controlling white liquor, black liquor, sulphuric acid, nitric acid; lime, caustic, weak wash, responsible for natural gas, bunker C, propane, operators in a control room next to Recovery Tech. Operates OWL plant (oxidized white liquor system - handling pure oxygen)	Yes, directs others, field operator by radio	Limited / no	Limited /no	Yes	Yes, responsible for environmental systems (air, water) and monitors main mill outfall for ph
Recaust Tech II	Yes, Relieves into RTI position; performs lockouts; danger from chemical and head burns; work alone in the field, exposed to all chemicals controlled by RTI including sulphur; Operating/firing of 8 gauge shotgun.	Yes, chemicals, burns, firing a gun, acts as the eyes and ears for RTII in the field	Limited / no	Limited /no	Yes	Yes
Relief- Re-caust CRU Staff	Yes, Relieve into RTII and may relieve in RTI position; when not doing relief they are posted to Machine Room. When working in Causticizing Dept. they act as either an RTI or RTII.	Yes	No	no	Yes	Yes
CRU Manager	Yes, Ultimately responsible for all safety systems in the plant; must be an expert on BLRBAC recommendations and follow processes; responsible for logic and safety system changes; responsible for adherence to all codes, regulations; Steam Chief responsibilities under the New Brunswick Boiler Act.	Yes, control of plant	Yes, impact of the job	Yes, impact of the job	Yes	Yes, High potential for environmental impact.
Recovery Superintendent	Yes, Very similar to CRU Manager position re: operating responsibilities for the plant; must consult with CRU Manager on all changes to plant operators;	Yes, control of plant, direction to supervisors	Yes, impact of the job	Yes, impact of the job	Yes	Yes, High potential for environmental impact

IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	provides direction to shift supervisors. Responsible for related projects, plant design, safety systems, etc. Assumes CRU Manager responsibilities when away;					
Causticizing SuperIntendent	Yes, Fills in to Recovery SuperIntendent when away; takes care of day to day operation of recaust plant; plant design; new equipment; designing safety systems for new equipment . High potential for environmental impact	Yes, control of plant, direction to supervisors	Yes, impact of the job	Yes, impact of the job	Yes	Yes
Shift supervisors	Yes, On shift responsibilities for safety operation of plant and direction of hourly operators; make key decisions with respect to operation of plant; High potential for environmental impact.	Yes, control of plant, direction to supervisors	Yes, impact of the job	Yes, impact of the job	Yes	Yes
Day Supervisor	Yes, Plans maintenance outages, directs and authorizes lockouts; moves up in all Superintendent positions and CRU Manager plant operation responsibilities	Yes, control of plant, direction to supervisors	Yes, impact of the job	Yes, impact of the job	Yes	Yes
Operations Maintenance Coordinator	Limited, Coordinates day to day maintenance; liaison between operations and maintenance, authorize lockouts; exposed to all chemicals in CRU	Limited, is in position of authority, authorizes lockouts	Limited	limited	Yes	Yes
Supply & Services						
Heavy Equipment	Yes, Drives 9386 Payloader; involved in snow removal, chip movement, ash movement, bark movement, delivery of goods for stores, has fork attachment for lifting in excess of 6000 lbs; broom attachment for sweeping roads, chemical removal and garbage-removal, etc. on mill	Yes, driving, collision	Limited	Yes, during certain times loads bark on private vehicles as part of IPP bark sales -fund raising	Yes, Potential for loss or damage to property and equipment due to collision	Limited, potential damage to environment is minimal

IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	site. Danger to self associated with operation of heavy equipment; collision with other vehicles, chemical exposures during dumping (caustic, process liquor, rejects from Bleach Plant and Brownstock); danger to foot traffic and vehicle traffic when operating equipment					
Truck Driver	Yes, May relieve Heavy Equipment Operator. Deliver chemical totes, barrels, small pails throughout the mill (Nitric Acid, Defoamer, pitch dispersant, Nalco water treatment chemicals, oil and lubricants, etc.) Danger to self associated with operating of equipment	Yes, Responsible for delivery of goods to all areas of mill, foot and vehicle traffic, chemical transport	Limited	Yes, Responsible for delivery of goods to all areas of mill as well as outside customers or vendors; operates on public highways	Yes, Potential for loss or damage to property and equipment due to collision potential or lifting loads	Yes, Potential damage to environment-chemical spill during transport
Yard Labourer	Yes, May relieve Heavy Equipment Operator; works as helper for truck driver. Responsible for rigging loads for truck driver, securing loads, directing a lift, operates fork lift. All hazards associated with Truck Driver apply	Yes, works as helper for truck driver. Responsible for rigging loads for truck driver, securing loads, directing a lift, operates fork lift;	Limited	Limited	Yes, Potential for loss or damage to property and equipment due to collision potential or lifting loads	Yes, Potential damage to environment-chemical spill during transport
Chemical Un-Loader	Yes, Responsible for loading and unloading chemicals from rail cars, trucks and totes (Sulphuric Acid, SO ₂ , Magnesium Hydroxide, Peroxide, Methanol, Magnesium Sulphate, Chlorate, Defoamer, Pitch Dispersant & Brine). Danger to self from chemical exposure.	Yes, danger to others due to chemical handling responsibilities	Limited	Limited	Yes, Potential for damage to property, plant, equipment & product primarily around chemical handling responsibilities (ie, spills)	Yes, Environmental concerns include SO ₂ handling and risk of chemical spills.
Low Motor Operator	Yes, may relieve through labourer, truck driver or heavy equipment operator position. Transport nitric acid and other heavy goods around the yard.	Yes, chemical handling	Limited	Limited	Limited, forklift damage	Limited
Warehouse Tow Operator	Yes, May relieve through	Yes, chemical handling	Limited	Limited	Limited, forklift damage	Limited

IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	labourer, truck driver or heavy equipment operator position. Transport nitric acid and other heavy goods around the yard					
Warehouse #3 - ship/rec/order	No, Responsible for ordering goods, create purchase orders, shipping and receiving Sends items for repairs, inventory counts and cycles. Yes, when travel by private vehicle or operate forklift or if required to relieve in all other Supply & Services positions that are SSP	Limited	Limited	Limited, out on public roads	No	No
Warehouse #2- ship/rec	Yes, chemicals and forklift. Shipper / Receiver position; loading and offloading transport vehicles, handling chemicals (all mill process and environmental/laboratory chemicals) as part of warehouse responsibilities.	Limited, chemical exposure	Limited	Limited	No	No
Warehouse #1 - Tow Motor	Yes, Counter Operator; operates tow motor as required. Handle small amounts of chemicals for labs, bump gas, handle gas testing equipment; direct bump testing of gas testers. Rotate into higher positions in Supply & Services as required.	Yes, foot traffic	Yes, foot traffic	No	No	No
Warehouse #1 - counter	Limited, Counter Operator (does not operate tow motor). Entry position into department.	Limited	Limited	Limited	No	No
Supply & Service Relief Clerk/Typist	<u>Will depend on the assigned duties.</u> Relieves through any/all Supply & Services position. Is an extra in the department only if all other positions are filled; no specific duties associated with this positions as they are intended to relieve.	<u>Will depend on the assigned duties</u>	<u>Will depend on the assigned duties</u>	<u>Will depend on the assigned duties</u>	<u>Will depend on the assigned duties</u>	<u>Will depend on the assigned duties</u>
	No, not in mill environment,	No	No	No	No	No

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IRVING PULP & PAPER

POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	Office position Administrative responsibilities associated with operation of the department. Control and inputting information into One World; assign stock numbers and categories; controls paging system; prints and records cycle counts; prepares financial data related to mill chemicals. Minimal to no risk to self or others; property, plant, equipment, suppliers, customers, general public or the environment					
<i>Technical</i>						
Technician	Yes, Responsible for environmental and process testing throughout the mill and environmental testing for Irving Paper. Exposure to chemicals (sulphuric acid, white liquor, caustic, formaldehyde, black liquor, green liquor, all pulp products and liquor products, mill effluent, all process chemicals and lab chemicals).	Yes, danger to other employees during sample collection or in lab testing, Daily interaction with Irving Paper employees as part of sample collection process	Limited	Yes; required to drive on public highways	Limited potential for damage to property, plant, equipment; could damage company vehicle	Yes, Significant impact for environmental risk as part of environmental testing responsibilities;
Asst. Technician	Limited. Works in main lab (12 hour days) responsible for paper product testing for IPP and customers; prepare samples for shipping.	No risk of personal danger to other employees, customers, public or suppliers	No risk of personal danger to other employees, customers, public or suppliers	No risk of personal danger to other employees, customers, public or suppliers	Limited to a risk of testing errors resulting in customer problems/business loss.	No
Shift Technician	Yes. Work shift work following operating pulp property testing; gather samples from pulp dryers which presents danger due to moving/rotating equipment, cutting blades in pulp dryers; similar equipment dangers to Tech IV in Finishing; Chemical exposure to CED; work alone most of the time	Limited	Limited	Limited	Limited, could potentially cause interruption to production; monitor quality and grade of product	No

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employees	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
<i>Staff</i>						
Environmental Co-ordinator	No, Interface between IPP and regulatory agencies / interested outside parties, Primarily office based; limited exposure to chemicals	No	No	Limited, Responsible for giving tours of IPP to environmental regulators, customers, and public; may result in inadvertent exposure to mill process chemicals/heat/steam/moving equipment.	Limited contribution to loss of property, plant or equipment.	Limited, unless failure to report. Responsible for reporting environmental situations and working closely with regulating bodies to investigate and resolve. May participate in any significant environmental incident investigations
Environmental Engineer	Yes, Supervises Technical Technicians; responsible for monitoring environmental aspects .Frequent travel throughout the mill in potentially risky areas (rotating equipment, working from heights, hot environment).	Yes inadvertent exposure to mill process chemicals, could impact safety of others due to inappropriate direction;	No	Limited	Limited ability for loss or damage to property, plant or equipment	No
Quality Engineer	Limited, Supervises the Assistant Technicians and Shift Technicians; processes quality data into reports and leads quality improvement initiatives. Primarily office based, limited exposure throughout the mill; Inadvertent exposure to mill process chemicals	Yes, supervises	No	Yes, gives tours	Limited, works directly with customers on quality issues - business management risk	No
Process Engineer	Yes, Pulping Shift Supervisor.	Yes, provides technical support and direction to field operators	Yes, equipment installation	Yes, tours	Yes, potential for loss to property, plant or equipment if direction to others is wrong	No
Manager	Yes, mill process equipment, outside travel 1-2 days/wk Exposure to mill process equipment, process chemicals, heat and cold. Potential for	Yes, gives direction to others about duties	Yes, work with suppliers, take around mill	Yes, Tours, outside travel 1 -2 days/wk	Yes, technical issues, business/financial risk	No

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	damage to property, plant and equipment minimal expect as directing others.					
<i>E & I Maintenance</i>						
Ind. Control Tech (Electrician)	Yes, responsible for plant electrical system with voltages up to 13,800 volts, and/or the plant control system. Troubleshooting / working with rotating/moving machinery; working throughout the mill in all environments with potential for exposure to hazardous chemicals, process lines, steam, etc.. May perform duties of Industrial Control Technician (Instrumentation)	Yes, high voltages	Limited	Limited	Yes, Potential for damage to property and plant - direct impact on plant operations	Yes, makes decisions impacting environmental systems as they are responsible for plant control equipment.
Ind. Control Tech (Instrumentation)	Yes, May perform duties of Industrial Control Technician (Electrician). Responsible for plant electrical system with voltages up to 13,800 volts, and/or the plant control system.	Yes, high voltages	Limited	Limited	Yes	Yes
E&I Supervisor	Yes, Relieve for E&I Planner. Directly supervise Industrial Control Technicians (Electrical & Instrumentation. Work throughout the mill in all environments with potential for exposure to hazardous chemicals, process lines, steam, etc	Yes, directly supervises	Yes, interact regularly with suppliers with respect to repair procedures and on-going maintenance requirements	Limited	Limited potential for damage to property and plant	Yes, responsible for decisions impacting environmental control systems
E&I Planner	Yes, Relieve for E&I Supervisors. Directly supervise Industrial Control Technicians (Electrical & Instrumentation. Work throughout the mill in all environments with potential for exposure to hazardous chemicals, process lines, steam, etc	Yes, directly supervises	Yes, interact regularly with suppliers with respect to repair procedures and on-going maintenance requirements	Limited	Limited potential for damage to property and plant	Yes, responsible for decisions impacting environmental control systems

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
E&I Systems Specialist & System Engineer	Yes, Responsible to design, configure and change the plant control systems; Supervise tradespeople and contractors on occasion as part of project team or troubleshooting problems in the field	Yes, directly supervises	Limited	Limited	Yes, significant potential for impact to property plant and equipment, environment (due to control of plant systems); capability for catastrophic failures (equipment and/or environment) due to incorrect configuration of plant control systems	capability for catastrophic failures (equipment and environment) due to incorrect configuration of plant control systems
E&I Systems Superintendent	Limited, Directly supervises E&I Systems Specialists and Systems Engineers; has all job responsibilities of Systems Specialist and Systems Engineers.	Yes, directly supervises	Limited	Limited	Yes, significant potential for impact to property plant and equipment, environment (due to control of plant systems); capability for catastrophic failures (equipment and/or environment) due to incorrect configuration of plant control systems	capability for catastrophic failures (equipment and environment) due to incorrect configuration of plant control systems
E&I Maintenance Manager Mechanical Maintenance	Directly responsible for all employees in E & I Maintenance Department. Responsible for safe operation of plant electrical system	Yes, directly supervises	Limited	Limited	Yes, Significant potential to impact property, plant, equipment and environment	Yes
Maintenance Tradesman /Technician	Yes, Exposure to and working with rotating equipment, climbing ladders, working from heights, using welding machines, cutting torches, locking out equipment, operating man-lift, heaving rigging and operation of overhead cranes, working in confined spaces, exposure to hazardous chemicals used in pulping process	Yes, hazard to others (anyone in mill) by virtue of workmanship & competency of equipment maintenance and handling of tools and equipment	Limited	No	Yes, Significant impact on property, plant and equipment (i.e. potential for damage) through on-going responsibilities	Yes, some possibility of environmental damage through inattention when using oil and lubricants, breaking flanges, etc.
Fire Chief	Yes, Responsible for maintenance, operation, testing and inspection of all fire systems at Irving Pulp & Paper. Travels throughout all mill areas, climbing on heights, exposure to chemicals, entry into confined	Yes, accuracy of fire chief's work has direct impact on other mill employees	Yes, Works closely, provides direction to suppliers and contractors, oversees quality of work, ensures proper isolation of	No		Yes, significant potential for environmental impact due to fire.

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employees	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	spaces, monitors hot work permits and policy, consulted on all high risk, fire sensitive work throughout the mill. Danger to self through inattention, accuracy of fire chief's work had direct impact on other mill employees, property, plant and equipment.		equipment related to fire systems,			
Apprenticeship Program	Yes, All position requirements, responsibilities and hazards associated with Maintenance Tradesmen/Technician					
Salvage Man	Position no longer active at IPP					
Co-Op Students	Yes, Works closely with and is mentored by Maintenance Tradesmen/Technician. May work in a confined space under supervision.	Yes, chain fall operation	Limited	Limited	Some minimal risk to property, plant and equipment.	
Staff						
Maintenance Supervisor	Yes, Responsible for direct supervision of Maintenance Tradesmen/Technician. Hazard to self when applying personal locks; entry to confined spaces, climbing ladders, inspecting work, exposure to hazardous chemicals	Yes, if they were to supply incorrect information or exercise poor judgment when providing job instruction and safety direction	Yes, exposure to service representatives, customers and suppliers through directing work in the field and providing hazard information	Limited	Yes, day to day decisions would have potential for damage to property, plant and equipment;	Yes, environmental damage potential is related to direction of workforce
Maintenance Planner	Limited, Similar to maintenance supervisor responsibilities with emphasis on accurate preparation of job scope for tradesmen (vs. hands on supervision). Relieves for maintenance supervisor	Limited, not hands on	Limited	No		
Reliability Engineer	Yes, Technical troubleshooting of complex mechanical maintenance issues and responsible for recommendations relating to resolution; make decision with respect to confined space work, lockouts,	Yes, responsible for direct supervision and to provide job instruction and safety direction to IPP employees	Yes, responsible for direct supervision of contractor crew; provide job instruction and safety direction	No		

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	exposure to hazardous chemicals					
Mechanical Maintenance Superintendent	Provides direct supervision and leadership to Maintenance Supervisors, Planners and Reliability Engineers. Work in all areas of mill; danger to self through exposure to all mill hazards including climbing and lifting, application of personal locks, confined space entry, exposure to hazardous chemicals	Yes, final lockout approval and decisions with respect to job instruction and safety directions	Limited	limited	Limited	Limited
Maintenance Manager	Yes, Overall responsibility for Maintenance workforce (staff and hourly); provides direction to leadership group; Certified Lockout Approver; danger to self and others same as Superintendent level.	Yes	Limited	Limited		
Pulping Shift supervisor	Yes, On shift responsibilities for safe operation of the plant and direction of hourly operators. Responsible for key on-shift operating decisions.	Yes, with respect to the operation and control of the plant and provides direction to hourly employees.	Yes, responsible for operation and control of the plant	Yes, responsible for operation and control of the plant.	Yes	Yes
Digester / Brownstock Superintendent	Yes, responsible for safe operation of 14 batch digesters (pressure vessels), routine maintenance and lockouts of associated equipment. Operation of high pressure hydraulic systems and large rotating equipment as well as several high pressure chemical applications.	Yes, final lockout approval and decisions with respect to job instruction and safety directions.	Yes, responsible for maintaining a safe tour route.	Yes, responsible for maintaining a safe tour route.	Yes	Yes
bleach Plant Superintendent	Yes, responsible for a chemically intensive process, handling, application and manufacturing of several highly toxic and dangerous chemicals. Responsible for the isolation of said equipment by maintenance personnel and development of safe work procedures for both operations and maintenance.	Yes, final lockout approval and decisions with respect to job instruction and safety directions.	Yes, responsible for maintaining a safe tour route.	Yes, responsible for maintaining a safe tour route.	Yes	Yes

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POSITIONS	Health & Safety				Loss or Damage	
	Employees	Other Employees	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
Finishing Superintendent	Yes, responsible for safe coordination of maintenance activities in Finishing, development of AWP's, deals with high pressure steam and limited application of chemical substance. Work environment includes heat stresses, large rotating equipment and many pinch points.	Yes, final lockout approval and decisions with respect to job instruction and safety directions. Responsible for safe work practices by operators in a hot, humid environment.	Yes, responsible for maintaining a safe tour route.	Yes, responsible for maintaining a safe tour route.	Yes	Yes
Wood Yard Superintendent	Yes, responsible for safe operation of both the rotating equipment and large fleet of mobile equipment. Develops and coaches employees on safe handling of mobile equipment; strict enforcement of traffic flows in Wood Yard area;	Yes, direct supervision of Woodyard employee activities during the day; provides direction to employees on standard operating procedures.	Yes, suppliers frequently work in immediate area, flue trucks, CAT reps, outside contractors, etc.; responsible for adherence to safety procedures.	Yes, responsible for safety of public during tours in immediate area.	Yes	Yes, some exposure due to hydraulic leaks, response to mill environmental concern.
Relief Shift Supervisor	Yes, relieves through pulping shift supervisor positions and may relieve for operating superintendents. Routinely supervises small projects and special crew assignments throughout the mill.	Yes, provides direction to hourly employees on plant operating and maintenance.	Yes, due to operation and control of the plant	Yes, due to operation and control of the plant	Yes	Yes
Production Engineer	Yes, responsible for process optimization in all areas; coordinates operations input to engineering projects. Routinely exposed to hazards associated with chemicals, high temperatures, pressure vessels and rotating equipment. Relieves through Operating Superintendent roles.	Yes; Directs employees through efforts aimed at process optimization; final lockout approval and decisions with respect to job instruction and safety direction.	Limited	Limited	Limited	Yes
Operations/Maintenance Coordinator	Yes, coordinates day to day maintenance, liaison between operations and maintenance, authorizes lockouts, exposed to all chemicals and hazards in all areas of the mill. Limited relief of operating superintendents in	Yes, final lockout approval and decisions with respect to job instruction and safety direction.	Limited	Limited	Yes	Yes

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employees	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	the Fibreline.					
Supervisor, Pulp Quality	Yes, exposure to mobile equipment in Shipping Shed, travels throughout the mill to assess process changes; exposure to chemicals, rotating equipment, pressure vessels and high temperatures.	Limited	Limited	Limited	Limited	Limited
Fibreline Manager	Yes, responsible for the activities of operating superintendents and shift supervisors, potential contact with pressure vessels, chemicals, hot activities, large rotating equipment, influences maintenance operation, shutdown activities, approves safe work practices and AWP's	Yes, provides direction to Fibreline personnel with respect to safe work practices, responsible for adherence to safety work practices by others; able to direct the activities of hourly personnel in all departments.	Yes, often liaison with chemical suppliers, students and public tours.	Yes	Yes	
Project Engineers (Civil and Electrical)	Yes, exposed to all hazards in the mill including large rotating equipment, hazardous chemicals, pressure vessels, temperature extremes; as well as all hazards associated with construction projects including mobile equipment, excavations, etc.	Yes, responsible for managing projects on mill site including educating employees on hazards associated with project activity (mobile equipment, chemical exposures, pressure vessels, etc.)	Yes, lead cross-functional teams including contractors and suppliers, responsible for educating them on work hazards associated with projects; responsible for contractor safety program.	Limited	Yes, significant impact due to project engineering responsibilities.	Yes; design deficiencies may have environmental impact.
Manager, Engineering	Yes, directly responsible for all project managers to ensure they following standards and codes. Exposed to all mill and construction site hazards.	Yes, in a position of authority, provides direction to project managers and contractors.	Yes, impact of the job.	Yes, impact of the job.	Yes	Yes
Stores Supervisor	Yes, located in mill stores area; some travel throughout the mill, responsible for process of receiving and transporting mill chemicals; some opportunity for exposure.	Yes, directly responsible for day to day activities of Supply & Services personnel including chemical unloading, stores, yard crew, etc.	Limited	Limited	Limited	Limited
Executive Secretary	Limited, office based, limited travel throughout mill however	Minimal	Minimal	Minimal	Minimal	Minimal

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	provides direction for photo and video shoots in various production areas.					
Human Resources Assistant	Minimal. Office position; admin responsibilities.	Minimal	Minimal	Minimal	Minimal	Minimal
Accounting / Payroll Clerk	Minimal. Office position; admin responsibilities	Minimal	Minimal	Minimal	Minimal	Minimal
Manager, Human Resources	Yes, some travel throughout the mill; may be exposed to all mill hazards including temperature extremes, chemicals, rotating equipment, pressure vessels;	Yes, provides direction to human resources personnel, may influence decisions made with respect to safety policies or procedures.	Minimal	Minimal	Minimal	Minimal
Safety Coordinator	Yes, provides leadership for mill safety initiatives, monitors compliance to OH&A and regulations, safe work practices, leads process for workplace inspection and accident investigation. Exposed to all mill hazards including temperature extremes, pressure vessels, large rotating equipment, mobile equipment, construction sites.	Yes, provides leadership to JOHSC, Emergency Response Team, leads job safety analysis development, interprets OH&A to ensure compliance.	Yes, by nature of role.	Yes, by nature of role.	Yes	Yes
Industrial Relations Superintendent	Yes, interacts in all areas throughout the mill, exposed to all mill hazards; responsible for employee compliance to drug & alcohol policy.	Limited	Yes, conducts tours for contractors and public.	Yes, conducts tours for contractors and public.	Limited	Limited
Industrial Health Practitioner	Yes, responsible to administer first aid services if required, responds to health risk issues or concerns relating to employees and contractors. Travels throughout mill, potential exposure to all hazards.	Yes, provides critical medical intervention during an emergency, administers first aid, established ERT training criteria.	Yes, provides medical intervention during an emergency, administers first aid.	Limited	Limited	Limited
Process Improvement Coordinator	Yes, works through mill site, potential for exposure to all mill hazards.	Limited	Yes, responsible for safety of customers/suppliers when conducting tours.	Yes, responsible for safety of public when conducting tours.	Limited	Limited
Manager, Systems Optimization and Strategic	Yes, interacts throughout the mill, recommends process	Yes, leads management team with respect to review	Limited	Limited	Limited	Limited

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POSITIONS	Health & Safety				Loss or Damage	
	Employee	Other Employee	Customer / Supplier	General Public	Property, Plant, Equipment, Product	Environment
	Improvements with respect to maintenance, potential for exposure to all mill hazards.	of safety concerns mill wide including work standards; decisions may impact safety.				
Training Coordinator	Yes, coordinates development of competency based training program for operators and maintenance employees; provides leadership to hourly trainers; travels throughout mill; potential for exposure to all mill hazards.	Yes, by nature of role.	Limited	Limited	Limited	Limited
Assistant Mill Manager	Yes, responsible for mill operations in absence of mill manager; potential contact with pressure vessels, chemicals, hot activities, large rotating equipment, supervises Technical and Engineering department.	Yes, provides direction to others.	Yes	Yes	Yes	Yes
Mill Manager	Yes, overall responsibility for total mill operation; exposure to all mill hazards including pressure vessels, chemicals, hot activities, large rotating equipment, influences maintenance operation, Ultimately responsible for all safety systems in the plant;	Yes, provides direction to others.	Yes	Yes	Yes	Yes

PART VI—TABLE OF AUTHORITIES

Cases	Paragraph(s) Referenced in Memorandum of Argument
<i>ADM Agri-Industries Ltd. v. National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada), Local 195 (Substance Abuse Policy Grievance)</i> , [2004] C.L.A.D. No. 610 (Springate)	66
<i>Alberta Union of Provincial Employees v. Lethbridge Community College</i> , [2004] 1 S.C.R. 727	45
<i>Bank of British Columbia v. Union of Bank Employees</i> , [1982] B.C.J. No. 1577 (S.C.) at para. 34 (and 42)	83
<i>British Columbia Securities Commission v. Branch</i> , [1995] 2 S.C.R. 3	49
<i>C.U.P.E. v. New Brunswick Liquor Corp.</i> , [1979] 2 S.C.R. 227	85
<i>Canada (Canadian Human Rights Commission) v. Canada (A.G.)</i> , [2011] 3 S.C.R. 471	42
<i>Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Local 454</i> , [1998] 1 S.C.R. 1079	45, 74
<i>Canadian National Railway Co. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)</i> (2000), 95 L.A.C. (4 th) 341 (Picher)	61, 62, 66
<i>Canadian Union of Public Employees, Local 8 v. Intercare Corporate Group Inc.</i> , 2010 ABQB 387	75
<i>Chamberlain v. Surrey School District No. 36</i> , [2002] 4 S.C.R. 710	38
<i>Chandler v. Miller</i> , 520 U.S. 305, 321-323 (1997)	50
<i>Communications, Energy and Paperworkers Union, Local 777 v. Imperial Oil Ltd.</i> (unreported) (27 May 2000) (Christian, Chair)	56, 59, 60, 64
<i>Dayco (Canada) Ltd. v. National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW-Canada)</i> , [1993] 2 S.C.R. 230	37, 44, 45
<i>Dufferin Concrete v. Teamsters, Local 230 (Luck Grievance)</i> (2010), 200 L.A.C. (4 th) 381 (Kaplan)	66
<i>Dunsmuir v. New Brunswick</i> , [2008] 1 S.C.R. 190	34, 37, 40, 42, 44, 46, 70, 75

Cases	Paragraph(s) Referenced in Memorandum of Argument
<i>Dupont Canada Inc. v. Communications, Energy Paperworkers Union of Canada, Local 28-0 (Drug and Alcohol Policy Grievance)</i> (2002), 105 L.A.C. (4 th) 399 (Picher, Chair)	66, 67
<i>Entrop v. Imperial Oil Ltd.</i> (2000), 50 O.R. (3d) 18 (C.A.)	57, 87
<i>Esso Petroleum Canada v. Communications, Energy & Paperworkers' Union, Local 614</i> (1994), 56 L.A.C. (4 th) 440 (McAlpine, Chair), aff'd, [1996] B.C.L.R.B.D. No. 257 (Young, Longpre and Mullin, Vice-Chairs)	49, 59
<i>Fording Coal Ltd. v. United Steelworkers of America, Local 7884</i> , [2002] B.C.C.A.A.A. No. 9 (Hope)	66
<i>Greater Toronto Airports Authority v. Public Service Alliance of Canada, Local 0004</i> (2007), 90 C.L.A.S. 177 (Devlin)	49, 59, 66
<i>Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900 (Lussier Grievance)</i> (2005), 157 L.A.C. (4 th) 225 (Picher, Chair), aff'd, [2008] O.J. No. 489 (Div. Ct.), aff'd (2009), 96 O.R. (3d) 668 (C.A.)	55, 56, 64, 66
<i>Imperial Oil Ltd. v. Communications, Energy and Paperworkers Union of Canada, Local 900</i> , 2009 ONCA 420	35
<i>Irving Paper, Division of J.D. Irving Ltd. v. Communications, Energy and Paperworkers Union of Canada (Policy Grievance)</i> (2007), 165 L.A.C. (4 th) 107 (Bladon)	59
<i>J.D. Irving v. Communications, Energy and Paperworkers' Union, Local 104 and 1309 (Drug and Alcohol Policy Grievance)</i> (2002), 111 L.A.C. (4 th) 328 (Picher, Chair)	59, 68
<i>Kemess Mines Ltd. v. International Union of Operating Engineers, Local 115</i> , 2006 BCCA 58	48
<i>Lévis (City) v. Fraternité des policiers de Lévis Inc.</i> , [2007] 1 S.C.R. 591	41, 43, 85
<i>Local 143 of the Communications, Energy and Paperworkers Union of Canada v. Goodyear Canada Inc.</i> , 2007 QCCA 1686	38, 54
<i>Metropol Security, a division of Barnes Security Services Ltd. v. United Steelworkers of America, Local 5296 (Drug and Alcohol Testing Grievance)</i> (1998), 69 L.A.C. (4 th) 399 (Whitaker)	59
<i>National Treasury Board Employees Union v. Von Raab</i> , 489 U.S. 656, 673-675 and footnote 3 (1989)	50, 79
<i>Navistar Canada, Inc. v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada)</i> , Local 504 (Substance Abuse Grievance)	57, 66, 68

Cases	Paragraph(s) Referenced in Memorandum of Argument
(2010), 195 L.A.C. (4 th) 144 (Newman)	
<i>Németh v. Canada (Justice)</i> , [2010] 3 S.C.R. 281	69
<i>Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)</i> , [2011] 3 S.C.R. 708	37
<i>Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals</i> , [2011] 3 S.C.R. 616	37
<i>Peacock v. Norfolk (County)</i> (2006), 81 O.R. (3d) 530 (C.A.)	46
<i>Petro-Canada Lubricants Centre (Mississauga) v. Communications, Energy and Paperworkers Union of Canada, Local 593 (Alcohol and Drug Policies Grievance)</i> (2009), 186 L.A.C. (4 th) 424 (Kaplan)	59
<i>R. v. Decorte</i> , [2005] 1 S.C.R. 133	51
<i>R. v. Dedman</i> , [1985] 2 S.C.R. 2	52, 89
<i>R. v. Ipeelee</i> , 2012 SCC 13	70
<i>R. v. Hufsky</i> , [1988] 1 S.C.R. 621	51
<i>R. v. Ladouceur</i> , [1990] 1 S.C.R. 1257	51, 89
<i>R. v. Nolet</i> , [2010] 1 S.C.R. 851	51
<i>R. v. Orbanski</i> , [2005] 2 S.C.R. 3	50, 51
<i>R. v. Stillman</i> , [1997] 1 S.C.R. 607	90
<i>Re Ottawa Fibre Inc. and E.C.W.U., Local 1541</i> (1992), 29 C.L.A.S. 22 (Abbott)	62
<i>Re Sarnia Cranes Ltd.</i> , [1999] O.L.R.D. No. 1282 (Shouldice, Vice-Chair)	59
<i>Rio Tinto Alcan Primary Metal (Kitimat/Kemano Operations British Columbia) v. National Automobile, Aerospace Transportation and General Workers of Canada (CAW-Canada) Local, 2301 (Drug and Alcohol Grievance)</i> (2011), 204 L.A.C. (4 th) 265 (Steeves)	66
<i>Sisters of St. Joseph of the Diocese of London in Ontario v. Service Employees Union, Local 210</i> , [1997] O.J. No. 3140 (C.A.), leave to appeal to S.C.C. refused, [1997] S.C.C.A. No. 504	84

Cases	Paragraph(s) Referenced in Memorandum of Argument
<i>Skinner v. Railway Labor Executives' Assn.</i> , 489 U.S. 602, 617, 625-626 (1989)	49, 58, 88
<i>St. Anne Nackawic Pulp & Paper Co. Ltd. v. Canadian Paper Workers Union, Local 219</i> , [1986] 1 S.C.R. 704	45
<i>Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79</i> , [2003] 3 S.C.R. 77	43, 69
<i>Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15</i> , [1997] 1 S.C.R. 487	37, 74, 77
<i>Trimac Transportation Services – Bulk Systems v. Transportation Communications Union</i> (1999), 88 L.A.C. (4 th) 237 (Burkett)	59
<i>United Assn. of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 488 v. Bantrel Constructors Co.</i> , 2009 ABCA 84	35
<i>United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.</i> , [1993] 2 S.C.R. 316	37, 44
<i>United Transportation Union v. Canadian Pacific Ltd. (Hutchinson Grievance)</i> (1987), 31 L.A.C. (3d) 179 (Picher)	55
<i>Veronia School District 47j v. Acton</i> , 515 U.S. 646, 663 (1995)	49, 50
<i>Voice Construction Ltd. v. Construction & General Workers' Union, Local 92</i> , [2004] 1 S.C.R. 609	37, 44
<i>W.W. Lester (1978) Ltd. v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 740</i> , [1990] 3 S.C.R. 644	74
<i>Weyerhaeuser Co. v. Industrial, Wood and Allied Workers of Canada</i> (2004), 127 L.A.C. (4 th) 73 (Taylor)	66, 68
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B. Johnston and T. Erskine, "Testing the Limits: Alcohol & Drug Testing for Offshore Employees" (2001) 24 Dalhousie L.J. 316	59
C. Pierce, "Balancing Employer Policies and Employee Rights: The Role of Legislation in Addressing Workplace Alcohol and Drug Testing Programs" (2008) 46 Alta. L. Rev. 141	59
Canadian Human Rights Commission, <i>Policy on Alcohol and Drug Testing</i> (revised October, 2009)	21

Cases	Paragraph(s) Referenced in Memorandum of Argument
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H.M. Smith and J.L. Anthony, "Walking the Centre Line: Balancing an Employee's Right to Privacy in Drug and Alcohol Policies in the Atlantic Offshore Oil Industry" (2003) 26 Dalhousie L.J. 591	57
New Brunswick Human Rights Commission, <i>Guideline on Drug and Alcohol Testing in the Workplace</i> (updated May 6, 2011)	21

PART VII—STATUTES, REGULATIONS AND RULES

(Reproduced in Respondents' Book of Authorities)

1. *Criminal Code* s. 217.1.
2. New Brunswick *Occupational Health and Safety Act* ss. 9(1) and 11.

COMMUNICATIONS, ENERGY
AND PAPERWORKERS UNION
OF CANADA, LOCAL 30
Appellant

and

IRVING PULP & PAPER, LIMITED
Respondent

S.C.C. Court File No. 34473

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF
APPEAL FOR NEW BRUNSWICK)**

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